STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Douglas B. Shapiro, Jane M. Beckering, and David H. Sawyer

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 163073
Plaintiff-Appellee,	Court of Appeals No. 351308
v	Alpena Circuit Court Nos. 17-7577-FH
TRAVIS MICHAEL JOHNSON,	17-7941-FH
Defendant-Appellant. _____/	

BRIEF ON APPEAL OF APPELLEE PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The People agree with Johnson that this Court has jurisdiction over this appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Under Michigan separation-of-powers principles, does MCL 769.1k(1)(b)(*iii*) violate separation of powers by assigning the judicial branch tasks regarding the imposition of court costs that are more properly accomplished by the Legislature?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Johnson did not give the trial court the opportunity to answer this question.

   Johnson did not give the Court of Appeals the opportunity to answer this question.

2. Does § 1k(1)(b)(*iii*) violate due process by creating a potential bias or an objective risk of actual bias?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3. If this Court holds § 1k(1)(b)(*iii*) facially unconstitutional, what remedy follows?

   Appellant's answer: Vacate the order of court costs.

   Appellee's answer: Vacate the order of court costs.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourteenth Amendment of the United States Constitution provides in part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Article 1, § 17 of the Michigan Constitution provides in part:

> No person shall . . . be deprived of life, liberty or property without due process of law.

MCL 769.1k provides in part:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilty is deferred by statute or sentencing is delayed by statute:
>
> * * *
>
> (b) The court may impose any or all of the following:
>
> * * *
>
> (*iii*) Until May 1, 2024,[1] 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.

[1] In 2017, when Johnson committed his offenses, § 1k(b)(*iii*) provided a sunset date of October 17, 2020. The Legislature has amended § 1k twice since then, most recently in 2022 PA 199, eff. Oct. 7, 2022. The amendments only extend the sunset date of subsection (b)(*iii*)—in all relevant respects, the statute is as it was in 2019.

INTRODUCTION

While no one could disagree that Michigan needs to fund its courts, there is great disagreement about the best way to do so. Johnson and his supporting amici have presented numerous explanations why the current system of court funding, which allows courts to recoup some of the costs of operations from convicted criminal defendants, is flawed. And certainly, the issue underlying this case presents difficult and significant policy questions.

Answering those policy questions is not the goal of this brief, nor should it be the goal of this Court. What this case does *not* present are difficult and significant constitutional questions. To the contrary, adhering to the well-established law governing separation of powers and due process, the questions raised here are easily answered.

First, Michigan does not have a constitutional requirement of *strict* separation of powers, as Johnson insists, but one in which powers may, under limited circumstances, overlap between branches—and this is especially true in the realm of criminal sentencing. Courts have no inherent power to impose sentences, but exercise only power delegated from the Legislature. And consistent with that, the Legislature has reasonably delegated to the courts the authority to tax costs on convicted defendants. Contrary to Johnson's assertion, there is nothing new about this practice—it goes back more than one hundred years in Michigan. And there is nothing unconstitutional about it either.

Second, the United States Supreme Court has squarely held, in *Dugan v Ohio*, that the federal right to due process is not violated when, as here, a judicial

officer assesses costs against a criminal defendant and those costs are paid into a fund, out of which that judicial officer's salary is paid. Johnson knows that the Supreme Court has held this, but he has never attempted to explain to this Court why *Dugan* does not control the fate of his due process claim. That omission is telling. The *Dugan* decision governs here and thus the due process claim fails.

Third, because there is no constitutional violation, this Court need not reach the issue of remedy. If it rules otherwise, this Court should vacate his court costs, either because that is the appropriate remedy or because he has waived any claim to a greater remedy.

In the end, the merits of Johnson's many *policy* arguments should be left for the Legislature to decide. His constitutional arguments fail under existing law. This Court should affirm the judgment below.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The facts surrounding Johnson's crimes are not necessary to resolution of this appeal. It suffices to say that in November 2017, Johnson pleaded no contest to aggravated assault, MCL 750.81a(3), and interfering with electronic communications, MCL 750.540, and was sentenced to 13 to 60 months for the assault conviction and 138 days (time served) for the interfering with electronic communications conviction. The trial court also revoked Johnson's probation on a deferred guilty plea for resisting or obstructing a police officer, MCL 750.81d, and sentenced him to a concurrent 138-day sentence for that offense. In each case, the trial court imposed $600 in costs.

Johnson later returned to the trial court and alleged that he had been denied his due process right to a neutral judge based on MCL 769.1k(1)(b)(*iii*), which allows trial courts to impose court costs "reasonably related to the actual costs incurred by the trial court . . . ." Although Johnson alleged that his judge had been biased by subsection (1)(b)(*iii*), he did not seek to vacate his conviction or withdraw his no-contest plea; rather, he only wished to vacate the award of court costs. Johnson also argued that subsection (1)(b)(*iii*) violates the principle of separation of powers. The trial court held the motion in abeyance for *People v Cameron*, which was then pending in this Court. See 501 Mich 986 (2018). After this Court denied leave to appeal in *Cameron*, 504 Mich 927 (2019), the trial court denied the motion to vacate court costs.

Johnson then filed a delayed application for leave to appeal in the Michigan Court of Appeals, which that court granted. The Michigan Court of Appeals then

affirmed the trial court's decision in a published decision, holding that subsection (1)(b)(*iii*) does not violate due process, nor does it violate the separation of powers.

Johnson sought leave to appeal, and this Court granted oral argument and supplemental briefing on the application. Following briefing and argument, this Court ordered supplemental briefing on three questions:

> (1) whether MCL 769.1k(1)(b)(*iii*) violates 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 (1989), quoting *Morrison v Olson*, 487 US 654, 680–681 (1988); see also *Houseman v Kent Circuit Judge*, 58 Mich 364, 367 (1885); (2) whether MCL 769.1k(1)(b)(*iii*) violates 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, 465–466 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8–9 (2016); and (3) should we find MCL 769.1k(1)(b)(*iii*) facially unconstitutional under either theory, what remedy follows. [May 13, 2022 Order.]

The parties submitted supplemental briefs addressing these questions. This Court then granted the application.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law that this Court reviews de novo. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6 (2003). "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id.*, citing *McDougall v Schanz*, 461 Mich 15, 24 (1999). "Further, when considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Id.*, citing *Council of Organizations and Others for Ed About Parochiaid v Governor*, 455 Mich 557, 570 (1997).

ARGUMENT

I. MCL 769.1k(1)(b)(*iii*) fits comfortably within Michigan's constitutional separation of powers.[2]

The legislative framework of enlisting the courts to impose court costs to assist in the funding of the judiciary does not violate the principles of separation of powers. The ability to assess costs is a role the judiciary has traditionally performed. Johnson's claim that the provision must be struck is not warranted—and striking the provision would not be the panacea Johnson says it would, in any event.

A. Michigan's Constitution does not require a strict separation of powers, but allows overlap in certain areas, one of which is criminal sentencing.

Under Michigan's constitutional structure, criminal sentencing operates under power granted by the People to the legislative branch and delegated from that branch to the judicial branch. In his brief to this Court, Johnson asserts that our Constitution "explicitly requires that the powers granted to each branch of government be *strictly* separated." (Appellant's Br on Appeal, p 10 (emphasis added).) But Johnson is mistaken. "This Court has established that the separation of powers doctrine does *not* require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v State*, 459 Mich 291, 296

[2] It is perhaps ironic that, in a case partially about limiting the judicial branch to its proper sphere, the first question in the order granting leave was not raised by either party, but by the Court itself. The People continue to believe that principles of party presentation counsel against deciding this issue in this case.

(1998) (emphasis added), citing *In re Southard*, 298 Mich 75, 83 (1941); *People v Piasecki*, 333 Mich 122, 146–148 (1952); *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982).

The appropriate overlap of constitutional responsibilities and powers is especially well-established in the area of criminal sentencing. A Michigan trial judge preparing to impose a sentence in a criminal case would look in vain to find an explicit constitutional grant of authority to do so. The word "sentence" does not appear in article 6 of the Michigan Constitution. Nor does the word "fine," "imprison," "punish," "penalty," or any form of those words or any related words. The power of sentencing is explicitly mentioned only in article 4 of the Constitution, which vests in the *Legislature* the power 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, § 45.

The proper division of powers in the realm of criminal sentencing is as follows: 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, and to impose that sentence on a convicted defendant. As this Court has held,

> In various eras, and with regard to various offenses, the Legislature has chosen to delegate various amounts of sentencing discretion to the judiciary. At present, for instance, there are offenses with regard to which the judiciary has no sentencing discretion, offenses about which discretion is sharply limited, and offenses regarding which discretion may be exercised under the terms set forth in the sentencing guidelines legislation. In previous years, before the 1999 effective date of the legislative sentencing guidelines, the

> Legislature provided sentencing discretion that in many instances was virtually without limit.
>
> *All this is for the Legislature to decide.* [*People v Garza,* 469 Mich 431, 434 (2003) (footnotes omitted, emphasis added).]

Here, of course, the Legislature has made the broad policy decision that convicted offenders should support the court systems by paying costs that are reasonably related to those incurred by the trial court. That policy choice is "for the Legislature to decide," and the Legislature has decided it. But the Legislature has quite reasonably delegated to the courts themselves the task of determining what amount of costs *is* reasonably related to the costs incurred by the trial court, and assessing those costs at sentencing. This is sensible because the information needed to determine the appropriate amount of costs is best known to the local courts themselves.

This Court has noted that sharing of power "may be constitutionally permissible" "[i]f the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other[.]" *Judicial Attorneys Ass'n*, 459 Mich at 296. The grant of authority in § 1k(1)(b)(*iii*) fits that description to a tee. It is limited and specific—a judge does not have free rein to impose any cost on any one at any time, but may only impose costs on a convicted defendant at sentencing, and those costs must be "reasonably related to the actual costs incurred by the trial court." It neither encroaches on nor aggrandizes the judiciary, because imposing consequences on a convicted criminal defendant—including financial consequences—is a core judicial function.

B. Johnson has failed to show that the Legislature's power to delegate sentencing authority is subject to an exception for a tax on convicted criminals.

Johnson agrees with the People that the courts' ability to impose sentences on convicted defendants is a power delegated from the Legislature, and Johnson does not disagree that that delegation is proper (despite his contention that Michigan's Constitution requires a strict separation of powers). Johnson argues, however that there is one consequence the Legislature is forbidden to empower the courts to impose on a convicted defendant—the tax found in § 1k(1)(b)(*iii*).

But Johnson nowhere explains what it is about the taxing power—or assessing costs more generally—that makes it an exception to the Legislature's generally plenary power to delegate sentencing authority. He relies chiefly on this Court's decision in *Houseman v Kent Circuit Judge*, 58 Mich 364 (1885). *Houseman* was not a criminal case, but involved an assessment made by a township drain commissioner to fund the construction of a ditch. *Id.* at 365. The statute at issue purported to allow a circuit court to not only set aside an invalid drainage assessment, but also to do such fact-finding as necessary to replace the invalid assessment with a correct one. *Id.* at 366. This Court held that that went too far—that 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 most significant distinction between *Houseman* and this case is the fact that this case involves the assessment of costs as part of a criminal sentencing, a quintessentially judicial task. Although Johnson contends in his brief that

"Michigan has no historical practice or precedent permitting judges to assess taxes," (Appellant's Br, p 17), this is mistaken. As the People pointed out in their second supplemental brief following oral argument on the application, this Court pointed out in a case decided just ten years after *Houseman* that "the common practice—in criminal cases the better practice—is for the court to determine the amount of costs which the respondent will be required to pay, and state the amount of costs in the judgment." *In re Clark Johnson*, 104 Mich 343, 344 (1895). And 34 years after that, this Court reaffirmed that "[t]he right of the court to impose costs in a criminal case is statutory." *People v Wallace*, 245 Mich 310, 313 (1929).

In *Wallace*, this Court struck down an award of costs *not* because the statute authorizing the Court to impose it was unconstitutional, either on separation-of-powers grounds or for any other reason. Rather that statute, like § 1k(1)(b)(*iii*), required the "costs imposed [to] bear some reasonable relation to the expenses actually incurred in the prosecution," and in *Wallace*, "they clearly d[id] not." *Id.* at 314. For that reason, this Court unanimously remanded the case to the trial court "to determine the costs . . . ." *Id.*

In a case about a court's ability to assess costs against a convicted criminal defendant, a unanimous decision from this Court ordering a circuit court to determine such costs is especially relevant—and that relevance is only heightened by Johnson's arguments about "historical practice and precedent." (Appellant's Br,

p 17.) Despite this, even though Johnson is aware of *Wallace* (it appears in his brief's index of authorities), he does not cite it at all.[3]

Clark Johnson and *Wallace* demonstrate that there is nothing new about the Legislature delegating to courts the power to assess costs against convicted criminal defendants.

C. Striking down § 1(b)(*iii*) would not preserve the judiciary's independence and apolitical character, but would have the opposite effect.

Johnson contends that allowing judges to assess costs against convicted defendants interferes with the independence of the judiciary. This argument ignores potential alternatives. Michigan needs courts. And courts need money. If this Court accepts Johnson's limitation on the Legislature's power, the alternative would be a judiciary that is *less* independent and *more* political, because the courts would become more dependent on either the Legislature or local governmental units for appropriations for its funding.

Johnson observes that tax policy is "partisan" and "polarizing" and involves "mud-wrestl[ing] over who has raised, will raise, or wants to raise taxes." (Appellant's Br, pp 14–15.) But the appropriations process, whether at the state or local level, is not any less partisan and polarizing. The proposed limitation on the

[3] Johnson also asserts that the Legislature, in its amicus brief opposing the application, "does not cite a single case in which county judges have been permitted to assess taxes." (Appellant's Br, p 17.) But the Legislature's amicus brief cited both *Clark Johnson* and *Wallace*. (Michigan Senate and Michigan House of Representatives' Brief Amicus Curiae, p 12.)

Legislature's authority would, if accepted, turn the judges of this state from a kind of tax assessor (of a very limited sort) into lobbyists. And whether or not that would be a positive change, it would certainly not depoliticize the judiciary or increase its independence. Cf. *Employees & Judge of Second Judicial Dist Ct v Hillsdale County*, 378 NW2d 744, 753–754 (1985) (WILLIAMS, J., concurring) (describing the problem at that time of court funding where the Legislature "ha[d] not yet fulfilled its promise" to fund courts, and "state courts and local funding units struggle[d] with the outmoded and inadequate system of local funding of state courts" resulting in an "ubiquitousness of dissatisfaction and conflict.").

More significantly, though, and returning to a previous point—§ 1k(1)(b)(*iii*) does not require judges to set tax policy. That policy was set by the Legislature in enacting § 1k for the assessment of costs. The courts only need to carry out that policy, and they are especially well-qualified to do so because the facts bearing on the appropriate amount of costs are best known to the judges themselves—not the Legislature. And when costs are not reasonably related to the costs of prosecution, the awards are reviewable on appeal. See, e.g., *People v Konopka*, 309 Mich App 345, 359–360 (2015); *Wallace*, 245 Mich at 313–314.

II. MCL 769.1k(1)(b)(*iii*) does not violate due process by creating a potential for bias or an objective risk of actual bias.

In 1928, the United States Supreme Court answered the question whether it is a violation of due process for a trial judge to impose costs on a convicted criminal defendant where those costs go to a fund out of which that judge's salary is paid.

Dugan v Ohio, 277 US 61 (1928). The answer was no. *Id.* at 65. The unanimous Court noted in support of its holding that any pecuniary motive was so remote, attenuated, and minimal as to not encroach on due process:

> The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or affect his fixed compensation. The mayor has himself as such no executive, but only judicial, duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. [*Id.*]

Nearly all of the above paragraph from *Dugan* applies equally to Alpena Circuit Judge Mack, who presided over Johnson's plea and sentencing proceedings. Because the Supreme Court squarely rejected Dugan's due-process claim, and because there is no meaningful factual or legal distinction between *Dugan* and this case, Johnson's due process claim fails.

Johnson has cited a great deal of federal authority in support of his federal constitutional claim—including *Ward v Village of Monroeville*, 409 US 57 (1972), and *Tumey v Ohio*, 273 US 510 (1927)—two other important cases on this subject. But he has completely refused to attempt to reconcile his position with *Dugan*'s all-fours rejection of it. In his application for leave to appeal to the Court of Appeals, in his merits briefs in that court, in his application to this Court, in both his supplemental briefs to this Court, and now in his merits brief to this Court, he has not cited *Dugan* a single time.

Johnson's due-process claim is rooted in the federal due-process guarantee, not the due-process guarantee in the Michigan Constitution. The due-process argument in Johnson's brief does not cite the Michigan Constitution or any Michigan caselaw—he only cites federal cases. The holdings of the United States Supreme Court on federal constitutional questions are binding on this Court. And of all the US Supreme Court cases addressing the role of money in creating a potential judicial bias, the facts of *Dugan* are by far the closest to the facts of this case.

Johnson has had a half-dozen opportunities in this appeal to attempt to address *Dugan* and explain why it does not directly control and compel the outcome of this case. Of all the cases that have been cited on the subject of a potential for bias arising out of a pecuniary motive on the part of a judge, *Dugan* is the most like this one. The repeated refusal to even attempt to grapple with *Dugan*'s controlling holding is tantamount to abandonment of the issue.

This Court has directed the parties' attention to *Caperton v AT Massey Coal Company, Inc*, 556 US 868 (2009), and to *Williams v Pennsylvania*, 579 US 1 (2016). Both cases involve unusual situations that take them far away from the mundane facts of this case.

In *Caperton*, the U.S. Supreme Court examined a situation wholly unlike the one here. In that case, Massey lost a $50 million jury verdict in the trial court. 556 U.S. at 872. In anticipation of Massey's appeal to the West Virginia Supreme Court of Appeals, Don Blankenship, who was Massey's chairman, CEO, and president,

spent more than $3 million to unseat one justice (McGraw) and install a new justice (Benjamin) he hoped would be more favorable. *Id.* at 873. This was about $1 million *more* than was spent by both candidates' campaign committees combined. *Id.*

While there are several distinctions between *Caperton* and this case, two immediately leap off the page: most glaringly, in this case Johnson was assessed $1,200 in costs, while Blankenship's chosen candidate received about $3,000,000 in contributions. The *Caperton* Court considered the amount important, noting, "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* at 884. The Court noted that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Id.* Presumably, the statutory maximum $1,000 Blankenship donated to Benjamin's campaign committee, *id.* at 873, would not have created a probability of bias requiring recusal.

A second—and more important—difference is the directness of the benefit to the judicial officer in question. *Caperton* involved a large expenditure of money directed toward the personal benefit of a single justice—though it did not go into his pocket, like the fines in *Tumey v Ohio*, 273 US 510 (1927)—it was certainly spent to his personal benefit. Here, however, as in *Dugan*, no money went directly into the pocket of Judge Mack or to his personal benefit.

Rather, any amount Johnson pays toward his assessment goes into a fund. Though Judge Mack's salary comes out of that fund, there are innumerable other payments going into and coming out of that fund—and crucially, Judge Mack's compensation does not change one cent based on any costs assessed by him. Cf. *Dugan*, 277 US at 65 ("The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not . . . . he receives a salary in any event, whether he convicts or acquits.")

Yet another significant difference between the facts of *Caperton* and those here is the fact of repeatability. *Caperton* involved one justice, one attorney, and one appeal. It is always going to be difficult to assess a risk of something occurring based on a single event. The risk of getting struck by lightning cannot be assessed by observing one person's experience in a thunderstorm. Similarly, the risk of getting attacked by a shark cannot be assessed by looking at the fate of a single swimmer. Instead, one looks at the prevalence of these events happening over many opportunities—or, applies what is known about these phenomena to a given situation. The *Caperton* Court applied what it knew about the phenomenon of campaign contributions to conclude that the $3 million Blankenship contributed, "in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election, had a significant and disproportionate influence on the electoral outcome." 556 US at 885.

Here, in contrast, MCL 769.1k(1)(b)(*iii*) has existed in its current form for over eight years. It applies in every criminal case in the State—hundreds of

thousands of cases in total. And yet neither Johnson nor amici have provided a single example of a case affected by bias caused by MCL 769.1k(1)(b)(*iii*).

To be clear, the point is not that Johnson *must* show an example of actual bias in order to show a risk of bias—that would make no sense in light of *Caperton*. Because actual bias can be hard to show, the mere probability of bias, if high enough, can cause a due process violation. *Caperton*, 556 US at 886–887. The point, rather, is that it is possible to estimate the risk of something happening by observing how frequently it happens. We know the chances of being attacked by a shark are low, even though there are some shark attacks. We know the chances of being struck by lightning are low, even though some people are struck by lightning. The fact that we see *no* examples of bias over hundreds of thousands of opportunities provides objective evidence (though concededly not proof positive) that there is little or no risk of bias.

And this absence of examples is not due to a lack of opportunity or motive—one of this Court's invited amici was the Michigan District Judges Association. The MDJA's members have an interest in providing examples of bias (since the MDJA advocates for striking down MCL 769.1k(1)(b)(*iii*)), and they would be aware of such examples if they existed (since they are themselves judges). And yet not a single example appears.

Even the $3 million contribution in *Caperton* created a close question for the Court, which divided five-to-four on the outcome. The majority noted that Massey and its supporting amici "predict that various adverse consequences will follow from

recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections." 556 US at 887. But the Court dismissed those fears, insisting that the outcome was driven by the facts of that case, which were "extreme by any measure." *Id.* If this Court were to import the *Caperton* holding from the extreme facts of a millionaire appearing to buy himself a state Supreme Court justice into the utterly ordinary facts of a trial court assessing court costs as directed by the Legislature, it would in sense ratify the fears the *Caperton* majority sought to dispel. Cf. *Caliste v Cantrell*, 937 F3d 525, 532 (CA 5, 2019), ("Our holding that this uncommon arrangement violates due process does not imperil more typical court fee systems.")

The situation in *Williams v Pennsylvania* is even further removed from the situation here. In that case, the Court had to ask whether a justice could preside in a case, having previously served as a prosecutor in the same case. 579 US at 4. That outcome was controlled by an application of "[t]he due process guarantee that 'no man can be a judge in his own case.' " *Id.* at 9. The fact that the justice had previously been involved in the case as an advocate created "a serious risk that [he] would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process." *Id.* at 11.

The risk of bias involved in a judge or justice passing judgment in a case in which he or she previously advocated in the same case might seem nearly too

obvious to require comment.[4] In such a case, the judicial officer has, in a fairly literal sense, become "a judge in his own case." But this is not true of a Michigan judge assessing an order of court costs, at the Legislature's direction and with the Legislature's guidance. The maxim of *nemo iudex in causa sua* predates the *Williams* decision by centuries, and it would certainly have been known to the Supreme Court in the 1920s, when that Court decided *Tumey* and *Dugan*. Indeed, the *Tumey* Court mentioned the principle in discussing the background principles of law that applied to that case. 273 US at 525, 528. But when the same Justices decided *Dugan* one year later, they unanimously concluded that "the principles announced in the Tumey Case do not cover this." 277 US at 65.

In sum, the principles of *Caperton* and *Williams* do not shed new light on the questions in this case. They involve the principle that no one can be a judge in his or her own case, which was one of the principles at stake in *Tumey* and *Dugan*. Just as the judicial officer in *Dugan* was not acting as a judge in his own case, Judge Mack was not acting as a judge in his own case when he assessed costs against Johnson.

Johnson briefly cites *Gibson v Berryhill*, 411 US 564 (1973), for the proposition that "an adjudicator's pecuniary interest in a given outcome 'need not be as direct or positive as it appeared to be in *Tumey*.' " (Appellant's Br, p 21, quoting *Gibson*, 411 US at 579.) But it is worth examining the issue in *Gibson*, because it is

[4] Whether that risk rises to a denial of due process is less obvious: the question divided the U.S. Supreme Court five-to-three.

yet another example of extreme and unusual facts leading to a finding of potential bias. In *Gibson*, the Alabama Board of Optometry sought to revoke the licenses of a number of optometrists in Alabama. Nothing too odd about that, except that the Board "was composed solely of optometrists in private practice for their own account," and the optometrists they sought to bar from practice "accounted for nearly half of all the optometrists practicing in Alabama." 411 U.S. at 578. The benefit to the Board members of wiping out almost half their in-state competition in one stroke might not be "direct," strictly speaking, but it is not remote or attenuated. Not only that, but there was also evidence that the Board had prejudged the facts—a source of potential bias independent of the pecuniary interest. *Id.*

In sum, all of the cases in which courts have found a potential bias have involved either a direct pecuniary benefit to the judicial officer or some extreme or unusual circumstance, or both. The only case which is on all fours with the facts presented here is the only case Johnson is unwilling to discuss—*Dugan*, which controls and requires rejection of the due-process claim.

III. If this Court holds § 1k(1)(b)(*iii*) unconstitutional, the remedy for Johnson is to vacate the order of court costs. But future defendants could seek a broader remedy if this Court holds that there is a due process violation.

This Court has asked what remedy follows should this Court hold § 1k(1)(b)(*iii*) unconstitutional on either Johnson's due process theory or this Court's

separation-of-powers theory. Johnson's answer is that the award of court costs should be vacated and he should be reimbursed any money he has paid.

If this Court holds that § 1k(1)(b)(*iii*) violates separation-of-powers principles, then the People agree that the appropriate remedy is to vacate the order and refund any money Johnson has paid.

If, however, this Court holds that § 1k(1)(b)(*iii*) violates due process by creating a potential for bias, then the remedy should be to vacate Johnson's convictions and sentences altogether, because his conviction would have been obtained in violation of due process. Johnson has repeatedly and unequivocally waived any claim to this remedy, seeking instead that his unconstitutional (according to Johnson) conviction be *maintained* but that the award of court costs be vacated.

In light of Johnson's waiver, this limited remedy is appropriate for Johnson. But this Court is not only deciding Johnson's case, but all cases to follow for similarly situated defendants. Johnson has not attempted any argument that would reconcile his broad constitutional claim with his narrow request for relief. A holding that § 1k(1)(b)(*iii*) deprives a defendant of an impartial judge would open the door for all other defendants whose appeals are pending to insist that their convictions be overturned due to the violation of due process.[5]

[5] Even defendants whose convictions are final on appeal could seek to have this Court's ruling applied retroactively, potentially endangering every conviction obtained in this state over the last eight years.

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the decision below and hold, consistent with binding US Supreme Court precedent, that § 1k(1)(b)(*iii*) does not violate due process. This Court should decline to address the separation-of-powers argument, but if it does address the argument, it should hold § 1k(1)(b)(*iii*) is a permissible delegation of sentencing and taxing power from the Legislature to the courts.

Respectfully submitted,

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