STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Fitzgerald, P.J., Cavanagh and Davis, JJ

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SELESA ARROSIEUR LIKINE and
MICHAEL JOSEPH PARKS,

Defendants-Appellants.
_____/

Supreme Court No. 141154; 141181

Court of Appeals No. 290218; 291011

Oakland Circuit Court No. 2008-220669-FH

Ingham Circuit Court No. 2008-001225-FH

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

Index of Authorities iii

Counter-Statement of Questions Presented x

Introduction 1

Counter-Statement of Proceedings and Facts 3

Argument 10

I. The rule in *People v Adams*—that inability to pay is not a defense to strict-liability felony non-support—is constitutional, because the family-court process provides due process by including an opportunity, after notice and hearing, to raise inability to pay before a judicial determination of the support obligation. The family court's resolution of whether a parent has the ability to pay, and the prohibition against challenging that predicate finding in a prosecution under MCL 750.165, does not offend due process protections but is consistent with the Legislature's intent and Michigan's interest in ensuring the proper support of children. 10

A. Preservation of Issue 10

B. Standard of Review 11

C. Analysis 11

1. Michigan has a strong public-policy interest in ensuring the support of children. That policy is implicit in the strict-liability scheme the Legislature created for the child-support felony statute. 11

2. The family court has the sole jurisdiction and expertise to set the child support obligation—necessarily including a parent's ability to pay—and the family court process provides a parent due process to challenge the ability to pay. 15

3. The crime of non-support under MCL 750.165 does not violate the Michigan Constitution where the underlying obligation to support is set by the family court, and during that process a parent can challenge the ability to pay. 20

4. The crime of non-support under MCL 750.165 does not violate due process under the Fourteenth Amendment where the underlying obligation to support is set by the family court and during that process a parent can challenge the ability to pay. Once the factual predicate of ability to pay is established in the family court, crossover collateral estoppel bars relitigation of ability to pay in the criminal proceeding. 22

a. Inability to pay is more properly viewed as a claim of impossibility to pay that is addressed during the family court proceedings, rather than a voluntariness claim. 23

b. A determination made outside the criminal proceeding—here a parent's ability to pay—does not violate due process. Once the factual predicate of ability to pay is established in the family court, the statute bars relitigation of ability to pay in the criminal proceeding, which is consistent with the crossover estoppel doctrine. 24

i. Crossover collateral estoppel 25

ii. Other cases applying crossover estoppel principle 29

iii. United States Supreme Court has not foreclosed crossover estoppel 31

iv. Crossover estoppel is not unprecedented in Michigan 32

vi. Distinguishing Likine's and Parks' other cited cases 34

Relief Sought 36

INDEX OF AUTHORITIES

Page

Cases

American States Ins Co v State Dep't of Treasury,
220 Mich App 586; 560 NW2d 644 (1996) 21

Barrow v Pritchard,
235 Mich App 478; 597 NW2d 853 (1999) 27

Bearden v Georgia,
461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983) 14

Burks v United States,
437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978) 28

Champion v Sec'y of State,
281 Mich App 307; 761 NW2d 747 (2008) 12, 13

City of Kettering v Greene,
9 Ohio St 2d 26; 222 NE2d 638 (1966) 24

City of Port Huron v Jenkinson,
77 Mich 414; 43 NW 923 (1889) 5, 9, 21, 22

Crego v Coleman,
463 Mich 248; 615 NW2d 218 (2000) 12

Deitz v Wometco West Michigan TV,
160 Mich App 367; 407 NW2d 649 (1987) 27

Dep't of Human Services v Johnson (In re Beck),
488 Mich 6; 793 NW2d 562 (2010) 13

Dep't of Human Services v Johnson (In re A.P.),
283 Mich App 574; 770 NW2d 403 (2009) 16

Easley v John Hancock Mut. Life Ins. Co.,
403 Mich 521; 271 NW2d 513 (1978) 13

English v Blue Cross Blue Shield of Michigan,
263 Mich App 449; 688 NW2d 523 (2004) 21

Frankenmuth Mut Ins Co v Continental Ins Co,
450 Mich 429; 537 NW2d 879 (1995) 20

Cases (continued)

Gaddis v Redford Tp.,
188 F Supp 2d 762 (ED Mich, 2002) 27

Hackley v Hackley,
426 Mich 582; 395 NW2d 906 (1986) 33

Hammoud v United States,
543 US 1097; 125 S Ct 1051; 160 L Ed 2d 997 (2005) 31

Hawkins v Murphy,
222 Mich App 664; 565 NW2d 674 (1997) 33

Hicks v Feiock,
485 US 624; 108 S Ct 1423; 99 L Ed 2d 721 (1988) 25

In re Caldwell,
228 Mich App 116; 576 NW2d 724 (1998) 13

In re Forfeiture of $ 1,159,420,
194 Mich App 134; 486 NW2d 326 (1992) 27

Lewis v United States,
445 US 55; 100 S Ct 915; 63 L Ed 2d 198 (1980) 30

McKinney v Alabama,
424 US 669; 96 S Ct 1189; 47 L Ed 2d 387 (1976) 32

McLaughlin v McLaughlin,
255 Mich App 475; 660 NW2d 784 (2003) 20

Morissette v United States,
342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952) 15

People v Adams,
262 Mich App 89; 683 NW2d 729 (2004) ..... passim

People v Carines,
460 Mich 750; 597 NW2d 130 (1999) 11

People v Carpenter,
464 Mich 223; 627 NW2d 276 (2001) 25

People v Denio,
454 Mich 691; 564 NW2d 13 (1997) 11

People v Ditton,
78 Mich App 610; 261 NW2d 182 (1977) 5

Cases (continued)

People v Gates,
434 Mich 146; 452 NW2d 627 (1990) 26

People v Glantz,
124 Mich App 531; 335 NW2d 80 (1983) 34

People v Goss (After Remand),
446 Mich 587; 521 NW2d 312 (1994) 27

People v Howard,
212 Mich App 366; 538 NW2d 44 (1995) 25

People v LeBlanc,
465 Mich 575; 640 NW2d 256 (2002) 11

People v Lown,
488 Mich 242; 794 NW2d 9 (2011) 11

People v Lynch,
410 Mich 343; 301 NW2d 796 (1981) 11

People v Monaco,
474 Mich 48; 710 NW2d 46 (2006) 5, 13

People v Nasir,
255 Mich App 38; 662 NW2d 29 (2003) 14

People v Quinn,
440 Mich 178; 487 NW2d 194 (1992) 14, 15

People v Reichenbach,
459 Mich 109; 587 NW2d 1 (1998) 21

People v Tierney,
266 Mich App 687; 703 NW2d 204 (2005) 25

People v Westman,
262 Mich App 184; 685 NW2d 423 (2004) 5, 13

Saxon v Dep't of Social Services,
191 Mich App 689; 479 NW2d 361 (1991) 21

Schlumm v Terence J O'Hagan, PC,
173 Mich App 345; 433 NW2d 839 (1988) 27

Slater v Slater,
327 Mich 569; 42 NW2d 742 (1950) 12

Cases (continued)

Smith v State,
2002 OK CR 2; 46 P3d 136 (Okla Crim App 2002) 28

State v Kremer,
262 Minn 190; 114 NW2d 88 (1962) 24

United States v Afshari,
426 F3d 1150 (CA 9, 2005) 30, 31

United States v Bailey,
115 F3d 1222 (CA 5, 1997) 29

United States v Bozarov,
974 F2d 1037 (CA 9, 1992) 31

United States v Craig,
181 F3d 1124 (CA 9, 1999) 28

United States v Hammoud,
381 F3d 316 (CA 4, 2004) 31

United States v Hammoud,
405 F3d 1034 (CA 4, 2005) 31

United States v Johnson,
114 F3d 476 (CA 4, 1997) 29

United States v Kerley,
416 F3d 176 (CA 2, 2005) 29

United States v Konovsky,
202 F2d 721 (CA 7, 1953) 27

United States v Mendoza-Lopez,
481 US 828; 107 S Ct 2148; 95 L Ed 2d 772 (1987) 32, 33

United States v Mumford,
630 F2d 1023 (CA 4, 1980) 28

West v West,
241 Mich 679; 217 NW 924 (1928) 12

Yates v United States,
354 US 298; 77 S Ct 1064; 1 L Ed 2d 1356 (1957) 28

Statutes

18 USC 228 ..... 28, 29

18 USC 2339B 30

42 USC 666, et seq. 19

MCL 257.320(1)(d) 33

MCL 257.323 33

MCL 257.904 34

MCL 552.27 13

MCL 552.451, et seq. 16

MCL 552.452(1) 18

MCL 552.455 17

MCL 552.501, et seq. 16

MCL 552.503 16

MCL 552.511 16

MCL 552.517b(2) 17

MCL 552.517b(2)(c) 17

MCL 552.517b(6)(a) 17

MCL 552.517b(6)(b) 17

MCL 552.519(1) 16

MCL 552.519(3)(a)(vi) 16

MCL 552.603(2) 20

MCL 552.603d 18

MCL 552.605 17

MCL 552.605e 18

MCL 552.671, et seq. 16

Statutes (continued)

MCL 600.1011 16

MCL 600.1011(3) 16

MCL 600.1021 16

MCL 710.56 13

MCL 712A.19b(3)(g) 13

MCL 750.165 ..... passim

MCL 750.165(2) 1

MCL 750.165(3) 14

MCL 750.165(4) 14

Other Authorities

1996 PA 388 16

1999 PA 150 19

1999 PA 152 19

1999 PA 160 19

1999 PA 161 19

2004 PA 570 14

House Bill 4816 19

House Bill 4817 19

House Bill 4818 19

Kennelly, Jr., *Precluding the accused: offensive collateral estoppel in criminal cases*, 80 Va L Rev 1379 27

LaFave, Criminal Law (5th ed) 24

Revised Judicature Act 16

Robinson, Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States, 29 NY L Sch L Rev 101 (1984) 23

Other Authorities (continued)

Smart, Criminal Responsibility for Failing to Do the Impossible,
103 Law Q Rev 532 (1987) 23

Constitutional Provisions

Const 1963 art 6, § 3 16

Const 1963, art 1, § 17 20

US Const, Am V 20

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Defendants-Appellants Selesa Likine and Michael Parks repeatedly failed to pay their required child support for years before being convicted for felony non-support. Both Likine and Parks had notice and opportunity in the family court to challenge their ability to pay the ordered child support. Have Likine and Parks been denied the right to prove that they were unable to pay the assessed support?

Appellants' answer: Yes

Appellee's answer: No

The Court of Appeals answered: No

The trial court answered: No

II. It is a well-established principle of Michigan law that a litigant may not use one case to collaterally attack an order entered in another case. Should parents who fail to satisfy their child support obligations be allowed to use a prosecution under MCL 750.165 as a vehicle to collaterally attack a child-support order entered in a civil proceeding, where parents have an opportunity to appear in that proceeding?

Appellants' answer: Yes

Appellee's answer: No

The Court of Appeals answered: No

The trial court answered: No

INTRODUCTION

These consolidated cases are about whether the courts will continue to recognize the best interests of Michigan's children by giving teeth to the billions of dollars of child-support orders (approaching $10 billion in state-wide arrearages) entered by the family courts for thousands of Michigan children (nearly 800,000 total cases with support orders). To the extent that a particular parent is unable to pay child support, that claim can and must be raised in the family court at the time the payment problem arises, not years after the fact in a criminal prosecution. Indeed, contrary to Appellants' due-process claims regarding MCL 750.165 (the statute that criminalizes the failure to pay child support), the law expressly requires that a parent receive notice of, and an opportunity to participate in, the proceeding that sets an appropriate child-support amount based on ability to pay. MCL 750.165(2).

This Court should not allow a deadbeat parent to collaterally attack a family court's child-support order by raising for the first time (or repeatedly) in a criminal proceeding, that there is an inability to pay, where the family-court process itself allows the parent notice and hearing to raise that issue. If a parent is unable to make ordered payments, it is incumbent on that parent to successfully petition the family court to modify the support order based on the change of circumstances in the parent's financial situation. The modification of child-support payments can be made *any* time there is a change in circumstances. If a parent fails to seek a modification or prove the inability to pay—and does not pay—it is only then that this person becomes a deadbeat parent subject to MCL 750.165. This process does not invocate a debtor's prisoner, but rather seeks to avoid the pauper child.

The Court of Appeals' decision in *People v Adams* does not offend due process protections under the Michigan Constitution or the Fourteenth Amendment, because the family court provides a parent the judicial forum to challenge inability to pay. Prohibiting a deadbeat

parent the ability to collaterally attack the predicate finding made in the family court order does not violate due process, nor does holding a parent to an obligation determined in a civil proceeding. This prohibition is consistent with the concept of crossover estoppel, which has been applied by courts in criminal proceedings that follow civil cases. Finally, *Adams* does not conflict with this Court's decision in *City of Port Huron v Jenkinson*. In stark contrast to the situation presented here, *Jekinson* involved insufficient notice and no judicial forum to raise inability to pay. Accordingly, the People of Michigan respectfully request that this Court affirm the Court of Appeals' decisions upholding Likine's and Parks' felony non-support convictions and sentences and hold that inability to pay is not a defense to felony non-support convictions under MCL 750.165.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Defendant-Appellant Michael Parks

On January 23, 2009, defendant-appellant Michael Parks (Parks) was charged in a one-count information for his violation of the felony non-support act, MCL 750.165. The People asserted that Parks failed to pay child support as ordered between October 1, 2006, and July 16, 2008. (28a.) Parks owed nearly one-quarter-of-a-million dollars ($234,444.83) in unpaid child support. (16b.)

The divorce complaint was personally served on Parks on November 10, 1994. (5b, 29a.) Parks and Diane Parks were divorced on September 20, 2000. (1b, 28a.) As part of the Judgment of Divorce, the court awarded Diane Parks custody and ordered Parks to pay her child support. (1b, 28a.) The original child support order for three children required Parks to pay $230.00 per week. (1b, 30a.) That court modified the order on August 19, 2003, and ordered Parks to pay $761.00 per week for three children. (6b, 7b, 30a.) Parks paid Diane Parks *zero* child support during the period relating to the criminal charge. (8b-10b, 28a, 30a.)

In civil court, Parks filed several motions attempting to reduce his child support order that triggered hearings before the court. (28a.) The court requested financial information from Parks and Diane Parks during these motion hearings. Diane Parks submitted the requested information about her income; Parks failed to comply. (28a-29a, 11b-12b.) Parks was represented by an attorney during these hearings, and the court declined to change Parks' support order. (28a.) Although Parks presented various excuses for why he allegedly could not pay his child support, the court denied a reduction to his child support. (28a-29a.) The record does not indicate that Parks ever appealed any of the child support orders.

Years later, Parks continued his strategy at his criminal trial by offering excuses for his failure to pay his child support. The People objected to Parks testifying regarding his proffered

inability to pay; however, the circuit court overruled these objections and allowed Parks to testify. (31a.) Parks claimed that he believed his court order was incorrect because his income was incorrectly imputed. (31a.) Parks further alleged that he was a rural practicing physician with a solo practice, independent contractor, or solo business person, and his income was imputed at the rate of an urban physician that was in group practice. (31a.) In 2003, Parks' income was imputed at $250,000 per year. (29a, 6b.)

Parks admitted that he was federally prosecuted for failure to pay child support, and he alleged that the restrictions placed on him during federal probation limited his ability to open his own practice. (32a, 6b.) Parks filed for bankruptcy in 2005. (32a.) He also claimed that he was disabled and receiving SSI benefits. (32a.) And finally, Parks claimed that during his motions to have his child support reduced, his attorney would not present any information at the hearings and gave him the "runaround." (32a-33a.)

The circuit court found Parks guilty. (34a.) At Parks' sentencing, his ex-wife provided a victim's statement to the circuit court. Diane Parks, who has multiple sclerosis, stated that she had to cut back on her medication to treat her illness, so that she could support her children. (16b.) Diane Parks, told the court that her three children have had to work since they were 16 years old to help support the household, because she is unable to work and because Parks would not pay his court-ordered child support. (16b.) The only time that Parks paid any child support was when he was incarcerated and forced to pay. (16b.) The Parks' daughter, Alexis Parks, also spoke at the sentencing. She informed the court that she has been working two jobs since she was 16 years old to help her mother, because her father would not pay his child support. (16b.) Parks was sentenced on February 25, 2009, to five years probation, with the first year to be served in the Ingham County jail. (16b.) As part of Parks' sentence, he was also ordered to pay restitution in the total amount of his child support arrearage at that time—$234,444.83. (16b.)

Parks appealed to the Michigan Court of Appeals as a matter of right. On April 20, 2010, the Court of Appeals affirmed defendant's conviction. *People v Parks*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (Docket No 291011), slip op, p 3. The Court of Appeals applied its precedent from *People v Adams* and *People v Westman*, finding that Parks was barred from asserting an inability-to-pay defense, and that there was no due-process violation because Parks had an adequate ability to (and did) plead inability to pay in the family court. *Parks*, slip op, p 2, citing *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004); *People v Westman*, 262 Mich App 184; 685 NW2d 423 (2004), overruled on other grounds in *People v Monaco*, 474 Mich 48; 710 NW2d 46 (2006). The Court of Appeals also distinguished *City of Port Huron v Jenkinson* because Parks—unlike the property owner in *Jenkinson*—had that civil forum to challenge ability to pay. *Parks*, slip op, p 2, citing *City of Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889). Moreover, the Court of Appeals concluded that to the extent that *Jenkinson* could be read to require an ability-to-pay defense to the *actus reas*, it cannot be read to require that the ability to challenge must be made in the criminal proceeding. *Parks*, slip op, p 3. Further, finding an intent element not present under the statute, the Court of Appeals distinguished *People v Ditton*. *Parks*, slip op, p 2, citing *People v Ditton*, 78 Mich App 610; 261 NW2d 182 (1977). Finally, the Court held that a trial court's reliance on a family court's ability-to-pay determinations did not violate due process, because ability to pay is not an element of the crime of non-support. *Parks*, slip op, p 3.

Unsuprisingly, Parks came up with new excuses that he chose not to provide to the family court at the time the family court set Parks' support obligations and denied his requested modifications. (16a-17a.) In doing so, Parks supplies outside-the-record material. (16a-24a.) (Parks Br at 2.) Parks admits that he failed to submit sufficient documentation to the family court. (20a-24a.)

This Court granted Parks' application for leave to appeal.

Defendant-Appellant Selesa Likine

On November 14, 2008, defendant-appellant Selesa Likine (Likine) was also charged in a one-count information for her violation of the felony non-support act, MCL 750.165. The People asserted that Likine failed to pay child support as ordered between February 1, 2005, and March 1, 2008. At trial, the People introduced a certified statement of arrearage prepared by Kimberly Hayes of the Oakland County Friend of the Court. (141a – 143a.) The statement showed that during the charging period of February 1, 2005, and March 1, 2008, Likine made only five partial payments of the 36 support payments that her support order required. She owed $48,381.75. (142a.) Likine admitted that there was little dispute as to the amount she owed. (107a.)

At a hearing on October 8, 2008, the circuit court granted the People's motion in limine to prohibit Likine from presenting the defense of inability to pay. At the hearing, the circuit court held that the Court of Appeals decision in *Adams*, prohibits a defense of inability to pay and that a defendant is required to seek a modification of the child support payments. (19a – 27a.) Likine admitted that she sought modification of her child support payment; however, the family court denied her proposed modification. (23a – 24a.)

The circuit 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 that she had previously failed to pay. (26a.) The circuit court specifically ruled that 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.)

On November 13, 2008, the day before trial, Likine filed a motion for reconsideration of the circuit court's ruling, specifically arguing that precluding her from presenting the defense of

inability to pay would violate the Due Process Clause of the Fourteenth Amendment. (33a.) The circuit court denied the motion for reconsideration on November 14, 2008, immediately before the trial started, and then issued a written order on November 25, 2008, acknowledging the earlier denial. (159a.)

Likine admitted that there were no material facts in dispute at trial. (107a.) The prosecution called only two witnesses: Kimberly Hayes from the Oakland County Friend of the Court Office, and defendant's former husband, Elive Likine. Likine was the only witness for the defense.

Likine was divorced from her husband, Elive Likine, on June 12, 2003. (56a.) Likine and Elive Likine were married for seven and a half years and have three children. (72a.) In the original divorce order, Elive Likine was granted physical custody. (73a.) Likine had shared parenting, which allowed her to have custody of her children on weekends and on alternate holidays. (111a.) Elive Likine testified that Likine told him that he "would suffer with these kids by [himself] and she would not pay any child support to [him]." (74a-75a.) Further, Likine had told him "that women don't pay child support." (75a.) Elive Likine testified that raising the children has been "financially a hardship." (75a.) Elive Likine testified that Likine made "[v]ery sporadic" payments and only when threatened by the Friend of the Court. (74a.)

The family court had first ordered Likine to pay child support on July 9, 2003, with support starting at $54 per month. (47a – 55a.) On August 20, 2004, Likine's child support order was modified to $100 per month for the next three months, and $181 per month thereafter. (47a – 55a.)

Likine claimed that she was hospitalized for a period of time due to mental illness. (116a.) During this time, Elive Likine requested to have Likine's parenting time suspended.

(101a.) The family court ordered that Likine only have supervised visits in public places with her children. (94a, 101a.)

Around May 2005, Elive Likine requested the Friend of the Court to increase Likine's child support payments. (77a.) Likine testified that her annual income in 2005 was $12,385, and that was the most she had ever earned in her working life. (94a-95a.) Likine testified that in May 2005, she received a $10,000 commission for the purchase of a home for which her boyfriend made payments. (92a.) Likine then modified her testimony and agreed that $12,385 did not include the $10,000 commission. (95a.)

On August 30, 2006, the Friend of the Court increased Likine's child support order from $181 per month to $1,131 per month, based on Likine's representation in other financial documents that her income was $15,000 per month ($180,000 per year). (148a.) In May of 2005, Likine had obtained a mortgage for a house in Rochester Hills, Michigan, for $409,900. (147a-148a.) To obtain this mortgage, Likine had listed her income on the mortgage application as being $15,000 per month ($180,000 per year). (147a – 149a.) Likine admitted that after August 2006, she missed many child-support payments and made partial payments at other times. (54a.) Moreover, the family court had previously concluded that Likine "had *misrepresented her income so many times that there is no way to adequately determine her income.*" (156a [emphasis added].) The family court also held that Likine had failed to present sufficient testimony and evidence of her alleged mental illness to enable the court to determine that she was unable to work, and that Likine was still maintaining her house payments. (156a – 157a.) Likine also admitted that she challenged the $1,131 child support order, but that the family court denied her motion. (63a-64a.) The Court of Appeals denied her delayed application for leave to appeal. *Likine v Likine*, unpublished order per curiam of the Court of Appeals, issued March 14, 2008 (Docket No 280148).

At trial, the People introduced, and the court admitted, the support order dated July 9, 2003, which set forth the terms and conditions of Likine's child support obligation. (50a, 51a.) Also introduced was exhibit 2, a certified Statement of Arrearage. (141a – 143a.)

The testimony and documents presented at trial showed that Likine failed to pay her court-ordered child support from February 1, 2005, to March 1, 2008, in violation of the felony non-support act, MCL 750.165.

The trial court instructed the jury on the three elements of MCL 750.165: (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 defendant did not pay the support in the amount or at the time stated in the order. (132a.)

On November 14, 2008, following a one-day trial, the jury found Likine guilty as charged. On December 22, 2008, Likine was sentenced to one year probation and ordered to pay restitution in the amount set forth by the family court. (160a -161a.)

Likine appealed as a matter of right to the Michigan Court of Appeals, which affirmed defendant's conviction. The Court of Appeals specifically concluded that Likine was not deprived of due process because: (1) *Jenkinson* was distinguishable, since it involved no prior judicial determination; (2) Likine was attempting to collaterally attack the family-court support order; (3) the civil proceedings provided Likine the proper forum to raise inability to pay; and (4) Likine's right to present a defense was not implicated, because inability to pay was legally irrelevant in light of the family-court order. *Likine*, 288 Mich App at 653-658.

Notwithstanding the Court of Appeals' holding in *Adams*, Likine argues that the present case is different because she was "incapacitated" or "disabled" due to her mental condition, and that due process requires that the strict liability principles of MCL 750.165 should be relaxed.

But defendant did not provide her complete records during the pendency of this case to either the family court or to the prosecution. There was no evidence presented in the family court, or otherwise in the record during the pendency of this case at the criminal trial, that defendant was incapacitated for the three-year period that she failed to fully pay her child support. Like Parks, Likine includes and references after-the-fact, outside-the-record material that the family court did not have regarding her disability and ability to pay. (Likine Br at 4-5, 7, 26-28, 37.) Likewise, she refers to, and attaches to her brief, a subsequent family court order from January 27, 2010—years after the fact—where the family court would have had additional information supplied by Likine. (Likine Br at 4-5, 7, 26-28, 37.) This is judicial sandbagging that cannot be tolerated in a system that requires a litigant to raise all her arguments and present all her evidence during initial proceedings, not in an after-the-fact collateral attack.

ARGUMENT

I. The rule in *People v Adams*—that inability to pay is not a defense to strict-liability felony non-support—is constitutional, because the family-court process provides due process by including an opportunity, after notice and hearing, to raise inability to pay before a judicial determination of the support obligation. The family court's resolution of whether a parent has the ability to pay, and the prohibition against challenging that predicate finding in a prosecution under MCL 750.165, does not offend due process protections but is consistent with the Legislature's intent and Michigan's interest in ensuring the proper support of children.

A. Preservation of Issue

Likine did not preserve the due process claim under the Michigan Constitution for appellate review because she never specifically raised the Michigan constitutional claim prior to or during trial. Although Likine did raise the Michigan constitutional claim in her motion for a new trial, this was too late to preserve this claim for appellate review to challenge the trial court's ruling on the pre-trial motion in limine. Issues raised for the first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review. *People v*

Lynch, 410 Mich 343, 351; 301 NW2d 796 (1981). This rule should also be true for motions for new trial, in which the claims raised therein were never presented before or during trial.

Likine erroneously claims that she raised her due process claim under the Fourteenth Amendment in the trial court via her response to the People's motion in limine. Likine's response argued that it would be a "failure of fundamental justice" if she were unable to argue to the jury that she was mentally or emotionally unable to obtain or keep employment sufficient to pay for the child support as ordered. The legal basis for Likine's proposed defense was the opportunity to obtain "jury nullification," not due process. (16a.)

Similarly, Parks has not preserved this claim for appellate review because defendant never raised any constitutional claims prior to or during trial.

B. Standard of Review

To the extent Likine or Parks failed to preserve claims for appellate review by timely raising it before or during the trial, this Court's review is limited to plain error affecting their substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999). Otherwise, preserved claims of constitutional questions are reviewed *de novo*. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 256 (2002). The proper interpretation of a statute is a question of law that is reviewed *de novo*. *People v Denio*, 454 Mich 691, 698-699; 564 NW2d 13 (1997). If statutory language is clear and unambiguous, judicial construction is not allowed. *People v Lown*, 488 Mich 242, 254-255; 794 NW2d 9 (2011).

C. Analysis

1. Michigan has a strong public-policy interest in ensuring the support of children. That policy is implicit in the strict-liability scheme the Legislature created for the child-support felony statute.

Support of Michigan's children is a public welfare issue. "Providing financial support for children is a permissible, important, and even compelling governmental interest." *Crego v*

Coleman, 463 Mich 248, 273; 615 NW2d 218 (2000); see also *Champion v Sec'y of State*, 281 Mich App 307, 318; 761 NW2d 747 (2008). "A law that requires a parent to support his child benefits not only the child but also the well-being of the community at large." *Adams*, 262 Mich App at 99. The number of children impacted by these consolidated cases and the funds necessary to properly support those children are immense. In 2009, for example, in Michigan, there were: (1) $1,391,917,746 (nearly $1.4 billion) in total child support collections; and (2) $9,379,203,889 (approaching $10 billion) in total arrearage due; and (3) 763,919 total cases with support orders established. U.S. Department of Health and Human Services, Office of Child Support Enforcement FY 2009 Preliminary Report, Summary Tables FY 2009 < http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/preliminary_report_fy2009/ > (accessed April 4, 2011). Moreover, the support of children is impaired by parents' efforts to evade recognition of their income. Michigan Supreme Court, The Underground Economy, June 2010 < http://courts.michigan.gov/scao/resources/publications/reports/UETF-2010.pdf > (accessed April 4, 2011).

Michigan's courts have long recognized a parent's obligation to support a child. *Slater v Slater*, 327 Mich 569, 571; 42 NW2d 742 (1950), citing *West v West*, 241 Mich 679; 217 NW 924 (1928). Moreover, the Legislature recognized the universal need for support by creating three broad categories for a support obligation pursuant to a support order: "(1) those entered pursuant to a divorce action; (2) those entered pursuant to a paternity action in which paternity has been established (through one of a number of available methods); and (3) those, as here, entered pursuant to a stipulation to dismiss a paternity action before determining paternity." *Crego*, 463 Mich at 256.

Further, the importance of a parent's financial duty to support a child is interwoven throughout other areas of Michigan law. For example, this Court recently held that a parent's

duty to support even survives termination of that parent's parental rights. *Dep't of Human Services v Beck (In re Beck)*, 488 Mich 6, 15; 793 NW2d 562 (2010). Failing to pay child support can also be a consideration in whether a parent's rights should be terminated. See MCL 712A.19b(3)(g). Further, a parent who fails to support and have a relationship with a child can have parental rights terminated— irrespective of that parent's incarceration and ability to earn a living—when there is a petition for a step-parent adoption. MCL 710.56; *In re Caldwell*, 228 Mich App 116; 576 NW2d 724 (1998). Also, driver's license applicants must furnish social security numbers to function as a tool in collecting data to enforce support obligations. *Champion*, 281 Mich App at 319. Support obligations even survive death. *Easley v John Hancock Mut. Life Ins. Co.,* 403 Mich 521, 523; 271 NW2d 513 (1978), citing MCL 552.27.

The importance of child support to the welfare of Michigan's children is reiterated in Michigan's case law. In *People v Westman*, the Court of Appeals held that the Michigan Legislature properly enacted MCL 750.165 as a strict-liability offense under its authority to enact laws protecting the public welfare and, thus, was not in conflict with defendant's constitutional right to due process. *People v Westman*, 262 Mich App 184, 190-191; 685 NW2d 423 (2004), overruled on other grounds, *People v Monaco*, 474 Mich 48, 50; 710 NW2d 46 (2006). The State's police power includes the power to regulate for the social good and the public welfare; laws enacted for the public welfare do not require a criminal intent because the accused generally is in a position to prevent the harm. *Westman*, 262 Mich App at 191-192.

MCL 750.165 provides, in relevant part that, "[i]f a court orders an individual to pay support for . . . a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony. . . ." The language of the statute is plain and unambiguous—inability to pay court-ordered child support is not a defense to felony nonsupport under MCL 750.165. "The State, of course, has a fundamental

interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment." *Bearden v Georgia*, 461 US 660, 669; 103 S Ct 2064; 76 L Ed 2d 221 (1983).

In *People v Adams,* the Michigan Court of Appeals concluded, based on the plain language of the statute, that MCL 750.165 is a strict-liability crime. *Adams*, 262 Mich App at 99-100. In reaching this conclusion, the court analyzed seven factors, including: (1) whether the statute is a codification of common law; (2) the statute's legislative history or its title; (3) guidance to interpretation provided by other statutes; (4) the severity of the punishment provided; (5) whether the statute defines a public-welfare offense, and the severity of potential harm to the public; (6) the opportunity to ascertain the true facts; and (7) the difficulty encountered by prosecuting officials in proving a mental state. *Adams*, 262 Mich App at 93-94; citing *People v Nasir*, 255 Mich App 38, 41-45; 662 NW2d 29 (2003), and *People v Quinn*, 440 Mich 178, 190 n 14; 487 NW2d 194 (1992).

Further, the court in *Adams* determined that allowing a defendant to offer excuses to avoid a conviction under MCL 750.165 negates the post-conviction procedures that subsection (4) of the statute affords: a defendant can file a bond conditioned on compliance, as well as additional opportunities to show cause.[1] Therefore, construing the statute according to its plain language, the court in *Adams* held that the Legislature did not intend to permit inability to pay to

[1] The Court in *Adams* explained that once a court granted bond that if a defendant failed to comply, this process provided an opportunity to show cause why there was a lack of compliance. The Court reasoned that it made no sense to allow a defendant to offer explanations for not paying before being sentenced if these same explanations were inherent for the conviction itself. *Adams*, 262 Mich App at 97. Subsection (4) of MCL 750.165 was previously designated as subsection (3) of MCL 750.165 prior to 2004 PA 570, effective January 1, 2005. *Adams* reference to subsection (3) is the same as current subsection (4). *Adams,* 262 Mich App at 97.

be a defense to felony non-support. Moreover, the crime of non-support fits well within the long-recognized class of offenses for which no criminal intent is generally thought necessary.[2]

2. The family court has the sole jurisdiction and expertise to set the child support obligation—necessarily including a parent's ability to pay—and the family court process provides a parent due process to challenge the ability to pay.

The Legislature determined the need in Michigan to create the family court. 1996 PA 388 amended the Revised Judicature Act when it added chapter 10, and in doing so, reorganized the court system in Michigan by creating the family division of circuit court. *Dep't of Human Services v Johnson (In re A.P.)*, 283 Mich App 574, 594-595; 770 NW2d 403 (2009). As part of the statutory changes, the judicial circuits were required to create a "family court plan," and under that plan the family division has "*sole and exclusive jurisdiction*" over an expansive list of proceedings involving families and children. *Johnson*, 283 Mich App at 595, quoting MCL 600.1011; MCL 600.1021 (emphasis added). For example, the family court has sole and exclusive jurisdiction over child-support matters. See, e.g., the family support act, MCL 552.451, *et seq*; the support and parenting time enforcement act, MCL 552.671, *et seq*; the friend of the court act, MCL 552.501, *et seq*. In fact, the Legislature expressly determined that a stated purpose that "the family court plan be consistent with the goal of developing sufficient *expertise in family law to properly serve the interests of the families and children* whose cases are assigned to that judge." MCL 600.1011(3) (emphasis added).

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[2] See e.g., *Morissette v United States*, 342 US 246, 262 n 20; 72 S Ct 240; 96 L Ed 288 (1952) (explaining that "violations of general police regulations, passed for the safety, health or well-being of the community" are among those to which the doctrine of "crime without intent" is often applied); *People v Quinn*, 440 Mich 178, 187; 487 NW2d 194 (1992) ("[T]he purpose of public welfare regulation [is] to protect those who are otherwise unable to protect themselves by 'placing the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger'").

In Michigan the Friend of the Court (FOC) was created and charged with the obligation of identifying a child support obligation and enforcing that obligation. MCL 552.503; MCL 552.519(3)(a)(vi); MCL 552.511. In arriving at the recommended child support obligation, the FOC uses a formula. MCL 552.519(3)(a)(vi). The formula is created by the State Court Administrators Office (SCAO), an office under this Court's authority. 1963 Const art 6, § 3; MCL 552.519(1). The formula is intended to ensure children receive proper support based on needs and the parents' resources:

> The child support formula became effective in 1987. The primary goal of the formula is to ensure children receive adequate financial support based upon their needs and the actual resources of each parent. The formula considers such factors as the income of each parent, family size, child care expenses, other minor children, and preexisting support orders.
>
> Friend of the court offices, prosecuting attorneys, domestic relations referees, and circuit court judges are required to use the formula when establishing or changing support. If a judge sets an amount different from the amount recommended by the formula, the reasons must be stated either in writing or on the record.

SCAO, Child Support Formula Manual

< http://courts.michigan.gov/scao/selfhelp/family/support.htm > (accessed April 4, 2011).

Each party is given an opportunity to provide requested information to the FOC which will allow the FOC to calculate the support. MCL 552.517b(2). If either party fails or refuses to provide the requested information to the FOC, then the FOC may impute income to that party and the FOC shall state in its recommendation all factual assumptions on which the imputed income is based. MCL 552.517b(6)(a) and (b). In both the Parks and Likine family court proceedings, income was imputed in the calculation of their support orders due to a failure to provide requested information and demonstrate their actual income.

If the payor objects to the amount of support ordered, the payor may file an objection within 21 days of the date of the notice of the proposed order, or, if the payor misses the 21-day

objection period, the payor may file a motion to modify the order at any time. MCL 552.517b(3); MCL 552.455. Deviations are permitted if the payor can prove that a deviation is necessary and the court determines that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record the reasons for the deviation as outlined in the statute. MCL 552.605.

A hearing is held following the filing of a complaint or a motion by either party. The court will then issue an order setting the child support as the court deems appropriate.

> If the parent complained of opposes the entry of the order upon the ground that he or she is without sufficient financial ability to provide necessary shelter, food, care, clothing, and other support for his or her spouse and child or children, the burden of proving this lack of ability is on the parent against whom the complaint is made.

MCL 552.452(1).

Furthermore, anytime there has been a change in circumstances that would adversely affect a parent's ability to comply with the child support order, the parent may petition the court for a modification under MCL 552.603d or MCL 552.605e. Under MCL 552.603d, the parent may even have assessed surcharges set aside and future surcharges waived when they prove that they have "no present ability, and will not have an ability in the foreseeable future, to pay the arrearage absent a repayment plan that waives or discharges amounts assessed as surcharge." Under this procedure, the parent is put on a payment plan and surcharges are set aside when the parent complies with the payment plan. Additionally, under MCL 552.605e, the parent may be able to enter a payment plan to have the arrearages abated or discharged if the court finds that the payment plan is in the best interest of the parties and the children involved.

In other words, the law already bends over backward to accommodate parents who truly have an inability to pay. To allow deadbeat parents to ignore these rights and instead collaterally attack a support order before a jury in a criminal case would invite inability-to-pay defenses and

inundate the criminal system with a responsibility that is best left to the civil court that has the expertise to determine a parent's ability to provide the necessary support for the children.

Moreover, there is a practical and comprehensive interrelationship between the civil process used to establish child support obligations and a criminal proceeding under MCL 750.165. When the Legislature amended MCL 750.165, it tie barred House Bill 4826 to the enactment of House Bill 4816, which, in part, created the office of child support—the office responsible for the centralized enforcement of child support, operation of the Michigan Child Support Enforcement System (MiCSES) and the Michigan Statewide Disbursement united (MiSDU). 1999 PA 152; 1999 PA 161. House Bill 4816 was tie barred to House Bill 4817 and 4818. 1999 PA 150 (relating duties and powers of the FOC); 1999 PA 160 (relating to enforcement of support, healthcare, parenting time orders for divorce, paternity, child custody, duties of the FOC, and duties and powers of the circuit court, et al). In large part, House Bill 4816 was in response to federal mandates. 42 USC 666, et seq. The interrelationship between the civil and criminal process is apparent.

Here, Likine initially availed herself—albeit unsuccessfully—of the family court process to modify her support. She also appealed. Parks also filed several unsuccessful motions regarding his child support. The record does not indicate whether Parks ever attempted to appeal his support orders. In fact, the Court of Appeals correctly noted that in *Likine* that "[d]uring the extended period between the entry of the child support order at issue and the filing of the criminal charge, it does not appear from the record evidence that [Likine] sought again to have the support order modified." *Likine*, 288 Mich App at 657. Moreover, "[h]ad [Likine] properly raised a challenge to her ability to pay the ordered child support, as well as any of her bona fide efforts to pay such support, they would have been considered and adjudicated by the court that issued the support order. However, defendant did not seek those, or any other, remedies before

she was prosecuted under MCL 750.165." *Likine*, 288 Mich App at 657. Both Likine and Parks had process available to them in the family court to raise the alleged inability to pay.

Likine's failure to successfully modify the amount of support was due to her misrepresentation of her income and her failure to adequately document her medical claims for psychiatric disability. Parks likewise failed to support his modifications requests. These were not difficult burdens. Both Parks and Likine therefore came into the divorce and family courts with "unclean hands" and now demand an extraordinary equitable remedy in derogation of the Legislature's clear mandate to impose strict liability. Moreover, they are, in result, seeking a prohibited retroactive modification. MCL 552.603(2); *McLaughlin v McLaughlin*, 255 Mich App 475; 660 NW2d 784 (2003).

Although these are criminal cases that are outside of equitable considerations, one who asks for equity must do so with clean hands. *Frankenmuth Mut Ins Co v Continental Ins Co*, 450 Mich 429, 440; 537 NW2d 879 (1995). Because Likine misrepresented her income so many times to the family court and the friend of the court, and had failed to provide her complete medical records to substantiate her alleged mental incapacity, her failure to prevail on her modification requests was attributable to her own actions. For example, the FOC reasonably increased Likine's child support order from $181 per month to $1,131 per month, based on Likine's representation in a mortgage application that her income was $15,000 per month ($180,000 per year). (53a.) If Likine lied to her mortgage lender, she should have candidly admitted her fraud to the family court. Parks likewise never supported why his child-support obligation was too high, though in his case, his objection appears to be philosophical. His ex-wife testified that he *never* paid support unless incarcerated and forced to pay. (6b.)

3. The crime of non-support under MCL 750.165 does not violate the Michigan Constitution where the underlying obligation to support is set by the family court, and during that process a parent can challenge the ability to pay.

Likine and Parks both argue that MCL 750.165 violates due process rights under the Michigan Constitution, Const 1963, art 1 § 17 ("No person shall. . .be deprived of life, liberty or property, without due process of law").[3] "Where the language of the federal constitution and that of the Michigan Constitution are nearly identical, a 'compelling reason' must justify interpreting one instrument of government as granting greater rights under the latter than under the former." *People v Reichenbach*, 459 Mich 109, 118-119; 587 NW2d 1 (1998). The Court of Appeals has consistently held the Michigan Constitution provides no greater due process protection than the federal due process guarantee. See e.g., *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004); *American States Ins Co v State Dep't of Treasury*, 220 Mich App 586, 590; 560 NW2d 644 (1996), citing *Saxon v Dep't of Social Services*, 191 Mich App 689, 698; 479 NW2d 361 (1991).

Likine's and Parks' due process argument, based on the Michigan Constitution, relies on the 1889 case of *City of Port Huron v Jenkinson*. *Jenkinson*, 77 Mich at 414. Reliance on this case is misplaced because *Jenkinson* is distinguishable. In *Jenkinson*, the City of Port Huron brought an action against Mr. Jenkinson for violating a local ordinance, which 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 to do so, such person, after due notice, shall be liable to prosecution." *Jenkinson*, 77 Mich at 417. The City of Port Huron, however, failed to specify the kind of sidewalk and the time in which the sidewalk must

[3] US Const, Am V provides: "No person shall . . . be deprived of life, liberty, or property without due process of law."

be made. *Jenkinson*, 77 Mich at 419. This Court held that the enforcement of the ordinance violated the defendant's right to due process because there was *insufficient notice*:

> It will be seen, from an examination of the two sections of the statute herein given, that, *before a person owning land in the city can be required to build a sidewalk along the street upon which it abuts, the council must have passed an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be made. In the case of that required of this defendant, the record does not show that this was ever done.* The complaint and warrant are both defective in this respect, and the court was without jurisdiction in the case; and the magistrate should have yielded to the motion to dismiss the proceedings, when it was made by counsel for the defendant.

Jenkinson, 77 Mich at 419 (emphasis added).

The Court struck down the ordinance as unconstitutional because no legislative 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 a duty a crime, for which he may be punished by both fine and imprisonment." *Jenkinson*, 77 Mich at 419.

In contrast here, Likine and Parks were not only on notice of their child-support obligations, they were active participants in the creation of that obligation. The family-court orders instructed them when to pay, whom to pay, and how much to pay. And the payment amount was judicially determined after notice and a hearing before the family court. Moreover, they, at times, availed themselves of the procedures to modify the support orders; however, the family court was not persuaded that modifying the support order was justified in light of the proffered excuses and outright fraud.

In *Jenkinson*, the city imposed the same obligation on every resident without regard for ability to pay. The Court in *Jenkinson* recognized the legal principle that a legislative body cannot impose a duty upon a person that would be impossible for that person to perform, and then to make the non-performance of that duty a crime. But that rule has no application here,

where the defendants were previously given notice and a hearing under the principles of due process, in which the ability-to-pay issue was judicially determined and found to be appropriate. What is more, where a parent's financial situation changes, that parent is permitted to seek judicial modification of the child support order. Indeed, the Court of Appeals in *Adams* specifically recognized that criminal prosecution under the felony non-support act could be avoided if defendants had "sought a modification in the first place before making himself vulnerable to criminal prosecution." *Adams*, 262 Mich App at 99-100.

The property owners or tenants in *Jenkinson*, by contrast, had no procedure in which to demonstrate their inability to pay for the sidewalks. The rule in *Jenkinson* is distinguishable from the facts of the present case because the command to Likine and Parks to act was not set by legislative fiat (as it was in *Jenkinson*) but rather by judicial fact-finding after due process notice and a hearing was held. *Jenkinson*, therefore, is inapposite to the instance case.

Moreover, there is no authority for a defendant to collaterally attack, in a felony non-support case, an underlying child-support order. Both Likine and Parks had a duty to abide by the family court's support order, and the failure to comply violated MCL 750.165.

4. The crime of non-support under MCL 750.165 does not violate due process under the Fourteenth Amendment where the underlying obligation to support is set by the family court and during that process a parent can challenge the ability to pay. Once the factual predicate of ability to pay is established in the family court, crossover collateral estoppel bars relitigation of ability to pay in the criminal proceeding.

Likine and Parks both incorrectly frame the issue presented as a "voluntariness" issue under due process. But this case has nothing to do with voluntariness; it has everything to do with Likine's and Parks' truthfulness (or lack thereof) and accuracy in the collateral family-court proceeding.

a. Inability to pay is more properly viewed as a claim of impossibility to pay that is addressed during the family court proceedings, rather than a voluntariness claim.

Likine and Parks argue that strict-liability offenses cannot punish purely involuntary acts or omissions because the *actus reus* of a crime must be the result of a voluntary deed. But the argument is a mislabeling of the question, because defendant is merging the concepts of voluntariness of an act and impossibility. For crimes of omission, an impossibility defense based on the lack of ability to comply is analogous to the voluntariness requirement in commission crimes. Robinson, Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States, 29 NY L Sch L Rev 101 (1984); Smart, Criminal Responsibility for Failing to Do the Impossible, 103 Law Q Rev 532 (1987).

It is a well established principle that crimes require an act or omission. LaFave, Criminal Law (5th ed), § 6.1(b), p 321. Omission cases arise from a "failure to act under circumstances giving rise to a legal duty to act." LaFave, Criminal Law (5th ed), § 6.2(c), pp 322-323. Likewise, as a general principle, it is clear that an act must be voluntary. LaFave, Criminal Law (5th ed), § 6.1(c), pp 322-323, 325. Common examples of involuntary acts identified in the Model Penal Code, for example, are: "a reflex or convulsion; those during unconsciousness or sleep; those during hypnosis or resulting from hypnotic suggestion; and others which are not a product of the effort or determination of the actor, either conscious or habitual," and cases generally support these classifications. LaFave, Criminal Law (5th ed), § 6.1(c), pp 323. Another example could be where a driver ran a red light because the driver behind him had failed to stop and pushed the first driver's car into the intersection, or a circumstance where brakes failed on a car, without knowledge by the driver of a defective condition. Compare *City of Kettering v Greene*, 9 Ohio St 2d 26; 222 NE2d 638 (1966) with *State v Kremer*, 262 Minn 190, 192; 114 NW2d 88 (1962).

Here, the question regarding inability to pay is not a "condition" that caused Likine and Parks to involuntarily act or involuntarily omit to act, nor is it an exertion of some outside force. Rather, it is a claim of insufficient income to pay child support—a claim that is/was properly resolved in the family court proceedings. Once addressed by the family court, a defendant cannot collaterally attack the ability to pay again, and this process does not deprive a parent subsequently convicted of non-support of due process under the Fourteenth Amendment.

To the extent that Likine contends that her actions in failing to pay the amount owed in her child support order were involuntary due to her mental and/or emotional disorders, she is attempting to present a diminished capacity defense based on her mental incapacity or mental illness. The defense of diminished capacity, however, is no longer a viable defense in Michigan. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001); *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Moreover, Likine could have fully presented these issues and convinced the family court that they impeded her ability to pay.

b. A determination made outside the criminal proceeding—here a parent's ability to pay—does not violate due process. Once the factual predicate of ability to pay is established in the family court, the statute bars relitigation of ability to pay in the criminal proceeding, which is consistent with the crossover estoppel doctrine.

"[A] collateral attack occurs wherever a challenge is made to a judgment in any manner other than through a direct appeal." *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). A family court's order sets the obligation to pay and includes a determination that the parent can pay that amount, and a parent has the opportunity to dispute that determination in the family court, appeal it, or move to modify it based on a change in circumstances. See Argument I(C)(2), supra. For Likine's and Parks' due process argument to prevail, this Court must accept a faulty premise: due process always requires the ability to collaterally attack a factual

determination reached outside of a criminal proceeding when that factual predicate is used to resolve an issue in a subsequent criminal proceeding.

Likine and Parks rely generally on the proposition expressed by the United States Supreme Court, in *Hicks v Feiock*, that criminal penalties cannot be imposed on someone who has not had all the constitutional protections required in a criminal proceeding. *Hicks v Feiock*, 485 US 624, 632; 108 S Ct 1423; 99 L Ed 2d 721 (1988). But that misses the point: the family court proceedings are not proceedings where a parent is convicted of a crime. Rather, it is a proceeding where the court with the jurisdiction and expertise determines and sets the child support obligation, which necessarily includes a determination of the ability to pay. That determination is a predicate factual determination. Both Likine and Parks had opportunities in the family court proceedings to seek modification of the support orders.

As demonstrated below, courts have recognized that determinations outside of the criminal proceedings can be determinative of an issue in the criminal proceedings—even as they might touch on elements of the crime. And due process does not always require that the defendant be able to collaterally attack them. Here, ability or inability to pay is not an element of the felony non-support under MCL 750.165. Rather, those determinations are made by the family court, and a parent is given due process to challenge the ability to pay. Both panels of the Court of Appeals correctly acknowledged and applied this principle. *Parks*, slip op, pp 2-3; *Likine*, 288 Mich App at 657.

i. **Crossover collateral estoppel**

Under circumstances where a predicate fact has been previously determined, the doctrine of crossover collateral estoppel (issue preclusion) should preclude defendant from arguing an inability to pay. As this Court stated in 1990:

> [c]ollateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined.

People v Gates, 434 Mich 146, 154-155; 452 NW2d 627 (1990).[4]

The term "crossover estoppel" was used in *People v Gates*, to refer to estoppel cases where the prior proceeding is criminal and the subsequent is civil, "or vice versa." *Gates*, 434 Mich at 155. This Court noted that the overwhelming majority of estoppel cases concern two civil proceedings, and that crossover cases are "relatively recent and rare." *Gates*, 434 Mich at 155. Under Michigan's collateral estoppel law, "[c]rossover estoppel ... is permissible." *Barrow v Pritchard*, 235 Mich App 478; 597 NW2d 853 (1999).

Case law has recognized crossover estoppel to preclude relitigation of an issue in a civil proceeding after a criminal proceeding has been recognized.[5] Several cases have ruled that a criminal conviction may estop a criminal defendant from relitigating in a subsequent civil proceeding those issues litigated and necessary to the judgment in the criminal proceeding.[6]

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[4] *Gates* held that a prosecutor was not estopped from trying a defendant on a charge of sexual assault where the defendant had been the subject of a civil jury verdict of no jurisdiction in probate court because the issue was not necessarily litigated in the civil proceeding. *Gates*, 434 Mich at 158.

[5] *In re Forfeiture of $ 1,159,420*, 194 Mich App 134, 145-146; 486 NW2d 326 (1992) (crossover estoppel was relied upon to preclude the claimants from challenging the validity of the search warrant in State court forfeiture proceeding where the validity had previously been determined in federal court.) *Barrow v Pritchard*, 235 Mich App 478; 481, 597 NW2d 853 (1999) (federal court decision to deny motion for a new trial based on ineffective assistance of counsel collaterally estopped legal malpractice in State court.)

[6] See *Gaddis v Redford Tp.*, 188 F Supp 2d 762 (ED Mich, 2002) (court collaterally estopped a § 1983 plaintiff from challenging the existence of probable cause for arrest, because that issue was fully and fairly litigated at the preliminary examination in his criminal case), *Schlumm v Terence J O'Hagan, PC*, 173 Mich App 345, 357; 433 NW2d 839 (1988), *Deitz v Wometco West Michigan TV*, 160 Mich App 367, 382; 407 NW2d 649 (1987).

There is no bar in Michigan to applying crossover estoppel here.[7]

Numerous cases have indicated that collateral estoppel can apply where the first lawsuit was civil and the second was criminal. See, e.g., *Yates v United States*, where the United States Supreme Court stated, "We are in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character." *Yates v United States*, 354 US 298, 335; 77 S Ct 1064; 1 L ed 2d 1356 (1957), overruled in part on other grounds *Burks v United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978). See also *United States v Mumford*, "the doctrine of collateral estoppel may be applicable when the first cause of action was civil and the second is criminal." *United States v Mumford*, 630 F2d 1023, 1027 (CA 4, 1980). See also *Smith v State*, 2002 OK CR 2; 46 P3d 136, 138 (Okla Crim App 2002), "we affirm the applicability of the doctrine of collateral estoppel to criminal prosecutions or proceedings when the prior proceeding was civil in nature."

Although usually being asserted against the prosecution, crossover estoppel has been used against a defendant. Courts have relied upon predicate factual determinations reached in

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[7] The State acknowledges that under *People v Goss*, the doctrine of collateral estoppel "cannot be invoked to preclude a defendant in a criminal case from contesting an essential element of a charge." *People v Goss (After Remand),* 446 Mich 587, 600; 521 NW2d 312 (1994). See also *United States v Konovsky*, 202 F2d 721, 726-27 (CA 7, 1953) (no preclusion where a criminal prosecution followed a civil suit because of differing burdens of proof). The State's argument that the ability to pay determination cannot be collaterally attacked is not contrary to *Goss* because the ability to pay is not an element of MCL 750.165. Moreover, the lack of public policy, noted in *Goss*, is absent here. *Goss*, 446 Mich at 605-606. Here, unlike *Goss*, there is a chance of "recurring violation[s]" and a great expense to the public. *Goss*, 446 Mich at 606. The lack of public policy in *Goss* that justified not drawing an analogy to the use of collateral estoppel in illegal reentry cases is not present here. See, Kennelly, Jr., *Precluding the accused: offensive collateral estoppel in criminal cases*, 80 Va L Rev 1379, 1382-1384.

preceding civil cases as conclusive of an issue in a criminal case, thereby barring relitigation of that issue. In fact, courts have done so in federal child support cases.[8]

In the context of ability to pay child support, the United States Court of Appeals for the Ninth Circuit in *United States v Craig*, reiterated that "a parent who considers himself or herself unable to pay an order of child support must seek a modification of the order from the state court and not from the federal district court in a CSRA prosecution . . . ."[9] *United States v Craig*, 181 F3d 1124, 1128 (CA 9, 1999). The Ninth Circuit recognized "that a competent state tribunal would have made a proper evaluation of [the defendant's] mournful apologia had it been presented to a family court prior to his federal indictment. . . . Accordingly, by the time he was the subject of a federal indictment, it was too late to avoid the consequences by pleading financial inability to pay the state court order." *Craig*, 181 F3d at 1128-1129. A prosecution does "'not turn on the fairness of the order, the reasons underlying the state court's issuance of the order . . . or any other matter involving relitigation of a family law issue.'" *Craig*, 181 F3d at 1128, quoting *United States v Bailey*, 115 F3d 1222, 1232 (CA 5, 1997).

The United States Court of Appeals for the Second Circuit in *United States v Kerley* addressed and rejected a collateral challenge—albeit on subject-matter jurisdiction grounds—to the underlying state court support order for a prosecution under the DPPA, 18 USC 228. *United States v Kerley,* 416 F3d 176 (CA 2, 2005). The Second Circuit noted that "[e]very circuit that has addressed the issue has stated that defendants in DPPA prosecutions cannot collaterally challenge the substantive merits of the underlying support order." *Kerley,* 416 F3d at 178. "A

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[8] There is a difference between the federal statute and Michigan's felony non-support statute. Under the Deadbeat Parents Punishment Act, 18 USC 228, unlike MCL 750.165, there is a willfulness requirement and a rebuttable presumption of the ability to pay.

[9] In *Craig*, the Ninth Circuit recognized that a parent who does not seek a modification will most likely have acted willfully. *Craig*, 181 F3d at 1128.

DPPA case 'turns only on the defendant's violation of a state court order,' and not on whether that order is valid under state law." *Kerley,* 416 F3d at 180.

In the same vein, the Fourth Circuit in *United States v Johnson* rejected a father's due process argument for a conviction under the predecessor Child Support Recovery Act because the United States Supreme Court has not said that "whenever a federal prosecution depends on proof of a prior judicial or administrative determination of guilt or civil liability for a specified offense, due process requires proof again, and beyond a reasonable doubt, of the essential elements of the predicate offense." *United States v Johnson*, 114 F3d 476, 482 (CA 4, 1997). In *Johnson*, the due process argument failed because there was nothing in the state system that deprived him of the opportunity to challenge the fundamental fairness of the underlying predicate child support order. *Johnson*, 114 F3d at 483.

Under Michigan's system, parents have a judicial forum to raise the inability to pay defense—the family court. Moreover, ability to pay is not even an element of the offense.

ii. **Other cases applying crossover estoppel principle**

There are other cases outside of child support area that are consistent with the principle that determinations reached in previous civil proceedings cannot be relitigated in criminal proceedings. In fact, these cases involve serious crimes with potentially long felony sentences. For example, the United States Court of Appeals for the Ninth Circuit in *United States v Afshari* rejected due process arguments raised by a defendant who was convicted of materially supporting a group designated by the Secretary of State as a terrorist organization and where the defendant could not raise a defense that the organization was not actually a terrorist organization. *United States v Afshari*, 426 F3d 1150 (CA 9, 2005). Under 18 USC 2339B, a person convicted under the statute "shall be fined under this title or imprisoned not more than 15 years," or if a death occurs, then for a term of years or life. Specifically, the Ninth Circuit rejected the

argument that due process prohibited prosecution where the court—the D.C. Circuit—with the power to review the predicate designation in an appellate proceeding, applying the normal administrative law standard of review, determined that the group's predicate terrorist designation was achieved through erroneous or unconstitutional procedurally deficient means but refused to set it aside, but instead, only remanded for the group to receive its procedural due process rights. *Afshari*, 426 F3d at 1156. The Ninth Circuit also rejected defendant's argument that if the predicate designation was unconstitutional and never set aside, it could not serve as a predicate for the crime of materially supporting a terrorist organization. *Afshari*, 426 F3d at 1156. The Ninth Circuit recognized that, generally, "a criminal proceeding may go forward, even if the predicate was in some way unconstitutional, so long as a sufficient opportunity for judicial review of the predicate exists." *Afshari*, 426 F3d at 1157, relying on *Lewis v United States*, 445 US 55; 100 S Ct 915; 63 L Ed 2d 198 (1980) (prior conviction could be used as a predicate for subsequent felon in possession of a firearm conviction, even where prior conviction obtained in violation of Sixth Amendment right to counsel). The predicate fact is only that the organization was listed and not correctly listed. *Afshari*, 426 F3d at 1159. Therefore, "due process does not require another review of the predicate by the court" adjudicating the crime of materially supporting a terrorist organization. *Afshari*, 426 F3d at 1159; see also *United States v Bozarov*, 974 F2d 1037 (CA 9, 1992) (defendant charged with exporting items specified under the Export Administration Act without a license could not challenge listing in the criminal proceeding).

Also, the United States Court of Appeals for the Fourth Circuit, sitting en banc, in *United States v Hammoud* reached the same result as the Ninth Circuit in *Afshari*. *United States v Hammoud*, 381 F3d 316 (CA 4, 2004) (en banc), rev'd on other grounds *Hammoud v United States*, 543 US 1097; 125 S Ct 1051; 160 L Ed 2d 997 (2005), reinstated in part, 405 F3d 1034 (CA 4, 2005). Specifically, in *Hammoud*, the defendant argued that his inability to challenge the

designation of the group as a terrorist organization deprived him of his right to a jury trial on all the elements of the crime of providing material support to a terrorist organization. *Hammoud*, 381 F3d at 331. The Fourth Circuit concluded that "Congress has provided that the *fact* of an organization's designation as a[] [terrorist organization] is an element of [the crime], but the *validity* of the designation is not." *Hammoud*, 381 F3d at 331 (emphasis in original).

The terrorist cases demonstrate that a person can receive a lengthy criminal sentence for material support even when a predicate fact and element—that the organization was a *foreign terrorist organization*—is decided outside the criminal process. There, the defendant is not afforded the opportunity to collaterally attack the designation, even when the defendant was not a party to the designation determination in the first instance. Here, Parks and Likine had an opportunity to participate in the underlying proceedings that established their child-support orders. In fact, both did participate. That Parks and Likine now disagree with the outcome in those proceedings is no reason to set aside their criminal convictions.

iii. United States Supreme Court has not foreclosed crossover estoppel

The United States Supreme Court has never foreclosed the possibility of crossover estoppel from a civil proceeding to a criminal proceeding. In fact, two cases implicitly accept the possibility of crossover estoppel of a predicate determination.

For example, in *McKinney v Alabama*, the defendant was convicted of selling mailable material previously found to be obscene in a civil proceeding. *McKinney v Alabama*, 424 US 669; 96 S Ct 1189; 47 L Ed 2d 387 (1976). The defendant was not allowed at his criminal trial to litigate whether the material was obscene, although he had no notice and was not a party to the previous state court proceeding that determined that the material was obscene. *McKinney*, 424 US at 670-673. In vacating the defendant's conviction, the United States Supreme Court

concluded that the defendant had to have "the opportunity to litigate in some forum the issue of . . . obscenity before he may be convicted of selling obscene material." *McKinney*, 424 US at 677. The Court did not conclude, however, that the defendant had to have an opportunity to litigate whether the material was obscene in the *criminal* proceeding itself. The Supreme Court could have held that but did not.

Similarly, in *United States v Mendoza-Lopez*, the United States Supreme Court held that where a defendant's prior deportation is a critical element of his subsequent crime of illegal reentry, and the defendant was denied meaningful judicial review of that deportation order because of underlying due process defects in the administrative process, due process required that the court must review that order in the criminal proceeding. *United States v Mendoza-Lopez*, 481 US 828, 834-839; 107 S Ct 2148; 95 L Ed 2d 772 (1987). Thus, "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Mendoza-Lopez*, 481 US at 838. There was nothing defective about the judicial process in the family court where Likine's and Parks' child support obligations were established.

iv. **Crossover estoppel is not unprecedented in Michigan**

Crossover collateral estoppel for predicate facts is not entirely foreign to Michigan and is applicable in other circumstances. It is a practical reality. For example, if paternity is litigated in a previous proceeding, it cannot be relitigated in a subsequent proceeding. In *Hackley v Hackley*, this Court addressed the circumstance where a subsequent "proceeding to cancel child support and determine paternity involves the same parties and the same issue as in the prior divorce proceeding." *Hackley v Hackley*, 426 Mich 582, 596; 395 NW2d 906 (1986); see also *Hawkins v Murphy*, 222 Mich App 664; 565 NW2d 674 (1997) (applying collateral estoppel to preclude

relitigation of paternity where court had entered order of filiation and divorce judgment resolving question). This Court held that "[a] finding of fact in a divorce decree that a child was born of the marriage of the parties establishes the child's paternity. Such a determination, if unappealed, is to be given conclusive effect." *Hackley*, 426 Mich at 596; see also *Hawkins v Murphy*, 222 Mich App 664; 565 NW2d 674 (1997) (applying collateral estoppel to preclude relitigation of paternity where court had entered order of filiation and divorce judgment resolving question). If a felony non-support action under MCL 750.165 followed a paternity determination in a civil proceeding, the father would not have the opportunity to collaterally attack in the criminal proceeding the finding of paternity reached in a paternity or divorce proceeding.

The practical reality of crossover estoppel also appears in areas far removed from issues of child support. For example, the Secretary of State can administratively suspend a driver's license of a person who has accumulated 12 points. MCL 257.320(1)(d). A person aggrieved by a final determination of the Secretary of State may appeal to circuit court. MCL 257.323. A defendant does not get to collaterally attack the predicate factual determination as to the validity of the suspension if charged with driving on a suspending license:

> A collateral attack on the validity of the suspension of a driver's license in a case where the defendant is charged with driving while his license is suspended is improper. See *People v Jankins*, 353 Mich 481; 92 NW2d 56 (1958). If defendant believed that his license was improperly suspended, his action should have been to petition for a hearing in circuit court for an order modifying or setting aside the suspension.

People v Glantz, 124 Mich App 531; 335 NW2d 80 (1983). Therefore, a person could be prosecuted for violating MCL 257.904 for driving on a suspended license without being able to collaterally attack the validity of the suspension.

When a defendant claims an inability to pay the ordered child support in a non-support case in Michigan—despite the family court determination—it is a collateral attack on the

substance of the family court order and that court's determination that a parent *does* have the ability to pay. Due process does not require this opportunity in the criminal proceedings. Moreover, if a defendant cannot collaterally attack the family court judgment in a federal child support prosecution, the same collateral attack on the judgment and ability to pay should be barred in the State court prosecution.

vi. Distinguishing Likine's and Parks' other cited cases

The cases Likine and Parks cite do not foreclose the argument that inability to pay is subsumed as a predicate fact in the family court's determination in setting the child support obligation or denying a modification—a determination under its express jurisdiction and expertise. The cases are readily distinguishable:

- *People v Ditton*, construed the previous version of MCL 750.165, prior to the 1999 amendment, for the proposition that without providing a defense of inability to pay, the Michigan felony non-support law would be unconstitutional. *People v Ditton*, 78 Mich App 610; 261 NW2d 182 (1977). *Ditton* construed the prior felony non-support law, which was not a strict-liability crime. The prior law had an element that the defendant had to leave the State of Michigan to evade his child support obligations before he could be guilty of the crime. But the defense of inability to pay did not survive the 1999 amendment to MCL 750.165. The Court in *Ditton* read this defense into the prior version of the statute based on a requirement of the Uniform Reciprocal Enforcement of Support Act, MCL 780.151 et seq. That Act had a requirement that before a defendant could be punished for contempt for noncompliance with the court order to pay support, he must have sufficient ability to comply with the court order.

- *People v Jackson* does not rebut the State's argument because *Jackson* involved a defendant's challenge to an order that imposed attorneys fees *without* considering the defendant's ability to pay. *People v Jackson*, 483 Mich 271, 276-277; 769 NW2d 630 (2009).

- The two Kentucky cases—*O'Harrah* and *Mason*—were decided more than 50 years ago and do not elaborate on the process that was or was not afforded to the parent in the previous civil proceeding. *Commonwealth v O'Harrah*, 262 SW2d 385 (1953); *Commonwealth v Mason*, 317 SW 2d 166 (1958).

- In *Epp v Nevada*, the Nevada statute making it a crime to willfully neglect or refusal to provide support and maintenance for a child, involved the state's demonstration of willfulness and the defendant's response of excuse or justification. *Epp v Neveda*,

107 Nev 510; 814 P 2d 1011 (1991). MCL 710.65 has no intent requirement where a defendant could attack the intent by claiming the inability to pay.

- In *Zablocki v Redhail*, the United States Supreme Court invalidated a state law that limited the ability to remarry when the person had child support obligations unless the person had state court permission. *Zablocki v Redhail,* 434 US 374, 375; 98 S Ct 673; 54 L Ed 2d 618 (1978). The opinion is unclear as to what standard of review was actually applied, but the Court did conclude that marriage was a fundamental right and that the statute's classifications did *not* assure support of children. *Zablocki,* 434 US at 388-391. It was the classification in *Zablocki* was problematic.

- In *Bearden v Georgia*, the United States Supreme Court addressed the probationer's failure to pay a fine or restitution as the basis for revocation and held that "[o]nly if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Bearden*, 461 US at 672. *Bearden* does not stand for a universal inability to pay defense in a criminal case.

Here, there was a family court order setting the support obligations for Likine and Parks, after notice and full hearing. The family-court orders in these cases necessarily found that Likine and Parks had the ability to pay. Likine and Parks are attempting nothing more than an end run around their support obligations. Such attempts should not be countenanced because they hurt children and eliminate the deterrent effect of holding parents accountable. Deadbeat parents should not be permitted to keep denying and challenging the ability to pay, even when the issue has been already decided in the family court and when the criminal jury has no expertise in income and support calculations, nor would the jury have the interests of the children before it. By removing the teeth of the statute and the deterrent effect, deadbeat parents would be seeking—in effect—nothing more than a retroactive modification that they are not entitled to. Here, as parents, Likine and Parks are not being subjected to a debtor's prison. Rather, they are being held accountable for being deadbeat parents and shirking their obligations to support their children.

RELIEF SOUGHT

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Court of Appeals' decisions upholding Likine's and Parks' felony non-support convictions and sentences and hold that inability to pay is not a defense to felony non-support convictions under MCL 750.165.

Respectfully submitted,

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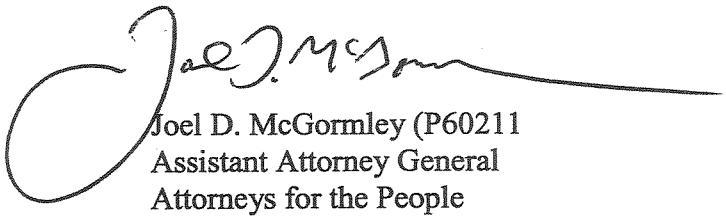

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