

STATE OF MICHIGAN  
IN THE SUPREME COURT

**THE PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellant.

v

**STEVEN MICHAEL CARTER**

Defendant-Appellee.

Supreme Court

No. 134687

Court of Appeals No. 270195

Third Circuit Court No. 05-011783

134687  
3rd

**SUPPLEMENTAL BRIEF IN SUPPORT OF  
APPLICATION FOR LEAVE TO APPEAL**

**KYM L. WORTHY**

Prosecuting Attorney  
County of Wayne

**TIMOTHY A. BAUGHMAN**

Chief of Research,  
Training, and Appeals

**MARILYN A. EISENBRAUN**

Assistant Prosecuting Attorney  
11<sup>th</sup> Floor, 1441 St. Antoine  
Detroit, Michigan 48226  
Phone: (313) 224-5794

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## JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The People applied for leave to appeal from that part of the July 3, 2007, opinion and order of the Court of Appeals which remands for the trial court to consider Defendant's ability to pay the assessed fees for appointed counsel pursuant to *People v Dunbar*,<sup>1</sup> and for resentence.<sup>2</sup> With regard to the first issue, the People requested that this Court grant leave to appeal and determine that *Dunbar* incorrectly concluded that before ordering reimbursement, a trial court must consider a defendant's ability to pay and the hardships he would endure if repayment is required. This Court has directed the parties to "submit supplemental briefs addressing whether the constitutional underpinnings of *People v Dunbar*, 264 Mich App 240 (2004), are sound."<sup>3</sup>

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<sup>1</sup> *People v Dunbar*, 264 Mich App 240 (2004)

<sup>2</sup> Application filed August 18, 2007

<sup>3</sup> Order of November 21, 2007

**STATEMENT OF QUESTIONS PRESENTED**

- I. **Due process concerns are satisfied by procedural safeguards that permit post-sentence adjustment of costs to avoid hardship and prevent deprivation of liberty when defendants are unable to pay. *Dunbar* holds that due process instead demands a pre-sentence inquiry into ability to pay. Should *Dunbar's* overstatement of due process requirements be overruled?**

The trial court was not presented with this issue.

The Court of Appeals said: No.

Defendant says: No.

The People say: Yes.

**STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

The People rely on the Statement of Facts set forth in the Application for Leave to Appeal

## ARGUMENT

### I

**DUE PROCESS CONCERNS ARE SATISFIED BY PROCEDURAL SAFEGUARDS THAT PERMIT POST-SENTENCE ADJUSTMENT OF COSTS TO AVOID HARDSHIP AND PREVENT DEPRIVATION OF LIBERTY WHEN DEFENDANTS ARE UNABLE TO PAY. *DUNBAR* HOLDS THAT DUE PROCESS INSTEAD DEMANDS A PRE-SENTENCE INQUIRY INTO ABILITY TO PAY. *DUNBAR*'S OVERSTATEMENT OF DUE PROCESS REQUIREMENTS SHOULD BE OVERRULED.**

#### *Standard of Review*

This Court reviews questions of constitutional law de novo.<sup>4</sup> The plain error standard of review applies to Defendant's unpreserved challenge to the order for reimbursement of attorney fees.<sup>5</sup>

#### *Discussion*<sup>6</sup>

The federal and Michigan constitutions guarantee that the state cannot deny individuals life, liberty, or property without due process of law.<sup>7</sup> Procedural due process requires safeguards in proceedings that affect those rights.<sup>8</sup>

Michigan provides these safeguards by publishing statutes that permit assessment of the cost of appointed counsel, providing the opportunity to object at sentencing to the imposition of those

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<sup>4</sup> *People v McCuller*, 479 Mich 672, 681 (2007); *People v Petty*, 469 Mich 108, 113 (2003)

<sup>5</sup> *People v Carines*, 460 Mich 750, 763, 774 (1999)

<sup>6</sup> The People also rely on the argument already presented in their Application for Leave to Appeal.

<sup>7</sup> U.S. Const., Am. V. XIV; Const. 1963, art. 1, § 17

<sup>8</sup> *Williams v Hofley Mfg Co*, 430 Mich 603, 610 (1988)

costs,<sup>9</sup> and protecting from sanctions those unable to pay court-ordered costs. But *People v Dunbar*<sup>10</sup> wrongly concluded that the Constitution instead demands that a trial court not only consider a defendant's ability to pay before ordering him to reimburse the cost of appointed counsel, but to also ensure that the record demonstrates that the court has considered this factor.<sup>11</sup>

Prior consideration of ability to pay was one of five constitutional requirements that a Fourth Circuit opinion concluded had "emerged" from United States Supreme Court decisions. In adopting these requirements from the Fourth Circuit's opinion in *Alexander v Johnson*,<sup>12</sup> the *Dunbar* panel failed to recognize that the cited cases did not prescribe the only constitutionally acceptable mechanisms for the imposition of costs.

The five-part test created by *Alexander v Johnson* relied on the theory that the Supreme Court had "carefully identified" in a series of cases (discussed below) the necessary components of a constitutionally acceptable "program" to recover the costs of appointed counsel: (1) the program must guarantee the right to counsel without cumbersome obstacles and (2) provide notice and an opportunity to be heard before reimbursement is ordered, (3) the entity requiring reimbursement must consider the defendant's financial situation before ordering reimbursement, (4) the collection practices cannot be more severe than those employed for other debts, and (5) a defendant cannot be

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<sup>9</sup> Defendant did not timely object to the imposition of costs at the sentencing hearing, but instead signed the probation order, which set forth the assessments to which he later objected.

<sup>10</sup> *People v Dunbar*, 264 Mich App 240 (2004)

<sup>11</sup> *Id.*, 253-254 (2004)

<sup>12</sup> *Alexander v Johnson*, 742 F2d 117 (CA 4, 1984)

incarcerated for failure to pay when he is unable to pay.<sup>13</sup> But *Alexander v Johnson* mistook procedures that met the constitutional requirements for the constitutional requirements.

In *James v Strange*,<sup>14</sup> the United States Supreme Court considered a Kansas statute providing for civil proceedings to recover the cost of appointed counsel. The Court held that Kansas had denied equal protection<sup>15</sup> to this class of debtors by denying it exemptions and protections available to others.<sup>16</sup> The Court did not reach the issue<sup>17</sup> of whether these post-conviction civil proceedings unconstitutionally burdened an indigent defendant's right to counsel.<sup>18</sup>

Relying in part on the equal protection analysis of *Strange*, the defendant in *Fuller v Oregon*<sup>19</sup> challenged a condition of his probation sentence that required reimbursement of the cost of appointed counsel. The Court rejected the equal protection claim because, unlike the statutes examined in *Strange*, the Oregon statutes did not deny such defendants exemptions or protections afforded to other debtors.<sup>20</sup> And, "[m]ore fundamentally, the imposition of a repayment requirement upon those for whom counsel was appointed but not upon those who hired their own counsel simply

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<sup>13</sup> *Id.*, 124

<sup>14</sup> *James v Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972)

<sup>15</sup> No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. XIV.

<sup>16</sup> *Strange*, *supra*, 407 US 128, 138-140

<sup>17</sup> *Strange*, *supra*, 407 US 128, 134

<sup>18</sup> *Sec. Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963)

<sup>19</sup> *Fuller v Oregon*, 417 US 40, 94 S Ct 2116, 40 L Ed 2d 642 (1974)

<sup>20</sup> *Id.*, 417 US 40, 47

does not constitute invidious discrimination against the poor.<sup>21</sup> Further, a defendant's after-the-fact contribution to the cost of appointed counsel did not overly burden the right to counsel.<sup>22</sup>

Critically, revocation of probation for failure to pay was not a debt-collection device, but a sanction imposed only upon those who intentionally refused to obey an order of the court — those who had the ability to pay but did not pay. The Oregon *statutes* required that the court consider and determine a defendant's ability to pay at several points, not only at the point of sanctions for failure to pay, but before imposing the condition of probation. But, although *Fuller* noted favorably the number and breadth of these provisions, it did not conclude that the *Constitution* requires multiple inquiries or that the inquiry must be made before the order to reimburse, rather than upon objection when the order is imposed, or before the court may impose sanctions for failure to pay.

The sanction of incarceration may deny due process, if applied in a discriminatory fashion or without adequate procedural safeguards. Thus, as is true with an order of restitution, or for the imposition of other costs or fines, a defendant may object or inform the trial court at sentencing if the terms create undue hardship,<sup>23</sup> and may not be incarcerated for failing to reimburse the costs of appointed counsel where he is unable to pay.<sup>24</sup>

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<sup>21</sup> *Id.*, 417 US 40, 48

<sup>22</sup> *Id.*, 417 US 40, 51-53; See, *Alaska v Albert*, 899 P 2d 103, 112-113 (1995)

<sup>23</sup> See, *People v Music*, 428 Mich 356 (1987); *People v Hill*, 430 Mich 898 (1988); *People v Grant*, 455 Mich 221, 224, n 4 (1997)

<sup>24</sup> *Bearden v Georgia*, 461 US 660, 103 S Ct 2064, 76 L Ed 2d 221 (1983)

Yet, *Dunbar* incorrectly concluded that Michigan's statutory procedures were inadequate to safeguard due process rights where the reimbursement order involves the cost of appointed counsel. Having approved the overly-broad *Alexander* "test," *Dunbar* not only concluded that the Constitution required inquiry before costs for appointed counsel were ordered, but then extended *Alexander* by requiring that the record affirmatively reflect the trial court's consideration of a defendant's ability to pay.<sup>25</sup>

To rectify the supposed constitutional defect in Michigan procedure for requiring contribution for the cost of assigned counsel, *Dunbar* recommended that the legislature consider the restitution statutes, for which the "due process concerns are nearly identical."<sup>26</sup> But, at the time of the *Dunbar* decision, the restitution statutes did not require the trial court to consider a defendant's ability to pay when imposing an order of restitution.<sup>27</sup> Earlier versions of the statutes included this provision, but even then, this Court concluded that explicit findings or references on the record were not required.<sup>28</sup>

Rather, this Court has held, in the context of restitution orders, that procedural safeguards which permit adjustment of the order to avoid undue hardship,<sup>29</sup> and which prevent "deprivation of liberty when criminal defendants are actually unable to pay . . ."<sup>30</sup> provide effective due process under the Constitution.<sup>31</sup>

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<sup>25</sup> *Dunbar*, supra, 254

<sup>26</sup> *Dunbar*, supra. 254 n12

<sup>27</sup> MCL 780.767(1)(4)

<sup>28</sup> See, *Grant*, supra, 223

<sup>29</sup> See, MCL 780.766(12)

<sup>30</sup> See, MCL 780.766(14)

<sup>31</sup> *People v Gahan*, 456 Mich 264, 276-277 (1997)





The probation statutes, like the restitution statutes, contain specific procedural safeguards to permit remission of assessed costs to avoid undue hardship and prevent deprivation of liberty when defendants are unable to pay. Even if the trial court had determined that he will likely be able to pay in the future, Defendant retains his right to assert an inability to pay, should that be the case, if sanctions are sought for his failure to submit payment.

MCL 771.3 provides in pertinent part:

(6)(a) The court shall not require a probationer to pay costs under subsection (2) unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs under subsection (2), the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.

(b) A probationer who is required to pay costs under subsection (1)(g) or (2)(c) and who is not in willful default of the payment of the costs may petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

\* \* \*

(8) If a probationer is ordered to pay costs as part of a sentence of probation, compliance with that order shall be a condition of probation. The court may revoke probation if the probationer fails to comply with the order and if the probationer has not made a good faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. The proceedings provided for in this subsection are in addition to those provided in section 4 of this chapter.

Although a trial court may appoint counsel after considering a defendant's financial situation,<sup>32</sup> it may also require contribution if the defendant, although indigent, is able to pay part of the cost of a lawyer.<sup>33</sup> As this Court agreed in *Music*, the probation statute distinguishes between *imposition* and *payment* of costs. A probationer may not be punished for failing to pay what he cannot afford, but sufficient protection is afforded by allowing a defendant who feels unable to pay, when required to do so, to come before the trial court to seek relief just as the probation department may do if the defendant does not pay when required to do so,<sup>34</sup> and the probation statute itself provides this procedural protection.<sup>35</sup> There is no reason to require that reimbursement of attorney fees be treated any differently than payment of restitution and costs.

In adopting *Alexander, Dunbar* imposed additional and unwarranted procedures on the trial courts in the apparent belief that although the Constitution did not require prior inquiry for the imposition of other fines and costs, the Constitution required another layer of inquiry, and one demonstrated by the record, when the costs assessed were to recover the costs of appointed counsel.<sup>36</sup> Michigan statutes provide process by which a defendant may seek remission of the order if he faces undue hardship and which prevent incarceration for the inability to pay a court-ordered cost. The additional requirements set forth in *Dunbar* are not mandated by the Constitution or by United States Supreme Court precedent, and should be rejected by this Court.

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<sup>32</sup> MCR 6.005(B)

<sup>33</sup> MCR 6.005(C)

<sup>34</sup> *Music*, supra, 360-361

<sup>35</sup> MCL 771.3(6)(b) and (8)

<sup>36</sup> *Dunbar*, supra, 255

**RELIEF**

WHEREFORE, the People request that this Court grant the People's application for leave to appeal, reject the *Dunbar* rule, reverse the Court of Appeals order, and affirm Defendant's sentences.

Respectfully submitted,

**KYM L. WORTHY**  
Wayne County Prosecuting Attorney

Timothy A. Baughman  
Chief of Research, Training, & Appeals

*Marilyn A Eisenbraun*

**MARILYN A. EISENBRAUN (P35968)**  
Assistant Prosecuting Attorney  
11<sup>th</sup> Floor, 1441 St. Antoine  
Detroit, MI 48226  
Phone: (313) 224- 5794

Date: December 17, 2007

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No. 134687

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STATE OF MICHIGAN)  
COUNTY OF WAYNE )ss

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of:  
**SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL.**

Upon: Valerie R. Newman

the above named defendant, by DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF  
DETROIT, enclosed in an envelope on December 17, 2007, plainly addressed as follows:

Valerie R. Newman - P47291  
State Appellate Defender Office  
645 Griswold St Ste 3300  
Detroit, MI 48226

*Patricia Williams*  
PATRICIA WILLIAMS

and said pleading was filed in SUPREME COURT, by U.S. Mail at the following address:

CORBIN R. DAVIS, Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 49079

Subscribed and sworn to before me  
this 17<sup>th</sup> day of December 2007.

*Cheritha P. Edwards*  
Notary Public, Wayne County, Michigan  
My commission expires: 01-23-09



KYM L. WORTHY  
PROSECUTING ATTORNEY

Richard Hathaway  
Chief Assistant Prosecutor

COUNTY OF WAYNE  
OFFICE OF THE PROSECUTING  
ATTORNEY  
DETROIT, MICHIGAN

1200 FRANK MURPHY HALL OF JUSTICE  
1441 ST. ANTOINE STREET  
DETROIT, MICHIGAN 48226-2301  
TEL: (313) 224-5777  
FAX: (313) 224-0974

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