State of Michigan

In the Supreme Court

People of the State of Michigan,
Plaintiff-Appellee,

v

Shawn Loveto Cameron, Jr.,
Defendant-Appellant.

Michigan Supreme Court
No. 155849

Court of Appeals
No. 330876

Trial Court
No. 13-1315-FH

Brian L. Mackie (P25745)
Washtenaw County Prosecutor
Attorney for Plaintiff-Appellee
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620

Marilena David-Martin (P73175)
Jacqueline Ouvry (P71214)
Attorneys for Defendant-Appellant
645 Griswold St.; 3300 Penobscot Building
Detroit, MI 48226
(313) 256-9833

Plaintiff-Appellee's Supplemental Brief on Application for Leave to Appeal

Brian L. Mackie (P25745)
Washtenaw County Prosecutor

By: Brenda L. Taylor (P59887)
Assistant Prosecutor
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620

Introduction

The Court has directed a Mini Oral Argument on the Application (MOAA) and ordered supplemental briefing on two questions:

(1) whether court costs under MCL 769.1k(1)(b)(iii) should be classified as a tax, a fee, or some other category of charge; and

(2) if court costs are a tax, whether the statute violates the Separation of Powers Clause or the Distinct-Statement Clause of the Michigan constitution.[1]

Plaintiff-Appellee asserts that court costs imposed under MCL 769.1k(1)(b)(iii) bear characteristics of many different monetary exactions imposed by the government, including resembling both taxes and fees. But they are neither. Court costs are properly classified as an administrative cost. Plaintiff-Appellee conceded to the Court of Appeals that court costs were a tax based on the legal framework used to differentiate a tax from a fee when regulating real property. That concession was erroneous as court costs are not part of the regulation of real property.

Further, even if classified as a tax for purposes of argument, imposition of court costs violate neither the Separation of Powers Clause nor the Distinct-Statement Clause. The Legislature has the authority to delegate to the judiciary (a co-equal branch of government) the power to impose court costs for the funding of the operation of the courts. By necessity, due to the differences in funding court operations throughout Michigan, MCL 769.1k(1)(b)(iii) provides a distinct statement via delineating that the exaction is for court costs, the amount of which will depend on the actual costs incurred in administering the trial court at issue.

[1] *People v Cameron*, ___ Mich ___; 907 NW2d 604 (2018).

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Counterstatement of Jurisdiction

This Court has jurisdiction in this case, and has directed argument on the application. MCRs 7.303(B)(1), 7.305(H)(1).

Counterstatement of Questions Involved

I. Exaction of money under MCL 769.1k(1)(b)(iii) is reimbursement for costs incurred from administering the judicial process that culminates in defendants' criminal convictions. Unlike the civil system, the criminal system cannot be pay-as-you-go. So while criminal court costs bear some characteristics of both taxes and regulatory fees, they are neither. They defray courts' administrative expenses and are reasonably related to the actual costs incurred. Should court costs be classified as administrative costs?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answers, "No."
The trial court was not presented with this question.
The Court of Appeals was not presented with this question, but called costs a tax.

II. MCL 769.1k(1)(b)(iii) delegates to courts the ability to recoup costs incurred from administering the judicial process that culminates in defendants' convictions. The statute distinctly states that the exaction is for recovery of monies reasonably related to actual costs, leaves the courts to calculate the specific amounts imposed since the amounts vary across the state, and requires transparency to the Legislature. Even if court costs are classified as a tax, is imposition of that tax constitutional?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answers, "No."
The trial court was not presented with this question.
The Court of Appeals answered, "Yes."

Counterstatement of Facts

Due to the nature of the legal issues contemplated within the MOAA, the facts underlying Defendant's conviction add nothing to the legal argument, but rather provide a necessary framework for why court costs were imposed. The limited factual recap presented by the Court of Appeals is sufficient for this purpose: "Defendant was convicted after a jury trial of assault with intent to do great bodily harm less than murder, MCL 750.84, for his role in an attack on a woman over a dispute regarding the payment of babysitting fees." He was sentenced to 13 months to 20 years in prison as a fourth-offense habitual offender.[2]

The critical facts at issue for this Court involve the imposition of court costs, Defendant's challenges to those costs, and evolving law. At sentencing on January 9, 2014, the trial court imposed $1,611 in court costs against Defendant. Defendant lodged no objection to the imposition of the costs at sentencing.[3] At that time, MCL 769.1k(1)(b) provided that a sentencing court could impose "[a]ny cost in addition to the minimum state cost . . . ."[4] On June 18, 2014, this Court, in *People v Cunningham*, held that the "any cost" language of the then-existing MCL 769.1k(1)(b)(ii) did not authorize a trial court to impose any cost upon a convicted defendant but rather authorized trial courts to impose only those costs that were separately authorized by statute.[5] Thereafter, on October 7, 2014, Defendant moved the trial court to correct its sentence as it related to court costs, arguing only that

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[2] *People v Cameron*, 319 Mich App 215, 218; 900 NW2d 658 (2017).
[3] Appellee's Appendix, p 16b; Motion and Sentencing Transcript, January 9, 2014.
[4] *People v Cunningham*, 496 Mich 145, 152; 852 NW2d 118 (2014) (quoting then-existing MCL 769.1k(1)(b)(ii)); MCL 769.1k, before amendment by 2014 PA 352.
[5] *Cunningham*, 496 Mich at 154.

the ruling in *Cunningham* required the trial court to vacate the order of costs; he did not argue that imposition of court costs constituted an unconstitutional tax.[6]

In response to *Cunningham*, the Legislature amended MCL 769.1k effective October 17, 2014, to provide, in pertinent part:

> (b) The court may impose any or all of the following: . . .
> (iii) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law, any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:
> (A) Salaries and benefits for relevant court personnel.
> (B) Goods and services necessary for the operation of the court.
> (C) Necessary expenses for the operation and maintenance of court buildings and facilities.

The Legislature specifically made the application of the amendments retroactive to encompass court costs that were imposed prior June 18, 2014 (when this Court decided *Cunningham*). Additionally, the Legislature specifically indicated that the amendments were enacted as a curative measure to address the authority of trial courts to impose court costs under MCL 769.1k, which was necessitated by this Court's *Cunningham* decision.[7]

At the November 6, 2014 hearing on Defendant's motion requesting that the court vacate court costs, Defendant withdrew his motion due to the newly enacted legislation.[8] Thereafter, for reasons not articulated on the record due to the motion being withdrawn, the trial court issued an order denying Defendant's motion to

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[6] Appellee's Appendix, pp 19b-24b; Motion to Correct Invalid Sentence, October 7, 2014.
[7] 2014 PA 352; see also *People v Konopka*, 309 Mich App 345, 354-355; 869 NW2d 651 (2015). The Legislature has since amended MCL 769.1k(1)(b)(iii), effective June 30, 2017, to adjust the sunset provision to set on October 17, 2020. 2017 PA 64.
[8] Appellee's Appendix, p 36b; Motion Hearing Transcript, November 6, 2014.

correct his sentence, specifically listing the amendments to MCL 769.1k as the reason.[9]

On direct appeal, Defendant challenged court costs on the bases of whether the trial court had statutory authority to impose court costs and whether application of the statutory amendments to MCL 769.1k was an ex post facto violation. The Court of Appeals affirmed the trial court's authority to impose court costs, but remanded for the trial court to examine the factual basis for the $1,611 imposed.[10] Defendant did not argue that imposition of court costs is an unconstitutional tax.

On remand, the trial court issued a written order regarding the computation of court costs. This order explained how the trial court arrived at the $1,611 figure—essentially by calculating the average cost of a felony case, with a $68 adjustment downward to reflect that state costs are separately ordered.[11] There were no factual findings by the trial court other than as it relates to the Washtenaw County trial court budget and the percentage of cases in the Washtenaw County trial court that are felonies.[12]

On appeal after remand, Defendant changed tack and for the first time argued that imposition of court costs under MCL 769.1k(b)(1)(iii) is an unconstitutional tax. Relying on analysis in unpublished Court of Appeals cases, and using the regulation construct for differentiating between a tax and a fee, the

[9] Appellee's Appendix, p 39b; Order Denying Motion to Correct Invalid Sentence, December 11, 2014.
[10] Appellant's Appendix, pp 2a-3a; *People v Cameron*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2015 (Docket No. 321387).
[11] Appellant's Appendix, pp 4a-5a. There was also a $2 deduction that is unexplained.
[12] Appellant's Appendix, pp 4a-5a.

People imprudently conceded that court costs were a tax before focusing on their constitutionality. The Court of Appeals, also using the principles applicable to determining whether a monetary exaction is a tax or a fee in the regulation arena, determined that court costs were a tax. That court held, however, that the tax was constitutional under both the Distinct-Statement Clause and the Separation of Powers Clause under the Michigan constitution.[13]

Defendant's application to this Court followed. In his application, Defendant argued that court costs were an unconstitutional tax, focusing only on the issues decided by the Court of Appeals—that court costs were a tax that did not violate the Distinct-Statement Clause or the Separation of Powers Clause. Defendant did not raise other statutory or constitutional challenges to MCL 769.1k(1)(b)(iii).

The Court then granted a MOAA and ordered supplemental briefing on two questions:

(1) whether court costs under MCL 769.1k(1)(b)(iii) should be classified as a tax, a fee, or some other category of charge; and

(2) if court costs are a tax, whether the statute violates the Separation of Powers Clause or the Distinct-Statement Clause of the Michigan constitution.[14]

[13] *People v Cameron*, 319 Mich App 215; 900 NW2d 658 (2017).
[14] *People v Cameron*, ___ Mich ___; 907 NW2d 604 (2018).

Argument

I. Exaction of money under MCL 769.1k(1)(b)(iii) is reimbursement for costs incurred from administering the judicial process that culminates in defendants' criminal convictions. Unlike the civil system, the criminal system cannot be pay-as-you-go. So while criminal court costs bear some characteristics of both taxes and regulatory fees, they are neither. They defray courts' administrative expenses and are reasonably related to the actual costs incurred. Court costs should be classified as administrative costs.

Standard of Review

This Court has said that whether a statute imposes a tax is a question of law that an appellate court reviews de novo.[15] As the below discussion demonstrates, however, the more appropriate standard of review in some cases might be a mixed question of fact and law. Defendant failed to raise in the trial court the issue of whether court costs imposed under MCL 769.1k(1)(b)(iii) are an unconstitutional tax. Therefore, the issue is unpreserved and appellate review is for plain error.[16]

Discussion

Monetary exactions by the government can take many forms including, but not limited to, taxes, fees, and fines.[17] Within the tax category, exactions can take the form of property taxes, sales taxes, and use taxes (as just a few examples).[18] Within the fee category, exactions can take the form of application fees and administration

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[15] *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998); see also *People v Cunningham*, 496 Mich 145, 149; 852 NW2d 118 (2014).
[16] *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).
[17] See *Dawson v Secretary of State*, 274 Mich App 723, 752; 739 NW2d 339 (2007) (Davis, J., concurring in part) (differentiating between fees, taxes, and fines).
[18] *Banner Laundering Co v Gundry*, 297 Mich 419, 427-429; 298 NW 73 (1941) (discussing different types of taxes within the State of Michigan, including personal property taxes, use taxes, and sales taxes); see also *Brunt Associates, Inc v Dep't of Treasury*, 318 Mich App 449, 457-458; 898 NW2d 256 (2017) (discussing the difference between sales and use taxes in Michigan).

fees, among others.[19] Such fees are regulatory in nature and are often referred to as user fees or regulatory fees.[20]

The nomenclature used in a statute does not control into which category any specific exaction falls.[21] Rather, when called upon, courts make the categorization by looking at many facets such as the legislative intent, the purpose of the exaction, and the incidents pertaining to it.[22]

An oft-disputed categorization is whether an exaction is a regulatory fee or a tax as it pertains to real property. In distinguishing between these two categories in relation to real property, this Court has provided guidance by articulating three primary criteria to be considered: (1) does the exaction serve a regulatory purpose rather than a revenue-raising purpose, (2) is the exaction proportionate to the necessary costs of the service, and (3) can a person voluntarily refuse or limit their use of the commodity or service provided.[23] This construct has become known as the *Bolt* test.[24]

The three-criterion construct delineated by this Court in *Bolt* is the construct that Plaintiff-Appellee used in its analysis before the Court of Appeals and is the construct that the Court of Appeals applied. Plaintiff-Appellee conceded that under these three criteria court costs are a tax. But a more thorough consideration of these

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[19] See *Westlake Transportation, Inc v Public Service Com'n*, 255 Mich App 589, 615-616; 662 NW2d 784 (2003) (discussing application and administration fees within the Motor Carrier Act).
[20] *Bolt*, 459 Mich at 161-162.
[21] *City of Dearborn v Michigan State Tax Commission*, 368 Mich 460, 471-472; 118 NW2d 296 (1962); see also *Union Steam Pump Sales Co v Deland*, 216 Mich 261, 264; 184 NW 353 (1921).
[22] *City of Dearborn*, 368 Mich at 471.
[23] *Bolt*, 459 Mich at 161-162.
[24] See, *Lapeer County Abstract & Title Co v Lapeer County Register of Deeds*, 264 Mich App 167, 184; 691 NW2d 11 (2004).

three criteria, as occasioned by this Court's MOAA Order, demonstrates that court costs imposed under MCL 769.1k(1)(b)(iii) have characteristics of both a tax and a regulatory fee, but are more akin to a regulatory fee than to a tax.

First, it is true that court costs raise revenue. But the first criterion does not require merely determining whether the exaction raises revenue – all exactions raise revenue. The first criterion requires consideration of what the primary purpose of the exaction is and discusses a comparison only between revenue-raising or regulatory purposes. Criminal courts are not regulatory in the commonly used sense of the word—providing guidelines and requirements for the operation and oversight of systems that impact the health and safety of citizens.[25] This Court has recognized the regulatory nature of some crime-related statutes, such as the Crime Victim's Rights Act.[26] But what is missing in the analysis of the first criterion is the dual purpose of the criminal courts. Not only do the criminal courts ensure that the rights of defendants are protected, but in so doing they also ensure the proper sentences of convicted offenders thereby promoting the welfare of the public. The court costs imposed are part of the legislative scheme involving sentencing—appearing under the Judgment and Sentence Chapter of the Code of Criminal Procedure.[27] The court costs are imposed only after a defendant is found guilty—thereby supporting the regulatory nature of imposition of costs as part of the sentence of a convicted offender. The regulatory purpose is indirect—reimbursing a government agency for the expenses in providing a service. Court costs raise

[25] See *Merrelli v City of St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959).
[26] *People v Earl*, 495 Mich 33, 43; 845 NW2d 721 (2014).
[27] Chapter 769, Chapter IX; Code of Criminal Procedure—Judgment and Sentence.

revenue, but they also are imposed as a consequence of criminal behavior at the sentencing of an offender where sentencing includes considerations for the public welfare. Such dual purposes does not relegate court costs to the category of taxes.[28]

Second, it is true that the public benefits from the courts' role in the prosecution of criminal offenders, but so do the offenders. The judiciary is the branch of the government that ensures a defendant receives the full panoply of rights to which she is entitled. Therefore, a direct benefit of the use of the criminal courts inures to defendants. The proportionality of the service to the costs imposed is apparent. MCL 769.1k(1)(b)(iii) allows imposition of court costs provided they are reasonably related to the actual costs incurred by the particular court. The calculation of that cost based on an average, as opposed to a pay-per-service method, is necessary to ensure that no defendant experiences a chilling effect in the defense of his case. That is, a defendant should not be placed in the position of having to decide whether to file a motion or not file a motion because the cost imposed for that motion would be $20. Nor should a defendant have to, like a civil litigant, pay an $85 fee for making a demand for a jury trial.[29] Rather, if convicted, a defendant will bear the average cost of the service he was a beneficiary of. This is no different than a person who pays $8 to enter the state park in a motor vehicle and only stays for one hour versus the person who pays $8 and stays for the entire day.[30] It is an average cost to cover the use of the service of the roadways and parking lots in the park. The law

[28] *Westlake Transportation, Inc*, 255 Mich App at 613 ("As long as a the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, . . ., and thus benefit the general public.") (citation omitted).
[29] MCL 600.2529.
[30] MCL 324.74117.

does not require that fees be directly equal to the cost incurred to avoid being classified as a tax, rather the fee must be a fair approximation of the costs.[31]

Third, it is true that most criminal defendants do not voluntarily choose to use the criminal justice system by actively seeking to be arrested, charged, and prosecuted. Many would like to avoid responsibility for their crimes. But that is a myopic look at this criterion. This criterion asks whether a person can voluntarily refuse or limit her use of the commodity or service provided. The answer to that question in the criminal justice context is simple and obvious: "yes." Criminal defendants can voluntarily refuse or limit their use of the criminal justice system by not committing a crime. Additionally, whether court costs are "voluntarily" incurred is a question that misses the mark. A person who wants to buy a new car does so with knowledge that she will have to pay sales tax, but the payment of sales tax is not something that she would "voluntarily" choose to pay if given the choice. A person who wants to use the state parks does so with the knowledge that he will have to pay an entrance fee (user fee) in he enters with a motor vehicle, but the payment of the user fee is not necessarily something that he would "voluntarily" choose to pay if given the choice. Similarly, a defendant who decides to break the law does so with the knowledge that she will have to pay court costs if found guilty. Just because a defendant would rather not be caught, and therefore not have to

[31] *United States v Sperry Corp*, 493 US 52, 60; 110 S Ct 387; 107 L Ed 2d 290 (1989) ("This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the costs of its services. All that we have required is that the user fee be a 'fair approximation of the cost of the benefits supplied.'"), quoting *Massachusetts v United States*, 435 US 444, 463 n 19; 98 S Ct 1153; 55 L Ed 2d 403 (1978).

come to court, does not make the imposition of court costs any more or less voluntary than the "voluntariness" with which a new-car-purchaser pays sales tax or a park-user pays an entrance fee in a motor vehicle (user fee). Many states do not even include the voluntariness analysis in determining the difference between a tax and a fee for just this reason.[32]

As the above discussion demonstrates, careful analysis of the three criteria demonstrates how difficult it is to shoe-horn the imposition of court costs under MCL 769.1k(1)(b)(iii) into the regulatory versus tax construct applicable to real property. That construct is not readily translatable to all other forms of monetary exactions. Court costs are not akin to regulating the use of highways, the licensing of drivers, or the management of a city's water system.[33] The three-criterion *Bolt* test should not be construed as having application beyond the regulatory fee versus tax determination involving real property. This limitation has been recognized by the Michigan Court of Appeals in categorizing fees for the copying of deeds as a "voluntary purchase transaction" instead of a tax: "However, it is apparent that the *Bolt* test is only designed to distinguish between user fees and taxes on real property and has no applicability in the present context. . . . Put simply, the *Bolt* test is designed to distinguish between assessments on real property that necessarily are either taxes or user fees. It has no application to a voluntary

[32] *Bloom v City of Fort Collins*, 784 P2d 304, 310-311 (Colo, 1989) (rejecting the use of a voluntariness consideration in distinguishing between a tax and a fee); see also, e.g. *Sinclair Paint Co v State Board of Equalization*, 15 Cal 4th 866, 874; 64 Cal Rptr 2d 447; 937 P2d 1350 (1997) (noting that an exaction that is compulsory can still be a fee rather than a tax).

[33] *Westlake Transportation, Inc*, 255 Mich App at 612 (applying the three-criterion test in the context of regulation of trucks within Michigan); *Dawson*, 274 Mich App at 746 (applying the three-criterion test to driver responsibility fees); *Bolt*, 459 Mich at 161-162 (adopting the three-criterion test in the context of storm water service charges).

payment in a transaction, like the purchase of a copy of a record, that does not involve any mandatory assessment."[34]

Further, a historical review of the case law demonstrates that there are other standards that Michigan appellate courts have looked to in determining whether an exaction is a tax. For example, in deciding that a local ordinance imposing an exaction for the collection of garbage was not a tax, the Michigan Court of Appeals emphasized that "the city's garbage collection fee [was] not an involuntary exaction for general governmental services, but, rather, [was] imposed solely to defray the costs of a specific service."[35] Here, the imposition of court costs against defendants defrays the cost of providing the service of the criminal justice system to defendants. Notably, this appears to have been one of the purposes of MCL 769.1k(1)(b)(iii)—to make the person responsible for generating the cost bear the cost rather than the general public.[36]

In another example, this Court considered the imposition of a fee for providing license plates and approved looking at whether the amount of an exaction is "larger than necessary to defray expenses," with an unreasonable amount being considered a tax and a reasonable amount not. Further, "'[i]t will be presumed that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself,

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[34] *Lapeer County Abstract & Title Co*, 264 Mich App at 184-185.
[35] *Iroquois Properties v City of East Lansing*, 160 Mich App 544, 564-565; 408 NW2d 495 (1987).
[36] Appellant's Appendix, p 25a; Legislative Analysis to MCL 769.1k ("Thus, unless House Bill 5785 is enacted to overturn the *Cunningham* decision, many local governments may experience budget shortfalls not just next year, but in future years as well, that could affect services to their residents beyond court operations. This has led to concerns that the burden to replace the lost revenue may fall on local residents *rather than on those using the criminal justice system*.") (emphasis added).

or is established by proper evidence.'"[37] Here, MCL 769.1k(1)(b)(iii) allows courts to recoup only those amounts reasonably related to the actual costs incurred by a defendants' use of the criminal justice system. The reasonably-related, actual costs calculation is done in a way that does not chill defendants' rights within the system and allows for the variances in the cost of administering the numerous courts across the state. The average court-by-court cost is not "larger than necessary" to defray the actual costs incurred.

Other than recent unpublished decisions of the Court of Appeals reaching differing conclusions as to whether court costs are a tax, which preceded the Court of Appeals published decision here, Plaintiff-Appellee was unable to find any case law in Michigan directly on point on this issue of how to determine whether a court cost imposed in a criminal case is a really a tax in disguise.[38] The criminal case distinction is critical because in the civil realm, court costs are generally mandated on a pay-per-service basis.[39] There are cases discussing whether the statute under which court costs are imposed authorizes the trial court's action, such as whether imposition of overhead costs of a court were authorized by the controlling statute.[40]

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[37] *City of Dearborn*, 368 Mich at 472, quoting *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338 (1914).

[38] See, e.g. *People v Knight*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2016 (Docket No. 324028), p 2 (questioning the application of the *Bolt* test and finding that even under this test imposition of court costs under MCL 769.1k(1)(b)(iii) is not a tax); *People v Bailey*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 323190), pp 4-5 (discussing the *Bolt* test and assuming for purposes of appeal that court costs under MCL 769.1k(1)(b)(iii) were a tax). These opinions can be found at Appellee's Appendix, pp 56b-64b.

[39] See MCL 600.2529.

[40] See, e.g., *People v Teasdale*, 335 Mich 1; 55 NW2d 149 (1952) (analyzing the then-existing probation statute which allowed courts to impose costs and finding that the statute did not allow for recouping expenditures for the maintenance and operation of the court); *Saginaw Public Libraries v Judges of 70th District Court*, 118 Mich App 379; 325 NW2d 777 (1982) (finding a statute allowing

Those cases are of little help here, because MCL 769.1k(1)(b)(iii) specifically authorizes imposition of costs to cover overhead expenses. Additionally, this Court has approved of costs being imposed in criminal cases, providing those costs are reasonably related to the expenses actually incurred and not excessive.[41] But none of those cases grappled directly with the taxation question.[42]

There is, however, a line of cases that—while not binding—brings to the forefront the necessity of making a distinction between regulatory and non-regulatory government action and discusses the non-regulatory action of administrating services. "[A] fee need not be regulatory in order not to be deemed a tax."[43] When an exaction is for administration of a government service and intended to reimburse the government agency for the cost of the service provided, it is not a tax but rather an administrative cost. The validity of the cost turns on whether the amount imposed bears a reasonable relationship to the actual expenses incurred by the government.[44] An exaction is not a "cost" if the use of the money gathered does not go to reimburse the government agency that provided the service, although it

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imposition of fees related to civil infractions did not allow for costs related to the operation of the court).

[41] See, e.g. *People v Wallace*, 245 Mich 310; 222 NW 698 (1929) (finding that the relevant statute allowed the imposition of the costs of prosecution, but remanding to ensure that the costs imposed bore a reasonable relation to the expenses incurred); *People v Robinson*, 253 Mich 507, 511; 235 NW 236 (1931) (approving costs imposed in a criminal case pursuant to a statute allowing for imposition of costs for expenses incurred in connection with the apprehension, examination, trial, and probation oversight of a criminal defendant providing the costs were not excessive).

[42] The lower court in *Saginaw Public Libraries* reached the conclusion that the costs imposed were a tax, but the Court of Appeals did not decide the case on that basis. *Saginaw Public Libraries*, 118 Mich App at 388-389.

[43] *Gorney v City of Madison Heights*, 211 Mich App 265, 270; 535 NW2d 263 (1995).

[44] See, e.g. *Gorney v City of Madison Heights*, 211 Mich App at 270 (finding that property tax administration fees were not taxes but rather were to defray the administrative costs of tax collection); *Foreman v Treasurer of Oakland County*, 57 Mich App 231, 238-239; 226 NW2d 67 (1974) (finding that probate court costs were not a tax but an administrative cost).

does not thereby automatically become a tax.[45] This standard—to what use an exaction referred to as a cost is put—is a standard other states have used on this very issue of imposition of court costs in a criminal case. When a court cost is collected by a criminal court pursuant to statute and put to the use of the criminal justice system, it does not make courts unconstitutional tax collectors.[46]

Imposition of court costs does not fit within the regulatory fee versus tax paradigm of *Bolt*. Those two categories fail to encompass all exactions levied by a government. In fact, decades ago the Legislature delineated a difference between "costs," "fees," and "penalties" when dealing with collection of exactions by the courts. Within these categories, the Legislature has defined "court costs" to be a "cost" not a "fee."[47]

Plaintiff-Appellee could find no Michigan appellate court decision that has announced a test that would be applicable to determining whether a non-regulatory government function from which administrative costs arise creates a tax. But from the case law certain questions emerge: (1) is the exaction intended to defray the cost of a service provided; (2) is the exaction reasonably related to the actual expenses incurred; and (3) does the exaction go to reimburse the government agency that provided the service? Here, court costs imposed under MCL 769.1k(1)(b)(iii) meet all the criteria to be called an imposition of a non-regulatory, administrative cost:

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[45] *People v Barber*, 14 Mich App 395, 402-403; 165 NW2d 608 (1968) (finding that a statutorily-authorized imposition of an additional 10% "cost" against criminal defendants was not really a "cost" as the money collected went to the law enforcement officers' training counsel and not to reimburse the government agency that expended its resources; it was a supplemental fine).
[46] See, e.g. *Peraza v State*, 467 SW3d 508, 517-518 (Tex Crim App 2015).
[47] MCL 600.4801.

(1) they are intended to defray the cost of the courts in providing criminal justice services as a consequence of an offender's commission of a crime; (2) they are reasonably related to the actual expenses incurred as they are imposed on a court-by-court basis using a formula provided by the State Court Administrative Office (SCAO) and were explained by the trial court with detail;[48] and (3) they do not go to the state general fund or some other designated fund (like the County Treasurer for Libraries or the Friend of the Court Fund), but rather go to the local funding units of the courts.[49]

MCL 769.1k(1)(b)(iii) does not unconstitutionally foist upon courts tax-collection duties; courts could refuse such imposition of a non-judicial function.[50] Rather, what the Legislature has constitutionally done is allow courts to recoup their administrative costs from the people who caused the expense—convicted defendants. Having to pay court costs under MCL 769.1k(1)(b)(iii) is a non-punitive, administrative cost imposed upon convicted criminal defendants who caused the expenditure. It was not error for the trial court to impose court costs in this case, let alone plain error.

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[48] Appellant's Appendix, pp 4a-5a; Order on Remand Detailing Computation of Court Costs (August 14, 2105).

[49] Appellee's Appendix, pp 43b, 52b; Circuit Court Fee and Assessments Table, October 2017; District Court Fee and Assessments Table, November 2017. The funding unit of circuit courts for all but the third circuit is the county in the circuit and the funding unit of district courts for all but the 36th district court is the district control unit. MCL 12.131.

[50] *People v Peters*, 397 Mich 360, 368; 244 NW2d 898 (1976).

II. MCL 769.1k(1)(b)(iii) delegates to courts the ability to recoup costs incurred from administering the judicial process that culminates in defendants' convictions. The statute distinctly states that the exaction is for recovery of monies reasonably related to actual costs, leaves the courts to calculate the specific amounts imposed since the amounts vary across the state, and requires transparency to the Legislature. Even if court costs are classified as a tax, imposition of that tax is constitutional.

Standard of Review

Whether a statute is constitutional is a question of law that an appellate court reviews de novo.[51] Defendant failed to raise in the trial court the issue of whether court costs imposed under MCL 769.1k(1)(b)(iii) are an unconstitutional tax. Therefore, the issue is unpreserved and appellate review is for plain error.[52]

Discussion

The Legislative branch is tasked with the obligation to impose taxes within the parameters allowed by, and constrained by, the constitution.[53] Assuming imposition of court costs under MCL 769.1k(1)(b)(iii) creates a tax, this Court has asked the parties to address two specific constitutional provisions—the ability of the Legislative branch to delegate taxing power to a co-equal branch of the government, which implicates the Separation of Powers Clause, and the requirement that any tax be distinctly stated, as required by the Distinct-Statement Clause. The Court of Appeals properly analyzed these clauses and, therefore, Plaintiff-Appellee will focus on expanding on the analysis as informed by Defendant's arguments.

The starting point for any constitutional analysis of a statute is the strong presumption of constitutionality. Absent a *clear* showing of unconstitutionality, the

[51] *People v McKinley*, 496 Mich 410, 414-415; 852 NW2d 770 (2014).
[52] *Carines*, 460 Mich at 764.
[53] Const 1963, art 9, § 1.

presumption will prevail.[54] Therefore, even if court costs under MCL 769.1k(1)(b)(iii) are considered a tax, they are presumed to be constitutional. Defendant-Appellant has not made a clear showing of unconstitutionality. In fact, there has arguably been no showing whatsoever in this case. Defendant-Appellant did not raise the unconstitutional tax argument before the trial court and, therefore, there is no factual record to which any appellate court can look.

Defendant-Appellant includes within his appendix, and argues within his supplemental brief, several fact-based documents that have not been vetted through the trial court process. Some of those documents, such as the report from the SCAO as to the court costs actually imposed and collected in 2016,[55] bear indicia of reliability and completeness on their face that could arguably be relied upon by this Court without any greater factual development as they are public records and reports.[56] In fact, in kind, Plaintiff-Appellee has included two public reports also from the SCAO, the circuit and district courts fee tables,[57] explaining where court costs collected under MCL 769.1k(1)(b)(iii) are distributed.

But inclusion of a self-generated chart of the State Appellate Defender Office (SADO) cases[58] that is by admission only one-quarter of the appellate cases within Michigan is not akin to including publicly available reports from SCAO. Defendant-Appellant did not seek permission from this Court to augment the record, nor did he

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[54] *Dawson*, 274 Mich App at 739-740 (emphasis added).
[55] Appellant's Appendix, pp 28a-34a; Court Costs Imposed and Collected in 2016.
[56] MRE 803(8).
[57] Appellee's Appendix, pp 40b-48b; Circuit Court Fee and Assessments Table, October 2017. Appellee's Appendix, pp 49b-55b; District Court Fee and Assessments Table, November 2017.
[58] Appellant's Appendix, pp 35a-54a; SADO Court Cost Data from 2017 Assignments.

request a remand to expand the record below.[59] Defendant-Appellant acknowledges there are many unanswered questions presented by his SADO documentation and that it is an incomplete state-wide picture. As such, before such documentation should be used as evidence clearly demonstrating unconstitutionality, it should be vetted before a fact-finding court.

But without regard to the lack of a factual record from the trial court, this Court can still determine that even if court costs are a tax, they do not run afoul of the Distinct-Statement and Separation of Powers Clauses.

Separation of Powers Clause

The Separation of Powers Clause provides that "[t]he powers of the 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 where expressly provided in this constitution."[60]

However, "separation" does not mean absolute separation.[61] Part of the Legislature's exclusive power is the power to levy taxes.[62] That power is not supposed to be surrendered, suspended, or contracted away.[63] But the Legislature does maintain the ability to delegate its power to other branches within certain parameters.[64] To prevent violating the separation of powers doctrine, the Legislature must provide adequate safeguards and standards to guide those

[59] See MCR 7.211(C)(1).
[60] Const 1963, art 3, § 2.
[61] *Markowski v Governor*, 495 Mich 465, 482-83; 825 NW2d 61 (2014).
[62] Const 1963, art 9, § 1, § 2.
[63] Const 1963, art 9 § 1, § 2.
[64] *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8-9; 658 NW2d 127 (2003).

receiving power.[65] Additionally, power delegated should be "sufficiently broad" as to accommodate the varying nature of tasks delegated, like assessing average costs.[66] Factors a court will look at in determining whether a delegation of power is unconstitutional include: (1) whether the Legislature authorized the power, (2) whether the Legislature limited the action, (3) whether the Legislature directed the entity to act, and (4) whether the Legislature limited the scope of how an entity may act.[67]

Defendant alleges that the statute violates the Separation of Powers Clause because the Legislature did not provide sufficient standards to guide the courts in assessing, collecting, or imposing this "tax." His argument largely relies on the fact that the statute itself does not give a specific amount or an exact formula for how to calculate costs. Furthermore, Defendant takes issue with the fact that the statute gives the courts discretion to impose a tax and that costs are not mandatory in a uniform way.

In analyzing this issue, the Court of Appeals analogized the delegation of power here to the Legislature's delegation of power to the courts to determine sentences.[68] Establishing penalties for crimes is a legislative power, but the separation of powers clause is not violated in that instance because the Legislature retains some discretion and sets standards and safeguards. The court reasoned that even though court costs are not a punishment, the analogy stands because

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[65] *People v Turmon*, 417 Mich 638, 652-53; 340 NW2d 620 (1983); *Hoffman v Otto*, 277 Mich 437, 440; 269 NW 225 (1936).
[66] *City of Ann Arbor v Nat'l Ctr For Mfg Sciences, Inc*, 204 Mich App 303, 308; 514 NW2d 224 (1994).
[67] *Westervelt v Natural Resources Comm'n*, 402 Mich 412, 441; 263 NW2d 564 (1978).
[68] *Cameron,* 319 Mich App at 234-35.

discretion has been delegated in both situations, and in both instances the Legislature has provided "intelligible principles."[69]

This analysis by the Court of Appeals hits the mark not only because imposition of court costs under MCL 769.1k(1)(b)(iii) is part of the sentence of a defendant, but also because the method of calculation of the court costs recognizes the need for diversity throughout the state and the need not to infringe defendants' rights. Trial courts need discretion in imposing court costs as a given trial court will often impose costs only on one of many cases a single defendant has before the court, thereby recognizing that a defendant with multiple cases often causes only one expenditure of funds by a court. Notably, Defendant complains that the SADO data demonstrates inconsistent imposition of costs by judges yet the incomplete nature of the SADO documentation does not allow this Court to determine if the no-cost entries were due to a court imposing court costs on only one of multiple files involving the same defendant. This highlights the limited value of the SADO documentation and emphasizes the failure of Defendant to preserve this argument in the trial court and allow a complete record to be created.[70]

Further, costs in a criminal case cannot be based on a pay-per-service basis (i.e. per pleading or per court proceeding) as that would potentially chill a defendant's unfettered ability to defend. This applies whether the pay-per-service cost would be imposed simultaneously with use of the service or imposed only after conviction. A defendant who knows that a motion will cost him $20 to file or will

[69] *Cameron,* 319 Mich App at 234-235.
[70] Appellant's Appendix, pp 35a-54a; SADO Court Cost Data from 2017 Assignments.

cost him $20 if he is convicted might choose not to file a motion that he would otherwise file. This cannot be the method of calculating court costs in criminal cases. The legislative directive providing that court costs must be those reasonably related to the actual costs and then allowing for the variances that are present throughout the State of Michigan for the cost to administer any given court is proper. The statute requires the courts that impose costs under the statute to report to SCAO and SCAO to report to the governor, the House, and the Senate.[71] The Legislature has acted constitutionally by delegating the authority to impose court costs to the courts who incur the costs and by requiring transparency to the Legislature.

This same conclusion is reached when applying the four factors listed above that are often used to determine whether an act of delegation is unconstitutional. The first factor is whether the Legislature authorized the power. Here, it is unquestionable that the Legislature has authorized the courts to collect costs based on the language of the statute and the relevant subparts. This Court, in *Cunningham*, held that courts have the authority to collect costs and the Court of Appeals has recognized this principle as well.[72] The legislative response to *Cunningham* only further supports the conclusion that the Legislature authorized courts to have the power to impose court costs.

The second factor is whether the Legislature limited the action. Here, the action is limited by the defining language in the statute. Courts may only collect

[71] MCL 769.1k (8), (9).
[72] *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014); *People v Konopka*, 309 Mich App 345; 869 NW2d 651 (2015).

costs that are "reasonably related" to actual costs of adjudication, the costs must have a factual basis, and the funds are only to be imposed for court expenditures, demonstrated by the non-exhaustive list contained in the statute. This factor implicates the same arguments concerning the Distinct-Statement Clause addressed and expanded on below.

The third factor the courts may consider is whether the Legislature directed the courts to act. That statute's language uses the discretionary "may" instead of the mandatory "shall" regarding court costs. But the direction to act is not to mandatorily impose court costs, but rather the direction to act is to exercise the court discretion inherent in any sentencing matter. The Legislature *directed the courts to act within their discretion*.

The fourth and final factor that a court may look at is whether the Legislature defined or limited the scope in which courts may act. Again, this factor is like the Distinct-Statement Clause argument below as well as the arguments in factor two above. The scope is limited because the Legislature has required local courts to work through SCAO and for SCAO to report to the Legislature. The Legislature made clear that the costs do not have to be calculated based on the costs involved in a particular case. Average costs of a court over a period of time are used to determine the costs reasonably related to the actual costs of a given court. If courts were to abuse the power delegated in the relevant statute, the Legislature could further limit or remove the courts' power, thus redefining the scope.

Next, Defendant argues for the first time that the statute is an unconstitutional referral statute because it allegedly requires a factual finding that has no significance outside of the statute. This is also a separation of powers argument,[73] but not one Defendant made to the Court of Appeals nor in his application to this Court. Nor is it responsive to this Court's Order for supplemental briefing because although it does deal with separation of powers, it does not depend on whether court costs are a tax.

A referral statute is a statute that is dependent on findings made outside of the Legislature's control.[74] Also, a referral statute allows an entity who has been delegated power to make a determination whether a fact has occurred that triggers the statute's operation.[75] An example of a permissible referral statute was a federal statute that allowed the President of the United States to cease trade with foreign countries if one of those countries acted to revoke a relevant decree. The Supreme Court held this statute to be constitutional because the only question was whether a fact (revocation of a relevant decree) triggered the effect of the statute.[76]

Referral statutes are rarely challenged.[77] This is largely due to the broad nature and discretion given to referral statutes. The only limitation for a referral statute to pass constitutional muster is that the independent finding that triggers the statute must serve a purpose *other than accommodating the statute*. This is

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[73] *Taylor v Smithkline Beecham Corp*., 468 Mich at 9-10; see also *Oshtemo Charter Tp v Kalamazoo County Road Com'n*, 302 Mich App 574; 841 NW2d 135 (2013).
[74] *Taylor*, 468 Mich at 10.
[75] *Oshtemo*, 302 Mich App at 591.
[76] *Taylor*, 468 Mich at 11-12.
[77] *Taylor*, 468 Mich at 12.

known as the independently significant standard.[78] If the independent fact is determined for reasons other than the statute, the statute is constitutional.[79]

Here, MCL 769.1k(1)(b)(iii) is not an unconstitutional referral statute as the only factual determination needed to trigger the statute is a criminal conviction, which is a finding that is independent of the operation of the statute. The statute was immediately effective and did not depend on some future uncertain event. The calculation of the costs is not a triggering of the statute, but rather operation of the statute. Further, even those cost calculations have an independent significance as courts need to calculate their operating expenses and their caseload breakdowns independent of this statute; courts have to calculate and prepare budget reports that are shared with others and relied upon for purposes other than MCL 769.1k(1)(b)(iii).[80]

Distinct-Statement Clause

The Distinct-Statement Clause provides that all laws imposing a tax must distinctly state the tax.[81] The purpose of the clause is to prevent the Legislature from being deceived by taxes that are levied for purposes not approved by the Legislature.[82] The clause is violated when a statute imposes an obscure or deceitful

[78] *Taylor*, 468 Mich at 12 ("That is, there is no improper delegation where the agency or outside body making the finding . . . is doing it for purposes independent of the particular statute to which it makes reference.").
[79] *Taylor*, 468 Mich at 12.
[80] See, e.g., Administrative Order No. 1998-5, 459 Mich cixxvi (1998); 2014-17 Budget Summary Washtenaw County, MI, <https://www.washtenaw.org/DocumentCenter/View/4150/2014-2017-Budget-Book-PDF> (accessed June 19, 2018).
[81] Const 1963, art 4, § 36.
[82] *Dawson*, 274 Mich App at 747.

tax, such as when an exaction is really a tax disguised as a fee. The statute need only be stated "clearly enough" to satisfy the requirements of the clause.[83]

Here, Defendant alleges that the statute violates the clause because there is no actual number value stated in MCL 769.1k(1)(b)(iii). As well-articulated by the Court of Appeals, the statute specifically provides that the calculation is not to be made based on the costs incurred for a specific case. Instead, the Legislature has provided guidance to the courts as to what costs are properly assessed and requires transparency to the Legislature.[84] The statute requires the courts that impose costs under the statute to report to SCAO and SCAO to report to the governor, the House, and the Senate.[85] There is nothing to suggest, let alone clearly show, an unconstitutional deception of the Legislature.

Additionally, as the Court of Appeals in this case pointed out, the statute contains a sunset clause.[86] At present, MCL 769.1k(1)(b)(iii) sunsets on October 17, 2020. This part of the statute demonstrates the will of the Legislature, not the deception of the Legislature. Pursuant to MCL 769.1k, the Legislature is collecting data from the courts regarding court costs and funding.[87] In response to *Cunningham*, the Legislature not only amended MCL 769.1k(1)(b)(iii) to make clear that the Legislature intended to authorize courts to collect from convicted defendants the administrative costs the courts incurred, it also created the Trial Court Funding Commission to "review and recommend changes to the trial court

[83] *Dukesherer Farms, Inc v Ball*, 73 Mich App 212, 221; 251 NW2d 278 (1977).
[84] *Cameron*, 319 Mich App at 230.
[85] MCL 769.1k (8), (9).
[86] *Cameron,* 319 Mich App at 231; MCL 769.1k(1)(b)(iii).
[87] MCL 769.1k (8), (9).

funding system."[88] That commission's report is not due until September 2019 and must include "the results of the commission's review, recommendations for changes, and recommendations for further legislative action."[89] Perhaps once the Legislature has gathered the necessary data, it will amend the statute to contain a specific dollar amount or enact other legislation to accomplish its goals. Thus, the Legislature has crafted MCL 769.1k(1)(b)(iii) to achieve its purpose in the most precise manner it can, *at this time*. There is nothing obscure or deceitful to the Legislature by courts imposing court costs in the manner prescribed by the Legislature and reporting back to the Legislature with the data required by the very statute that allowed imposition of the costs.

Lastly, in addition to addressing this Court's specific questions regarding the Distinct-Statement Clause and the Separation of Powers Clause as ordered, Defendant-Appellant expands his argument beyond his original application to this Court to argue the Headlee Amendment, due process, and void for vagueness. None of these arguments have previously been addressed by the trial court, the Court of Appeals, or brought to this Court via application. Since these issues are not responsive to this Court's Order, Plaintiff-Appellee will not address them other than to briefly explain why they fail.[90]

[88] MCL 600.11103.
[89] MCL 600.11104.
[90] Should this Court desire Plaintiff-Appellee to brief these added arguments, Plaintiff-Appellee can certainly do that upon order of this Court.

First, the Headlee Amendment applies only to enactment of taxation provisions by local governments.[91] A state-imposed tax does not run afoul of the Headlee Amendment. [92] MCL 769.1k(1)(b)(iii) was enacted by the State Legislature, is overseen by SCAO, and applies state-wide. Although there is localization to ensure proper calculation of costs and for the collection thereof, that localization does not turn a state-imposed tax into a locally-imposed tax, nor does use of the funds at the local level when a state-wide purpose is served.[93] Second, imposition of court costs under MCL 769.1k(1)(b)(iii) occurs only at sentencing, after a defendant has had the full panoply of due process rights afforded to him in a criminal prosecution. Defendant had notice of the fees prior to sentencing as they were contained within the PSIR, the right to contest the fees at sentencing in the same manner as he could contest any other aspect of his sentencing,[94] the right to a determination of his financial resources upon enforcement of the payment of the costs,[95] and the right to the return of any monies paid if his conviction is overturned (and he is not later convicted).[96] There is no failure of due process, particularly when imposition of court costs does not implicate a fundamental right for due process analysis.[97] Finally, in looking to the text of the statute and applying ordinary meaning to that text as this Court must, the statute is not vague.[98] It clearly informs that the imposition of costs

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[91] Const 1963, art 9, § 31.
[92] *Airlines Parking, Inc v Wayne County*, 452 Mich 527, 532-538; 550 NW2d 490 (1996).
[93] See *Airlines Parking, Inc*, 452 Mich at 538.
[94] MCR 6.425.
[95] MCL 769.1k (10); *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009).
[96] *Nelson v Colorado*, ___ US ___; 137 S Ct 1249, 1252; 197 L Ed 2d 611 (2017).
[97] *People v Lloyd*, 284 Mich App 703, 709-10; 774 NW2d 347 (2009).
[98] *Dep't of State Compliance & Rules Div v Michigan Education Ass'n*, 251 Mich App 110, 116-17; 650 NW2d 120 (2002).

is for those "reasonably related to the actual costs incurred by the trial court" and then gives guidance as to what is an "actual cost." While the precursor statute that provided that a court could impose "any cost" in addition to the state cost might have left a lot of room to contemplate what "cost" a court could impose, MCL 769.1k(1)(b)(iii) does not leave that room—court costs must be reasonably related to that actual costs incurred by the trial court.

Defendant failed to preserve his arguments in the trial court. There has been no factual development of the record to aid this Court. Thus, Defendant has failed to demonstrate plain error that effected his substantial rights. But even from a review of the law and the limited factual record, the constitutionality of the administrative costs imposed under MCL 769.1k(1)(b)(iii) is demonstrated. The Legislature delegated to the judiciary the power to recoup costs occasioned by the administration of the judicial processes leading to the criminal convictions of defendants. The Legislature gave the judiciary guidance in how to determine those costs, required the costs to be reasonably related to the actual costs incurred, and required transparency to the Legislature. Imposition of court costs under MCL 769.1k(1)(b)(iii) is constitutionally sound.

Relief Requested

Plaintiff-Appellee, the People of the State of Michigan, respectfully request that this Court deny Defendant-Appellant's Application for Leave to Appeal, or grant other relief consistent with the analyses above.

Respectfully submitted,

Brian L. Mackie (P25745)
Washtenaw County Prosecutor

By: /s/ Brenda L. Taylor
Brenda L. Taylor (P59887)
Assistant Prosecutor
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620

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