**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellee,

-vs-

**MICHAEL JOSEPH PARKS,**

Defendant-Appellant.
_____/

**Supreme Court No.** 141181

**Court of Appeals No.** 291011

**Lower Court No**. 08-1225FH

**INGHAM COUNTY PROSECUTOR/**
**ATTORNEY GENERAL**
Attorney for Plaintiff-Appellee
_____

**DOUGLAS W. BAKER (P49453)**
Attorney for Defendant-Appellant
_____

# DEFENDANT-APPELLANT'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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Court of Appeals answers, "No."

Defendant-Appellant answers, "Yes."

## STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-appellant Dr. Michael Joseph Parks stood trial in Ingham Circuit Court on a single charge of failing to pay child support.[1] Judge William Collette, who served as fact-finder, found Dr. Parks guilty and sentenced him to a five-year term of probation, the first year to be spent in jail.

Dr. Parks appealed by right to the Michigan Court of Appeals. He argued that because both the state and federal constitutions require proof of a voluntary actus reus, Judge Collette erred by accepting the prosecution's argument that inability to pay is not a defense to felony nonsupport, and thus disregarding the evidence of Dr. Parks's inability to pay. The Court of Appeals rejected his arguments, and affirmed his conviction and sentence. 13a-15a.

This Court has since granted Dr. Parks's application for leave to appeal, together with those of Selesa A. Likine and Scott Bennett Harris. The Court has directed the parties 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. *See Port Huron v Jenkinson*, 77 Mich 414 (1889)."

**The trial evidence**

Dr. Michael Parks and Diane Leslie Parks, while married, had three children: Alexis (born in 1989), Eric (born in 1990), and Stephanie (born in 1992). 27a. In 1994, Diane Parks filed for divorce from Michael. 27a. The divorce was finalized in 2000. 31a.

Dr. Parks was a party to the divorce, represented by counsel. 28a. He was ordered to pay child support through the divorce judgment. 28a. He was at first ordered to pay $230/week for

[1] MCL 750.165.

all three children. 28a. In 2003, the order was modified. Dr. Parks was now required to pay $761/week, or $3130.35/month, as long as there were three children to support. 30a.

During the period of time alleged in the criminal information (October 1, 2006 through July 16, 2008), Dr. Parks did not make the required payments. 30a.

* * * *

Dr. Parks did not dispute that he was a party to the proceedings that led to the support order. Nor did he dispute that he had failed to make all the payments required of him during the specified period. His defense was that he was unable to pay. The modified support order was too high from the start because it imputed his income at the rate of an urban physician in group practice, when in fact he was a rural solo practitioner with a much lower income. 31a. Then, a physical disability left him unable to practice medicine, and with a disability income of just $424/month. 32a. In 2005, he was forced to declare bankruptcy. 32a.

Dr. Parks had sought to modify the child-support order to reflect his changed circumstances. 32a. His lawyer, though, had done a poor job of providing documentation, and the order had remained unmodified. 33a.[2]

* * * *

The trial prosecutor objected to Dr. Parks's defense evidence, arguing that inability to pay is not a defense. The judge acknowledged the prosecutor's point, but, in an attempt to avoid creating an appellate issue, allowed the testimony anyway:

> MS. BRENNER [the trial prosecutor]: Objection, Your Honor. Inability to pay is not a [d]efense to this crime. The court of appeals, People versus Adams, has made that very clear.

[2] In the Court of Appeals, Dr. Parks filed a motion to remand to establish: (i) that he had been disabled and unable to work as a physician since April 2005, and (ii) that the Friend of the Court had finally recognized his ongoing disability as reason for modifying the child-support order, and recommended a modified order of **$0.00**. 16a-24a. The Court of Appeals denied his motion. 9a.

> THE COURT: Well, I know, but that's a point for argument. I understand the law.
>
> MS. BRENNER: No testimony about inability to pay should be allowed.
>
> THE COURT: But I am going to have this trial and it is nonjury, and I don't see what difference it makes. See, I don't grant a lot of motions because it's really hard to overrule me when I don't do that. See, I have reasons I do what I do.
>
> MS. BRENNER: Yes, Your Honor.
>
> THE COURT: Okay. If it was a jury trial I would consider different issues, but it's not. Go ahead. [31a.]

However, as the testimony came in the judge strongly hinted that the defense would be unavailing: "Whether he could pay or not is not an issue. The fact is, is he was under a court order to pay." 32a.

In summation, the prosecutor reminded the judge that the charged crime required no proof of mens rea; its only elements were whether the defendant was ordered to pay support as part of a proceeding to which he was a party or had notice, and whether he failed to pay. 33a.

Explaining his verdict, the judge adopted the prosecutor's view ("as Ms. Brenner stated, there are three elements to the charge"). 34a. Because Dr. Parks was represented by counsel at a proceeding at which a support order was properly entered, and because Dr. Parks failed to pay, Judge Collette convicted him. 34a.

The judge also noted that Dr. Parks had moved to amend the order but not provided documentation, and cited that lapse as reason to think Dr. Parks "simply does not want to pay." 34a.

## I. BOTH STATE AND FEDERAL CONSITUTIONS REQUIRE AN INABILITY-TO-PAY DEFENSE TO THE CRIME OF FAILURE TO PAY CHILD SUPPORT. THE TRIAL COURT ERRED BY DISREGARDING THE DEFENSE EVIDENCE OF INABILITY TO PAY.

**Standard of review**

Constitutional questions, and questions of law generally, are reviewed de novo. *People v Sierb*, 456 Mich 519, 522 (1998).

**Argument**

### A. THE COURT OF APPEALS WAS MISTAKEN TO TREAT THE CONSTITUTIONAL ISSUES AS UNPRESERVED. IN THE ALTERNATIVE, TRIAL COUNSEL WAS INEFFECTIVE FOR NOT EXPLICITLY MAKING A CONSTITUTIONAL ARGUMENT.

Dr. Parks preserved his appellate claim that the state and federal constitution require recognition of an inability-to-pay defense to MCL 750.165 by presenting an inability-to-pay defense at trial. The trial judge allowed him to present evidence in support of his defense, but then refused to factor the defense into his verdict. An objection to the judge's verdict would have been futile. *Cf. People v Patterson*, 428 Mich 502, 514 (1987) (insufficient-evidence claim need not be raised in trial court to preserve it for appellate review). Because the trial judge gave counsel no reason to register a constitutional complaint before announcing his verdict, the Court of Appeals was wrong to treat Dr. Parks's constitution-based objection to that verdict as unpreserved. *See* 13a.

To the extent that legal arguments were needed to preserve the issue (even though the trial judge admitted the defense evidence), counsel was ineffective for not making them. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const AmVI, XIV; Const 1963, art 1, §20. The test for determining ineffective

assistance is twofold: whether "'counsel's performance was deficient,'" and if so, whether his "'deficient performance prejudiced the defense.'" *People v LaVearn,* 448 Mich 207, 213 (1995) (quoting *Strickland v Washington,* 466 US 668, 687 (1984)). Both prongs are met here. Counsel's performance was deficient because the case law to support the inability-to-pay defense was well-established and readily available to her. Moreover, if laying a legal foundation for the defense was necessary, she could have had no legitimate strategy for not doing so. And if Dr. Parks's appellate arguments are correct and should have persuaded the trial judge, then counsel's failure to present them was also prejudicial.

### B. THE STATE CONSTITUTION REQUIRES AN INABILITY-TO-PAY DEFENSE. A MICHIGAN CRIMINAL CONVICTION MAY NOT BE BASED ON AN INVOLUNTARY ACT OR OMISSION.

The Michigan Constitution does not permit a court to criminally convict a defendant for failing to make a legally-required payment without taking account of the defendant's inability to pay. *City of Port Huron v Jenkinson,* 77 Mich 414 (1889). In *Jenkinson*, this Court reviewed 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 (quoting Port Huron City Charter § 1, c. 18). The punishment for violating the ordinance was to pay a fine or suffer up to 90 days of imprisonment. *Jenkinson*, *supra* at 416 (quoting Port Huron City Charter § 14). The ordinance violated the Michigan Constitution, this Court ruled, because:

> *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).]

*Jenkinson* thus recognized as a matter of Michigan constitutional law the fundamental criminal-law principle that a criminal conviction must be based upon a voluntary act. A defendant cannot be convicted of failing to perform a legal duty if that duty was impossible for the defendant to perform. *See, e.g., United States v Spingola*, 464 F2d 909, 911 (7th Cir 1972) ("[g]enuine impossibility is a proper defense to a crime of omission").

*Jenkinson* remains good law. It has not been overruled, and was indeed cited favorably by two justices of this Court as recently as 2009. *People v Dowdy,* 484 Mich 855, 855-56 (Kelly, CJ, concurring); *see also id*. at 862 n 22 (Hathaway, J, dissenting). *Jenkinson* continues to be cited in law review articles, *see, e.g.*, Jack Apol & Stacey Studnicki, *Criminal Law,* 51 Wayne L Rev 653 (2005), and was also cited in Wayne R. LaFave's 2008 treatise, *Substantive Criminal Law* (2d ed 2008), for the proposition that "one cannot be criminally liable for failing to do an act which he is physically incapable of performing."

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 directly in conflict with *Jenkinson*'s constitutional rule, and is thus unconstitutional. Moreover, *Adams* fails on its own terms because it confuses the concepts of mens rea and actus reus. *See* Apol & Studnicki, *supra,* at 674 ("[*Adams*] is more correctly framed as a voluntary act case rather than a mens rea case"). *Adams* reasoned that because the legislature enacting MCL 750.165 dispensed with a mens rea requirement, it necessarily meant to dispense with an inability-to-pay defense.

However, inability to pay is not a state-of-mind defense; it is an actus reus defense.[3] A defendant who does not have the money for a required payment cannot make the payment, no matter the defendant's intentions. The defendant is incapable of performing the duty. *Adams*, which dealt exclusively with the mens rea requirement, simply does not answer the constitutional question presented in this appeal.[4]

*Jenkinson* requires reversal here. Like the Port Huron ordinance at issue in *Jenkinson*, the failure-to-pay-child-support statute legally obliges certain people, Dr. Parks included, to make payments. Dr. Parks presented evidence to show that, because of his financial circumstances, it was "impossible for him to perform" the required payments. *Id*. The trial judge

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[3] *Adams* emphasized the strict-liability nature of the nonsupport law as reason for rejecting an inability-to-pay defense. *Adams*, 262 Mich App at 94-96. But while a strict-liability offense dispenses with a mens rea requirement, it still requires proof of a voluntary criminal act or omission. The authorities for this view are legion. For example:

- "[T]he act or omission must be deliberate and voluntary in order to violate even a strict liability provision." 21 Am Jur 2d *Criminal Law* §132 (2009).

-A statute cannot punish an involuntary act or omission because the voluntary act requirement is "a core minimum culpability requirement." Alan C. Michaels, *Constitutional Innocence*, 112 Harv L Rev 828, 879 (1999). The requirement that an act or omission be voluntary is fundamental, applies regardless of the nature of the crime, and is "universal in application." *Id.* at 879 n.279 (quoting Paul H. Robinson, *Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?*, Action and Value in Criminal Law 187, 195 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993)).

-A "voluntary act is an absolute requirement for criminal liability," Wayne R. LaFave, Jr & Austin Scott, Jr., *Criminal Law* 199 (2d ed 1986) (quoted in Michaels, *supra*, at 879 n.279), and "public welfare offenses are no exception." Michaels, *supra*, at 879 n.279 (citing Phillip E Johnson, *Strict Liability: The Prevalent View*, in 4 Encyclopedia of Crime & Justice 1518, 1519 (Sanford H Kadish ed, 1983)).

-Strict liability only eliminates the mens rea requirement, but cannot dispose of the voluntary act requirement. Kevin Emerson Collins, *Constructive Nonvolition in Patent Law and the Problem of Insufficient Thought Control*, 2007 Wis L Rev 759, 784 n.77 (2007).

[4] *Adams*' conclusion that inability-to-pay is no defense to a strict liability crime appears to have steered Michigan law into uncharted waters. *See* Apol & Studnicki, 51 Wayne L Rev at 674 ("[a]n involuntary act—or an involuntary failure to act when there was a duty to do so—has never before been subject to punishment in American law."); see also the Brief of Selesa A. Likine at 11-16, n 4 (showing that no other state forbids an inability-to-pay defense).

completely disregarded that evidence and convicted him solely on his failure to pay. Under *Jenkinson*, the judge should have considered Dr. Parks's proof of his inability to pay as a defense to the charge: if Dr. Parks truly could not pay, then he could not be held criminally liable.

The trial court's verdict, dependent as it was on the assumption that inability to pay was no defense, must be overturned in light of *Jenkinson*.

### C. THE FEDERAL CONSTITUTION'S DUE PROCESS CLAUSE SIMILARLY FORBIDS CONVICTION BASED ON AN INABILITY TO PAY.

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." Wayne R. LaFave, *Substantive Criminal Law* § 6.2 (2d ed 2008); *see also* 22 CJS *Criminal Law* § 45 (2008); Apol & Studnicki, *supra*, at 674 ("[No one] can be held criminally liable for failing to perform an act which one is incapable of performing."); Smart, *supra*, at 532 ("[T]here is something inherently inconsistent if not actually repugnant in a law which requires for compliance with its dictates that a member of society should do something that for him is impossible.") An individual must have been able to perform a failed, legally-mandated duty in order for criminal liability to attach, even in the specific context of nonpayment of child support. A parent "is not criminally liable for child nonsupport in cases where, through no fault of his or her own, such a person lacks the ability or means to support the child." 23 Am Jur 2d, *Desertion and Nonsupport* § 41 (2009).

A legislature may not abrogate the voluntary act requirement. On the rare occasions legislatures have enacted 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, *Substantive Criminal Law*, *supra*, § 3.3. A legislature cannot eliminate the voluntary act requirement because "[voluntary conduct] in responsibility is more fundamental than mens rea

. . . for even where mens rea in that sense is not required and responsibility is 'strict' or 'absolute'. . . [a voluntary act] . . . is still required." HLA Hart, *Punishment and Responsibility* 90 (1968) (quoted in Michael Edmund O'Neill, *Stalking the Mark of Cain*, 25 Harv JL & Pub Pol'y 31, 38 n.25 (2001)). When a statute imposes criminal liability based on a failure to perform a duty, such "[a]n omission . . . , it goes without saying, *presupposes the capacity to do so*." Wilson, *supra*, at 1013 (emphasis added) (citing KJM Smith & William Wilson, *Impaired Voluntariness and Criminal Responsibility*, 13 Oxford J Legal Stud 69 (1993)); *see also* 22 CJS *Criminal Law* § 45 (2008) ("[f]or criminal liability to be based on the failure to act, there must be a duty imposed by the law to act and the person must be physically capable of performing the act.); Wilson, *supra*, at 1035 (stating that the "defense of impossibility is the counterpart of automatism as applied to cases of omission.") (citing Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 Law Q Rev 424 (1989)).

The due-process component of the voluntary-act requirement is reflected in the United States Supreme Court's decisional law. The Court has invalidated state statutes, even in non-criminal contexts, that prohibit defendants from presenting 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 which provided that non-custodial fathers with outstanding child support obligations were prohibited from marrying unless they first obtained a court order granting permission. Zablocki, 434 US 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 emphasized 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 (emphasis added). The Court held 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). According to Justice Powell, "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 (Powell, J concurring) (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.

Similarly, 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." *Bearden*, 461 US 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. The Court stated that the treatment of indigent individuals in the criminal

justice system should be evaluated by the principle of "equal justice." *Id*. at 664 (citing *Griffin v Illinois,* 351 US 12, 19, 76 S Ct 585, 100 L Ed 891 (1956)). In its analysis, the Court relied upon its holdings in *Williams v Illinois,* 399 US 235, 90 S Ct 2018, 26 L Ed 2d 586 (1970), and *Tate v Short,* 401 US 395, 91 S Ct 668, 28 L Ed 2d 130 (1971), which held respectively that "a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum because they are too poor to pay the fine" and that "a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full." *Bearden*, 461 US at 664. The Court reasoned that *Williams* and *Tate* distinguished situations where a defendant could not pay from situations where "a defendant was at fault in failing to pay." *Id*. at 668. Revoking probation where "*through no fault of his own, [the probationer] 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).

### D. DUE PROCESS FORBIDS A CRIMINAL COURT FROM RELYING ON A CIVIL-COURT SUPPORT ORDER AS PROOF OF ABILITY TO PAY.

The Court of Appeals held that Dr. Parks had sufficient opportunity to present his inability-to-pay defense in the Family Court proceeding that led to the support order. 14a. However, that analysis ignores "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, including the requirement that the offense be proved beyond a reasonable doubt." *Hicks v Feiock,* 485 US 624, 632, 108 S Ct 1423, 99 L Ed 2d 721 (1988). Every element of the offense must be proved beyond a reasonable doubt, including the actus reus requirement. However, a Family Court's ability-to-pay determination, like other determinations in civil cases, is not subject to the proof-beyond-a-reasonable-doubt standard. Also missing from

such proceedings are other important due-process protections, such as the right to appointed counsel. *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 (1982) (discussing the differences between civil and criminal due process with regard to commitment proceedings) (citing *Addington v Texas*, 441 US 418, 99 S Ct 1804, 60 L Ed 2d 323 (1979)).

It is therefore well-established that the findings of a civil case cannot be imported to establish guilt in a criminal trial. *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 Appx 274, 291 (CA 10, 2004). In the 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).

* * * *

Due process requires a retrial at which Dr. Parks is allowed to present evidence of his inability to pay to a court that recognizes the defense, if supported, to be a valid one.

## SUMMARY AND RELIEF

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his conviction and remand for retrial.

Respectfully submitted,

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