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State of Michigan
In the Supreme Court

People of the State of Michigan

Plaintiff-Appellee,

v.

Kelwin Dwayne Edwards

Defendant-Appellant.

Michigan Supreme Court No. 163942

Court of Appeals No. 354647

Wayne Circuit Court No. 13-029-01 FC

Mr. Edwards's Supplemental Brief

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Statement of the Questions Presented

First Question

By turning judges into tax assessors, does MCL 769.1k(1)(b)(iii) violate separation of powers?

Second Question

Does MCL 769.1k(1)(b)(iii) violate due process by creating a risk of or potential for judicial bias at sentencing?

Third Question

Should this Court sever MCL 769.1k(1)(b)(iii) and order the circuit court to reimburse Mr. Edwards?

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Introduction

MCL 769.1k(1)(b)(iii) empowers sentencing courts to assess a tax on those convicted of a crime. Sentencing courts have discretion over who pays and how much to charge. The tax revenue generated ultimately funds the daily operation of the county courts.

The statute violates separation of powers. Legislators, not judges, decide who to tax and how much to assess.

The statute also violates due process. Because only those convicted of a crime pay this tax as part of their sentence, it appears to be a punishment. Appearing to raise court revenue as retribution creates an objective risk of judicial bias at sentencing.

This Court should invalidate MCL 769.1k(1)(b)(iii), sever the statutory section, and order the circuit court to reimburse Mr. Edwards.

Statement of Facts

A jury convicted Mr. Edwards of two felony charges, but his convictions are not at issue on this appeal. What is at issue is a portion of his sentence. In addition to depriving Mr. Edwards of his liberty, the circuit court deprived Mr. Edwards of his property.

Although the sentencing court made no mention of any monetary penalties during the sentencing proceeding, the Judgment of Sentence directed Mr. Edwards to pay $1300, as authorized by MCL 769.1k(1)(b)(iii). *Judgment of Sentence.*

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Arguments

I. MCL 769.1k(1)(b)(iii) violates separation of powers by turning judges into tax assessors. Legislators, not judges, have the power to assess taxes.

MCL 769.1k(1)(b)(iii) assigns judges the power to assess a tax—one that raises revenue for the county treasury and, ultimately, the local courts. *People v Cameron*, 319 Mich App 215, 228 (2017). Enlisting judges to raise revenue to fund the courts violates separation of powers. Funding government services is a power assigned to the Legislature. And tax policy—who to tax and how much to impose—is a partisan, polarizing issue. To protect the judiciary's independence and nonpartisan character, judges do not assess taxes, and raising revenue for the courts is a task "more properly accomplished by [the Legislature]." *Mistretta v United States*, 488 US 361, 383 (1989).

A. The statute tasks county judges with raising tax revenue for the county treasury.

MCL 769.1k(1)(b)(iii) levies a tax. *Cameron*, 319 Mich App at 229. Taxes raise revenue to benefit the greater good by way of "exactions or involuntary contributions 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*, 405 Mich 1, 15 (1979). "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. The revenue generated comes from involuntary contributions—individuals charged with a crime have no ability to avoid using the court system and failing to pay may lead to incarceration. MCL 769.1k(10); see also *Cameron*, 319 at 228. The revenue generated ends up in the county treasury, and the county allocates the money to fund the trial courts. MCL 600.571(d); MCL 774.26; MCL 600.591; see also *Cameron*, *supra* at 223; *Konopka, supra* at 369. A well-funded court system benefits the greater public. *Cameron*, 319 Mich at 227.

The statutory scheme empowers judges to assess the tax at sentencing. MCL 769.1k(1), (1)(b). Legal and lay dictionaries all give "assess" a similar meaning. In legalese, to assess means (1) "to calculate the amount or rate of (a tax, fine, etc.)" or (2) "to impose (a tax, fine,

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etc.).” Lay dictionaries point in the same direction: to assess is “to impose a tax or other charge on.” *Random House Webster’s College Dictionary* (1997).

MCL 769.1k(1)(b)(iii)’s plain language gives courts the discretion over who to tax and how much to impose. To come up with a number, judges may consider the costs “reasonably related to the actual costs incurred by the trial court,” but are not obligated to “separately calculat[e] those costs involved in the particular case.” MCL 769.1k(1)(b)(*iii*). Judges may factor “[s]alaries and benefits for relevant court personnel[,]” any “[g]oods and services necessary for the operation of the court[,]” and “necessary expenses” for court facility upkeep. MCL 769.1k(1)(b)(iii)(A)-(C).

Cameron offers an example of a judicial tax assessment. The judges in Washtenaw County assessed a flat $1,611 “per felony case.” *Cameron*, 319 Mich App at 219. To get to that number, the circuit court determined its “ten year average annual total budget” then multiplied that number by the “average annual percentage” of felony filings to arrive at the “average annual budget” for the court’s felony prosecutions. *Id*. Dividing the average annual budget by the average number of felony filings over a 6-year period resulted in a rough average cost for each felony prosecution. *Id.* After some subtraction, the circuit court totaled a bottom-line figure of $1,611. *Id.*

Put simply, the Washtenaw Circuit Court assessed a felony-prosecution tax—but only on those convicted of felonies. The court raised revenue off convictions based on the circuit court’s overall budgetary concerns, *not* to reimburse the court for the actual cost of prosecuting a specific case.

By giving judges the discretion to assess a tax, MCL 769.1k(1)(b)(iii) violates separation of powers.

B. Our Constitution prevents one branch of government from exercising the powers of another.

Separation of powers prevents the “encroachment and aggrandizement” of power in one branch of government. *Mistretta*, 488 US at 382, 419-420 (cleaned up). Keeping any one branch from accumulating too much power staves off tyranny and safeguards

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individual liberty. See, e.g., Madison, the Federalist No 47 ("there is no liberty. . . if the power of judging be not separated from the legislative and executive powers").

Michigan's Constitution explicitly embraces separated powers. "The powers of government are divided into three branches: legislative, executive and judicial." Const 1963, art 3, § 2. The Legislature exercises the "legislative power," the Governor wields the "executive power," and the judiciary is vested with the "judicial power." Const 1963, art 4, § 1; Const 1963, art 5, § 1; Const 1963, art 6, § 1. "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.[1]

Our Constitution does not define "judicial power." But in his seminal 19th Century treatise on constitutional law, Professor Thomas Cooley termed it the power "to decide private disputes between or concerning persons[.]" Cooley, A Treatise on the Constitutional Limitations (1886), p 92. In deciding private disputes, the judiciary exercises its other well-established responsibility: "to say what the law *is*." *Makowski v Governor*, 495 Mich 465, 471 (2014), quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

That the judiciary has power to say what the law is in *private* disputes is key because the Constitution trusts the Legislature to "regulate *public* concerns, and to make law for the benefit and welfare of the state." Cooley, *supra* at p 92; see also *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 141 (2006). To provide for the public's benefit and welfare, the Legislature has the exclusive power to tax. Const 1963, art 9, § 1. See also *C F Smith Co v Fitzgerald*, 270 Mich 659, 669 (1935) (apart from specified constitutional limits, the Legislature "has full control" over taxation) and *Thompson v Auditor Gen*, 261 Mich 624, 657 (1933) ("The power of taxation is legislative in character, and the Legislature of this state has plenary power over it").

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[1] Separation of powers has long been interwoven into this state's constitutional fabric. Every one of our Constitutions has included a similar provision. See Const 1908, art 4, § 1, 2; Const 1850, art 3, § 1, 2; Const 1835, art 3, § 1.

Vesting taxing power in the Legislature goes back to first principles of representative government. To effectively provide services for the people, the government requires "officers, agents, and employees." *C F Smith Co*, 270 Mich at 668. To pay those people, the government needs revenue, and to raise revenue, the government must impose taxes on the people's property. *Id.* So long as the people taxed have the power to elect their representatives, the people guard against arbitrary and unfair taxation because "in imposing a tax the legislature acts upon its constituents." *Id.* Thus, the people's power to elect members of the Legislature checks the Legislature's power to tax the people.

C. Judges cannot be assigned the Legislature's taxing power.

Separation of powers has long prohibited Michigan's judiciary from making decisions about who to tax, how much tax to assess, and how to allocate tax revenue. *School District of City of Pontiac v City of Pontiac*, 262 Mich 338, 353 (1933) (judges interpret the law, not make it, which is why the power to tax belongs to the legislature because determining revenue sources and allocating taxes each require lawmaking), rev'd on other grounds by *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 81 (2018); *Houseman v Kent Circuit Judge*, 58 Mich 364 (1885) (invalidating a statute assigning judges the power to levy taxes in place of invalid ones).

Houseman controls here. *Houseman* involved a state law providing for "the drainage of swamps, marshes, and other low lands." 1881 PA 269, enacting §1. The drain law aimed at providing a "benefit for the public health." *Id.* It allowed counties and townships to elect or appoint a drain commissioner and assigned the commissioner considerable authority to plan for, finance, and carry out local drain construction. 1881 PA 269, §4, 6.

Functionally, the drain commissioner operated as a tax assessor. The commissioner could map out where a drain would go, determine which towns and lands benefited from the drain, and apportion the drain's construction cost among the benefiting townships and landowners. 1881 PA 269, §16-21. Once the commissioner sent out the bills, either the towns levied a drain tax or landowners paid the drain tax directly. 1881 PA 269 §21. For landowners, failing to pay drain taxes carried the same

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consequences as failing to pay other taxes—the government could take your property and sell it. *Id.*

The drain law created a distinct cause of action for landowners to challenge the drain commissioner's tax assessment. 1881 PA 269, §40. Section 40 provided that once the commissioner levied the drain tax, if a landowner identified a "manifest error" in the commissioner's work, the landowner could petition a court to appoint a surveyor to cross-check the drain commissioner's math. *Id.* If the surveyor's findings demonstrated commissioner error, the court could, among other options, "relevy" the drain tax. *Id.*

Houseman arose out of a local dispute over drain taxes. Relying on Section 40, some landowners challenged a tax assessment, and a circuit court urged the parties to seek the appointment of a surveyor so the court could determine "what, if any, portion" of the drain tax was valid against the landowners. *Id.*at 366.

Relying on separation of powers, this Court invalidated Section 40, holding that "each of the three branches of government shall be kept, so far as practicable, separate," and the judicial branch "shall not exercise the powers confided by [the Constitution] to either of the others." *Id.* at 367. Section 40 assigned to the judiciary the power to "send[] out surveyors or other persons to" find the facts the judge needed "to relevy taxes in place of invalid ones," powers "not pertain[ing] to the judicial branch of the government." *Id.* Turning judges into tax assessors doomed Section 40. *Id.*

To invalidate MCL 769.1k(1)(b)(*iii*), this Court need only apply *Houseman*. Separation of powers bars the Legislature from assigning to the judiciary powers that belong to the other branches, and *Houseman* says the power to levy taxes "do[es] not pertain to the judicial branch of government." *Houseman*, supra at 367. Just as Section 40 impermissibly turned judges into tax assessors, so, too, does MCL 769.1k(1)(b)(iii).

D. Prohibiting judges from assessing taxes preserves the judiciary's independence and nonpartisan character.

Prohibiting judges from assessing taxes is consistent with the purpose of separated powers. Judges may not assess taxes because the

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judiciary may not be assigned powers belonging to the partisan branches. *Buback v Romney*, 380 Mich 209 (1968); *Dearborn Twp v Dail*, 334 Mich 673, 682-683 (1952) (citing *Houseman* in favor of strict separation of powers); *Local 170, Transport Workers Union of America, CIO v Gadola*, 322 Mich 332 (1948); *Houseman*, 58 Mich at 367. Keeping the judiciary independent of the partisan branches preserves the judiciary's nonpartisan character. Two twentieth century cases illustrate this point.

In the 1940's, this Court examined a state law mandating arbitration for labor-management disputes within public utilities. See *Local 170, Transport Workers Union of America, CIO v Gadola*, 322 Mich 332, 333-334 (1948). The compulsory arbitration law required a judge to serve as chairperson of an arbitration board, but the board functioned like a court. *Local 170*, 322 Mich at 334. The board could subpoena witnesses, administer oaths, take testimony, compel attendance, and receive evidence. *Id.* Eventually, the board issued a binding decision—in the form of a new employment contract—to resolve the employment dispute. *Id.*

This Court struck down much of the compulsory arbitration law because it "ignore[d] the plain constitutional language that 'no person belonging to one department shall exercise the powers properly belonging to another.' " *Id.* at 345, quoting Const 1908, art 4, § 2. Citing *Houseman*, the majority concluded that the law turned judges into executive branch administrators tasked with making "difficult and far reaching inquiries into economic and social policies." *Id.* at 347. The law compelled the judge "to fix wages, hours of labor and working conditions, or, on the other hand, arbitrate as to fair returns on invested capital[.]" *Id.* Turning judges into executive-branch policy makers impaired the judiciary's independence, a critical component of democratic government: "the absolute independence of the judiciary from executive or legislative control is of transcendent import. Our form of government cannot be maintained without an independent judiciary." *Id.* at 346.

In the 1960's, this Court again confronted a threat to the judiciary's independence. Faced with the decidedly political task of removing an elected official from office, a power assigned to the executive, Governor Romney selected a probate judge to handle the actual removal

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proceedings. *Buback v Romney*, 380 Mich 209, 225-228 (1968). This Court rejected the attempted assignment. *Buback*, 380 Mich at 228.

The lead opinion in *Buback* relied on *Houseman* to support a robust separation of powers. *Buback*, 380 Mich at 220-221. When a "power is assigned to one branch of government, that power must be exercised within that branch if the doctrine of separation of powers is to be meaningful." *Id.* at 227. This Court prohibited the executive from "pick[ing] and choos[ing] statewide among the probate judges" to vest a member of the judiciary with a power assigned to the executive. *Id.* at 228.

Houseman, *Romney*, and *Local 170* distill down to one principle: a meaningful separation of powers insulates the judiciary from any obligation to exercise powers assigned to the partisan branches. Enlisting the judiciary to assess taxes, set economic and social policy, or remove elected officials jeopardizes confidence in courts as independent arbiters of the law.

Independence from the Legislature and the executive guarantees the judiciary's nonpartisan character. *Mistretta*, 488 US at 407. Assessing taxes is a public policy decision about who pays, how much, and for what. Few issues are as polarizing along party lines. Candidates for office in the partisan branches routinely mud-wrestle over who has raised, will raise, or wants to raise taxes. But citizens ought to vote for a judge because the person has qualities amenable to resolving controversies—not based on approval or disapproval of a judge's tax policy.

MCL 769.1k(1)(b)(*iii*) erodes a meaningful separation between the political branches and the judiciary. Eroding that separation threatens the judiciary's independence and constitutionally enshrined nonpartisan character. Const 1963, art VI, § 2, § 8, § 12.

The statute is unconstitutional.

E. That the judicial tax assessment occurs at sentencing does not fix the separation of powers violation

Resisting that conclusion, the state says MCL 769.1k(1)(b)(iii) is a proper exercise in judicial sentencing discretion. *People v Johnson* (Docket No. 163073), Appellee's Second Supplemental Brief on Appeal,

filed June 3, 2022, p 2-3. The state says the Legislature has the power to "define the scope of permissible sentences, and the Judiciary has the power to choose a sentence from within the scope the Legislature has defined . . . ." *Id.* at 2. Because MCL 769.1k(1)(b)(iii) permits judges to assess a tax at sentencing, the statute merely instructs the judiciary on "how to sentence those convicted of a crime." *Id*. at 3.

That a judicial tax assessment occurs at sentencing, *People v Jackson*, 483 Mich 271, 283 (2009), does not turn an unlawful exercise of the taxing power into a lawful act of judicial sentencing discretion. Even though sentencing for criminal offenses is an area where the legislative and judicial branches share responsibility, see, e.g., Const 1963, art 4, § 45*,* judges do not have the power to assess taxes, at any time.

Revenue generation is unlike any of the judge's responsibilities at sentencing. While tax assessment is a consequential decision requiring thoughtful deliberation, determining how much revenue to raise for the county treasury has nothing to do with an individual's culpability or capacity for change. See *People v Snow*, 586 Mich 586 (1972).

Nor is raising tax revenue equivalent to ordering restitution. Appellee's Second Supplemental Brief, 3. Restitution orders attempt to resolve a discrete dispute between a crime victim and the person convicted of committing the crime. In entering a restitution order, the judge must calculate the losses sustained by the victim resulting from the course of criminal conduct. *People v McKinley*, 496 Mich 410, 419 (2014), citing MCL 780.766(2). A judge's authority to order restitution in an individual case does not permit a judge to raise revenue to fund a public service.

Mistretta does not suggest a different result. *Mistretta* found no federal separation of powers violation where federal judges voluntarily participated in a sentencing commission tasked with promulgating federal sentencing guidelines. 488 US at 412. Sitting on a sentencing commission did not blend judicial and legislative power. *Id.* at 393. The judges on the commission did not exercise their judicial power, and the commission did not legislate. *Id.* at 407-408. Judges offered their expertise to set guidelines to "rationalize" criminal sentencing, a process "performed exclusively by the judicial branch." *Id.* at 407.

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In sharp contrast, MCL 769.1k(1)(b)(iii) empowers sentencing courts to decide who to tax and how much to assess, and that does impermissibly blend judicial and legislative authority. Cf. *Mistretta*, 408 US at 404 ("the Constitution . . . does not forbid judges to wear two hats; *it merely forbids them to wear both hats at the same time*.").

F. Neither historical practice nor precedent permit judges to assess taxes.

In an amicus brief supporting the state's position, the Legislature insists our system of separated powers has always permitted the judiciary to fund itself. *People v Johnson* (Docket No. 163073), Amicus Brief of the Michigan Senate and the Michigan House of Representatives, filed June 30, 2022. But the Legislature's argument conflates county funding of county courts with county *judges* generating revenue for county courts. The former, although ill-advised, is constitutionally permissible. See *Grand Traverse Co v State*, 450 Mich 457, 474 (1995) (finding no constitutional obstacle to the Legislature enlisting counties to fund the courts but noting that "numerous cases addressing conflicts about court funding . . . demonstrate the need for continuing efforts by the judicial, legislative, and executive branches" to reform court funding). County funding for county courts is permissible because those responsible for making funding and taxing decisions are policy makers working for the branches tasked with policy making, and they are ultimately (and appropriately) politically accountable for their funding decisions.

The Legislature does not cite a single case in which county judges have been permitted to assess taxes. The Legislature comes closest with *Union Tr Co v Durfee*, 125 Mich 487, 494 (1901). House and Senate Amicus, 12.

Durfee involved a dispute over an inheritance tax. In 1899, the Legislature imposed a five percent levy on the "transfer of any property, real or personal" valued at more than $500. 1899 PA 188, §1. Calculating the value of the estate turned on an appraiser's assessment of the estate's "clear market value." *Id.* The county treasurer handled the administration and payment of the tax. 1899 PA 188, §3. The treasurer collected the monies and sent them to the state treasury. 1899 PA 188, §3, 20. If an estate ended up in probate court, the judge could settle any

factual disputes about the estate's value and determine how much of the estate was subject to the inheritance tax, which enabled the court to calculate the estate's tax bill based on the legislatively imposed flat five percent. 1899 PA 188, §10, 13.

In *Durfee*, this Court saw no issue with the powers assigned to the probate court. 125 Mich at 494. The law empowered probate judges to do what they usually do: resolve factual disputes about the value of an estate and apply a legislatively determined formula to determine the estate's tax liability. *Id.* at 495. Nowhere did this Court approve of the judiciary exercising discretion over whether to tax, who to tax, or how much to assess, as is the case with MCL 769.1k(1)(b)(iii). Nor did the inheritance tax permit the county courts to raise revenue for the county treasury. Instead, courts made the factual determinations required in an individual case and issued orders applying the law in each probate case before them.

Apart from *Durfee*, the Legislature traces a separation of powers argument from historical example. Going back to the 1940s, a host of statutes, and a few cases, permit judges to impose costs of prosecution. House and Senate Amicus, 10-12 & n 1-4; see also *In re Johnson*, 104 Mich 343 (1895). The Legislature suggests these statutes and cases sap the force of any separation-of-powers challenge to MCL 769.1k(1)(b)(*iii*).

However, some of the historical statutes referenced by the Legislature deal with the imposition of costs in civil cases. See, e.g., 1846 RS, ch 92 §3, 57. Civil costs more closely resemble a user fee rather than a tax because civil litigants can choose whether to use the court system to referee a private dispute. Individuals convicted of a felony have no such option. *See Cameron,* 319 Mich App at 227-228.

Some of the historical statutes do involve cost collection in criminal cases. But the Legislature's argument ignores a constitutionally significant distinction. Recouping the costs of prosecution has always been limited to something very close to the actual, individualized costs of a particular prosecution. See *People v Wallace*, 245 Mich 310, 314 (1929) (reversing a trial court's imposition of $250 in court costs, permitted by a criminal statute, because the actual costs of prosecution were closer to $25 dollars); *People v Barber*, 14 Mich App 395, 403 (1968) (striking down a law funding police academies with a ten percent special

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assessment imposed by the judge at sentencing because the assessment had no "reasonably direct relation to actual costs"). Cost collection in criminal cases has never been a vehicle to fund the day-to-day operations of the courts. *Saginaw Public Libraries v Judges of 70th Dist Ct*, 118 Mich App 379, 388 (1982) ("Costs imposed must reasonably relate to the costs of the prosecution of a civil infraction violation *and cannot include the costs of the daily operation of the courts or other governmental units*" (emphasis added)); see also *Johnson*, 336 Mich App at 703-704 (Shapiro, J., dissenting).

G. MCL 769.1k(1)(b)(iii) is not a permissible delegation of Legislative power.

The Legislature wrongly asserts MCL 769.1k(1)(b)(iii) is a proper delegation of the taxing power to the judiciary. House and Senate Amicus, 18. The Legislature can only delegate to the judiciary functions "that do not trench upon prerogatives of another branch and are appropriate to the central mission of the judiciary." *Mistretta*, 488 US at 388. The judiciary's central mission is dispute resolution and legal interpretation, not revenue generation; it is the Legislature's prerogative to assess taxes. *Pontiac*, 262 Mich at 353; *Houseman,* 58 Mich at 367.

MCL 769.1k(1)(b)(iii) violates the Michigan Constitution, which explicitly provides for separated powers, and this Court's precedent, which prohibits the judiciary from assessing taxes and preserves the judiciary's nonpartisan character.

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II. MCL 769.1k(1)(b)(iii) violates due process by creating a potential for bias or an objective risk of actual bias at sentencing.

MCL 769.1k(1)(b)(iii) places every sentencing judge in an untenable position. The law permits sentencing courts to assess a tax upon those found guilty of a crime. Making the guilty pay appears to give judges discretion to assess a punitive tax to raise revenue, which creates an objective risk of bias at sentencing. Sentencing courts assess a tax based on the circumstances of the county and court finances, not the circumstances of the individual before the court. Such a scheme creates a "possible temptation" for the average person as judge to elevate court budgetary concerns over individualized, proportionate punishment. The statute violates due process.

A. Objective evidence of judicial bias violates the due process clause.

The constitutional guarantee of due process secures a right to "a fair trial in a fair tribunal." *In re Murchison*, 349 US 133, 136 (1955). The guarantee of a fair tribunal safeguards against a biased decisionmaker. *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 887 (2009). Judicial bias violates fundamental fairness in two distinct ways. *Caperton*, 556 US at 883. First, evidence of a judge's actual, subjective bias requires relief. *Id*. Second, the "imperatives of due process" require an objective inquiry in all cases, "whether or not actual bias exists or can be proved." *Caperton*, 556 US at 886. The objective inquiry into judicial bias asks whether an arrangement, be it personal or pecuniary, creates a " 'potential for bias' " or an "objective risk of actual bias." *Caperton*, 556 US at 881, 886.

Although the objective inquiry stems from *Caperton*, its roots extend much deeper. In *Tumey v Ohio*, 273 US 510 (1927), a Prohibition-era state law empowered certain mayors to preside over criminal trials for unlawful possession of alcohol. 273 US at 516-519. If the mayor-judge convicted the liquor possessor, the statute allowed the mayor-judge to impose a host of monetary penalties, and the mayor got to keep some of the money as a salary bump. *Id*. at 519-522. The remainder of the money went into the town coffers. *Id*. at 520-522.

The mayor-judge's interest in raising money for himself and the village violated due process. *Tumey*, 273 US at 533-534. Scouring common-law authorities, the Court found it "very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in resolving the subject-matter which he was to decide, rendered the decision voidable." *Tumey*, 273 US at 524, citing Bonham's Case, 8 Coke, 118a. Drawing on that principle, the Court said fundamental fairness prohibited a deprivation of liberty or property at the hands of a judge with a "direct, personal, substantial pecuniary interest" in the outcome. *Id*. at 523.

A denial of due process did not require evidence of actual bias. *Tumey*, 273 US at 524. No concept of a fair tribunal permitted any mayor-judge to preside over a criminal proceeding and benefit financially. *Id.* at 532. An unconstitutional risk of bias existed in every case: "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" renders the criminal process fundamentally unfair. *Id.* at 532.

Tumey located a due process violation at sentencing because the mayor-judge had a financial interest in imposing higher monetary penalties. *Id.* at 533-534. The higher the fine, the bigger their salary got, and the more money the town made. *Id.* The mayor-judge's incentive to charge more at sentencing risked a deprivation of property at the hands of a biased decisionmaker. *Id.*

What mattered in *Tumey* was not the subjective motivations of the actual mayor-judge but a "possible temptation," meaning the potential for bias, a point the Supreme Court clarified with *In re Murchison*, 349 US 133 (1955).

Murchison arose out of Michigan's one-man grand jury statute. The one-man grand jury turned judges into prosecutors, and to investigate crime, the judge-as-prosecutor could subpoena witnesses. *Murchison*, 349 US at 134-135. A judge interrogated Murchison about possible bribery, and after hearing Murchison's answers, the judge convicted Murchison of contempt. *Id.*

Permitting a judge to act as accuser and adjudicator violated the right to a neutral arbiter. Ensuring the "appearance of justice" "may

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sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.* at 136. That is so because due process "has always endeavored to prevent even the *probability of unfairness*." *Id.*

The Court acknowledged the lack of precise criteria to determine a "probability of unfairness," but considered the circumstances, including relevant relationships. *Id.* at 136. Having been an accuser, any judge could not be, "in the very nature of things, wholly disinterested" in the outcome. *Id.* at 137. Any accuser and adjudicator could too easily fall victim to the "possible temptation" not to hold the balance fairly. *Id.*

Fifteen years after *Murchison*, the Supreme Court again confronted a state law permitting a mayor-judge to raise revenue. *Ward v Village of Monroeville*, 409 US 57 (1972). An Ohio law allowed small-town mayors to adjudicate minor infractions, and the monetary penalties assessed upon conviction raised revenue for the town. *Ward*, 409 US at 58-59.

Unlike in *Tumey,* Monroeville's mayor-judge did not personally profit from the money raised. *Ward*, 409 US at 60. Still, the revenue-generation scheme violated due process because the mayor-as-executive bore responsibility for the town's finances, and the revenue raised in mayor's court went to the town treasury. The incentive to raise revenue created a "possible temptation" for any mayor-as-judge not to hold the balance nice, clear, and true" at sentencing. *Ward*¸ 409 US at 60 (cleaned up). Just as in *Tumey*, the mayor's obligation to the town fisc risked making any mayor-judge "partisan to maintain the high level of contribution [of money] from the mayor's court." *Id.* Again, a "possible temptation" existed because high contributions from mayor's court required higher monetary penalties. *Id.*

Ward extended *Tumey*. *Ward* identified a "possible temptation" outside of a scenario where the judge personally profited. *Ward*¸ 409 US at 60; see also *Gibson v Berryhill*, 411 US 564, 579 (1973) (an adjudicator's pecuniary interest in a given outcome "need not be as direct or positive as it appeared to be in *Tumey").* And *Ward* focused on the apparent unfairness of statutes that blend judicial power with revenue generation. The dual roles "involve a lack of due process of law" because one person occupies "two practically and seriously inconsistent

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positions, one partisan and the other judicial[.]" *Ward*, 409 US at 60, quoting *Tumey*, 273 US at 534. A partisan interest in revenue generation appears to skew the mayor-judge's ultimate sentencing decision. *Id.*

A risk of or potential for bias violates due process in civil cases, as well. In *Aetna Life Insurance Co v Lavoie,* 475 US 813 (1986), a state supreme court justice voted to uphold a damages award against an insurer. *Lavoie*, 475 US at 823-824. But at the time, the justice was also a plaintiff in a separate case against the same insurance companies involving a materially similar issue. *Id.* Because the state supreme court justice voted in a way that advanced his position as plaintiff in similar litigation, "the appearance of justice" required the court to vacate the state supreme court decision and remand for further proceedings. *Id.* at 828.

As the law leading up to *Caperton* demonstrates, the "possible temptation" giving rise to a due process violation can occur at various decision points based on different factual scenarios. *Caperton* and *Lavoie* found a risk of or potential for bias when state supreme court justices cast votes in civil cases. *Tumey* and *Ward* confronted mayor-judges with a financial incentive to generate revenue, and the incentive risked a biased decisionmaker at sentencing, when the mayor-judge imposed the monetary penalties. *Murchison* had nothing to do with pecuniary interests, but the judge's dual role risked the probability of unfairness. And factual variations aside, *Lavoie*, *Tumey*, and *Ward* all involved deprivations of property by objectively biased arbiters.

That is where the law stood when the Supreme Court decided *Caperton*, which affirmed a legal principle firmly established by *Tumey*, *Murchison*, *Lavoie*, and *Ward.* Due process requires the reviewing court to ask whether a certain pecuniary or personal arrangement creates an "risk of actual bias" or a "potential for bias," an inquiry measured "by objective and reasonable perceptions." *Id.* In every case, a "possible temptation" for the "average man" as judge not to hold the balance fairly violates the right to a fair trial in a fair tribunal. *Caperton*, 556 US at 878-886.

Caperton found additional support for an objective inquiry in judicial codes of conduct. *Caperton*, 556 US at 888-889. Many state codes

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incorporated the American Bar Association's objective test: " '[a] judge shall avoid impropriety and the *appearance* of impropriety.' " *Id.* at 888, quoting ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004). Avoiding even the appearance of impropriety "maintain[s] the integrity of the judiciary and the rule of law." *Caperton*, 556 US at 889. The rule of law depends on public respect for judicial judgments, and public respect for judgments turns on the "issuing court's absolute probity." *Id.*

B. MCL 769.1k(1)(b)(iii) appears to impose a tax as punishment. Appearing to raise revenue as retribution creates an objective risk of bias.

Objectively, MCL 769.1k(1)(b)(iii) creates a potential for or risk of bias at sentencing. The statute allows sentencing courts to raise revenue for the court system and conditions any monetary payment on a finding of guilt. MCL 769.1k(1). The monetary penalty becomes a part of a person's sentence. *People v Jackson*, 483 Mich 271, 283 (2009). Because only the guilty pay, the tax assessed looks like punishment. See *United States v Bajakajian,* 524 US 321, 327-328 (1998) (the Court had "little trouble" concluding that a forfeiture statute imposed a punishment where the monetary penalty was assessed at sentencing and only upon the guilty) and *Austin v United States*, 509 US 602, 609 (1993) (a cash penalty can be a punishment even if it "also compensates the government for services").

Appearing to raise revenue as a punishment creates a "possible temptation" for any sentencing court not to hold the balance fairly. The discretionary decision to deprive an individual of their property seems driven by the court's budgetary concerns, see MCL 769.1k(1)(b)(iii)(A)-(C), not an individual's right to a proportionate sentence.

Sentencing is an "intensely human" process, which touches upon "the most fundamental human rights: life and liberty." *People v Heller*, 316 Mich App 314, 318 (2016) (cleaned up). A sentencing court imposes punishment only after careful consideration of a person's background and circumstances, their moral culpability, and their capacity for change. *People v Snow*, 586 Mich 586 (1972).

MCL 769.1k(1)(b)(iii) has no proportionality mechanism. It deprives individuals of their property based on "a rote or mechanical application of numbers to a page." *Heller*, 316 Mich App at 320. Especially so in Mr.

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Edwards' case, where the sentencing court said nothing about any monetary penalty during the sentencing proceeding. The statute's plain language permits such silence, as it does not require judges to tabulate individualized costs of prosecution, and nowhere does the statute ask courts to determine a person's ability to pay. Much the opposite is true: once the court decides to assess the tax, the person has no ability to *avoid* payment. *Cameron*, 319 Mich App at 229. Paying late risks late fees. MCL 600.4803. Failing to pay may lead to incarceration, MCL 769.1k(10), and judges may assess the tax even if the individual is indigent.

The objective risk of bias created by MCL 769.1k(1)(b)(iii) parallels the due process violations in *Tumey* and *Ward*. There, as here, sentencing courts' occupy "two practically and seriously inconsistent positions, one partisan and the other judicial[.]" *Ward*, 409 US at 60, quoting *Tumey*, 273 US at 534. There, as here, sentencing courts' interest in the local budget risks a partisan motive to raise more money. *Ward*, 409 US at 60; *Tumey*, 273 US at 534. There, as here, a sentencing court partisan to raising revenue has an incentive to impose harsher deprivations of property—either taxing more people or assessing higher amounts. *Ward*, 409 US at 60; *Tumey*, 273 US at 534.

Just as in *Murchison*, the sentencing court's dual roles create a "probability of unfairness." *Murchison*, 349 US at 136. There, the judge's decision as adjudicator appeared unjust because of the judge's relationship to the defendant as the accuser. *Id.* Here, the judge's decision to impose a discretionary tax appears unjust because of the judge's relationship with court staff, people whose "salaries and benefits" factor into the assessment. MCL 769.1k(1)(b)(iii)(A). There, the circumstances of the dual arrangement appeared unfair. *Murchison*, 349 US at 136. Here, factoring the circumstances of the court fisc into a criminal sentence appears unfair.

MCL 769.1k(1)(b)(iii) creates an objective risk of bias at sentencing. The statute gives sentencing courts the discretion to assess a tax that looks like punishment, and any revenue generated funds the county courts. Appearing to raise revenue as retribution elevates the court's financial circumstances over the individual circumstances of the person punished. And the statute appears to incentivize sentencing courts to impose harsher economic penalties. The statute violates due process.

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III. On its face, MCL 769.1k(1)(b)(iii) violates both separation of powers and due process. This Court should sever the statute and order the circuit court to reimburse Mr. Edwards.

Mr. Edwards raises facial challenges to MCL 769.1k(1)(b)(iii). "To sustain a facial challenge, [Mr. Edwards] must establish that no set of circumstances exists under which the statute would be valid." *Johnson v Vanderkooi*, __Mich__ (2022) (Docket No. 160959); slip op at 10; 2022 WL 2903868.

On its face, MCL 769.1k(1)(b)(iii) violates separation of powers. The statute assigns to the judiciary the powers of a tax assessor, and no set of facts permits judges to assess taxes. *Houseman*, 58 US at 367. Any law "conferring upon the judiciary the exercise of powers belonging to either of the others cannot be regarded as valid." *Id.*

Facially, MCL 769.1k(1)(b)(iii) also violates due process. The statute appears to impose a tax as punishment and appearing to raise revenue as retribution creates an objective risk of, or potential for, bias. Every sentencing court faces a "possible temptation" to elevate revenue generation over proportionate monetary penalties.

MCL 769.1k(1)(b)(iii)'s facial invalidity on both due process and separation-of-powers grounds requires this Court to sever it. The unconstitutional provision can be, and has been, precisely identified—MCL 769.1k(1)(b)(iii)—and after removing it, what remains leaves "a complete and operable statute in place." *People v Betts*, 507 Mich 527, 580 (2021) (Viviano, J., concurring in part).

Caliste v Cantrell, 937 F3d 525 (CA 5 2019) instructs on the need for severance. *Caliste* confronted a judge assigned dual roles—judicial officer and court administrator. As judicial officer, the judge made pretrial release decisions, and a state law required a portion of bail bond sales be returned to the courts. *Caliste*, 937 F3d at 526. More grants of bond secured by bail bonds led to more bail bond sales which meant more money for the courts. *Id.* As an administrator, the judge had a say in where the court's money went. *Id.*

The Fifth Circuit located an objective risk of a biased arbiter at the bond hearing because the state law created a "direct link" between the

court's bond determinations and the court's operating expenses. *Id.* at 533. To remedy the due-process violation, the court suggested enjoining the statute returning a portion of the bond sales to the court. *Id.* Doing so would "sever the direct link" between judicial decision making and revenue generation. *Id.*

Severing MCL 769.1k(1)(b)(iii) cuts the direct link between sentencing decisions and county court revenue generation.

Finally, Mr. Edwards is entitled to reimbursement of the money he paid towards his court costs. Just as in *Tumey* and *Ward,* at sentencing Mr. Edwards was deprived of his property by an arbiter whose decision was clouded by the objective risk of bias. *Ward*, 409 US at 60; *Tumey*, 273 US at 532-534. To remedy the unconstitutional monetary payment, this Court should order Wayne County to vacate the tax and reimburse Mr. Edwards.

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Conclusion and Relief Requested

Kelwin Dwayne Edwards suffered a deprivation of property in violation of our Constitution. He respectfully asks this Court to reverse the decision of the Court of Appeals, sever MCL 769.1k(1)(b)(iii), and remand to the Wayne County Circuit Court with instructions to vacate the assessment of court costs.

Respectfully submitted,

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