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'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS FOR JURISDICTION

Defendant-Appellant, Selesa Likine, appeals from the Court of Appeals' published opinion of June 8, 2010, affirming her conviction under MCL 750.165 for failure to pay child support.

On November 30, 2010, this Court granted Defendant-Appellant's Application for Leave to Appeal to 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."

STATEMENT OF QUESTIONS INVOLVED

I. **By refusing to allow Ms. Likine to present a defense of inability to pay her assessed child support, did the courts below violate her rights under the Michigan Constitution as interpreted by this Court in *City of Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889)?**

The Trial Court answered: "No."

The Court of Appeals answered: "No."

Defendant-Appellant answers: "Yes."

II. **By refusing to allow Ms. Likine to present a defense of inability to pay her assessed child support, did the courts below violate her rights under the Fourteenth Amendment?**

The Trial Court answered: "No."

The Court of Appeals answered: "No."

Defendant-Appellant answers: "Yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-appellant Selesa Likine was found guilty of the felony of failing to pay child support, pursuant to MCL 750.165, on November 14, 2008 after a one-day jury trial before the Hon. John J. McDonald of the Oakland County Circuit Court. On December 23, 2008, Judge McDonald sentenced Ms. Likine to probation and jail, with credit for the more than forty days in the Oakland County Jail that Ms. Likine served while awaiting trial. On May 7, 2009, Judge McDonald denied Ms. Likine's motion for a new trial.

Ms. Likine appealed as of right and on April 20, 2010, the Court of Appeals affirmed. 199a-204a. Ms. Likine filed a timely Application for Leave to Appeal to this Court on May 28, 2010, which was granted on November 30, 2010. 205a.

Introduction to Material Facts

This case presents the question of whether the state may convict a citizen of a felony and imprison her for failing to pay child support without allowing her to present evidence to the jury that she could not possibly have paid the assessed amounts against her because she was disabled, unemployed, and confined to a mental hospital for a portion of the period in which she failed to make payments. As the Court of Appeals noted, Michigan, alone among the states, makes it a felony to fail to pay an assessed child support payment even when it is impossible for the defendant to make that payment.

Ms. Likine paid only part of the child support she owed for February 2005 to March 2008. Throughout this period, however, Ms. Likine suffered from severe mental illness, requiring hospitalization, and had almost no income. She tried unsuccessfully to persuade the Family Court to modify her assessment, which was erroneously increased six-fold shortly after she was

released from a mental hospital. The Family Court finally recognized its error in January 2010, more than a year after Ms. Likine was convicted. Specifically, the Family Court recognized that Ms. Likine's assessments were incorrectly based on imputed income in violation of guidelines that bar such imputation for persons subsisting on disability payments. As a result, the Family Court reduced her assessments by 98%, to $25 per month.

In a pretrial ruling, the trial court nevertheless granted the prosecution's motion to bar Ms. Likine from presenting evidence of inability to pay the full amount of her assessed child support. As a result, the jury did not learn that the Social Security Administration had classified Ms. Likine as totally disabled or that she did not and could not work during the period in which she fell behind in her payments. During deliberations, the jury recognized that it did not have the whole story and requested information about Ms. Likine's employment during the relevant period, but the trial court, having previously ruled that Ms. Likine could not explain her inability to pay to the jury, refused to answer the jury's question.

The Pretrial Ruling Barring the Defense of Inability to Pay

Relying on the Court of Appeals' decision in *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004), the prosecution filed a motion in limine to bar Ms. Likine from presenting evidence of her inability to pay. 9a-11a. In response, Ms. Likine noted the critical information the jury would not hear should the prosecution prevail: (1) that she was classified as totally disabled by the Social Security Administration due to a diagnosis of schizoaffective disorder and major depressive disorder; (2) that she had been unemployed since her hospitalization in September 2005; and (3) that the Family Division had erroneously imputed an income of $5000 per month to her, which resulted in child support payments of $1131 per month, even though she

never earned that much money. 12a-14a. Ms. Likine's Social Security Income Statement (attached as an exhibit to her response) and other documentation established that she had never earned more than $19,000 in a year, and that after January 2006 her only income was $603 per month in disability benefits from the Social Security Administration. 17a-18a.

The trial court granted the prosecution's motion, ruling that Ms. Likine could not present evidence of her "inability to work or the fact that the child support obligation was too high. Because that's what the *Adams* case says. You can't do that." 27a. According to the court, instead of seeking to present a defense of inability to pay, Ms. Likine should have sought a modification of the child support payments. 23a. Trial counsel responded that Ms. Likine had, in fact, sought modification. 23a. The court itself further noted that, even if Ms. Likine's child support modification motion had been successful, it would not have retroactively absolved her of criminal liability for the payments she had already failed to make in full. 26a.[1]

Before trial, Ms. Likine filed a motion for reconsideration, arguing that precluding her from presenting the defense of inability to pay would violate the Due Process Clause of the Fourteenth Amendment. 33a. Shortly after the trial concluded, the court issued an order confirming that it had denied the pretrial motion to reconsider. 159a.

Trial

Since Ms. Likine was barred from presenting evidence that her illness made it impossible for her to make the ordered child support payments, there were no material facts in dispute at trial. The prosecution called only two witnesses: Kimberly Hayes from the Oakland County

[1] Indeed, when the Family Court finally granted Ms. Likine's third motion for modification of her child support payment obligation on January 27, 2010, it did not grant her any retroactive relief.

Friend of the Court Office and Ms. Likine's former husband, Elive Likine. Ms. Likine was the only witness for the defense.

Ms. Likine was divorced from her husband, Elive Likine, on June 12, 2003. 56a. They had been married for seven and a half years and had three children. 72a. In the original divorce order, Mr. Likine was granted physical custody. 73a. Ms. Likine had shared parenting, which allowed her to have custody of her children on weekends and on alternate holidays. 111a.

Ms. Likine was first ordered to pay child support on July 9, 2003, starting at $54 per month. 50a-51a. From July 2003 to September 2004, Ms. Likine made all of the payments except one. 61a. On August 20, 2004, the court ordered Ms. Likine to pay $100 per month for the next three months and $181 per month after that. 53a. In November 2004, Ms. Likine paid the $100 that she owed. 61a. During the following six months, Ms. Likine made one payment of $181 plus arrears. 62a.

As documented in her Response to the Motion in Limine, Ms. Likine was terminated from her last employment in September 2005, shortly after she was hospitalized for a month because of her schizoaffective disorder and major depressive disorder. 13a. She missed additional payments while hospitalized for her mental illness. 116a. At this time, Mr. Likine filed an order to have Ms. Likine's parenting time suspended. 101a. The court ordered that Ms. Likine only have supervised and public visits with her children. 94a, 101a.

Around May 2005, Mr. Likine requested that the Friend of the Court increase Ms. Likine's child support payments. 77a. Although Ms. Likine had a real estate license (which she lost in 2006 due to nonpayment of dues), her 2005 income was only $12,385. 94a. In May 2005, Ms. Likine received a commission when her boyfriend purchased a home in her name. 92a. That

was the only sale Ms. Likine ever made using her license. 89a. Ms. Likine applied some of the commission toward the arrearage on her child support payments. 95a.

On August 30, 2006 (some eight months after the Social Security Administration had declared Ms. Likine disabled and entitled to disability benefits), the Friend of the Court apparently imputed income to Ms. Likine based on her former boyfriend's purchase of the home in her name, and found that starting on June 1, 2005, Ms. Likine's child support payments should increase more than sixfold, from $181 per month to $1,131 per month.[2] 53a. The Friend of the Court's August 30, 2006, decision imputed an income of $5000 per month based on its calculation of Ms. Likine's expenses.[3] 92a, 94a. Ms. Likine made some payments and partial payments for the increased amount, but she missed many payments. 54a.

During this period, Ms. Likine requested modification of the $1,131 child support order, but the request was denied. 63a. Ms. Likine repeatedly attempted to appeal that denial to the Court of Appeals, but her appeals were denied for reasons unrelated to the merits. *See Likine v*

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[2] On January 27, 2010, the Family Court reduced Ms. Likine's child support payment obligation to $25 per month based on her *actual* income. The Family Court, however, did not grant retroactive relief despite improper imputation in violation of the Michigan Child Support Manual. 2004 MCSF 2.10(f) ("Imputation is not appropriate where: (1) A parent's source of income is a means tested income, such as . . . Supplemental Security Income (SSI) . . . ."); *see also* MCL 552.605 ("[T]he 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."). Ms. Likine brought the January 27, 2010, Family Court order (attached to this Brief) to the attention of the Court of Appeals before oral argument and asks this Court to take judicial notice of it. *See* MRE 201(b).

[3] The Court of Appeals' opinion contains "facts" about Ms. Likine's financial situation which are not found in the record and are incorrect. 199a. In fact, the Family Court used evidence of mortgage payments of $1366.19 per month, not the two separate mortgage payments of $2000 and $1000 each month that the Court of Appeals stated. Ms. Likine had a secondary lien on the home in her name in a much lower amount, but no additional monthly payments were listed. In addition, the Family Court did not base its calculations on the purchase of a new car as the Court of Appeals states, but rather payments of $265 per month for a leased car. The house was foreclosed upon and short sold. 95a.

Likine, No. 273896 (Mich App, Nov. 2, 2006) (denying appeal for lack of jurisdiction); *Likine v Likine*, No. 280148 (Mich App, Mar. 14, 2008) (denying appeal for failure to persuade court of need for immediate review). At the time of the trial, Ms. Likine was again requesting reconsideration of her motion to modify her child support payments. 120a.

In June 2007, the home purchased in Ms. Likine's name was foreclosed and short sold. 95a. At the time of trial, Ms. Likine lived with her mother. 96a. In 2008, Ms. Likine received permission from the Friend of the Court to make partial payments in the amount of $100 per month. 120a. Throughout Ms. Likine's civil and criminal cases, she paid her attorneys a total of $1,000, which she borrowed from her mother and family. 99a.

Because of the trial court's ruling, Ms. Likine was not allowed to tell the jury that she had been unemployed since September 2005. Nor was she allowed to tell the jury that since being declared disabled she had received Social Security Income disability payments as her sole source of income because of her mental illness. 13a.

The trial court instructed the jury that, to convict, it must find (1) that the defendant was under a valid court order to pay for the support of her children, (2) that the defendant appeared in or received notice by personal service of the action in which the order was issued, and (3) that the defendant did not pay the support in the amount or at the time stated in the order. 132a. Having previously ruled that Ms. Likine could not present a defense based on her inability to pay the full assessed amount, the trial court did not instruct the jury on that defense.

During its deliberations, the jury sent a written request to the trial court asking two questions: (1) "In the third element, does it state did she pay the full amount or did she try to pay?" and (2) "What was her employment during the payment period?" 138a (emphasis added).

The court replied in writing to the jury that the statute required "The full amount," and added that "I cannot answer the second question." 138a.

After receiving this response, the jury convicted Ms. Likine as charged. 137a. Ms. Likine was subsequently sentenced to probation and jail, with credit for the more than forty days she served in the Oakland County jail before trial.

Motion for New Trial

Ms. Likine filed a motion for new trial, pursuant to MCR 7.208(B)(1), arguing that the trial court's refusal to allow her to present a defense of inability to pay violated the Michigan Constitution, as interpreted by this Court in *City of Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889), and the Fourteenth Amendment of the federal constitution. 162a-170a.

The trial court orally denied the motion for new trial at a hearing on April 8, 2009. The court explained, "I disagree with the Court of Appeals' case [*Adams*] in some respects, I think inability to pay should be an issue. However, they make it clear that if, if there's a judgment that isn't modified and they don't pay it, it's strict liability. So I'm denying your motion." 195a-196a. The court issued a written order denying the motion for new trial on May 7, 2009. 198a.

The Court of Appeals

Ms. Likine appealed as of right and argued that the trial court's refusal to allow her to present an inability to pay defense violated the Michigan Constitution, as construed by this Court in *Jenkinson*, and the Due Process Clause of the Fourteenth Amendment. The Court of Appeals affirmed Ms. Likine's conviction. 199a.

The Court of Appeals concluded that *Jenkinson* is distinguishable because the Family

Court had determined Ms. Likine's ability to pay and that permitting a defendant such as Ms. Likine to argue in her criminal case that she could not pay would amount to an impermissible collateral attack on the Family Court's decision. 201a-202a. The Court of Appeals also concluded that because the statute, as interpreted in *Adams*, "imposes strict liability," it does not violate the state or federal constitutions to preclude a defense that the defendant's failure to pay was an involuntary *actus reus*. 202a. And, finally, the court held that Ms. Likine's state and federal constitutional rights to present a defense were not violated since, under this interpretation of the statute, "evidence of inability to pay was not relevant to any fact in issue." 203a.

On November 30, 2010, this Court granted leave to appeal to address whether an interpretation of MCL 750.165 that does not permit a defendant to raise a defense of inability to pay is unconstitutional. 205a.

SUMMARY OF ARGUMENT

The Court of Appeals' decision in *People v Adams,* 262 Mich App 89; 683 NW2d 729 (2004), represents the first time in American history that a jurisdiction has upheld a statute that imposes criminal liability without allowing a defendant to prove that the *actus reus* was involuntary. This Court should reject *Adams* and reaffirm *City of Port Huron v Jenkinson*, 77 Mich 414, 419; 43 NW 923 (1889), in which this Court held that, under the due process clause of the Michigan Constitution, involuntary omissions may not be criminalized. As the *Jenkinson* Court put it, "**[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.**" *Id.* at 419 (emphasis added).

It is impossible to reconcile *Jenkinson* with the Court of Appeals' decisions in this case and in *Adams*. In *Adams*, the Court of Appeals held that Michigan's felony non-support statute, unlike the non-support statutes in every other state, bars defendants from arguing that they were genuinely unable to pay the assessed amount.[4] In both *Adams* and this case, the Court of

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[4]A fifty-state (and the District of Columbia) survey of criminal nonsupport statutes confirms that Michigan is the only state that provides no defense for an inability to pay, by statute or through subsequent case law. *See* Ala Code § 13A-13-4 (2010) ("A man or woman commits the crime of nonsupport if he or she intentionally fails to provide support **which that person is able to provide** and which that person knows he or she is legally obligated to provide to a dependent spouse or child less than 19 years of age."); Alaska Stat § 11.51.120 (2010) ("A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child the person knowingly fails, without lawful excuse, to provide support for the child . . . . **'[W]ithout lawful excuse' means having the financial ability to provide support** or having the capacity to acquire that ability through the exercise of reasonable efforts."); Ariz Rev Stat § 25-511 (2010) ("A. [A]ny parent of a minor child who knowingly fails to furnish reasonable support for the parent's child is guilty of a class 6 felony . . . . B. **It is an affirmative defense to a charge of a violation of subsection A of this section that the defendant...was unable to furnish reasonable support.**"); Ark Code Ann § 5-26-401 (2010) ("(a) A person commits the offense of nonsupport if he or she fails to provide support to the person's: (2) Legitimate child who is less

than eighteen (18) years of age . . . . (g) **It is an affirmative defense to a prosecution under this section that the defendant had just cause to fail to provide the support.**"); *Dempsey v State*, 108 Ark 76; 157 SW 734, 735 (1913) ("In order to make out the offense, there must also be failure and neglect or refusal to maintain and provide for the wife and children. This means, of course, a wilful or negligent failure to provide, and not mere failure on account of inability."); *Nelke v State*, 19 Ark App 292; 720 SW2d 719 (1986) (decision under current law); Cal Penal Code § 270 (2010) ("**The court, in determining the ability of the parent to support his or her child, shall consider all income**, including social insurance benefits and gifts."); Colo Rev Stat 14-6-101 (2010) ("Any person who willfully neglects, fails, or refuses to provide reasonable support and maintenance for his spouse or for his children is guilty of a class 5 felony . . . . It shall be an affirmative defense . . . to a prosecution under this section that **owing to physical incapacity or other good cause the defendant is unable to furnish** the support, care, and maintenance required by this section."); Conn Gen Stat § 53-304 (2010) ("Any person who neglects or refuses to furnish reasonably necessary support to the person's spouse, child under the age of eighteen or parent under the age of sixty-five shall be deemed guilty of nonsupport...unless the person shows to the court before which the trial is had that, **owing to physical incapacity or other good cause**, the person is unable to furnish such support."); Del Code Ann tit 11, § 1113 (2010) ("(a) A person is guilty of criminal nonsupport when that person knowingly fails, refuses or neglects to provide the minimal requirements of food, clothing or shelter for that person's minor child . . . (d) In any prosecution for criminal nonsupport or aggravated criminal nonsupport, **it is an affirmative defense that the accused was unable to pay or provide support**, but the accused's inability to pay or provide support must be the result of circumstances over which the accused had no control."); DC Code § 46-225.02 (2010) ("For purposes of this section, failure to pay child support, as ordered, shall constitute prima facie evidence of a willful violation. **This presumption may be rebutted if the obligor was incarcerated, hospitalized, or had a disability during the period of nonsupport.** These circumstances do not constitute an exhaustive list of circumstances that may be used to rebut the presumption of willfulness."); Fla Stat § 827.06 (2010) (Any person who willfully fails to provide support **which he or she has the ability to provide** to a child or a spouse whom the person knows he or she is legally obligated to support commits a misdemeanor of the first degree.); Ga Code Ann § 19-10-1 (2011) ("If any father or mother willfully and voluntarily abandons his or her child, either legitimate or born out of wedlock, leaving it in a dependent condition, he or she shall be guilty of a misdemeanor."); *Elam v State*, 138 Ga App 432; 226 SE2d 290, 290-291 (1976) ("[T]he trial court erroneously ruled out some of the defendant's evidence as to his financial condition which tended to negate the element of willfulness . . . This evidence will not support a finding of wilful and voluntary abandonment, and the judgment must be reversed."); Haw Rev Stat § 709-903 (2010) ("A person commits the offense of persistent nonsupport if the person knowingly and persistently fails to provide support **which the person can provide** and which the person knows the person is legally obliged to provide to a spouse, child, or other dependent."); Idaho Code § 18-401 (2010) ("Every person who: (2) **Willfully** omits, **without lawful excuse**, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children, or ward or wards"); *State v Shaw*, 96 Idaho 897; 539 P2d 250, 253 (1975) ("[W]hether the state has overcome by proof beyond a reasonable doubt [the defendant's] ability to provide or support and the wilful nature of his non-support or omission, are factual issues for resolution by the jury."); 750 Ill Comp Stat 16/15 (2011) ("[D]eserts or

willfully refuses to provide for the support or maintenance . . . **and the person has the ability to provide the support.**"); Ind Code Ann § 35-46-1-5 (2010) ("(a) A person who knowingly or intentionally fails to provide support to the person's dependent child commits nonsupport of a child, a Class D felony . . . . (d) **It is a defense that the accused person was unable to provide support.**"); Iowa Code Ann § 726.5 (2010) ("A person, **who being able to do so,** fails or refuses to provide support for the person's child or ward under the age of eighteen years for a period longer than one year or in an amount greater than five thousand dollars commits nonsupport."); *State v Dvoracek*, 140 Iowa 266; 118 NW 399, 401 (1908) ("Of course, if the defendant is utterly without means and is unable to earn them his neglect could not well be willful, unless he purposely has placed himself in that situation."); Kan Stat Ann § 21-3605 (2010) ("Nonsupport of a child is a parent's failure, neglect or refusal **without lawful excuse** to provide for the support and maintenance of the parent's child in necessitous circumstances."); *State v Krumroy*, 22 Kan App 2d 794; 923 P2d 1044, 1050 (1996) ("Krumroy would be guilty of failing to provide support without lawful excuse if a jury concluded that he had the ability to earn a livelihood and did not do all that he could or should have done under the circumstances."); Ky Rev Stat Ann §530.050 (2010) ("(1) A person is guilty of nonsupport: (a) When he persistently fails to provide support **which he can reasonably provide** and which he knows he has a duty to provide to a minor"); *Rogers v Commonwealth*, 321 SW2d 779, 781 (Ky 1959) ("Physical disability and financial inability have been recognized as defenses to a prosecution under the child desertion statute."); La Rev Stat § 14:74 (2010) ("Criminal neglect of family is the desertion or intentional nonsupport...Physical incapacity which prevents a person from seeking any type of employment constitutes a defense to the charge of criminal neglect of family."); Me Rev Stat tit 17-A § 552 (2010) ("A person is guilty of nonsupport of dependents if he knowingly fails to provide support **which he is able by means of property or capacity for labor to provide** and which he knows he is legally obliged to provide to a spouse, child or other person declared by law to be his dependent."); Md Fam Law Code § 10-203 (2010) ("A parent may not **willfully** fail to provide for the support of his or her minor child."); *Moore v Tseronis*, 106 Md App 275; 664 A2d 427, 430 (1995) ("[F]or the purposes of the child support guidelines, a parent shall only be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, **not compelled by factors beyond his or her control,** to render himself or herself without adequate resource."); Mass Gen Laws ch 273, § 1 (2010) ("A spouse or parent shall be guilty of a felony . . . if (3) **wilfully** and **while having the financial ability or earning capacity to have complied,** he fails to comply with an order or judgment for support which has been entered."); Minn Stat § 609.375 (2010) ("Whoever is legally obligated to provide care and support to a spouse or child, whether or not the child's custody has been granted to another, and knowingly omits and fails to do so is guilty of a misdemeanor...It is an affirmative defense to criminal liability under this section if the defendant proves by a preponderance of the evidence that the omission and failure to provide care and support were **with lawful excuse.**"); *State v Bilotta*, 231 Minn 377; 43 NW2d 111, 113 (1950) ("Defendant's unfortunate financial situation, as far as the record indicates, was not created by him. . . . In our opinion, the evidence does not support the finding of the court that defendant wilfully failed to make proper provision for his minor child."); Miss Code Ann § 97-5-3 (2010) (Any parent who shall desert or **wilfully** neglect or refuse to provide for the support and maintenance of his or her child or children...shall be guilty of a felony."); *Page v State*, 160 Miss 300; 133 So 216, 217 (1931) ("Inasmuch as the evidence failed to show that the neglect was willful, which is to say that it was with a stubborn purpose and

without justifiable excuse, the judgment must be reversed and the case remanded for a new trial."); Mo Rev Stat § 568.040 (2010) ("[A] parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide."); *State v Akers*, 287 SW2d 370, 372 (Mo Ct App 1956) ("If through no action of his own he lacked the ability to support them, his failure to do so was not without good cause and the evidence is insufficient to sustain the conviction."); Mont Code Ann § 45-5-621 (2010) ("A person commits the offense of nonsupport if the person fails to provide support **that the person can provide** and that the person knows the person is legally obliged to provide to a spouse, child, or other dependent."); Neb Rev Stat § 28-706 (2010) ("[A]ny person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport."); *State v Bright*, 238 Neb 348; 470 NW2d 181, 184 (1991) ("The determination of whether a defendant has the ability to pay child support in order to determine whether the failure to do so was intentional is a question of fact left to the jury."); Nev Rev Stat Ann § 201.020 (2010) ("a person who knowingly fails to provide for the support of his or her: (b) Minor child...as ordered by a court, is guilty of a misdemeanor."); *Epp v State*, 107 Nev 510; 814 P2d 1011, 1013-1014 (1991) ("Thus the State could establish willfulness by showing that Epp: (1) had the ability to generate income; (2) earned wages during the time period in question; and (3) failed to make the child support payments. . . . Obviously, 'the law does not contemplate punishing a person for failing to do a thing which he cannot do."); NH Rev Stat Ann § 639:4 (2010) ("A person is guilty of non-support if such person knowingly fails to provide support which such person is legally obliged to provide and **which such person can provide** to a spouse, child or other dependent."); NJ Stat Ann § 2C:24-5 (2010) ("A person commits a crime of the fourth degree if he willfully fails to provide support **which he can provide** and which he knows he is legally obliged to provide to a spouse, child or other dependent."); NM Stat Ann § 30-6-2 (2010) ("Abandonment of dependent consists of **a person having the ability and means to provide** for his spouse or minor child's support and abandoning or failing to provide for the support of such dependent."); NY Penal Code § 260.05 (2010) ("[B]eing a parent, guardian or other person obligated to make child support payments by an order of child support entered by a court of competent jurisdiction for a child less than eighteen years old, he or she knowingly fails or refuses **without lawful excuse to provide support for such child when he or she is able to do so**, or becomes unable to do so, when, though employable, he or she voluntarily terminates his or her employment, voluntarily reduces his or her earning capacity, or fails to diligently seek employment."); NC Gen Stat § 14-322 (2010) ("Any parent who shall willfully neglect or refuse to provide adequate support for that parent's child . . . shall be guilty of a misdemeanor."); *State v McMillan*, 10 NC App 734; 180 SE2d 35, 36 (1971) ("In a prosecution under G.S. 14-322 the failure by a defendant to provide adequate support for his child must be wilful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved."); ND Cent Code § 12.1-37-01 (2010) ("1. A person is guilty of an offense if the person willfully fails to pay child support in an amount ordered by a court or other governmental agency having authority to issue the orders . . . . 4. It is an affirmative defense to a charge under subsection 1 that the **defendant suffered from a disability during the periods an unpaid child support obligation accrued, such as to effectively preclude the defendant's employment at any gainful occupation**. This

defense is available only if the defendant lacked the means to pay the ordered amounts other than from employment."); Ohio Rev Code Ann § 2919.21 (2010) ("(B) No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support . . . . (D) It is an affirmative defense to a charge of failure to provide adequate support under division (A) of this section or 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."); Okla Stat tit 21, § 852 (2010) ("Unless otherwise provided for by law, any parent, guardian, or person having custody or control of a child...who willfully omits, **without lawful excuse**, to furnish necessary...monetary child support . . . for such child which is imposed by law, upon conviction, is guilty of a misdemeanor."); Or Rev Stat § 163.555 (2009) ("(1) A person commits the crime of criminal nonsupport if...the person knowingly fails to provide support for such child . . . . (3) It is an affirmative defense to a prosecution under this section that the defendant has **a lawful excuse** for failing to provide child support."); *State v Timmons*, 75 Or App 678; 706 P2d 1018, 1019 (1985) ("It is commonly understood that a 'lawful excuse' refers to some condition, not of the defendant's own making, which prevents the defendant from being able to provide support."); 23 Pa Cons Stat § 4354 (2010) (An individual who willfully fails to comply with a support order of a court of this Commonwealth **when the individual has the financial ability to comply with the support order** commits an offense."); RI Gen Laws § 11-2-1, 11-2-1.1 (2011) ("Every person . . . who shall neglect to provide **according to his or her means** for support of his or her spouse or children, or who shall neglect or refuse to aid in the support of his or her spouse and/or children."); SC Code Ann § 63-5-20 (2009) ("Any able-bodied person **capable of earning a livelihood** who shall, **without just cause or excuse**, abandon or fail to provide reasonable support to his or her spouse or to his or her minor unmarried legitimate or illegitimate child dependent upon him or her shall be deemed guilty of a misdemeanor."); SD Codified Laws § 25-7-16 (2010) ("A parent of a minor child who intentionally omits **without lawful excuse** to furnish necessary food, clothing, shelter, medical attendance, other remedial care, or other means of support for the person's child is guilty of a Class 1 misdemeanor . . . . For the purposes of this section, **unemployment without justifiable excuse** or without verifiability of searching for employment is not a lawful excuse for noncompliance."); Tenn Code Ann § 39-15-101 (2010) ("A person commits the crime of nonsupport who fails to provide support **which that person is able to provide** and knows the person has a duty to provide to a minor child or to a child or spouse who, because of physical or mental disability, is unable to be self-supporting."); Tex Penal Code § 25.05 (2010) ("(a) An individual commits an offense if the individual intentionally or knowingly fails to provide support for the individual's child younger than 18 years of age, or for the individual's child who is the subject of a court order requiring the individual to support the child . . . . (d) It is an affirmative defense to prosecution under this section that **the actor could not provide support** for the actor's child."); Utah Code Ann § 76-7-201 (2011) ("(1) A person commits criminal nonsupport if, having a spouse, a child, or children under the age of 18 years, he knowingly fails to provide for the support of the spouse, child, or children . . . . (5)(a) In a prosecution for criminal nonsupport under this section, it is an affirmative defense that **the accused is unable to provide support**."); Vt Stat Ann tit 15, § 202 (2010) (a parent who, without lawful excuse, shall desert or **wilfully** neglect or refuse to provide for the support and maintenance of his or her child. . . . shall be imprisoned not more than two years or fined not

Appeals concluded that the Michigan legislature had intended to amend MCL 750.165 so as to preclude an inability to pay defense. Whether or not this reading of the statute is correct, this Court recognized in *Jenkinson* that a statute precluding such a defense abrogates the bedrock constitutional requirement for criminal liability: the defendant must commit a **voluntary *actus reus***. If a defendant does not pay an assessment because she cannot, she has not committed a

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more than $300.00, or both."); *State v Thibedeau*, 95 Vt 164; 113 A 873, 874 (1921) ("Where, as here, the charge is a **wilful** neglect to support, the pecuniary ability of the respondent is material."); Va Code Ann § 20-61 (2010) ("[A]ny parent who deserts or **willfully** neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of eighteen years of age . . . shall be guilty of a misdemeanor."); *Painter v Commonwealth*, 140 Va 459; 124 SE 431, 432 (1924) ("The capacity of a husband to contribute to the maintenance of his family is presumed, but the presumption may be overcome by proof of impossibility, and it is overcome when it is shown that he is without estate, so broken in health as to be entirely incapacitated, and is himself absolutely dependent on the charity of his friends. That the absolute inability of the accused to contribute anything to the support of his family should be held to bar the prosecution, at least temporarily, is apparent from a consideration of the act in its entirety and its avowed purpose."); Wash Rev Code § 26.20.035 (2010) ("[A]ny person **who is able to provide support, or has the ability to earn the means to provide support**, and who: (a) Willfully omits to provide necessary food, clothing, shelter, or medical attendance to a child dependent upon him or her; . . . is guilty of the crime of family nonsupport."); W Va Code § 61-5-29 (2010) ("A person who: (a) Repeatedly and willfully fails to pay his or her court-ordered support **which he or she can reasonably provide** and which he or she knows he or she has a duty to provide to a minor; and (b) is subject to court order to pay any amount for the support of a minor child and is delinquent in meeting the full obligation established by the order and has been delinquent for a period of at least six months' duration is guilty of a misdemeanor."); Wis Stat § 948.22 (2010) ("(4) Under this section, the following is prima facie evidence of intentional failure to provide child, grandchild or spousal support: a) For a person subject to a court order requiring child, grandchild or spousal support payments, when the person knows or reasonably should have known that he or she is required to pay support under an order, failure to pay the child, grandchild or spousal support payment required under the order . . . . (6) Under this section, **affirmative defenses include but are not limited to inability to provide child, grandchild or spousal support**."); Wyo Stat § 20-3-101 (2010) ("(b) Any person who without just cause or legal excuse intentionally fails, refuses or neglects to provide adequate support which the person knows or reasonably should know the person is legally obligated to provide to a child under eighteen (18) years of age is guilty of:(i) a misdemeanor . . . . (c) It is an affirmative defense to a charge under subsection (a) or (b) of this section that **the person was unable to provide adequate support but did provide such support as was within that person's ability and means.**") [Emphasis added throughout this footnote].

voluntary *actus reus*, and, as this Court held in *Jenkinson*, it is flatly unconstitutional to punish her for an involuntary omission.

The United States Supreme Court has repeatedly reached the same conclusion under the Fourteenth Amendment as this Court did in *Jenkinson* under the Michigan Constitution. *See Zablocki v Redhail*, 434 US 374; 98 S Ct 673; 54 L Ed 2d 618 (1978) (holding due process and equal protection prohibit a state from punishing a parent incapable of paying assessed child support by denying him right to remarry); *see also Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983) (holding due process violated when probation revoked for failure to pay fine and restitution without finding defendant capable of paying); *Tate v Short*, 401 US 395; 91 S Ct 668; 28 L Ed 2d 130 (1971) (holding equal protection principles violated by incarcerating indigent who cannot pay fine). It is, in short, a violation of both the federal and state constitutions to impose criminal liability on Ms. Likine without allowing her to present evidence of her inability to pay during her criminal trial. She must be able to argue that her act was involuntary.

The Court of Appeals responded that a defendant in a felony non-support case cannot challenge the Family Court's implicit conclusion that she can pay a particular amount. But that conclusion ignores the crucial constitutional distinction between civil and criminal proceedings. It is a "fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v Feiock*, 485 US 624, 632; 108 S Ct 1423; 99 L Ed 2d 721 (1988). Since Family Court proceedings lack the basic due process protections found in criminal courts, including the right to counsel, the right to the effective assistance of counsel, the right to a jury trial, the right of confrontation, and the right to have elements proven beyond a reasonable doubt, the findings of

Family Court **cannot** constitutionally be used to preclude a defendant from showing, **in a separate criminal case,** that she could not pay her child support and that, therefore, her *actus reus* was involuntary. Presenting evidence of inability to pay at her criminal trial would not be "an impermissible collateral attack on the underlying support order," as the Court of Appeals held. 201a. To the contrary, Ms. Likine has a constitutional right to present an inability to pay defense under the robust due process afforded defendants in criminal proceedings. 201a-202a. And in fact, an inability to pay defense addresses whether a defendant was capable of making child support payments that she missed **at the time she missed them**—a question the Family Court support order simply does not answer.

The facts of this case bring the due process violation into sharp focus: Ms. Likine has been diagnosed with schizoaffective and major depressive disorders and subsists solely on Social Security Income. She was nevertheless convicted of failing to pay child support based on a Family Court's indisputably erroneous assessment of imputed income, and she was not permitted to defend herself by proving to the jury that she could not pay and that, therefore, her failure to pay was an involuntary *actus reus*.

In short, this case presents the question whether, despite this Court's clear holding in *Jenkinson*, a person may be convicted of a felony and jailed, as Ms. Likine was, for being too poor to pay an assessment against her. As *Jenkinson* makes clear, it is not a crime in this nation to be poor, and it is unconstitutional to jail a person because of her poverty.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF MCL 750.165 AS PROHIBITING A DEFENDANT FROM PRESENTING EVIDENCE OF AN INABILITY TO PAY CHILD SUPPORT VIOLATES THE MICHIGAN CONSTITUTION AS INTERPRETED IN *JENKINSON.*

Standard of Review and Issue Preservation

State constitutional issues present questions of law subject to *de novo* review. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003).

Ms. Likine presented the argument that the trial court's denial of her right to present a defense of inability to pay violated the Michigan Constitution in her timely-filed motion for new trial. 162a-164a. The trial court denied the motion for new trial on the merits. 198a. Ms. Likine again raised this argument in the Court of Appeals, and that court also rejected the argument on the merits. 199a.

A. The Court of Appeals' interpretation of MCL 750.165 as precluding a defense of inability to pay conflicts with *Jenkinson* and violates the Michigan Constitution.

The Court of Appeals' recognition that "the *actus reus* [in MCL 750.165] is the failure to pay the support as ordered" 202a, coupled with the court's holding that a defendant is not allowed to present evidence of her inability to pay, creates a direct conflict with this Court's decision in *City of Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889). In *Jenkinson*, this Court recognized that the Michigan constitution guarantees a criminal defendant the right to present evidence establishing an involuntary *actus reus.*

The Court of Appeals' interpretation of MCL 750.165 creates a statutory scheme that does precisely what *Jenkinson* prohibits: it criminalizes an involuntary act. In *Jenkinson*, Port

Huron brought a criminal action against Mr. Jenkinson for violating a local ordinance that imposed a duty on property owners and occupants to "construct, keep and maintain good and sufficient sidewalks . . . in front of or adjacent to such real estate; and upon failure so to do, such person, after due notice, shall be liable to prosecution." *Id.* at 417 (citation omitted). The punishment for violation of the ordinance was to pay a fine or up to ninety days of imprisonment. *Id.* at 416.

This Court held the ordinance unconstitutional under the Michigan Constitution, reasoning as follows:

> **No 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.** It needs no argument to convince any court or citizen, where law prevails, that **this cannot be done**; and yet such is the effect of the provisions of the statute and by-law under consideration. It will readily be seen 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, and fails to comply with such request, such omission becomes criminal; and, upon conviction of the offense, he may be fined and imprisoned. **It is hardly necessary to say these two sections of the statute are unconstitutional and void, and that the provisions are of no force or effect. They are obnoxious to our constitution and laws; and the two sections of the statute are a disgrace to the legislation of the state.**

Id. at 419-20 (emphasis added).

This Court's decision in *Jenkinson* was presumably based on the Due Process Clause of the Constitution of Michigan of 1850, which provided: "No person shall be . . . deprived of life, liberty or property, without due process of law." Const 1850, art VI, § 32. The language of the Due Process Clause is identical in the current Michigan Constitution. Const 1963, art I, § 17.

Jenkinson remains good law. Indeed, several justices of this Court relied on and cited *Jenkinson* as recently as 2009 for the proposition that "[a] person cannot be criminally liable for

failing to do an act that he or she is incapable of performing." *People v Dowdy*, 484 Mich 855, 855-56; 769 NW2d 648 (2009) (Kelly, CJ, concurring); *see also id.* at 862 n 22 (Hathaway, J, dissenting). In addition, this Court held in 2009, again consistent with *Jenkinson*, that when the state begins an enforcement action on a judgment, a criminal defendant "must . . . be given an opportunity to contest the enforcement on the basis of indigency" at that time. *People v Jackson*, 483 Mich 271, 292; 769 NW2d 630 (2009); *see also* Wayne R. LaFave's *Substantive Criminal Law* (2d ed 2008) (citing *Jenkinson* for the proposition that "one cannot be criminally liable for failing to do an act which he is physically incapable of performing").

This Court did not qualify—and has not since qualified—its holding in *Jenkinson* that it is unconstitutional to criminalize the failure to perform an impossible duty. **There is no language in *Jenkinson* suggesting that the Port Huron ordinance would have been constitutional had there been a separate civil proceeding to determine how much Mr. Jenkinson could have paid for the sidewalk.** This Court's unambiguous holding in *Jenkinson* that a criminal statute is void if it criminalizes a failure to pay without allowing the defendant to show that he or she cannot pay plainly applies to MCL 750.165. Therefore, a straightforward application of *Jenkinson* leads inescapably to the conclusion that a defendant charged with violating MCL 750.165 for failing to pay child support must be allowed to present a defense of inability to pay.

Faced with Ms. Likine's argument that *Jenkinson* controlled, the Court of Appeals chose instead to rely on its own precedent, *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004), even though *Adams* is impossible to reconcile with *Jenkinson*. *See* 202a ("Thus, defendant's attempt to challenge the child support order in her criminal trial by claiming an inability to pay the amount ordered was properly denied and did not constitute an abuse of discretion. As simply

stated in [*Adams*], '[t]he Michigan nonsupport statutes generally reflect the rule that the offense presupposes the ability to pay.'").

The Court of Appeals' interpretation of MCL 750.165 in *Adams* criminalized an involuntary act, a breathtaking departure from the bedrock state and federal constitutional rule that a criminal defendant cannot be punished for an involuntary act or omission. This rule is so universally followed that, until the Michigan Court of Appeals declared in *Adams* that felony nonsupport defendants were barred from presenting an inability to pay defense, an involuntary omission had "never before been subject to punishment in American law." Jack Apol & Stacey Studnicki, *Criminal Law*, 51 Wayne L Rev 653, 674 (2005). Although the Court of Appeals identified an *actus reus* in MCL 750.165—"the failure to pay the support as ordered" 202a—it completely failed to address the constitutionality of interpreting MCL 750.165 so as to eliminate the requirement that the *actus reus* be **voluntary**.

The defense of inability to pay does not go to criminal intent; it is a defense to the *actus reus* requirement in MCL 750.165, which no legislature and no court can eliminate under the Michigan Constitution, as this Court decisively held in *Jenkinson*. Even if a court were to interpret MCL 750.165 as a strict liability statute—no *mens rea*—it cannot constitutionally interpret it to criminalize an involuntary act. Under the Michigan Constitution (and under the United States Constitution as well), only voluntary acts can be crimes.

This Court's decision in *Jenkinson* controls this case. Exactly as in *Jenkinson,* a defendant charged with a criminal offense for failing to perform a duty claims that compliance is impossible due to poverty. And, exactly like the ordinance at issue in *Jenkinson*, MCL 750.165 as interpreted by the Court of Appeals has made non-performance a crime regardless of whether compliance is possible. Under this Court's interpretation of the Michigan Constitution's due

process clause in *Jenkinson*, and as implicitly reaffirmed just two years ago in *Dowdy* and *Jackson*, the Court of Appeals' reading of MCL 750.165 should be held "unconstitutional and void." *Jenkinson*, 77 Mich at 420.

B. The determination of an ability to pay and the availability of a modification hearing in Family Court do not satisfy criminal due process requirements and, therefore, do not distinguish this Court's interpretation of the Michigan Constitution in *Jenkinson*.

The Court of Appeals did not directly deny that it violates the Michigan Constitution to criminalize an involuntary failure to pay. Instead, the Court of Appeals relied on its own decision in *Adams* in an effort to distinguish *Jenkinson* because, in this case, unlike *Jenkinson*, "the duty imposed upon defendant *was* adjudged possible for her to perform" in that the Family Court order was entered "after a judicial determination . . . that defendant had the financial means." 201a. In addition, the Court of Appeals reasoned that the availability of civil proceedings where Ms. Likine could seek modification of her child support order "afforded her ample opportunity to present evidence of her ability or inability to pay an increased amount of child support." 201a.

The Court of Appeals' attempt to distinguish *Jenkinson* on the ground that a child support modification proceeding was available in Family Court fails for three reasons. First, the "civil proceeding exception" the Court of Appeals read into *Jenkinson* fails as an interpretation of that precedent because Mr. Jenkinson presumably **could** have filed a declaratory judgment action in district or circuit court against his sidewalk assessment, just as Ms. Likine tried, but failed, to modify the erroneous level of child support payments that had been assessed against her. There is simply no language in *Jenkinson* that supports the Court of Appeals' view that a defendant faced with an assessment she cannot pay must go to civil court to get the assessment modified

and that an unsuccessful attempt to do so precludes her from claiming an inability to pay defense in a subsequent criminal prosecution.

But even if the Court of Appeals' "civil proceeding exception" could be reconciled with the language of *Jenkinson*, the exception fails for two other reasons. The Court of Appeals' reasoning grants preclusive effect, in a criminal proceeding, to findings in a civil case in a way that directly violates the due process clauses of both the state and federal constitutions. And it reflects a fundamental misunderstanding of Family Court proceedings, which are intended to determine only the amount a non-custodial parent can pay **going forward**, not whether a defendant was capable of making child support payments **already missed**.

1. **A "civil proceeding exception" would violate criminal due process requirements.**

The Court of Appeals' reliance on the Family Court's determination of Ms. Likine's ability to pay is misplaced because such civil court proceedings do not satisfy the due process required in a criminal proceeding. Family Court proceedings lack, among other rights, the right to appointed counsel, to the effective assistance of counsel and the right to have a jury determine whether there is proof of each element beyond a reasonable doubt. *See United States v Mandycz*, 447 F3d 951, 962 (CA 6, 2006) ("Criminal cases offer many due process protections – e.g., jury trial, indictment, beyond-a-reasonable-doubt burden of proof, right to counsel – that civil proceedings...do not."); *cf In re Baker*, 117 Mich App 591, 594-95; 324 NW2d 91 (1982) (discussing the differences between civil and criminal due process with regard to commitment proceedings). In her Family Court proceedings, Ms. Likine did not enjoy the constitutional rights to confront witnesses, to the effective assistance of counsel, and to a competency determination. And, perhaps most importantly, she did not have the right in civil court to have a jury of her peers determine whether she was able to pay the amount assessed. *See Blakely v*

Washington, 542 US 296, 313; 124 S Ct 2531; 159 L Ed 2d 403 (2004) ("[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment").

It is firmly established that findings in a civil case are insufficient to establish guilt in a criminal case. *See, e.g.*, *United States v Cohen*, 946 F2d 430, 437 (CA 6, 1991) (holding that a judge's jury instructions in a criminal case that "merely distinguished the burden of proof in a civil case from that in a criminal case" did not sufficiently prevent "the improper inference that the civil judgment established defendant's guilt in the criminal action"). Additionally, "[t]he differences in proof standards [between civil and criminal cases] preclude application of the collateral estoppel doctrine." *Ives v Boone*, 101 Fed Apx 274, 291 (CA 10, 2004). In the specific context of criminal nonsupport, basing "absolute criminal liability solely upon noncompliance with the terms of . . . a civil judgment . . . violates[] due process." *Commonwealth v Mason*, 317 SW2d 166, 167-68 (Ky, 1958).

The prosecution's argument in opposition to Ms. Likine's application to this Court demonstrates exactly how providing preclusive effect to the Family Court order violated Ms. Likine's due process rights in her criminal case. The prosecution contended that the Family Court's imputation of income to Ms. Likine was not improper because it was not until later that the "defendant had submitted proof of her disability and Supplemental Security Income," and because "there [was] no way to adequately determine [Ms. Likine's] income." Brief in Opposition to Application at 7. But in a criminal proceeding, a jury could not be permitted to arbitrarily determine an amount a defendant could pay based on inadequate and incomplete information. Similarly, because child support proceedings are historically equitable in nature, *Wilkins v Wilkins*, 149 Mich App 779, 792; 386 NW2d 677 (1986), the Family Court may base a

child support order not on a purely factual determination but rather an equitable one, *see Ghidotti v Barber*, 459 Mich 189, 192; 586 NW2d 883 (1998)—an impermissible action by a jury in a criminal case, *see Sorrells v United States*, 287 US 435, 450; 53 S Ct 210; 77 L Ed 413 (1932) (stating that equitable principles do not apply in criminal prosecutions because "the statute defining the offense is necessarily the law of the case").

Further, the Family Court failed to follow its own rules, the due process specified under MCL 552.605, which requires "the court [to] order child support in an amount determined by application by of the child support formula developed by the state friend of court bureau." Instead, the Family Court imputed fictitious income to Ms. Likine, whose only true source of support at the time was Social Security Income disability payments, which she received because of her severe mental illness. Such imputation of income was in direct violation of the Michigan Child Support Manual, which states that imputation "is not appropriate where: (1) A parent's source of income is a means tested income, such as . . . Supplemental Security Income (SSI)." 2004 MCSF 2.10(f). The Family Court's failure to comport with its own procedures is reflected in its much-belated order on January 27, 2010, reducing Ms. Likine's child support payment obligation from $1131 per month to just $25 a month, a 98% reduction.

In other words, the Family Court now recognizes that it simply got it wrong when it imputed income to Ms. Likine. It finally corrected that error in January 2010. Nevertheless, according to the prosecutor and the Court of Appeals, Ms. Likine is forbidden from raising that indisputable error in her criminal case even though she had no constitutional right to the effective assistance of counsel in Family Court, where her prior civil attorney failed to present the documents that would have prevented the error in the first place. What occurred in Ms. Likine's case highlights how a civil proceeding does not protect a criminal defendant's rights under the

due process clauses of the state and federal constitutions and why, therefore, a civil court order cannot constitutionally be given preclusive effect to bar a defense in criminal court.

2. **The availability of a modification hearing does not satisfy criminal due process requirements.**

A final reason the Court of Appeals' attempt to distinguish *Jenkinson* fails is that the availability of a civil court modification hearing does not change the fact that MCL 750.165, as interpreted, unconstitutionally criminalizes the failure to pay child support even when it is impossible for a person to pay. As the prosecution has conceded, "[t]he trial court specifically ruled that **even if defendant's child support modification motion were successful, it did not retroactively absolve defendant of criminal liability for the amounts she had previously failed to pay**." Appellee's Court of Appeals Brief at 1; emphasis added.

This admission underlines the constitutional infirmity of the prosecution's reliance on the civil Family Court modification procedures to satisfy criminal due process under the state and federal constitutions: **Even if the Family Court eventually finds that the child support it ordered was erroneous and grants modification of child support payments, as the Family Court finally did in this case in early 2010, the modification does not alter what the defendant was required to pay prior to the request for modification, and thus the defendant remains criminally liable for all of the payments missed before the filing of the request.** The availability of a modification hearing, therefore, cannot cure criminal liability imposed in violation of due process.

Ms. Likine, who sought and was denied modification, exemplifies why the availability of a civil modification proceeding cannot satisfy the requirements of criminal due process so as to preclude her from defending the criminal charge with her inability to pay. Ms. Likine was hospitalized with severe mental illness during the period in which she failed to make payments.

When she was released from the hospital, she attempted to modify the payments. But her attempts were unsuccessful because, not being entitled to the appointment of counsel in Family Court, she was represented by an attorney hired by her mother who failed to point out that the income imputed to her was in direct violation of the Michigan Child Support Manual in light of the Social Security Administration's determination of her disability. **But even if she had succeeded in modifying the payments, Ms. Likine still would have been criminally liable for all of the payments she missed *before* the date she filed her first *successful* modification request; that is, her criminal liability would still extend to payments she missed while hospitalized and, according to the Court of Appeals, even then, she would not be entitled to defend herself against the criminal charges by arguing inability to pay.**

A simple hypothetical further illustrates this point that a correct Family Court order cannot constitutionally be given preclusive effect in a criminal action under MCL 750.165. Suppose the Family Court orders a non-custodial parent on February 1, 2011, to pay $1000 per month, an amount she can reasonably pay given her employment and assets. Suppose further that on February 2, 2011, the non-custodial parent is run over by a bus and spends the next ten months in a coma. Suppose further that she emerges from the coma on November 30, 2011, completely disabled and with no assets (her assets having been drained to cover her medical care). Finally, suppose she goes to Family Court the next day after emerging from her coma, on December 1, 2011, and successfully obtains a modification that day so that she will pay only $25 month from her disability check going forward. **Under the Court of Appeals' decision, the non-custodial parent in this hypothetical would be guilty of a felony, with no possible defense, for the $10,000 in child support payments she missed while she was in a coma even**

though she was physically incapable of paying and had no income or assets from which to pay even if she had been conscious.

This hypothetical illustrates that a Family Court order as to a parent's **ability to pay going forward** cannot answer the question arising in a subsequent criminal prosecution as to **whether the parent could pay *when* she missed the payments**. In this hypothetical, the Family Court's order assessing the parent's ability to pay on February 1 is correct; and when the parent later fails to make the payments and tries to explain why she did not make the payments, the correctness of that February 1 order tells us absolutely nothing about whether she could pay on each of the dates she missed the payments from February through November.

To put it in terms of what the Court of Appeals held in this case, the parent's defense that she could not pay is not necessarily an attack on the Family Court's order that she pay because the defense of inability to pay in the criminal case is addressed to a **retrospective** inquiry, whereas the Family Court order to pay is a **prospective** determination. To put it even more simply, what the Court of Appeals did was to compare apples and oranges.

The Court of Appeals' attempt to distinguish *Jenkinson* both violates due process and fails as a matter of logic. Ultimately, the decisions of the Court of Appeals in this case and in *Adams* represent a truly radical departure from a fundamental tenet of Anglo-American law. The rule of *Adams* allows the criminalization of an involuntary *actus reus* even though "[a]n involuntary act—or an involuntary failure to act when there was a duty to do so—**has never before [*Adams*] been subject to punishment in American law**." Jack Apol & Stacey Studnicki, *Criminal Law*, 51 Wayne L Rev 653, 674 (2005) (emphasis added). This Court should therefore reaffirm *Jenkinson* and hold that Ms. Likine is entitled to a new trial at which she may present the defense of inability to pay.

II. THE PROHIBITION OF AN INABILITY TO PAY DEFENSE ALSO VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Standard of Review and Issue Preservation

Constitutional issues present questions of law. This Court therefore reviews *de novo* the lower court decisions that denied Ms. Likine her Fourteenth Amendment right to present an inability to pay defense. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Ms. Likine argued that her inability to present this defense violated the Fourteenth Amendment in her Motion for Reconsideration, which was filed and denied before the trial began. 31a-38a. Ms. Likine again raised this argument in the Court of Appeals, which rejected it on the merits.

A. The Court of Appeals' interpretation of MCL 750.165 criminalizes an involuntary omission in conflict with the Fourteenth Amendment.

According to the Court of Appeals, the *actus reus* of the crime of felony failure to pay child support is "the failure to pay the support as ordered," making the failure "complete at the time that the individual fails to pay the ordered amount at the ordered time." 202a. As discussed in Argument I, *supra*, that holding results in the criminalization of an **involuntary** *actus reus*; that is, Ms. Likine is criminally liable for failing to pay the requisite child support even though she is **unable** to pay. The same principles that led to this Court's decision in *Jenkinson* have led courts throughout the country, including the United States Supreme Court, to conclude that any statute punishing involuntary conduct violates the United States Constitution.

Unfortunately, the Court of Appeals' opinions in this case and in *Adams* hopelessly confuse the distinct concepts of *mens rea* and *actus reus* by repeatedly referring to the elimination of the inability to pay defense in MCL 750.765 as creating a "strict liability" law. In general, criminal liability necessitates both *mens rea* and *actus reus*, two separate components.

A "strict liability" offense "consist[s] only of forbidden acts or omissions," eliminating the requirement of a "culpable mental state." 21 Am Jur 2d *Criminal Law* §132 (2009).

Ms. Likine certainly does not deny that some strict liability offenses are constitutional. But MCL 750.165, as interpreted in *Adams*, is not a strict liability offense. Rather, it imposes "the duty of performing an **act** upon any person which it is **impossible** for him to perform, [making] his non-performance of such duty a crime, for which he may be punished by both fine and imprisonment." *Jenkinson*, 77 Mich at 419-20 (emphasis added). In other words, MCL 750.165, as interpreted in *Adams*, criminalizes an involuntary *actus reus*, not the absence of *mens rea*.

While some strict liability statutes are constitutional, no statute criminalizing an involuntary *actus reus* had ever been upheld before *Adams*; rather, "the act or omission must be deliberate and voluntary in order to violate even a strict liability provision." 21 Am Jur 2d *Criminal Law* §132.

Specifically, under the Fourteenth Amendment's Due Process Clause, "one cannot be criminally liable for failing to do an act which he is . . . incapable of performing." LaFave, *supra,* at § 6.2; Apol & Studnicki, *supra*, at 674 ("[No one] can be held criminally liable for failing to perform an act which one is incapable of performing."). The requirement that an act or omission be voluntary is "a core minimum culpability requirement" that applies regardless of the nature of the crime, and is "universal in application." Alan C. Michaels, *Constitutional Innocence*, 112 Harv L Rev 828, 879 & n 279 (1999) (citation omitted); *see also id.* ("A 'voluntary act is an absolute requirement for criminal liability'" (quoting Wayne R. LaFave, Jr. & Austin Scott, Jr., *Criminal Law* 199 (2d ed 1986))). As this Court recognized in *Jenkinson*, no legislature or court can criminalize an act or omission that is not voluntary. On the rare occasions when American

legislatures have tried to enact statutes that do not require proof of a voluntary act or omission, "these statutes have generally been held to be beyond the police power of the state." LaFave, *supra*, at § 3.3.

Applying these principles, the United States Supreme Court has invalidated state statutes, even in non-criminal contexts, that punished persons without permitting them to present evidence of their inability to comply with the duty imposed by the State. For example, in *Zablocki v Redhail*, 434 US 374; 98 S Ct 673; 54 L Ed 2d 618 (1978), the Court struck down a Wisconsin statute that prohibited non-custodial fathers with outstanding child support obligations from marrying unless they first obtained a court order granting permission. *Id.* at 375. The plaintiff in *Zablocki* was unable to obtain the necessary court order because he lacked the financial means to meet his support obligations and was hence "absolutely prevented from getting married." *Id.* at 387. The Court struck the statute down on both due process and equal protection grounds. Justice Stewart, concurring, observed that "[t]he Wisconsin law **makes no allowance for the truly indigent**" and that "[t]o deny these people permission to marry **penalizes them for failing to do that which they cannot do**. Insofar as it applies to indigents, the state law is an irrational means of achieving these objectives of the State." *Id.* at 394 (Stewart, J, concurring) (emphasis added). Justice Stewart concluded that "[a] legislative judgment so alien to our traditions and so offensive to our shared notions of fairness offends the Due Process Clause of the Fourteenth Amendment." *Id.* at 395.

Justice Powell, concurring in the judgment, distinguished between "persons who are able to make the required support payments but simply wish to shirk their moral and legal obligation" and those "without the means to comply with child-support obligations." *Id.* at 400 (Powell, J, concurring). Justice Powell stated that "the **vice inheres**, not in the collection concept, but **in the**

failure to make provision for those without the means to comply with child-support obligations." *Id.* at 400 (emphasis added). Justice Powell agreed with the majority that the Wisconsin statute was unconstitutional because the statute failed to provide for those who were unable, rather than merely unwilling, to pay the child support they owed. *Id.* at 400-401.

In *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983), the Court addressed the question of "whether the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine and restitution." *Id.* at 661. The Court held that the "trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.* at 662. The petitioner was ordered to pay a $500 fine and $250 in restitution as a condition of his probation. *Id.* He was laid off from his job, unable to find other work, and subsequently imprisoned when he violated his probation by failing to pay the balance of the fine and restitution. *Id.* at 663. Revoking probation where "**through no fault of his own, he cannot pay the fine**" violates due process because it is "**contrary to the fundamental fairness required by the Fourteenth Amendment.**" *Id.* at 673 (emphasis added). In *Bearden*, the Court favorably cited Justice Powell's concurring opinion in *Zablocki*, which emphasized the **distinction between "persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay."** *Id.* (emphasis added).

In Ms. Likine's case, the "vice [of MCL 750.165 as interpreted] inheres . . . in the failure to make provision for those without the means to comply with child-support obligations." *See Zablocki*, 434 US at 400 (Powell, J, concurring). Imposing liability when it is impossible for the defendant to perform is "contrary to the fundamental fairness required by the Fourteenth

Amendment." *Bearden*, 461 US at 673. In preventing Ms. Likine from arguing to the jury that it was impossible for her to comply with her child support order, the Court of Appeals decision violated her rights under the Fourteenth Amendment.

Until 2004, Michigan precedent recognized that the Federal Constitution requires that a nonpayment of child support statute allow for an inability to pay defense. Prior to its decision in *Adams*, the Court of Appeals had held in *People v Ditton*, 78 Mich App 610; 261 NW2d 182 (1977), that, although the Michigan felony nonsupport statute did not "expressly provide for such a defense," "inability to pay is a defense to the crime charged" because to hold otherwise would render the statute unconstitutional under the United States Constitution. *Id.* at 614, 617 (citing *Commonwealth v O'Harrah*, 262 SW2d 385, 388 (Ky Ct App, 1953), and *Commonwealth v Mason*, 317 SW2d 166 (Ky Ct App, 1958)).

The courts of other states, as the Court of Appeals recognized in *Ditton*, have long held that the Fourteenth Amendment Due Process Clause requires that an inability to pay defense be read into a felony nonsupport statute. In *Mason*, for example, the Kentucky Court of Appeals explained that the nonsupport statute in question "imposed absolute criminal liability solely upon noncompliance with the terms of the divorce judgment" and that "[i]n so basing the offense solely on a civil judgment, the statute violated due process." 317 SW2d at 167-68 (citing *O'Harrah*, 262 SW2d at 388). The Kentucky Court of Appeals further held that the "**defense of inability to pay must also be considered to be considered available**" under the Kentucky nonsupport statute in order that the statute not violate due process. *Mason*, 317 SW2d. at 168 (emphasis added). Similarly, the Nevada Supreme Court has observed that its criminal nonsupport statute "[obviously] . . . does not contemplate punishing a person for failing to do a

thing which he cannot do." *Epp v State*, 107 Nev 510, 514; 814 P2d 1011 (1991) (quoting *Meek v Commonwealth*, 309 Ky 370, 379; 217 SW2d 961 (1949)).

In contexts other than felony nonsupport, courts in other states have universally held that a statute cannot constitutionally punish a defendant for an involuntary *actus reus*. For example, in upholding a statute that required motorists to stop in case of an accident, the Alabama Supreme Court noted that the statute would only be valid if the motorists' ability to stop was not "impossible of reasonable performance." *Lashley v State*, 236 Ala 1, 4; 180 So 717 (1938). The California Supreme Court upheld an ordinance that outlawed "camping" in a public street or area, noting that the prosecutors allowed a "due-process-based necessity defense" to those who violated the ordinance involuntary. *Tobe v City of Santa Ana*, 9 Cal 4th 1069, 1087; 892 P2d 1145 (1995). The Washington Supreme Court held that the State did not have to prove that defendant sex offender willfully frequented a place where he knew children congregated before revoking a suspended sentence but took pains to explain that this holding "does not mean the State does not have to prove [the defendant] took a volitional act. If [the defendant] were in an area where minors are known to congregate against his will then it presents a situation different from the one presented here and may involve a different analysis." *State v McCormick*, 166 Wash 2d 689, 702 n 6; 213 P3d 32 (2009).

B. Federal due process is not satisfied by using a determination made in *civil* court to preclude the defendant in a separate criminal case from arguing that she did not commit a voluntary *actus reus* because she could not pay.

As discussed in Argument I, *supra*, the Court of Appeals relied on the Family Court's determination of Ms. Likine's ability to pay to conclude that its interpretation of MCL 750.165 did not violate the state or federal constitutions. 202a ("[D]efendant was afforded numerous

opportunities in the civil proceedings to establish her inability to pay the ordered amount of child support. . . . Accordingly, defendant was not denied due process on the ground that, because the offense imposes strict liability, she was prevented from proving that her failure to pay child support in compliance with the court order was involuntary"). For exactly the same reasons that the findings of Family Court cannot, consistent with the Michigan Due Process Clause, be used to establish Ms. Likine's ability to pay in her separate criminal case, those findings also cannot, consistently with the Fourteenth Amendment Due Process Clause, be used for that purpose. Again, allowing a defense of inability to pay is not a collateral attack on the Family Court determination because a child support order is prospective whereas the defense requires a retrospective inquiry.

The United States Supreme Court recognizes "the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings[.]" *Hicks v Feiock*, 485 US 624, 632; 108 S Ct 1423; 99 L Ed 2d 721 (1988). Family Court proceedings do not require the same level of due process as criminal proceedings. In reading MCL 750.165 to bar an inability to pay defense, the State, the trial court, and the Court of Appeals relied on the Family Court's finding regarding Ms. Likine's ability to pay. That critical finding was the result of a civil process, which did not provide Ms. Likine with her criminal procedural rights, including, *inter alia*, a jury trial, the right to the appointment of effective counsel, and confrontation.

In this case, those criminal procedural protections would have made all the difference. Without a jury and without the effective assistance of counsel, the Family Court erroneously imputed an income to Ms. Likine of $5000 per month, an amount far greater than she ever earned in her life, and then used that amount to justify a more than six-fold increase in her child

support obligations. 53a, 92a, 97a. The Court of Appeals relied on this flawed Family Court process as if it satisfied criminal due process, instead of holding that Ms. Likine has the right for the finder of fact to determine her ability to pay at her criminal trial. Before Ms. Likine is convicted of a felony for failure to pay child support, due process guarantees her the right to have a jury of her peers determine whether she committed a voluntary *actus reus* when failing to pay her child support payments in full, and not to have that decision made by a judge in a wholly separate civil proceeding not subject to the requirements of criminal due process.

Additionally, the Court of Appeals argued that Ms. Likine had opportunities to modify her child support obligations. 202a-203a. The details of Ms. Likine's case highlight why giving findings from modification hearings preclusive effect in a criminal case is a denial of due process. Ms. Likine appealed her August 30, 2006 child support order for payments of $1,131 a month immediately. Her repeated appeals to the Court of Appeals were denied for reasons unrelated to the merits. *See Likine v Likine*, No. 273896 (Mich App, Nov. 2, 2006) (denying appeal for lack of jurisdiction); *Likine v Likine*, No. 280148 (Mich App, Mar. 14, 2008) (denying appeal for failure to persuade court of need for immediate review). Ms. Likine, at the time of the trial, again requested reconsideration of her motion to modify her child support payments. 120a. In 2008, Ms. Likine again sought reconsideration, but her motion was dismissed. It was not until January 27, 2010, over three years after her initial motion for reconsideration, that Ms. Likine's third motion for reconsideration was granted, reducing her payments by 98% to $25 a month. But relief was not granted retroactively despite the improper imputation of income in 2006. When, as in Ms. Likine's case, the Family Court denies such modifications or does not retroactively apply the modifications, a parent may be criminally convicted of failing to pay child support in the amount determined or imputed by the Family Court even when, as here, the

amount imputed by the Family Court is patently erroneous. The Due Process Clause does not allow such an outcome. Ms. Likine is entitled to present an inability to pay defense at her trial so that a jury of her peers can determine if her failure to pay was in fact a voluntary omission.

Lastly, the Court of Appeals characterized Ms. Likine's argument as "an impermissible collateral attack on the underlying support order." 201a. The Court of Appeals also emphasized that Ms. Likine had opportunities in her civil Family Court proceedings to challenge her ability to pay. 202a (concluding that "such a defense merely attempts to challenge the amount of the support ordered in the civil proceeding by a court which has sole, exclusive, and continuing jurisdiction over the support order").

The Court of Appeals was mistaken in its analysis. In *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), this Court recognized that a separate judgment cannot be used to preclude an inability to pay defense in a criminal enforcement proceeding. *Jackson* involved the assessment of attorney's fees on criminal defendants under MCL 769.1k, which this Court noted, was "not limited by reference to a defendant's ability to pay." 483 Mich at 283. This Court held that the Due Process Clause did not, as the defendant tried to argue, require an ability to pay assessment before the imposition of a fee, but noted that "**[the ability-to-pay] assessment is . . . required at the time payment is required, i.e., when the imposition is enforced**." *Id.* at 291 (emphasis added). The Court further held that "once enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, **the trial courts should evaluate the defendant's ability to pay**." *Id.* at 292 (emphasis added). It does not matter whether the statute itself requires the assessment. *Id.* at 291. Rather, the assessment is required by due process.

The Family Court's child support order is the imposition of a fee on the defendant. When the State chooses to charge a defendant like Ms. Likine under MCL 750.165, it begins an enforcement action. Under *Jackson* and the Due Process Clause, therefore, Ms. Likine **"must . . . be given an opportunity to contest the enforcement on the basis of indigency**." *Jackson*, 483 Mich at 292 (emphasis added).

Because due process requires the trial court to make an ability-to-pay determination at the time of enforcement, the Court of Appeals' attempt to characterize Ms. Likine's arguments as an impermissible collateral attack on the binding judgment of the Family Court is incorrect. In other words, even if the Family Court order is an accurate assessment of the defendant's ability to pay going forward, **the Family Court order cannot answer the question that arises later when the defendant misses a payment as to whether the defendant was able to pay at that time.**

For the reasons stated above, prohibiting Ms. Likine from presenting evidence of her inability to pay directly conflicts with the Fourteenth Amendment, which both requires a voluntary act or omission for criminal liability and bars a state from criminally punishing the indigent for being unable to pay their obligations.

CONCLUSION

Therefore, 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,

MICHIGAN INNOCENCE CLINIC

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Dated: January 25, 2011

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Approved, SCAO

Original - Court
1st copy - Plaintiff

2nd copy - Defendant

STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY	UNIFORM CHILD SUPPORT ORDER (PAGE 1) ☐ EX PARTE ☐ TEMPORARY ☐ MODIFICATION ☐ FINAL	OAKLAND COUNTY 02-674011-DM JUDGE LINDA HALLMARK F. LIKINE,SELESA v LIKINE,ELIVE,

Court address

1 M no.

Plaintiff's name, address, and telephone no.	v	Defendant's name, address, and telephone no.
Selesa Likine 4125 Balmour Detroit MI 48224		Elive Likine
Plaintiff's attorney name, bar no., address, and telephone no. Dennis M. Hatley P26378 39577 Woodward Bloomfield Hills MI 48304		Defendant's attorney name, bar no., address, and telephone no. Elizabeth Sadowski P34991 431 Sixth Street Rochester MI 48307
Plaintiff's source of income name, address, and telephone no. NONE		Defendant's source of income name, address, and telephone no. Chrysler

RECEIVED FOR FILING OAKLAND COUNTY CLERK 2010 JAN 28 AM 9:38 BY: DEPUTY CLERK

☐ The friend of the court recommends support be ordered ~~as follows~~. Per January 4, 2010 hearing.
☐ If you disagree with this recommendation, you must file a written objection with _____ on or before 21 days from the date this order is mailed. If you do not object, this proposed order will be presented to the court for entry.
☐ Attached are the calculations pursuant to MCL 552.505(1)(h) and MCL 552.517b.

UNLESS OTHERWISE ORDERED in item 13: ☐ Standard provisions have been modified (see item 13).

1. The support obligation for a child continues until that child reaches age 18. The support obligation for a child continues thereafter until that child reaches age 19 years and 6 months, as long as the child is regularly attending high school full-time with a reasonable expectation of graduating, and the child is residing full-time with the support recipient or at an institution. Child care for a child continues through August 31 following that child's 12th birthday. The parties must notify each other of changes in child-care expenses and must additionally notify the friend of the court if the change ends those expenses.
2. Income withholding takes immediate effect. Payments shall be made through the Michigan State Disbursement Unit unless otherwise ordered in item 13.
3. **Child Support.** The payer has a monthly child-support obligation as follows: TOTAL $25.00 PER MONTH, NOT PER CHILD

Payer: Selesa Likine	Payee: Elive Likine	Support effective date: OCTOBER 5, 2009

Children's names and birth dates: Maliya Likine 11-20-96, Monjoo Likine 7-20-95, Elive Jr 9-9-93

Children supported: 1 child | 2 children | (3 children) | 4 children | 5 or more children

Base support: (includes support plus or minus premium adjustment for health-care insurance)

	1 child	2 children	3 children	4 children	5 or more children
Support:	$	$	$ 25.00	$	$
Premium adjust.	$	$	$	$	$
SS pymt. credit:	$	$	$	$	$
Total:	$ 0.00	$ 0.00	$ 25.00	$ 0.00	$ 0.00
Ordinary medical:	$	$	$	$	$
Child care:	$	$	$	$	$
Other:	$	$	$	$	$
Total:	$ 0.00	$ 0.00	$ 25.00	$ 0.00	$ 0.00

☐ Support includes a parental-time offset using _____ overnights for _____ (Plaintiff) and _____ overnights for _____ (Defendant).

The support provisions ordered above ☒ do ☐ do not follow the child-support formula.

(See Page 2 for the remainder of the order.)

Approved, SCAO

Original - Court
1st copy - Plaintiff

2nd copy - Defendant
3rd copy - Friend of the court

STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY	UNIFORM CHILD SUPPORT ORDER (PAGE 2) ☐ EX PARTE ☐ TEMPORARY ☒ MODIFICATION ☐ FINAL	CASE NO. 02-674 011-DM

Court address

Fax no. Court telephone no.

Plaintiff's name: Selesa Likine

v

Defendant's name: Elive Likine

4. **Insurance.** For the benefit of the children, the ☐ plaintiff ☒ defendant shall maintain health-care coverage through an insurer (as defined in MCL 552.602[o]) that includes payment for hospital, dental, optical, and other health-care expenses when that coverage is available at a reasonable cost, including coverage available as a benefit of employment or under an individual policy
   ☐ ~~up to a maximum of $_____ for plaintiff.~~ ☐ up to a maximum of $_____ for defendant.
   ☐ not to exceed 5% of the plaintiff's/defendant's gross income.
5. **Uninsured Health-Care Expenses.** All uninsured health-care expenses exceeding the annual ordinary medical amount will be paid _____% by the plaintiff and 100 % by the defendant. Uninsured expenses exceeding the annual ordinary medical amount for the year they are incurred that are not paid within 28 days of a written payment request may be enforced by the friend of the court. The annual ordinary medical amount is _____.
6. **Qualified Medical Support Order.** This order is a qualified medical support order pursuant to 29 USC 1169. To qualify this order, the friend of the court shall issue a notice to enroll pursuant to MCL 552.626b. A parent may contest the notice by requesting a review or hearing concerning availability of health care at a reasonable cost.
7. **Retroactive Modification, Surcharge for Past-Due Support, and Liens for Unpaid Support.** Except as provided by MCL 552.603, support is a judgment the date it is due and is not modifiable retroactively. A surcharge will be added to past-due support. Unpaid support is a lien by operation of law and the payer's property can be encumbered or seized if an arrearage accrues in an amount greater than the periodic support payments payable for two months under the payer's support order.
8. **Change of Address, Employment Status, Health Insurance.** Both parties shall notify the friend of the court in writing, within 21 days, of any change in: a) their mailing or residence addresses and telephone numbers; b) the names, addresses, and telephone numbers of their sources of income; c) their health-maintenance or insurance companies, insurance coverage, persons insured, or contract numbers; d) their occupational or drivers' licenses; and e) their social security numbers unless exempt by law pursuant to MCL 552.603.
9. ***Redirection and Abatement:*** *Subject to statutory procedures, the friend of the court: 1) may redirect support paid for a child* to the person who is legally responsible for that child, 2) shall abate support charges for a child who resides on a full-time basis with the payer of support, or 3) shall redirect support to the Department of Human Services for a child placed in foster care.
10. **Fees.** The payer of support shall pay statutory and service fees as required by law.
11. **Review.** Each party to a support order may submit a written request to have the friend of the court review the order. The friend of the court is not required to investigate more than one request received from a party each 36 months. A party may also file a motion to modify this support order.
12. **Prior Orders.** Except as changed in this order, prior provisions remain in effect. Support payable under any prior order is preserved. Any past-due support shall be paid in the amount calculated using the Michigan Child Support Formula.
☐ 13. **Other: (Attach separate sheets as needed.)**

IT IS SO ORDERED:

JANUARY 27, 2010
Date

Judge Bar no.

Plaintiff (if consent/stipulation) Date

Defendant (if consent/stipulation) Date

Plaintiff's attorney
Wm M Haffey 1-27-10
Date

Defendant's attorney Date

Prepared by: DENNIS M. HAFFEY
Name (type or print)

CERTIFICATE OF MAILING

I certify that on this date I served a copy of this order on the parties or their attorneys by first-class mail addressed to their last-known addresses as defined in MCR 3.203.

Date

Signature