STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
JUDGES: E. THOMAS FITZGERALD, MARK J. CAVANAUGH AND ALTON T. DAVIS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court No. 141154

SELESA A. LIKINE,

Defendant-Appellant.

_____/

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DEFENDANT-APPELLANT SELESA LIKINE'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Ignoring the bedrock principle that criminally culpable acts must be voluntarily committed, the Court of Appeals in *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004), unconstitutionally broke with this Court's precedent and criminalized a failure to do the impossible. *See City of Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889). In fact, until *Adams*, Michigan, like every other jurisdiction, acknowledged that inability to pay is an indispensible defense to felony non-support. Conspicuously absent from the prosecution's brief is any attempt to address the fact that Michigan is the only jurisdiction in the country to prohibit criminal defendants from presenting an inability to pay defense. See Appellant's Brief at 11 n 4.

In an attempt to defend *Adams,* the prosecution relies on the doctrine of "crossover collateral estoppel." The cases the prosecution cites, however, demonstrate that "crossover collateral estoppel" is irrelevant in this case. Apart from *Adams*, it appears no court has ever used "crossover collateral estoppel" or any other doctrine to preclude a defendant from litigating in her criminal case whether it was possible for her to comply with a previously issued civil order. To use the existence of a civil order to preclude such a criminal defense would violate numerous constitutional rights, including due process, the right to a jury trial, and the right to effective assistance of counsel.

Adams should be overruled and this case remanded to the trial court for a new trial in which Ms. Likine must be allowed to present her inability to pay defense. This case is not about policy considerations or legislative intent behind MCL 750.165, but a mandate in the state and federal constitutions—the due process right of Ms. Likine to present an involuntary *actus reus* defense at trial—that no legislature or court may deny.

STATEMENT OF FACTS

Ms. Likine relies on the Statement of Facts found in her Brief on Appeal. The prosecution's brief misstates a fact when it claims that "[t]here was no evidence presented . . . in the record during the pendency of this case at the criminal trial court, that defendant was incapacitated." Appellee's Brief at 10. In fact, Ms. Likine presented evidence of her Social Security disability statement to the trial court judge in her response to the prosecution's motion to bar her inability to pay defense and discussed her disability in that response. 12a–14a, 17a–18a. Furthermore, Ms. Likine would have presented additional evidence of her incapacity at trial, but *the prosecution* successfully moved to exclude this evidence.

ISSUE PRESERVATION

Ms. Likine's state constitutional claim was preserved under MCR 7.208(B) in her timely-filed motion for a new trial, 162a-164a, and both the trial court and the Court of Appeals decided the issue on the merits. The prosecution claims, however, with no supporting authority, that an issue presented in a timely motion for new trial is not preserved. Appellee's Brief at 10-11. This claim is wrong. *See, e.g.*, *People v Neal*, 459 Mich 72, 81; 586 NW2d 716 (1998) (holding that defendant preserved his due process claim when he "argued the point in a motion for new trial in circuit court, and raised the issue in briefs to the Court of Appeals and this Court.").

The prosecution first concedes that Ms. Likine raised a federal constitutional claim, Appellant's Brief at 6-7, but then later claims she failed to do so, *id.* at 11. Ms. Likine did, in fact, raise the federal claim in her pretrial motion for reconsideration,[1] 31a-38a, 159a, and both the trial court and Court of Appeals decided the issue on the merits.

[1] The prosecutor incorrectly states that Ms. Likine claimed she raised the issue in her response to the People's motion in limine. *Compare* Appellee's Brief at 11 *with* Defendant-Appellant's Brief at 30.

ARGUMENT

I. *ADAMS* UNCONSTITUTIONALLY CRIMINALIZES A FAILURE TO DO THE IMPOSSIBLE IN VIOLATION OF THE MICHIGAN AND FEDERAL CONSTITUTIONS.

Over 120 years ago, this Court held "[n]o legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his non-performance of such duty a crime, for which he may be punished by both fine and imprisonment." *City of Port Huron v Jenkinson*, 77 Mich at 419. After quoting this very language, the prosecution claims that *Jenkinson* was actually just about lack of notice: "This Court held that the enforcement of the ordinance violated the defendant's right to due process because there was *insufficient notice*." Appellee's Brief at 21 (emphasis in original).

To make this claim, the prosecution quotes at length the Court's discussion on notice, completely ignoring the two sentences that immediately follow that discussion:

> This [notice] defect *would be sufficient to dispose of the case if no other infirmity appeared; but a more serious difficulty is encountered* upon an examination of [the statute and provisions]. Neither of them are of any validity whatever.

Jenkinson, 77 Mich at 419 (emphasis added). The Court then proceeded to explain, in the emphatic language quoted on page 20 of Ms. Likine's Brief on Appeal, that the "more serious" constitutional defect was that the Port Huron ordinance made no allowance for the indigent who could not afford to build a sidewalk. *Jenkinson,* 77 Mich at 419-420. The prosecution's claim that *Jenkinson* is entirely, or even primarily, about lack of notice is a mischaracterization of the case.

The United States Supreme Court has similarly recognized that the Fourteenth Amendment bars a state from punishing an indigent for failing to pay a court-ordered judgment he cannot pay, *see, e.g.*, *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983),

and has even issued such a holding in the context of court-ordered child support payments, *see Zablocki v Redhail*, 434 US 374; 98 S Ct 673; 54 L Ed 2d 618 (1978). It is telling that the prosecution does not even cite *Bearden* and *Zablocki* until the last page of its brief and makes no serious effort to explain how these cases do not compel reversal here.

II. "CROSSOVER COLLATERAL ESTOPPEL" HAS NO APPLICATION TO THIS CASE AND COULD NOT CONSTITUTIONALLY BE APPLIED TO BAR MS. LIKINE FROM PRESENTING AN INABILITY TO PAY DEFENSE.

The heart of the prosecution's brief is the novel claim that the doctrine of "crossover collateral estoppel" could be used to preclude a criminal defendant from arguing inability to pay a civil judgment at her criminal trial. The prosecution cites eighteen cases that it claims support the doctrine of "crossover collateral estoppel" in Michigan and elsewhere, but not one of those cases suggests that *the prosecution* could estop *the defendant* from arguing *at a criminal trial* that the *actus reus* was involuntary. In fact, such estoppel would be unconstitutional.

A. This Court and the United States Supreme Court Have Rejected the Application of Collateral Estoppel (Much Less "Crossover Collateral Estoppel") Against Criminal Defendants.

To categorically reject the prosecution's argument, this Court need look no further than one of the cases upon which the prosecution heavily relies, this Court's decision in *People v Gates*, 434 Mich 146; 452 NW2d 627 (1990). *See* Appellee's Brief at 25–26. The prosecution cites *Gates* for the proposition that "crossover collateral estoppel" is possible in Michigan. But in *Gates*, this Court *rejected* the application of "crossover collateral estoppel" *against the prosecutor*. In relying on *Gates,* the prosecution overlooks the fact that this Court observed: "[*o*]*f course, the heightened burden of proof in a criminal trial would prevent the prosecutor from asserting collateral estoppel against a defendant in the criminal trial*." *Id.* at 159 n 14 (emphasis added).

This Court has not only recognized that "crossover collateral estoppel" against a criminal defendant is unconstitutional because the due process provided in a prior civil proceeding is inadequate to bind a criminal defendant; this Court has also held that collateral estoppel cannot be used against a criminal defendant even when his guilt on a predicate offense has already been established at a prior *criminal* trial. *People v Goss*, 446 Mich 587, 600; 521 NW2d 312 (1994).

Similarly, the United States Supreme Court has long recognized that applying collateral estoppel against a criminal defendant would be unconstitutional even when the prior proceeding was a criminal prosecution. In *Simpson v Florida*, 403 US 384, 386; 91 S Ct 1801; 29 L Ed 2d 549 (1971), the Court observed, "the prosecutor could not, while trying the case under review, have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night." *See also United States v Dixon*, 509 US 688, 710 n 15; 113 S Ct 2849; 125 L Ed 2d 556 (1993) (Scalia, J, plurality opinion) ("[A] conviction in the first prosecution would not excuse the Government from proving the same facts the second time").[2]

Even if this Court's precedent did not firmly bar the application of "crossover collateral estoppel" against a criminal defendant, the doctrine is inapplicable for at least one other reason. The doctrine of collateral estoppel applies only when the issue in question at the second proceeding was "necessarily determined by the judgment in the prior proceeding." *Gates*, 434 Mich at 158 (internal quotation and citation omitted). But as discussed in Ms. Likine's principal

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[2] The Prosecution's Brief at 32–33 cites *McKinney v Alabama*, 424 US 669; 96 S Ct 1189; 47 L Ed 2d 387 (1976), and *United States v Mendoza-Lopez*, 481 US 828; 107 S Ct 2148; 95 L Ed 2d 772 (1987), as if these cases supported its position even though both cases *rejected* the government's estoppel arguments. In both cases, the Court simply held on narrow grounds that the prior proceedings did not provide enough due process to bar the defendants from challenging the prior findings in their criminal cases.

brief at 28–29, a Family Court judgment that a non-custodial parent should pay a certain amount *going forward* does not "necessarily determine" whether that parent was unable to pay *when she missed the payments,* much less whether there is proof beyond a reasonable doubt that she was able to pay.[3]

B. The Prosecution's "Crossover Collateral Estoppel" Cases Are Inapposite.

Not one of the cases the prosecution cites even remotely supports the breathtaking claim that a prior judgment in a civil case can estop a criminal defendant from defending herself on the ground that she could not perform the required *actus reus*. It is not surprising that the prosecution cannot cite any such cases because such a result would be foreclosed by *Goss*, *Gates*, and *Simpson.*

Instead, the prosecution cites numerous cases that are far off point. For example, the prosecution cites five cases for the unremarkable proposition that a conviction in a criminal case can sometimes be used to estop the defendant in a subsequent civil case. Appellee's Brief at 26 nn 5–6. But the reverse is patently not true, as this Court recognized in *Gates*, because the

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[3] The prosecution's entire argument to this Court depends on the proposition that the Family Court order is a conclusive determination that the parent could pay at the time he or she missed the payment, but the prosecution has publicly taken exactly the opposite position. In an April 19, 2011, press release (http://www.michigan.gov/ag/0,1607,7-164--254542--,00.html, last visited 4/20/11), Attorney General Bill Schuette reported that his office has been very successful in collecting child support and "*noted the Child Support Division focuses on those parents who have an ability to pay, but refuse to do so*. . . 'The threat of criminal prosecution can be a very strong motivator,' said Schuette. 'Our message could not be clearer - *if you have the ability to pay child support and refuse to fulfill that responsibility, we will hold you accountable*.' . . . The Division also regularly conducts investigative work to identify non-custodial parents currently behind in child support payments who have the ability to pay. *Charges are initiated only when an investigative analysis of the offender's financial circumstances reveals an ability to pay.*" (Emphasis added). The prosecution thus publicly admits that, contrary to the position the prosecution has taken before this Court, the Family Court order alone cannot establish that a delinquent parent had the ability to pay and therefore an investigation is necessary to determine if the parent could pay at the time he or she missed the payments. The prosecution's insistence that the jury cannot be permitted to make the same determination is baffling.

"heightened burden of proof in a criminal trial would prevent the prosecutor from asserting collateral estoppel against a defendant in a criminal trial." 434 Mich at 159, n 14.

The prosecution also cites cases such as *Yates v United States*, 354 US 298; 77 S Ct 1064; 1 L Ed 2d 1356 (1957), *United States v Mumford*, 630 F2d 1023 (CA 4, 1980), and *Smith v State*, 46 P3d 136 (Okla Crim App 2002), Appellee's Brief at 27, for the proposition that "crossover collateral estoppel" can apply where the first lawsuit was civil and the second criminal, but the prosecution neglects to mention that these cases all involved use of collateral estoppel *against the prosecutor*, not against the defendant. Of course, the heightened burden and due process problems that bar the use of a prior civil judgment against a criminal defendant are absent when a prior civil judgment is offered against the government.

The prosecution further attempts to find support in federal cases involving the Deadbeat Parents Punishment Act ("DPPA"), 18 USC 228. But unlike MCL 750.165 after *Adams*, the DPPA includes a willfulness requirement. In other words, not only are DPPA defendants not estopped by the prior state court judgments from presenting an inability to pay defense; *the DPPA affirmatively allows the defendant to present an inability to pay defense.*

For example, in *United States v Craig*, 181 F3d 1124, 1129 (CA 9, 1999), Mr. Craig had *pleaded guilty* to violating the predecessor statute to the DPPA, and the prior state family court order was used to prevent Mr. Craig from contesting the *amount* of restitution set by a magistrate judge as part of his sentencing, not his ability to pay it. The Ninth Circuit certainly did not hold that Mr. Craig could have been denied the due process right to contest his ability to pay if he had gone to trial and instead observed that "Craig's guilty plea constituted an admission of all elements of the offense." *Id.*

Similarly, in *United States v Kerley*, 416 F3d 176, 177-178 (CA 2, 2005), the court concluded that defendants charged under DPPA cannot collaterally attack the *validity* of the underlying state child support orders, but the court never suggested that this means that a DPPA defendant cannot claim inability to pay the amount ordered. On the contrary, the Second Circuit and, apparently, every other circuit to apply the DPPA have specifically recognized that the defendant is entitled to argue to the jury that he or she could not pay the state judgment.[4] In *United States v Johnson*, 114 F3d 476 (CA 4, 1997), the court held only that defendant could not contest his *paternity* in the federal criminal proceeding, which, unlike ability or inability to pay, is neither an element of the offense nor negates the *actus reus* of the offense. Since, as discussed above, a state cannot constitutionally dispense with the voluntary *actus reus* requirement in a criminal case, a state cannot preclude a defendant from defending on the ground that the *actus reus* was involuntary, as this Court recognized in *Jenkinson.*

The prosecution's position also finds no support in *People v Glantz*, 124 Mich App 531; 335 NW2d 80 (1983), or the two "material support" cases the prosecution cites, *United States v Afshari*, 426 F3d 1150 (CA 9, 2005), and *United States v Hammoud*, 381 F3d 316 (CA 4, 2004) (en banc), *cert granted on other grounds*, *vacated* and *remanded*, 543 US 1097 (2005), *reinstated in part*, 405 F3d 1034 (CA 4, 2005). In *Glantz*, the Court of Appeals held that in a prosecution for driving on a suspended license, the defendant could not challenge the prior decision to suspend his license. In *Afshari* and *Hammoud*, the federal courts held that defendants charged with materially supporting a designated terrorist group could not challenge the prior

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[4] *See United States v Mattice*, 186 F3d 219, 228 (CA 2, 1999) (no violation of DPPA if defendant cannot pay state court judgment); *United States v Ball*, 598 F3d 366, 371 (CA 7, 2010) (approving DPPA instruction requiring jury to find that defendant had ability to pay state court judgment); *United States v Edelkind*, 525 F3d 388, 398 (CA 5, 2008) (noting DPPA instruction requiring jury to find inability to pay).

designation of the group. Once again, as with *Johnson*, the prosecution mixes apples and oranges; Mr. Glantz was attempting to attack the *validity* of his prior suspension, not his *ability to comply* with the suspension, and the defendants in *Afshari* and *Hammoud*, were attempting to challenge the *validity* of the prior designations of the groups they supported, not their *ability to comply* with the ban on supporting such groups.

In the present case, Ms. Likine does not contest the *validity* of the prior Family Court order; that is, she does not claim a right in criminal court to deny that she owes the accumulated child support arrearages until the order was finally corrected in January 2010. She claims only a constitutional right to tell the jury that she *could not pay the ordered amounts* before she can be deprived of her liberty for her involuntary failure to pay.

The key point in all of these cases is that the validity of the prior decisions is simply not in issue in the criminal cases. Thus, whether Mr. Glantz's license should have been suspended was not at issue in his criminal case. There is no dispute that his license was suspended and that it was therefore illegal for him to drive, but he would still have been entitled to defend on the ground that he did not drive voluntarily. Similarly, the issue in *Afshari* and *Hammoud* was not whether the groups should have been designated as foreign terrorist organizations. The groups were so designated, and it was therefore illegal to support them, but the defendants were still entitled to defend on the ground that they provided that support involuntarily.

Here, by the same token, the issue is not whether the Family Court should have ordered Ms. Likine to pay; the issue is solely whether she can be punished if, in fact, she could not pay. As this Court recognized more than a century ago in *Jenkinson*, any statute that imposes criminal punishment on a defendant for failing to pay an assessment or judgment without allowing for a defense of inability to pay is unconstitutional. And as the United States Supreme Court made

clear in *Bearden* and *Zablocki*, it violates the Fourteenth Amendment to punish a person for failing to pay a court-ordered judgment without making allowances for those who cannot pay.

The prosecution's argument that a civil order can estop a defendant from proving her involuntary *actus reus* in a criminal case is novel and remarkable. If there were any legal basis for this argument, the prosecution would have cited it. It did not because there is none.

CONCLUSION

Therefore and for the reasons set forth in her Brief on Appeal, Defendant-Appellant Selesa Likine requests that this Court reverse the judgment of the Court of Appeals and remand for a new trial at which she would be entitled to present a defense of inability to pay.

Respectfully Submitted,

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