STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

-v-

SHAWN LOVETO CAMERON, JR.,

Defendant-Appellant

_____/

Supreme Court No 155849
Court of Appeals No 330876
Washtenaw CCC No 2013-001315-FH

BRIEF OF *AMICUS CURIAE*

MICHIGAN ASSOCIATION OF COUNTIES

IN OPPOSITION TO THE

APPLICATION FOR LEAVE TO APPEAL

Submitted by:

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STATEMENT OF QUESTIONS PRESENTED

Issue I: Are court costs under MCL 769.1k(1)(b)(iii) properly classified as a user fee, not a tax, and as such encounter no constitutional impediment to their implementation as the Legislature has mandated?

Amicus curiae Michigan Association of Counties answers "yes".

Issue II: Assuming *arguendo* court costs under MCL 769.1k(1)(b)(iii) are a tax, does MCL 769.1k(1)(b)(iii) violate either the Separation of Powers Clause, Const 1963, art 3, § 2, or the Distinct-Statement Clause, Const 1963, art 4, § 32?

Amicus curiae Michigan Association of Counties answers "no" and "no".

The Michigan Association of Counties (MAC) was granted permission to participate as *amicus curiae* by this Court's order of April 4, 2018.

STATEMENT OF FACTS

MAC adopts the summary of facts appearing in the Court of Appeals' published per curiam decision of April 4, 2017, *People v Loveto*, 319 Mich App 215, 218-219; 900 NW2d 658 (2017) [Appx 7a-8a]]:

> In this criminal proceeding, defendant Shawn Cameron, Jr., comes before this Court in an appeal of right for a second time. At issue in the instant appeal is whether the imposition of court costs under MCL 769.1k(1)(b)(iii) constitutes an unconstitutional tax. Defendant is not the first person to challenge the constitutionality of MCL 769.1k(1)(b)(iii) on this basis; however, there are no published opinions on the issue. * * *
>
> I. PERTINENT FACTS AND PROCEDURAL HISTORY
>
> 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. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 13 months' to 20 years' imprisonment. The court also ordered defendant to pay certain costs and fees, including $1,611 in court costs.
>
> Defendant appealed by right, arguing that the trial court lacked the statutory authority to impose court costs and that the Legislature's retroactive grant of such authority was unconstitutional. See 2014 PA 352, enacting § 1. Relying on binding precedent, a panel of this Court disagreed. *People v Cameron*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2015 (Docket No. 321387). However, the panel remanded the case to the trial court for a determination of whether the court costs imposed were "'reasonably related to the actual costs incurred by the trial court[.]' " *Id*. at 2, quoting MCL 769.1k(1)(b)(iii).
>
> On remand, the trial court explained the basis for the imposition of $1,611 in court costs:
>
> > The Washtenaw County Trial Court previously established a factual basis for the court costs it has imposed on each felony case at the time of sentencing. The costs were computed based on the ten year average annual total court budget of $16,949,292 multiplied by the average annual percentage of all filings which are felonies, i.e., 22%, which revealed the average annual budget for the Washtenaw Trial Court's handling of all of its criminal felony cases. This amount was then

> divided by the average annual number of felony filings over [the] last 6 years (2,217) which resulted in the average court costs of handling each felony case as $1,681. The state costs were subtracted ($68) as well as an additional $2, resulting in the sum of $1,611 being assessed per felony case.

On this basis, the trial court concluded that the amount of court costs imposed on defendant was reasonably related to the actual costs incurred by the trial court.

After the Court of Appeals ruled on the second appeal that the costs imposed are a tax, but that the tax is constitutionally valid, defendant sought leave to appeal, and this Court ordered further briefing and oral argument to help decide whether to grant leave to appeal or take any other action per MCR 7.305(H).

ARGUMENT

Issue I: Court costs under MCL 769.1k(1)(b)(iii) are properly classified as a user fee, not a tax, and as such encounter no constitutional impediment to their implementation as the Legislature has mandated.

Standard of Review

Questions of law are reviewed de novo on appeal, *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 173; 848 NW2d 95 (2014), while questions of fact resolved in a bench trial are reviewed for clear error, giving particular deference to the trial court's superior position to determine witness credibility. *Id.* To date, the lower courts have treated the issue as one of law, but this approach is fundamentally flawed.

This threshold difficulty may arise from the fact that this Court has previously held that whether a charge is a permissible fee or an illegal tax is a question of law. *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998), citing a Court of Appeals' decision. However, in the more recent case of *Wolf v City of Detroit*, 489 Mich 923; 797 NW2d 136 (2011)[1], involving a city's solid waste inspection fee, this Court held to the contrary, that the

[1] There can be no dispute but that, despite being a "back of the book" decision, *Wolf* is precedential. *People v Crall*, 444 Mich 463, 464 n. 8; 510 NW2d 182 (1993).

issue is initially one of fact:

> On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we VACATE the January 21, 2010 opinion and order of the Court of Appeals. At this time, a material question of fact exists concerning the direct and indirect costs of the services for which the solid waste inspection fee is charged. Such a finding is necessary to determine whether the City of Detroit's solid waste inspection fee is proportionate to the necessary costs of the inspection service, and may also impact whether the fee serves a revenue-raising or a regulatory purpose. See *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998). Accordingly, summary disposition in favor of the defendant was improper. We therefore REMAND this case to the Court of Appeals. Because substantial fact-finding may be necessary, the Court of Appeals should consider a further remand to the circuit court for this purpose. See MCL 600.308a(5).

So, unless the facts are undisputed, the distinction between a fee and a tax is factual at the outset, and only then may settled legal standards as to the basis for computing the charge be considered. Review of the application of law to any facts is de novo. *Olson v Olson*, 256 Mich App 619, 637-638; 671 NW2d 64 (2003), citing *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996).

Here, the circuit court, tasked on first remand with a limiting directive to address the relationship of the costs imposed to the actual costs incurred in the prosecution of this individual criminal defendant, made a fact finding that the $1,611 repayment obligation imposed on defendant was an arithmetical 10-year average of all felony cases, including those tried to a jury, those tried to the bench, and those resolved by plea, as well as those with multiple motion hearings and those with one or none. Compare this simple methodology to the straightforward, but far pricier and more individualized, accounting method invoked by the Court of Appeals *in futuro* for criminal contempt cases in *In re Thurston* (*People v Shier)*, 226 Mich App 205, 231-235; 574 NW2d 374 (1998), reversed on other grounds *sub nom People v Shier #2*, 459 Mich 923; 589 NW2d 777 (1998). But there has been no fact finding concerning the nature of the disputed charge; the Court of Appeals, having incorrectly assumed that whether the charge is a

fee or a tax is a question purely of law, never either mandated an evidentiary hearing on the related underlying factual issues nor had a proper record from which to make such requisite fact findings on its own. This underscores the "unwisdom" of according plenary consideration to this case to resolve issues of consequence for which the record is hopelessly inadequate (see the "Issue Preservation" section of this brief immediately below).

As earlier noted findings of fact by trial courts, including any findings made by the Washtenaw County circuit court on remand, are reviewed under the clearly erroneous standard. *Miller-Davis Co, supra*. A factual finding is clearly erroneous if it either lacks substantial evidence to sustain it, or if the reviewing court is left with the definite and firm conviction that the trial court made a mistake. *People v Mazur*, 497 Mich 302, 308; 872 NW2d 201 (2015), citing *Miller-Davis Co v Ahrens Constr, Inc, supra*, 495 Mich at 172-173.

This Court reviews constitutional questions de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008). Statutes are presumed to be constitutional and must be construed as such unless it is clearly apparent that the statute is unconstitutional. As held in *Cady v Detroit*, 289 Mich. 499, 505; 286 NW 805 (1939) (citations omitted):

> A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation. Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt.

Accordingly, "the burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007). Here, that party is the appellant Cameron Jr.

Issue Preservation

According to the Court of Appeals, defendant admits that he did not preserve a challenge to the constitutionality of the imposition of court costs under MCL 769.1k(1)(b)(iii) [Appx 8a, n. 1]. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Appellate review of unpreserved constitutional claims is for plain error affecting the defendant's substantial rights. *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009).

Here, even if the imposition of $1,611 in court costs were constitutionally suspect, there is nothing about the putative error that is "plain", still less can it be said that defendant's *substantial* rights have been adversely affected thereby. Defendant is a fourth time habitual offender, with no real history of gainful employment, let alone of sufficient earnings to leave funds available beyond what is minimally necessary for his own food, clothing and shelter (even while imprisoned, defendant is liable to repay the State for the costs of his incarceration, MCL 800.403 requiring, in subsection (3), that 90% of his available funds be devoted to that purpose), so whether or not defendant finds remunerative work during his incarceration, there is unlikely to be anything left over to pay even a small fraction of the $1,611 assessed as court costs[2]. The $1,611 figure also does not include any component for the expenses of law enforcement in investigating the crime, apprehending the offender, housing defendant in the county jail pending arraignment and trial, or the time and expense of prosecutors, appointed counsel, transportation from jail to court and back or from jail to state prison (and back for multiple hearings on this unpreserved issue); matters for which defendant is also civilly liable, MCL 801.87.

[2] The Department of Corrections is to deduct from any prison wages 50% of the monthly amount in excess of $50, which is forwarded when the deductions equal or exceed $100.00 or when the prisoner is paroled. But payments owed under the crime victims rights act, MCL 780.751 *et seq*., or as reimbursement to a crime victim under MCL 791.220h, take priority. MCL 769.1l..

No compelling reason appears why this Court should expend more scarce judicial resources (and taxpayer dollars) addressing complex constitutional questions at the behest of *this* appellant on *this* record in *this* case, where such questions are essentially theoretical. This is especially so when essential facts necessary to distinguish a fee from a tax are entirely unexplored and the record is completely undeveloped in this regard and will not permit this Court to effectively resolve any constitutional questions without additional hearings, see *Wolf v Detroit, supra*.

Legal Analysis

MCL 769.1k(1)(b)(iii) provides:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred by statute or sentencing is delayed by statute:
> * * *
> (b) The court may impose any or all of the following:
> * * *
> (iii) Until October 17, 2020, 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.

This subsection took its present form as a result of 2017 PA 64, effective June 30, 2017 but substantively equivalent provisions were first added by 2014 PA 352, effective October 17, 2014[3].

[3] The 2014 version provided:

> Sec. 1k. (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
> * * *

At the outset, it is important to note that other charges, such as the expense of appointed counsel, are authorized to be recovered in identical fashion by MCL 769.1k(1)(b)(iv). Sub-subsection (1)(b)(iv) is carried forward from still earlier versions of the statute, going back at least as far as 2005 PA 316 (where recovery of appointed counsel expenses was provided within sub-subsection (1)(b)(iii) as then numbered).

A related statute, MCL 780.905, as amended, came before this Court for consideration on leave granted based on a claim it operated as a prohibited *ex post facto* law in *People v Earl*, 495 Mich 33; 845 NW2d 721 (2014). This Court there determined that the statute, not having a punitive purpose, but being designed to fund programs to aid crime victims, was not within the ambit of the *ex post facto* clauses of US Const, art 1, §10 or Const 1963, art 1, §10. In the course of its analysis, the Court provided the following analytical blueprint equally applicable here to a different sort of constitutional challenge, 495 Mich at 36-39:

> The Crime Victim's Rights Fund is contained within the Crime Victim's Rights Act, MCL 780.751 *et seq*. The Crime Victim's Rights Act was enacted in response to the growing recognition of the concerns regarding disproportionate treatment of crime victims and a perceived insensitivity to their plight. *People v Grant*, 455 Mich 221, 239-240; 565 NW2d 389 (1997). In 1989, the Crime Victim Services Commission was established as part of the Crime Victim's Rights Act and was given the following duties:
>
> > (a) Investigate and determine the amount of revenue needed to pay for crime victim's rights services.
> > (b) Investigate and determine an appropriate assessment amount to be imposed against convicted criminal defendants and juveniles for whom the probate court or

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(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 family division of circuit court enters orders of disposition for juvenile offenses to pay for crime victim's rights services.
> (c) By December 31 of each year, report to the governor, the secretary of the senate, the clerk of the house of representatives, and the department the commission's findings and recommendations under this section. [MCL 780.903.]

The Legislature established the Crime Victim's Rights Fund to pay for crime victim's rights services. MCL 780.904(1). The Crime Victim's Rights Fund is funded by the crime victim's rights assessment. MCL 780.904. Currently, a convicted felon is assessed $130, those convicted of misdemeanors are assessed $75, and juveniles are assessed $25 when the court enters an order of disposition for a juvenile offense. MCL 780.905(1) and (3). Money remaining in the Crime Victim's Rights Fund after victim's services have been paid for may be used for crime victim compensation. MCL 780.904(2). See, also, MCL 18.351 to MCL 18.368. Excess revenue that has not been used for crime victim compensation may be used to establish and maintain a statewide trauma system. MCL 780.904(2).

B. EX POST FACTO CLAUSE

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence. *Calder v Bull*, 3 US (3 Dall) 386, 390; 1 L Ed 648 (1798). At issue in this case is whether an increase in the crime victim's rights assessment increases the punishment for a crime.

Determining whether a law violates the Ex Post Facto Clause is a two-step inquiry. *Smith*, 538 US at 92. The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. *Id*. If the Legislature's intention was to impose a criminal punishment, retroactive application of the law violates the Ex Post Facto Clause and the analysis is over. *Id*. However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id*. (citations and quotation marks omitted). Stated another way, even if the text of the statute indicates the Legislature's intent to impose a civil remedy, we must determine whether the statute nevertheless functions as a criminal punishment in application. Because we conclude that the Legislature did not intend the crime victim's rights assessment to be a criminal punishment, we will address both issues.

C. WHETHER THE LEGISLATURE INTENDED THE CRIME VICTIM'S RIGHTS ASSESSMENT TO BE PUNITIVE

When determining whether the Legislature intended for a statutory scheme to impose a civil remedy or a criminal punishment, a court must first consider the statute's text and its structure. *Smith*, 538 US at 92. Specifically, a court must ask whether the Legislature, "indicated either expressly or impliedly a preference for one label or the other." *Hudson v United States*, 522 US 93, 99; 118 S Ct 488; 139 L Ed 2d 450 (1997)

> (citation and quotation marks omitted). In considering whether a law is a criminal punishment, a court "generally bases its determination on the purpose of the statute." *Trop v Dulles*, 356 US 86, 96; 78 S Ct 590; 2 L Ed 2d 630 (1958). "If the statute imposes a disability for the purposes of punishment--that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Id*. However, a statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose. *Id*. "The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature." *Id*. When giving effect to the Legislature's intent, we first focus on the statute's plain language. *People v Cole*, 491 Mich 324, 330; 817 NW2d 497 (2012) (citations and quotation marks omitted).

Here, the statute itself does not clearly express the Legislature's purpose in explicit terms. But since MCL 769.1k, which by its unambiguous wording applies to criminal defendants convicted of any crime, whether by plea of guilty or nolo contendere or trial, MCL 769.1k(1); *separately* provides, in sub-subsections (1)(b)(i) and (ii), for the imposition of fines and costs authorized by the statute violated by this defendant, it is a fair inference that the purpose of sub-subsection (1)(b)(iii) is not penal. Had the Legislature intended a punitive imposition of court costs in sub-subsection (1)(b)(iii), it would have provided or expanded the definition of "costs" or "fine" in a general statute such as MCL 761.1 to include some or all of the expenses of prosecution and adjudication associated with convicting a person of criminal charges. This understanding of the Legislature's overall scheme is further supported by MCL 769.1a(2) and (3), which require that, as part of any sentence for a crime, the defendant be required to make full restitution to the victim and return any property damaged, lost or destroyed, or pay its fair market value. This clarifies that the Legislative plan is to bring about a more just society by compensating crime victims without (as was the original conception of the Crime Victims Compensation Board, 1976 PA 223, now MCL 18.352 *et seq*. as amended) using public monies, usually raised by taxes, to fund the system.

MCL 769.1k(1)(b)(iii) thus is not a tax, but a user fee, imposed on persons whose actions create burdens for the justice system. As noted in *In re Thurston, supra*, criminal defendants do not generally have to pay court fees, such as motion fees, jury fees, and similar charges imposed on civil litigants. In MCL 769.1k(1)(b)(iii), the Legislature appears to have reviewed this policy and determined that, while persons charged with crimes but ultimately acquitted or against whom criminal charges are otherwise dismissed may continue to protect their individual rights by filing motions, benefiting from appointment of counsel at public expense, and invoking their right to trial by jury without paying the fees usually associated with such litigation expenses, those who are convicted have, by their wrongful conduct, imposed expenses on the justice system which in fairness should be at least partially charged to their accounts.

Just as a homeowner who puts out two trash containers for pick up every week may pay a waste hauling and disposal fee double that of his or her neighbor who makes do with one container of trash, as a means of accounting for the extra transportation costs as well as the greater landfill space consumed; the convicted criminal has caused the court system to devote resources to respond to the criminal activity which his or her law-abiding neighbors have not imposed on the public. While the Legislature might have individualized this placement of expenses on the persons whose actions engender these burdens to a greater degree than is required by MCL 769.1k(1)(b)(iii), the adoption of a statistical mean share, as was done here based on a 10-year average, is a step in the direction of a user fee similar to that borne by civil litigants, for whom motion fees, case initiation fees, and other charges are likewise only a fraction of the actual public expense necessary to maintain and operate our institutions of justice. Defendant is in the position of those who visit public parks and pay access fees, camping fees, etc. The $1,611 cost assessment does not, even over time, fully reimburse the government for

the entire cost, but at least those who are using the system more than the average citizen bear a greater percentage of the economic burden.

The fact that those who use public parks generally do so voluntarily, while criminal defendants may be assumed to utilize the court system involuntarily, is a distinction without a difference. Many homeowners may prefer to dig a well and use a septic tank rather than be served by a public water supply system and public sewage treatment, for which a user fee is uniformly imposed (almost always on a metered basis, so that those who use more pay more), but most cities require the latter to preserve and promote public health and protect aquifers as a public resource. Given the availability of the defense of duress to almost all crimes other than murder, *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920), persons convicted of crimes can be said to have *chosen* to engage in activity prohibited by law. Judicial proceedings resulting therefrom can thus legitimately be said to be the direct product of *voluntary* or *volitional activity*, although user fees can be charged irrespective of voluntariness.

The Court of Appeals thus got itself off on the wrong foot (Appx 9a) when it began its analysis by positing that " '[a] tax is an "exaction[] or involuntary contribution[] of money the collection of which is sanctioned by law and enforceable by the courts.' *Dukesherer Farms, Inc v Director of the Dep't of Agriculture (After Remand)*, 405 Mich 1, 15; 273 NW2d 877 (1979) (quotation marks omitted)." While that may represent an accurate *definition* of "tax", it is no aid in *distinguishing* a "tax" from a "user fee", since a fee may also be involuntary, and its collection may (more accurately, *must*) also be sanctioned by law and enforceable by the courts.

The Court of Appeals then continued down a wrong line of analysis by opining in its very next sentence [Appx 9a-10a],

> "Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred." *Westlake Transp, Inc v Pub Serv Comm*, 255

> Mich App 589, 612; 662 NW2d 784 (2003), aff'd s*ub nom American Trucking Ass'ns, Inc v Mich Pub Serv Comm*, 545 US 429; 125 S Ct 2419; 162 L Ed 2d 407 (2005), and *Mid-Con Freight Sys, Inc v Mich Pub Serv Comm*, 545 US 440; 125 S Ct 2427; 162 L Ed 2d 418 (2005). "Taxes are designed to raise revenue for the general public, while a fee confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Westlake Transp*, 255 Mich App at 613 (quotation marks and citation omitted).

Those statement are, at best, only partially correct (as use of the adverb "usually" clearly telegraphed). Taxes do indeed raise revenue, but basic arithmetic demonstrates that fees likewise generate revenue; so again, revenue does not *distinguish* a tax from a fee. And, because taxes can result in money flowing to a general fund, or be limited to deposit in a special fund or reservation for a specified purpose, as is likewise true of fees, again, such generic clichés do not further the analysis necessary to resolve the posed constitutional question on its merits. The true distinction between a "tax" and a "fee" is that taxes *may* raise revenue *in excess* of any governmental service or benefit conferred or associated therewith, while a fee *cann*ot generate more revenue than the cost of associated regulation or other government activity. "[A]n exaction must not produce revenue in excess of the cost of the regulation. *Bray v Dep't of State*, 418 Mich 149, 160, 341 NW2d 92 (1983)." *Rouge Pkwy Assoc v City of Wayne*, 423 Mich 411, 419; 377 NW2d 748 (1985).

It is similarly *not* true that a "fee confers benefits only upon the particular people who pay the fee". A trash hauling fee arguably benefits the person whose trash is properly disposed of in a landfill or environmentally licensed and operated incinerator, while a sewage fee leads to sanitary removal of human waste. The fees thus represent to that degree an exchange of value for service, *but the person paying the fee may or may not regard the service received as a benefit.* Human waste can be used as fertilizer, so a paleo-inspired farmer might regard mandatory public sewage service as a detriment. Meanwhile, *the public reaps a clear benefit*

from having trash handled in an environmentally-conscious manner and the public health is surely benefited (or at least intended to be benefited) by publicly administered clean water and sewage treatment. So the effort to analyze the issue here presented in terms of whether benefit is conferred and upon whom is doomed to lead to a logical dead end. A fee may be perfectly valid even if no benefit is conferred—as this Court recognized in *Bray v Dep't of State, supra*, 418 Mich at 158-159 (upholding Motor Vehicle Accident Claims Fund fee of $45 per year on licensed drivers who did not maintain no fault insurance):

> That examination indicates to us that the plaintiffs were clearly not buying anything, and, contrary to the Court of Appeals[‘] position that it was akin to the buying of insurance, we find nothing to indicate that plaintiffs as a class were securing any benefits. If anything, in exchange for the $45 paid under the Motor Vehicle Accident Claims Act, rather than being insured, they were made more vulnerable in the area of automobile liability. The fund that plaintiffs' fees were financing was clearly not primarily for the benefit of the uninsured motorists. Prior to 1965, those who were injured by uninsured and uncollectible drivers often found it useless to attempt to perfect their claims and secure judgments. After the passage of the MVACA, they had good reason to do so because of the possibility of collecting from the fund within the limits provided by the act. They were required to subrogate their interests to the Secretary of State, who then could pursue the uninsured motorist. The Secretary of State had a weapon that the injured motorist did not have, his ability under the MVACA to suspend both the operator's licenses and motor vehicle registrations of those against whom there were uncollected judgments and who had not entered into arrangements with the Secretary of State for repayment. The plaintiff class was clearly made more vulnerable by the passage of the MVACA. If there were any benefits received by the plaintiff class, those benefits elude us.

By relying on its own precedents and ignoring this Court's pronouncements, the Court of Appeals strayed from correct jurisprudential path.

The Court of Appeals' further quotation from its *Westlake Transp* decision merely exacerbates its analytical errors in this case [Appx 10a]:

> When determining whether a charge constitutes a fee or a tax, a court must consider three questions: "(1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue, (2) whether the charge is proportionate to the necessary costs of the service to which it is related, and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related." *Id.* at 612.

We have already demonstrated that the supposed dichotomy between revenue raising and anything else is incorrect. Similarly, whether the payor has the ability to refuse or limit its use of the service to which the charge relates confuses voluntariness, with proportionality, which is a separate (and likewise inadequate, if not erroneous) inquiry. So two of the three *Westlake* factors used to distinguish a fee from a tax are invalid, and the third factor (proportionality) cannot serve as a defining test either.

A trash hauling fee may be predicated on the number of city-provided trash bags (as has been the method in Lansing, where the city sells and later collects orange trash bags, and no other trash containers, and charges a per bag fee). Those Lansing residents who need only one trash bag pay a fraction of the cost of those who need two or more. Elsewhere, municipalities charge a flat fee for a container of a designated volume (so that some users may feel they pay too much when the container is larger than their requirements, while others resort to various means of compression to fit their requirements into the given volume at the same price).

The Legislature *might* have structured the "criminal user fee" of MCL 769.1k(1)(b)(iii) by directing trial courts to calculate their costs on a daily instead of a per case basis, or even on a time-in-court basis, per-page-of-pleadings-and-motions basis, or a variety of other cost accounting methodologies, resulting in fees that are more exactingly proportional to the individual defendant than what applies here. But as with per container trash hauling fees, a "one size fits all" still represents proportionality of sorts, and nowhere in our State (or federal) constitution is there a requirement that only the most actuarially exacting accounting method be utilized to calculate a user fee. To the contrary, this Court has recognized that *a user fee need only be rationally related in some minimal way to the cost of the activity at issue*.

Thus, as this Court held in *Rouge Pkwy Assoc, supra*, 423 Mich at 419, finding no

constitutional infirmity in a statute imposing a flat 1% property tax collection fee, "we have never held that the costs of a given regulation must be shared equally by all; *i.e.*, that it is impermissible to charge someone more than their pro-rata share of the cost." And further, "A fee or tax based on the fee payer's or taxpayer's pro-rata share of the cost of the instant government service was certainly reasonable, but it is not the only reasonable principle or basis on which to assess such an exaction." *Id*. at 423.

Ultimately, this Court has held that, in the first instance, it is for the Legislature to determine whether to fund a desirable activity by taxes or by fees, and only where the Legislature's choice is devoid of rational basis can it be said to violate the Constitution:

> We do not doubt that expenditures for the advertising of a specific commodity to increase the use or consumption of that commodity produced in this state could be viewed as a benefit to all. In the same respect, the imposition of provisions of the Act which allow for the institution of standards of quality and inspection systems insuring that only wholesome produce reaches the market could be viewed as a benefit to all. However, the fact that these general benefits are by-products of the Act does not deny that the benefits inure primarily to the producers. The Legislature has made a rational decision that assessment as opposed to taxation is the reasonable means of effectuation of its purpose, and examination of the underlying circumstances here does not dictate a finding that the Legislature erred. Admittedly, Johnson and Miller appear to be conflicting precedent for the instant issue, but we are not compelled by dicta in Miller to reach a different result.
>
> The instant situation is analogous to other situations which are commonly deemed the proper subject matter for assessment such as street improvements, drains and sewers. Undoubtedly, such projects bestow incidental benefits upon the general public, but the persons who receive the tangible and most immediate benefits are the ones obligated to pay.

Dukesherer Farms, Inc, supra, 405 Mich at 18-19.

The Court of Appeals, through a different path, reached the correct result (that the fee *is* constitutionally valid), but for the wrong reasons. That, however, provides no reason or basis for *reversal* or any other form of appellate relief in favor of defendant. As this Court commented recently in *People v Elliott*, 494 Mich 292, 323 n. 1; 833 NW2d 284 (2013), "we generally do

not disturb a trial court's ruling when it reaches the right result for the wrong reason. See, *e.g.*, *People v Brownridge*, 459 Mich 456, 462; 591 NW2d 26 (1999)."

Issue II: Assuming *arguendo* court costs under MCL 769.1k(1)(b)(iii) are a tax, the statute does NOT violate either the Separation of Powers Clause, Const 1963, art 3, § 2, or the Distinct-Statement Clause, Const 1963, art 4, § 32.

Standard of Review

See Issue I.

Issue Preservation

See Issue I.

Legal Analysis

There is no reason to address this issue, because the charges imposed on convicted criminal defendants by MCL 769.1k(1)(b)(iii) are a user fee, not a tax. However, when looking at this inquiry, there can be no separation of powers problem. It is the Legislature upon which the 1963 Constitution confers the power of taxation, Const 1963, art 4, §1. As this Court held in *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141-142; 719 NW2d 553 (2006):

> Perhaps the most fundamental aspect of the "legislative power," authorized by the opening sentence of US Const, art I, §8, which defines the powers of the legislative branch, is the power to tax and to appropriate for specified purposes. See also Const 1963, art 4. The power to tax defines the extent to which economic resources will be apportioned between the people and their government, while the power to appropriate defines the priorities of government. Partly in recognition of the enormity of these powers, the framers of our constitutions determined that the branch of government to exercise these powers should be that branch which is closest to, and most representative of, the people.

So if MCL 769.1k(1)(b)(iii) represents the imposition of a tax, doing so is inherently within the proper authority of the Legislature. Having thus *arguendo* assessed a "tax" and prescribed criteria for its calculation, the Legislature was at liberty to delegate determination of the precise amount of the tax in each instance to another branch of government. While usually such

delegations are to the executive (such as a tax assessor at the local level, or the Department of Treasury at the state level), nothing precludes delegation to the judiciary, where it is the judiciary which is called upon first to calculate judicial expenses on a non-individualized basis, and then to impose the "tax" at the time of sentencing.

The Legislature is not prohibited from delegating authority related to taxes statutorily authorized. The Legislature is only forbidden to *surrender* the *power* of taxation, Const 1963, art 9, §2, which a mere *delegation of functions*, whether administrative or adjudicatory in relation to taxes, does not cause. *Dearborn Fire Fighters v Dearborn*, 394 Mich 229, 245-246; 231 NW2d 226 (1975) (requiring public employers to fund public first responder wages imposed by statutory arbitration [so called "Act 312 arbitration"] held not to violate the prohibition on surrender of the power of taxation, even though municipality might have to increase taxes to fund such an arbitration award); *Wikman v City of Novi*, 413 Mich 617; 322 NW2d 103 (1982) (Legislature could delegate power to adjudicate property tax disputes to Tax Tribunal and concomitantly bar circuit courts from adjudicating such matters). And the Legislature may, generally, delegate broad discretion to the judiciary, or circumscribe delegated discretion to nil. *People v Garza*, 469 Mich 431, 434; 670 NW2d 662 (2003). The Legislature may even delegate substantive law making power to the judiciary (as is done in MCL 600.308(e) with respect to the jurisdiction of the Court of Appeals—which per Const 1963, art 6, §10, is to be "determined by law"—over appeals from non-final orders of the circuit courts). *People v Polus*, 447 Mich 952, 955; 530 NW2d 479 (1994) (Boyle and Riley, JJ, concurring in part and dissenting in part), citing *Hanna v Plumer*, 380 US 460, 474; 85 S Ct 1136; 4 L Ed 2d 8 (1965) (Harlan, J., concurring).

Turning to the "distinct statement" requirement, "[e]very law which imposes, continues

or revives a tax shall distinctly state the tax." Const 1963, art 4, §32, if MCL 769.1k(1)(b)(iii) imposes a "tax", it *is* indeed distinctly stated. The statute mandates including imposition of the "tax" at the time of sentencing, and specifies with reasonable precision how the amount shall be calculated, at least as definitively as the collection fee upheld in *Rouge Pkwy Assoc, supra*, 423 Mich at 419.

Art 4, §32 carries forward identical phrasing from Const 1908, art 10, §6 and Const 1850, art 14, §14. The latter was analyzed by this Court in *Westinghausen v People*, 44 Mich 265; 6 NW 641 (1880), which considered an objection to the requirement of a statute enacted in 1879 requiring the payment of a tax for the privilege of selling intoxicating liquor. In rejecting the claim advanced by the appellant that the constitutional requirement was violated, it was said with reference to the purpose and scope of the constitutional provision (boldfaced emphasis added):

> Its intent is manifest to prevent the legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might, by some indirection, be used for objects not approved by the legislature. Inasmuch as the constitution in another place confines all statutes to single objects, the restriction is less important than under the old constitution. It receive a reasonable construction to carry out its design. The statute in question does not, we think, violate that design. The tax, it is admitted, is definite enough. It is to be received by the county treasurer of each county and placed by him to the credit of the contingent fund of the township, city, or village from which it is collected, and paid over to the proper local officer to be used for the purposes of that fund. Pub Acts 1879, p. 297.
>
> We can see no reason why the increase of the contingent fund of a corporation is not a specific object. The constitution certainly does not contemplate, but rather forbids, any reference to a city or village charter in terms; and it would be a gross abuse to insert in such a statute as this a copy of the multifarious purposes of a contingent fund, mentioned in any or all of the local charters at length. There is no uncertainty in a provision which names the classes of beneficiaries, and devotes the taxes to their use in a fund which is perfectly understood by every one as devoted to non-specified purposes, some of which could not be readily foreseen. If this objection is good it would be difficult to understand why a city charter, allowing money to be paid into a contingent fund, would not come within similar difficulties. A nice objector might say that paying money over to a city or township for general purposes would be uncertain. **We must treat these provisions sensibly, and not hypercritically; and when the purpose is named and unmistakable, and it is impossible for the legislature to be misled concerning it, no other practical**

requirement can be found.

Accord: *Rockwell Spring & Axle Co v Romulus Twp*, 365 Mich 632, 637 ff; 114 NW2d 166 (1962).

In MCL 769.1k(8) and (9), the Legislature has provided for detailed reporting by the judiciary to the state court administrative office regarding costs assessed and collected, and for the state court administrator to compile such data in turn and convey the information to the governor, the secretary of the senate, and the clerk of the house. And in MCL 775.22, the Legislature has, in substantial detail, directed how collected assessments shall be disbursed. Thus, the "definite statement" clause has been fulfilled at least to the extent held sufficient unto the constitutional requirement by *Rockwell Spring* and *Westinghausen, supra*. MCL 769.1k(1)(b)(iii) therefore does not violate Const 1963, art 4, §32.

RELIEF REQUESTED

There is no merit to any of the unpreserved constitutional issues defendant seeks to present to this Court. Leave to appeal should be denied.

Alternatively, by peremptory order/opinion under MCR 7.305(H), the decision of the Court of Appeals should be affirmed, *but* on the proper analytical basis elucidated in this *amicus* brief.

Respectfully submitted,

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