

UNITED STATES
IN THE SUPREME COURT

MICHIGAN STATE TREASURER,

Respondent,

USSC No. *NEW FILING*

Michigan Supreme Court No. 157122

-v-

Michigan Court of Appeals No. 336202

MICHAEL A. KENNEDY,

Petitioner.

Trial Court No. 16-105227-CZ

/

PETITION FOR WRIT OF CERTIORARI

NOW COMES Petitioner, in Pro Personam, and submits this Petition for consideration by the United States Supreme Court to grant a Writ of Certiorari.

Submitted by:

Michael A. Kennedy (No. 972647)
Central Michigan Correctional Facility
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Saint Louis, MI 48880

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QUESTION PRESENTED

I: DID MICHIGAN'S EMMET COUNTY CIRCUIT COURT ("TRIAL COURT") VIOLATE ARTICLE VI CLAUSE 2 OF THE UNITED STATES CONSTITUTION BY FAILING TO RULE THAT THE UNITED STATES' CRIMINAL RESTITUTION LIEN ON PETITIONER'S PENSION WAS SUPERIOR TO MICHIGAN'S STATE CORRECTION FACILITY REIMBURSEMENT ACT'S LIEN ON THE SAME PENSION?

Petitioner says "Yes".

The Michigan Trial Court says "No" but "Maybe".

The Michigan Court of Appeals says "No".

The Michigan Supreme Court says "No".

LIST OF PARTIES

This action involves the following two parties:

Petitioner: Michael A. Kennedy

Respondent: The State of Michigan

(JP Morgan Chase Bank and the Michigan Office of Retirement Services are no longer parties. They were only named, initially, as receiverships of Petitioner's pension by the Trial Court and have since been dismissed because their receiverships have ended.)

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4. State Judgment of Sentence, February 22, 2016
5. U.S. Writ of Continuing Garnishment, June 6, 2016
6. State Final SCFRA Order, November 18, 2016
7. U.S. District Judge Neff's Order (Re: Lien Priority), August 10, 2016
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OPINIONS BELOW

A. State Trial Court Opinion: November 18, 2016: The Emmet County Circuit Court held that the State's SCFRA lien was superior to the earlier Federal restitution lien of April 11, 2016. (Appendix 6).

B. Michigan Court of Appeals in Docket No. 336202: January 9, 2018: The Michigan Court of Appeals in an unpublished opinion upheld the decision of the Emmet County Circuit Court. (Appendix 1).

C. Michigan Supreme Court Decision in Docket No. 157122: July 3, 2018: The Michigan Supreme Court denied the appeal and upheld the decision of the lower courts. (Appendix 2).

STATEMENT OF JURISDICTION

The Petitioner was denied leave to appeal by the Michigan Supreme Court on July 3, 2018. The Petitioner makes this Petition within 90 days of the entry of said Order from the Michigan Supreme Court.

The Petitioner asserts that jurisdiction is proper in the United States Supreme Court as his Petition is timely and raises a significant issue relating to Article VI, Cl. 2, of the United States Constitution.

This case affects all State (Michigan) – Federal prisoners.

CONSTITUTIONAL ISSUE PRESENTED

The Petitioner's petition involves the proper interplay between Federal and State liens. Specifically, this petition involves the Supremacy Clause of Article VI, Cl. 2, of the United States' Constitution because the State of Michigan has failed to recognize that a valid United States restitution lien takes priority over Michigan's State Correctional Facility Reimbursement Act (SCFRA) lien. Petitioner believes that state courts, including the Michigan Court of Appeals and the Michigan Supreme Court, will continue to violate the tents of Article VI, Cl. 2, unless this Court grants Petitioner a Writ of Certiorari.

STATEMENT OF THE CASE

Background: Petitioner has been prosecuted for the same event by both the United States (Appendix 3) and the State of Michigan (Appendix 4). Subsequently, the two sovereigns seek to control Petitioner's pension to either (1) collect restitution for Petitioner's victims by liening and garnishing Petitioner's pension (U.S.) or collect reimbursement for Michigan's costs of incarcerating Petitioner by seizing 90% of Petitioner's pension by a SCFRA civil suit (Michigan).

Courts have long recognized that problems may arise in executing state and federal sentences on a single defendant. *United States v. Mason*, 2012 U.S. Dist. LEXIS 70980 (D VT 2012); *Ponzi v. Freesenden*, 258 U.S. 254, 255; 42 S.Ct. 309; 66 L.Ed 607 (1922). In this case, the problem is over competing state and federal liens' priorities to a pension.

Timeline: On February 22, 2016, Michigan issued its Judgment of Sentence upon Petitioner. (Appendix 4). The Michigan Judgment did not automatically create a SCFRA lien on Petitioner's pension. Michigan had to still file in the future a SCFRA civil suit in Emmet County Circuit Court and obtain a final judgment before it had a SCFRA lien on Petitioner's pension. MCL 800.401 et. seq.

On April 11, 2016, the United States District Court for the Western District of Michigan issued its own sentence on Petitioner which included a restitution order for \$1,388,467.20. (Appendix 3). The District Court's Order automatically created a restitution lien on all of Petitioner's property, including his pension. 18 USC § 3613(c). The restitution lien is automatically treated as a tax liability under the Internal Revenue

Code of 1986. 18 USC § 3613(c).

On June 6, 2016, the United States also garnished Petitioner's pension under a Writ of Continuing Garnishment. (Appendix 5). Consequently, by the time that the United States had acquired its statutory restitution lien on Petitioner's pension and garnished Petitioner's pension, Michigan had only filed its SCFRA complaint to seize 90% of the same pension but without yet obtaining a final Trial Court order awarding Michigan 90% of the pension. (Appendix 6). It was not until November 18, 2016, that Michigan concluded its SCFRA civil suit, *in rem*, against Petitioner's pension when the Trial Court issued its Final Order awarding Michigan 90% of Petitioner's pension. But, Michigan's November 2016, SCFRA Final Order was issued seven months after the United States' restitution lien had already attached to the same pension (April 11, 2016) and three months after the United States had garnished the pension (June 6, 2016).

In response to the Trial Court's SCFRA Order in favor of Michigan, Petitioner filed with the Trial Court a Motion for it to reconsider its November 18, 2016, SCFRA Order citing the Honorable United States District Judge Neff's August 10, 2016, Order that granted a permanent garnishment of Petitioner's pension pursuant to enforcing the United States' restitution lien. Judge Janet Neff expressly stated in her August 10, 2016, Order that the United States' "*government's restitution lien has priority over the State's civil suit*" (sic SCFRA suit). See Appendix 7.

The Trial Court denied Petitioner's Motion for Reconsideration and let stand its SCFRA Order that has, in fact, been used to seize 90% of Petitioner's pension to reimburse Michigan for the costs of incarcerating Petitioner but which ignores the priority of the United States' restitution lien designed to reimburse Petitioner's victims.

(Petitioner has raised as an affirmative defense to Michigan's SCFRA suit the priority of the United States' restitution lien on the pension.)

Noteworthy, in the Trial Court order denying Petitioner's Motion for Reconsideration is the Trial Court's admission that "If such an order were issued (sic by U.S. Judge Neff on April 10), this Court would be obligated to follow it." See Appendix 8.

Thus, by December 8, 2016, when the Trial Court denied Petitioner's Motion for Reconsideration, the United States had already obtained a statutory restitution lien on Petitioner's pension, garnished it, and obtained United States District Court Judge Neff's order stating that the United States' restitution lien had priority over Michigan's SCFRA lien on the same pension. And, the Trial Court itself had admitted that it would have to follow Judge Neff's Order that stated that the United States' restitution lien has priority over Michigan's SCFRA civil suit!

After denial of his Motion for Reconsideration, Petitioner appealed the SCFRA judgment to the Michigan Court of Appeals and to the Michigan Supreme Court. Both appeal courts denied Petitioner's appeals without providing any legal analysis. See Appendixes 1 and 2. The Michigan Supreme Court simply stated "...we are not persuaded that the issues presented should be reviewed by this Court." See Appendix 2. Thus, this Petitioner appeals to the United States Supreme Court so that the issue of federal restitution lien priority over Michigan's SCFRA lien may be adjudicated. (Note: There are no reported cases involving United States restitution liens versus Michigan SCFRA liens.)

Lien Priority Discussion and Argument

Preamble: Petitioner focuses his appeal upon the priority of the United States' restitution lien (18 USCS § 3613(c)) over Michigan's SCFRA lien issued by the Trial Court. This focus does not require any interpretation of the SCFRA statute, MCL 800.401 et. seq. Instead, it requires only knowledge of the interplay of federal and state law between state and federal sovereigns when their competing liens arise. If the Supreme Court finds that the United States' restitution lien is superior to Michigan's SCFRA lien on Petitioner's pension, then the Court must vacate the Trial Court's SCFRA order that seizes 90% of Petitioner's pension and order a refund of the monies already seized by Michigan to be returned to the Michigan Office of Retirement Services to be disbursed by law.

Analysis: When a federal lien competes with a Michigan lien, state law is only applied to determine if the Petitioner owns any property (e.g. owns a pension). Once state law determines that Petitioner owns property, then federal law determines the priority of the competing state and federal liens that attach to that property. *United States v. Ford*, 857 F.Supp.2d 660, 663-4 (ED Mich 2012). (All parties agree that Petitioner owns a pension).

It is undisputed that when a federal lien is involved, the relative priority between competing claims to property is determined by the federal principle that "the first in time is first in right." *United States v. City of New Britain*, 347 U.S. 81, 87; 74 S.Ct. 367 (1954). A prior lien gives to that prior claim priority satisfaction out of the subject it binds. *Id.* at 87.¹

¹ Michigan has argued that a lienor must undertake collection efforts to perfect its lien and cites *State Treasurer v. Bences*, 318 Mich. App. 136, 152, for authority. *Bences*, however, does not involve a competing federal lien.

The Petitioner properly raised, in the first instance, the defense of the federal restitution lien as a bar to Michigan collecting pension monies under a SCFRA lien in the Trial Court. The Trial Court is given exclusive jurisdiction over all SCFRA actions. MCL 800.404(1). When a state court has exclusive jurisdiction, a party's recourse is to raise a federal defense in state proceedings "even if both parties concede that the federal defense is the only question truly at issue, even if a federal defense is anticipated." *Quwi-El Bey v. Probate Court*, 2012 U.S. Dist LEXIS 111193 (E.D. Mich. August 8, 2012); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393; 107 S.Ct. 2425; 96 L.Ed2d 318 (1987). Thus, Petitioner is required to raise the federal defense of a prior federal restitution lien in the State's Trial Court. In turn, the Trial Court, having exclusive jurisdiction over SCFRA actions must hear federal defenses in that state court action.

Furthermore, Petitioner cannot remove the state-court action to a U.S. District Court. Removal is possible only if the state court action could have been *originally* filed in a federal court. *Caterpillar* at 392; *State Treasurer v. Lacrosse*, 203 U.S. Dist. LEXIS 104667 (E.D. Mich. July 26, 2013); 28 USCS 1441(a). Then, removal to a federal court can only be by a defendant who is:

The United States or any agency thereof or any officer (or person acting under that officer) of the United States or any agency thereof, in an official or individual capacity, for or relating to any act under color of any right, title, or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. 28 USCS 1441(a), 28 USCS 1442(a)(1); *Richmond v. Daimler Chrysler*, 2000 U.S. Dist. LEXIS 583 (E.D. Mich. January 13, 2000).

Bences is a ruling about the States' rights relative to its citizens' rights to money. Indeed, collection efforts are never a requirement for perfecting a lien. Choate liens can have years to be collected upon: Mechanics liens can be collected upon within one year of becoming choate (MCL 570.1117(1)); mortgage liens can be collected upon 15 years after a default (MCL 600.5803)); and federal restitution liens have 20 years to be collected upon (18 USC § 3613(c)).

Petitioner, however, is obviously not the “United States or any agency or officer...thereof”. Therefore, Petitioner has no right to seek removal of his federal defense to a federal court for argument. Indeed, since the Trial Court has exclusive jurisdiction over SCFRA actions, the SCFRA claim itself could never have been originally filed in the federal court, which is one prerequisite to removal.

Thus, the Petitioner must remain in the state’s Trial Court. Therein, he must raise his federal defense that the United States’ restitution lien is a bar to the Trial Court seizing Appellant’s pension because the United States restitution lien has priority over all the State’s SCFRA lien to the same pension.² Unfortunately, the Trial Court concluded that Petitioner’s priority arguments between federal and state liens “are not his to make in opposition to Plaintiff’s SCFRA action.” (Appendix 8, p. 1).

The U.S. Court’s August 10, 2016, Order by Judge Neff was presented to the Trial Court in Petitioner’s Motion for Reconsideration on November 28, 2016. (Appendix 9). The Trial Court, further dismissed Judge Neff’s Order by ruling that Judge Neff’s reference to the “State’s civil suit”, (over which Judge Neff rules the U.S. restitution lien has priority over the State’s civil suit), did not specifically refer to Michigan’s SCFRA suit; and that the Neff Order, in any event, did not adjudicate the U.S. restitution lien priority to Michigan’s SCFRA judgment lien over Petitioner’s pension. (Appendix 8).

² The Trial Court misunderstands the Petitioner’s motive for raising the federal defense. The Trial Court believes that Petitioner is ‘championing’ a ‘claim’ for the benefit of the U.S. Court. (TCO, p. 2, ¶ 4; Appendix 8). But, Petitioner raises the U.S. restitution lien priority only as a defense to the State’s SCFRA civil suit. It is brought into the State’s Trial Court as a defense against the State’s SCFRA civil suit, creating the expected U.S. versus State “problems” between two sovereigns executing their respective sentences against this single Defendant—a problem that Respondent cannot resolve in its favor being *last in time, therefore last in right*.

A reading of Judge Neff's August Order, however, shows that the U.S. Court was writing in the context of Michigan suing to freeze and seize Petitioner's pension (sic "State's civil suit"). (Appendix 7, p. 2). Judge Neff states that "On June 6, 2016, a (sic Federal) writ of continuing garnishment was issued against Petitioner's portion of his ex-wife's 'pension' account at the Michigan Public School Employees Retirement System". *Id.* That is the same pension that Michigan attempts to seize by its SCFRA "civil suit".

Also, the United States District Court clearly ruled that the U.S. restitution lien has "priority over the State's civil suit". (Appendix 7, p. 2). The Federal Court actually uses the word "priority" in its prioritization of the U.S. restitution lien.

Statutory Federal Lien Priority Explained (beyond Judge Neff). The United States restitution lien arose when the United States District Court's "Judgment in a Criminal Case" was issued on April 11, 2016. That Judgment ordered restitution. (Appendix 3). A restitution lien automatically arose upon the issuance of the United States' judgment. 18 USCS 3613(c). The lien covers 100% of Petitioner's property. *Id.* Consequently, the U.S. restitution lien covers 100% of the Petitioner's pension.³

Michigan, however, did not obtain a SCFRA lien on the pension until seven months later on November 18, 2016, when the Trial Court issued its Final Order awarding Michigan a SCFRA lien on the same pension. (Appendix 6). Until Michigan

³ Michigan argues that if the United States had garnished 25% of Petitioner's pension, then the remaining 75% of the pension is available for seizure by Michigan under SCFRA. But, if Michigan is to seize 75% of Petitioner's pension, Michigan must show that the United States Restitution Lien that covers all the pension has shrunk by 75%, leaving 75% of the pension available to Michigan. *No* federal law, however, exists that says a lienor's lien shrinks to match the scope of the lien enforcement from time to time. Furthermore, the United States can garnish 25% or 100% of Petitioner's pension at various times. Since a delinquent federal restitution lien is treated as a delinquent federal tax owing to the United States, the Federal Consumer Credit Protection Act's limitation upon the United States garnishing only 25% of Petitioner's pension does not apply. 15 USC § 1673(b)(1)(C). The United States can vary its garnishment of Petitioner's pension to the extent the Petitioner can afford to pay a greater garnishment. 18 USC § 3664(f)(2)(A)-(C).

obtained the Final Order, Michigan only had an inchoate lien on the pension. The United States, however, held a choate lien already on the pension since its April 11, 2016, sentencing of the Petitioner. The United States' restitution lien became choate when assessed by the U.S. Judgment. 18 USCS 3613(c); *United States v. First Nat'l Bank and Trust Co.*, 386 F.2d 646, 647 (1967).

The State SCFRA lien become choate only later when: 1) The identity of the lienor is known; 2) The identity of the property is known; and 3) The amount of the lien is known...that is when there is nothing more to be done. *First National Bank* at 647. (The standard for choateness of a state lien and a federal lien is the same. *First National Bank* at 647).

Although the identity of the lienor (Michigan) and property (pension) was known before November 18, 2016, Michigan's SCFRA lien became choate only when the amount of its SCFRA lien was finally determined by the Trial Court on November 18, 2016, by its Final Order that ruled that Michigan could seize 90% of Petitioner's pension. The United States' restitution lien, however, was choate earlier on April 11, 2016, because: the United States' lienor was known (United States), the property was identified by statute (18 USCS 3613(c) as being all Petitioner's property), and the amount of the restitution lien was then known: (\$1,388,467.02 as determined by the United States' April 11, 2016, Judgment of Sentence.)

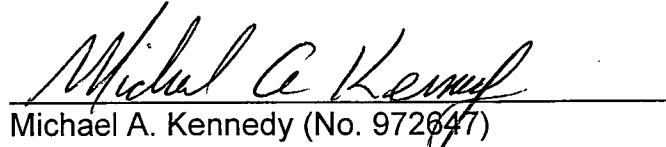
The relative priority of a state lien to a federal lien depends on the relative time each lien becomes choate. *United States v. Vermont*, 377 U.S. 351, 354; 84 S.Ct. 1267; 12 L.Ed2d 370 (1964). For liens *first in time is first in right*. *United States v. McDermitt*, 507 U.S. 447, 449; 123 S.Ct. 1526; 123 L.Ed2d 128 (1993). A prior lien is

entitled to prior satisfaction out of the thing it binds. *United States v. New Britain*, 347 U.S. 81, 85; 74 S.Ct. 367; 98 L.Ed 520 (1954). Therefore, the United States' restitution lien became choate before the State's SCFRA lien and is *first in right* to Petitioner's entire pension. The United States' restitution lien of \$1,388,467.20 is entitled to "satisfaction" out of the entire pension by its various U.S. Courts, agencies, and departments over twenty years. 18 USC § 3613(c). Since there is no unencumbered pension (it being previously 100% liened by the United States), the Trial Court erred attempting to seize it for Michigan by failing to recognize the supremacy of federal law that grants priority to the United States' restitution lien over Michigan's SCFRA lien as required by Article VI, Clause 2 of the United States Constitution. Yet, it is mandated by Article VI, Cl. 2, of the Constitution that state courts cannot refuse to apply federal law. *Printz v. United States*, 521 U.S. 898; 1175 S.Ct. 2365; 138 L.Ed2d 914 (1997). The judges in every state shall be bound by federal law. *Id.* at 928-9.

Relief Requested: Petitioner requests the United States Supreme Court to grant his Petition for a WRIT OF CERTOARI to consider the issue presented herein.

Respectfully Submitted;

July 26, 2018



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