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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MALAIKA N. ONYEAGOLU

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Case No. CR16-0745

Department No. 3

**DEFENDANT/APPELLANT'S OPENING
BRIEF ON APPEAL**

For the reasons more fully set forth hereinafter, Defendant/Appellant Malaika N. Onyeagolu hereby appeals her misdemeanor conviction of violation of Nevada Revised Statute ("NRS") 484C.110 (DUI First Offense) from the Reno Justice Court in Case No. RCR2015-085078 on the grounds that NRS 176.059 creates a structural financial conflict of interest such that the trial court had a pecuniary interest in the outcome of Defendant/Appellant's case. The pecuniary interest inherent in NRS 176.059 is an unconstitutional violation of the separation of powers as well as a fundamental denial of due process of law.

INTRODUCTION

"Trial before 'an unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 215-216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d 423, 427 (1971). The Preamble to the Revised Nevada Code of Judicial Conduct states: "The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity,

1 will interpret and apply the law that governs our society.”¹ By funneling back to the Court system
2 and to the individual judges of that court system, a portion of the mandatory administrative
3 assessment from every defendant who “pleads guilty or guilty but mentally ill or is found guilty or
4 guilty but mentally ill of a misdemeanor, including the violation of any municipal ordinance,” NRS
5 176.059 unconstitutionally creates an institutional bias, or at least the perception of one, in favor of
6 conviction.

7 More importantly, the “kickback” of a portion of the assessments mandated by NRS 176.059
8 violates the due process clause of the 4th and 14th amendments to the United States Constitution as
9 well as Article I, Section 8 paragraph 5 of the Nevada State Constitution. When the day to day
10 operation of the courts are paid from the mandatory assessments derived from a guilty plea or
11 conviction, the judges are placed under tremendous institutional pressure to find people guilty based
12 on revenue goals for the courts. The fact that some of the rebate money is paid to a judge directly
13 is even more offensive to maintaining the impartiality of the trial judge and the system.² The rebate
14 of a portion of the money paid as a result of a guilty determination appears to the ordinary citizen
15 to create an unfair trial and destroys the public’s confidence our system of justice. The kickback
16 system appears to the public that an accused cannot have a fair trial by an impartial and unbiased
17 judge.³ In *Tumey v. Ohio*, 273 U.S. 510 (1927), *Dugan v. Ohio*, 277 U.S. 61 (1928), and *Ward v.*
18 *Village of Monroeville* 409 U.S. 57 (1972), the Supreme Court of the United States held that
19 financial assessments may violate the Due Process Clause if they create a “possible” financial
20 “temptation” that undermines a defendant’s right to an impartial judge. *Tumey*, 273 U.S. at 532.

21 ¹ http://www.leg.state.nv.us/CourtRules/SCR_CJC.html last accessed July 13, 2016.

22 ² During Oral Argument on Defendant’s Motion to dismiss, Justice Court Judge, the Honorable
23 Scott E. Pearson stated that judges personally received a benefit from the administrative fines in the
24 form of travel and continuing education costs re-imbursement. *See* Exhibit A, attached, hereinafter
25 “Hearing Transcript” at pp. 8-9. Before the passage of NRS 176.059 these costs would be the
26 judge’s own responsibility. Defendant/Appellant disputes that these charges were mandatory
27 because judges, like other lawyers who must pay their own way, could find less expensive methods
28 to obtain their required continuing education credits. For example, judges (and lawyers) could listen
to recorded lectures on line instead of flying to State Bar meetings in vacation destination locations
such Waikoloa, Hawaii to listen to lectures held at fancy hotels.

³ In example, the trial court mentioned the United States Department of Justice report on
Ferguson as an example of a system so riddled with systemic corruption that is both unconstitutional
and generally perceived by the community as corrupt which led to frustration and a disrespect for
all institutions of law enforcement. *See* Hearing Transcript at pp. 15-16, 46.

1 This concept is further expressed in the Code of Judicial Conduct’s Second Canon: “A judge shall
2 avoid impropriety and the appearance of impropriety.” *See* ABA ANNOTATED MODEL CODE OF
3 JUDICIAL CONDUCT, Canon 2 (2004).

4 And although a Justice of the Peace lacks the power and/or the Justice Court lacks
5 jurisdiction to declare unconstitutional a statute of the State of Nevada, it is the constitutional duty
6 of every judge of the Reno Justice Court, and of this Court as well, to dismiss with prejudice any
7 criminal case where it is impossible to provide the accused a fair trial. *See, Salaiscooper v. Eighth*
8 *Judicial Dist. Court ex rel. Cty. of Clark*, 117 Nev. 892, 34 P.3d 509 (2001).

9 In addition, self-financing of courts and judges from assessments on people found guilty
10 violates the separation of powers doctrine. Section 1 of Article 6 of the Nevada Constitution states,
11 “The judicial power of this State is vested in a court system . . .” whereas the collection of revenue
12 is a function of the executive branch. “[A]nd no persons charged with the exercise of powers
13 properly belonging to one of these departments shall exercise any functions, appertaining to either
14 of the others, except in the cases expressly directed or permitted in this constitution.” NEV. CONST.
15 art. III, § 1. The Constitution has not delegated to the Courts the power to collect a “tax” or to keep
16 the fines they impose.

17 Any conviction under these circumstances violates the due process clause of the 4th and 14th
18 amendments to the United States Constitution as well as Article I, Section 8 paragraph 5 of the
19 Nevada State Constitution. For these reasons, more fully set forth below, the Justice Court erred in
20 denying Defendant/Appellant’s January 22, 2016 Motion to Dismiss, resulting in this appeal.

21 **STATEMENT OF FACTS**

22 Defendant/Appellant Malaika N. Onyeagolu was accused of driving under the influence of
23 alcohol in violation of NRS 484C.110 on or about December 24, 2015. In advance of her trial in
24 the Reno Justice Court, Defendant/Appellant made a preliminary motion to dismiss for denial of
25 due process on the grounds that the Court has a direct, pecuniary incentive to find the accused guilty
26 in order to collect a portion of the administrative assessment mandated by section 1 of NRS 176.059,
which creates at least the appearance of impropriety.⁴ In support of its noticed motion,

27 ⁴ Defendant also made a motion to suppress evidence, which was denied by the Court. The
28 Court indicated the result of that motion was largely based upon the Court’s factual findings of the
(footnote continued)

1 Defendant/Appellant submitted the declaration of Leah L. Jones, which contained the State of
2 Nevada Statement Of Municipal/Justice Courts Administrative Assessments for the Reno Justice
3 Court, the Reno Municipal Court and the Sparks Municipal court attached as Exhibit B, hereinafter
4 “Courts Administrative Assessments”. The court was asked to take judicial notice that “For the
5 three-year period of January 2013 through January 2016 the [Reno Justice] courts assessed
6 \$2,031,496.27 in fees specific to NRS 176.0591 subsections 5d and 6d, NRS 176.0613,2 and NRS
7 484C3. . . . This is a sum of an average of \$677,165.40 per year.⁵ By simply dividing the yearly
8 sum by 12, Defendant argued that the Reno Justice Court is influenced to find a defendant guilty by
9 the approximately \$56,000 a month the court receives from the rebate of assessments levied on all
10 guilty pleas or judgments.

11 The operation of the statute was not in dispute.⁶ Under NRS 484C.400, as a first time
12 offender, if the Court finds the defendant guilty, or accepts a plea of guilty, the court *must* “Fine
13 the person not less than \$400 nor more than \$1,000.” In addition, Defendant *must* pay an
14 administrative assessment for misdemeanor between \$105 and \$120, which is about 25% of her fine
15 as required by NRS 176.059.⁷ Under section 6 (b) of NRS 176.059, out of every administrative

16 misdemeanor of the arresting officer. *See* Hearing Transcript at pp. 98-99. Defendant asserts that the
17 rulings on the motion to suppress were tainted by what appeared to the Defendant and the general
18 public a lack of impartiality since Defendant asserted that the Court was essentially being paid a fee
19 to find the Defendant guilty.

20 ⁵ For purposes of the record, this Court is also requested to take judicial notice of these figures.

21 ⁶ Although this Court, like the trial court, may be more familiar than counsel for
22 Defendant/Appellant with the mechanics of implementing this administrative rebate program.

23 ⁷ Section 1 of NRS 176.059 states: “Except as otherwise provided in subsection 2, when a
24 defendant pleads guilty or guilty but mentally ill or is found guilty or guilty but mentally ill of a
25 misdemeanor, including the violation of any municipal ordinance, the justice or judge shall include
26 in the sentence the sum prescribed by the following schedule as an administrative assessment and
27 render a judgment against the defendant for the assessment:

Fine	Assessment
\$5 to \$49.....	\$30
50 to 59.....	45
60 to 69.....	50
70 to 79.....	55
80 to 89.....	60
90 to 99.....	65
100 to 199.....	75

28 (footnote continued)

1 assessment, the misdemeanor defendant must pay “Seven dollars for credit to a special revenue
2 fund for the use of the justice courts.”⁸ Under Section 6(a) of NRS 176.059, “[t]wo dollars for credit
3 to a special account in the county general fund for the use of the county’s juvenile court or for
4 services to juvenile offenders.” In addition, under Section 8 of NRS 176.059, 51% of the remainder
5 of money goes to the courts directly, including money used to hire back retired judges to help
6 adjudicate cases. NRS 176.059(8) states:

7 Of the total amount deposited in the State General Fund pursuant to paragraph (d) of
8 subsection 5 and paragraph (d) of subsection 6, the State Controller shall distribute
the money received to the following public agencies in the following manner:

9 (a) Not less than 51 percent to the Office of Court Administrator for allocation
as follows:

10 (1) Thirty-six and one-half percent of the amount distributed to the Office of
Court Administrator for:

11 (I) The administration of the courts;

12 (II) The development of a uniform system for judicial records; and

(III) Continuing judicial education.

13 (2) Forty-eight percent of the amount distributed to the Office of
Court Administrator for the Supreme Court.

14 (3) Three and one-half percent of the amount distributed to the
Office of Court Administrator for the payment for the services of retired
15 justices, retired judges of the Court of Appeals and retired district judges.

16 (4) Twelve percent of the amount distributed to the Office of Court
Administrator for the provision of specialty court programs.

17 (b) Not more than 49 percent must be used to the extent of legislative
authorization for the support of:

18 (1) The Central Repository for Nevada Records of Criminal History;

19 (2) The Peace Officers’ Standards and Training Commission;

20 (3) The operation by the Department of Public Safety of a computerized
interoperative system for information related to law enforcement;

(4) The Fund for the Compensation of Victims of Crime;

200 to 299.....	85
205 300 to 399.....	95
210 400 to 499.....	105
215 500 to 1,000.....	120

22
23
24 If the justice or judge sentences the defendant to perform community service in lieu of a fine, the
25 justice or judge shall include in the sentence the amount of the administrative assessment that
26 corresponds with the fine for which the defendant would have been responsible as prescribed by the
schedule in this subsection.

27 ⁸ If the case was in Municipal Court, then NRS 176.059.5(b) provides the same assessment must
28 imposed be for the benefit of the municipal courts.

1 (5) The Advisory Council for Prosecuting Attorneys; and
2 (6) Programs within the Office of the Attorney General related to victims of
3 domestic violence.

4 During the hearing on the motion to dismiss, the court candidly admitted it was intimately
5 familiar with the assessment rebate figures since as chief judge, the trial court helped prepare and
6 review these figures, monthly. *See* Exhibit C attached, Transcript of May 30, 2016 hearing,
7 hereinafter “Hearing Transcript” at pp. 14-15. The trial judge also disclosed, in all candor, that he
8 was the judge in two specialty courts directly financed by these funds. *Id.* at p. 27. The Justice
9 Court conceded that the money goes to pay for the day to day operations of the court, including the
10 salaries of Court personnel, training, and other non-capital expenses of the Court. *Id.* at pp. 10-14,
11 25. In addition, the Court in this case admitted that a portion of every assessment was not only used
12 to support the day to day operations of the Court, but that each judge of the Court, himself included,
13 received a direct personal benefit from these funds in the form of reimbursements for travel and
14 continuing education expenses. *Id.* at pp. 9-10.

15 The trial court judge admitted he was aware of the injustice caused by courts that acted more
16 like collection agencies for the county and protectors of the police as agents for the same government
17 than neutral fact finders, and even directed counsel to review the Report of the United States
18 Department of Justice in the Ferguson Missouri riots which was reviewed and made part of the
19 record in this case. *Id.* at pp. 15, 19-20, 46, 109. The Justice Court rationalized that since the
20 individual defendant’s guilty determination contributed only a small amount to the operation of the
21 courts and/or to the direct pecuniary benefit of the Judge individually, that the court could resist the
22 temptation to find someone guilty just to collect the administrative fee, although in the aggregate
23 the rebated fees would add up to a large amount. *Id.* at pp. 16-19. Defendant/Appellant argued that
24 the Court was using the wrong standard, and that the mere appearance of impropriety was enough
25 to taint all proceedings as fundamentally unfair and a denial of due process. *Id.* at pp. 48-49.

26 Defendant/Appellant cited to the Justice Court judge the relevant case law, i.e. *Tumey v.*
27 *Ohio*, *Ward v. Vill. of Monroeville*, and *In re Murchison*, but the court rejected
28 Defendant/Appellant’s position that proof of individual judge/case specific corruption was not
necessary. *Id.* at p. 102. As a result, and having lost the motion to suppress based on credibility

1 resolutions by a court paid only if defendants are guilty,⁹ Defendant entered into a conditional plea
2 pursuant to NRS 174.035(3) preserving this sole issue for appeal.¹⁰ A timely appeal of that plea
3 followed.

4 ARGUMENT

5 **I. The Trial Court Had Jurisdiction To Consider The Constitutionality Of NRS 176.059** 6 **In The Context Of A Motion To Dismiss**

7 It may seem a bit theatric to begin Defendant/Appellant Malaika N. Onyeagolu's first
8 argument in her opening brief on appeal from a simple DUI conviction with a discussion of *Marbury*
9 *v. Madison*, 5 U.S. 137, 138, 2 L. Ed. 60 (1803), but this case deals with the fundamental power and
10 purpose of the Judiciary at a time when the public has lost confidence in our criminal justice system
11 and questions whether it is truly fair and impartial. *Marbury v. Madison* stands for the proposition
12 that the Constitution of the United States forbids courts from issuing orders or engaging in official
13 acts that are beyond its jurisdiction and are contrary to the Constitution. A fair trial by an impartial
14 arbiter is guaranteed by the Due Process Clause of the Fourth and Fourteenth Amendments.

15 Furthermore, in *Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, the
16 Supreme Court of Nevada held that Justice Courts may consider constitutional issues may now
17 consider the constitutionality of a statute when raised as a defense or motion to suppress in a criminal
18 case. As stated in *Salaiscooper*:

19 The justice courts have express authority to consider constitutional issues, including
20 claims concerning the constitutionality of searches, admissibility of evidence, the
21 validity of prior convictions, and as in this case, issues involving selective,
22 discriminatory, gender-based prosecution.

23 ⁹ Defendant/Appellant's argument, from the point of view of the common citizen, is that it is not
24 a far step from receiving money only if the defendant is found guilty to being paid to find the
25 defendant guilty when the amount of money per defendant, in the aggregate, is significant. In
26 addition, the more direct the benefit to the judge, is directly proportional to the amount of pressure
27 on the judge to find the defendant guilty. In this case, the money is used for day to day operations
28 of the court as opposed to long term capital improvements, and some of the money goes directly to
reimburse the judge for what would otherwise be out of pocket expenses, i.e., a direct pecuniary
benefit to the individual judge hearing the case.

¹⁰ Defendant/Appellant appeals the denial of the motion to suppress on the same grounds, i.e.
that it could appear to the average citizen that the trial court judge was improperly influenced by the
rebate of the administrative fee to find the arresting officer credible as part of the basis for
conviction.

1 *Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 117 Nev. 892, 34 P.3d 509 (2001)
2 (reversing *McKay v. City of Las Vegas*, 106 Nev. 203, 789 P.2d 584 (1990)).

3 By failing to grant Defendant/Appellant's motion to dismiss the Reno Justice Court
4 committed a fundamental denial of due process of law in conjunction with a violation of the
5 separation of powers doctrine because it failed to fully consider the constitutionality of NRS
6 176.059. The court would not have been overreaching its authority based on the precedence in
7 *Salaiscooper*. Defendant/Appellant's appeal provides the Nevada judiciary with an opportunity to
8 review the constitutional and due process violations of NRS 176.059's inherent and structural
9 conflict or interest through the impermissible pecuniary interest it creates for the judiciary.

10 **II. This Court Should Consider The Judicial/Institutional Conflict Of Interest Created By**
11 **NRS 176.059 Under The Tumey/Ward Standard**

12 In *Tumey v. Ohio*, 273 U.S. 510 (1927), *Dugan v. Ohio*, 277 U.S. 61 (1928), and *Ward v.*
13 *Village of Monroeville* 409 U.S. 57 (1972), the Supreme Court held that financial assessments may
14 violate the Due Process Clause if they create a "possible" financial "temptation" that undermines a
15 defendant's right to an impartial judge. *Tumey*, 273 U.S. at 532. Due process may be violated
16 because of a personal or structural conflict of interest. Proof of an actual conflict of interest is
17 unnecessary. *Brown v. Vance*, 637 F.2d 272, 282 (5th Cir. 1981). Instead, the relevant question is
18 "whether the economic realities make the design of the fee system vulnerable to a 'possible
19 temptation' to the 'average man' as judge." *Id.* at 284. The test is "levelled at the system, not the
individual judge." *Id.* at 279. Thus, the possibility of bias is sufficient to violate due process.¹¹

20 In *Tumey*, the Supreme Court held that the Due Process Clause is violated if a judge has a
21 "possible" pecuniary interest in a case's outcome. *Tumey*, 273 U.S. at 532. In *Tumey* the mayor
22 presided as judge over individuals who were accused of violating the state's prohibition on alcoholic
23 beverages. The mayor's pecuniary interest was twofold. First, the prohibition statute created a
24 "direct, personal, substantial" incentive for the mayor to convict defendants. If the mayor convicted
25 the defendant, he received twelve dollars in additional salary from the fees imposed on the
26 defendant. If the defendant was not convicted, the mayor did not receive anything. Second, the

27 ¹¹ See, Micah West, *Financial Conflicts of Interest and the Funding of New Orleans's Criminal*
28 *Courts*, 101 Cal. L. Rev. 521 (2013), available at <http://scholarship.law.berkeley.edu/californialawreview/vol101/iss2/4/> last visited January 21, 2016.

1 statute created a structural incentive for the mayor to convict defendants in order to address the
2 financial needs of the village. The fees “substantially” increased the revenue of the village, which
3 the mayor was responsible for managing. The Court recognized that many mayors would not allow
4 the fees to affect their judgment. Nevertheless, the Court held that any procedure that offers “a
5 possible temptation” to the “average man as judge” to “forget the burden of proof required to convict
6 the defendant” or “not to hold the balance nice, clear, and true between the state and the accused”
7 violates the Due Process Clause. *Id.*; *see also*, *Echavarria v. Baker*, No. 3:98-CV-00202-MMD,
8 2015 WL 225422, at *10 (D. Nev. Jan. 16, 2015).¹² The *Tumey* Court reasoned:

9 Every procedure which would offer a possible temptation to the average ... judge to
10 forget the burden of proof required to convict the defendant, or which might lead him
11 not to hold the balance nice, clear and true between the State and the accused, denies
12 the [accused] due process of law.”

13 *Tumey*, 273 U.S. at 532.

14 Furthermore, in *Ward v. Village of Monroeville*, the Court held that a structural conflict of
15 interest could violate due process. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34
16 L.Ed.2d 267 (1972). In *Ward* the mayor presided over a court that provided a “substantial portion”
17 of village funds by assessing fines, fees, costs, and forfeitures. These financial assessments
18 comprised a “major part” of village income, ranging from one-third to one-half of the village’s
19 revenue funds. The mayor also had “wide executive powers.” He acted as the president of the
20 village council, presided at all meetings, voted in cases of a tie, accounted for the village’s finances,
21 and filled vacancies in village offices. The Court concluded that the possibility of a conflict of
22 interest “plainly” exists when the mayor’s executive responsibilities for village finances “may make
23 him partisan to maintain the high level of contribution from the mayor’s court.” *Id.* at 60. Thus,
24 due process could be violated, despite the absence of any direct financial benefits from financial
25 assessments.

26 Both *Tumey* and *Ward* were cited in *Brown v. Vance*. The *Brown* court explained:

27 ¹² In *Echavarria v. Baker*, No. 3:98-CV-00202-MMD, 2015 WL 225422, at *39 (D. Nev. Jan.
28 16, 2015) the United States District Court granted of a writ of habeas, effectively overruling, and
severely criticizing Nevada Supreme Court’s ruling in *Echavarria v. State*, 108 Nev. 734, 737–39,
839 P.2d 589, 591–93 (1992).

1 In *Tumey* and *Ward* the Supreme Court, as we read the opinions in those cases, was
2 not as interested in the probity of an individual judge or perhaps even, of the great
3 majority of judges. It was interested rather in the inherent defect in the legislative
4 framework arising from the vulnerability of the average man-as the system works in
5 practice and as it appears to defendants and to the public. The Court’s inquiry there
6 and our inquiry here is not whether a particular man has succumbed to temptation,
7 but whether the economic realities make the design of the fee system vulnerable to a
8 “possible temptation” to the “average man” as judge. Here we have no need to be
9 solicitous of the honor of a particular judge; none has been questioned. Nor do
10 concerns of judicial administration necessarily require a high evidentiary barrier. The
11 *Tumey-Ward* test, in sum, is levelled at the system, not the individual judge. This is
12 the reason it speaks of temptation to the average man. The “average man as judge”
13 concept was made the heart of the test to introduce a humble Everyman, prey to the
14 vicissitudes of life, the need for bread on the table, and for small favors from the right
15 people.

16 *Brown v. Vance*, 637 F.2d 272, 278 (5th Cir. 1981).

17 Moreover, a conflict of interest exists if there is a possibility that any judge who is mindful
18 of his or her institutional responsibilities, may rule in a way that will aid the institution that the judge
19 represents. It is not even necessary for a judge to receive direct compensation from fees to find a
20 conflict of interest. Courts have found a structural conflict of interest when the judiciary controls
21 the financial assessments generated from adjudications. Control over financial assessments gives a
22 judge an incentive to generate income for the court. For example, in *Augustus v. Roemer*, a federal
23 court invalidated a Louisiana statute imposing a fee on bail bonds because state court judges
24 exercised “complete executive control” over the fees. *Augustus v. Roemer*, 771 F. Supp. 1458, 1473
25 (E.D. La. 1991). In *Augustus* three Parishes enacted laws that imposed a two percent charge on all
26 bail bonds and a twenty-dollar charge on all recognizance bonds. While the parish judges did not
27 receive direct compensation from the fees, the federal court found that the judges exercised or
28 potentially exercised “total control over the amounts collected.” *Id.* at 1473. Thus, the bail fee
“plainly creates a temptation for the judges to forego due process and assess high bail amounts in
order to maintain the level of funding necessary to run their respective criminal justice systems.” *Id.*

And, in *State v. Rideau*, a Louisiana appellate court found Calcasieu Parish’s funding scheme
“particularly troubl[ing].” *State v. Rideau*, 943 So. 2d 559, 576 (La. App. 2006). The Louisiana
statute permitted the criminal court to pay its expenses from a Criminal Court Fund account derived
from fines and forfeitures. Although fines and forfeitures were deposited into the city treasury, “the
trial court, along with the district attorney, manage and control the Criminal Court Fund.” *Id.* at

1 577. The court paid jury expenses from these funds and loaned the public defender's office funds
2 to pay for Rideau's defense. *Id.* After being convicted of manslaughter, the trial court imposed
3 \$127,905.45 in court, prosecution, and indigent defense costs. *Id.* at 564. The trial judge described
4 these as costs "the Court itself actually had to spend in the prosecution of this case." *Id.* at 577. The
5 appellate court noted "the inherent danger in allowing courts or judicial officers to have a stake in
6 the costs collected from defendants," a danger "recognized long ago by the framers of [Louisiana's]
7 1898 Constitution." *Id.* See further, *United Church of the Medical Center v. Medical Center*
8 *Commission*, 689 F.2d 693, 699 (7th Cir. 1982)(a statute that granted a municipal commission the
9 right to accept proceeds from land-use judgments violated the Due Process Clause); *Esso Standard*
10 *Oil Co. v. López-Freytes* 522 F.3d 136 (1st Cir. 2008).

11 Here the Justice Court Judge has admitted as much. During the hearing on the motion to
12 dismiss, the court candidly admitted it was intimately familiar with the assessment rebate figures
13 since as chief judge, the trial court helped prepare and review these figures, monthly. See Hearing
14 Transcript at pp. 14-15. The trial judge also disclosed, in all candor, that he was the judge in two
15 specialty courts directly financed by these funds. *Id.* at p. 27. The Justice Court conceded that the
16 money goes to pay for the day to day operations of the court, including the salaries of Court
17 personnel, training, and other non-capital expenses of the Court. *Id.* at pp. 10-14, 25. In addition,
18 the Court in this case admitted that a portion of every assessment was not only used to support the
19 day to day operations of the Court, but that each judge of the Court, himself included, received a
20 direct personal benefit from these funds in the form of reimbursements for travel and continuing
21 education expenses. *Id.* at pp. 9-10.

22 Under NRS 176.059, all money that is not spent on the Courts directly, goes to pay for law
23 enforcement and programs for prosecuting attorneys. A very small percentage goes to the victims
24 of crime. Even the money to pay for the computerized database comes from this fund. In sum, the
25 police, the courts and prosecutors all appear to have an institutional pecuniary interest in finding
26 someone guilty in order to impose an administrative assessment, and in the cases of judges who are
27 retired or who will retire, a direct personal interest if they wish to "moonlight" as judges again. The
28 prior version of NRS 176.059, which was a flat ten dollars per incident administrative assessment
and limited to funding only capital acquisitions is now recast to NRS 176.0611. Over 51% of the

1 money collected from administrative assessments goes to the Office of Court Administrator and the
2 remainder, a little less than 49%, funds other projects directly related to the operation of the courts,
3 such as for (1) The Central Repository for Nevada Records of Criminal History; (2) The Peace
4 Officers' Standards and Training Commission; (3) The operation by the Department of Public Safety
5 of a computerized inter-operative system for information related to law enforcement; (4) The Fund
6 for the Compensation of Victims of Crime; (5) The Advisory Council for Prosecuting Attorneys;
7 and (6) Programs within the Office of the Attorney General related to victims of domestic violence.
8 See Exhibit B, Administrative Assessments. Only the victims compensation funds are for the benefit
9 of the general public.

10 Defendant/Appellant is cognizant that the mayors in *Tumey* and *Ward* and the judge charged
11 with following NRS 176.059's edicts are not strictly analogous however the reasoning in
12 *Tumey/Ward* and described in *Brown* is that the test is "levelled at the system, not the individual
13 judge." *Brown*, 637 F.2d. at 279. Properly applying that test to NRS 176.059 provides sufficient
14 grounds to determine that Defendant/Appellant's due process rights were violated.

14 **III. Prior Cases Upholding NRS 176.059 Are Distinguished**

15 The Nevada Supreme Court has twice upheld earlier versions of NRS 176.059 but in each
16 case, the statute was substantially different than the current version of the law, and the law has
17 changed in the interim as well. No court has applied a *Tumey/Ward* analysis to any version of the
18 statute but the factors that the Court relied upon to uphold the old NRS 176.059 are no longer present
19 in the current version of the law. Indeed, the old version of NRS 176.059 which imposed a flat ten
20 dollar per incident additional assessment and was limited to capital acquisitions only, now is
21 renumbered to NRS 176.0611. It was NRS 176.0611 that these prior cases upheld, not the new
22 version of NRS 176.059.

23 For example, in the case of *Bd. of Cty. Comm'rs Clark Cty. v. White*, the Nevada Supreme
24 Court considered a version of NRS 176.059 that provided for the imposition of an administrative
25 assessment fee in the amount of a flat ten dollars per person as a surcharge on fines for misdemeanor
26 pleas or convictions and the violation of municipal ordinances. *Bd. of Cty. Comm'rs Clark Cty. v.*
27 *White*, 102 Nev. 587, 591, 729 P.2d 1347, 1351 (1986). The money collected was expressly limited
28 to capital improvements, only, and could not be used for operational expenses of either the court or

1 law enforcement. *Id.* Citing *Bd. of Cty. Comm'rs Clark Cty v. White* the Court in *McKay v. City of*
2 *Las Vegas* reasoned:

3 This court has already reviewed NRS 176.059, when it imposed a flat fee for
4 misdemeanor or ordinance violations, to determine whether a district court order
5 compelling the use of some revenues for court improvement was proper. *Bd. of Cty.*
6 *Comm'rs v. White*, 102 Nev. 587, 729 P.2d 1347, 1350 (1986). At that time, we
7 rejected a challenge to the statute that claimed it was unlawful and unworkable. We
8 summarized the thrust of the former version of NRS 176.059 as follows:

9 The foregoing analysis distills into two basic conclusions: (1) the assessment fee
10 provides a source of funds for court improvement and capital acquisitions which is
11 in addition to general fund allotments necessary to fund the annual operation budgets
12 of the courts; and (2) such monies earmarked for, but unused by, the court system
13 during each fiscal year are transmuted into general fund monies available for use by
14 the accountable government agency as it sees fit. Such funds are not to be
15 accumulated from year to year for the exclusive use of the courts.

16 *McKay v. City of Las Vegas*, 106 Nev. 203, 206, 789 P.2d 584, 585-86 (1990) *overruled by*
17 *Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 117 Nev. 892, 34 P.3d 509 (2001)

18 The court in *McKay* went on to emphasize that: "Our holding in this case does nothing to
19 diminish our holding in *White* that revenues generated from the assessments of NRS 176.059 are to
20 be used primarily for court improvement and judicial capital acquisition." *Id.* at 207. This is exactly
21 the opposite of the current version of the law which requires more than 51 % of the money collected
22 to be spent on operational projects of the Courts or law enforcement. The flat fee assessment limited
23 to capital expenses is now at NRS 176.0611, which is really the statute the court was considering in
24 *McKay* and *White*.¹³

25 **IV. NRS 176.059 Is Not Neutral Because It Only Provides Court And Victim Related** 26 **Services**

27 ¹³ For the same reason, the Court in *Com. of N. Mariana Islands v. Kaipat*, is distinguishable.
28 *Com. of N. Mariana Islands v. Kaipat*, 94 F.3d 574, 581 (9th Cir. 1996) The *Kaipat* court upheld
the constitutionality of the Commonwealth of the Northern Mariana Islands practice of earmarking
civil and criminal fines imposed by the courts for a judicial building fund. The court in that case
held that funds went into the Judicial Building Fund which was created solely for the purpose of
constructing improved judicial facilities, not for paying any funds to any judge, and no judge has
any control over expenditures from the Fund. *Id.* at 576. The building was going to be built anyway,
since the Saipan legislature authorized a \$15 million loan from the CNMI Retirement Fund for
construction of the Judicial Complex. *Id.*

1 It is clear that NRS 176.059 is not intended to be neutral. It provides no funds whatsoever
2 for legal aid, but provides funds for prosecutors, law enforcement, and alleged victims. From a
3 layman's point of view, the administrative assessment is not neutral, and appears to be an
4 endorsement of the Prosecution by the Court.

5 CONCLUSION

6 Based on the foregoing reasons, Defendant/Appellant respectfully requests that this Court
7 reverse the May 30, 2016 decision of the Justice Court denying Defendant's motion to dismiss.
8 NRS 176.059 is a bounty hunting system that is structurally if not directly controlled by the Judiciary
9 for the benefit of the Judiciary. The Separation of Powers demands that the Court does not self-
10 fund. In addition, the self-funding scheme violates due process. In the eyes of the layman, the
11 Judges of Justice Courts have a vested interest in imposing administrative assessments, with funds
12 going directly toward daily operations of those courts where the Judges of the Justice Court work.
13 None of the funds can be used for defendant-orientated public interest. To the average man in the
14 street, NRS 176.059 appears to establish a cottage industry of fining individuals to support the day
15 to day operations of the judicial branch, prosecutors, and law enforcement. As stated in paragraph
16 2 of the Preamble to the Revised Nevada Code Of Judicial Conduct:

17 Judges should maintain the dignity of judicial office at all times, and avoid
18 both impropriety and the appearance of impropriety in their professional and
19 personal lives. They should aspire at all times to conduct that ensures the
20 greatest possible public confidence in their independence, impartiality,
21 integrity, and competence.

22 This Court should reverse the trial court's denial of Defendant/Appellants Motion to dismiss
23 if it wishes to avoid the appearance of impropriety and inspire public confidence in the
24 independence, impartiality, integrity and competence of the Justice Courts of the State of Nevada.

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AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court of the State of Nevada, County of Washoe, does not contain the social security number of any person.

Dated: July 18, 2016

Respectfully submitted,

/s/ Mark R. Thierman
Mark R. Thierman, Esq.

Attorney for Defendant / Appellant

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APPENDIX INDEX

DATE	DESCRIPTION	VOLUME	PAGES
3/30/2016	Hearing Transcript re Motion to Dismiss	1	1-120
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3/4/2015	Investigation of the Ferguson Police Department (Continued)	3	171-225

PROOF OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Thierman Buck, LLP, and that on the 18th day of July, 2016, I electronically filed a true and correct copy of **DEFENDANT / APPELLANT'S OPENING BRIEF ON APPEAL**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

George Smith
Washoe County District Attorney's Office
Deputy District Attorney
P.O. Box 11130
Reno, NV 89520

I declare under penalty of perjury under the laws of the State of Nevada and California that the foregoing is true and correct. Executed on July 18, 2016 at Reno, Nevada.

/s/Tamara Toles
Tamara Toles