

STATE OF MICHIGAN

IN THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Case No. 350287

Lower Court No. 18-003602-FH

-vs-

JOHN QUINTON LEWIS,

Defendant-Appellant.

**AMICUS CURIAE BRIEF OF THE
DETROIT JUSTICE CENTER, AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN AND STREET DEMOCRACY**

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STATEMENT OF INTEREST OF THE AMICI CURIAE¹
DETROIT JUSTICE CENTER

The Detroit Justice Center (DJC) is a non-profit law firm working alongside Metro Detroit communities to create economic opportunities, transform the justice system, and promote equitable and just cities. A key aspect of its work is representing low-income and no-income Detroiters who are involved in the criminal legal system because they owe money that they cannot afford to pay, stemming from traffic-related citations or offenses. In representing the poor, DJC attorneys have witnessed the ways in which MCL 769.1k(1)(b)(iii) leads judges to order unpayable court fines, fees, and costs for indigent defendants, with no regard to their economic hardship. In March 2020, DJC published a report of these findings along with substantial recommendations for change. *Highway Robbery: How Metro Detroit Cops and Courts Steer Segregation and Drive Incarceration.* J. Chowning, E. Keith, & G. Leonard, March 2020 (Appendix A) (hereafter *Highway Robbery*).

Despite their substantial traffic debt, many DJC clients drive to survive because of the lack of reliable public transit options in this region. Specifically, the intersection of poverty and limited public transit investment exacerbates the disparities caused by the geography of opportunity² and prevents clients from easily attending court hearings in municipalities outside the city of Detroit, transporting their children to and from school, traveling to work or to pursue gainful employment, receiving medical care at hospitals in nearby suburbs, or traveling to suburban grocery stores for those who live in areas known as food deserts. The necessities of each client’s life dictate their

¹ Pursuant to MCR 7.212(H)(3), *Amici* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than *Amici* or its counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

² The “geography of opportunity” of Metro Detroit refers to the ways in which “resources are spatially distributed along racial, ethnic, and/or socioeconomic lines” (Appendix A, p. 9).

need to travel. Tragically, most clients are charged with offenses stemming directly from their own indigence and impoverishment (such as lack of insurance or expired license plates), rather than being true matters of public safety. DJC helps clients relieve such financial and legal barriers to having a valid driver's license so that the individuals we serve might have a chance at more mobility, and in turn, more stability.

Time and time again, DJC has found that when a client could not afford to pay a single civil infraction, they fell into a struggle that included a cycle of license suspensions, misdemeanor charges, and subsequently, a web of traffic-court related debt trapping the client in multiple courts. When attorneys provide judges with evidence of poverty—including struggles with homelessness or housing instability, unemployment and underemployment, domestic violence or community violence, or severe disability or other documented illnesses—judges either ignore or scoff at this documentation and go on to order steep monetary penalties. Even when DJC attorneys empower and assist indigent clients to overcome past traumatizing court-related indignities in order to utilize the few available avenues for financial relief—such as filing hardship letters with supporting documentation or filing motions for relief from judgment—many judges regularly scold the attorneys for their advocacy and/or refuse to consider any non-payment alternatives other than incarceration.

Far from being an effective measure of ensuring safe roads or safe communities, the imposition of these fines, fees, and court costs destabilizes poor defendants and leaves them increasingly unable to function safely in society, as they then face warrants and other barriers to employment and financial security caused by their inability to pay. For these reasons, the Detroit Justice Center has a strong interest in this case and asserts that MCL 769.1k(1)(b)(iii) prevents judges from being impartial in their decisions around guilt or innocence and assessment and collection of fines, fees, and costs.

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

The American Civil Liberties Union Fund of Michigan (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of approximately 1.6 million members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU of Michigan regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan.

For the last decade, the ACLU of Michigan has helped lead an effort in the state to draw attention to the problem associated with Michigan's heavy reliance on court-imposed assessments to fund the judicial system, particularly the problem of debtors' prisons resulting from the inability of many defendants to pay those assessments. In October 2010, the ACLU published the report *In for a Penny: The Rise of America's New Debtors' Prisons*, containing a detailed section discussing issues in the Michigan courts relating to legal fines and obligations, including the problems created when excessive court-imposed costs lead to incarceration of the indigent.³ In 2011, the ACLU of Michigan engaged in court watching around the state and filed emergency appeals in five district court cases in order to draw attention to the widespread problem of "pay or stay" sentences.⁴ In 2012 and 2013, the ACLU of Michigan again engaged in court watching and found that the practice of imposing so-called "pay or stay" sentences without an indigency hearing remains endemic throughout the state. The ACLU has filed numerous cases challenging "pay or stay" sentencing, including *In re Anderson*, 15-2380 (Macomb Cir. Court), a superintending control action to halt "pay or stay" sentencing practices in the 38th District Court in Eastpointe. The ACLU of Michigan also worked closely with judges and other stakeholders on the revisions

³ See <http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>.

⁴ See ACLU, *ACLU Challenges Debtors' Prisons Across Michigan* (Aug. 4, 2011), <http://www.aclumich.org/article/aclu-challenges-debtors-prisons-across-michigan> (Appendix E).

to the Michigan Court Rules to address constitutional deficiencies in the collection of costs imposed on defendants and has worked in the legislature to promote sustainable and equitable funding streams for the judiciary. Given the interconnection between unconstitutional “pay or stay” sentencing and the increasing costs imposed on indigent defendants, the ACLU of Michigan believes that, as an amicus, it can contribute to the Court’s understanding of the present case.

STREET DEMOCRACY

Street Democracy is a nonprofit organization providing holistic legal services to people to help people suffering through poverty and oppression and to transform systems that oppress them into systems of opportunity. One example of their work is the development Street Outreach Court Detroit (“SOCD”) in 2012, a collaborative specialty docket at 36th District Court where a person’s efforts to address the root causes of their homelessness are used to resolve their outstanding fines, costs, and jail time. In SOCD, people “pay off” their tickets with enrollment in a job training program, attending sobriety meetings, studying for a GED, and seeing their doctor regularly.⁵

Street Democracy shifted its focus to criminal justice reform after clients at their soup kitchen clinic repeatedly stated that driver’s responsibility fees, license suspensions, warrants, and debt brought on by unaffordable court-imposed costs, fines, and fees were the primary reasons they could not escape poverty. This cascade of calamity is the natural result of driver responsibility fees, automatic driver license suspensions for nonpayment, and district courts’ unwillingness to entertain motions for alternative sentences. The district courts’ reputation for “pay-or-stay” sentencing and harsh collection tactics were so ingrained in the community that SOCD has to hold its hearings at a local soup kitchen to assure their attendance.

⁵ For more information, *see* <https://www.streetdemocracy.org/socd>.

Despite SOCD-style sentences’ proven track record in reducing recidivism, judicial economy, and broad societal savings to the systems that serve the homeless, courts continue to be resistant to adopting alternative sentencing regimes like homeless courts⁶ or functional sentencing.⁷ Underlying the judges’ continued reluctance to waive fines is concern that their “generosity” will have negative consequences when they go to justify their annual budget before the local funding unit.

The issues before this Court pose great significance to all of Michigan’s citizens, particularly to the 14% who live below the poverty line and the 29% who are working poor, and Street Democracy, as amicus curiae, seeks to enhance the Court’s understanding of this impact on those populations.⁸

⁶ See “SOCD, Three Years Later...”, Street Democracy, August 2018, (Appendix F)

⁷ See “What if courts were designed to provide opportunity instead of punishment? A report on the efficacy of functional sentences”, Street Democracy, October 2018, (Appendix G)

⁸ <https://poverty.umich.edu/data-tools-poverty-and-well-being-map-2020>

INTRODUCTION

This Court is considering whether MCL 769.1k(1)(b)(iii) violates the due process rights of Michigan defendants under the United States and Michigan Constitutions. US Const Amend XIV; Const 1963, art 1, § 17. This statute authorizes trial courts to impose court costs on defendants who either plead guilty or no contest or who are convicted after trial, in either circuit or district court. The resulting funds are used to cover the costs of operating the judicial system and are expressly intended for that purpose. Because judges can assess costs only after conviction, MCL 769.1k(1)(b)(iii) prevents judges from being impartial in their decisions around guilt or innocence since an acquittal or dismissal will prevent the assessment and collection of costs. When courts have a financial incentive to convict, defendants are deprived of their due process rights to an impartial and neutral jurist to preside over their case.⁹

To provide context, this Brief shares what the *Amici Curiae* attorneys have learned from representing low-income Detroiters in criminal traffic matters in approximately forty Metro Detroit district courts and other state courts. These clients sincerely wish to address their court obligations. Yet, their inability to pay is often an insurmountable barrier, and their unresolved monetary judgments create a cascade of collateral consequences. They quickly become entangled in an expanding web of criminal charges, unaffordable court debt, warrants, and jail time, leading to huge social costs such as homelessness, mental health trauma, and chronic poverty.

Despite this tragic impact, courts continue to use MCL 769.1k(1)(b)(iii) to raise the substantial revenue for court funding. Many courts are reluctant to employ alternatives to monetary penalties on poor defendants, such as community service or waiving discretionary fees and costs. Underlying the judges' continued reluctance to do so is the concern that their

⁹ *In re Murchison*, 349 US 133, 136 (1955); *People v Cheeks*, 216 Mich App 470, 480 (1996).

“generosity” will have negative consequences of 1) revenue loss, 2) local government demands that they justify their annual budget requests; or 3) pressure to improve their collection efforts. The Trial Court Funding Commission 2019 Interim Report illuminates how the pressure on judges to raise revenue results in a substantial return. According to the report, approximately 26.2% of the funding for trial court administration in the state is generated by the funds that trial courts collect from assessing costs against criminal defendants at sentencing. See Appellant’s Brief on Appeal, p 3 (*Interim Report, attached as Appellant’s Appendix H*).

This issue poses great significance to all of Michigan’s citizens. As *Amici Curiae*, we respectfully urge this Court to find that MCL 769.1k(1)(b)(iii) violates defendants’ due process rights because it incentivizes and actually does cause courts to place their financial needs over defendants’ constitutional rights, and hence it creates an incentive to secure their conviction and sentence in violation of the Fourteenth Amendment of the U.S. Constitution and Due Process Clause of Michigan’s Constitution.¹⁰

¹⁰ See, e.g., *Tumey v State of Ohio*, 273 US 510, 532 (1927); *Ward v Monroeville*, 409 US 57, 59-60 (1972).

ARGUMENT

I. MCL 769.1K(1)(B)(III) VIOLATES A DEFENDANT’S RIGHT TO DUE PROCESS BECAUSE IT FINANCIALLY INCENTIVIZES COURTS TO FIND DEFENDANTS GUILTY AND ASSESS NUMEROUS COSTS UPON THEM.

A. Standard of Review

As stated in Appellant’s brief, the standard of review is de novo with regard to questions of law. *People v Carpentier*, 446 Mich 19 (1994). It makes sense to scrutinize governmental action more closely when the State stands to benefit.” *Timbs v Indiana*, 139 S Ct 682, 689 (2019) (internal quotation marks omitted).

B. A judge who determines a defendant’s fate while knowing that a defendant’s conviction will raise revenue for his court and/or city violates that defendant’s due process rights under the 14th Amendment.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 US 133, 136 (1955). The United States’ and Michigan’s Constitutions guarantee that no state shall deprive any person of “life, liberty or property, without due process of law.”¹¹ US Const Am XIV; Const 1963, art 1, § 17. A defendant in a criminal trial is entitled to expect a “neutral and detached magistrate.” *People v Cheeks*, 216 Mich App 470, 480 (1996). The Supreme Court has long recognized that there are situations in which “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable” including when a judge stands to benefit from a defendant’s conviction. *Withrow v Larkin*, 421 US 35, 47 (1975).

¹¹ The Fourteenth Amendment of the United States Constitution provides: “Nor shall any State deprive any person of life, liberty, or property, without due process of law .” Const 1963, art 1, § 17 provides: “No person shall be . . . deprived of life, liberty or property, without due process of law.”

C. The U.S. Supreme Court established an “average man as a judge” inquiry to test whether financial incentives created a conflict of interest that deprived the accused of their due process rights.

In two seminal cases, the United States Supreme Court has found a violation of due process under similar circumstances presented by Mr. Lewis’ case. In *Tumey v Ohio*, 273 US 510, 515-516 (1927), the village mayor presided as a judge over criminal matters for violation of the state’s Prohibition Act, outlawing the possession of liquor.¹² As judge, the mayor determined the defendant’s guilt and sentence, and at sentencing, would impose fines and costs as the sentence. *Id.* at 516. For a defendant who could not pay, the mayor could sentence the defendant to jail until the defendant’s balance was deemed paid, receiving 60 cents of credit per day. *Id.* Per state statute, the revenue generated from this court was split between the state and the municipality, and the municipality could use the funds for city and law enforcement costs. As an executive, the mayor had authority over how the village’s funds were spent. *Id.* at 517-519. From May to December 1923, this court collected \$20,000, with more than half being kept in the village’s coffers, and pursuant to a village ordinance allocating fund distribution, the mayor received a percentage of these funds in addition to his normal salary. *Id.* at 521-522.

The U.S. Supreme Court held that the mayor’s court violated the Fourteenth Amendment by depriving defendants of due process of law. *Id.* at 523, 534. The Court found that the mayor had a “direct, personal, pecuniary interest” in convicting the defendants that came before him because he could not impose fines and costs on anyone that he acquitted. The Court noted that this happened as a normal function of the laws that were enacted to authorize the court to impose costs on defendants to raise revenue. *Id.* The Court rejected the argument that a judge, under these

¹² Section 6212-15 of the Ohio General Code. The mayor’s court was originated to enforce the Prohibition Act. *Id.*

circumstances, would act with high honor and self-sacrifice and carry out his judicial duties with no danger of acting unjustly. The Court stated that due process required more:

Every procedure which would offer a **possible temptation to the average man as a judge** to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law. [*Id.* at 532 (emphasis supplied).]

The Court explained that the state prohibition laws that created these courts induced cities to derive revenue through their enforcement of the laws. Critically, the Court emphasized that the problem was not just the mayor's *personal* financial incentive but also his *budgetary* motive. *Id.* at 532-533. Since the mayor, as the village's executive, had an interest in revenue that would be generated for the village from the court, there was little possibility that an average man in the mayor's shoes would ensure that a defendant in his court could receive a fair trial. *Id.*

In *Ward v Monroeville*, 409 US 57 (1972), the mayor of Monroeville, Ohio, presided as a jurist over ordinance violations and traffic offenses in the municipal court. As the village's executive, the mayor had authority over the village's finances, presided over city council, appointed village officials, and possessed decision-making authority for the municipality in general. *Id.* at 58. In the Ohio Supreme Court decision, the court found that "the revenue produced from a mayor's court provided a substantial portion of a municipality's funds." *Id.* at 59 (quoting *Monroeville v Ward*, 271 NE2d 757 (Ohio 1971)). To assist the mayor's court in raising revenue, the Chief of Police testified that he would regularly charge defendants under village ordinances rather than state law if he had a choice. This decision affected how much revenue would be kept by the village as any revenue from state law charges was required to be shared with the state treasury. *Id.* at 58, fn 1.

Relying on the holding in *Tumey*, the Supreme Court in *Ward* held that, under these facts, the Monroeville mayor's conduct violated the Fourteenth Amendment and deprived a defendant

in a criminal case of due process of law. *Id.* at 60 (citing *Tumey*, 273 US at 532, 534). The Court rejected the contention that *Tumey* was distinguishable because Monroeville’s mayor did not receive direct and personal benefit from the revenue generated. *Id.* The Court explained that although the mayor in *Tumey* shared in the funds collected, this fact did “not define the limits of the principle.” *Id.* The Court emphasized that the test is whether the mayor’s situation offered “the average man as a judge” a “possible temptation” “to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.” *Id.* at 60 (quoting *Tumey*, 273 US at 532). The Court explained that the “possible temptation” may exist when the mayor’s executive role influences him to ensure “a high level of contribution from the mayor’s court.” *Id.*

The Court explained that when there were two important and seriously inconsistent positions, one judicial and the other partisan, the average person as a jurist could possibly be tempted to balance the financial needs of the jurisdiction against the rights of the accused. *Id.* This “necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.” *Id.* at 60 (quoting *Tumey*, 273 US at 534).

In *Caperton v AT Massey Coal Co*, 556 US 868, 883 (2009), the Supreme Court definitively held that the “Due Process Clause has been implemented by objective standards that do not require proof of actual bias.” *Id.* (citing *Tumey*, 273 US at 532; *Mayberry v Pennsylvania*, 400 US 455, 465-466 (1971); *Aetna Life Ins Co v Lavoie*, 475 US 813, 825 (1986)). “In defining these standards, the Court has asked whether, ‘under a realistic appraisal of psychological and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Id.* at 883-884 (quoting *Withrow*, 421 US at 47).

D. Courts have applied the “average man as a judge” test to find due process violations when judges are incentivized by state statute to generate court revenues from imposing costs.

The Supreme Court’s *Tumey* and *Ward* decisions clearly established the “average man as a judge” test. The test applies to situations when a judge is required to make decisions regarding the accused’s guilt or innocence and those judicial decisions also directly impact the official’s overall work, such as how much revenue those decisions will provide to the judge’s court budget. Because the judge plays a vital role in both outcomes, this situation would create a “possible temptation” to overlook the rights of the accused. *Tumey, supra* at 532; *Ward, supra* at 60. The due process inquiry is objective and examines the strength of the temptation rather than the actual showing of impartiality. Multiple courts have applied the *Tumey/Ward* test in reviewing whether the “average person” as a judge faces “possible temptation.”

In *Caliste v Cantrell*, 937 F 3d 525, 526 (CA 5, 2019), the Court reviewed whether the magistrate’s decision-making was impacted during bond hearings when criminal defendants were ordered to post surety bonds for release. Per Louisiana law, commercial surety bonds had a 1.8% court fee, which the court collected and deposited in a “Judicial Expense Fund.” These surety bond fees contributed approximately 20-25% of the revenue collected for the fund. *Id.* The fund paid for court operating costs such as office supplies and travel as well as staff salaries. The expenses were substantial, totaling more than \$250,000 per judge annually *Id.* All the court’s judges, including the magistrate, administered the fund. *Id.* at 526.

In *Caliste*, the magistrate routinely required surety bonds from about half the defendants that came before him (he saw 100-150 per week). *Caliste*, 937 F 3d at 526. At these hearings, he routinely failed to consider the defendant’s ability to pay or non-financial conditions as a guarantee for their appearance at future court hearings. *Id.* at 527. If a defendant couldn’t raise the money to post a surety bond, he would remain in jail. *Id.*

The Fifth Circuit held that under the *Tumey/Ward* test, the defendants who appeared before the magistrate had been deprived of due process. *Caliste*, 937 F 3d at 531-532. The magistrate contended that his decision-making should be reviewed under an “average judge” standard instead of the “average man as judge” standard. He argued that the average *judge* could be impartial and avoid being tempted by the revenue generated from the fees. *Id.* at 529. The Court rejected this argument, emphasizing that following *Tumey* and *Ward*, “the ‘average man as judge’ standard—focusing on the strength of the temptation rather than an actual showing of impartiality—has guided the due process inquiry ever since.” *Id.* The *Caliste* Court confirmed that the “average judge” standard had been soundly rejected when reviewing a judge’s financial conflicts. *Id.* at 529-530. The Court also noted that the Supreme Court had applied the *Tumey/Ward* standard in a subsequent decision. *Id.* (citing *Caperton v AT Massey Coal Co*, 556 US 868, 878, 881 (2009)).

Applying this standard, the *Caliste* Court held that the funding scheme gave the magistrate judge a financial interest in imposing a surety bond because fees from those bonds went to the Judicial Expense Fund. *Caliste*, 937 F 3d at 530. As a judge of that court, he had an interest in maintaining the fund because he benefited budgetarily, even though he did not receive funds for his personal use. *Id.* The Court reasoned that the Judicial Expense Fund paid for “critical pieces” that made the court function, i.e., staff, court reporters, office supplies, etc., which the magistrate could not operate without. *Id.* Because surety bond orders financially benefited the court, and the judge’s decision to order surety bonds in hundreds of cases ensured that these fees were collected as authorized by statute, the judge violated the due process rights of the defendants who came before him. *Id.* at 531. The Court concluded that “the current arrangement pushes beyond what the bounds of due process allows.” *Caliste*, 937 F 3d at 532.

Another panel of the Fifth Circuit rejected the “average judge” standard advanced by trial court judges in *Cain v White*, 937 F 3d 446, 453-454 (CA 5, 2019). In *Cain*, trial judges imposed

finer as criminal penalties for various defendants. When those defendants had not paid their debt, the court issued bench warrants. *Id.* at 450. After the defendants were arrested, the court ordered them to post a \$20,000 surety bond or remain incarcerated until their debt was paid. *Id.* The defendants could spend up to 6 days to 2 weeks in jail until their family and friends paid off their debt or the judge released them. *Id.* at 448, 450. The judges conducted no ability to pay hearings before imposing jail sentences. *Id.* at 450. The money collected for fees and fines went to the “Judicial Expense Fund,” contributing almost one-quarter of the budget for the fund.¹³ The judges controlled decisions about the fund’s expenditures, which paid for staff salaries and operational expenses. *Id.* at 448-449.

The District Court had held that the judges’ practice was unconstitutional and issued an injunction. *Cain*, 937 F 3d at 450. The judges argued on appeal that the District Court had improperly applied the “average man as judge” standard rather than an “average judge” standard. *Id.* at 451. They argued that the *Tumey/Ward* test only applied to factual situations such as when a non-judicial officer (like a mayor) was presiding over cases. *Id.* The *Cain* Court disagreed, holding that the “average man as judge” was the proper test based on *Tumey/Ward* and that the question of impartiality did not depend on whether a person would actually avoid temptation, but rather if an average person had the “possibility of temptation.” *Id.* at 453. The Court also affirmed the District Court’s finding that the judges gained sufficient budgetary benefit from this collection process so as to render it contrary to principles of due process. *Id.* at 454-455.

Numerous other courts applying the *Tumey/Ward* “average man as a judge” test have similarly found due process violations:

¹³ The fund was created by state law and could be used by the court as a general fund and received revenue from a variety of sources including bail bonds and the collection of fines and fees. *Cain*, 937 F 3d at 448.

1. *Rose v Village of Peninsula*, 875 F Supp 442, 452-53 (ND Ohio 1995) – the mayor’s court-generated revenue made up 11-14% of the town’s general fund revenue, and the mayor had significant control over how that money was spent.
2. *DePiero v City of Macedonia*, 180 F 3d 770, 782 (CA 6 1999) – the mayor presided over the court system and had substantial executive authority, including preparing the town budget. Even though a factual dispute existed as to whether the court’s revenue represented 9% or 2% of the town budget, the court determined that, regardless, it violated due process. Citing *Ward*, the Court stated, “the Supreme Court’s test does not call for proof of actual temptation. The mere possibility of temptation to ignore the burden of proof is all that is required.” *Id.* (citing *Ward*, 409 US at 60).
3. *Connally v Georgia*, 429 US 245, 250 (1977) – the court held that paying justices of the peace \$5 every time they issued a warrant while paying nothing when a warrant application was denied offered ““a possible temptation to the average man as a judge ... or which might lead him not to hold the balance nice, clear and true between the State and the accused”” *Id.* (quoting *Ward*, 409 US at 60).

Here, Appellee has relied on *Dugan v Ohio*, 277 US 61 (1928), but this case is clearly distinguishable. Indeed, in *Ward*, the United States Supreme Court distinguished *Dugan* precisely because the mayor who had judicial authority in *Dugan* had very limited executive authority of any sort because a city manager along with the city commission exercised all executive powers. This rendered the *Dugan* mayor’s relationship to budgetary matters “too remote” to raise due process concerns. *Ward*, 407 US at 60. Conversely, in *Ward*, the mayor had greater authority over the municipality’s finances and decision-making in general. *Id.* at 58.

Caliste and *Cain* have made clear that *Ward* applies with full force when judicial decision-makers are called upon to render verdicts that directly impact judicial budgets that will fund their staff and courtrooms because the connection between the judicial decision-making and budgetary necessity is not too remote. As *Caliste* explained, “We conclude that Judge Cantrell is more like the *Ward* mayor than the *Dugan* mayor. Because he must manage his chambers to perform the judicial tasks the voters elected him to do, Judge Cantrell has a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also

helps allocate. And the bond fees impact the bottom line of the court to a similar degree that the fines did in *Ward*, where they were 37–51% of the town's budget.” *Caliste*, 937 F3d at 531.

E. MCL 769.1k(1)(b)(iii) is unconstitutional because it creates a temptation for judges to overlook the rights of defendants in favor of generating revenue.

1. The Legislature enacted MCL 769.1k(1)(b)(iii) to raise revenue for the sentencing court from criminal defendants.

The Michigan Legislature passed MCL 769.1k(1)(b)(iii) to allow courts to raise revenue. At the core of this problem is a court funding structure that incentivizes cities and courthouses to turn a profit off the backs of criminal defendants. In 2014, when the Supreme Court decided that courts did not have independent legislative authority to impose “any” costs on defendants, MCL 769.1k(1)(b)(iii) was enacted to provide a remedy.

In *People v Cunningham*, 496 Mich 145, 147 (2014), the Michigan Supreme Court considered whether MCL 769.1k(1)(b)(ii), which at the time allowed the imposition of “[a]ny cost in addition to the minimum state cost set forth in subdivision (a),” gave the courts independent authority to charge any costs to a criminal defendant. The Supreme Court held that it did not. *Id.* at 147, 154, 158. The Court stated that MCL 769.1k(1)(b)(ii) should be read in the broader statutory scheme. *Id.* at 154.

The Court explained that the Legislature’s intent was reflected in the various statutes they enacted to authorize the court to impose specific fines and costs, embodied in existing statutes. *Cunningham*, 496 Mich at 156, and fn 9. Thus, the courts did not have the independent authority to impose “any cost.” “Rather, MCL 769.1k(1)(b)(ii) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute.” *Id.* at 154.

Following *People v Cunningham*, the Legislature amended MCL 769.1k by adding subsection (b)(iii), as follows:

(iii) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law, 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.

[MCL 769.1k(1)(b)(iii)]¹⁴

The law expressly authorizes the trial court to assess convicted defendants its “actual costs” and gives judges specific authority to impose costs on defendants, whom they are sentencing. In *People v Cameron*, 319 Mich App 215, 222 (2017), this Court affirmed that the express purpose of MCL 769.1k(1)(b)(iii) was to raise revenue for the sentencing court.

2. Enactment of MCL 769.1k(1)(b)(iii) created an unconstitutional temptation for Michigan judges.

MCL 769.1k(1)(b)(iii) creates an unconstitutional temptation under the *Tumey/Ward* test. Again, after a defendant is convicted, MCL 769.1k(1)(b)(iii) allows a judge to impose “actual costs” without a requirement that there be a separate calculation for that specific case. Consequently, each judge gains a substantial budgetary benefit from the money collected from imposing court costs, which expressly pay for court expenses. By definition, this budgetary benefit would make the average person vulnerable to a “possible temptation.” *Tumey*, 273 US at 532.

As expressed in the law’s plain language, judges sentence criminal defendants and then, *as part of their sentence*, order these defendants to pay the **operating** costs of the trial court, which include staff salaries, employee benefits, goods, services, and necessary building expenses. MCL 769.1k(1)(b)(iii). In Mr. Lewis’s case, Judge Lambros imposed two concurrent jail sentences,

¹⁴ Public Act 352 of 2014; The statute’s sunset provision expired in October, 2020 but was amended recently by Public Act of 151 of 2020, extending the sunset to Oct. 1, 2022.

totaling 11 months, and then ordered Mr. Lewis to pay \$300 in court costs and \$250 in county oversight fees. (Sentencing Tr, 12/13/18, p 22).

Similar to the facts in *Tumey* and its progeny (*Ward, Caliste, Cain supra*), MCL 769.1k(1)(b)(iii) induces the court to use a defendant's conviction to collect operating revenue for the court. *See Tumey, 273 US at 533.* The average person sitting as judge cannot divorce the defendant's conviction and revenue collection, consequently facing the "possible temptation" to forget the burden of proof and deny the defendant's right to the due process of law. *Id.* at 534. In Michigan, because judges cannot collect this revenue without *first* convicting a defendant and imposing a sentence, judges cannot act as impartial decision-makers simultaneously while imposing costs under the authority of MCL 769.1k(1)(b)(iii). Therefore, this statute should be held unconstitutional.

F. MCL 769.1k(1)(b)(iii) creates a system where courts are financially dependent on the revenue collected from costs assessed to defendants.

MCL 769.1k(1)(b)(iii) poses a significant threat to judicial independence. Under this scheme, district and circuit courts have an obvious conflict of interest. Judges are incentivized to convict and order costs for the benefit of their courtrooms, the courthouse, and to support the salaries and benefits of court staff. If a judge acquits, no money comes to the court. If a judge convicts, the court may order a statutorily unlimited amount of costs (subject only to a "reasonably related" test, MCL 769.1k(1)(b)(iii)). This conflict of interest, where the court itself has a financial interest in convicting the defendant, threatens the independence of the judiciary:

It is the courts that we turn to ensure that conflicts are resolved peacefully and according to the rule of law, that rights are protected, and that government actors operate according to the limits of the law. The predictability provided by the impartial application of law sustains our social and economic relationships. It is the decisional independence of judges to make their determinations according to the law without interference from other government actors or even the majority will of the moment, and the institutional independence of the courts to operate without undue influence of the other branches of government that enable the

courts to perform their constitutionally prescribed role. The Commission of the 21st Century Judiciary expressed concerns that without sufficient funding, the institutional independence of the courts and the judiciary's capacity "to preserve itself as a separate and co-equal branch of state government" would be threatened. [American Bar Association, *Report on State Court Funding* (August 2004) p 40.]

When courts "are over-dependent on fees, such reliance can interfere with the judiciary's independent constitutional role, divert courts' attention away from their essential functions, and, in its most extreme form, threaten the impartiality of judges and other court personnel with institutional, pecuniary incentives." Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010) p 30.

According to the Trial Court Funding Commission 2019 Interim Report, approximately 26.2% of the funding for trial court administration in the state is generated by the funds that trial courts collect from assessing costs against criminal defendants at sentencing. See Appellant's Brief on Appeal, p 3 (*Interim Report, attached as Appellant's Appendix H*). Hence, one of the additional disconcerting aspects of the statute is that it makes the courts, not the county, the collector and beneficiary of costs meant to offset the expenses of court operations, when in fact the state and county have the constitutional obligation to fund trial court operations through taxation. See Const 1963, art 7, § 2; Const 1963, art 9, § 1; *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 134 (2006). The statute also, by logical implication, allows the courts to retain the money as no transfer of funds is specified once the costs are collected.¹⁵ In effect, the statute renders the courts "revenue-raisers" on behalf of the county and state. *Cameron*, 319

¹⁵ In contrast, the minimum state costs go to the justice system fund. MCL 769.1j(6). Criminal fines are paid to the library fund. Const 1963, art 8, § 9. Civil filing fees that are collected in the circuit court are paid in part to the county treasurer but in large part to the state's civil filing fee fund. MCL 600.2529.

Mich App at 224; *see People v Barber*, 14 Mich App 395, 405 (1968) (“courts are not tax-gatherers”).

It is the legislative function to provide proper funding of the courts. *46th Circuit Trial Court*, 476 Mich at 141-142. “A working justice system and corrections system is the responsibility of all citizens and should be funded accordingly.” Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 98 Minn L Rev 1735, 1749-1750 (2015). “Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should generally not be supported by revenues generated from court-ordered fines, fees, or surcharges.” Conference of Chief Justices and Conference of State Court Administrators, Resolution 4, adopted January 31, 2018.

Amici Curiae respect the difficulties in collecting revenue through taxation. Taxes are unpopular and subject to a number of constitutional restrictions. Yet, the legislative taxing authority is uniquely suited for funding the expenses of state government, and in particular the expenses of core government operations. “The power to tax defines the extent to which economic resources will be apportioned between the people and their government...” *46th Circuit Trial Court*, 476 Mich at 141. Without MCL 769.1k(1)(b)(iii), counties and the state must find suitable alternative streams of revenue, a burden already imposed upon them by the Legislature.

In summary, the courts are not a private enterprise. They do not exist for private benefit alone. Criminal defendants in particular are not a special class of citizens upon whom the expenses of state government should be levied:

Convicted felons have committed crimes and we punish them for doing so. They may be fined, incarcerated, or placed under other forms of supervision and restrictions upon their conduct. However, they remain citizens of our state. Whatever their conduct, they do not constitute a special class upon whom the courts may assess higher taxes or fees to pay for the expense necessary to maintain the constitutionally required operations of government.

As held in [*People v. Dilworth*, 291 Mich App 399 (2011)] and *Teasdale*, if a particular case requires a court to incur specific costs, then those costs may be assessed. However, the costs of operating the government itself is borne by all Michigan residents not merely or particularly by those that run afoul of the law. [*People v Cunningham (After Remand)*, 301 Mich App 218, 225 (2013) (Shapiro, J., dissenting), rev'd *People v Cunningham*, 496 Mich 145 (2014).]

II. THE EXPERIENCES AND STUDIES OF AMICI AND OTHERS HIGHLIGHT THE PRACTICAL AND SOCIAL IMPACTS OF THE COURT FUNDING STRUCTURE UNDER MCL 769.1K(1)(B)(III).

Under MCL 769.1k(1)(b)(iii), courts can add huge costs, for vague reasons or without explanation, on low-income defendants at sentencing, and they regularly and cavalierly exercise this discretion since there is no requirement that the courts explain how they calculated these totals. *Highway Robbery*, p 26, n 154. Rather, courts are allowed to reverse engineer these costs to cover their budgets or even produce a surplus, calculating the costs imposed on people by dividing the court's operating costs among the number of cases the court processes. *See, e.g., People v Cameron*, 319 Mich App 215, 219 (2017). This means that courts can charge low-income defendants hundreds of additional dollars above and beyond the fine amount solely to produce revenue. Thus, costs function as an additional punishment to defendants and regressively penalize the poor disproportionately.¹⁶

A. Typical assessments of fees and costs can double or quadruple the underlying fine, reflective of a mismatch between its purpose of regulating behavior and its function of raising revenue.

Fines, imposed at sentencing for traffic misdemeanors, are meant to be punitive. However, they become excessively punitive for poor people because courts do not factor in a person's ability

¹⁶ Together, fines, fees, and costs add up quickly. One real-world example is Mr. C, a DJC client who received a ticket for a civil infraction, in January of 2016. The court imposed a \$125 fine. When the client could not afford to pay immediately, the court added a \$40 minimum state cost, a \$15 "miscellaneous" court cost, a \$45 clearance fee, and another 20% late fee of \$52. By April, only three months later, the cost of the ticket had more than doubled to \$312. *Highway Robbery*, p 26 (inset).

to pay before imposing costs in addition to fines and fees. Defendants also face other fees and costs, whose sole purpose is to raise revenue for the court budgets and government projects, including things like public libraries, which are wholly unrelated to the offense at hand or even the legal system.¹⁷ *Highway Robbery*, p 26, n 154.

Even before costs are added to the defendant's sentence, other assessments are already high. The actual fine charged depends on each jurisdiction's preference and the amount assessed is only limited by the penalty statute. *See, e.g.*, MCL 257.907(7); MCL 600.8727(7). Various statutes authorize multiple amounts that can be charged to a defendant's total bill to the court. In addition to fines that are authorized by statute, MCL 769.1k(1)(b)(i),¹⁸ there are mandatory fixed fees such as minimum state costs, justice system assessments, and crime victims' rights fees.¹⁹

Moreover, courts have broad discretion to impose other amounts, that can add hundreds of dollars in costs such as:

1. *Warrant Fees and additional costs.*
 - a. MCL 769.1k(2)-additional costs incurred in compelling appearance
 - b. MCL 600.2559(n) -Bench warrant fees in civil infractions \$40 plus hourly fees for execution of bench warrant.

¹⁷ Fees are used to fund libraries, organizations, and public entities that provide services for crime victims, state and local police, the Secretary of State, and the state's "Court Equity Fund." *Fines and Costs Distribution Table*, State Court Administrative Office (Feb. 2013)(Appendix C); Mich. Trial Court Funding Commission, Final Report 14 (2019), (Appellant's Brief, Appendix H) ; Steve Zucker, *Where do the court fines go? From libraries to law enforcement, court fines and costs go many places*, Petoskey News-Review (Oct. 8, 2015), https://www.petoskeynews.com/featured-pnr/where-do-the-court-fines-go/article_a51d23cd-f2a6-5a82-8d7a-9cabd6644b1b.html

¹⁸ MCL 750.503. "If a person is convicted of a felony for which no punishment is specially prescribed, the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$5,000.00, **or both**." *Id.* (Emphasis supplied.) and MCL 750.504. "If a person is convicted of a crime designated in this act or in any other act of this state to be a misdemeanor for which no punishment is specially prescribed, the person is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$500.00, **or both**." *Id.* (Emphasis supplied.)

¹⁹MCL 769.1j, \$50 per misdemeanor; \$68 per felony; MCL 600.8727(4)(\$10); MCL 600.8827(4)(\$10);MCL 257.907(13)(\$40);MCL 780.905 (\$75 per misdemeanor; \$130 per felony).

- c. MCL 257.729-Additional costs in traffic civil infractions.
 - d. After sentencing, courts will add multiple costs over time until the bill is paid in full, sometimes entitled “supplemental sentencing.”
2. MCL 769.1f-*Reimbursement* of prosecution and law enforcement costs for specified crimes, including costs of salaries and transportation.
 3. MCL 771.3(2)(c),(5); MCL 771.3c. *Probation Costs*. Supervision costs and costs of court-ordered services imposed as part of a probationary sentence, such as drug testing, education, counseling.
 4. MCL 769.1k(1)(b)(iv) -Attorney’s fees.
 5. MCL 257.907(4) - costs up to \$100 for specific traffic civil infractions under State code; this limit does not apply to traffic misdemeanor or ordinance violations
 6. MCL 600.8727(3) - costs up to \$500 for municipal civil infractions
 7. MCL 600.8827(3) - costs up to \$500 state civil infractions
 8. MCL 600.4803. *Late Fees*. 20% of total amount owed, 56 days after due date, i.e., sentencing date.

N.B. See also *Cunningham*, 496 Mich at 155-156 and fn 9, referencing other statutes, in which the Legislature authorized courts to impose costs.

This does not fully capture how cities can raise money by enacting their own ordinances and how local courts can set their own schedule of fines for these ordinances to ensure that the funds collected stay within local government. *Highway Robbery*, p 28, n 175; see MCL 257.951 (authorizing municipalities to adopt the Uniform Traffic Code by reference). Funds are distributed after collection between local governments and courts based on which code (local or state) is used in the charging document. See “Fines and Costs Distribution Table” (Appendix C) Notably, this practice is similar to the facts of *Ward*, where the Monroeville Chief of Police testified that he would charge under local law rather than state law, when he had a choice, to ensure that funds were retained by the village. *Ward*, 409 US at 58, n 1. Therefore, the promise of significant

revenue collection impacts charging decisions, and ultimately, court-imposed fines, fees, and costs.

B. Governments and courts have used MCL 769.1k(1)(b)(iii) to raise millions of dollars for local budgets.

The influx of significant revenue from costs and fines shows a functional bias toward revenue generation. Judges consistently use this bias in only one manner: to raise funds for the court's budget under MCL 769.1k(1)(b)(iii). *See Court Costs Imposed and Collected 2018 under MCL 769.1k, Appendix G of Defendant-Appellant's Brief on Appeal.* A key element of that revenue-generating structure is what happens once a low-income person has been found guilty of a crime, either by plea or trial: they are ordered to pay fines, fees, **and** costs—with no consideration given to their ability to pay at sentencing. As stated above, the Trial Court Funding Commission found that court-imposed costs generated 26.2% of the funding for trial court administration. *See Appellant's Brief on Appeal, p 3 (Interim Report, attached as Appellant's Appendix H).*

In many poorer jurisdictions, including cities like Lincoln Park, Eastpointe, Warren, and Allen Park, judges regularly impose \$400 in costs on offenses that carry only a \$100 fine—a 400% bonus to the bottom line. *Highway Robbery, p 29.* In Taylor, a full 18% of the city's general fund revenue comes from money raised by their District Court. *Id.*, n 178. But wealthy cities lean heavily on their traffic courts as well. In the 2018-2019 fiscal year, 15% of the general fund revenue for the City of Ferndale came from its District Court. *Id.*, p 29, n 179.

The 43rd District Court in Hazel Park is an example of just how dependent cities can be on their courts for money. In the 2019 fiscal year, the court brought in a total revenue of \$3,268,846, despite having only \$1,308,846 in operating expenses, resulting in a net profit of nearly 2 million dollars—*more than double the court's budget.* *Highway Robbery, p 28, n 173.* If the court's

budget is considered as a part of the city’s general fund budget, the court accounts for 20% of all revenue—one out of every five dollars made—but only 8% of all expenditures. *Id.*

City budget reports also reflect the cities’ demands of the courts to raise revenue. The City of Southfield’s budget report for 2019-2020 noted that because “District Court revenue and expenses continue to decline with reduced caseload[s],” the court’s revenue is “being propped up with increased fees” charged to individuals. *Id.*, p 28, n 174. Likewise, in Eastpointe’s 2015-2016 budget, the court reported working with the city’s prosecutors to charge people with civil infractions under local ordinances instead of state law so the revenue would go to the city rather than the state. *Id.*, p 28, n 175. Notably, this practice is similar to that of the Monroeville Chief of Police in *Ward*. *Ward*, 409 US at 58, n 1.

C. Judges’ own voices clearly demonstrate that MCL 769.1k(1)(b)(iii) subjects them to constitutionally impermissible pressures to impose fines and fees.

The *Tumey/Ward* “average man as judge” test applies to Michigan’s courts as the pressure to raise funds when the judges are sentencing defendants has come to fruition since the passage of this statute. Judges from all over the state have shared their concerns with the Legislature and the higher courts on this issue.

In *People v Cameron*, the Michigan District Judges’ Association (MDJA) asked the Supreme Court to find MCL 769.1k(1)(b)(iii) unconstitutional. *Amicus Brief of Michigan District Judges Association*, p 16, in *People v Cameron*, 504 Mich 927 (2019)(Appendix B).²⁰ MDJA’s Amicus Brief detailed how the organization opposed the amendments to MCL 769.1k in 2014 because it creates a conflict of interest for judges and allows local governments to pressure judges to raise revenues for court operations. Appendix B, pp 12-13. The MDJA argued that their fears

²⁰ The purpose of providing and citing the Amicus Brief of Mich. Dist. Judges’ Association is to edify this Court and in no way is suggesting that the MDJA has signed on to this Amicus Brief or that the MDJA is asking for the Court of Appeals to rule on the issue before this Court.

had come to pass because multiple judges throughout the State have been pressured by their local governments and questioned on their revenue-raising effectiveness. Appendix B, pp 14-15. With the brief, the MDJA submitted letters of various judges who had been pressured by their government units. *Id.*; see also Appendix I of Defendant Appellant’s Brief on Appeal (Letters of District Judges throughout the State).

The primary issues that the Michigan Supreme Court originally granted leave for in *Cameron* concerned “whether court costs under MCL 769.1k(1)(b)(iii) should be classified as a tax, a fee, or some other category of charge; and (2) if court costs are a tax, whether the statute violates the Separation of Powers Clause, Const 1963, art 3, § 2, or the Distinct-Statement Clause, Const 1963, art 4, § 32.” *People v Cameron*, 501 Mich 986 (2018). After briefing and oral argument, the Michigan Supreme Court denied leave, allowing the Court of Appeals holding to stand. *People v Cameron*, 504 Mich 927 (2018).

The MDJA urged the Michigan Supreme Court to consider the constitutional implications of having judges preside over cases when they had a pecuniary interest from convicting defendants, which has resulted from the revenue-raising pressure allowed by MCL 769.1k(1)(b)(iii). The MDJA argued that since the statute only allows a portion of the revenue raised to be retained by the courts, this would incentivize the court to convict multiple defendants to raise the required amount of funds for court operations. Appendix B, p 16.

Notably, the MDJA cited two United States Supreme Court decisions, also cited herein and in Appellant’s Brief on Appeal, in support of their argument: *Tumey v State of Ohio*, 273 US 510 (1927) and *Ward v Monroeville*, 409 US 57 (1972). Appendix B, pp 10-12. In its conclusion, the MDJA argued that “the ‘possible temptation’ of raising more revenue through increasing the number of criminal convictions infringes upon defendants’ due process rights guaranteed to them

under the Fourteenth Amendment, rendering MCL 769.1k(1)(b)(iii) unconstitutional.” Appendix B, p 16.

Significantly, Chief Justice McCormack stated that the MDJA’s analysis about the constitutionality of MCL 769.1k(1)(b)(iii) was compelling. In her concurrence in *Cameron*, Justice McCormack highlighted the MDJA’s arguments concerning the statute and trial court funding system. Justice McCormack expounded that the system created a conflict of interest for judges, who were faced with the burden of court funding, specifically referencing the letters of trial judges who had been pressured by their cities to raise operational funds. *People v Cameron*, 504 Mich 927, 928 (2018)(McCormack, C.J., concurring)(Appendix D). Chief Justice McCormack recognized that the due process issue was not before the Court in *Cameron* but indicated that the Court should consider this question in the future as well as urging the Legislature to act before “the pressure placed on local courts cause the system to boil over.” *Id.*

This mirrors statements made by the bench to a DJC attorney, who had advocated that his client should not be penalized for failing to appear in court as he had not received the court’s notice due to being homeless. The District Court Judge responded that she to issue the bench warrant, stating something to the effect of “unfortunately, the city has made this court the tax collector.”

This DJC attorney experienced a similar situation in the 35th District Court in Plymouth. One of DJC’s clients had been convicted of driving with a suspended license, which carried a typical sentence of approximately \$850 in that court, almost \$500 of which are for court costs. When the DJC attorney asked the judge if he could waive fines and/or costs, the Plymouth judge first said to this attorney, off the record, that “if we start waiving fines and costs, this court would financially implode.” On the record, he simply insisted he did not have the authority to waive fines and costs. *Highway Robbery*, p 28.

D. Trial court judges, in response to the pressures created by MCL 769.1k(1)(b)(iii), wield their discretion in unconstitutional ways to exact payments from defendants, leading to disastrous consequences for poor and vulnerable populations.

In criminal and traffic misdemeanor cases, these fines, fees, and costs can be imposed in addition to a sentence of imprisonment.²¹ One case’s register of actions illustrates this example: the court’s costs (\$553) can exceed the actual fine (\$450), more than doubling the bill.

CNT: 01 C/M/F: M 3200		SENTENCE ON ONE COUNT		ORD#5.62A	Local Ordinance =		
DROVE WHILE LICENSE SUSP/REV/DENIED					Money for City		
ARRAIGNMENT DATE:	07/18/11	PLEA:	PLEAD GUILTY	PLEA DATE:	08/13/18		
FINDINGS:	DSP GLTY PL	DISPOSITION DATE:	08/13/18				
SENTENCING DATE:	08/13/18						
FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
450.00	553.00	50.00	0.00	195.00	0.00	1248.00	1248.00
JAIL SENTENCE:		17 DAYS	PROBATION:		GRAND TOTAL		
VEH IMMOB START DATE:		NUMBER OF DAYS:		VEH FORFEITURE:			
COSTS CHARGED ARE MORE THAN FINE							

A DJC’s client bill for violation of a city ordinance.

1. Courts decline to use their discretion to waive financial obligations and instead use warrants and the threat of incarceration to extort payment.

Under state law and Michigan’s court rules, judges have the discretion to order additional time to pay, payment alternatives, or a reduction or waiver of the amount owed, including court costs—if a person cannot afford to pay. See MCL 600.8729(4); MCL 600.8829(4); MCL 771.3(6)(b); MCR 6.425(E)(3)(b). However, judges often take great pains to avoid doing so, likely

²¹ In this case of a DJC client, the defendant’s total traffic misdemeanor bill of fines, costs, and fees was \$1248.00 along with a 17-day jail sentence. This defendant was also assessed \$120 each for two other violations on the same ticket, bringing her total to \$1468, and she was expected to pay the total in four months. Because she went to jail on the date of sentencing, she lost her job and could not pay \$1468 in four months. Instead, it took her another *two years* to pay off the balance plus a 20% late fee of \$294. The court did not ask defendant about her ability to pay before sentencing or offer to reduce the amount assessed due to her indigent status.

because of the pressures they face to raise funds. First, many judges never ask about a person's ability to pay if they don't have an attorney, even at show cause hearings which are specifically designed for this purpose. Second, even if judges inquire into a person's ability to pay, they frequently opt to extend the payment deadline or place people on payment plans rather than waiving the charges, even if the person is unemployed and has no foreseeable way to make payments. Furthermore, Michigan court collections guidelines instruct judges not to offer payment plans longer than 30 days for civil infractions. *Highway Robbery*, p 29, n 181. Third, when DJC attorneys have asked judges to waive outstanding traffic debt, many judges have claimed that they have no authority to waive discretionary fines and fees, even when presented with the statutes that explicitly outline their ability to do so. *Id.*, p 29.

To ensure that defendants pay the costs they have assessed but refused to waive, judges weaponize the statutes that provide authority to courts to punish nonpayment. MCL 769.1k(10); MCL 771.3; MCL 600.8729; MCL 600.8829. Judges can show cause defendants and/or a defendant can be charged with a misdemeanor for nonpayment. MCL 600.8827(9). Additionally, judges can jail defendants for civil contempt if they fail to pay. MCL 257.908. Defendants held in contempt are sometimes incarcerated until they pay or until they have spent one day in jail for each \$10, they owe the court. MCL 257.908(5). By statute, a court can only jail a defendant who has the ability to pay but has intentionally decided not to, or who has not made a "good faith effort to obtain the funds required for payment." MCL 257.908(3); MCL 769.1k(10); MCR 6.425(E)(3). Jailing someone for nonpayment if they are unable to pay is a violation of Michigan court rules, MCR 6.425(E)(3), state law, MCL 257.908(3); MCL 769.1k(10), and the United States Constitution, *Bearden v Georgia*, 461 US 660 (1983).

Unfortunately, in practice, all too often of judges fail to take appropriate measures to

determine someone's ability to pay, or outright assume that all nonpayment is willful. In 2019, a DJC client was arrested on a warrant for failure to pay his fines and costs for a traffic ticket in Lincoln Park. His attorney asked the judge to consider the defendant's inability to pay, argued that the client had little work history, had been homeless, and stated he had no present ability to pay the balance owed. The judge said that if the defendant had paid \$.50 a day from the date of sentencing until his arrest date, he would have paid in full, and the judge decided that for that reason alone, the defendant had the ability to pay the fine. The judge refused to consider the indigency factors or whether payment would result in manifest hardship to the defendant, as required by MCR 6.425(E)(3)(c). The client had been experiencing unemployment, homelessness, and jail time since receiving the ticket, rendering a \$.50 daily payment impossible.²²

This "pay or stay" sentencing practice has been rampant throughout the state. The ACLU of Michigan's attorneys have witnessed this practice in seven different counties in Michigan-Wayne, Oakland, Macomb, Montcalm, Muskegon, Kent, and Ionia. In 2011, ACLU attorneys challenged the jail sentences of five defendants from various state district courts, who could not afford to pay their court debt. For each defendant, the judge failed to hold a hearing that would prove the individual was too poor to pay or give the defendant the option of a payment plan or community service.²³

2. When courts abandon their constitutional obligation of neutrality in favor of revenue generation, they condemn the poor to deepening poverty and homelessness.

When judges ignore the poverty of defendants and ameliorative laws to reduce or waive

²² See also Sarah Alvarez, *Detroit court gets tough on traffic tickets.*, Bridge (Jun. 8, 2017), <https://www.bridgemi.com/urban-affairs/detroit-court-gets-tough-traffic-tickets-county-taxpayers-get-stuck-tab>; Joseph Shapiro, *Supreme Court Ruling Not Enough To Prevent Debtors Prisons*, NPR (May 21, 2014), <https://text.npr.org/313118629>.

²³ *ACLU Challenges Debtors' Prisons Across Michigan*, ACLU, (Aug. 4, 2011) (Appendix E)

finances and costs owed, under MCR 6.425(E)(3)(b), these fees and costs can quickly become crushing debt. Mr. B., a DJC client whose license was suspended for an unpaid ticket after he lost his job in 2013, owed the City of Detroit \$3,600 solely in civil infraction traffic tickets when we met him in 2019. He also had 18 pending traffic misdemeanor cases—which, if he were convicted of or if he pleaded guilty to, could have cost him between \$300 and \$500 in fines and costs each, or an additional \$5,400 to \$9,000. *Highway Robbery*, p 30. All these tickets stemmed from the same job loss, and Mr. B’s need to continue to drive to try and find work to pay off his tickets, despite a suspended license for these unpaid tickets. As a result of this debt, Mr. B was arrested and held in jail for a week, and even after, continued to face arrest warrants for other jurisdictions, further limiting his ability to work. *Id.* This cascading effect is confirmed by the criminal histories of graduates of the SOCD program, who have, on average, 11 open matters in Detroit alone.²⁴

Research demonstrates that monetary fines, when assessed without regard to ability to pay, push the poor into deeper poverty and homelessness. Street Democracy’s findings following its first pilot of functional sentencing, a sentencing protocol that replaces fines and fees with referrals to in-community services that reduce criminogenic risk and enhance resistance to criminal spin, e.g. job placement, sobriety, GED, and medical services. Fifty-nine percent (59%) of the indigent clients who did not receive a functional sentence experienced housing instability as a result of monetary fines, 4.5 times more than those who received functional sentences and minimal fines. As one Street Democracy client put it, “I fell behind on rent, food, and utilities. [It was] like a domino effect.” *What if courts were designed to provide opportunity instead of punishment? A report on the efficacy of functional sentences*, Street Democracy, October 2018 (Appendix G)

²⁴ “SOCD, 2020” Street Democracy (2021), p 1 (Appendix H)

Even if ordered to pay the minimum of fines and costs required by law, the debt can still be unpayable when the poor are presented with the impossible “choice” between having a roof over their head or being right in the eyes of the law. For many, their limited income is often insufficient to fully satisfy all outstanding debt as most traffic matters involve multiple infractions. By refusing to waive fines, fees, or costs, this system makes “policing for profit” possible.

3. This system bolsters discriminatory policing of the poor.

In this system, the incentives of the courts and local police departments are linked. While courts are tasked with generating revenue by imposing costs on defendants, an expansive and discriminatory system of policing helps bring those defendants into the courtroom. Michigan police spend an inordinate amount of time and resources pursuing traffic charges, which may be considered “easy money” despite their negligible impact on public safety: across the state, half of all criminal prosecutions are for minor traffic offenses, like driving with a suspended license or having expired plates. *Highway Robbery*, p 23.

In many cities across Metro Detroit, including Allen Park, Hazel Park, Romulus, Taylor, Lincoln Park, Madison Heights, and Ferndale, data show the police issuing 50 to 75 traffic tickets per every 100 residents in just one year. *Highway Robbery*, p 21. These tickets are disproportionately targeted against poor and Black drivers, in part due to Michigan’s many laws that criminalize driving while poor. *Id.*, pp 18-20, 23. For the City of Dearborn, data shows that 47.7% of police citations in 2019 went to Black drivers in a city where less than 4% of the population is Black, and 52% of citations were for license plate violations.²⁵

These drivers are aware that the system is biased against them. At a community-led

²⁵See <https://www.accountabilityfordearborn.org/policing-in-dearborn/dearborn-police-data/citations>.

meeting in 2019 to discuss residents' concerns with the traffic court system, one participant described it as "the law of economic averages. If you look poor, if you're Black, police assume they have a better chance of catching you with a suspended license or without insurance, so they pull you over." *Highway Robbery*, pp 22-23.

Indigent residents fear the courts as well as the police. At the 2016 Supreme Court hearing on court rule amendments, Street Democracy clients shared powerful testimony on how they feared facing judges who could send them to jail when they could not afford to pay court fines, fees, and costs. This fear paralyzed them so intensely that they avoided court for years, leading to a cycle of poverty and homelessness until they were offered the assistance of the Street Outreach Court program. They begged the Supreme Court to adopt "ability to pay" rules to allow poor defendants to attend court without fear of incarceration.²⁶

E. The "average man" believes that the judiciary is biased towards revenue generation and in violation of their due process rights.

A review of Google-based public court reviews further confirm that a significant portion of Michigan residents already view the neutrality of judges to be compromised by the revenue generating aspects of district courts today.²⁷ Approximately 25% of all written reviews of the Detroit-area district courts surveyed allege corruption, extortion, disregard for the financial position of defendants, or the court's wanting to generate as much revenue as possible. Factoring in upvotes, that number jumped to 32%. For the 43rd District Court - Hazel Park Division, a staggering 42% (69% weighted) of written reviews were negative reviews concerned directly with fines and fees. Below are a few review excerpts:

"My tickets came to \$126, but after adding all the "lawyer fees" "state and city fees" and such, my total was at \$430! If you pay the actual fines of the tickets, you are still held as liable for these miscellaneous fees, and you get charged more money if you do not.

²⁶ Public Administrative Hearing 5/18/16, <https://www.youtube.com/embed/9cgGLMpC7Jc?t=1027s>.

²⁷ *Public Perception of Judicial Bias in Revenue Generation*, Street Democracy 2021 (Appendix I).

In a city where many of the citizens are trying to stay afloat, I feel it is shameful the way they are robbing us blind!”

“They have a really bad system they're all they want is money they want you to plead to a different charge with no points just to get more money out of you cuz (sic) they think people don't know their rights.”

“No due process in court and will extort money any way they can.”

CONCLUSION AND RELIEF SOUGHT

In support of Defendant John Quinton Lewis and all of Michigan’s citizens affected, as *Amici Curiae*, we respectfully urge this Court to hold that MCL 769.1k(1)(b)(iii) violates the due process rights of defendants. The courts cannot be impartial when the incentive to place the courts’ financial needs over the rights of the accused has created an incentive to secure their conviction and sentence. This deprives defendants of their right to a neutral jurist free from temptation in violation of the Fourteenth Amendment of the US Constitution and Due Process Clause of Michigan’s Constitution. For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted, this 24th day of March, 2021:

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