State of Michigan
In the Supreme Court

The People of the State of Michigan	COA No. 374487
Plaintiff-Appellee,	Cheboygan County Circuit Court Case No. 24-006781-FH
v.	MSC No. 168539
Clinton Ormsbee	
Defendant-Appellant.	

Clinton Ormsbee's Supplemental Brief

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First Question

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Mr. Ormsbee answers: Yes.

The trial court answered: The trial court did not answer.

The Court of Appeals answered: No.

Second Question

II. Does MCL 769.1k(1)(b)(*iii*), either facially or as applied, violate due process by creating a " 'potential for bias' " or an "objective risk of actual bias"? *Caperton v A T Massey Coal Co, Inc*, 556 US 868, 881, 886 (2009), quoting *Mayberry v Pennsylvania*, 400 US 455, 466 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8-9; Const 1963, art 1, § 17.

Mr. Ormsbee answers: Yes.

The trial court answered: The trial court did not answer.

The Court of Appeals answered: No.

Third Question

III. Does MCL 769.1k(1)(b)(*iii*), either facially or as applied, violate the Distinct Statement Clause of Const 1963, art 4, § 32?

Mr. Ormsbee answers: Yes.

The trial court answered: The trial court did not answer.

The Court of Appeals answered: No.

Introduction

How to fund Michigan courts, the meaning and role of the iterations of MCL 769.1k(1), and how criminal cases produce revenue are problems which have vexed this Court and this state for more than a decade. While funding Michigan courts may be a difficult problem, what role courts themselves should have is not—they should have no role.

Forcing Michigan courts to fund themselves off the backs of people they convict and imprison spawns multiple constitutional violations. The Legislature's delegation of this authority and duty violates the clearest boundary of our separation of powers. The operation of the current iteration of MCL 769.1k(1)(b)(*iii*), in conjunction with a byzantine network of funds it feeds into, violates our Distinct Statement Clause. And forcing judges to finance their facilities, pay their staff, and meet other financial obligations by monetizing criminal sentences violates Due Process. This must stop, and this Court must stop it.

Statement of Facts and Background

A Brief History of the Court Cost Statute

The experiment of funding courts through MCL 769.1k—the "court cost" statute—has been a failure from the start.

A previous iteration of the statute stated that courts could impose "[a]ny cost in addition to the minimum state cost set forth in subdivision (a)." *People v Cunningham*, 496 Mich 145, 152 (2014), quoting then MCL 769.1k(1)(b)(*ii*). The *Cunningham* Court reasoned that because imposition of more specific costs were authorized by other statutes, reading subsection (1)(b)(*ii*) to allow imposition of literally "any cost" would render those other provisions nugatory. *Id.* at 154-157. Therefore, subsection (1)(b)(*ii*) authorized only the imposition of costs otherwise authorized. *Id.*

Cunningham put a temporary stop to funding courts through criminal sentences, but it was imperfect for at least two reasons. First, the holding made little sense. While a literal reading of then (1)(b)(*ii*) arguably rendered other statutory provisions nugatory, *Cunningham*'s reading rendered (1)(b)(*ii*) nugatory. If all (1)(b)(*ii*) did was authorize *already authorized costs*, then (1)(b)(*ii*) did nothing. Further, there was no textual support for that reading. Second, nothing about *Cunningham* prevented the Legislature from simply tweaking the statute to authorize funding courts through criminal sentences, which the Legislature promptly did.

Four months after *Cunningham* was decided, the Legislature amended MCL 769.1k to add subsection (1)(b)(*iii*), which detailed specific costs that could be recovered through criminal sentences. The Legislature described the amendment as a "curative measure" to allow

courts to impose the costs of running the judicial system following *Cunningham*. 2014 PA 352, enacting section 2. And yet, in the interval between *Cunningham* and that amendment—when courts could not fund their overhead through criminal sentences—courts continued to operate.

Also in response to *Cunningham*, the Legislature created the Trial Court Funding Commission (TCFC) to address public and widespread problems with trial court funding. 37a. The Commission, which included five judges from around the state, documented the direct connection between subsection (1)(b)(*iii*) and court funding. It recounted that "many stakeholders [are] concerned that the courts are under increasing pressure from state and local governments to increase revenue." 42a. And worse, "[s]ome stakeholders believe that even the perception that judges are considering revenues when making judicial decisions can undermine the public trust in the court system." *Id.* The report's recommendations section concluded that the use of court costs to both fund courts and other government services creates an "ethical dilemma of judges being incentivized to maximize revenue from parties to support their budgets." 60a. It therefore proposed legislative reforms to "eliminate the ethical dilemma judges face as well as the public perception that judges fine individuals in order to fund their courts." 61a. The TCFC identified three "key barriers to an effective trial court funding system":

- A real or perceived conflict of interest between a judge's impartiality and the obligation to use the courts to generate revenue;
- Inadequate funding from all sources due to excessive dependence on local government funding; and

- Unequal access to justice harming those who are most vulnerable and have the least access to financial resources. [37a, 41a.]

The TCFC concluded that 26.2 percent of trial court funding was being generated by courts themselves. 40a. In gross terms, that was about $291 million annually generated from criminal sentencing assessments. *Id.* An estimated $127 million annually that was transferred to the trial courts from the state had originally been collected by trial courts. *Id.* When the TCFC further analyzed the various funding sources and destinations, it uncovered a dizzying mishmash of at least six different funds where money filters from one fund to another, to another. 47a.

The result in *Cunningham* and the subsequent amendment to MCL 769.1k immediately threw the statute into renewed litigation with challenges under separation of powers, due process, equal protection, and ex post facto grounds. *People v Konopka (On Remand)*, 309 Mich App 345 (2015). The defendant in *Konopka* did not prevail in the Court of Appeals and did not seek leave to appeal to this Court. But challenges to MCL 769.1k continued.

In *People v Cameron*, 319 Mich App 215 (2017), the defendant argued the statute violated the Distinct Statement Clause of Const 1963, art 4, § 32, as well as Separation of Powers principles. The Court of Appeals concluded that the Distinct Statement Clause was not violated because the Legislature labeled it as a "curative measure" to the holding of *Cunningham* and the statute included a requirement for reporting how much money was collected. *Id.* at 230-231. The court concluded, "defendant has presented no evidence indicating that the Legislature did not intend MCL 769.1k(1)(b)(*iii*) to raise revenue for the courts or that the court costs collected are directed to a use unintended by the

Legislature." *Id.* at 231. The *Cameron* panel found defendant's Separation of Powers argument conclusory, but it addressed the argument anyway. The court found that even if the Legislature had delegated the taxing power to the judiciary through MCL 769.1k(1)(b)(*iii*) some delegation of the taxing power was allowed. *Id.* at 235. Further, even though the statute provided little guidance about how costs were to be calculated and assessed, a lack of specification was required "in order to accommodate the varying costs incurred by the circuit courts." *Id.*

The defendant in *Cameron* did seek leave to this Court, which this Court denied. Then Chief Justice McCormack concurred in the denial but wrote separately to discuss the due process concerns raised by the Michigan District Judges Association (MDJA):

> They describe the pressures they face as district judges to ensure their courts are well-funded. For example, one city threatened to evict a district court from its courthouse because it was unable to generate enough revenue. Another judge noted that the same city suggested that judges eliminate personnel if they could not generate enough revenue to cover the operational costs. A third judge recounted that his local funding unit referred to the district court as "the cash cow of our local government."
>
> The MDJA contends that MCL 769.1k(1)(b)(*iii*) creates a conflict of interest by shifting the burden of court funding onto the courts themselves. In the MDJA's telling, MCL 769.1k(1)(b)(*iii*) incentivizes courts to convict as many defendants as possible. The "constant pressure to balance the court's budgets could have a subconscious impact on even the most righteous judge." MDJA Brief, p 16. [*People v Cameron*, 504 Mich 927 (2019) (MCCORMACK, C.J., concurring).]

She acknowledged that denying leave in *Cameron* would "allow our current system of trial court funding in Michigan to limp forward . . . ." *Id*. She encouraged the Legislature to address the problem "before the pressure placed on local courts causes the system to boil over." *Id*. It did not. And the challenges continued.

In *People v Johnson*, 509 Mich 1094 (2022), and *People v Edwards*, 509 Mich 1095 (2022), this Court granted leave to address whether MCL 769.1k violated Due Process and/or Separate of Powers principles (and if so what remedy the Court should employ). After argument, the Court vacated the grant order and denied leave. But not quietly.

Justice Welch dissented and wrote that MCL 769.1k(1)(b)(*iii*) "has effectively turned Michigan's trial courts into self-funding tax assessors and collectors by requiring the courts, and the courts alone, to decide which convicted individuals pay a tax and how much they must pay to help fund the judiciary's operations." *People v Johnson*, 511 Mich 1047, 1057 (2023) (WELCH, J, dissenting). Justice Welch noted the longstanding principle that "[t]he whole subject of finance and taxation is placed by the Constitution of this State under the control of the legislature," *id*. at 1066 quoting *C F Smith Co v Fitzgerald*, 270 Mich 659, 670 (1935), as well as the fact that Const 1963, art 9, § 2 "explicitly prohibits the Legislature from surrendering its power of taxation," *id*.

Then-Justice Cavanagh agreed with Justice Welch and also wrote that MCL 769.1k(1)(b)(*iii*) violates due process by creating a potential for bias or an objective risk of actual bias. *People v Johnson*, 511 Mich 1047, 1049 (2023) (CAVANAGH, J, dissenting). Then-Justice Cavanagh noted, among other things, that the MDJA filed an amicus brief stating *they believed the statute created a conflict of interest*. *Id*. at 1053-1054.

She quoted the MDJA as saying the "constant pressure to balance the court's budgets could have a subconscious impact on even the most righteous judge." Then-Justice Cavanagh also discussed the saga of MCL 769.1k and challenges such as *Cameron* and *Konopka* which leaned on the Legislature's intent to fund courts through assessments on criminal defendants and reasoned that "[b]y denying leave to appeal here, the Court seems to be reading MCL 769.1k(1)(b)(*iii*) inconsistently with how the *Konopka* and *Cameron* panels understood the statute, leaving the continued viability of those cases unclear." *Id*. at 1053.

Justice Bolden concurred in the denial of leave to appeal but relied on the facial nature of the challenge in those cases. *People v Johnson*, 511 Mich 1047, 1047 (2023) (BOLDEN, J, concurring). But she also wrote that the denial "does not mean that the judiciary can never consider due-process or other as-applied challenges when funding pressures demonstrably impeded the goals of the judiciary." *Id*. at 1048.

After all that, MCL 769.1k(1)(b)(*iii*) remains in force and states:

> (b) The court may impose any or all of the following:
>
> . . .
>
> (*iii*) Until December 31, 2026, 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.

Mr. Ormsbee's Case

On July 16, 2024, Clinton Ormsbee pleaded no-contest to Home Invasion (Third Degree) in the Cheboygan County Circuit Court. 8a. He was subsequently sentenced to 2 years of probation, with the first year to be served in the Cheboygan County Jail. 24a. He was also assessed $350 in court costs. 28a.

Mr. Ormsbee filed an Application for Leave to Appeal in the Court of Appeals on February 19, 2025, arguing that MCL 769.1k(1)(b)(*iii*) is unconstitutional as applied to him. His application was denied on April 1, 2025. 32a. On May 21, 2025, Mr. Ormsbee filed an Application for Leave to Appeal before this Court. This Court has scheduled oral argument on Mr. Ormsbee's leave application and ordered supplementary briefing on:

> whether MCL 769.1k(1)(b)(*iii*), either facially or as applied, violates: (1) separation of powers by assigning the judicial branch " 'tasks that are more properly accomplished by [the Legislature],' " *Mistretta v United States*, 488 US 361, 383, 109 S Ct 647, 102 L Ed 2d 714 (1989), quoting *Morrison v Olson*, 487 US 654, 680-681, 108 S Ct 2597, 101 L Ed 2d 569 (1988); see also *Houseman v Kent Circuit Judge*, 58 Mich 364, 367, 25 NW 369 (1885); Const 1963, art 9, § 1; (2) due process by creating a " 'potential for bias' " or an "objective risk of actual bias," *Caperton v A T Massey Coal Co, Inc*, 556 US 868, 881, 886, 129 S Ct 2252, 173 L Ed 2d 1208 (2009), quoting *Mayberry v Pennsylvania*, 400 US 455, 466, 91 S Ct 499, 27 L Ed 2d 532 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8-9, 136 S Ct 1899, 195 L Ed 2d 132 (2016); Const 1963, art 1, § 17; and (3) the Distinct Statement Clause of Const 1963, art 4, § 32. [*People v Ormsbee*, 26 NW3d 830 (2025).]

Arguments

I. MCL 769.1k(1)(b)(*iii*) violates Separation of Powers principles on its face and as applied to Mr. Ormsbee.

Standard of Review

Appellate courts review de novo both questions of statutory interpretation and questions of constitutional law. *People v Vanderpool*, 505 Mich 391, 397 (2020).

Issue Preservation

Mr. Ormsbee preserved his objections to the trial court's imposition of an unconstitutional sentence by raising it in a proper motion to remand. See MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 311-312 (2004).

Discussion

Although the boundaries between our branches of government "need not be airtight," *Makowski v Governor*, 495 Mich 465, 482 (2014), there are boundaries. The clearest of these is that "[t]he whole subject of finance and taxation is placed by the Constitution of this state under the control of the Legislature." *C F Smith Co v Fitzgerald*, 270 Mich 659, 670 (1935). This boundary has been clearly marked for at least 90 years. This Court must resist the Legislature's attempts to cross it.

A. The Legislative and Judicial Powers, and their Separation

Michigan's Constitution divides our government into the legislative, executive, and judicial branches. Const 1963, art 3, § 2. "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. Speaking of this section, this Court

has said that "[t]his historical and constitutional division of the powers of government forbids the extension, otherwise than by explicit language or necessary implication, of the powers of one department to another." *Wood v State Admin Bd*, 255 Mich 220, 225 (1931). While it is true that "some powers must be shared," *Carter v DTN Management Co*, 515 Mich 61, 74 (2024), this Court looks to "explicit [constitutional] language or necessary implication" to see a specific power may be shared. *Wood*, 255 Mich at 225. But "if there is any ambiguity, the doubt should be resolved in favor of the traditional separation of governmental powers." *Civil Service Com'n of Michigan v Auditor General*, 302 Mich 673, 683 (1942).

The Legislature bears the responsibility of, among other things, taxation and finance: "[t]he Legislature shall impose taxes sufficient with other resources to pay the expenses of state government." Const 1963, art 9, § 1. Our constitution devotes an entire article to taxation and finance, and it begins by assigning this authority and responsibility to the Legislature. The constitution then makes the boundary unmistakable: "[t]he power of taxation shall never be surrendered, suspended or contracted away." Const 1963, art 9, § 2.[1]

That taxation and finance are inherently legislative functions is not a new idea. "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." *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 141 (2006). This

[1] The placement of these dictates was not mistake or happenstance. We know the framers were intentional about the organization of our constitution. See *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 691 (2022).

Court has recognized that the powers to tax and appropriate are enormous, and "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." *Id*. at 141-142.

The judicial power is very different. Unlike legislative power, which "regulate[s] public concerns" and "make[s] law for the benefit and welfare of the state," the "province" of judicial power is to "decide private disputes between or concerning persons." *Carter*, 515 Mich at 75, citing Cooley, Constitutional Limitations (1st ed.), p. 92.

More specifically, judicial power is defined by a "combination of considerations," including:

> the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. [*Carter*, 515 Mich at 75, quoting *Nat'l Wildlife Fed v Cleveland Cliffs Iron Co*, 471 Mich 608, 613-615 (2004).]

B. MCL 769.1k(1)(b)(*iii*) Imposes a Tax

Throughout the sordid history of the iterations of this statute and challenges to it, courts have agreed on one thing: the statute imposes a tax.

A tax raises revenue by way of 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 Department of Agriculture (After Remand)*, 405 Mich 1, 15 (1979); see also *Cameron*, 319 Mich App at 222 (collecting cases). When deciding whether a charge amounts to a tax or a fee, courts ask "(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." *Westlake Transp, Inc v Public Service Com'n*, 255 Mich App 589, 612 (2003). Under that framework, taxes raise revenue, need not be proportionate to the cost of the relevant service, and are not voluntary. *Id*. at 613-615; *Cameron*, 319 Mich App at 228-229.

"Undeniably, 'MCL 769.1k(1)(b)(*iii*) is a revenue-generating statute.'" *People v Johnson*, 336 Mich App 688, 699 (2021), quoting *Cameron*, 319 Mich App at 224; see also *Konopka (On Remand)*, 309 Mich App at 370. Costs imposed vary widely from county to county and from case to case. Whatever amount is imposed, no cost is proportionate to the service rendered, because criminal defendants are not receiving a service. *Cameron*, 319 Mich App at 227. Obviously, prosecution does not benefit a defendant. *Id*. And, once convicted, defendants have no ability to refute or limit the charge. This iteration of MCL 769.1k(1)(b)(*iii*), like previous iterations, imposes a tax.

C. Applicable Tests

When one branch of Michigan's government seeks to exercise another branch's power, a two-part analysis is required. First, courts look to the text of the Michigan constitution to determine whether it expressly or

necessarily implies that transfer of authority. If it does not, the arrangement violates the separation of powers, and the analysis ends. If it does, the power rests in a constitutional twilight area, and courts proceed to the second step: applying *Mistretta* to illuminate whether the power sharing is permissible.

This Court's goal in interpreting a constitutional provision is to "give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of 'common understanding.' " *League of Women Voters of Michigan v Secretary of State*, 508 Mich 520, 535 (2022) quoting *Michigan Coalition of State Employee Unions v Michigan*, 498 Mich 312, 323-324 (2015). Further, this Court "locate[s] the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification." *Id.*

As mentioned above, our Constitution of course divides our government into three branches. Const 1963, art 3, § 2. Our constitution says more about the boundaries between those branches: "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. This Court has long seen the plain meaning of this provision: "[t]his historical and constitutional division of the powers of government forbids the extension, otherwise than by explicit language or necessary implication, of the powers of one department to another." *Wood*, 255 Mich at 225. Finally, "if there is any ambiguity, the doubt should be resolved in favor of the traditional separation of governmental powers." *Civil Service Com'n of Michigan*, 302 Mich at 683.

That said, there exist rare situations in which courts have found an explicit or necessarily implied overlap of authority, rendering the sharing of power "constitutionally permissible." *Judicial Attorneys Ass'n v State*, 459 Mich 291, 296-297 (1998), citing *Mistretta*, 488 US at 382 (emphasis added). In those cases, courts proceed apply the test articulated in *Mistretta v United States*.

In *Mistretta*, the United States Supreme Court addressed the constitutionality of the creation of a sentencing commission within the judiciary to promulgate sentencing guidelines. 488 US at 368-369. The petitioner argued in part that the creation of the commission required judges to exercise legislative power in making sentencing policy. *Id*. at 383. The Court explained there can be a "twilight area" on the boundaries of governmental power where "activities of the separate Branches merge." *Id*. at 386. When one of those branches is the judiciary, the Court noted two specific dangers: "first, that the Judicial Branch neither be assigned nor allowed tasks that are more properly accomplished by other branches, and, second, that no provision of law impermissibly threatens the institutional integrity of the Judicial Branch." *Id*. at 383 (cleaned up). Power sharing in the twilight area must pass this test.

The commission fell squarely into the twilight area since the judiciary had long exercised rulemaking authority in different contexts. *Id*. at 386-378 citing *Wayman v Southard*, 23 US (10 Wheat) 1, 43 (1825). Further, sentencing "long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Id*. The nature of the shared responsibilities of the legislative and judicial branches in this twilight area easily cleared *Mistretta's* two-part test. *Id*. at 393-395.

D. MCL 769.1k(1)(b)(*iii*) is Facially Unconstitutional

When, as here, it is "readily apparent" that a statute is unconstitutional, the ordinary presumption of constitutionality yields. *Tolksdorf v Griffith*, 464 Mich 1, 5 (2001). A statute's challenger satisfies his burden of proving unconstitutionality by showing that "no set of circumstances exists under which the act would be valid." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 (2007). Here, no set of circumstances, real or imagined, could save MCL 769.1k(1)(b)(*iii*).

1. *The Michigan Constitution Expressly Forbids this Delegation*

First, per Const 1963, art 3, § 2, this Court should inquire if there is anything "expressly provided in this constitution" for the judiciary to exercise the power ostensibly granted by MCL 769.1k(1)(b)(*iii*). This Court has also held that "necessary implication[s]" may also suffice. *Wood*, 255 Mich at 225. As every court which has considered the matter has concluded, MCL 769.1k(1)(b)(*iii*) amounts to a tax. See *Cameron*, 319 Mich App at 224; see also *Konopka (On Remand)*, 309 Mich App at 370. The statute allows courts to tax defendants for its own "[s]alaries and benefits", "good and services" used for operation of the court, and other "necessary expenses." For this delegation of taxation and finance duty and authority to survive, the Michigan constitution must contain some express provision or necessary implication. There is none.

To the contrary, the Constitution expressly prohibits such a delegation. Not only does Const 1963, art 9, § 1 specify the Legislature as possessing the authority and obligation of taxation and finance, but Const 1963, art 9, § 2 is explicit that "[t]he power of taxation shall never be surrendered, suspended or contracted away." It's hard to know how

the framers could have spoken more clearly, or how these unambiguous mandates can be avoided.

Even if we scour the entirety of Article 9, there is not even a mention of courts wielding the power of taxation. Const 1963, art 9, § 10 specifies that local governments share in sales tax revenue. Const 1963, art 9, § 11 establishes the State School Aid Fund, and mandates that it receive revenue. In all, Article 9 has 42 sections dealing with taxation and finance in such great detail that it creates two separate trust funds for wildlife: a game and fish trust fund, Const 1963, art 9, § 41, and a nongame trust fund, Const 1963, art 9, § 42. Article 9 is extremely detailed but not one time does it contemplate the judiciary wielding the authority of taxation and finance.

Neither does Article 6, which establishes the judiciary, contemplate wielding the power of taxation. The finances of the judiciary are addressed in Const 1963, art 6, § 7:

> The supreme court may appoint, may remove, and shall have general supervision of its staff. It shall have control of the preparation of its budget recommendations and the expenditure of moneys appropriated for any purpose pertaining to the operation of the court or the performance of activities of its staff except that the salaries of the justices shall be established by law. All fees and perquisites collected by the court staff shall be turned over to the state treasury and credited to the general fund.

Courts are empowered only to make recommendations as to their budget, and to spend money appropriated to them. Courts are not empowered to spend anything not appropriated to them, and are certainly not empowered to generate their own revenue through taxation. To the contrary, Const 1963, art 6, § 7 makes clear that any

fees collected must be turned over to the state treasury. They cannot be set aside for courts, they must be credited to the general fund. Further, once in the general fund, Const 1963, art 9, § 17 requires "appropriations made by law" for any withdrawal. Again, the constitution assigns this duty and authority to the Legislature.

This Court has long protected the judiciary from this sort of legislative overreach. For example, in *Houseman v Kent Circuit Judge*, 58 Mich 364 (1885), a statute allowed judges to appoint surveyors to determine apportionment of costs for drain assessments. This Court struck the statute down, explaining:

> . . . [t]he duties which it imposes upon the courts are not judicial in their nature, but belong to the administrative branch of the government. The sending out surveyors or other persons to make examination or surveys to relevy taxes in place of invalid ones, are each and all acts which do not pertain to the judicial branch of the government. [*Id.* at 367.]

The delegation of the Legislature's taxing power through MCL 769.1k(1)(b)(*iii*) is more extreme than *Houseman* in multiple respects. In *Houseman*, the court was appointing an expert to calculate the amount of the tax. With MCL 769.1k(1)(b)(*iii*) the judge does it with near limitless discretion. In *Houseman*, the relevying occurred only when there was a controversy about an initial assessment. With MCL 769.1k(1)(b)(*iii*) judges may impose the tax in every case. In *Houseman* the cost of a drain project would provide a judge clear guidance on how much to assess. With MCL 769.1k(1)(b)(*iii*) the only limit on how much can be taxed is the expenses of the court, which are not clearly accounted for as to each defendant that comes before the court. If MCL 769.1k(1)(b)(*iii*) were permissible, *Houseman* would have come out the other way.

There is no express provision in our constitution for courts to tax. There is no necessary implication of a judicial power that requires courts to tax. Even through the lens of a facial challenge, MCL 769.1k(1)(b)(*iii*) is blatantly unconstitutional. Whatever facts play out in the real world, whatever is appropriated to the judiciary from one year to the next, the authority and duty of taxation are quintessentially legislative. Const 1963, art 9, § 1. The Legislature is forbidden from delegating this authority and responsibility. Const 1963, art 9, § 2. That is enough for this Court to resolve the question and end its analysis.

2. *Applying Mistretta*

There is no evidence in our constitution that taxation resides in a twilight area between the legislative and judicial branches of Michigan's government. If this Court concludes otherwise, it should employ the analysis of *Mistretta* and check for two dangers: "first, that the Judicial Branch neither be assigned nor allowed tasks that are more properly accomplished by other branches, and, second, that no provision of law impermissibly threatens the institutional integrity of the Judicial Branch." 488 US at 383. Both are present, and MCL 769.1k(1)(b)(*iii*) fails this test as well.

Taxing to fund the functions of the judiciary is certainly a task "more properly accomplished by other branches," specifically the Legislature. This Court has previously noted the framers designed the legislative branch to perform the duties of taxation and finance:

> 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. [*46th Circuit Trial Court*, 476 Mich at 141-142.]

This Court has also said:

> . . . the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people . . . [*Civil Service Com'n of Michigan*, 302 Mich at 682 quoting *Colbert v State*, 86 Miss 769 (1905).]

This Court has compared the suitability of this task for the legislative and judicial branches:

> In contrast with the judiciary, for example, the legislature is not restricted in the range of testimony that it may hear as a prelude to enacting public policy, it is better positioned to accommodate competing policy priorities, it is better equipped to effect compromise positions after negotiation and bargaining, it is more regularly and directly accountable to the people, and its membership is more broadly representative of society and its various interests. [*Id.* at 142.]

All of this authority and responsibility have been foisted onto the Judiciary with no real guardrails or guidance. MCL 769.1k(1)(b)(*iii*) describes almost everything courts spend money on as an expenses that can be paid for by taxing criminal defendants. The statute gives no guidance about which defendants should be taxed, or how much. There is no guidance on how much revenue to raise. Are courts restricted to

covering the bare minimum of expenses they face, or can they expand their expenditures? Can courts use MCL 769.1k(1)(b)(*iii*) to buy new furniture? Office snacks?

Mistretta itself offers a good illustration of authority that makes sense to share between the legislative and judicial branches. There, the Court was considering the constitutionality of a sentencing commission to create sentencing guidelines. *Mistretta*, 488 US at 363-370. Though the core function of the judicial branch is settling cases and controversies, the judicial branch has also long exercised rulemaking authority with respect to its own functions. *Id*. at 386-388. Further, the subject matter of the commission was *federal sentencing*. Sentencing is also a quintessentially judicial function, and an area where the two branches have always shared authority. *Id*. at 389-391. None of that can be said about MCL 769.1k(1)(b)(*iii*) or taxation which, as described above, is a core legislative function.

MCL 769.1k(1)(b)(*iii*) also "impermissibly threatens the institutional integrity of the Judicial Branch." *Id*. at 383. Mr. Ormsbee incorporates by reference here, later argument about how MCL 769.1k(1)(b)(*iii*) creates an appearance of impropriety for Due Process purposes. For the moment, it should suffice to note the Legislature created the TCFC, which formally and publicly concluded there was "[a] real or perceived conflict of interest between a judge's impartiality and the obligation to use the courts to generate revenue," as well as concluding that there was "[u]nequal access to justice harming those who are most vulnerable and have the least access to financial resources." 41a. This was the conclusion of the Legislature's own commission. The MDJA has *twice* taken the remarkable step of filing amicus briefs in this Court arguing that MCL 769.1k(1)(b)(*iii*) "unconstitutionally shifts the funding burden

on to the courts, and by doing so, creates an inherent conflict of interest in the judges who are simultaneously charged with determining guilt or innocence and then sentencing convicted defendants, but also forced to fund their courts and their counties by assessing costs against defendants who have pled guilty or been convicted of a criminal offense." 87a.

E. MCL 769.1k(1)(b)(*iii*) is Unconstitutional as Applied to Mr. Ormsbee

In an as-applied challenge, Mr. Ormsbee need only show the judiciary exercised the Legislature's taxing power in *his* case[2]. It certainly did when it collected $350 for its own coffers. As described above, MCL 769.1k(1)(b)(*iii*) is facially unconstitutional and no factual development is needed to demonstrate its infirmity. But the facts only make it worse.

MCL 769.1k(1)(b)(*iii*) interferes with the judiciary's obligation and ability to maintain impartiality in criminal proceedings and its authority to maintain and administer rules regulating trial judges' impartiality. Const 1963, art 1, § 17; Const 1963, art, 6 §§ 5, 30. *See also* MCR 9.202; Code of Judicial Conduct, Canon 2(A). Again, this Court need not take Mr. Ormsbee's word for that. Michigan judges have taken the remarkable step of filing amicus briefs with this Court to make this exact assertion. 88a.

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[2] "An as-applied challenge, to be distinguished from a facial challenge, alleges 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 (2014).

Further, the judiciary is ill-suited to wield this power and has done so inequitably. This is demonstrated by the January 2022 SCAO Report, which collected data through 2020. While Saginaw County Circuit Court assessed court costs in only seven cases, totaling $2,846, neighboring Genesee County Circuit Court assessed court costs in 781 cases, totaling $216,361.50. 218a-220a. Similarly, while Oakland County Circuit Court assessed court costs in only 152 cases, totaling $29,250, nearby Wayne County Circuit Court assessed court costs in 6,507 cases, totaling $6,419,128. 218a-220a

Canon 2 states that "[a]t all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary." Under Michigan law, a judge's failure to comply with Canon 2 of the Code of Judicial Conduct is grounds for removal. MCR 9.205(b)(2). "No matter how neutral and detached a judge may be, the burden of taxing criminal defendants to finance the operations of his court, coupled with the intense pressures from local funding units could create at least the appearance of impropriety." *People v Cameron*, 504 Mich 927 (2019) (MCCORMACK, CJ, concurring). Since MCL 769.1k(1)(b)(*iii*) creates the appearance of impropriety in every trial judge, Michigan law demands every trial judge to recuse themselves from every case that crosses their desk. MCL 769.1k(1)(b)(*iii*) effectively renders the judicial branch unable to complete its assigned function of presiding over criminal proceedings.

Should this Court find that MCL 769.1k(1)(b)(iii) *could* be implemented in accordance with separation of powers principles, it clearly has not played out that way in the real world.

II. MCL 769.1k(1)(b)(*iii*) is unconstitutional facially and as applied to Mr. Ormsbee as it violates Due Process protections.

Standard of Review

Appellate courts review de novo both questions of statutory interpretation and questions of constitutional law. *Vanderpool*, 505 Mich at 397.

Issue Preservation

Mr. Ormsbee preserved his objections to the trial court's imposition of an unconstitutional sentence by raising it in a proper motion to remand. See MCL 769.34(10); MCR 6.429(C); *Kimble*, 470 Mich at 311-12 (2004).

Discussion

No person ought to be a judge in their own cause. This notion is clear, obvious, and very old. It is also "inflexible" and "manifestly just." Cooley, Constitutional Limitations (1st ed.), p. 410. And yet, that is exactly what happens when Michigan judges impose "court costs" on criminal defendants to fund everything in their courts from staff salaries to miscellaneous expenses. This Court must stop this ongoing statewide violation of Due Process.

A. Due Process and Judicial Integrity

Due Process protections prohibit every procedure which "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused . . . ." *Tumey v Ohio*, 273 US 510, 532 (1927). Direct pecuniary interests are prohibited, to be sure. *Id*. at 523. But, such an interest does "not define the limits of the principle." *Ward v Village of Monroeville*, 409 US 57, 60

(1972). A "possible temptation" can also exist when financial responsibilities of a judge make them "partisan to maintain the high level of contribution from the mayor's court." *Id*. Likewise, Michigan's "Due Process Clause requires an unbiased and impartial decisionmaker." *Cain v Michigan Dep't of Corr*, 451 Mich 470, 497 (1996).

Courts have rejected the reframing of this test as inquiring about how an "average judge" might respond to temptation and reaffirmed that the test inquires about "the *average man* as a judge." This "average man as a judge" standard focuses "on the strength of the temptation rather than an actual showing of impartiality." *Caliste v Cantrell*, 937 F3d 525, 529 (CA 5, 2019). Those who argue for an "average judge" gloss on *Tumey* reason that judges are not as tempted as the average person, or that they have a "knack for impartiality." *Id*. at 529-530. However, "the law has long rejected that presumption for a judge's financial conflicts." *Id*. at 531.

The United States Supreme Court has repeatedly said no showing of actual bias is required. *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 883-884 (2009) ("[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias . . . ."). This objective inquiry asks "under a realistic appraisal of psychological tendencies and human weakness," whether "there is an unconstitutional potential for bias." *Id*. at 881, 883 (quotation marks and citations omitted). Courts look to "objective and reasonable perceptions" to ascertain whether there is a potential for, risk of, or appearance of bias.

Id. at 884.[3] See also *Cain v White*, 937 F3d 446, (CA 5, 2019) (holding a judicial expense fund amounted to an "institutional interest" under *Ward*); *Alpha Epsilon Phi Tau Chapter House Ass'n v Berkeley*, 114 F3d 840, (CA 9, 1997) (recognizing *Tumey* addressed both "direct, personal, substantial pecuniary interest" and "institutional responsibilities" which provide a motive).

In particular, *Tumey* recognizes that an interest for an individual judge is not necessary to create a Due Process violation. The institutional interest of the court suffices. *Tumey*, 273 US at 532-533. For example, in *Tumey*, "[t]he statutes were drawn to stimulate small municipalities," and the judge had an institutional interest "in the financial condition of the village." *Id*. The same was true in *Ward*, where the Court observed a "major part" of the village's income was derived from the revenue generated by the mayor's court. *Ward*, 409 US at 58. *Ward* was clear that the fact that the mayor in *Tumey* shared in the fees and costs "did not define the limits of the principle." *Id*. at 60.

B. MCL 769.1k(1)(b)(*iii*) is Facially Unconstitutional

As discussed above, a statute's ordinary presumption of constitutionality yields when its unconstitutionality is "readily apparent." *Tolksdorf*, 464 Mich at 5. A challenge succeeds with a showing that "no set of circumstances exists under which the act would

[3] While violation of the Michigan Judicial Code may not entitle any particular defendant to relief, it reflects a similar prohibition. Code of Jud Conduct, Canon 2(A) ("A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. . . .").

be valid." *In re Request for Advisory Opinion*, 479 Mich at 11. Here, no set of circumstances, real or imagined, could save MCL 769.1k(1)(b)(*iii*).

The institutional interest created by MCL 769.1k(1)(b)(*iii*) is spelled out directly in the statute. The statute is meant to pay for "[s]alaries and benefits for relevant court personnel," "[g]oods and services necessary for the operation of the court," and "[n]ecessary expenses for the operation and maintenance of court buildings and facilities." MCL 769.1k(1)(b)(*iii*). To this situation the Court applies *Tumey*'s test and asks if a criminal sentencing with MCL 769.1k(1)(b)(*iii*) in play "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused . . . ." *Tumey*, 273 US at 532. Obviously, it would.

In Michigan, criminal sentences are supposed to be consistent with the principle of proportionality. See generally *People v Posey*, 512 Mich 317, 348 (2023). A sentence should be tailored to the offense and the offender, and give consideration to the reformation of the offender, the protection of society, the discipline of the offender, and the deterrence of others from committing the same offense. *People v Snow*, 386 Mich 586, 592 (1972). None of these permissible considerations would lead a court to extract funds from criminal defendants to pay for "goods" the court might consume, "benefits for relevant court personnel," or for "maintenance of court buildings." The only consideration that could possibly lead a court to impose these costs is the court's own institutional interest. There is thus a "possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused" and to use MCL 769.1k(1)(b)(*iii*) to extract money from the people it convicts for the court's benefit rather than permissible

sentencing purposes. Indeed, that is the only reason MCL 769.1k(1)(b)(*iii*) would be used, and it is the reason the statute exists.

This analysis should be enough to show that "no set of circumstances exists under which the act would be valid." *In re Request for Advisory Opinion*, 479 Mich at 11. But to be even more thorough, we can consider all possible circumstances, which reduce to two: those in which the Legislature has not adequately funded the Judiciary, and those it which it has.[4]

In the case of inadequate funding, courts must use MCL 769.1k(1)(b)(*iii*) to operate. In that circumstance, courts are imposing criminal punishment for their own benefit rather than for permissible purposes. This is not merely the "temptation" to fail to "hold the balance nice, clear, and true" between the state and the accused; it is an actual failure to do so. In that circumstance, MCL 769.1k(1)(b)(*iii*) fails *Tumey's* test.

In the case of adequate funding, courts have no need for additional revenue. In that circumstance, courts do not need to use MCL 769.1k(1)(b)(*iii*) to operate. But why, then, would they ever use it? If a monetary punishment was appropriate under the *Snow* factors, why not impose a fine which would go to public libraries? If a victim was entitled

[4] Reasonable people might disagree on whether a particular level of funding is "adequate" or not. This does not matter. Wherever the line is drawn, every circumstance will be in one case or the other. We might also define "adequate" as having enough money for "[s]alaries and benefits for relevant court personnel," "[g]oods and services necessary for the operation of the court," and "[n]ecessary expenses for the operation and maintenance of court buildings and facilities," which are the only things MCL 769.1k(1)(b)(*iii*) revenue is meant to pay for.

to compensation why not impose restitution which would compensate the victim? In this circumstance, a court employing MCL 769.1k(1)(b)(*iii*) would be taking money from a criminal defendant for its own use which it did not need, without any justification under Michigan's longstanding principles of criminal sentencing. In that circumstance also, MCL 769.1k(1)(b)(*iii*) fails *Tumey*'s test.

MCL 769.1k(1)(b)(*iii*) clearly offers the temptation "not to hold the balance nice, clear, and true between the state and the accused," *Tumey*, 273 US at 532, and no factual development can change that.

C. MCL 769.1k(1)(b)(*iii*) is Unconstitutional as Applied to Mr. Ormsbee

In an as-applied challenge, Mr. Ormsbee need only show that Due Process was violated in his case. See *Bonner*, 495 Mich at 223. It certainly was when the court collected $350 for its own coffers. MCL 769.1k(1)(b)(*iii*) is facially unconstitutional as there is no circumstance where it does not violate Due Process. But the reality of how MCL 769.1k(1)(b)(*iii*) has been used makes it much worse.

As discussed above, the Legislature itself created the TCFC in response to *Cunningham*. The very first sentence of the TCFC's Final Report says "Michigan residents going to court should not face a judge who needs money from a defendant to satisfy demands for court operating expenses." 37a. And yet that happens every day, all across the state, and happened in Mr. Ormsbee's case. The report recognizes "the historic problem with money's influence on the justice system as manifested in Michigan." *Id*. After two years of work, the commission "unanimously concluded":

> that the existing system is broken, and it is imperative to create a stable and consistent funding source for Michigan trial courts that removes trial court judges from the role of raising money for the operation of the courts. [*Id.*]

The TCFC's report acknowledged the temptation judges faced to use criminal sentences, not for their intended and permissible purposes, but to squeeze money from powerless defendants. That report was issued *seven years ago*. Nothing has been done, and these unconstitutional circumstances remain in place.

Further, this Court does not need to wonder whether judges feel the temptation "not to hold the balance nice, clear, and true between the state and the accused." The MDJA has explicitly told this Court that judges face much more than temptation. They face pressure. And the MDJA has written to this Court on the matter *twice*.

In *People v Cameron*, the MDJA took the remarkable step of filing an amicus brief arguing its members faced unconstitutional pressures. *Cameron*, 504 Mich at 927 (2019) (MCCORMACK, CJ, concurring). The MDJA argued that MCL 769.1k(1)(b)(*iii*) "creates a conflict of interest by shifting the burden of court funding onto the courts themselves." *Id.* The MDJA noted its members' experiences and warned "constant pressure to balance the court's budgets could have a subconscious impact on even the most righteous judge." *Id.* As discussed, the behavior of "the most righteous judge" is not the applicable standard. Rather, "the average man as judge" is the standard. As then-Chief Justice McCormack pointed out, the Due Process issue was not presented in *Cameron*, so the Court denied leave. But it was presented in *Johnson*, and again the MDJA filed an amicus brief. 80a. The MDJA explicitly stated "MCL 769.1k(1)(b)(*iii*) gives Michigan's judges a pecuniary

interest in the outcome of their criminal cases." *Johnson*, 511 Mich at 1053 (CAVANAGH, J, dissenting). Again, this Court denied leave. Perhaps this Court was not considering these and other facts because *Johnson* was styled as a facial challenge.[5] But, an as-applied challenge is properly before the Court now.

It could be argued that Mr. Ormsbee's $350 is insignificant to the court. That cute framing game both misses (or ignores) the point and is foreclosed by *Ward*. No one argues that Mr. Ormsbee's sentencing court took $350 from him to fund the entirety of the circuit court's finances. That is not the point. Rather, the practice of imposing court costs on *each* defendant is what keeps courts going. And Mr. Ormsbee fell prey to that scheme. There is plenty of evidence courts *rely* on this funding, including the TCFC's own conclusion from its final report: "The current system is dependent upon court assessments (fees, fines, and costs) to generate substantial revenues to fund roughly one-third of court operations." 48a.

So it was in *Ward*. There, each fine was only $50, but the *Ward* Court looked to the aggregate effect of all the assessments. *Ward*, 409 US at 58-59. The *Ward* Court compared, year by year, the *total* collected from defendants against the Monroeville court's total revenue. *Id*. The *Ward* Court noted that the income from fines was "of such importance" that when it was threatened, the village retained a consultant for advice. *Id*.

[5] Justice Bolden noted the facial nature of that challenge and said "this does not mean that the judiciary can never consider due-process or other as-applied challenges when funding pressures demonstrably impeded the goals of the judiciary." *Johnson*, 511 Mich at 1049 (BOLDEN J, concurring).

After *Cunningham*, Michigan did essentially the same thing, forming the TCFC.[6]

Undoubtedly the prosecution will raise *Dugan v Ohio*, 277 US 61 (1928), as the prosecution has in other court costs cases. *Dugan* is of no moment, as *Ward* tells us. In *Dugan*, the judge/mayor who adjudicated the defendant's case had financial responsibilities too remote to warrant "a presumption of bias" in his judicial function. *Ward*, 409 US at 60-61. We don't need presumptions to know what pressure Michigan Judges face. Just look at the appendix of the last MDJA brief filed with this Court.

- Then-Chief Judge of the 55th District Court Thomas Boyd: "The first county administrator I met was a Deputy County Controller. He began our conversation by telling me that 'district court is the cash cow of local government.' . . . A few years later, the Chair of the County Commission's Finance Committee told me that the County would like about $300,000 in revenue in excess of expenditures from the court."

- District Court Judge Maria Ladas Hoopes on the court's involvement in local funding: "Insidious to this is the unconstitutional pressure to create revenue by charging

[6] "The Michigan Legislature created the Trial Court Funding Commission (TCFC), through Act 65 of 2017, to review Michigan's trial court funding system and make recommendations. This legislation was enacted in response to *People v Cunningham*, a Michigan Supreme Court decision that determined state law does not provide courts with the authority to impose costs upon criminal defendants to fund the day-to-day operation of the courts." 37a.

higher finds and costs to defendants we care constitutionally required to impose a fair and unbiased sentence to."

- District Court Judge Shelia R. Johnson: "The Court had to justify its need for a budget in correlation to the amount of money that the court brought in. At one point during this period the Court was threatened to be evicted from the City building and left to find its own resources to rent space to carry out its duties." See also letter of then District Court Judge Susan Moiseev.

- Chief Judge of the 45th District Court Michelle Friedman Appel: ". . . it is and always has been the position of the City of Oak Park that our budget allocation is not predicated on the needs of the Court, but is tied exactly to the amount of revenue we generate through fines and costs. It has long been, and continues to be, the City's position that any reduction in revenue generated by fines and costs, whatever the reason, automatically necessitates a reduction of the Court's budget."

- Anonymous District Court Judge on what staff told them in response to "low" financial assessments: "Judge, we've got to train you better; you're not providing for the family with fines and costs like that." "Judge, you're never going to be able to get that fancy courtroom technology you want if you keep giving all that credit for fines and costs." "We've got to feed the family." [200a-211a].

Local funding units are squeezing courts to impose these costs. The people who work beside judges every day are imploring judges to impose

more costs to "feed the family." No one can seriously argue this does not offer a "temptation."

The widespread appearance of impropriety regarding these unfair costs is worsening. Defendants have been challenging these impositions for more than a decade. This Court acted in *Cunningham* and has refused to act since. But the challenges keep coming. At least three times this Court has denied leave on challenges similar to Mr. Ormsbee's.[7] At least three cases are currently pending in the Court of Appeals or Circuit Court.[8] At least four other cases are currently pending before this Court with similar challenges.[9] Some of those contain additional evidence of the widespread perception of the impropriety of imposing these unfair costs. Mr. Aaron Field's case, for example, contains affidavits from people who believe sentencing judges get a "commission" or "cut" of the costs they impose. See *People v Field* (Docket No. 169734). People believe judges "can exercise their power as they want." *Id*. Given that judges are encouraged to use these costs to bolster the technology in their courtrooms, and that court staff rely on judges to "feed the family," the perception that judges are taking a "cut" is at least arguably accurate. Whether judges can "exercise their power as they want" is up to this Court.

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[7] *People v Jones*, 18 NW3d 315 (2025); *People v Kincaid*, 19 NW 3d 339 (2025); *People v Pritchard*, 19 NW3d 368 (2025); *People v Hudson*, 19 NW3d 346 (2025).

[8] *People v Smith* (Docket No. 379812); *People v King* (Docket No. 370135); *People v Portis* (Wayne County Docket No. 21-006468-01-FC).

[9] *People v Adkins* (Docket No. 169057); *People v Field* (Docket No. 169734); *People v Field* (Docket No. 169736); *People v Saeed* (Docket No. 168586).

III. MCL 769.1k(1)(b)(*iii*) is unconstitutional as applied to Mr. Ormsbee as it violates the Distinct Statement Clause.

Standard of Review

Appellate courts review de novo both questions of statutory interpretation and questions of constitutional law. *Vanderpool*, 505 Mich at 397.

Issue Preservation

Mr. Ormsbee preserved his objections to the trial court's imposition of an unconstitutional sentence by raising it in a proper motion to remand. See MCL 769.34(10); MCR 6.429(C); *Kimble*, 470 Mich at 311-12 (2004).

Discussion

The Distinct Statement Clause requires that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." Const 1963, art 4, § 32. This provision has not received much attention in recent years, and its text has changed in its most recent iteration. But, it has to mean something. And if it means anything, it must at least mean that a tax which is directed to specific uses cannot in practice be funneled to non-specified uses. That is exactly what is happening with MCL 769.1k(1)(b)(*iii*), so it is unconstitutional as applied to Mr. Ormsbee.[10]

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[10] The Court's order directed the parties to address whether MCL 769.1k(1)(b)(*iii*) is unconstitutional facially or as applied to Mr. Ormsbee. The statute is facially constitutional with regard to the Distinct Statement Clause. If the money collected from MCL

A. The Distinct Statement Clause, Generally.

As a threshold matter, MCL 769.1k(1)(b)(*iii*) imposes a tax, as addressed in Issue I, Section B *supra*. So, it must comply with the Distinct Statement Clause. To understand the Distinct Statement Clause's purpose, we can look to *Westinghausen v People*, 44 Mich 265, 266-267 (1880). As included in the 1850 Constitution, the Distinct Statement Clause read:

> Every law which imposes, continues or revives a tax shall distinctly state the tax, and the objects to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object. [Const 1850, art 14, § 14.]

Westinghausen noted the clause's "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." 44 Mich at 267. As such, *Westinghausen* directed, "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." *Id.*

There, the tax in question was a tax imposed on people selling liquor. *Id.* at 266. The tax was to be collected by the county treasurer and placed to the credit of the contingent fund of the township, city, or village from which it was collected, and paid over to a local officer. *Id.* at 267. The

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769.1k(1)(b)(*iii*) went to its specified uses the Distinct Statement Clause would be satisfied. So, it is not true that "no set of circumstances exists under which the act would be valid." *In re Request for Advisory Opinion*, 479 Mich at 11. However, that would only exacerbate the Separation of Powers and Due Process problems with the statute. Further, that is not what happens in practice.

defendant, who sold liquor without paying the tax, argued that a contingent fund was not a specific enough recipient of the tax. This Court disagreed, noting that this proved too much insofar as it would invalidate any contingent fund. *Id*. But, even at this outer boundary, the proceeds from the tax went into a discrete fund specified by the statute.

The 1963 Constitution carried over the Distinct Statement Clause but revised it to its present form, deleting the requirement for specifying where taxed funds are allocated to. "In a complex system of taxation, when the proceeds of one general tax may be devoted to many different purposes, this seems obsolete." 1 Official Record, Constitutional Convention 1961, p 36. The Distinct Statement Clause has not often been discussed since then.

As mentioned above, MCL 769.1k(1)(b)(*iii*) was challenged under the Distinct Statement Clause in *Cameron*. That was a facial challenge where the defendant bore the burden to show that "no set of circumstances exists under which the [a]ct would be valid." *Judicial Attorneys Ass'n v State*, 459 Mich 291, 303 (1998). There the defendant had argued MCL 769.1k(1)(b)(*iii*) "does not reveal that it is creating a tax, does not establish a 'rate of calculation,' does not specify or limit the amount a court may charge, and does not clarify what proportion of the court's operating and maintenance costs criminal defendants will bear." 319 Mich App at 229. The *Cameron* panel reasoned that because courts had an "obligation to 'establish a factual basis'" and because it was meant as a "curative measure" to *Cunningham* the legislature had not been misled.

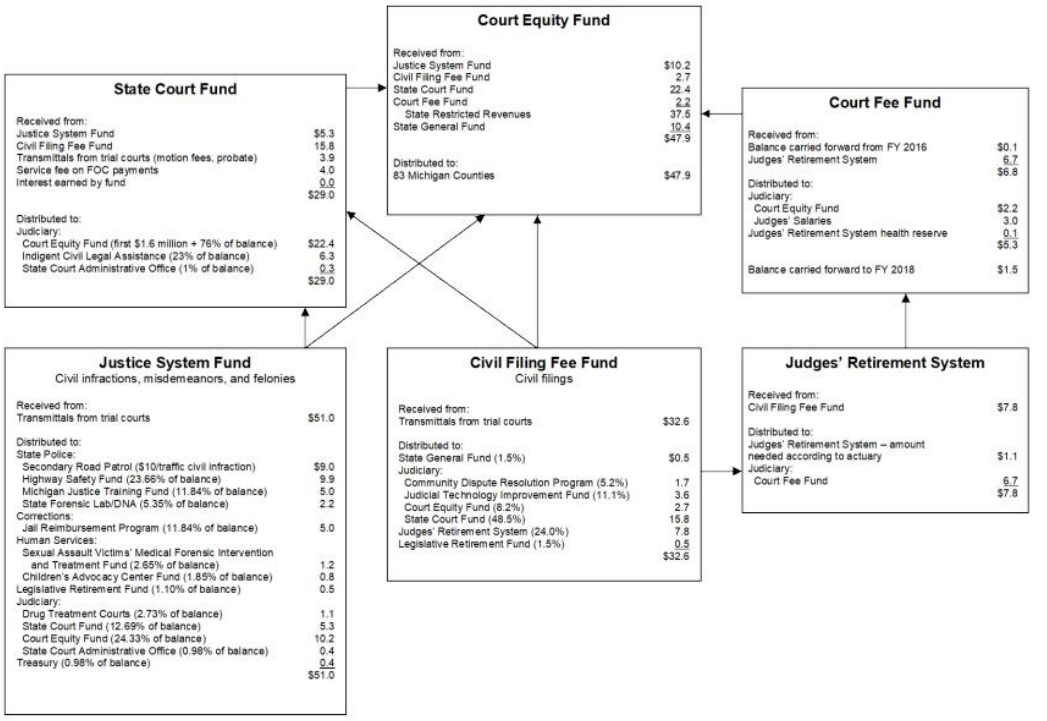
However, that was a facial challenge. In that context, a challenger of a statute "must establish that no set of circumstances exists under

which the [a]ct would be valid." *Judicial Attorneys Ass'n v State*, 459 Mich 291, 303 (1998). But there is a theoretical set of circumstances in which MCL 769.1k(1)(b)(*iii*) would be valid: if the funds taken from criminal defendants for the purposes listed in the statute went to those purposes. Here, however, Mr. Ormsbee challenges MCL 769.1k(1)(b)(*iii*) as it is applied to him in that the funds do not go where MCL 769.1k(1)(b)(*iii*) directs them.

B. MCL 769.1k(1)(b)(*iii*) is Unconstitutional as Applied to Mr. Ormsbee

The question for this Court now is whether the real world application of MCL 769.1k(1)(b)(*iii*) has resulted in the Legislature 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." *Cameron*, 319 Mich App at 229 quoting *Gillette Commercial Operations North America & Subsidiaries v Department of Treasury*, 312 Mich App 394 (2015). Yes, it has. MCL 769.1k(1)(b)(*iii*) very specifically lists where court costs assessed against criminal defendants are supposed to go. But they don't go there. They go here:

EXHIBIT 3. 2017 Court Equity Funding Sources (in millions)



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47a.

For example, consider the "Justice System Fund" that receives "transmittals from trial courts" in cases regarding "[c]ivil infractions, misdemeanors, and felonies." *Id.* That money is then distributed to, among other things, the State Police's Highway Safety Fund, and the Legislative Retirement Fund. *Id.* Furthermore, over ten percent of the Justice System Fund is transferred to the "State Court Fund," which is then distributed to, among other things, an Indigent Civil Legal Assistance program. *Id.* These uses of Mr. Ormsbee's court costs are not "reasonably related to the actual costs incurred by the trial court." MCL 769.1k(1)(b)(*iii*). Nor are they any of the statute's enumerated purposes. E.g. MCL 769.1k(1)(b)(*iii*)(A) ("Salaries and benefits for relevant court personnel.").

Although the statute is clear where funds collected as court costs are supposed to go, they instead filter through a byzantine system which atomizes and scatters every dollar it touches. How could the Legislature, or anyone for that matter, know where collected court costs end up?

The changes to the Distinct Statement Clause and commentary from the convention bear a bit more discussion. Language was deleted, and the explanation was that "[i]n a complex system of taxation, when the proceeds of one general tax may be devoted to many different purposes, this seems obsolete." 1 Official Record, Constitutional Convention 1961, p 36. But in MCL 769.1k(1)(b)(*iii*) the Legislature did not create a "general tax" made to be "devoted to many different purposes." The text of the statute is very clear. It has three specific purposes:

> (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. [MCL 769.1k(1)(b)(*iii*).]

Notable omissions from MCL 769.1k(1)(b)(*iii*)'s stated purposes are the State Police's Highway Safety Fund, the Legislative Retirement Fund and Indigent Civil Legal Assistance. These uses are not authorized by MCL 769.1k(1)(b)(*iii*), and using Mr. Ormsbee's tax dollars for this clearly amounts to "furnishing money that might, by some indirection, be used for objects not approved by the legislature." 44 Mich at 267.

Conclusion and Relief Requested

For the reasons discussed above, Mr. Ormsbee respectfully requests that this Honorable Court strike down MCL 769.1k(1)(b)(*iii*) as unconstitutional and vacate Mr. Ormsbee's court costs.

Respectfully submitted,

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