State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Kelwin Dwayne Edwards

Defendant-Appellant.

MSC No. 163942

COA No. 354647

Wayne County Circuit Court
Case No. 13-029-01-FC

Mr. Edwards's Reply Brief

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I. MCL 769.1k(1)(b)(iii) empowers judicial tax assessment, not cost collection, and in a system of separated powers judges do not assess taxes.

In his opening brief, Mr. Edwards advanced a narrow rule: MCL 769.1k(1)(b)(iii) violates separation of powers because it turns judges into tax assessors. By design, the statute tasks judges with raising revenue to fund the county court system, and judges have discretion to decide who to tax and how much tax to assess. In a system of separated powers, legislators—not judges—raise tax revenue to pay for public services like the court system. Legislators—not judges—decide who to tax and how much to tax. Plus, assessing taxes is almost impossible to disassociate from partisan political wrangling, so asking judges to make county tax policy threatens the nonpartisan character of our judiciary. For all those reasons, tax assessment is a task more properly accomplished by the Legislature, and MCL 769.1k(1)(b)(iii) violates separation of powers.

In response, both the Attorney General and the Legislature try to place a different frame around the statute. They say MCL 769.1k(1)(b)(iii) does no more than permit judges to do what they've always done: assess court costs upon entry of judgment. Legislature's Brief, 7-9; AG's Brief, 10 n 3. Per the statute's plain language, the judge charges an individual in an amount "reasonably related to the actual costs," i.e., something close to covering the government's expenses for a service provided. So, says the state, MCL 769.1k(1)(b)(iii) asks judges to add a user fee to a judgment of sentence. See *Rouge Parkway Associates v City of Wayne*, 423 Mich 411, 420 n 5 (1985) (explaining that a user fee covers the costs of a government service). AG's Brief, 9-10.

Framing MCL 769.1k(1)(b)(iii) as a court-costs statute elevates form over function. It is true MCL 769.1k(1)(b)(iii) labels any monetary payment an assessment of "costs." But it is also true that " 'legislative labeling cannot preclude judicial determination, or excuse a court from its responsibility to give realistic construction to terms employed in statutes.' " *People v Johnson*, 336 Mich App 688, 707 (2022) (Shapiro, J., dissenting), quoting *People v Barber*, 14 Mich App 395, 401 (1968).

People v Cameron has already given MCL 769.1k(1)(b)(iii) a realistic construction. The statute assesses a tax. *People v Cameron*, 319 Mich App 215, 227-228 (2017). A tax is a compulsory payment that raises revenue to fund public services; user fees are one-time payments meant to cover some portion of the actual costs of a discrete service, like an auto registration or a fishing permit. To differentiate between the two, courts apply a three-part test: (1) does the charge regulate behavior or raise revenue, (2) is the charge proportionate to the "necessary costs of the service to which it is related[,]" and (3) does the person paying have a chance to "refuse or limit its use of the service to which the charge is related." *Westlake Transp, Inc v Pub Serv Com'n*, 255 Mich App 589, 614 (2003); see also *Cameron*, 319 Mich App at 224-227.

Begin with the first prong—regulation or revenue. "Undeniably, 'MCL 769.1k(1)(b)(iii) raises revenue.' " *Johnson*, 336 Mich App at 701, quoting *Cameron*, 319 Mich App at 224. The statute permits judges to assess an amount greater than the actual costs of an individual prosecution. Charging an individual more than the cost of a service provided is a hallmark of a tax. *Rouge Parkway Associates v City of Wayne*, 423 Mich 411, 419 (1985); *Gorney v Madison Hgts*, 211 Mich App 265, 268 (1995) ("where revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise").

What's more, *Cameron* makes clear the revenue raised goes to providing a public service—the criminal court system. *Cameron*, 319 Mich at 223, 226-227. Raising revenue to fund a public service is what taxes do. *Rouge Parkway Associates*, 423 Mich at 424 (Cavanagh, J., concurring) ("If the collection fee was designed to raise revenue for general public purposes, rather than to cover specific governmental expenses, it is in reality a tax.").

Turn to the second part of the tax/fee test. MCL 769.1k(1)(b)(iii) has a proportionality problem. Proportionality is an indicator of a user fee: every individual using a service pays for the service and receives a benefit in line with the amount paid. *Cameron*, 319 Mich App at 224-227.

Those convicted of a crime are not the only users of the court system and the court system 'benefits primarily the public, not the defendant."

Id. Yet people convicted of a crime are the only ones that pay, MCL 769.1k(1), and they pay for the benefits conferred upon everyone else, *Cameron*, 319 Mich App at 227. That disproportionality between who pays and who benefits points in the direction of a tax, not a user fee. *Id.*

Finally, consider the test's third part, whether a person can avoid paying. Taxes are involuntary contributions, *Dukesherer Farms, Inc v Director of the Dep't of Agriculture*, 405 Mich 1, 15 (1979), and MCL 769.1k(1)(b)(iii) imposes an involuntary payment. Unlike hunters, fishermen, or drivers—who can choose to forego public services entirely—a person charged with a crime has no ability to opt out of the court system. Nor can a person avoid payment by limiting their use of the courts. Even a guilty plea may lead to a monetary penalty. See *Cameron*, *supra,* at 228. Once payment is assessed, failing to pay on time triggers a late fee. MCL 600.4801; MCL 600.4803. Failing to pay at all may lead to incarceration. MCL 769.1k(10).

The state cannot frame away the basic problem here. What MCL 769.1k(1)(b)(iii) does is empower judges to assess a tax to fund the court system. *Cameron*, *supra.* What it does not do is charge a user fee to cover the actual costs of a service provided. So, even if Michigan has a long history of allowing judges to tack a user fee (court costs) onto a final judgment, MCL 769.1k(1)(b)(iii) breaks from that history.

Resisting that conclusion, both the Legislature and the AG emphasize *People v Wallace*, 245 Mich 310 (1929). There, this Court vacated a trial court's arbitrary bill of costs and remanded with a reminder: "costs imposed must bear some reasonable relation to the expenses actually incurred in the prosecution." *Wallace*, 245 Mich at 314. The state says the language of MCL 769.1k(1)(b)(iii) tracks the holding in *Wallace*, and that synergy proves the statute imposes costs, not taxes. Legislature's Brief, 9; AG's Brief, 9-10.

A contextual read of *Wallace* shows the case does not support the state's position. But first, the facts. It's May 1927, Prohibition in South Haven. 2a. Two unknown men approach the constable and tell him a truck full of booze is set to pass through the town later that night. 3a. A few hours later, Joe Wallace comes rolling down from Grand Rapids in an REO Speedwagon. 26a. Police pull Wallace over—they say he had a

headlamp out. 26a-27a. Wallace tells the officers he has a load of films destined for movie palaces in Benton Harbor and St. Joseph. 27a. But Wallace can't name a single movie theater in either town. 27a.

Without a warrant, police search the truck. 27a-28a. They find beer and ale. 27a-28a. They arrest Wallace. He is convicted of violating a Prohibition-era, liquor-control law. 45a. The court sentences Wallace to a jail term and orders Wallace to pay $250 in court costs. 46a.

Primarily, *Wallace* was an early Fourth Amendment case. Wallace's lawyer focused on the legality of the search and arrest. 6a-11a. But in one paragraph of argument, Wallace also challenged the $250 in court costs as "arbitrary." 11a-12a. Wallace's lawyer went out on a limb: "the prosecuting attorney will not claim on the argument of this cause that the taxable costs exceed the sum of $25." 12a.

But the prosecutor did not so stipulate. 19a-20a. Instead, the prosecutor said $250 in costs was proper and sought reimbursement for "the time of the circuit judge, the prosecuting attorney, the county stenographer, the clerk and his deputy, besides that of the officers and others in trying to locate" Wallace. 19a-20a. Only by the "court arbitrarily assessing these costs" could the local government be made whole. 20a.

This Court rejected the prosecutor's argument. After considering the entire record, the Court agreed with Wallace and said actual costs could not have exceeded $25. *Wallace*, 245 Mich at 314. From there, this Court had no trouble concluding the "$250 imposed is far in excess of the actual costs of prosecution." *Id.*

Wallace does not make MCL 769.1k(1)(b)(iii) constitutional. In *Wallace*, a 1920s prosecutor insisted court costs should include the salaries and incidentals for the judge, the clerk's office, the prosecuting attorney, and the investigating police officers, essentially the entire system. This Court rejected that argument. Yet here, a 2020s prosecutor relies on *Wallace* to support a modern rehash of the rejected argument: "costs" include the salaries and goods and services and buildings necessary to run the court system. Just as this Court rejected the argument in the 1920s, so too should this Court reject it today.

A. The Legislature cannot relinquish its power to assess taxes and cannot task judges with inherently nonjudicial responsibilities.

The AG and the Legislature insist Mr. Johnson (and, by extension, Mr. Edwards) has separation of powers all wrong. According to the state, our Constitution does not require a strict separation of powers. AG's Brief, 5-6; Legislature's Brief, 3. Instead, separation of powers permits a flexible approach to public policy, emphasizing interbranch cooperation, play in the joints, and overlapping powers. Legislature's Brief, 4-5.

The state's argument goes like this: a "limited and specific" sharing of power *may* pass constitutional muster provided the power sharing arrangement does not encroach on another branch's power or aggrandize power in one branch. *Judicial Attorneys Ass'n v State*, 459 Mich 291, 296 (1998); AG's Brief, 7; Legislature's Brief, 3-4.

Mr. Edwards has never advocated for a strict separation of powers. Although, this Court's precedent does give him grounds to make such an argument. See, e.g., *Local 170, Transp Workers Union of Am, CIO v Gadola*, 322 Mich 332, 347 (1948) ("The opinions of this Court indicate that [separation of powers] is to be strictly applied."). Regardless, this case does not require this Court to decide between strict separation or play in the joints.

Under any conception of separated powers, judges do not assess taxes. *Houseman v Kent Circuit Judge*, 58 Mich 364, 367 (1885). Levying taxes is "not judicial in nature," *Houseman*, 58 Mich at 367, and it violates separation of powers to assign judges tasks that are "inherently nonjudicial[,]" *Mistretta v United States*, 488 US 361, 387 (1989). Tax assessment "belong[s] to the administrative branch of the government[,]" *Houseman*, 58 Mich at 367, and the Legislature cannot enlist the judiciary to carry out "executive or administrative duties of a nonjudicial nature[,]" *Morrison v Olson*, 487 US 654, 677 (1988).

Dividing the powers of government into three branches serves as a check on the Legislature's power to "mak[e] the law." *In re Certified Questions From United States Dist Court, W Dist of Michigan, S Div*,

506 Mich 332, 357 n 16 (2020). In passing a law, the Legislature cannot make itself more powerful *or* "relinquish[] its own powers to another branch." *Id.*

Relinquishing the taxing power is exactly what MCL 769.1k(1)(b)(iii) accomplishes. Instead of passing a bill to better fund the courts, the Legislature passed a statute directing trial courts to fund themselves. The statute foists the unpopular task of tax assessment onto the judiciary, disguises a revenue-generation scheme as cost collection, and imposes the tax as part of a criminal sentence. If ever a wolf wore sheep's clothing, MCL 769.1k(1)(b)(iii) fits the bill.

Finally, the Legislature suggests MCL 769.1k(1)(b)(iii) survives a separation of powers challenge because it does no more than task judges with *gathering* taxes. Legislature's Brief, 10-11. Other states permit judges to gather taxes. Legislature's Brief, 11. But our state does not. *People v Cameron*, 504 Mich 927; 929 NW2d 785, 786 (2019) (McCormack, C.J., concurring in denial of leave) (doubting MCL 769.1k(1)(b)(iii)'s constitutionality because it "assign[ed] judges to play tax collector" to raise revenue for the courts); *Barber*, 14 Mich App at 405 ("Courts are not tax-gatherers.")

B. Michigan's Constitution does not allow judges to assess taxes as punishment for a criminal offense.

The AG sees no separation-of-powers problem where a court makes someone pay as part of a criminal sentence. AG's Brief, 5-6. The AG's argument builds from constitutional text. Our Constitution directs the Legislature "to provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences." Const 1963, art 4, § 5. Accordingly, the Legislature has authority to "define the scope of permissible sentences," and the judiciary imposes individualized sentences within the set scope. AG's Brief, 6. Consistent with that "overlap of constitutional responsibilities," the state says the Legislature has made the "broad policy decision" to have "convicted offenders" pay for the court system as part of their sentence. AG's Brief, 7.

The state's argument relies on the same problematic reframe as above. MCL 769.1k(1)(b)(iii) is about tax assessment, not cost collection. What the state urges is a read of our Constitution permitting judges to assess a tax as punishment for a crime. But that can't be right. See *Johnson*, 336 Mich App at 702-704 (Shapiro, J., dissenting) (explaining why a tax as punishment violates a host of constitutional protections). At a minimum, taxes lack proportionality, see *Westlake Transp, Inc*, *supra*, so assessing a tax as punishment necessarily risks a disproportionate sentence every time.

Also, the AG's read of the indeterminate-sentencing clause is in tension with the text. As the AG concedes, nowhere does Article 4, §5 mention monetary penalties. AG's Brief, 6. At most, the text says "indeterminate *sentences*." It could be the AG believes "sentences" encompass deprivations of property, in addition to deprivations of liberty. But taking "indeterminate sentences" in context, the framers limited the phrase's meaning only to deprivations of liberty. After directing the Legislature to set "indeterminate sentences," the clause then gives the Legislature power to provide for "the detention and release of persons *imprisoned or detained under such sentences*." Connecting "imprisoned or detained" with "such sentences" strongly suggests that Article 4, § 5 codifies a common legal understanding in Michigan—an indeterminate sentence means a deprivation of liberty featuring a lower bound and an upper bound. *People v Wright*, 432 Mich 84, 92 (1989), citing *People v Tanner*, 387 Mich 683 (1972).

Bolstering that read, Michigan has no common practice of imposing indeterminate monetary penalties. Indeed, the court made Mr. Edwards pay a set amount: $1300. The court did not order Mr. Edwards to pay $5 to $1300 and leave it to the parole board's discretion to decide when Mr. Edwards had paid enough.

MCL 769.1k(1)(b)(iii) violates separation of powers. The statute tasks judges with tax assessment, tax assessment belongs to the Legislature, and Michigan has no historical practice of allowing judges to make tax policy. As the AG concedes, the remedy is to sever the statute and reimburse Mr. Edwards. AG's Brief, 20.

II. An objective risk or appearance of bias, standing alone, violates the due process right to a neutral arbiter. Mr. Edwards has proof of an objective risk of bias.

MCL 769.1k(1)(b)(iii) violates the due process right to a neutral arbiter. The statute empowers judges to raise revenue for their own courts. Judges fund themselves by imposing a monetary penalty upon those convicted of a crime, and the monetary penalty is included in the judgment of sentence. Such a scheme creates an objective risk of bias at sentencing. By imposing higher monetary penalties and/or imposing monetary penalties on more convicted individuals, the sentencing judge raises more money for the court and appears to punish a person based on the court's fiscal circumstances, not the circumstances of the offense and offender.

In urging this Court to reject that argument, the AG sees no objective risk of bias because nobody has identified an actually biased judge. AG's Brief, 15-16. Absent evidence of a bad actor charging more because the court needs money, there is no reason to think MCL 769.1k(1)(b)(iii) creates an objective risk of bias. AG's Brief, 16.

The state's argument undervalues "the difficulties of inquiring into actual bias[.]" *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 883 (2009). Actual bias does not operate like a shark bite or lightning strike. When a shark bites or lightning strikes, the evidence is plain—bites and strikes leave disfiguring physical injuries. But bias lurks in the privacy of a person's mind. *Id.* And even then that person may "misread[] or misapprehend[] the real motives" at play. See *id.* In other words, a person may not realize they have a bias, or may not realize how bias sways their own decisions. *Id.*

Because bias may be at work, and *nobody* may realize it, any inquiry into actual bias "is not one the law can easily superintend or review[.]" *Id.* Enter the necessity of an inquiry into the objective risk of bias. *Caperton*, 556 US at 877, 881; *Gacho v Wills*, 986 F3d 1067, 1075 (CA 7 2021) ("Due-process claims based on judicial bias require an objective assessment of the likelihood of bias, not just a subjective assessment of actual bias."). The AG's argument collapses any distinction between actual bias and an objective risk of bias. See *Gacho*, 986 F.3d at 1075

(explaining that evidence of actual bias is *sufficient* to violate due process, but proof of actual bias is not *necessary* to show an unconstitutional risk of bias).

And the AG ignores tangible proof of the objective risk of bias. MCL 769.1k(1)(b)(iii) places real financial pressures on judges. See Brief of Michigan District Judges Association, p 18-21. One Michigan judge described the pressure "to fund themselves and their counties as 'a corrupting presence in each and every criminal case.' " Brief of Michigan District Judges Association, p 21.

The AG discounts that "corrupting presence" because *Dugan v State of Ohio*, 277 US 61 (1928) approved of a judge raising revenue. In *Dugan*, the judicial officer had a "remote" connection to the money raised, so the Supreme Court found no due process violation. *Dugan*, 277 US at 65. According to the AG, Michigan's judges are in materially the same position as the mayor in *Dugan*. AG's Brief, 12-13.

Legally, the AG glosses over some key distinctions between *Dugan* and here. Most importantly, the mayor in *Dugan* was not forced into the "dual role" that raises due process concerns. *See Ward v Village of Monroeville*, 409 US 57, 60 (1972) (explaining that the union of "the executive power and the judicial power" risks making a mayor-judge "partisan" to impose harsher monetary penalties and thus violates due process); *Tumey v State of Ohio,* 273 US 510, 534 (1927) ("A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law"). In *Dugan* the mayor exercised only judicial authority. *Dugan*, 277 US at 65. A town manager handled the executive tasks, others handled legislative business, and the mayor received the same salary regardless of their decisions in mayor's court. *Id.*

Factually, Michigan's judges are not in the same position as the mayor in *Dugan*. Many Michigan judges "are told by their funding units that they have to cut hundreds of thousands of dollars from their budget if the court does not generate more revenue." Brief of Michigan District Judges Association, p 20. Courts are pressured to be their "own source of funding." *Id.* If judges fail to fund themselves, they face eviction, staff

furloughs, even layoffs. *Id.* At 20-21. The financial pressure on judges is more real than remote.

The AG also overlooks the part of *Dugan* helpful to Mr. Edwards. Here's how *Dugan* framed the due process violation in *Tumey*:

> [A] defendant brought into court might with reason complain that he was not likely to get a . . . fair sentence from a judge who as chief executive was responsible for the financial condition of the village . . . and who by his interest as mayor might be tempted to accumulate from heavy fines a large fund by which the running expenses of a small village could be paid, improvements might be made, and taxes reduced. *Dugan*, 277 US at 65.

As *Dugan* recognized, a judicial officer with an institutional incentive to raise revenue could do so either by imposing monetary penalties on more people or by imposing higher amounts. That perverse incentive for a sentencing court to deprive a person of their property based on circumstances unrelated to the person's culpability created an objective risk of bias and violated due process.

MCL 769.1k(1)(b)(iii) creates the same risk of bias. It forces Michigan's judges to "occup[y] two practically and seriously inconsistent positions, one partisan and the other judicial[.]" *Tumey,* 273 US at 534. Judges have the power to assess a monetary penalty at sentencing, but a risk of bias arises because the monetary penalty ultimately funds the judge's court and staff. Such a scheme appears to "make [the judge] partisan to maintain the high level of contribution" from the convicted individuals appearing before the court. *Ward*, 409 US at 60. One Michigan judge said exactly that: the funding scheme "creates an 'unconstitutional pressure to create revenue by charging higher fines and costs to the defendants we are constitutionally-required to impose a fair and unbiased sentence to.' " Brief of Michigan District Judges Association, p 20.

Because the risk of bias is real, MCL 769.1k(1)(b)(iii) violates due process.

Conclusion and Relief Requested

MCL 769.1k(1)(b)(iii) violates separation of powers and due process. In a system of separated powers, the judiciary is a nonpartisan, coequal branch of government that has all the power to say what the law is and none of the power to levy taxes to fund public services. To protect and promote the rule of law, judges must always act, and appear to act, as neutral arbiters of the case or controversy before them. Asking sentencing judges to fund the courts on the backs of convicted individuals creates an objective risk of judicial bias. This Court should sever the statute and reimburse Mr. Edwards.

Respectfully submitted,

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Respectfully submitted,

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