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 Circuit Court
No. 13-001315-FH

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

Randi M. Merchant (P72040)
Assistant Attorney General
Revenue and Tax Division
Attorneys for Amicus Curiae
Michigan Department of Attorney General
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General, as a constitutionally established officer for the State, has an independent obligation to protect the interests of the People of the State of Michigan. See Const 1963, art 5, §§ 3, 21; MCL 14.101. The Michigan Court Rules recognize this duty by authorizing the Attorney General to file a brief in this Court as amicus curiae at the merits stage without first seeking permission. MCL 7.312(H)(2). As explained in the accompanying motion, the Attorney General requests leave to file this brief at the application stage to explain the potential broad implications of the issue before the Court, given the existence of numerous other statutes that authorize the imposition of various costs related to a prosecution that leads to a conviction.

The Court of Appeals' decision concluded that the provision at issue constitutes a tax, and the decision implicates the separation-of-powers doctrine and the Distinct Statement Clause of the Michigan Constitution. It also could have a far-reaching impact on Michigan criminal procedure laws, given the existence of numerous other similar statutes. Accordingly, this Court should clarify that MCL 769.1k(1)(b)(iii) does not impose a tax, but instead authorizes a different type of charge.

STATEMENT OF QUESTIONS PRESENTED

1. Should this Court conclude that the court costs provided for under MCL 769.1k(1)(b)(iii) cannot be classified as either a tax or a fee, but instead constitute some other category of charge?

   Appellant's answer: Did not answer.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

   Amicus curiae's answer: Yes.

2. If the Court of Appeals correctly characterized MCL 769.1k(1)(b)(iii) as a tax, does the statute violate the separation-of-powers doctrine or the Distinct Statement Clause?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

   Amicus curiae's answer: No.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 3, § 2 of Michigan's 1963 Constitution

> The power 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 as expressly provided in this constitution.

Article 4, § 32 of Michigan's 1963 Constitution

> Every law which imposes, continues or revives a tax shall distinctly state the tax.

Article 9, § 2 of Michigan's 1963 Constitution.

> The power of taxation shall never be surrendered, suspended or contracted away.

MCL 769.1k

> (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 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.

INTRODUCTION

In reviewing the constitutional validity of MCL 769.1k(1)(b)(iii), the Court of Appeals considered only whether the statute provided authority to impose a tax or a fee. This focus is too narrow because the government may impose financial obligations on its citizens by a variety of mechanisms, not just by taxes and fees.

Artificially constrained to try to categorize court costs as either a tax or a fee, the Court of Appeals incorrectly determined that the costs qualified as a tax. But unlike traditional revenue-raising statutes, the court-costs provision at issue does not raise money for general government functions unrelated to a defendant's criminal case; instead, it defrays a portion of the court's operational costs. The Court of Appeals also incorrectly determined that the statute could not be viewed as serving a regulatory purpose and that an individual subject to the charge could not limit his exposure to liability under the statute. Yet despite the flaws in the Court of Appeals' analysis, the court was right that costs do not constitute traditional fees because the service provided by the courts admittedly benefits a larger pool of people than those that pay court costs. For this reason, this Court should characterize the court costs as what they are—as costs. Or the Court could consider them to be another type of charge, such as an assessment.

Even if the statute is viewed as a tax, it is not unconstitutional. The statute does not violate the separation of powers doctrine because it contains sufficient limitation and guidance to constitute a valid delegation of authority. And it does not violate Michigan's Distinct Statement Clause because it is not deceitful and

there is no evidence the money was used for a purpose that the Legislature had not approved.

STATEMENT OF FACTS

The Attorney General adopts the statement of facts set forth in People of the State of Michigan's supplemental brief filed June 21, 2018.

STANDARD OF REVIEW

This Court generally applies de novo review when determining whether a statute is constitutional and when addressing issues of statutory interpretation. *People v Buie*, 491 Mich 294 (2012). But because Cameron did not raise the issue of the constitutionality of the court costs at issue before the trial court, the issue is unpreserved. The effect of an unpreserved constitutional error is reviewed for plain error. *People v Borgne*, 483 Mich 178, 184 (2009).

ARGUMENT

I. Court costs imposed on criminal defendants following a conviction should not be characterized as either a tax or a fee.

A. The Court of Appeals applied the wrong test.

In deciding whether MCL 769.1k(1)(b)(iii) should be classified as a tax, the Court of Appeals went off track at the outset by applying the test this Court set forth in *Bolt v City of Lansing*, 459 Mich 152, 158 (1998). As Washtenaw County explains, this was not the correct test to use here because the statute at issue does not involve an assessment on real property. See *Lapeer County Abstract & Title Co*

v Lapeer County Register of Deeds, 264 Mich App 167 (2004) ("the *Bolt* test is designed to distinguish between assessments on real property that necessarily are either taxes or user fees.") Indeed, unlike *Bolt*, this case is not about taxes or even an obligation imposed through civil litigation; instead, the costs arise at the end of a criminal case, where monetary obligations that are neither taxes nor fees—think of fines—are often imposed. When, as here, a case involves a government charge or financial imposition that is not necessarily limited to those two categories (taxes or fees), the *Bolt* framework is inapplicable. In short, it is a false dichotomy to ask whether the court costs were a tax or a fee—they are a different category altogether.

B. Court costs have been a component of the criminal justice system for more than a century.

State and federal courts have recognized for more than a century the government's power to enact legislation imposing an obligation on criminal defendants to pay various costs related to obtaining a conviction. See *People v Kennedy*, 58 Mich 372, 373 (1885); *People v Wallace*, 245 Mich 310, 313–314 (1929); *People v Cunningham*, 496 Mich 145, 149 (2014), superseded on other grounds by 2014 PA 352; *Bradley v State*, 69 Ala 318, 319 (1881); *People v McKenna*, 791 F Supp 1101, 1108 (ED La 1992).

Currently, there are at least fifteen Michigan statutes that authorize courts to impose liability on a convicted criminal defendant for costs associated with obtaining his conviction. These statutes appear in a variety of acts, including the Michigan Penal Code, MCL 750.1 *et seq*., and the Code of Criminal Procedure,

MCL 760.1 *et seq*. They do not refer to the monetary liability as a tax or as a fee; rather, the statutes describe it as a cost or an expense:

- MCL 750.49(5) (authorizing "costs of prosecution" for animal fighting);
- MCL 750.50(4) (authorizing "costs of prosecution" for other crimes against animals);
- MCL 750.159j(2) (authorizing "costs of the investigation and prosecution" for racketeering);
- MCL 752.845 (authorizing "costs of prosecution" for offenses relating to certain injuries resulting from firearms);
- MCL 769.1f (authorizing "expenses for prosecuting" violations of a number of statutes, including provisions of the vehicle code, the public health code, the natural resources and environmental protection act, the aeronautics code, the railroad code, the penal code, and other statutes);
- MCL 772.8 (authorizing "costs of prosecution" for proceedings under Chapter XII of the Code of Criminal Procedure);
- MCL 774.22 (authorizing "costs of prosecution and other reasonable expenses, direct and indirect" related to Chapter XIV of the Code of Criminal Procedure).

The Legislature has also used similar language in the regulatory context; various other regulatory acts also include costs-of-prosecution provisions. For example, the Natural Resources and Environment Protection Act, MCL 324.101 *et seq*., alone contains no fewer than five sections that include references to "costs of prosecution" when discussing the consequences of violating certain provisions of the Act. MCL 324.48739; MCL 324.17107; MCL 324.95163; MCL 324.95153; MCL 324.48702b.

C. The state imposes financial obligations on its citizen through a variety of mechanisms.

It is axiomatic that the state has the power to require individuals to pay money to the government under a variety of circumstances. These charges take many forms, including fines, taxes, fees, costs, and assessments. The distinctions between the types of exactions imposed by the government, and even between taxes and fees, "are not always observed with nicety in judicial decisions." *Bolt*, 459 Mich at 165.

Despite the state's long history of imposing financial liability for costs on convicted criminal defendants, the Court of Appeals has recently issued conflicting unpublished decisions on whether court costs should be considered a tax. Compare *People v Bailey*, unpublished per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 323190) ("[W]e assume for this appeal that it imposes a tax, rather than a governmental fee"), and *People v Duke*, unpublished per curiam of the Court of Appeals, issued April 12, 2016 (Docket No. 325473) (same), with *People v Knight*, unpublished per curiam of the Court of Appeals, issued February 23, 2016 (Docket No. 324028) ("[W]e hold that MCL 769.1k(1)(b)(iii) imposes a cost, not a tax, on criminal defendants."). This case led to the first published decision on the issue and presents this Court with the opportunity to settle the question.

The Court of Appeals and the parties below incorrectly assumed that the court costs provided for by MCL 769.1k(1)(b)(iii) must fall into one of only two categories—either a tax or a fee. Cameron continues to maintain this assumption and failed to address this Court's instruction to consider whether another category

would be appropriate. In contrast, the Washtenaw County Prosecutor's supplemental brief took a fresh look at the issue and recognized that alternative classifications are a better fit.

As explained in more detail below, the Attorney General agrees with Washtenaw County that the court costs available under MCL 769.1k should not be classified as a tax or a fee. They do not qualify as a tax because they do not serve a revenue raising purpose, as is necessary to be classified as a tax. And they do not qualify as a fee, because although the statute can be viewed as serving a regulatory purpose, the costs do not fall neatly within the factors of the test that Michigan courts use to determine if a charge is a fee. For this reason, this Court should classify the court costs imposed under MCL 769.1k(1)(b)(iii) as a different type of charge. The Court should characterize the court costs as just that—as costs. In the alternative, the Court should designate the charges as an assessment.

D. MCL 769.1k(1)(b)(iii) does not provide for a tax.

Even if the *Bolt* test were applicable in the context of this type of statute, the costs provided for in MCL 769.1k(1)(b)(iii) should not be classified as a tax. Cameron asserts that the language of the statutory provision at issue "on its face" demonstrates its purpose is "to raise revenue." (Def's Supp Br, p 4.) The Court of Appeals agreed with Cameron. The Court of Appeals also relied on *People v Konopka*, 309 Mich App 345, 359 (2015), to support its conclusion that the statute had a revenue-raising purpose. *People v Cameron*, 319 Mich App 215 (2017). But this reliance was misplaced because, as the Court of Appeals explicitly recognized,

the *Konopka* decision "assumed without elaboration" that a revenue-generating purpose was served. *Id.* at 223.

To start with the statutory language, this provision does not "on its face" demonstrate the purpose of raising revenue. Quite the contrary, it aims to offset "any cost reasonably related to the actual costs incurred by the trial court . . . ." MCL 769.1k(1)(b)(iii). And as explained below, the determination for whether a statute should be characterized as "revenue raising" should not begin and end with whether it permits the government to collect money. Instead, it should consider whether the provision is designed to defray the costs of a particular government function, rather than serve as a revenue stream to be used to pay for the general cost of governing, and it should compare the statute to traditional revenue raising laws.

1. The fact that a statute permits the government to require an individual to pay money does not mean it has a revenue raising purpose.

Both Cameron and the Court of Appeals fail to appreciate that a statute enabling the government to collect money is not automatically deemed to be "revenue raising" as that phrase is understood for the purpose of determining whether a law constitutes a tax. If this were the case, every law that imposed a financial obligation on individuals would be considered a tax (which means there would be only one category, as even fees impose a financial obligation). The raft of case law rejecting claims that various fees and assessments should be characterized as a tax demonstrates this is not the case.

Instead, a law should be viewed as having a revenue-raising purpose when a financial obligation is imposed on an individual in the context of a particular government function or service if the amount exceeds the amount necessary to defray the costs associated with that function or if the funds collected are intended to be used to pay for the general cost of governing.

2. The court costs at issue here are not intended to be used to fund other types of government functions and do not exceed the amount of the court's operational expenses.

Michigan courts have concluded that a charge is a tax instead of a fee when the money collected is intended to be used to fund government functions other than the ones associated with the function at hand. For example, in *Merrelli v City of St Clair Shores*, 355 Mich 575 (1959), this Court concluded that increased building fees adopted following a substantial population increase must be classified as a tax under the facts of that case. The amount the city collected more than doubled after the fees were increased, but the city's expenses in relation to performing that government function for which the fees were imposed did not rise in a similar fashion. *Id*. at 585. As a result, the amount collected was "entirely disproportionate" to the costs associated with the government function the fees were related to. *Id*. The *Merrelli* Court concluded that the increased fees were actually intended to fund "the increased expenses of city government arising from the growth of the city." *Id*. at 586. Thus, when the evidence demonstrates that the charge is imposed to defray the "general cost of government" rather than alleviate the expenses incurred to provide special services required by a particular

government function, such as the regulation and control of new buildings, the charge runs afoul of the prohibition against using police power "to enact and enforce what is in reality a revenue raising ordinance." *Id.* at 588.

Likewise, in the *Bolt* case, this Court concluded that a storm water service fee should be characterized as a tax. This holding was based on the Court's conclusion that the charge was not "designed to defray the costs of a regulatory activity" because the revenue was used to fund a substantial portion of an infrastructure project that was "designed to provide a long-term benefit to the city and all of its citizens." *Bolt,* 459 Mich at 163–164.

Unlike the charges levied under *Merrelli* or *Bolt*, there is no indication that the amounts that could be imposed under MCL 769.1k(1)(b)(iii) are intended for an improper purpose. Quite the opposite, the statute limits the authority of the court, allowing it to impose only those costs "reasonably related to the actual costs incurred by the trial court . . . ." MCL 769.1k(1)(b)(iii). The money is intended to defray the cost of operating and staffing the court proceedings that lead to a defendant's conviction. There is nothing in the statute to indicate that the funds could be used to pay for an infrastructure project such as a new courthouse.

Michigan Courts have also held that a law imposing a financial obligation "becomes a revenue measure" when it imposes an amount higher than what is necessary to defray the necessary expenses of the government service. *Vernor v Sec of State*, 179 Mich 157, 168 (1914). But the "actual costs incurred" language limits the expenses that may be charged, and there is no evidence to suggest that the costs

imposed under MCL 769.1k(1)(b)(iii) exceeded the government's expenses related to operation of the courts in question.

Cameron notes that the SCAO report indicates that courts across Michigan received $38 million dollars in 2016. (Def's Supp Br, p 5.) While this looks like a large number at first glance, the significance of that figure is diminished when one considers that the total amount of costs collected by the circuits courts in 2016 accounted for only approximately one-third of the amounts imposed. (Def's Appendix, 30a). The total collection rate of the district and municipal courts was admittedly higher, at approximately 85%. (Def's Appendix, 34a.) But of the 164 courts (circuit, district, and municipal) identified on the report, only 8 fully collected the costs imposed that year—the 13th, 18th, and 42nd circuit courts and the 31st, 66th, 74th, 92nd and 94th district courts. (*Id.*) Yet even those jurisdictions that could boast full collection rates cannot be said to have imposed costs that exceeded the necessary expense of the government service when one considers that the amount collected only accounted for a small portion of that court's budget. For example, although the 66th District Court in Shiawassee County collected over $200,000, its approved budget for 2016 was over $1 million dollars. Shiawassee County 2016 Approved Budget, p 10.[1] And in Washtenaw County where the defendant in this case was sentenced, although the county budgeted expenditures

[1] http://www.shiawassee.net/Docs/Administration/Shiawassee%20County%202016%20Approved%20Budget.pdf.

exceeding $6 million dollars for the circuit court alone, it collected less than 10% of that amount in court costs. See Def's Appendix, 29a; Washtenaw Budget, p 107.[2]

Therefore, Cameron's claim that courts could use this statute as a means to fully fund their court systems is without merit. This is especially true given that a court's enforcement power is limited. Specifically, MCL 769.1k(10) prohibits a defendant from being imprisoned, jailed, or incarcerated for nonpayment of costs if he lacks the resources to pay.

3. The statute at issue here differs from traditional revenue-raising statutes.

Michigan courts have described taxation as "a means of raising revenue for the general benefit of the public as a whole." *Dukesherer Farms v Ball*, 73 Mich App 212 (1977). When the statutory provision at issue is compared to traditional taxing statutes that undoubtedly have a revenue-raising purpose, such as an income tax or a sales tax, it is clear that MCL 769.1k(1)(b)(iii) does not serve to raise revenue for the public as a whole.

Consider, for example, the prototypical revenue-raising taxes: the income and sales taxes. The Individual Income Tax Act, MCL 206.1 *et seq*., imposes a compulsory obligation for individuals to pay a certain percentage, currently 4.25%, "for receiving, earning, or otherwise acquiring income from any source whatsoever." MCL 206.51(1). The Legislature specifically stated that the act was intended "for

[2] https://www.washtenaw.org/DocumentCenter/View/4150/2014-2017-Budget-Book-PDF?bidId=.

the purpose of meeting deficiencies in state funds." MCL 206.1. Thus, monies collected under this Act could be used in any number of ways to finance the vast scope of government functions. Similarly, the Sales Tax Act, MCL 205.51 *et seq.*, requires those who make sales at retail to remit 6% tax on the gross proceeds of business "for the privilege of engaging in that business." MCL 205.52. Sales taxes go towards the general fund, revenue sharing, the school aid fund, the comprehensive transportation fund, the state aeronautics fund, and the qualified airport fund. Thus, these monies are also spent for performance of a wide range of government activities.

In contrast, the costs imposed under MCL 769.1k(1)(b)(iii) serve a much more limited purpose. They are collected by and used to defray the operational expenses of the court. They do not become part of a general government spending fund that can be used for any number of purposes.

E. The statute at issue serves a regulatory purpose.

The Court of Appeals specifically noted that the statute did not "reveal a regulatory concern with the public health, safety, and welfare *because* '*court costs are not a form of punishment*.' " (*Cameron*, 319 Mich App at 222-223, emphasis added.) Yet the court referenced no authority that would require a punishment component for the statute to be considered regulatory in nature. In fact, the government requires individuals to pay money under countless circumstances that cannot be reasonably construed as a form of punishment but are routinely

characterized as regulatory fees, such as building permit fees, driver's license fees, and hunting license fees.

This Court has indicated that a charge should be upheld as a regulatory fee if it relates to a police regulation and the money collected is not disproportionate to the cost of administering the regulation. *Vernor*, 179 Mich at 167. This Court has recognized that "police power" is an "elastic" concept that can be applied to "all rules and regulations for the protection of life and the security of property." *People v Brazee*, 183 Mich 259, 262 (1914), aff 241 US 340. "It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about the 'greatest good for the greatest number.' " *Id.* at 262.

The statutory provision at issue is contained within the Code of Criminal Procedure, MCL 760.1 *et seq*. When the Legislature enacted the Code of Criminal Procedure, the purpose of the Act was described as, among other things, to "codify the laws relating to criminal procedure." Act 175 of 1927. This Court has recognized that the Code of Criminal Procedure must be read together *in pari materia* with the Penal Code because both "relate generally to the same thing." *People v Smith*, 423 Mich 427, 442 (1985). The Penal Code is an example of the exercise of the state's police power, and the Code of Criminal Procedure regulates that application and exercise of that police power. For this reason, the Court of Appeals was not correct when it concluded that MCL 769.1k does not serve a regulatory purpose.

F. The Court of Appeals incorrectly concluded that a defendant cannot refuse or limit his exposure for liability.

The Court of Appeals' decision indicates that the court costs at issue "are not voluntarily incurred." This is not accurate.

An accused defendant admittedly enjoys the presumption that his use of the court system is involuntary at the outset of the proceedings. Thus, if the court costs at issue could be imposed on any criminal defendant regardless of the outcome of the case, there would be a voluntariness problem. But the plain language of the statute explicitly states that the court costs can only be imposed as part of an individual's sentence following a conviction based on a plea or finding of guilt after a hearing or trial. Thus, court costs will be imposed only on defendants that our legal system has concluded have engaged in an intentional, voluntary act that ultimately resulted in the financial liability provided for in MCL 769.1k(1)(b)(iii).

And it would not help Cameron if it were true that the costs were truly involuntary. Rather, that would simply highlight that the *Bolt* dichotomy (deciding between taxes or fees) does not fit in the criminal context. Consider, for example, another common financial obligation in the criminal context: fines. As to the third *Bolt* factor (voluntariness), a fine imposed as a part of a criminal sentence would be involuntary in the same sense—which would point to it being a tax. But the purpose factor would point in the opposite direction (i.e., toward a fine being a fee), because the purpose of fines is not to raise revenue, but to regulate behavior (through deterrence). And yet the proportionality factor would cut against it being a fee, because fines are not proportionate to the service provided but to the

culpability of the conduct. In short, these factors do not provide helpful guidance in the current context.

G. The Court of Appeals' proportionality analysis was flawed.

The Court of Appeals agreed with Cameron that the costs at issue were not proportionate to the service related to the imposition of the charge because the court's "role in the prosecution of defendant benefits primarily the public, not defendant." *Cameron*, 319 Mich App at 226-227. In reaching this conclusion the court relied on *State v Mederios*, 89 Hawaii 361 (1999), to support its finding that the general public was the primary beneficiary. This reliance was misplaced. The *Mederios* case involved an ordinance enacted by a local unit of government that permitted a convicted defendant to be charged $250 for costs related to arrest, processing, investigation, and prosecution of the convicted person and, as such, implicated the penal system at large, and the *Medeiros* court seemed particularly troubled with imposing costs of investigation on a defendant. *Id*. at 368. In contrast, the law at issue here was enacted by the Legislature, is more limited in scope, and does not relate to the entire penal system, only the court costs involved in the defendant's case. Moreover, the *Medeiros* court's determination regarding the true beneficiary of the law in that case was based in part on its recognition that rehabilitation of an offender is not a foundation of that state's penal system. *Id*. at 369. In Michigan, rehabilitation is a goal "rooted in Michigan's legal traditions." *People v Bullock*, 440 Mich 15 (1992).

Despite the distinctions between the instant case and the *Medeiros* case, it is true that the court costs at issue cannot accurately be characterized as a traditional service fee or user fee. See *Westlake Transp Inc v Public Serv Comn*, 255 Mich App 589, 613 (2003) (indicating that a fee must confer a benefit directly on the people that pay the fee, rather than the general public). While a criminal defendant, even one who is ultimately convicted, receives a benefit from the operation of the court that presides over the case (the court ensures a process consistent with constitutional guarantees), the operation of the court benefits more than only those individuals that pay the fee. For this reason, this Court should classify the court costs as a different category of government exaction other than a tax that would implicate the separation-of-powers doctrine and the Distinct Statement Clause or a fee that would require a showing of a direct benefit to only those that pay the charge.

H. The statute at issue should be characterized as providing for an assessment of court costs.

As explained above, the court costs cannot truly be characterized as either a tax or a fee, which may be why this Court asked whether the statutory provision at issue could be classified as some other charge. (Order, 3/9/18.) Michigan should follow the example of Florida, Texas, and Oklahoma and treat court costs imposed on convicted criminal defendants as a distinct category of charge, sometimes referred to as an assessment.

In Florida, costs imposed on a criminal defendant following conviction are characterized as an assessment. In *State v Young*, 238 So 2d 589 (1970), the Florida Supreme Court held that court costs imposed on a criminal defendant following a conviction were an assessment not a tax. In reaching this conclusion, the court relied on the fact that the assessment was imposed only following a conviction and stated that it was reasonable for a convicted individual to bear some financial responsibility for the costs "of the agencies that society has had to employ in defense against the very act for which he has been convicted." Likewise, in *Davis v State*, 495 So 2d 928, 930 (1986), the Florida Court of Appeals also held that "the imposition of costs assessments against persons violating penal laws is not a direct tax and is appropriately levied upon those who should be made to bear the burden of these agencies." The costs at issue in the *Davis* case were somewhat different from those at issue here because Florida law divided the funds between various governmental criminal justice entities. *Id*. at 930. Despite this difference, the reasoning is equally applicable here.

In Texas, an assessment of court costs is permitted when the funds are allocated for a legitimate criminal justice purpose. *Peraza v State*, 467 SW 3d 508, 517–518 (Tex Crim App 2015). The *Peraza* court defined criminal justice purpose as "one that relates to the administration of the criminal justice system." *Id*. When a Texas statute complies with that requirement, it is not considered a tax that implicates Texas's separation-of-powers clause. *Id*.

In addition, the Oklahoma Court of Criminal Appeals has considered the constitutionality of monetary assessments imposed on convicted criminal defendants and concluded that same are not taxes that would "render the courts 'tax gatherers' in violation of the separation of powers doctrine." *State v Claborn*, 870 P2d 169, 171 (1994). The *Claborn* court reasoned that the assessments were properly enacted by the legislature and were reasonably related to the costs of administering the criminal justice system and thus did not constitute an executive branch tax. *Id.*

Adopting the practice of Florida, Texas, and Oklahoma would be consistent with existing Michigan law. The Legislature has characterized other charges that offset the cost of performing a government function without providing a direct benefit to the individual that pays as assessments. For example, MCL 803.225a(6) and MCL 803.307a(6) authorize a $60 assessment "to defray the costs associated with the requirements of DNA profiling and DNA retention" obligations. In addition, MCL 287.606(1) permits the beef industry commission to assess producers based on a percentage of gross receipts from sale of all cattle raised or fed in the state to defray the program and administrative costs. See also *People v Earl*, 495 Mich 33, 40 (2014) (discussing assessments imposed by the Crime Victim's Rights Act).

To be sure, assessments are generally imposed at a specifically identified rate, *Earl*, 495 Mich at 40, and the statutory provision at issue here does not identify a specific rate or formula for the charge. But there is nothing in Michigan

caselaw that *requires* an assessment to be set at a specific amount. And the statute does include limitations on the court's ability to impose court costs, i.e., they must be reasonably related to the actual costs involved in the particular case. Accordingly, this Court should conclude that court costs imposed pursuant to MCL 769.1k(1)(b)(iii) are an assessment even though the statute provides more latitude for the calculation of the amount than other statutes that provide for an assessment.

If this Court finds that the statute at issue is not a tax, it is not necessary to consider whether the statute constitutes a separation-of-powers violation or a violation of the Distinct Statement Clause. But if such an analysis is required, the law should be found to be constitutional as explained below.

II. Even if this Court determines that MCL 769.1k(1)(b)(iii) provides for a tax, it is constitutionally valid because it does not violate the separation-of-powers doctrine or the Distinct Statement Clause.

A. The statute at issue constitutes a proper delegation of legislative authority and therefore does not violate the separation-of- powers doctrine.

The Michigan constitution provides for three separate branches of government and generally prohibits those acting under one branch of the government from exercising powers that belong to another. Const 1963, art 3, § 2. In addition, the Michigan constitution reserves the power to tax with the legislative branch. See Const 1963, art 9, §§ 1-2; *UAW v Green*, 498 Mich 282, 290 (2015). But Michigan caselaw states that some commingling of the branches of government may occur without running afoul of the constitution. This Court has held that "the

separation of powers doctrine does not rigidly confine all powers of a certain character to one branch or another." *Coalition of State Emp Union v State*, 498 Mich 312, 330 (2015). In addition, this Court has stated that "the complexities of modern government necessitate that today many facets of traditionally 'legislative' power be exercised by administrative agencies." *People v Turmon*, 417 Mich 638, 649 (1983). Under this caselaw, a delegation of legislative power may be upheld when it includes sufficient limitations to prevent unfettered use of the legislative power so delegated. *Id*. at 649-650.

After concluding that MCL 769.1k(1)(b)(iii) imposed a tax, the Court of Appeals nevertheless determined that the provision did not run afoul of the separation-of-powers doctrine. The Court of Appeals found that the statutory language limiting the availability of costs to those reasonably related to those involved in the defendant's case provided adequate guidance to confer a valid delegation. *Cameron*, 319 Mich App at 236. The Court of Appeals further concluded that the Legislature's failure to set forth a specific cost calculation methodology did not render the statute invalid because the requirement that courts provide a factual basis for the costs ensures that the courts cannot exercise unfettered discretion. *Id*. These conclusions should not be set aside by this Court.

Cameron's claim that the statute lacks intelligible principles or sufficient standards should be rejected. The statute contains an explicit limitation that the costs imposed must be reasonably related to the actual costs incurred by the trial court in the defendant's case. MCL 769.1k(1)(b)(iii). When imposing costs under

the statute, the sentencing judge is required to provide a factual basis for the amount. *People v Konopka*, 309 Mich App at 359. Thus, Cameron's assertion that the statute could be read to allow the courts to completely fund their operations or even profit from the costs can be rejected out of hand. As noted above, even in a county that collected the full amount of costs imposed in 2016, the amount collected was only a fraction of the court's expenditures for that year.

Cameron also takes issue with the fact that the statute includes a non-exhaustive list of the types of expenses that may be considered when imposing costs under the statute. MCL 769.1k(1)(b)(iii) ("including, but not limited to"). While the statute does allow for the imposition of costs for types of expenses beyond personnel and building operations, the statute contains sufficient limitation and guidance to constitute a valid delegation of authority. Even if a court elected to impose a charge on a convicted defendant for a cost of a type not explicitly identified in the statute, such costs must be reasonably related to the actual costs involved in the case that lead to the defendant's conviction and the court must set forth a factual basis to satisfy this connection. This limitation remains in place regardless of type of expense the sentencing judge considers when imposing costs.

B. The statute at issue here does not violate Michigan's Distinct Statement Clause.

Michigan's Constitution requires that every law imposing, continuing, or reviving a tax "distinctly state" the tax. Const 1963, art 4, § 32. Michigan appellate courts have indicated that the distinct statement clause is intended to prevent a law

from imposing an "obscure or deceitful" tax, *Dukesherer Farms*, 73 Mich App at 221, as well as preclude the collection of money for a use not approved by the Legislature. *Dawson v Secretary of State*, 274 Mich App 723, 747 (2007) (opinion by Wilder, PJ). The statutory provision at issue here is not deceitful, and the money collected under it is used in accordance with a purpose expressly approved by the Legislature.

Cameron's claim that the statute is deceitful is without merit. The law implicates the Distinct Statement Clause only if it is a tax. Cameron maintains that the provision must be classified as a tax because "on its face" it is clearly a revenue raising measure. He cannot succeed on the claim that it is obviously a tax, then fairly turn around and assert that the statute imposes a deceptive tax. It either clearly imposes a tax or it does not. If it does, there is no Distinct Statement Clause violation. If it does not, the provision is inapplicable.

In addition, there is no basis to conclude that a Distinct Statement Clause violation exists because it enables the collection of money for a use unapproved by the Legislature. "The purpose of [the distinct statement clause] 'is 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.' " *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015). In enacting MCL 769.1k(1)(b)(iii), the Legislature specifically authorized courts to impose financial obligations on convicted defendants related to the costs incurred by courts

in securing those convictions. Thus, the express purpose of the law was to enable courts to defray their operational costs related to cases that result in a criminal conviction. There is nothing in the record showing that the collected funds were used for any other purpose.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals reached the correct result but did so by applying a flawed analysis. MCL 769.1k(1)(b)(iii) does not impose a tax or user fee, but instead constitutes a different type of charge, a cost or an assessment, that does not implicate the separation-of-powers doctrine or the Distinct Statement Clause. But even if the provision at issue were a tax, the Court of Appeals' determination that the law is constitutionally sound because it does not violate the Distinct Statement Clause or run afoul of the separation-of-powers doctrine was correct.

The Attorney General respectfully requests that this Honorable Court affirm the Court of Appeals' decision but clarify that MCL 769.1k(1)(b)(iii) does not impose a tax. Alternatively, if this Court concludes that the provision is properly characterized as a tax, the Court should deny Cameron's application for leave to appeal because the Court of Appeals correctly determined that the law did not violate the separation of powers or the Distinct Statement Clause.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General

Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

/s/ Randi M. Merchant
Randi M. Merchant (P72040)
Assistant Attorney General
Revenue and Tax Division
Attorneys for Amicus Curiae
Michigan Department of Attorney General
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203

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