

**IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS  
(SERVITTO, P.J. AND SAAD AND DONOFRIO, JJ.)**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**HARVEY EUGENE JACKSON**

Defendant-Appellant.

\_\_\_\_\_ /

**MACOMB COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellee

\_\_\_\_\_ /

**STATE APPELLATE DEFENDER OFFICE**

Attorney for Defendant-Appellant

\_\_\_\_\_ /

**Supreme Court No. 135888**

**Court of Appeals No. 282579**

**Lower Court No. 2006-004473-FH**

**BRIEF ON APPEAL - APPELLANT**

**STATE APPELLATE DEFENDER  
OFFICE**

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this case by virtue of its January 28, 2009 Order granting leave to appeal.

## **STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE COURT OF APPEALS CORRECTLY DECIDE IN *PEOPLE V DUNBAR* THAT DUE PROCESS PROTECTIONS APPLY TO TRIAL COURTS' ASSESSMENTS OF ATTORNEY FEES?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

- II. MUST THE TRIAL COURTS CONSIDER A CONVICTED DEFENDANT'S ABILITY TO PAY TOWARD THE COST OF ATTORNEY FEES PRIOR TO IMPOSING ANY ORDER?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

- III. IS THE ATTORNEY FEE ISSUE APPROPRIATELY ADDRESSED AT SENTENCING GIVEN THE SUPREME COURT'S PRONOUNCEMENT IN *FULLER* THAT ONLY THOSE WHO ACTUALLY BECOME CAPABLE OF REPAYING THE STATE WILL EVER BE OBLIGED TO DO SO AND THAT THOSE FOR WHOM REPAYMENT WOULD WORK 'MANIFEST HARDSHIP' ARE FOREVER EXEMPT FROM ANY OBLIGATION TO PAY?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

- IV. MUST THE STANDARDS FOR DETERMINING WHEN THE COURT MAY IMPOSE AN ATTORNEY FEE ASSESSMENT ON A CONVICTED DEFENDANT COMPORT WITH DUE PROCESS CONSIDERATIONS AS SET FORTH IN THE *DUNBAR* DECISION?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

V. DOES IMPOSING A 20% LATE FEE PURSUANT TO MCL 600.4803(1) CONSTITUTE AN IMPERMISSIBLE MEANS OF ENFORCEMENT THAT EXPOSES CRIMINAL DEFENDANTS WHO HAVE HAD THE ASSISTANCE OF APPOINTED COUNSEL TO MORE SEVERE COLLECTION PRACTICES THAN ORDINARY CIVIL DEBTORS?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

On December 14, 2006 Judge Miller of the Macomb County Circuit Court sentenced Mr. Jackson, pursuant to a plea agreement, to multiple terms of imprisonment, with the highest term being 8 to 15 years. Sentence Transcript (ST) 17; 9a, Judgment of Sentence; 11a. Judge Miller ordered Mr. Jackson, who had court appointed counsel, 7a, 8a to “pay your attorney fees.” *Id.*

After the court clerk told the Judge that there was a recommended amount, the Court stated:

Oh. Got recommendation on that – in the amount of seven hundred and twenty-five dollars for Mr. Ciske’s services. Would you agree with that, sir?

ST, 18; 10a

Neither Mr. Jackson nor his counsel responded to the Court’s question. *Id.*

Following sentencing, the Court entered an Order to Remit Prisoner Funds for Fines, Costs and Assessments for the Department of Corrections to withdraw funds from Mr. Jackson’s prison account until his attorney fees and other assessments, not including restitution, were paid in full. 12a.

Mr. Jackson requested the appointment of appellate counsel. The form he signed showed no present employer, no assets of any kind and liabilities for “fines and lawyer fees.” This form, which is a Macomb County form, states, in relevant part:

“I agree to reimburse the County of Macomb all monies expended on my behalf for attorney and defense costs in this matter, and, if I am unable to repay those attorney fees and defense costs in full, I will enter into a reimbursement payment plan at a rate in accordance with my ability to pay. I understand that MCL 600.4801 and MCL 600.4803 provide for imposition of a 20% late fee for any amounts due and owing if not paid within 56 days of the due date. The total amount is due upon approval of payment to my attorney by the Judicial Aide.”

13a.

On July 2, 2007 appellate counsel moved to correct an invalid sentence. (Motion Transcript (MT). As part of that motion counsel addressed the Court on the attorney fee assessment. MT, 8; 14a. Counsel brought to the Court's attention that at the time of sentencing, according to the presentence report, Mr. Jackson "was making roughly \$200 a month doing handyman jobs." MT, 9; 15a Counsel went on to point out that Mr. Jackson was now serving an eight (8) year minimum term of imprisonment. *Id.*

The Court ruled as follows:

"Yes. Attorney fees absent a presentation made at sentencing to waive the fee because of indigency, I don't believe that was done. So we'll have to deny that motion as well."

MT, 10; 16a; 17a (Circuit Court Disposition).

The Court of Appeals denied Mr. Jackson's Application for Leave to Appeal from the Circuit Court's post conviction rulings. 18a.

Mr. Jackson now files this Brief in response to this Court's Order, 19a, granting leave on the issue of ordering defendants with court appointed counsel to pay attorney fees.

**I. THE COURT OF APPEALS CORRECTLY DECIDED IN PEOPLE V DUNBAR THAT DUE PROCESS PROTECTIONS APPLY TO TRIAL COURTS' ASSESSMENTS OF ATTORNEY FEES.**

**Issue Preservation:**

Issue preservation is not applicable to this question although appellate counsel did file a timely post conviction motion challenging the imposition of attorney fees. 16a, 17a.

**Standard of Review:**

This case presents a question of law and is therefore reviewed de novo. See, generally, *People v Hardiman*, 466 Mich 417, 646 NW2d 158 (2002)(discussing the continuing validity of *People v Atley* (citations omitted))

**Legal Discussion:**

*People v Dunbar*, 264 Mich App 240, 690 NW2d 476 (2004), was correctly decided under United States Supreme Court precedent. *Dunbar* properly held that a sentencing judge is required to consider a defendant's "foreseeable ability to pay" before determining how much, if any, of the costs of his defense he will be required to repay. *Id.* at 254-55.

As *Dunbar* recognized, the Supreme Court has distinguished between attorney fee repayment programs that satisfy constitutional requirements and those that do not. See *Dunbar*, 264 Mich App at 252-53 (comparing *James v Strange*, 407 US 128; 92 S Ct 2027; 32 L Ed 2d 600 (1972) with *Fuller v Oregon*, 417 US 40; 94 S Ct 2116; 40 L Ed 2d 642 (1974)).

In *James v Strange*, the Supreme Court analyzed a Kansas recoupment statute where the state was permitted to use civil proceedings to recover the cost of an appointed attorney from the defendant. The Kansas statute allowed the state to recoup the costs of the defense from a defendant under the terms of the Kansas Code of Civil Procedure. *Id.* at 131. A defendant was, however, not "accorded any of the exemptions provided by that code for other judgment debtors

except the homestead exemption.” *Id.* Thus, while other debtors under the Kansas code qualified for a variety of exemptions, such as “restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness,” a defendant required to pay back the costs of his or her defense was not permitted any of these exemptions. *Id.* at 135.

*James* ultimately held that the attorney fee recoupment statute violated Equal Protection because it subjected people required to pay back defense costs to “such discriminatory conditions of repayment.” *Id.* at 140. The court explained that “[t]o impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes.” *Id.* at 140-41. Because it decided the case on Equal Protection grounds, the Court did not reach the question of whether the statute impermissibly burdened the right to counsel:

“Kansas has enacted laws both to provide and compensate from public funds counsel for the indigent. There is certainly no denial of the right to counsel in the strictest sense. Whether the statutory obligations for repayment impermissibly deter the exercise of this right is a question we need not reach . . . .”

*Id.*

In contrast to *James*, the Supreme Court upheld - against Equal Protection and Right to Counsel challenges - an Oregon recoupment statute which provided that repayment of defense costs may be required as part of a sentence. *Fuller v Oregon*, 417 US 40, 51-54; 94 S Ct 2116; 40 L Ed 2d 642 (1974). In so doing, the Court examined the procedural safeguards the Oregon statute required before repayment may be ordered. In upholding the statute against an argument that the requirement of repayment would “chill” the right to counsel, the court noted, “[t]he Oregon statute is carefully designed to insure that only those who actually become capable of

repaying the State will ever be obliged to do so. Those . . . for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to pay.” *Id.* at 53 (footnote omitted).

Finally, in the third case relied upon by the *Dunbar* court, the United States Supreme Court held that a sentencing court may not revoke a defendant’s probation for failure to pay fines or restitution unless it can be shown that the defendant has the ability to pay. *Bearden v Georgia*, 461 US 660, 103 S Ct 2064, 76 L Ed 2d 221 (1983)

The *Dunbar* court correctly relied upon a Fourth Circuit decision, *Alexander v Johnson*, 742 F2d 117 (CA4, 1984), which interpreted *James, Fuller, and Bearden* to require that Michigan’s attorney fee repayment programs have several features to pass constitutional muster, including that “the entity deciding whether to require repayment must take cognizance of the individual’s resources, the demands on his own and family’s finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent.” *Dunbar, supra* at 253, (quoting *Alexander v Johnson, supra* at 124). This is similar to the language in *Fuller* which notes that the wording of the statute at issue “makes it clear that a determination that an indigent ‘will be able’ to make subsequent repayment *is a condition necessary for the initial imposition* of the obligation to make repayment.” 417 US at 53 n12 (emphasis added).

This Court should affirm *Dunbar’s* foundational holding that recoupment for attorney fees is subject to constitutional scrutiny and implement a court rule to facilitate statewide standards and compliance.

## II. THE TRIAL COURTS MUST CONSIDER A CONVICTED DEFENDANT'S ABILITY TO PAY TOWARD THE COST OF ATTORNEY FEES PRIOR TO IMPOSING ANY ORDER.

### **Issue Preservation:**

Issue preservation is not applicable to this question although appellate counsel did file a timely post conviction motion challenging the imposition of attorney fees. 16a, 17a.

### **Standard of Review:**

This case presents a question of law and is therefore reviewed de novo. See, generally, *People v Hardiman*, 466 Mich 417, 646 NW2d 158(2002)(discussing the continuing validity of *People v Atley* (citations omitted))

### **Legal Discussion**

In *People v Dunbar*, 264 Mich App 240, 690 NW2d 476 (2004) the Court of Appeals engaged in a thorough analysis of the trial court's sentencing procedure with respect to the imposition of attorney fees to determine if it comported with due process. The Court concluded that due process required the trial court to consider the defendant's financial circumstances. The Court stated: "It is important to recognize that the purpose of the court considering a defendant's financial situation is to ensure that 'repayment is not required as long as he remains indigent'" *Dunbar* at 256, quoting *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984).

Any court order requiring an indigent defendant to pay for his court appointed counsel must comply with due process. At the very least, due process requires the court (1) to offer to hold a hearing before it deprives the indigent defendant of a property interest and (2) to give the defendant notice of the proceeding. *Matthews v Eldridge*, 424 US 319, 333, 96 S Ct 893, 47 L Ed 2d 18 (1976).

As a practical matter, all courts consider a defendant's ability to pay prior to imposing attorney fees. As happened in this case, all Circuit Courts have a screening process to determine whether the Court will appoint counsel. In this case, the Macomb County Circuit Court uses their own form to determine eligibility for court appointed counsel. On that form, Mr. Jackson indicated that he had no assets, no liabilities and earned \$100/week. 7a. The Court therefore appointed him counsel. 8a.

Following conviction, the probation department prepared a presentence report<sup>1</sup>, as is done in every felony case. As part of that report the Agent inquired into Mr. Jackson's employment history, assets and obligations. Thus, the Judge at sentencing had the benefit of both the pre-screening financial information and the post conviction financial information.

In *Fuller v Oregon*, 417 US 40, 44; 94 S Ct 2116; 40 L Ed 2d 642 (1974), the Court stated:

“First, a requirement of repayment may be imposed only upon a convicted defendant . . . . Second, a court may not order a convicted person to pay these expenses unless he “is or will be able to pay them.” The sentencing court must “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. As the Oregon court put the matter in this case, ***no requirement to repay may be imposed if it appears at the time of sentencing that “there is no likelihood that a defendant’s indigency will end . . . .”*** Third, a convicted person under an obligation to repay “may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof.” The court is empowered to remit if payment “will impose manifest hardship on the defendant or his immediate family. . . .”

*Fuller v Oregon*, 417 US 40, 44; 94 S Ct 2116; 40 L Ed 2d 642 (1974)(emphasis added) (internal citations to Oregon statutes omitted).

The *Fuller* Court noted that the statute was “quite clearly directed” at people who are unable to afford an attorney at the time of criminal proceedings, but who “subsequently gain the

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<sup>1</sup> The presentence report is submitted under separate cover since it is a confidential document.

ability to pay the expenses of legal representation.” *Id.* at 46. In upholding the statute against an argument that the requirement of repayment would “chill” the right to counsel, the court noted, “[t]he Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so. Those . . . for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to pay.” *Id.* at 53 (footnote omitted). Additionally, Defendants with no likelihood of having the means to repay *are not put under even a conditional obligation to do so*, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no “manifest hardship” will result. *Id.* at 46 (emphasis added). Lastly, in addressing the right to counsel claim, the Court noted the narrow design of the Oregon statute:

“Oregon’s legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation against those who actually become able to meet it without hardship.” *Id.* at 54 (emphasis added). This language suggests that were Oregon’s statute not so closely tailored to a defendant’s ability to pay, it might impose an impermissible burden on the constitutional right to counsel.”

*Id.*

The First Circuit has similarly noted the implication from *James* and *Fuller* that “a court *should not order* a convicted person to pay [attorney reimbursement] expenses unless he is able to pay them or will be able to pay them in the future considering his financial resources and the nature of the burden that payment will impose. If a person is unlikely to be able to pay, no requirement to pay is to be imposed.” *Olson v James*, 603 F.2d 150, 155 (10th Cir. 1979) (emphasis added).

What *Fuller* and *Olson* recognize is that the determination of whether a defendant has or will have the ability to pay costs of his court-appointed attorney must be made prior to even the imposition of the “conditional obligation.” *See Fuller*, 417 US at 54.

In interpreting the federal statute that provides for the appointment of counsel for indigent federal defendants,<sup>2</sup> federal courts of appeals have consistently found that a trial court must examine a defendant's continued ability to pay before ordering reimbursement for appointed counsel. *See United States v Seminole*, 882 F.2d 441, 443 (CA 9, 1989) (holding that “[i]f the ‘fine’ was actually an order for reimbursement of fees paid to [defendant’s] court appointed counsel, the district court erred by not making the requisite finding that ‘funds are available for payment’ of the fees.”); *United States v Mitchell*, 893 F.2d 935, 936 (CA 8, 1990) (finding trial court’s failure to make an informed decision whether defendant was able to pay restitution was an abuse of discretion); *United States v Jimenez*, 600 F.2d 1172, 1174 (CA 5 1979) (trial court must make a finding that the defendant is currently able to repay fees).<sup>3</sup>

In addition, the courts of many other states that have examined the issue have found that before the government can order an indigent defendant to reimburse or contribute to the costs of his appointed counsel—whether the costs are part of his sentence or not—the court imposing the

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<sup>2</sup> 18 USC 3006A.

<sup>3</sup> *See also United States v Connolly (In re Boston Herald)*, 321 F.3d 174, 178-79 (CA 1, 2003); *United States v Lorenzini*, 71 F.3d 1489, 1494 (CA 9, 1995); *United States v Graham*, 72 F.3d 352, 359 (CA 3, 1995); *Hanson v Passer*, 13 F.3d 275, 278 (CA 8, 1994); *United States v Angulo*, 864 F.2d 504, 509 (CA 7, 1988); *Alexander v Johnson*, 742 F.2d 117, 123-24 (CA 4, 1984); *Olson v James*, 603 F.2d 150, 152-55 (CA 10, 1979).

cost must first determine the indigent defendant's ability to pay.<sup>4</sup> Many states also have enacted statutes to provide for specific procedures that will comply with the requirements of due process when determining whether an indigent defendant should contribute to the cost of his appointed counsel. *See, e.g.*, Cal Penal Code §987.8(b) (Supp 2004) (providing that whenever a defendant is provided with court-appointed counsel, at the end of the criminal proceedings in the trial court, "the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof").<sup>5</sup>

Therefore, as indicated by the United States Supreme Court, the constitutional right to counsel means that before a court may order an indigent to contribute to the costs of his defense, he must be afforded due process. Due process at least requires that an indigent defendant must have received notice that the matter may be raised by the trial court, and he must be given a hearing in which the tribunal must determine the defendant's ability to pay. *See Fuller v Oregon*,

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<sup>4</sup> *See Warren v City of Enterprise*, 641 So 2d 1312, 1315 (Ala Cr App, 1994); *State v Albert*, 899 P2d 103, 106-13 (Alas, 1995); *Espinoza v Superior Court*, 166 Ariz 557, 560-61, 804 P2d 90, 93-94 (1991); *Cal Teachers Ass'n v California*, 20 Cal 4th 327, 352, 975 P2d 622 (1999); *In re Estate of Benney*, 790 P2d 319, 326 (Colo, 1990); *Potter v State*, 547 A2d 595, 600 (Del, 1988); *People v Cozad*, 158 Ill App 3d 664, 670, 511 NE2d 211 (Ill App 4 Dist, 1987); *Everroad v State*, 730 NE2d 222, 226-27 (Ind Ct App, 2000); *State v Haines*, 360 NW2d 791, 797 (Iowa, 1985); *Walker v State*, 26 Kan App 2d 410, 410-12, 988 P2d 283 (1999); *Donovan v Commonwealth*, 60 SW3d 581, 584-85 (Ky App, 2001); *Haynes v State*, 26 Md App 43, 51, 337 A2d 130 (1975); *State v Tennin*, 674 NW2d 403, 407-08 (Minn, 2004); *State v Wood*, 245 Neb 63, 511 NW2d 90 (1994); *Taylor v State*, 111 Nev 1253, 903 P2d 805 (1995), *overruled on other grounds*, *Gama v State*, 112 Nev 833, 920 P2d 1010 (1996); *Opinion of the Justices*, 121 NH 531, 539; 431 A2d 144 (1981); *M v S*, 169 NJ Super 209, 218, 404 A2d 653 (1979); *State v Webb*, 591 SE2d 505, 513-14 (NC, 2004); *Matter of Adoption of K A S*, 499 NW2d 558, 565 (ND, 1993); *State v Crenshaw*, 145 Ohio App 3d 86, 90, 761 NE2d 1121 (Ohio App 8 Dist, 2001); *Williams v State*, 711 P2d 116, 118 (Okla Cr, 1985); *Johns v Johnson*, 165 Or App 561, 563-64, 996 P2d 1013 (2000); *Commonwealth v Opara*, 240 Pa Super 511, 513-27, 362 A2d 305 (1976); *State v Haught*, 179 W Va 557, 562, 371 SE2d 54 (1988); *White Eagle v State*, 280 NW2d 659, 661 (SD, 1979); *Busby v State*, 984 SW2d 627, 632 (Tex Crim App, 1998); *Ohree v Commonwealth*, 26 Va App 299, 308-09, 494 SE2d 484 (1998); *State v Morgan*, 173 Vt 533, 536, 789 A2d 928 (2001); *State v Blank*, 131 Wash 2d 230, 239, 930 P2d 1213 (1997); *State v Grant*, 168 Wis 2d 682, 684-685, 484 NW2d 370 (Wis App 1992); *Keller v State*, 771 P2d 379, 387-88 (Wy 1989).

*supra*. Thus, *Dunbar* correctly held that the court must “provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant’s presentence investigation report or, even more generally, a statement that it considered the defendant’s ability to pay,” *prior to* imposing a requirement of attorney fee repayment. 264 Mich App at 254-55. *Dunbar*’s requirement that a court consider a defendant’s “foreseeable ability to pay” before ordering attorney fee repayment is therefore appropriate under controlling United States Supreme Court precedent.

*Dunbar*, however, did not go far enough and failed to make clear what considerations are critical to the determination of ability to pay. The issue of criteria will be addressed in Issue IV, *Infra*.

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<sup>5</sup> *See also* Ala Code § 15-12-25 (Supp 2003); Ariz Rev Stat § 9-499.09 (Supp 2003); Colo Rev Stat § 21-2-106 (2003); Fla Stat Ann § 938.03 (West Supp 2004); Ga Code Ann § 17-12-10 (Supp 2003); Idaho Code § 19-854 (Supp 2003); 725 Ill Comp Stat 5/113-3.1 (2002); Ind Code § 35-38-1-18 (1998); Kan Stat Ann § 22-4513 (Supp 2002); La Rev Stat Ann 15:148 (Supp 2004); Neb Rev Stat § 29-3908 (Supp 2002); NC Gen Stat § 7A-455.1 (2003); ND Cent Code, § 12.1-32-08 (Supp 2003).

**III. WHETHER TO IMPOSE ATTORNEY FEES IS APPROPRIATELY ADDRESSED AT SENTENCING GIVEN THE SUPREME COURT’S PRONOUNCEMENT IN *FULLER* THAT ONLY THOSE WHO ACTUALLY BECOME CAPABLE OF REPAYING THE STATE WILL EVER BE OBLIGED TO DO SO AND THAT THOSE FOR WHOM REPAYMENT WOULD WORK ‘MANIFEST HARDSHIP’ ARE FOREVER EXEMPT FROM ANY OBLIGATION TO PAY.**

**Issue Preservation:**

Issue preservation is not applicable to this question as the issue is whether Dunbar correctly held that a challenge to an order for repayment of attorney fees may be premature until collection efforts have begun.

**Standard of Review:**

This case presents a question of law and is therefore reviewed de novo. See, generally, *People v Hardiman*, 466 Mich 417, 646 NW2d 158(2002)(discussing the continuing validity of *People v Atley* (citations omitted))

**Legal Discussion:**

*In Fuller*, the Court examined the procedural safeguards the Oregon statute required before repayment may be ordered. *Fuller v Oregon*, 417 US 40, 51-54; 94 S Ct 2116; 40 L Ed 2d 642 (1974). In upholding the statute, the court noted, “[t]he Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so. Those . . . for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to pay.” *Id.* at 53 (footnote omitted). The *Fuller* Court also noted that the wording of the statute at issue “makes it clear that a determination that an indigent ‘will be able’ to make subsequent repayment *is a condition necessary for the initial imposition* of the obligation to make repayment.” 417 US at 53 n12 (emphasis added).

In *People v Dunbar*, the Court stated: “[i]n most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment.” 264 Mich App 240, 256, 690 NW2d 476 (2004). This statement was premised on the holdings from *People v Guajardo*, 213 Mich App 198, 539 NW2d 570 (1995) and *People v LaPine*, 63 Mich App 554, 234 NW2d 700 (1975).

Mr. Guajardo pled guilty to retail fraud for stealing approximately \$28,000.00 worth of jewelry. Mr. Guajardo agreed to pay restitution as part of the plea agreement and indicated on the record that he expected to be employed following his release from prison. The Court specifically found that “he may not be able to pay it” but found a challenge to the amount imposed premature, as did the Court of Appeals because repayment was scheduled to begin only after he was released from prison. At the time, the restitution statute took into consideration a defendant’s ability to pay. *Guajardo*, 213 Mich App at 199-201

Mr. LaPine appealed from his conviction and the trial court ordered him to reimburse the county for the costs of his transcripts at a rate of \$15/month starting one month after he began employment following his release on parole. The *LaPine* Court cited to *Fuller v Oregon* and made it clear that such an order was appropriate “so long as reimbursement fairly reflects the defendant’s ability to pay.” *LaPine*, 63 Mich App at 558.

The key difference in *LaPine* and *Guajardo* from Mr. Jackson’s case, and most felony cases, is that repayment was ordered only after each gentleman was released from prison. The Court ordered Mr. Jackson to begin payment immediately and transmitted such an Order to the Department of Corrections. 12a.

Perhaps more importantly, while the *LaPine* decision cited to *Fuller v Oregon*, it did so in one sentence with no analysis of the issue. The Court in *Fuller* was plain and unambiguous;

no repayment may be ordered unless there is a finding that the defendant will be able to pay without manifest hardship. This requirement of finding an ability to pay without manifest hardship has become a standard that the trial courts routinely ignore.

Dunbar's statement that a challenge to the imposition of attorney fees will be premature until collection efforts begin is a misstatement of United States Supreme Court precedent. The trial court must assess, on the record, the defendant's ability to pay. Before ordering any assessment of attorney fees, the court must find that the defendant has or will have the ability to pay without manifest hardship.

Further, making the financial assessment and determination of whether to order contribution toward the cost of court appointed counsel at the time of sentencing is practical and promotes judicial economy. The trial court at sentencing has at its fingertips all the information necessary to make the determination of the defendant's ability to pay. The trial court has the screening for counsel information, and the presentence report. Oftentimes probation agents make recommendations as to fines, fees and costs presumably based on the financial information the agent gathered in preparing the report.

Any challenge to the imposition of attorney fees is appropriately addressed at the time the court imposes those fees. Further, a challenge to those fees is appropriate any time there is a change in the defendant's financial circumstances such a job loss or other factors that would impact on his ability to pay court ordered attorney fees.

**IV. THE STANDARDS FOR DETERMINING WHEN THE COURT MAY IMPOSE AN ATTORNEY FEE ASSESSMENT ON A CONVICTED DEFENDANT MUST COMPORT WITH DUE PROCESS CONSIDERATIONS AS SET FORTH IN THE *DUNBAR* DECISION.**

**Issue Preservation:** Issue preservation is not applicable to this question.

**Standard of Review:** This case presents a question of law and is therefore reviewed de novo.

See, generally, *People v Hardiman*, 466 Mich 417, 646 NW2d 158 (2002)(discussing the continuing validity of *People v Atley* (citations omitted))

***Legal Discussion***

*The constitutional right to counsel*, US Const Am VI; Const 1963, art 1, § 20, guarantees that no one will be required to appear in a criminal proceeding without counsel due to indigency. *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). An indigent defendant has the right to appointed counsel at public expense. *Jensen v Menominee Circuit Judge*, 382 Mich 535, 170 NW2d 836 (1969); MCR 6.005(B), 6.610(D)(2).

The constitutional nature of the right to counsel is integral to a proper analysis of when a convicted defendant may impose attorney fees. When a defendant requests a lawyer and claims financial inability to retain one, the court must determine whether that person is indigent. Under MCR 6.005(B), the court looks to and is guided by the following factors:

- (1) present employment, earning capacity and living expenses;
- (2) outstanding debts and liabilities, secured and unsecured;
- (3) whether the defendant has qualified for and is receiving any form of public assistance;
- (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal and real property owned; and

(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer.

MCR 6.005(C) addresses partial indigency:

(C) Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.

The constitutional right to counsel also means that an indigent defendant may not be required to contribute as long as he remains indigent. Consequently, a post-trial order by a court that an indigent defendant must contribute to the cost of his court-appointed counsel is unconstitutional unless it complies with due process. *See Fuller v Oregon*, 417 US 40, 51-54; 94 S Ct 2116; 40 L Ed 2d 642 (1974). “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Armstrong v Manzo*, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965)

The Legislature in 2006 enacted a provision allowing the trial courts to impose an assessment on a criminal defendant for “the expenses of providing legal assistance to the defendant.” MCL 769.1k.<sup>6</sup>

Thus, Michigan has statutory authority to impose an attorney fee assessment with no framework for how to constitutionally implement the statute. The logical framework for addressing a post conviction assessment of attorney fees is to look at the factors identified in the eligibility screening process.

To comport with constitutional Due Process requires the following five features of any program of contribution/reimbursement:

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<sup>6</sup> This provision only applies following conviction. MCL 769.1k(1)

(1) First, under all circumstances the state must guarantee the indigent defendant's fundamental right to counsel without procedural obstacles designed to determine whether he is entitled to court-appointed representation.

(2) Second, if a state decides to seek repayment from a defendant it must provide him with adequate notice of the contemplated action and a meaningful opportunity to be heard.

(3) Third, when deciding whether to require repayment the court must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent.

(4) Fourth, the defendant who accepts court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor.

(5) Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his obstinacy. *Alexander v Johnson*, 742 F2d 117, 123-124 (CA 4, 1984); *see also Olson v James*, 603 F2d 150, 153-155 (10th Cir. 1979).

In this case, as happens in many of the circuit courts in Michigan, Mr. Jackson, if he is able to read, arguably received notice that he would have to pay for his attorney fees when he signed the request for counsel form. Such notice, however, does not pass constitutional scrutiny.

In reality, the only real notice comes at the time of sentencing. Current practice is that the Judge imposes sentence and then lists off the fines, costs and fees assessment with no input from the defendant or defense counsel. In this case the Court did ask Mr. Jackson if he agreed with the \$725.00 assessment and he gave no answer. However, simply asking once the fee has been imposed if the defendant agrees with it, is unacceptable.

As seen by the present case, the current practice in Michigan, fails to comply with at least the second and third features required by the United States Supreme Court. It does not provide an indigent defendant with *adequate* notice or opportunity to be heard, nor does it require the trial judge to determine the indigent defendant's ability to pay by taking cognizance of the defendant's resources, and the hardships he or his family will endure if repayment or contribution is required.

The real answer to this issue, however, lies with better screening for eligibility for court appointed counsel. In January 2008, the Supreme Court of Nevada entered an Order adopting Commission findings about Nevada's public defense system. ADKT No. 411. As part of that Order the Court addressed the determination of indigency and set forth the following standard:

“A person will be deemed ‘indigent’ who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own. ‘Substantial hardship’ is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility.

Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.”

Id. at 2-3.

If this Court were to adopt a similar standard, the repayment issue would resolve itself because there would be a much better record of the defendant's financial resources. If defendants requesting court appointed counsel are properly screened in the beginning, then the courts could easily discern those with disposable income that could go toward the cost of

appointed counsel and those, like Mr. Jackson, who have no disposable income and will likely never be able to pay any assessment without substantial hardship.

Michigan courts have lost sight of the Supreme Court's reasoning differentiating constitutional recoupment programs from unconstitutional recoupment programs. The courts have glossed over terms like "substantial hardship" and "foreseeable ability to pay" or have ignored their meaning. Finding someone able bodied, which perhaps the most common finding from trial courts, does not equate with ability to pay. Ability to physically work is not an ability to pay. Often people with mental health issues are physically able to work but no employer will hire them because of their mental health issues. People with drug and alcohol addictions are often physically able to work but cannot hold down a job due to their addictions.

This Court should not only adopt guidelines for determining eligibility for court appointed counsel, this Court should extend those guidelines to post conviction determinations of whether it is appropriate for the trial court to assess attorney fees. The constitutional guidelines are set forth above. At a minimum the assessment of fines, costs and fees should be made part of the sentencing process, not treated as an afterthought. The Court should inform the parties of any assessments it intends to impose and its reasoning prior to the determination of the sentence and give the defendant and his attorney an opportunity to respond.

This Court must give clear direction to the trial courts that "physically able to work" does not equate with "ability to pay". A meaningful decision can only be made after full consideration of a defendant's financial circumstances. There is a significant body of research on this issue and it makes no sense to spend money trying to obtain recoupment from people who will not ever be able to pay. People who have the ability to contribute toward the cost of their

court appointed counsel without substantial hardship should do so and those unable to do so can not be burdened with an assessment they will never be able to pay.

**V. IMPOSING A 20% LATE FEE PURSUANT TO MCL 600.4803(1) CONSTITUTES AN IMPERMISSIBLE MEANS OF ENFORCEMENT THAT EXPOSES CRIMINAL DEFENDANTS WHO HAVE HAD THE ASSISTANCE OF APPOINTED COUNSEL TO MORE SEVERE COLLECTION PRACTICES THAN ORDINARY CIVIL DEBTORS.**

**Issue Preservation:**

Issue preservation is not applicable to this question.

**Standard of Review:**

This case presents a question of law and is therefore reviewed de novo. See, generally, *People v Hardiman*, 466 Mich 417, 646 NW2d 158(2002)

**Legal Discussion:**

In *James v Strange*, the Supreme Court analyzed a Kansas recoupment statute where the state was permitted to use civil proceedings to recover the cost of an appointed attorney from the defendant. The Kansas statute allowed the state to recoup the costs of defense from the defendant under the terms of the Kansas Code of Civil Procedure. *Id.* at 131. A defendant was, however, not “accorded any of the exemptions provided by that code for other judgment debtors except the homestead exemption.” *Id.* Thus, while other debtors under the Kansas code qualified for a variety of exemptions, such as “restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness,” a defendant required to pay back the costs of his or her defense was not permitted any of these exemptions. *Id.* at 135.

*James* ultimately held that the attorney fee recoupment statute violated Equal Protection because it subjected people required to pay back defense costs to “such discriminatory conditions of repayment.” *Id.* at 140. The court explained that “[t]o impose these harsh conditions on a

class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes.” *Id.* at 140-41.

Counsel has not found any statute like MCL 600.4803 that allows for the imposition of a 20% late fee in the civil context. Under MCL 500.3142 and 500.3148 an insurance company that fails to pay a claim within 30 days pays a 12% assessment and attorney fees.

MCL 600.6013 ties the interest rate for civil judgments to the Department of Treasury T-Bill interest rate. In 1989 that would have been 10% and today it is 3.7%, compounded.

While the statute applies to all criminal defendants, it violates the constitution with respect to those qualifying for court appointed counsel. Imposing such a harsh penalty on a class of people who have already been determined by the court to not have the means to retain an attorney is an impermissible means of enforcement because it singles out criminal defendants for unequal treatment.

## **CONCLUSION**

Mr. Jackson asks that this Court find that the constitutional premise of *Dunbar* was correctly decided and that the trial courts must assess a defendant's ability to pay any court appointed attorney fees at the time of sentencing and state its findings on the record at sentencing so that the defendant and have constitutionally adequate notice and an opportunity to be heard prior to the imposition of any attorney fee assessment. Further, that this Court find MCL 600.4803 unconstitutional as a violation of equal protection in that it imparts a more severe collection sanction on indigent defendants than ordinary civil debtors.

Respectfully submitted,

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Date: March 3, 2009