STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Appellee

vs.

SELESA LIKINE	**No. 141154**
MICHAEL PARKS	**No. 141181**
SCOTT HARRIS	**No. 141513**

Appellants

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Table of Contents

PAGE

Index of Authorities

Cases

Statutes

Other

Statement of the Question

I.

MCL 750.165 neither requires proof of the defendant's ability to pay deficient support as an element of the offense nor establishes a defense of inability to pay. Is the statute, understood within the statutory scheme, constitutional?

Defendants answer "NO"

Amicus answers "YES"

Statement of Facts

Amicus adopts the statements of facts by the People in these cases.

Argument

I.

MCL 750.165 neither requires proof of the defendant's ability to pay deficient support as an element of the offense nor establishes a defense of inability to pay. The statute, understood within the statutory scheme, is constitutional.

A. The Approach of the Amicus

This court has directed that the parties in these combined cases address "whether the rule of *People v Adams*, 262 Mich App 89 (2004) — holding that inability to pay is not a defense to the crime of felony non-support under MCL 750.165 — is unconstitutional." The first question, then, is whether in *Adams* the Court of Appeals correctly construed MCL § 750.165 as not including an "ability to pay" component—so that inability to pay is neither an element nor a defense to the crime of felony-nonsupport—and if so, the second question is whether the statute itself is unconstitutional.[1]

The first question is one of statutory construction. Michigan's statement of the task of the judiciary in statutory construction is orthodox:

- "Our primary aim is to effect the intent of the Legislature."
- "We first examine the language of the statute and if it is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." In this examination, common words must be understood to have their everyday, plain meaning, and technical words, including terms of "legal art," are to be given their understood technical meaning.[2]

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[1] The "rule" of *Adams* cannot be unconstitutional; the holding of that case is either correct or incorrect. If incorrect the constitutional question disappears, if correct, then the issue is whether the legislature enacted an unconstitutional statute.

[2] Helpfully, Michigan has statutes on the point: MCL 8.3a provides that "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and

- "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent" and look to such aids as legislative history.[3]

This orthodox view, which has come to be known, sometimes derisively, as "textualism," has come under some attack, though in some of the expressed disagreement there appears to be more than a whiff of the semantic

The principal disagreement between textualists and their critics is a fundamental one: when a court undertakes to "effect the intent of the legislature" what is it the court is attempting to discover? Judge Easterbrook has written that "intent is empty."[4] By this he means not that the legislature is not the lawgiver, with the role of the court to discover what law it is the legislature has enacted, but that there is no collective *subjective* legislative intent: "Peer inside the heads of legislators and you find a hodgepodge....Intent is elusive for a natural person, fictive for a collective body."[5] When a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which

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appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."; see also MCL 750.2 regarding construction of penal statute: "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

[3] See e.g. *Wickens v. Oakwood Healthcare Sys.*, 465 Mich. 53, 60 (2001); *People v. Phillips*, 469 Mich. 390 (2003); *Gilbert v. Second Injury Fund*, 463 Mich. 866 (2000); *People v. Davis*, 468 Mich. 77 (2003); *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 465 Mich. 872 (2001). This court has criticized the use of legislative history in the construction of statutes that are not ambiguous. See e.g. *People v. Guerra*, 469 Mich 966 (2003).

[4] Frank Easterbrook, "Text History, and Structure in Statutory Interpretation," 17 Harv Jrnl L & Pub Policy 62, 68 (1994).

[5] Id.

naturally leads one first to the principal expression of intent—the text of the statute. The "law" is what the "objective indication of the words" of the statute mean.[6]

But included in an "objective indication of the words" is the *context* in which they are used within the statutory scheme. The overarching principle is that the text of the statute—even the "plain" text—must be "placed alongside the remainder of the *corpus juris*"[7] to ascertain its meaning, for in the law, as in life, *context* is often determinative. If a friend says he is going to go "look at the Riviera," it is important to grasping his meaning to know if he has a plane ticket in his pocket or a Buick in his garage.[8] And this is a well-accepted principle, as it has often been said that courts are to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[9] Textualism, then, is not "strict constructionism," "a degraded form of textualism that brings the whole philosophy into disrepute."[10] So long as the court in its attempt to discover the "objectified" intent of the legislature does so by seeking to determine "what a reasonable person would gather from the text of the law, *placed alongside the remainder of the*

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[6] Antonin Scalia, *Matter of Interpretation* (Princeton University Press: 1997), at 29.

[7] Scalia, at 17.

[8] As Justice Scalia has explained: "If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else." Scalia, at p. 26.

[9] *Sun Valley Foods Co. v. Ward,* 460 Mich. 230, 237 (1999), quoting *Bailey v. United States,* 516 U.S. 137, 145, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

[10] Id, at 23.

corpus juris,"[11] its opportunity for supplanting the law as enacted with law of its own choosing is limited.

Amicus, then, will first examine the language of MCL § 750.165, "placed alongside the remainder of the corpus juris," and then turn to the constitutional question.

B. The Construction of the Statute Given By the Court of Appeals in Adams: Ability to Pay Is Not An Element, Nor Is Inability to Pay An Affirmative Defense

(1) *The text*

Amicus believes it wise always to begin with the actual language of the statutory provision or provisions at issue, for reference only to the judicial gloss which has been laid upon the text can lead one far astray:

> (1) If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both.
>
> (2) This section does not apply unless the individual ordered to pay support appeared in, or received notice by personal service of, the action in which the support order was issued.
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> * * * * *
>
> (4) The court may suspend the sentence of an individual convicted under this section if the individual files with the court a bond in the amount and with the sureties the court requires. At a minimum, the bond must be conditioned on the individual's compliance with the support order. If the court suspends a sentence under this subsection and the individual does not comply with the support order or another

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[11] Scalia, at 17 (emphasis supplied). And see Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum L Rev 427, 538 (1947)(quoting Justice Holmes as saying, with regard to legislative intent, "I don't care what their intention was. I only want to know what the words mean").

> condition on the bond, the court may order the individual to appear and show cause why the court should not impose the sentence and enforce the bond. After the hearing, the court may enforce the bond or impose the sentence, or both, or may permit the filing of a new bond and again suspend the sentence. The court shall order a support amount enforced under this section to be paid to the clerk or friend of the court or to the state disbursement unit.

(2) The Adams decision

The statute is somewhat unusual, as it posits the existence of a prior court order. Rather than penalizing conduct that is declared criminal, the statute declares criminal the failure to comply with an existing court order, with but one defense for that failure—the lack of notice either through appearance in the underlying action or by personal service of the court order. There is no "willfulness" element to the statute, which flatly provides that one who "does not pay the support in the amount or at the time stated in the order" is guilty of a felony. The court in *Adams* thus found that there is no element of ability to pay, nor any defense of inability to pay:

- The current version of the statute clearly does not include a fault element. Instead, it states merely that the individual "does not pay the support."

- In *Ditton* [*People v. Ditton,* 78 Mich.App. 610 (1977)] under the preamended statute . . .This Court first acknowledged that the statute did not expressly provide for such a defense [as inability to pay] . . . .this Court nevertheless held that the trial court erred in ruling that ability to pay was irrelevant, and instead held that inability to pay was a defense to the crime of felony nonsupport under § 165. . . .in *Ditton,* this Court concluded that excluding evidence of inability to pay could result in injustice and therefore the Court implied a criminal intent requirement into the statute.

- However, in the current amended statute, in addition to deleting gender-specific references such as "husband" and "father" and the requirement that the person leave the state, the Legislature removed any reference to the individual's refusal or neglect to pay the support. Given the Legislature's deletion of language relating to refusal or

neglect, there is no longer wording in the statute that could be used to support a construction that would include a mens rea requirement.

- Allowing the defendant to offer an explanation and avoid conviction would negate the postconviction procedures afforded under subsection 3 of the statute. Once the defendant is convicted, subsection 3 of § 165 authorizes the court to suspend the sentence if the defendant files a bond conditioned on compliance. If the defendant fails to comply with the bond, the statute then gives the defendant additional opportunities to show cause why he has still not complied with the support order or other condition on the bond. Given these postconviction chances for redemption before punishment is imposed, the Legislature prudently decided that no additional culpable mental intent need to be shown before a conviction could be entered.[12]

C. Adams' Reading of the Statute is Correct

Adams correctly reads the statute. Its text contains no "willfulness" requirement; indeed, when the statute was amended to its current language former language that if "said husband or father [the amendment also gender-neutralized the statute] shall *refuse or neglect* to pay such amount at the time stated in such order and shall leave the state of Michigan, said husband or father shall be

[12] *People v. Adams,* 262 Mich.App. 89, 93-100 (2004).

guilty of a felony...."was altered, deleting "refuse or neglect." And beyond the ordinary reading of the words "does not pay the support in the amount or at the time stated in the order," which admits of no inquiry, either by way of element or defense, into the ability of the defendant to pay, is the context of the statute within the "remainder of the *corpus juris,"* which convincingly makes the point as well.

MCL § 750.165 begins "If *the court* orders an individual to pay support for the individual's former or current spouse, or for a child of the individual...." (emphasis supplied). *What* court? The court exercising authority under the Support and Parenting Time Enforcement Act.[13] That comprehensive act provides for the manner in which child support is to be calculated: ". . .the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519."[14] Deviations from the formula are permitted in some defined circumstances.[15] And a support order that is part of a judgment or is an order in a domestic relations matter is a judgment, with the full force, effect, and attributes of a judgment of this state, and is not, on and after

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[13] MCL § 552.601-552.650.

[14] MCL § 552.605(2).

[15] "The court may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
(a) The child support amount determined by application of the child support formula.
(b) How the child support order deviates from the child support formula.
(c) The value of property or other support awarded instead of the payment of child support, if applicable.
(d) The reasons why application of the child support formula would be unjust or inappropriate in the case." MCL § 552.605(2).

the date it is due, subject to retroactive modification, except as provided in the statutory scheme itself: "retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support."[16] And changed circumstances concerning ability to pay can lead to a revision of the support order, on motion of the payer.[17]

There *are* jurisdictions with statutory schemes that allow an affirmative defense of inability to pay in nonsupport prosecutions, but these jurisdictions clearly set out the defense in the statute. For example, in Indiana the statute provides "It is a defense that the accused person was unable to provide support."[18] And in Ohio the statutory scheme provides that "It is an affirmative defense to a charge of . . .failure to provide support established by a court order under division (B) of this section that the accused was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means."[19] Federally, the statute creates a presumption: "**Presumption.**--The existence of a support obligation that was in effect for the time

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[16] MCL § 552.605.

[17] MCL § 552.17, MCL § 552.455(1), MCL § 552.517. And as the People note, the Friend of the Court even provides forms, with accompanying instructions, for the filing of such motions.

[18] Indiana Code 35-46-1-5(d).

[19] R.C. § 2919.21(D).

period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period."[20]

The Michigan statute—"If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony . . . ."—contains no willfulness element, no presumption, nor any affirmative defense of lack of ability to pay. *Adams* correctly reads the statute to say what it quite clearly says.

D. The Statute As Correctly Construed in Adams Is Constitutional

MCL § 750.165 is sometimes called a "strict liability" offense. The Court of Appeals in the *Ditton*[21] case used that terminology, as did the panel in the *Parks* case under review here.[22] The Court of Appeals also called the offense a "strict liability" offense in *People v Westman*, finding that as so construed the statute does not violate due process.[23] But this is a misnomer; ability to pay is hardly irrelevant. Under the statutory scheme, as detailed previously, one is not criminally liable for

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[20] Though no federal circuit appears to have addressed the issue, several federal district courts—whose opinions establish no "law" other than for the judge issuing the opinion, have found that because the presumption shifts the burden of persuasion on an element of the offense ("willfully") and is therefore unconstitutional. See e.g. *United States v. Morrow*, 368 F.Supp.2d 863, 865 -866 (C.D.Ill.,2005). The Michigan statute contains no "willfulness" element, nor any statutory presumption.

[21] *People v. Ditton,* 78 Mich.App. 610 (1977).

[22] See slip opinion, 2010 WL 1576737, p.2 ("...ability to pay is not an element of the strict liability offense of failure to pay support."

[23] *People v. Westman*, 262 Mich.App. 184, 191 (2004), overruled in part on other grounds, *People v Monaco*, 474 Mich 48 (2006): "In this case, the Legislature properly enacted MCL 750.165 as a strict liability offense under its authority to enact laws protecting the public welfare."

failure to pay support when impecunious; rather, the ability to pay is taken into account *when the order for support is determined and entered*, and the statutory scheme leaves jurisdiction for modification of that order with the court that entered it, with the person against whom the support order was entered fully able to move for and obtain modification of the order on changed circumstances concerning ability to pay. The question is not whether ability to pay is relevant; rather, it is where did the legislature *allocate responsibility* for making the determination of ability to pay (allowing an initial order to be revisited if and when circumstances change)? And the answer is that the statutory scheme places that responsibility exclusively with the court entering the support order.

The panel in the *Likine*[24] case well-stated the matter. The legislature has determined the manner in which support is to be determined and to be modified, and the court in which those tasks are to be performed. Allowance of an "inability to pay" defense—which does not appear in the text—is thus inconsistent with the statutory scheme, constituting an "an impermissible collateral attack on the underlying support order."[25] Under MCL § 552.1224 it is the issuing court that maintains jurisdiction over support, the statute providing that the "tribunal of this state that issues a support order consistent with this state's law has continuing, exclusive jurisdiction over a child support order" if the parties and children at issue remain residents of this state. To allow an "inability to pay" defense in a prosecution under MCL § 750.165 would thus countenance a collateral attack. It could also lead to a determination by the appropriate court of ability to pay by way of use

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[24] *People v Likine*, 2010 WL 1568450 (2010) (unpublished opinion), one of the cases under review in this combined case.

[25] *Likine* (slip opinion).

of the child support formula, even a denial by that court of a motion for reduction of the amount as unsupported (such a denial or denials appear to have occurred in *Parks)*, and yet avoidance of responsibility under MCL § 750.165 on a jury's reasonable doubt as to ability to pay if the defense is considered a burden-shifting affirmative defense, or on a jury's conclusion by a preponderance that defendant lacks the ability to pay if the defense is considered an affirmative defense on which defendant has the burden of persuasion,[26] both in contradiction to the existing support order, and, in some cases, even a denial of a motion for modification.

There is nothing unconstitutional in a statutory scheme that imposes liability for violation of a court order and requires that a challenge to or request for a modification of that order be made to the court that entered it, so long as a continuing opportunity to gain modification of the order exists. Indeed, though the *Westman* case refers to the statute as a "strict liability" statute, the court found due process satisfied precisely because ". . . defendant was in a position to prevent the harm by complying with or seeking modification of the court order directing him to pay child support. . . .He failed to do so. We find no violation of defendant's right to due process."[27] And in an Indiana case, *Stephens v State,*[28] the court held that in the criminal nonsupport prosecution defendant could not attack the underlying support order as improperly calculating the amount of support, as he needed either

> to appeal the specific issues he contended were problematic, file a petition to modify support, or file a motion to correct error in order

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[26] Because the statute contains no such defense, the court would have to legislative its terms if it is recognized.

[27] *Westman*, at 191.

[28] *Stephens v State*, 874 N.E.2d 1027, 1032-1033 (Ind. App. 2007).

> for the support to be modified by the child support order. . . . Put simply, did not successfully appeal any aspect of the...child support proceedings. He may not now reincarnate the issues that were adjudicated in that proceeding. . . .By attempting to challenge the validity of the support calculation, Stephens would be re-addressing the exact issue that was before the child support court. He had a full and fair opportunity to litigate the issue in the prior proceedings. The child support court specifically instructed Stephens that the support order could be modified . . . .The support order needed to be challenged and changed, if at all, by the child support court or this court on direct appeal.

So also here. That process that defendant was constitutionally due with regard to the amount to be paid and the ability to pay was provided in the original proceedings in which the support order was entered, as well as the process allowing hearings on modification requests if sought by the defendant. In the criminal proceeding, the court order that the statute references cannot be collaterally attacked.

The 1889 case of *City of Port Huron v Jenkinson*[29] is readily distinguishable. There local ordinance required residents to "keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate," including the responsibility to build or repair a sidewalk if necessary. Failure to do so after appropriate notice was punishable by fine and imprisonment for not more than three months. No provision was made for consideration of inability to pay. This court observed that "a tenant occupying a house and lot in the city of Port Huron, and so poor and indigent as to receive support from his charitable neighbors, if required by the city authorities to build or repair a sidewalk along the street in front of the premises he occupies, ...[who] fails to comply with such requirement . . . becomes criminal; and, upon conviction of the offense, he may be fined and imprisoned." This court concluded that "No legislative or municipal body has

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[29] *City of Port Huron v Jenkinson*, 77 Mich 414 (1889).

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."[30] But this is entirely unlike the comprehensive statutory scheme involved here. No conclusion regarding ability to pay, nor any provision for altering a finding of ability to pay, was provided for in the *Jenkinson* ordinance scheme, both of which are built into the statutory scheme here. Again, because the original support order is arrived at through a formula that takes into account ability to pay, and because that order is subject to modification by the court entering it, which maintains exclusive jurisdiction, defendant is provided with the process he is due, and may not collaterally attack that order in the criminal proceeding.

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[30] 77 Mich at 420.

Relief

WHEREFORE, amicus requests that this Honorable Court affirm the Court of Appeals.

Respectfully submitted,

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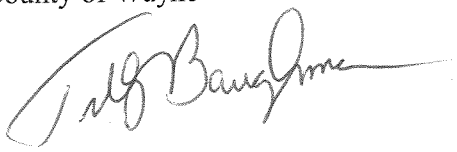

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