

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

VIRGIL SMITH

Defendant-Appellant

Supreme Court No. 156353

Court of Appeals No. 332288

Lower Court No. 15-5228-01

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SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

- I. Is the issue of the plea condition requiring Mr. Smith’s resignation from office factually moot? If so, was it appropriate for the Court of Appeals to review the provision under state and federal mootness jurisprudence because doing so was in the interests of judicial economy?

Trial court made no answer.

Court of Appeals made no answer.

Defendant-Appellant answers, “Yes.”

- II. Did the plea conditions requiring that Mr. Smith resign his Senate seat and refrain from holding elected or appointed office during his five-year probationary period violate the Michigan Constitution’s separation of powers and offend public policy?

Trial court answers, “Yes.”

Court of Appeals answers, “Yes.”

Defendant-Appellant answers, “Yes.”

- III. Did the trial court properly strike unconstitutional conditions from the plea agreement and act within its discretion when it denied the prosecutor’s motion to withdraw from the plea because enforcement of the agreement absent the offending conditions served the interests of justice?

Trial court answers, “Yes.”

Court of Appeals answers, “Yes.”

Defendant-Appellant answers, “Yes.”

ARGUMENT SUMMARY

The prosecutor insists she has the power to decide when a citizen's alleged criminal violation makes him or her unfit to hold public office, regardless of the clear constitutional text expressly reserving that right for the Legislature. The prosecutor's exercise of this power would violate Michigan's constitutional separation of powers and public policy.

Under Michigan's Constitution, the power to expel a sitting legislator lies with the representative's specific house and requires a supermajority vote. And the authority to determine a citizen's eligibility to run for office lies with the Legislature, which the Constitution tasks with passing laws to regulate elections and to declare certain individuals ineligible for office. Outside of these exceptions, the People decide who is fit for office through their vote. Here, the county prosecutor attempted to usurp these functions through its plea agreement with then-state senator Virgil Smith. And even though Mr. Smith agreed to the plea deal, no government official can waive the constitutional separation of powers through a legally binding agreement. This Court should uphold the separation of powers outlined by Michigan's Constitution.

In addition, the Court should affirm the Court of Appeals' decision and the trial court's denial of the prosecution's motion to vacate the plea. The trial court properly severed unconstitutional plea conditions while leaving intact the core plea exchange: reduced charges and an agreed-upon sentence in return for self-conviction. Doing so is consistent with contract principles and would serve the ends of justice.

Because the trial court and Court of Appeals applied the clear language of our Constitution to reach the right result, this Court should deny leave to appeal and/or affirm the Court of Appeals decision below.

STATEMENT OF FACTS

In 2016, then-state senator Virgil Smith pleaded guilty to malicious destruction of personal property valued at \$20,000 or more. *Plea Hearing Transcript*, 2/11/16, attached as Appendix A, 38. Mr. Smith's plea was pursuant to an agreement with the prosecutor, under which Mr. Smith agreed to serve ten months in jail, serve five years of probation, undergo alcohol and drug treatment, abstain from contacting the complainant, submit to mental health treatment, surrender a personal firearm, pay full restitution to the complainant, resign his office as state senator, and not hold any elected or appointed public office for the five-year probationary period. Appendix A, 36-37. In exchange, the prosecutor agreed to dismiss three related charges. Appendix A, 36-37.

Before accepting Mr. Smith's plea, the trial court asked the parties whether the sentence agreement was "reasonable under the circumstances." Appendix A, 13-14. In response, the prosecutor mentioned a number of factors affecting her office's determination of a reasonable sentence for Mr. Smith:

- The prosecutor received documentation showing that Mr. Smith suffered from untreated bipolar depression and a neurocognitive disorder at the time of the offense, Appendix A, 15;
- That same documentation indicated Mr. Smith may have suffered a hypomanic episode during the offense, Appendix A, 15;
- The agreement would allow the prosecutor to spare the resources required for a trial and allow those resources to be "devoted to somebody who posed a greater danger in the community," Appendix A, 24;
- There was a difference in the "strength" of the evidence related to two of the dismissed counts, Appendix A, 26; and
- Foregoing a trial would spare the parties the embarrassment of publically exposing sensitive information, Appendix A, 27.

The trial court stated “...I want to make sure that the sentence here....is fair both to Mr. Smith and to the People of the State of Michigan.” Appendix A, 33. The parties agreed to file memorandum in advance of sentencing to address the trial court’s concerns. Appendix A, 51. The trial court advised Mr. Smith of the rights he would waive by entering his plea. Appendix A, 35-45. The trial court found that Mr. Smith’s plea was understanding, voluntary, and accurate before accepting Mr. Smith’s guilty plea. Appendix A, 45.

Prior to sentencing, the parties filed a joint sentencing memorandum and Mr. Smith filed a separate sentencing memorandum. *Sentencing Hearing Transcript*, 3/14/16, attached as Appendix B, 5. At the sentencing hearing, the trial court reviewed the presentence investigation report and the sentencing guidelines with the parties. Appendix B, 6-10, 12-39. The trial court sentenced Mr. Smith, consistent with the plea and sentence agreement, to five years probation with the first ten months to be served in the Wayne County Jail. Appendix B, 61. It also ordered as conditions of probation that Mr. Smith participate in alcohol abuse and mental health treatment and refrain from any communication with the complainant. Appendix B, 65. The trial court acknowledged that Mr. Smith had already surrendered his firearm. Appendix B, 65.

The trial court then turned to the plea conditions related to Mr. Smith’s then-current position as state senator and his ability to hold a public office in the future. The trial court noted that there was no legal authority requiring Mr. Smith to resign his position in the state legislature as a direct or collateral consequence of his conviction for malicious destruction of property. Appendix B, 69-71. In other words, the parties were asking the trial court to impose the condition that Mr. Smith resign because they agreed to it, not because it was required or authorized by law. Appendix B, 75. The trial court reviewed a number of authorities, including the Michigan Constitution, *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), and

Leopold v Maryland, 216 Md App 586; 88 A 3d 860 (2014). Appendix B, 72. Based on these authorities, the trial court concluded that the parties did not have the right to barter away Mr. Smith's elected office as part of the plea and sentence agreement. Appendix B, 76-77. Further, the trial court stated "it would be illegal for me to impose as a condition of sentence that [Mr. Smith] resign from office and that he not hold public office during the pendency of this probation. It would violate the separation of power [because] I'm a member of the judicial branch..." Appendix B, 77-78. He also concluded that the prosecutor lacked the authority to extract such agreements from Mr. Smith under separation of powers principles. Appendix B, 78.

The trial court ultimately struck the unconstitutional provisions from the plea agreement as void and refused to include them on the judgment of sentence. Appendix B, 80. The trial court left the remainder of the plea and sentence agreement intact because the parties "assured the court at the plea hearing and at the sentencing hearing that the plea bargain protected the public and provided punishment and rehabilitation." *Order Declaring Void Portions of the Plea Agreement*, 3/14/16, attached as Appendix C; *Opinion and Order Denying Prosecutor's Motion to Vacate Plea*, 3/28/16, attached as Appendix E, 3.

The prosecutor filed a motion to vacate the plea. *Motion Hearing Transcript*, 3/28/16, attached as Appendix D, 3. After a hearing, the trial court denied the motion and issued a written opinion. Appendix E. The trial court applied contract principles to determine that the unconstitutional provisions of the plea agreement were void and unenforceable. Appendix E, 3. It concluded that applying contract principles was appropriate because doing so would not subvert the ends of justice. Appendix E, 3-4. Vacating the plea "would in fact harm the interests of justice" because it would allow the prosecutor to dominate the legislative branch with the

threat of forced resignation and compromise the court's integrity by involving it in the prosecutor's domination. Appendix E, 4.

Three days later, Mr. Smith resigned from his position as state senator.¹

The prosecutor filed an application for leave to appeal with the Court of Appeals. *Prosecutor's Application for Leave to Appeal*, 4/1/16. The Court of Appeals granted leave to appeal. *Order Granting Leave to Appeal*, 8/26/16. After briefing and argument, the Court of Appeals issued an unpublished per curiam opinion holding that the issues raised by the prosecution's appeal related to the constitutionality of the resignation and ban provisions were moot because Smith had resigned and had not declared an intention to run. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2017 (Docket No. 332288), slip opinion attached as Appendix F, 1-2. The Court of Appeals concluded that the trial court acted within its sound discretion by refusing to vacate the plea because vacating the plea would at that time would have "subvert[ed] the ends of justice." Appendix F, 3.

Around the same time the Court of Appeals issued its decision, Mr. Smith decided to run for Detroit City Council.² In response, the prosecutor filed a motion for reconsideration, which the Court of Appeals denied. *Order Denying Reconsideration*, 6/5/17.

The prosecutor then sought leave to appeal to this Court, which peremptorily remanded the case to the Court of Appeals "for consideration as on reconsideration granted." *Prosecutor's Application for Leave to Appeal*, 7/26/17; *People v Smith*, ___ Mich __; 899 NW2d 407 (August 15, 2017).

¹ 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).

² 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).

On remand, the Court of Appeals affirmed the trial court's decision, holding that both political plea conditions—the resignation requirement and the prohibition from seeking public office—violated separation of powers principles expressly established by Michigan's Constitution. *People v Smith* (on remand), __ Mich App __; __ NW2d __, 2017 WL 3614229 (August 22, 2017) (Docket No. 332288), slip opinion attached as Appendix G, 6-8. For these reasons, it was proper for the trial court to declare the unconstitutional terms void and striking them from the plea agreement. Appendix G, 6-8.

The prosecutor again sought leave to appeal. *Prosecutor's Application for Leave to Appeal*, 8/27/17. This Court granted oral argument on whether to grant the prosecutor's application and ordered supplemental briefing on the following issues:

- (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 or is void as against public policy;
- (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; and
- (3) whether the trial court abused its discretion by voiding terms of the plea agreement without allowing the prosecutor to withdraw from the agreement.

People v Smith, __ Mich __; __ NW2d __ (September 11, 2017) (Docket Nos. 156353 & (83)).

ARGUMENT

- I. The issue of the plea condition requiring Mr. Smith's resignation from office is factually moot; however, it was appropriate for the Court of Appeals to review the provision under state and federal mootness jurisprudence because doing so was in the interests of judicial economy.**

Standard of Review

This Court reviews questions of justiciability and related constitutional questions de novo. *Michigan Chiropractic Counsel v Commissioner of Office of Financial Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006), overruled on other grounds in *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010) (citation omitted).

Argument

The validity of the provision requiring Mr. Smith to resign from public office was properly before the Court of Appeals, even though Mr. Smith resigned from office. While Mr. Smith's resignation rendered the specific issue involving the resignation provision factually moot, an actual controversy existed in the appeal and it was appropriate for the Court of Appeals to address it. The issue was properly before the Court of Appeals in light of state and federal mootness jurisprudence because the validity of the resignation provision is of public significance and is likely to recur, yet evade review. Additionally, because the legal analysis of the resignation provision is almost identical to the analysis of the ban provision and relates directly to whether the trial court properly denied plea withdrawal, the typical concerns that underlie the prohibition against addressing moot issues do not apply. Should this Court disagree, then it should dismiss this appeal on the basis that the issues presented are no longer justiciable.

In general, judicial powers only extend over actual cases and controversies. *Roe v Wade*, 410 US 113, 123-125, 128-129; 93 S Ct 711; 35 L Ed 2d 147 (1973). Courts generally lack the

authority to render opinions upon moot questions. *Church of Scientology of California v United States*, 506 US 9, 12; 113 S Ct 447; 121 L Ed 3d 313 (1992); *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001). A question becomes moot when a subsequent event makes it impossible for the reviewing court to fashion a remedy. See *Church of Scientology*, 506 US at 12; *People v Jones*, 317 Mich App 416, 431; 894 NW2d 723 (2016). The purpose of the mootness doctrine is to ensure that “the judiciary does not usurp the power of the coordinate branches of government,” by limiting judicial powers to live controversies in which the parties have an interest in the outcome. *Michigan Chiropractic Counsel v Commissioner of Office of Financial Ins Services*, 475 Mich 363, 371-372, n 15; 716 NW2d 561 (2006), overruled on other grounds in *Lansing Schools Educ Ass’n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010) (citations and quotations omitted).³

In this case, the prosecutor took her appeal from the trial court’s ruling that the resignation provision was unconstitutional and void and also from the trial court’s ruling denying her motion for plea withdrawal. In the Court of Appeals, the prosecutor sought two forms of relief: remand for inclusion of all of the terms of the plea agreement in the judgment of sentence *and* reversal of the trial court’s order denying its motion to vacate the plea. *Prosecutor’s Brief on Appeal*, 9/29/16 13, 15. While neither of these remedies is technically foreclosed by the fact of Mr. Smith’s resignation, an amended judgment of sentence ordering Mr. Smith’s resignation would have no practical or legal consequence because he has already resigned. This renders the issue of the resignation provision moot as “an event occur[ed] while [the] case [was] pending on

³ For similar reasons, courts should also avoid deciding questions that are not ripe. *Michigan Chiropractic Counsel*, 475 Mich at 370-371. That means that courts should avoid reviewing hypothetical or contingent claims before an actual injury has been sustained. *Id.* at 370-371 n 14. A claim is not ripe if “it rests up contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Id.* (citations and quotations omitted).

appeal that makes it impossible for the court to grant any effective relief whatever to a prevailing party.” *Church of Scientology*, 506 at 12 (citations and quotations omitted).

Even though the prosecutor’s appellate claim regarding Mr. Smith’s resignation was factually mooted by the time the Court of Appeals issued its opinion after remand, it was still appropriate for the Court of Appeals to address the issue because it is of public significance and is likely to evade review.⁴ *Kaczmarek*, 464 Mich at 481. The question is significant because it involves separation of powers principles established by Michigan’s Constitution and goes to the authority of the prosecutor to bargain with elected officials about whether they will continue to hold their offices, notwithstanding the will of the electorate. Left unaddressed by our appellate courts, this question is likely to recur because of the prosecutor’s position that bargains with politicians about the duration of their tenure in office are within her charging authority. See *Prosecutor’s Brief on Appeal*, 9/29/16 p 8. Further, this issue is likely to evade review as the defendants to whom the prosecutor makes such offers are likely to resign consistent with their agreement.⁵ Thus, it was appropriate for the Court of Appeals to review the trial court’s ruling that the resignation provision was unconstitutional, even if this Court concludes that issue was moot. *Kaczmarek*, 464 Mich at 481 (considering the mooted question of whether a defendant retains an appeal as a matter of right from the prison sentence imposed for a probation violation).

⁴ While Mr. Smith argued this issue did not fall under this mootness exception in the Court of Appeals, a closer review of the controlling authorities and subsequent events, including Mr. Smith’s run for elected office, have altered the analysis from what it was at an earlier stage in this appeal.

⁵ In general, unconstitutional plea conditions are exactly the kind of issues that will be likely to recur, yet evade review because of defendants’ limited appellate rights from plea-based convictions. In addition, defendants may agree to unconstitutional plea conditions offered by the prosecutor in an effort to avoid the possibility of serving time in prison or to resolve a case without the costs and burdens of a trial. Such defendants are likely to comply with unconstitutional provisions for those very same reasons. This is consistent with Mr. Smith’s position in the trial court that if the trial court was going to order his resignation, he would rather comply with that order that face the possibility of plea withdrawal. Appendix D, 20-21.

In addition, consideration of the propriety of the resignation provision was in the interests of judicial economy. The legal analysis of the propriety of the resignation is almost identical to the legal analysis of the propriety of the ban provision. In addition, the question of whether it was appropriate to strike the resignation provision and deny plea withdrawal, necessarily turns on the other question of whether the provision itself was unconstitutional. In other words, even though the prosecutor's appeal framed these as two questions, the answer to one depends upon the answer to the other. The legal issues in this case are interconnected such that the legal controversies are very much live and the parties continue to have a legal interest in the outcome of the case. *Michigan Chiropractic Counsel*, 475 Mich at 371-372, n 15.

For all of these reasons, it was appropriate for the Court of Appeals to decide the constitutionality of the resignation provision, along with the other issues in this appeal. Should this Court disagree, then it should dismiss the prosecutor's application for leave to appeal on the basis that it does not present justiciable issues.⁶ See *People v Lyle*, 418 Mich 960; 362 NW2d 215 (1984); see also *People v Hershey*, 497 Mich 959; 858 NW2d 461 (2015) (granting motion to dismiss).

⁶ This Court has asked only whether it was appropriate for the Court of Appeals to address the resignation provision, presumably because Mr. Smith was running for elected office at the time of this Court's order granting oral argument on the application. Since that time, Mr. Smith lost the election he entered during the pendency of this appeal. As a result, the constitutionality of the ban provision is no longer ripe for review. *Michigan Chiropractic Counsel*, 475 Mich at 370-371.

- II. The plea conditions requiring that Mr. Smith resign his Senate seat and refrain from holding elected or appointed office during his five-year probationary period violate the Michigan Constitution's separation of powers and offend public policy.**

Standard of Review

This 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. "By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Natl Wildlife Fedn v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800, 806 (2004). While the doctrine "does not require so strict a separation as to provide no overlap of responsibilities and powers,"⁷ it is concerned with conflicts of interest and designed to protect liberty and "preclude the exercise of arbitrary power."⁸

In assessing a separation of powers question, a court must consider the nature of the power being exercised to ensure that the power is being exercised in the correct branch of government and in compliance with any constitutional requirements for that type of power. See *INS v Chadha*, 462 US 919, 958-59; 103 S Ct 2764; 77 L Ed 2d 317 (1983).

In this case, the prosecutor, a member of the executive branch, sought to remove Mr. Smith, then a state senator, from office. Using the threat of criminal prosecution and

⁷ *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998).

⁸ *Myers v United States*, 272 US 52, 293; 47 S Ct 21; 71 L Ed 160 (1926) (Brandeis, J. dissenting)

incarceration, the prosecutor conditioned a reduced charge and sentence on Mr. Smith's promise to resign his state Senate seat and not seek or hold elected or appointed office for five years. She then asked the court to accept the plea, impose these conditions, and enforce the agreement. As both the trial court and Court of Appeals concluded, offering these plea agreement terms was an unconstitutional attempt to violate the separation of powers. The power to remove a member of the legislature from office or designate an individual ineligible from running for or being appointed to office are legislative powers to be exercised exclusively by the legislature according to the procedures set forth in the Michigan Constitution.

A. The Constitution expressly grants the Legislature the exclusive power to remove a legislator from office.

The Michigan Constitution expressly reserves within the Legislature the right to determine when its own members should be expelled. Article 4, § 16 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. [emphasis added]

This 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 houses of the Legislature have the "sole" power to expel their members. The Constitution permits no other process and no other body to remove legislators from office. What's more, the Michigan Constitution specifically bars the executive branch from removing members of the legislative branch. See Const 1963 art 5, § 10 (granting the Governor authority to remove or suspend any elective or appointive state officer, "except legislative or judicial").

The Constitution explains the procedure—to the exclusion of any other procedure—for removing a legislator from office: expulsion by the legislator’s house. See Const 1963, art 4, § 16. And expulsion requires a supermajority. *Id.* 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.

B. The Constitution expressly grants the Legislature the exclusive power to determine a citizen’s eligibility for holding office.

The Michigan Constitution also makes the Legislature the sole arbiter of the “qualifications, elections and returns of its members.” See Const 1963, art 4, § 16. It further explicitly sets forth 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.

C. Both lower courts applied the clear language of Michigan’s Constitution to determine that the political conditions of the plea agreement were unconstitutional and violated public policy.

Following the plea hearing the trial court researched the aforementioned constitutional provisions and properly concluded that the Constitution grants the Legislature the exclusive authority over the eligibility and expulsion of its members. Appendix A, 52. It also determined

that Mr. Smith's conviction for malicious destruction of personal property did not make him ineligible for public office or result in his automatic expulsion under Const 1963, art 11, § 8. Appendix A, 70-72. After questioning the parties at length concerning the agreement and the boundaries between the branches of government, the trial court rightly concluded that imposing the resignation and bar-to-office terms would be the *actual* exercise of the powers reserved to the legislative branch without any of the constitutional safeguards.

The court stated, "it would be illegal for me to impose as a condition of his sentence that he resign from office and that he not hold public office during the pendency of this probation. It would violate the separation of powers cause [sic] I'm a member of the judicial branch and the Constitution provides for the removal, a way that legislators can be removed." Appendix B, 77-78. The judge further concluded the agreement represented an "unconstitutional interference by the Prosecutor with the legislative branch of government and the rights of defendant's constituents." Appendix C.

The Court of Appeals agreed, holding that in requiring Mr. Smith to resign from his state Senate seat as part of the plea bargain, "the prosecution attempted to invade the role of punishing and expelling a member of the state Senate." Appendix G, 6. And because that duty was solely a legislative and not a judicial or executive function, "the prosecution's *offering* of that plea agreement was an unconstitutional attempt to violate the separation of powers." Appendix G, 6 (emphasis in original).

Likewise, when the prosecution included in the plea bargain a requirement that Mr. Smith not seek public office for his five-year probationary period, it "violated the Michigan Constitution, which specifically sets out what crimes can disqualify an individual and from seeking public office" and "invaded the role of the defendant's constituents to decide upon his

moral and other qualifications.” Appendix G, 6. Finally, the Court of Appeals, like the trial court, rightly recognized that by entering an order requiring that Mr. Smith comply with these conditions the court too would be exercising powers not available to the executive or judicial branch. Appendix G, 6.

While this case raises an issue of first impression in Michigan, persuasive authority supports these holdings. For instance, the United States District Court for the Eastern District of New York dealt with a nearly identical issue in *United States v Richmond*, 550 F Supp 605 (ED NY 1982). There, a member of Congress agreed to plead guilty to a number of crimes in return for the dismissal of other charges. *Id.* at 606. As part of the agreement, the Congressman promised to resign and not seek reelection. *Id.* The *Richmond* court ruled that these two provisions of the plea agreement “represent[ed] an unconstitutional interference by the executive with the legislative branch of government and with the rights of the defendant’s constituents.” *Id.* The court stated that the provision requiring resignation “would provide an intolerable threat to a free and independent” legislature in light of “the enormous spectrum of criminal laws that can be violated” and “the powerful investigative and prosecutorial machine available to the executive.” *Id.* at 608. Similarly, the court said it was the voters who were to decide upon the legislator’s moral qualifications, not another branch of government. *Id.* at 607.

A Maryland appellate court reached the same conclusion in a case in which a county executive was prohibited, as a condition of probation, from being a candidate for any elected office. *Leopold v State*, 216 Md App 586; 88 A3d 860 (2014). The *Leopold* court determined that in light of a statutory scheme governing the eligibility and removal of public officials, “the separation of powers precludes the trial court from interfering in areas where the Legislature left the questions of eligibility.... to the County Council and the General Assembly.” *Id.* at 611, 613.

While neither of these cases is directly controlling, they demonstrate that other courts faced with this relatively novel question have reached the same conclusion as the courts below and are persuasive authority on the issue.

D. The trial court and Court of Appeals correctly concluded that the political promises required by the plea agreement implicated the constitutional separation of powers and violated public policy, whether or not Mr. Smith assented to them.

Separation of powers protections have two components: “one axis reaches to the person affected by government action and encompasses his or her relation to a constitutional branch; the other axis runs from each governmental branch to the others to insure separation and independence in the constitutional structure.” *Pacemaker Diagnostic Clinic of America, Inc. v Instromedix, Inc.*, 725 F2d 537 (CA 9) (en banc), *cert. denied*, 469 US 824; 105 S Ct 100; 83 L Ed 2d 45 (1984). Though prosecutors are permitted to condition sentencing or charging deals on a waiver of individual constitutional rights,⁹ the constitutional protections contemplated by the separation of powers are not purely individual rights that can be waived or bartered away.

As the United States Supreme Court concluded in *Commodity Futures Trading Com'n v Schor*, 478 US 833, 850–51; 106 S Ct 3245, 3256–57; 92 L Ed 2d 675 (1986),

[T]o the extent that [separation of powers principles are] implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

⁹ *Boykin v Alabama*, 395 US 238, 243; 89 S Ct 1709; 23 L Ed 2d 274 (1969) (knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and the right to confrontation).

See also *Richmond*, 550 F Supp at 609 (“The defendant’s voluntary consent cannot cure those portions of the plea bargain condemned by the Constitution.”).

The prosecutor erroneously argues that the separation of powers is not violated when an elected official agrees to resign from office and refrain from holding public office in exchange for a reduction of criminal charges. *Prosecutor’s Application for Leave to Appeal* at 12. Specifically, the prosecutor maintains that unless she is “forcing the official to resign from office” there is no infringement on the powers of the legislative branch. *Id.* (emphasis in original). But as the trial court and Court of Appeals correctly held, “the fact that defendant was willing to voluntarily relinquish his state Senate seat and refrain from seeking public office during probation is entirely irrelevant to the issues presented here.” Appendix G, 7; see also Appendix E, 4. As the trial court recognized, “It does not matter that the defendant voluntarily agreed to this portion of the plea agreement because these constitutional protections exist not for the defendant’s personal benefit, but to protect the rights of the defendant’s constituents and the rights of the legislative branch of government.” Appendix E, 4.

Nor can an agreement to an unconstitutional provision shield it from judicial review under principles of public policy. In *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390 (CA 9, 1991), the United States Court of Appeals for the Ninth Circuit considered a private contract that contained a provision restricting a person’s right to run for public office. The court voided the provision as violating public policy, concluding that enforcement of the provision would violate the individual’s constitutional right to run for elective office and the constitutional right of his voters to elect him. *Id.* at 1396. It described the public interest at stake as being “of the highest order,” and involving “the most important political right in a democratic system of

government: the right of the people to elect representatives of their own choosing to public office.” *Id.* at 1397.

In *Davies* the Ninth Circuit found that the “waiver was knowing” but held that the provision was “void as contrary to public policy” and could not be enforced. *Davies*, 930 F2d at 1395. In reaching this conclusion, it relied on the United States Supreme Court analysis in *Town of Newton v Rumery*, 480 US 386, 392, 107 S Ct 1187; 94 L Ed 2d 405 (1987).

In *Rumery*, an individual charged with criminal tampering with a witness to a sexual assault entered into an agreement with the prosecutor, whereby the criminal charges against him were dropped in return for his waiver of all rights to bring a civil action against the prosecutor. *Id.* at 390-91. The Court, in determining whether the agreement violated public policy, noted that such agreements are not per se unenforceable but must be subject to a balancing test. *Id.* at 392-393. In finding that the public interest in enforcement of the agreement outweighed the policies furthered by non-enforcement, the Court relied on the fact that the rights released by Rumery were, in the Court’s view, mere private rights: thus the Court believed that surrendering these did not have a significant impact upon the public at large. *Id.* at 394-95. While recognizing that *Rumery* involved the surrender of a *statutory* remedy and that the contract before them involved the waiver of a *constitutional* right which arguably requires a stricter rule than the one embodied in *Rumery*, the Ninth Circuit concluded that even under the *Rumery* test the waiver provision in *Davies* contract was unenforceable. *Davies*, 930 F2d at 1397.

Certainly, the Legislature’s sole power to expel a member does not bar a member from voluntarily resigning from office. It does, however, bar the prosecutor from using the threat of prosecution and possible imprisonment in order to secure resignation (or the promise not to hold elected or appointed office) through a plea agreement. As the Court of Appeals observed, while

Mr. Smith was free to accept or reject the plea offer, the promises that he made as conditions of the plea were not without valuable consideration or legal obligation. See Appendix G, 6-7. The legally binding nature of the plea's political promises violates the separation of powers and public policy whether Mr. Smith assented to them or not.

E. The lower courts correctly concluded that the prosecutor's demand that Mr. Smith resign and not seek office violates public policy and that public policy counsels voiding the political plea conditions.

County prosecutors should not have the power to use plea agreements to declare a legislator unqualified to hold office. This principle is especially true considering a prosecutor's substantial discretion in charging individual defendants and the leverage that gives her in plea negotiations. In light of this discretion, does the county prosecutor get to decide which alleged crimes justify seeking political plea conditions? In a later case of identical facts, could the county prosecutor exercise her discretion and *not* seek these political conditions? Could a county prosecutor only extract political promises from members of one political party, but not the other?

Here, both the trial court and the Court of Appeals recognized the coercive ramifications of this type of negotiation ("using prosecution and possible imprisonment in exchange for resignation or promise not to seek elected office") and the possibility for abuse. Appendix G, 6-7 ("Even tacit permission for prosecutors to engage in such negotiation, even if done innocently at the time, could open the door to the executive branch using its power of prosecution to remove those from elected office that do not align with the executives political preferences."). Indeed, Mr. Smith's was willing to abandon his state Senate seat to avoid prosecution and imprisonment, even after the trial court held that the prosecutor overreached in seeking his resignation as a condition of the plea. Appendix E, 2-3. Moreover, to treat political rights as bargaining chips undermines the political process. And as the Court of Appeals observed, "[i]f the resignation

from public office is used as a potential plea negotiation tool . . . the executive branch is effectively recognizing a second class of citizens – an elected class with an individual, uncommon benefit with which to bargain.” Appendix G, 7.¹⁰

“There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.” *Bordenkircher v Hayes*, 434 US 357, 365; 98 S Ct 663, 669; 54 L Ed 2d 604 (1978). This is one of those limits.

Contrary to the Court of Appeals dissent’s claim, the majority’s decision did not create a “blanket prophylactic prohibition on negotiated plea agreements between prosecutors and public elected officials.” *People v Smith* (on remand), __ Mich App __; __ NW2d __, 2017 WL 3614229 (August 22, 2017) (Docket No. 332288), dissenting opinion attached as Appendix H, 4. It merely disallowed extracting political promises in exchange for leniency, leaving the prosecutor’s broad charging power intact.

The decision to bring a charge and what charge to bring remains in the discretion of the prosecutor. *People v Venticinqu*, 459 Mich 90, 100; 582 NW2d 732 (1998). And, the prosecutor alone has the discretion to permit a defendant to plead to a lesser offense. *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115; 215 NW2d 145 (1974) (*Genesee Prosecutor II*). Furthermore, the charges the prosecutor elects to bring and her willingness to engage in plea-

¹⁰ While the prosecutor suggests it enters plea agreements that require defendants to resign with some regularity, that has no bearing on this Court’s analysis here. First, it is highly unusual for the prosecutor’s office to condition a reduced conviction and charge on the defendant resigning from his or her current employment, especially where the offense is wholly unrelated to the employment. Further, even though such agreements may create the “special class” of defendants who have greater bargaining power than others, it does not offend the Constitution in the same way because the removal and qualifications for those positions are not expressly reserved to another branch of government by the Constitution.

bargaining inevitably affects which sentences are available for the court to impose. *People v Conat*, 238 Mich App 134, 149-150; 605 NW2d 49 (1999). Charging decisions may result in other collateral consequences as well.

Through the exercise of these fundamentally executive powers, a prosecutor may have an indirect effect on the composition of the legislature and the electoral process.¹¹ “These decisions... are merely instances of the executive branch, through the office of the prosecutor, exercising its power to enforce the laws by bringing criminal charges against offenders.” *Id.* at 150. And critically, “this power is not without checks and balances.” *Id.* This is the sort of “overlap” of functions that the Framers contemplated, and the doctrine of separation of powers is not violated when this occurs. *Id.* at 146.

F. The Court of Appeals dissent misapplied the court rule and ignored the legal basis for the trial court’s decision to strike the plea provisions: the resignation and refrain from holding office conditions were in excess of the prosecutor’s authority to negotiate.

In his dissenting opinion, Judge Riordan stated that his review of “the transcript and record in this case confirms that the trial court failed to comply with the provisions of MRE 6.302¹² and abused its discretion when it determined that permitting the prosecution to withdraw the plea agreement would ‘subvert the ends of justice.’” Appendix H, 3. Judge Riordan’s review of the record is erroneous—a plain reading of the plea transcript establishes that the trial court carefully and completely carried out its obligations under MCR 6.302.¹³ Furthermore, Mr. Smith

¹¹ For example, if the facts supported it, a prosecutor could charge an elected official with a crime that upon conviction would result in ineligibility for public office under the Michigan Constitution. See Const 1963, art 11, § 8.

¹² There is no Michigan Rule of Evidence numbered 6.302. Based on the context, the dissent seems to have intended to cite MCR 6.302.

¹³ MCR 6.302 instructs that the court may not accept a plea of guilty unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A). To this end, the rule requires

has never claimed he was forced to enter into the plea agreement or that his plea was involuntary under MCR 6.302(C). Nor did the trial court find that Mr. Smith's guilty plea was involuntary (or that Mr. Smith did not voluntarily agree to resignation and forbearance in order to resolve the criminal charges pending against him) when it concluded that certain conditions in the plea agreement violated the separation of powers. The problem that the trial court identified was not a defect in the plea proceedings, but a plea condition in excess of the prosecutor's authority.

Relatedly, though the dissent took issue with "the trial judge's conclusion that there was 'prosecutorial domination' over the defendant 'through forced resignation,'" the trial judge never suggested there was any prosecutorial misconduct and unequivocally stated that it believed the

that the court place the defendant under oath and conduct a colloquy with the defendant in which it carries out subrules (B)-(E) ensuring that the plea is understanding, voluntary, and accurate.

As required by MCR 6.302(B), it advised Mr. Smith of the charges and the maximum possible prison sentences Appendix A, 36, and the trial rights he would be giving up if his plea was accepted Appendix A, 38. The court further advised Mr. Smith that if his plea was accepted he would be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not his own choice to enter the plea. Appendix A, 40. Mr. Smith was also notified that any appeal from the conviction and sentence would be by application and not by right. Appendix A, 39.

The court also complied with the provisions of MCR 6.302(C), which requires the trial court to ensure the plea is voluntary. It asked the parties about the plea agreement and the agreement was stated on the record and confirmed by the parties. Appendix A, 35-37. The court also advised Mr. Smith that he had accepted the agreement without having considered the presentence reporting or sentencing memorandums and thus was not bound to follow an agreement to a sentence for a specified term, but that Mr. Smith would have an opportunity to withdraw from the plea agreement if that was the case. Appendix A, 40. What's more, the court questioned Mr. Smith whether anyone had promised him anything beyond what is in the plea agreement (as required by MCR 6.302(C)(4)(a)), whether anyone had threatened him (MCR 6.302(C)(4)(b)), and whether it was his own choice to plead guilty (MCR 6.302(C)(4)(c)). Appendix A, 42.

Finally, per MCR 6.302(D), through questioning Mr. Smith the court properly established the factual basis for the offense of malicious destruction of personal property worth \$20,000 or more. Appendix A, 42-44. And then, on completing the colloquy with Mr. Smith, the court asked defense counsel and the prosecutor whether they were aware of any promises, threats, or inducements other than those already disclosed on the record and whether the court had complied with subrules (B) through (D). Appendix A, 44. The parties agreed that MCR 6.302 was satisfied and the court accepted Mr. Smith's plea. Appendix A, 44-45.

prosecutor's intentions to be entirely benign.¹⁴ Appendix H, 2-4; Appendix B, 78, 79. What the court did find was that the prosecutor overstepped her authority. Appendix B, 78. Specifically, the court concluded that the agreement in this case was against public policy because it involved a "technique that has the possibly [sic] of executive or prosecutorial domination of members of the state legislature through forced resignation." Appendix B, 79.

Conclusion

Promises to resign from or forgo public office have no place in plea negotiations. They offend the separation of powers set forth in the Michigan Constitution and are contrary to public policy. And while a criminal defendant may knowingly and voluntarily waive many individual constitutional protections in exchange for immunity or leniency, some rights are not subject to bargaining. An elected official cannot consent to the executive and judicial branches of government exercising rights properly belonging to the legislative branch. The constitutional rights associated with the separation of powers are not purely individual; rather, they serve institutional interests, which protect the rights of the voters as well as the legislative branch of government. As such, the trial court properly determined that the conditions of Mr. Smith's plea requiring him to resign from his state Senate seat and not seek public office for five years were unconstitutional. For these reasons, this Court should deny the prosecutor's application for leave to appeal and/or affirm the Court of Appeals opinion on remand.

¹⁴ Nor did the subjective state of mind of the prosecutor matter in *Richmond*. "It matters not that in this case the prosecutor's intention was benign. Availability of the technique and the possibilities of its abuse cannot be tolerated." *Richmond*, 550 F Supp at 609.

- III. The trial court properly struck unconstitutional conditions from the plea agreement and acted within its discretion when it denied the prosecutor's motion to withdraw from the plea because enforcement of the agreement absent the offending conditions served the interests of justice.**

Standard of Review

This 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). “At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231, 243 (2003) (internal citations omitted).

Argument

The trial court properly severed unconstitutional plea conditions and acted within its discretion by voiding the terms without affording the prosecutor an opportunity to withdraw from the agreement. As the trial court and Court of Appeals concluded, enforcement of the agreement absent the offending conditions served the interests of justice. Appendix E, 4; Appendix G, 8. Further, the trial court properly denied the prosecutor’s motion for plea withdrawal because this case is not controlled by *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995), and because there is no absolute right to plea withdrawal under MCR 6.310(E).

- A. The trial court properly severed unconstitutional plea conditions that were unrelated to the agreed-upon charges and sentence.**

After concluding that the resignation and prohibition from holding public office conditions of the plea agreement represented an unconstitutional interference by the prosecutor (and the court if it were to impose those conditions) with the legislative branch of government

and the rights of Mr. Smith's constituents, the trial court declared those conditions void and unenforceable. Appendix C; Appendix E, 3. It further concluded that the plea remained valid with regard to the charge to which Mr. Smith pleaded guilty and the remaining portions of the sentence agreement.

The trial court's authority to revise a prosecutor's decision in response to constitutional violations finds support in this Court's case law. In *Genesee Prosecutor II*, this Court made the general observation that a judge does not supervise prosecuting attorneys. *Genesee Cty Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 121; 215 NW2d 145 (1974). But this Court left room for judicial review, stating that the judge "may reverse or revise" prosecutors' decisions "if it appears on the record that they have abused the power confided to them." *Id.* (emphasis added).

In severing the void conditions without disturbing the rest of the plea agreement, the court utilized principles of contract interpretation. See Appendix E, 3 (stating that contractual analogies may be applied in the context of a plea agreement if to do so would not "subvert the ends of justice" and citing *People v Swirles* (After Remand), 218 Mich App 133, 135; 553 NW2d 357 (1996); *People v Jackson*, 192 Mich App 10; 480 NW2d 283 (1991) and *People v Martinez*, 307 Mich App 641; 861 NW2d 905 (2014)). In contract law, where an agreement contains a discrete invalid or illegal provision, a court will sever the illegal term and enforce the remainder of an otherwise valid contract unless the court concludes that the term was "an essential part of the agreed exchange." Restatement (Second) of Contracts § 184(1) (1981). This is the very principle applied by the trial court. Appendix E, 3-4.

Here, the unconstitutional terms did not affect the heart of the agreement: self-conviction to the most serious of the charged offenses in exchange for a dismissal of the other counts and a

sentence agreement to ten months in the county jail with no early release and five years' probation subject to numerous conditions designed to facilitate Mr. Smith's rehabilitation. Additionally, as discussed in more detail *infra*, in deciding that voiding the unconstitutional conditions without disturbing the rest of the plea served the ends of justice, the trial court relied on assurances made by the prosecutor and the defendant at both the plea and sentencing hearings that the plea bargain protected the public and provided punishment and rehabilitation. Appendix E, 3.

Given the lack of authority addressing this situation, it was appropriate and within the trial court's discretion to apply contract principles. See e.g. *People v Blanton*, 317 Mich App 107, 125-126; 894 NW2d 613 (2016). Furthermore, under the facts of this case, the court's decision to sever the unconstitutional conditions did not "subvert the ends of justice." *Swirles*, 218 Mich App at 135.

B. The trial court did not abuse its discretion in denying the prosecutor's motion to withdraw the plea.

The prosecution does not have an absolute right to plea withdrawal. Pursuant to MCR 6.310(E), "[o]n the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." (Emphasis added). Because the trial court's authority is discretionary ("may vacate"), the court is not required to vacate a plea if it finds that: (1) the breach was insignificant¹⁵ or (2) the administration of criminal justice would not be properly served by granting the prosecutor's motion.¹⁶ See also *Jackson*, 192 Mich App at 14-15 ("In light of the prosecutor's expansive powers and the public interest in maintaining the

¹⁵ See 1989 Staff Comment to former subrule MCR 6.310(C) (authorizing the court to vacate a plea before sentencing on the basis of the prosecutor's motion showing that the defendant has failed to comply with the terms of the agreement).

¹⁶ Cf. *People v Hannold*, 217 Mich App 382; 551 NW2d 382 (1996), overruled on other grounds in *People v Smart*, 497 Mich 950; 857 NW2d 658 (2015)

integrity of the judicial system, agreements between defendants and prosecutors affecting the disposition of criminal charges must be reviewed within the context of their function to serve the administration of justice.”).

The trial court conducted this analysis and properly found that “[e]nforcement of the plea agreement without the offending portions serves the interests of justice.” Appendix E, 4. It based its conclusion on two key findings.

First, as discussed above, the trial court relied on the assurances made by the prosecutor in court and in the joint sentencing memorandum that the bargain served the public and the interests of justice. For example, the prosecutor informed the court that her office had an interest in resolving the case without expending the resources required for a trial. Appendix A, 24. Such resources could then be “devoted to somebody who posed a great danger to the community.” Appendix A, 24. Not only that, but the prosecutor’s acknowledged that there was a difference in the “strength” of the evidence related to two of the dismissed counts. Appendix A, 26. In addition, she mentioned that the plea agreement was reasonable in light of documentation the defense provided showing that Mr. Smith’s behavior during the offense may have resulted from undiagnosed and untreated mental health issues. Appendix A, 15. The agreement would also spare both the complainant and Mr. Smith the embarrassment of a trial, which was another consideration for her office. Appendix A, 27. Even though the trial court repeatedly asked the prosecutor to explain why the specific terms of the agreement was in the public’s best interest, the prosecutor never once mentioned the unconstitutional terms at all, much less emphasized them as central to the agreement. Appendix A, 24-27.

And as the Court of Appeals rightly observed, Mr. Smith did not go unpunished as a result of the trial court’s decision. Appendix G, 9. He was required to serve ten months in jail

without the possibility of early release and five years of probation, as well as submit to alcohol and drug treatment with monthly documentation, submit to a mental health evaluation and full compliance with treatment, and pay full restitution to be determined. Appendix G, 9. The offending terms did not affect conviction, sentence, or conditions of probation, and unlike the conditions of probation, were not reasonably related to Mr. Smith's rehabilitation or the protection of the public.

Second, the trial court recognized that vacating the plea for renegotiating of the agreement would not cure the illegal nature of the negotiations and would in fact continue to subvert the ends of justice. Appendix E, 3-4. To this end, the court acknowledged that in response to the prosecutor's motion, Mr. Smith argued that while he believed the trial court should not vacate the plea, if it intended to do so, he wanted the opportunity to fulfill the terms of the plea agreement in order to avoid prosecution and imprisonment. Appendix E, 2-3. The fact that Mr. Smith was willing to abandon his state Senate seat in order to avoid prison time, even after the trial court held that the terms of the plea that required him to resign and not hold office were unconstitutional, highlighted the risk of abuse associated with the negotiation tactic. Appendix E, 2-3; see also Appendix G, 7. And where the dangers of the practice were already apparent, the court properly determined that vacating the plea bargain and allowing continued negotiation would further harm the interests of justice. Appendix E, 4.

Finally, Mr. Smith detrimentally relied on the bargain. As the Court of Appeals observed, if the trial court had granted the prosecutor's motion to vacate the plea, that would put Mr. Smith

back at the bargaining table in a much worse position. Appendix G, 8-9.¹⁷ The prosecutor and the public now know that he is willing to plead guilty, he surrendered the weapon used as a condition of the plea, he served 10 months in jail, and he voluntarily resigned his state Senate seat. As the Court of Appeals noted, allowing the prosecution to “go back to the negotiating table with such advantages after it made an unconstitutional plea agreement would undoubtedly ‘subvert the ends of justice.’” Appendix G, 9.

C. The trial court’s order denying the prosecutor’s motion to withdraw the plea is not at odds with *Siebert* because the trial court set aside the conditions because they were unconstitutional rather than as a matter of discretion.

Because this case involves unconstitutional plea conditions that could not be imposed or enforced without compromising the integrity of the court, it is fundamentally different from *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995) and its companion cases. The trial courts in *Siebert* and its companion cases deviated from the sentencing agreements in an effort to exercise their sentencing discretion. *Siebert*, 450 at 506-508. The courts chose to impose sentences lower than what the agreements called for because they believed that new information about the defendants’ bargained for cooperation dictated a lower sentence. *Id.* Here, the trial court did not “intend[] to impose a sentence lower than the agreement call[ed] for,” *Siebert*, 450 Mich at 504; rather, it concluded as a matter of law that it could not impose the unconstitutional provisions. Appendix C.

¹⁷ Where the trial court concluded as a matter of law it could not impose the unconstitutional provisions, specific performance of the sentence specified in the agreement was not available to Mr. Smith. Compare to *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995) (where the prosecutor seeks withdrawal after a court exercises its discretion to impose a sentence lower than what the agreement called for, remanding to allow the defendant affirm the plea and impose the sentence specified in the agreement is the appropriate remedy). See Appendix B, 74 (“So let me ask, since the parties agreed to this aspect—since they agreed that Mr. Smith should resign from state senate does that mean I should impose it?”); see also Appendix B, 79 (“his voluntary consent to this doesn’t cure that because he doesn’t have that right to resign in exchange for this sentence agreement”).

This case stands in contrast with *Siebert* because the trial court’s action did not subvert the prosecutor’s bargaining authority. Indeed, the prosecutor did not have the authority to require the defendant to resign his position as a state senator and prohibit him from holding elective or appointed office during the pendency of his probation in the first place. Thus, the court’s decision was not the result of a mere difference of opinion about the length of a sentence, but rather resulted from its own lack of authority to impose (and the prosecutor’s lack of authority to offer) the unconstitutional conditions. This was not only proper, but a perfect example of checks and balances in action. As discussed *infra*, judicial review of the prosecutor’s broad charging discretion is limited to where an abuse of power occurred. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). Furthermore, had the court imposed these unconstitutional conditions, it, like the prosecutor, would have violated the separation of powers and interfered with the rights of Mr. Smith’s constituents.

There are no slippery slopes here. The concerns highlighted by the *Siebert* Court—that “[d]efendants may be less likely to offer full cooperation when they can fall back on contractual arguments that will permit escape from a minimum sentence,” and “[t]o the extent that enforcement of the bargained-for sentence becomes more problematic, prosecutors will be more reluctant to offer these bargains”—are not relevant where the basis for the trial court’s deviation is a legal conclusion that the conditions in question are unconstitutional and *ultra vires*. Compare *Siebert*, 450 Mich at 515. This is a rare situation, as evidenced by the dearth of case law concerning how a trial court should proceed when the prosecutor offers an agreement with unconstitutional terms and a defendant pleads pursuant to that agreement and in exchange for a specific sentence. And any chilling effect on the offering of constitutionally questionable plea

conditions caused by the trial court court's application of contract principles to sever the unconstitutional provisions should be welcomed.

The trial court's decision to deny the prosecutor's motion to withdraw the plea and instead leave valid the charge to which Mr. Smith pleaded and the remaining portions of the sentence agreement served the administration of criminal justice and did not violate any fundamental sense of fair play.

D. If the Court disagrees and finds that the trial court abused its discretion in denying the prosecutor's motion for plea withdrawal, vacating the plea at this juncture would violate principles of due process.

The plea in this case was entered on February 11, 2016—nearly two years ago. Since then Mr. Smith has publicly resigned his office, surrendered a personal firearm, completed his jail sentence, and complied with the terms of his probation including mental health and substance abuse treatment. If this Court permits the prosecutor to withdraw the plea at this juncture, it would leave Mr. Smith with little to offer and place the prosecutor in a far stronger bargaining position than she was initially. A decision that sends Mr. Smith back to the bargaining table—as a result of a government official's constitutional violation—after the majority of the terms of the agreement have been fulfilled, would be so fundamentally unfair that it would violate due process of law. US Const, Amends V & XIV; Const 1963, art 1, § 17.

SUMMARY REQUEST FOR RELIEF

Defendant-Appellant Virgil Smith asks this Honorable Court to either deny the prosecutor's application for leave to appeal or affirm the decision below.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Katherine Marcuz

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