18-6756
NO.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN J. KORESKO, V,

Petitioner

v.

A. ALEXANDER ACOSTA,
SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
CASE NO. 17-1140

PETITION FOR A WRIT OF CERTIORARI

John J. Koresko, V
1159 Seaton Ross Rd.
Radnor, PA 19087
Tel: (610) 202-0076
Email: jjkoresko@gmail.com
Pro Se

QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals incorrectly decided that parts of a $38 million judgment for "disgorgement" entered in 2015 against the Petitioner, could be enforced by the Secretary of Labor in an ERISA case – as "appropriate relief" under 29 U.S.C. § 1132(a)(2) or (a)(5) --

   A. by imprisonment of the Petitioner in 2016 for disobedience of preliminary injunctive orders that were not restated in the Final Judgment; and

   B. by post-incarceration garnishment on behalf of nonparties, of amounts not traced to any ERISA plan assets;

   in the absence of any award to the United States?

2. Was Petitioner illegally imprisoned for debt – in violation of 28 U.S.C. § 2007 – when the Secretary employed incarceration for over two years to assist collection of a money judgment debt?

PARTIES TO THE PROCEEDING BELOW

Petitioner is John J. Koresko, V, one of the defendants and Petitioner below, and the principal, director, officer or controlling shareholder of the other corporate party defendants listed below (which are not public companies):

- **PennMont Benefit Services, Inc.**, a Pennsylvania corporation;
- **Koresko & Associates, P.C.** , a Pennsylvania corporation;
- **Koresko Law Firm, P.C.,** is a Pennsylvania corporation;
- **Penn Public Trust,** a Pennsylvania non-profit corporation.

- Co-defendants **Regional Employers Assurance Leagues Voluntary Employees Beneficiary Association Trust** and **Single Employer Welfare Benefit Plan Trust** were Pennsylvania trusts named as defendant parties by the Secretary. Petitioner was the controlling fiduciary of each before their property was seized and Petitioner was removed by order of the district court. They did not participate in the trial of this case or the appeal.
- **Co-defendant Jeanne Bonney is a party but did not appeal.**

Respondent, A. Alexander Acosta, is the Secretary, United States Department of Labor, the plaintiff-appellee below.

TABLE OF CONTENTS

TABLE OF CONTENTS OF PETITIONER'S APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

State Constitutions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

John J. Koresko, V respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order denying panel rehearing and rehearing *en banc* (App., *infra,* 1a)* is unreported. The opinion of the court of appeals dated March 23, 2018 (3a) is unreported but available at *Sec'y U.S. Dept. of Labor v. Koresko,* 726 Fed. Appx. 127 (3d Cir. 2018). The opinion of the court of appeals dated April 2016 (36a) is unreported, but available at *Sec'y U.S. Dept. of Labor v. Koresko,* 646 F. Appx. 230 (3d Cir. 2016).

The district court's order of August 31, 2016 (20a) is unreported but available at 2016 U.S. Dist. LEXIS 117384. The prior orders of the district court are reported at *Perez v. Koresko,* 86 F.Supp.3d 293 (E.D. Pa. 2015) (*"Perez")* and *Solis v. Koresko,* 884 F.Supp.2d 261 (E.D. Pa. 2012) (*"Solis"*).

* - "(__a)" refers to a page in Petitioner's Appendix.

****

JURISDICTION

The judgment of the court of appeals was entered March 26, 2018. The court of appeals denied a petition for panel rehearing and rehearing *en banc* on June 12, 2018. (1a.) On August 30, 2018, Justice Alito extended the time to file a petition for certiorari to and including November 9, 2018. No. 18A226. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), **29 U.S.C. § 1001** et seq., and the United States Constitution are reproduced in the Appendix to this petition (80a). **28 U.S.C. § 2007** reads:

Imprisonment for debt

> (a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State.
>
> (b) Any person arrested or imprisoned in any State on a writ of execution or other process issued from any court of the United States in a civil action shall have the same jail privileges and be governed by the same regulations as persons confined in like cases on process issued from the courts of such State. The same requirements governing discharge as are applicable in such State shall apply. Any proceedings for discharge shall be conducted before a United States magistrate judge for the judicial district wherein the defendant is held.

****

INTRODUCTION

Petitioner was imprisoned for alleged civil contempt from May 6, 2016 until June 22, 2018. He was punished in a federal prison, placed in known danger, and abused for eight months in solitary confinement.

No court has ever recognized the remedies of civil contempt and imprisonment as "appropriate relief" permitted by §502(a) of the Employee Retirement Security Act of 1974, as amended ["ERISA"], 29 U.S.C.§ 1132(a)(2) and (a)(5). And no court has allowed incarceration as an ERISA equitable remedy in the presence of a complete and adequate remedy at law – until now.

Petitioner was jailed for disobedience of a preliminary injunction and other interlocutory orders, issued in 2013 and 2014 by a retired district court judge, Hon. Mary McLaughlin. Those orders were superseded by Judge McLaughlin's final money judgment for restitution and disgorgement issued on March 13, 2015. The terms of the final order are plain. [Dkt. 1149]. It says nothing about any duty to turn over any land or condominiums, and Judge McLaughlin did not demand any such thing in the published opinion she wrote a month before the order. The Judge had already included all expenditures for real estate in the final money judgment, meticulously detailed in a spreadsheet Appendix [Dkt. 1134-1].

Judge McLaughlin's opinion and order of judgment admit that Petitioner had already given a power of attorney over a certain foreign bank account, and each of the transfers to that account were also specifically included in the total and unpaid money judgment.

****

The final judgment order does not incorporate any other previous equitable order. It tells Petitioner he must pay an additional $19 million, in addition to amounts already seized. [Dkt. 1149] (56a). That is as plain a money judgment as ever issued by a court. It was a complete and adequate remedy at law.

The words of another paragraph in the Judgment order did not declare that Petitioner possessed any assets described in any turnover order. The words basically say, *"turn over trust assets if you have any."* Those words matter now because the courts below implied the terms of old and vague preliminary injunctions into the final judgment -- contrary to this Court's jurisprudence that requires specificity of equitable orders, particularly in the context of contempt. The issue of specificity (required by Rule 65(d), F.R.Civ.P.) only lurks because of a more fundamental issue.

The most elemental and dispositive question of this case is whether a preliminary order from 2013, and pre-judgment "confirming orders," were legally superseded by the final money judgment in 2015. If the preliminary orders expired and did not survive, no basis existed for the district court to imprison Petitioner for contempt. In every other Circuit, preliminary orders expire, and they have no further legal effect, *ipso facto,* upon entry of a final judgment. *U.S. Phillips Corp. v. KBC Bank, N. V.,* 590 F .3d 1091, 1093-94 (9th Cir. 2009) (collecting cases). They are moot and bind nobody after a judgment. That rule is well-percolated, and undisputed, except in this case.

This case has another serious aspect that has never been addressed directly

****

by this Court. Once the final money judgment issued, none of the orders could be enforced by contempt because federal and state laws prohibit imprisonment to enforce monetary obligations. 28 U.S.C. § 2007. The statutory prohibition has existed since the 1800s.[1] This Court has assailed the practice of imprisonment for debt as illegal since at least the 1920s without ever mentioning the statute. *See Maggio v. Zeitz*, 333 US 56 (1948); *Oriel v. Russell,* 338 U.S. 358 (1929). It appears illegal as a matter of procedural due process. See *Turner v. Rogers*, 546 U.S. 821, 131 S. Ct. 2507 (2011); *Hicks v. Feiock,* 485 U.S. 625, 638 (1988). Nevertheless, some courts like the Third Circuit hold (as here) that a person can be imprisoned if the court tells a person to "transfer" money in a fund, rather than to "pay" it. The Third Circuit Court of Appeals said Petitioner was not imprisoned for debt, because the new judge said the imprisonment was for failure to obey an order to pay $1.68 million. Somehow, an order to pay a sum certain in money can now be enforced by imprisonment via the convenience of semantics.

Regardless of what "debt" historically was, modern statutes like Pennsylvania's treat legal judgments and equitable decrees the same. An order to transfer money is not enforceable like an equitable order to transfer unique property. In this case, Petitioner was imprisoned for not surrendering "$1.6 million," yet nobody testified that he had any part of that money at the time of judgment or in 2016, long after Judge McLaughlin wrote in the judgment that the amounts might not be collected and remain part of the unpaid judgment. Dkt.

[1] Based on Revised Statutes §§. 990, 991, and 992, originally adopted in the act of Feb. 28, 1839, c. 35, 5 Stat. 321.

****

1149, f.n. 2 (55a). *Perez v. Koresko*, 86 F.Supp.3d 293,394, fn. 68 (E.D. Pa. 2015) (151a) (*"Perez"*)

The case has immediate importance in the state and federal courts of all fifty States, and the territories and possessions of the United States that have, by constitution, statute, or both, abolished imprisonment for debt. The federal courts have had since 1839 to decide what imprisonment for debt is. It appears that the lower courts are in no hurry to enunciate a common sense meaning of the words "for debt," or to concede that a judgment debt for disgorgement is a monetary remedy that eliminates any basis for a simultaneous equitable order to turn over money or value. There is plain and continued resistance to this Court's instructions over the last three decades, particularly in ERISA cases, that an order to transfer money is not equitable relief, regardless of whether courts call it restitution or disgorgement.

Judge McLaughlin never ordered Petitioner to pay anything to the Secretary or the United States in the final judgment. [Dkt. 1149] (56a – 60a). The Court of Appeals accepted the Secretary's argument that the government has the power to obtain writs of garnishment under 28 U.S.C. § 3205. (16a). Nevertheless, it cannot be explained why that court would not credit the Secretary's admission that there had to be a debt to the United States (and a judgment debtor) in order for the government to use that collection statute.[2] The Secretary had no power,

[2] "The United States shall include in its application for a writ of garnishment * * * (B) the nature and amount of the *debt* owed and the facts that not less than 30 days have elapsed since demand on the debtor and payment of the *debt* was made and

****

under any federal statute to engage in garnishment for private parties.

This Court will not likely encounter a more factually apt case to confirm the universal bar against the employment of process of the federal courts to collect debt by use of imprisonment. The ugly underbelly of civil incarceration is inducing prisoners to make payments, voluntarily or involuntarily. Imprisonment used to keep a man from defeating collection of debts by garnishment is no less imprisonment of a debtor to force him to pay his debt.

This case is the natural vehicle, in a purely statutory setting, to address why "civil contempt proceedings" involving government lawyers and agencies are inherently penal and "more closely resemble debt-collection proceedings." *Turner v. Rogers, 131* S. Ct. at 2520.

---

the judgment *debtor* has not paid the amount due * * * ," 28 U.S.C. § 3205(b)(1)(B). That statute was enacted as section 3611 of Federal *Debt* Collection Procedures Act of 1990 ("FDCProA"), Pub. L. No. 101-647, 104 Stat. 4789, 4933 (Nov. 29, 1990) (codified as 28 U.S,C, Part 176 sections 3001 through 3308). Section 3205 is in subchapter C. Section 3001specifies that the "chapter provides the exclusive procedures for the United States to recover a judgment on a *debt*:" but "does not apply with respect to an amount owing that is not a *debt*, or to a claim for an amount owing that is not a *debt*." "*Debt*" is "an amount owing to the United States on a direct loan" or "other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by persons other than the United States." 28 U.S.C 3002(3). The United States was no party to any of the trust or plan documents at issue here. There is no debt to the United States or even implicitly "for the use of the United States." (16a – 17a). The FDCProA certainly does not include within its procedures an agency's use of incarceration as a prologue to collection of a debt; and it does not allow the United States to act as collection agent for judgment debts payable to third parties. [Italics added.]

****

STATEMENT OF THE CASE

A. SUMMARY OF THE PROCEEDINGS.

The factual background of this case is described in the opinion of Hon. Mary McLaughlin. *Perez v. Koresko*, 86 F.Supp.3d 293 (E.D. Pa. 2014). [Dkt. 1134].[3] Petitioner was found liable at the suit of the United States Department of Labor (DOL) for fiduciary duty violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA") involving a multiple employer welfare benefit trust. (11a). Judge McLaughlin retired from the Bench in September 2015, after entering a massive money judgment against Petitioner, but not holding him in contempt of her prior orders from 2013 and 2014. A new judge, Hon. Wendy Beetlestone, took over the case. Without ever seeing Petitioner and without any sworn evidence, Judge Beetlestone decided that he violated Judge McLaughlin's orders. The new judge threw him into federal prison for over twenty-five months. The Third Circuit Court of Appeals refused to exercise *de novo* review of Judge Beetlestone's re-interpretation and effective restatement of Judge McLaughlin's orders.

Judge Beetlestone: (i) declared Petitioner in civil contempt on April 26, 2016 [Dkt. 1307] (ii) ordered him into federal prison on May 5, 2016 [Dkt. 1311]; and (iii) punished him in solitary confinement [Dkt. 1350, p. 28; Dkt. 1341]. The court refused to allow *pro bono* counsel to assist on a limited basis [Dkt. 1321, 1324, 1327, 1328]. From the solitary confinement unit, Petitioner sent the court

---

[3] "Dkt." denotes the docket entries in case no. 09-cv-00988 (E..D. Pa.)

****

three handwritten requests for relief. [Dkt. 1346]. The court treated those papers as a motion for reconsideration, which it denied on August 31, 2016, [Dkt. 1390]. Judge Beetlestone issued an opinion [Dkt. 1391] that does not discuss any evidence.

Judge Beetlestone summoned Petitioner from solitary confinement four times in May, June, July and August, 2016. [Dkt. 1341, 1350, 1359, 1388]. On June 8, 2016 he was subjected to full deposition about his income and assets. Petitioner claimed insolvency, but Judge Beetlestone still refused to release him. In December 2018, she changed her order. Petitioner was ordered to give a power of attorney to permit a sale of foreign real estate which was never discussed in the record of proceedings from 2004 through the 2015 judgment. He complied, and he was released in June 2018.

The Third Circuit confirmed that there has never been any proceeding to determine that Petitioner was in possession of any plan or trust assets. (14a). The argument -- that a court could only order contempt after a finding of possession and ability to comply – was called "meritless."

The Third Circuit confirmed that the imprisonment was permitted because Petitioner violated Judge McLaughlin's preliminary injunction order issued in 2013 (and "confirming orders" issued in 2014), and those prior orders were not rendered moot by the subsequent final judgment. That decision stands at odds with the Third' Circuit's own order (No. 13-3827, May 4, 2015) that dismissed Petitioner's appeal of the preliminary injunction order, and declared the

****

controversy relating to the preliminary injunction "moot," because of the final judgment and order

B. Details of the Final Judgment for Disgorgement

In *Perez,* Judge McLaughlin found Petitioner liable and his affiliates liable for violations of the prohibited transactions provisions of ERISA, 29 U.S.C. § 1106. She opined that 29 U.S.C. § 1109(a) allowed her to enter a judgment at the suit of the Secretary of Labor, consisting of "restitution for losses and disgorgement of profits." *Perez,* at 392. The Court did not enter any judgment in favor of the Secretary or any beneficiary or participant. Rather, the Court entered Final Judgment (as corrected in March 2015) in favor of two multiple employer trusts and various ERISA plans described in the *Perez* opinion; and it directed payment of "the balance due" to the Court's "Independent Fiduciary on behalf of *** Trust[s]" without mentioning the Secretary. [Dkt. 1149].

Judge McLaughlin found the total amount at issue in the case was $39,839,477.04." (the "Total Amount"). After reducing that amount by $19,987,362.16 seized by the Court on September 16, 2013 pursuant to its preliminary injunction [Dkt. 496], Judge McLaughlin concluded that the "defendants are therefore liable for $19,852,114.88 in restitution for losses and disgorgement of profits * * *." *Id.* at 394. That amount was modified, as described herein.

In a spreadsheet labeled as the Appendix to her opinion [Dkt. 1134-1], Judge McLaughlin set forth 256 items she included in the Total Amount of the

****

judgment. *Id.* Of these, only fourteen line-items, falling into two categories, are immediately relevant to this Petition.

1. *The amounts in the RBTT Account.* As reflected at Line 246 of the Appendix, the Total included the last known amount in a bank account, located in Nevis, West Indies, called the "RBTT Account" in the amount of $1,422,367.41. *Perez,* at 396. Judge McLaughlin confirmed that *Petitioner had given the Court's Independent Fiduciary a power of attorney over the RBTT account,* and the defendants "would no longer be liable for the balance of the account" once the Court got control, unless "the account was drained by them." *Id.,* at fn. 65. Judge McLaughlin then changed course in the Final Judgment and order [Dkt. 1149] with respect to the RBTT Account. She reduced the Total Amount by that same $1,422,367.41, to $38,417,109.63 [Dkt. 1149, ¶ 2a], because the Court had "double-counted." The RBTT Account consisted of amounts transferred by Petitioner from ScotiaBank. *Perez,* at 352. The Court had already accounted for the only three transfers to ScotiaBank (totaling *"$1.68 million")* as part of the Total judgment amount, as listed in the Appendix: $500,000 (Line 1), $180,000 (Line 2), and $1,000,000 (Line 3). *Perez,* at 532. She added: "the Court will further reduce the total liability ... by that account's remaining balance." (Emphasis added.) [Dkt. 1149, p2, FN2]. In sum, the *$1.68 million* first transferred to Scotia Bank, which became the RBTT account balance, was in the money judgment in 2015; and that judgment was subject to reduction by amounts collected pursuant to Petitioner's duly executed power of attorney. After learning in May 2015 RBTT had closed the

****

account, and Petitioner did not take that money, Judge McLaughlin did not declare contempt.

2. *Payments on Nevis real estate contracts.* Judge McLaughlin classified all investments in Nevis real estate construction contracts as ERISA prohibited transactions. *Perez,* at 347, 351. The following line items, representing payments to a third-party real estate developer, Deon Daniel, or his Attorney Hobson, make up $3,372,000 of the Total and unpaid judgment: Line 4, $400,000; Line 5, $320,000; Line 22, $70,000; Line 247, $250,000; Line 248, $450,000; Line 249, $152,000; Line 250, $750,000; Line 251, 540,000; Line 256, 240,000; Line 257, $200,000. *Id.;* Dkt. 11134-1. These payments constituted over ninety percent of the contract price of $3,600,000. *Id.* There is no other discussion of Nevis properties in the Judgment order, and Judge McLaughlin never classified any Nevis properties as plan assets or proceeds of plan assets.

C. THE TURNOVER PARAGRAPH.

After the monetary award in Paragraph 1, Paragraph 3 of the Final Judgment and Order, declared that all assets previously seized by the Court's injunction order of September 16, 2013 were "permanently turned over and retitled to the Independent Fiduciary." The next sentence says:

> To the extent that notwithstanding the September 16, 2013 Order, any assets of the [Trusts] remain in the custody or control of any of the Koresko defendants or third parties, the Koresko Defendants and third parties shall immediately turn over such assets to the [Independent Fiduciary] and such assets shall be permanently retitled to the [Independent Fiduciary].

****

[Dkt. 1149].

The Court's only hint of how the foregoing relief might fit ERISA was its discussion of 29 U.S.C. 1109 in the opinion issued a month previously. *Perez,* at 392. Nothing in this sentence (or anywhere else in the judgment) identifies or declares an equitable charge on any specific assets. The court did not declare which assets were in the "immediate" "custody or control" of Petitioner or any "third parties." In its clarification of what it considered plan assets, the judge spoke only of bank accounts, not anything else. *Id.,* at 396, and fn. 65.

The Court offered no explanation of whether this was additional injunctive relief; and why monetary disgorgement was not an adequate remedy at law.

D. JUDGE MCLAUGHLIN FOUND NO CONTEMPT OF THE 2013 PRELIMINARY INJUNCTIONS OR RELATED ORDERS.

There is no dispute that the Secretary filed its "Second Motion for Contempt" on February 9, 2016 [Dkt. 1283] to enforce a preliminary injunction after entry of a final judgment. In that Second Motion for Contempt, offered without affidavit or any verification or certification of hearsay attachments, the Secretary said that Petitioner: "consistently failed to comply with the Court's injunctive order [Dkt. No. 496], and subsequent related orders, directing that he transfer $1.68 million... [and] title or other indicia of ownership to real estate in Nevis [West Indies] ...." [Dkt. 1283]. The "injunctive order" was a preliminary injunction issued by Judge McLaughlin on September 16, 2013. [Dkt. 496]. The "subsequent related orders" refer to several interrelated, interlocutory decrees [Dkt. 990, 1033] entered in

****

2014, also by Judge McLaughlin. None of these were incorporated into the final judgment.

In September 2013, the Secretary filed a Motion for Adjudication of Civil Contempt (the "First Contempt Motion"). [Dkt. 518]. The Secretary alleged that Petitioner violated Paragraph 6 of the injunctive order which directed Petitioner to turn over to the Independent Fiduciary three relevant things: (i) "all assets of the plans ...;" (ii) "Assignments of all rights in the Nelson Spring condominiums...;" and (iii) All other personal and real property purchased, in whole or part with assets of the plans ...." [Dkt. 496]. For over a year afterward, Judge McLaughlin considered the Secretary's ongoing demands that Petitioner surrender control of certain money and "condominiums" in Nevis. There was never any testimony or proof that he could transfer anything.

On September 10, 2014, Judge McLaughlin denied the Secretary's first Motion for Contempt, except with respect to Petitioner's failure to transfer to the United States the accounts held in the Nevis branch of the Royal Bank of Trinidad and Tobago (the "RBTT Account"). [Dkt. 990; 1134, p. 29]. Judge McLaughlin confirmed that Petitioner was not otherwise contempt for failure to transfer other personal or real property.

After Petitioner was injured in an automobile accident, [Dkt. 898; 977; 990; 1234, p28] Judge McLaughlin ordered Petitioner to surrender possession and control of the RBTT account by way of a power of attorney in favor of the court's Independent Fiduciary. [Dkt. 1033]. Petitioner signed a power of attorney on

****

October 24, 2014. [Dkt. 1091-1]. Counsel for the Independent Fiduciary objected to the October version of the power of attorney, [Dkt. 1091-2], and then sent a revised power of attorney form to Petitioner's lawyer in late November 2014. [Dkt. 1091-2]. After hearing that Petitioner had not signed the revision, the Judge set a new deadline that Petitioner missed. [Dkt. 1187]. Petitioner was late, but he obeyed. He delivered the power of attorney and purged any pending issue of contempt on December 17, 2014. [Dkt. 1091-2, pp. 2-5 (form), 1098, 1102, 1115].

After entering judgment on March 13, 2015, Judge McLaughlin became aware that "Nevis counsel" did not secure the RBTT account with the power of attorney. The court learned that RBTT closed the account, and that Petitioner did not take the money. [Dkt. 1217, 1218]. On May 12, the court ordered Petitioner to give an affidavit "to explain the closing of the Nevis bank accounts" or "face contempt." [Dkt. 1195]. Petitioner responded immediately. [Dkt. 1201, 1204]. The court did not find Petitioner in contempt.

E. THE 2016 CONTEMPT PROCEEDINGS AND PUNISHMENTS.

On September 16, 2015 the case was reassigned from Judge McLaughlin to Judge Beetlestone. [Dkt. 1260]. Five months later, the Secretary decided to seek contempt again -- a year after the Final Order that does not, anywhere, award money or property to the Secretary of Labor.

Immediately after the Secretary filed its Second Motion for Contempt [Dkt. 1283], Lawrence McMichael, Esq. of the Dilworth Paxon firm received notice, as he was still listed as Petitioner's counsel on the district court docket. He requested

****

clarification from Judge Beetlestone as to the status of indemnification for attorney fees, as Judge McLaughlin had allowed indemnification for a variety of tasks, even after trial. [Dkt. 1134 p.47-42, 212; 1225]. McMichael formalized his request by letter dated March 18, 2016. [Dkt. 1297].

McMichael asserted that the plain language of the governing documents in the case mandated indemnification. *Id.*, at 1. McMichael argued that the new Contempt Motion was an attempt to impose imprisonment for the collection of a money judgment. He also presented the defenses of insolvency, inability to pay, and disability:

> * * * [Petitioner] suffers from a number of disabilities... Given Koresko's compromised health and the various demands on his time and attention, the best way to assure that he will be fairly represented is to permit Dilworth to represent him and compensate the firm from the ... frozen accounts. As far as we are aware, he has no significant unfrozen assets with which he can pay lawyers.

[Dkt. 1297, at pp. 3-4.][4] The Secretary opposed any funds for counsel. [Dkt. 1298].

Judge Beetlestone issued an order on March 31, 2016 [Dkt. 1300], which denied Petitioner money for counsel fees. The order directed Petitioner to file a "response" by April 14, 2016; and it scheduled an "oral argument/hearing" for April 26. The order did not compel anyone to appear, and it did not warn anyone that lack of response would result in a finding of contempt.

---

[4] Petitioner was financially crippled long before the final money judgment. In order to obtain its preliminary injunction., the Secretary subpoenaed Petitioner's personal banking records, and told the Court that irreparable harm existed because Petitioner had no discernable assets outside corporate solution but suffered personal liabilities of over $1 million. Dkt. 377-1, pp. 31-35.

****

In the transcript of the "oral argument/hearing" of April 26, 2016 [Dkt. 1321], Judge Beetlestone confirmed that McMichael was not expected to appear for Petitioner. *Id.*, at 4. Petitioner did not appear. The Secretary produced no witnesses, and nobody introduced either an affidavit or certification. The only evidence was a photocopy of a letter, addressed to a third person, allegedly by a "condo developer" from outside the United States purporting to say that a trust owned property in Nevis. *Id.* at 7. In the following exchange, the court noted Petitioner's apparent inability to comply:

> THE COURT: You know, we have this letter and it says they are owned by John Koresko Trust Fund. If they are in litigation as Mr. Koresko has said, and no one has said that is an incorrect representation, he might not have the ability to turn over the indicia of ownership or the ability to turn over the condos – so how do you respond to that?
>
> SECRETARY's SOLICITOR: Well, I think he's able to comply with this Court's Order dated September 17, 2013.

Id., at p. 8.

Judge Beetlestone then read paragraph 6 of the 2013 preliminary injunction [Dkt. 496] and said: "I assume that he's ordered to turn over or make assignments of all rights .... " *Id.,* at p. 9. On page 10, the Court agreed with the Secretary's bare assertion that Petitioner should be jailed because "he has the ability to hand over the rights in the litigation." *Id.* But, Judge McLaughlin never required that after denying contempt in September 2014. [Dkt. 515 at 98; Dkt. 990].

Without citation to any page of any opinion or order, Judge Beetlestone wrote on August 31, 2013:

****

> The Court held that Koresko was required to disgorge and surrender all Trust assets and funds that he had transferred into the Royal Bank of Trinidad and Tobago.

[Dkt. 1391, p.6.] Petitioner is unable to locate any such "holding" in Judge McLaughlin's opinion of February 2015 [Dkt. 1134], or the plain language of the Final Judgment, [Dkt. 1149]. Judge Beetlestone did not refer to the evidentiary record known to Judge McLaughlin or the plain language of Judge McLaughlin's orders. Judge Beetlestone assumed that Petitioner was "John Koresko Trust Fund" (without any proof that a trust even existed) and ordered Petitioner to turn over the following discrete "assets" or face imprisonment: (i) An unspecified fund of $1.68 million; (ii) Unit 3A "Nelson Spring Resort" ("Unit 3A"); (iii) Condo Unit 5B, Condo Unit 5C, Condo Unit 6A, and Condo Unit 6B, Nelson Springs Resort (the "Other Units"); and (iv) "any lot of land held in the name of John Koresko at Cliff Dwellers in Nevis" (the "Lot"). [collectively, the "Listed Assets"] [Dkt. 1307; 1391].

Petitioner could not comply. He voluntarily surrendered when the Marshals called.

On June 16, 2016, the court summoned Petitioner from the jail. Petitioner asked again for relief from the extreme restrictions of solitary confinement, where he was in the most punitive part of the prison. [Dkt. 1347, transcript, pp. 23-31]. The judge affirmed that Petitioner was put in solitary confinement because she and the officials at Federal Detention Center – Philadelphia believed he was in danger. The solitary confinement continued for months.

Meanwhile, the court allowed the Secretary to use the imprisonment to

****

facilitate execution against Petitioner's general assets, including an escrow account in Oklahoma. The Secretary obtained a writ of garnishment, using the Federal Debt Collection Procedures Act, after writing in its motion that Petitioner owed a debt to the United States. The Third Circuit opined that the Secretary could garnish because the judgment was "for the use of the United States." (16a). The record reflects no such language in any court order. The Circuit Court does not explain how the garnishment on account of judgment debt was not assisted by "incarceration" of Petitioner pursuant to "any process of issued by the courts of the United States" in Pennsylvania, a state that long ago abolished imprisonment for debt. 28 U.S.C. §2007.

****

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION TO ENFORCE A PRELIMINARY INJUNCTION AFTER IT WAS SUPERSEDED BY FINAL JUDGMENT CREATED A CONFLICT WITH EVERY OTHER CIRCUIT COURT.

It is undisputed that the Secretary asked for imprisonment because Petitioner violated the 2013 order (and related orders); and in 2016, the new district judge imprisoned him for it. The Third Circuit decided that the preliminary injunction of 2013 was not "swallowed up" by the final judgment,[5] concluding: "The September 16, 2013, Order remained in effect and was not rendered moot by the judgment on the merits." (15a). The Circuit Court offered only a vague suggestion that Judge Beetlestone interpreted the orders in a way that allowed them to live on. The Court cited no authority for its position. Regardless, Judge Beetlestone could not invigorate a legally terminated order unless the rest of the Circuit Courts of Appeal have been wrong for over a century.

A. A final judgment, *ipso facto*, dissolves a preliminary injunction.

Before this case, it appeared to be undisputed within the courts of the Third Circuit and elsewhere that a preliminary injunction terminates when the district court enters final judgment. *Brennan v. Wm. Paterson College,* 492 Fed. Appx. 258, 264 (3d Cir. 2012) (nonprec.); *Ameron, Inc. v. U.S. Army Corps of Eng.*,

---

[5] This Court has used the term "swallowed up" also as a practical expression of the doctrine of *res judicata*. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Indeed, all matters relevant to the 2016 contempt order, including the issues of turnover, possession, control, and contempt of the 2013 and 2014 preliminary orders, could have been raised or were actually litigated via the Secretary's First Contempt Motion. The 2016 contempt proceedings could not be used to resuscitate the issues. *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 (1979). The 2013 and 2014 orders were supplanted by the Final Judgment.

610 F.Supp. 750, 757 (D.N.J. 1985), ("Where ... a final judgment has been entered on the merits, the preliminary injunction comes to an end and is superseded by the final order."), *aff'd as modified*, 809 F.2d 979 (3d Cir. 1986).

In *Brennan*, the Third Circuit panel cited the cases which state "the controlling rule" applicable in all the Circuits who have considered the issue. A preliminary injunction dissolves when a final injunction is entered; and it no longer has any binding effect on anyone: *U.S. Phillips Corp. v. KBC Bank, N. V.*, 590 F .3d 1091, 1093-94 (9th Cir. 2009) ("the preliminary injunction dissolves *ipso facto* when a final judgment is entered"); *Madison Square Garden Boxing v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1997) ("With the entry of the final judgment the preliminary injunction came to an end, and it no longer had a binding effect on anyone.") (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953)).

The reasoning of those cases in the Ninth, Third, and Second Circuits reflects the identical and uniform position in the First, Seventh, Eighth, Tenth, Eleventh and District of Columbia Circuits:

Fundicao Tupy S.A. v. United States, 841 F.2d 1101, 1103 (Fed.Cir.1988) ("[A]lthough a preliminary injunction is usually not subject to a fixed time limitation, it is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause.") (internal quotation marks omitted);

Cypress Barn Inc. v. Western Electric, 812 F. 2d 1363, 1364 (11th Cir. 1987)

("Since a preliminary injunction is interlocutory in nature, it cannot survive a final order of dismissal.")(citing *Madison Square Garden Boxing, Inc. v. Shavers, supra);*

Venezia v. Robinson, 16 F.3d 209, 211 (7th Cir. 1994) ("A preliminary injunction cannot survive the dismissal of a complaint.")(citing *Cypress Barn, Inc., supra);*.

U.S. ex rel. Bergen v. Lawrence, 848 F. 2d 1502 (10th Cir. 1988) ("With the entry of the final judgment, the life of the preliminary injunction came to an end, and it no longer had a binding effect on any one. The preliminary injunction was by its very nature interlocutory, tentative and impermanent.") (citing *Madison Square Garden Boxing, Inc. v. Shavers, supra* and *Ameron, Inc. v. U.S. Army Corps of Engineers, supra*).

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953) provides a practical explanation why final judgment dissolves a preliminary injunction. "For a preliminary injunction — as indicated by the numerous more or less synonymous adjectives used to label it — is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness." *Id.*

In the Ninth Circuit, the foregoing rule has existed for over a century. *See Sweeney v. Hanley,* 126 F. 97, 99 (9th Cir 1903) (cited in *U.S. Phillips Corp.,, supra,* 1093-94). Relying on *Sweeney,* the First Circuit agreed in *Raphael v. Monroe,* 60 F.2d 16, 20 (1st Cir. 1932) that a receiver could not rely on a preliminary injunction to supply the basis for its power over a debtor's property after the

issuance of a final judgment. ("In any event if, by the preliminary injunction, any right or power could, under the circumstances disclosed, have been obtained over the property * * * , it was lost when the injunction was dissolved by the final decree in the District Court, not having continued the injunction."). Those facts and the holding line up with the present case.

In *Heasley v. United States,* 312 F.2d 641 (8th Cir. 1963) a man was charged with criminal contempt. Just like Petitioner, he claimed that the order imprisoning him was illegal because it was based on a preliminary injunction that was superseded by a final order. Relying on *Sweeney,* the Circuit Court agreed that the "temporary injunction Petitioner is alleged to have violated in the case at bar ceased to be effective on the entry of final decree," and therefore, the district court exceeded its jurisdiction in conducting proceedings for contempt. *Heasley*, at 649.

In *Fundicao Tupy, supra*, the court held that an appeal of a preliminary injunction order had become moot by the entry of a final judgment. The Circuit Court found support in this Court's declaration: "The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). It made no sense to suggest that a preliminary injunction had any legal life after entry of a final judgment:

> Thus, although a preliminary injunction is usually not subject to a fixed time limitation, it "is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause." 7 J. Moore, J. Lucas, & K. Sinclair, Jr., *Moore's Federal Practice* ¶ 65.07 at 65-114 to 65-115 (2d ed. 1987) (citation omitted). *See also Gaulter v. Capdeboscq,* 423 F.Supp. 823, 825-26 (E.D.La.1976) (preliminary

> injunction has no effect after trial on merits), *aff'd in part & remanded,* 594 F.2d 129 (5th Cir.1979) (affirming dissolution of injunction); 11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2947 at 426-27 (2d ed. 1973) ("a preliminary injunction normally lasts until the completion of the trial on the merits, unless it is dissolved earlier"); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure: Jurisdiction* § 3921 at 12-13 (1977) (issues arising from interlocutory injunction ruling may become moot by the time of final judgment).

Fundicao Tupy S.A. v. United States, 841 F.2d at 1103.

The decision in *U.S. Phillips Corp. v. KBC Bank, N. V.*, 590 F .3d 1091, 1093-94 (9th Cir. 2009) also illustrates the conflict between this case and the controlling rule elsewhere. In *U.S. Phillips,* KBC Bank obtained a preliminary injunction freezing the assets of the defendants, against whom Phillips had a judgment. On the day the district court originally entered its preliminary injunction, it also entered a default judgment. The district court granted KBC's motion to modify the freeze in injunction to allow KBC to set-off. Phillips appealed, saying the modification was moot. The Ninth Circuit agreed with Phillips that entry of the default judgment meant there was no preliminary injunction to modify, and accordingly, vacated the modification order. The Ninth Circuit cited *Sweeney, supra; U.S. ex rel Bergen, supra, Madison Square Garden, supra; Fudicao Tupy, supra*; and *Cyprus Barn, supra.* The *U.S. Phillips* court agreed that this Court's decision in *Univ. of Texas v. Camenish, supra.*, supported its holding. The purported modification entered after a preliminary injunction was dissolved was void *ab initio.* A district court cannot modify a preliminary injunction retroactively

to expand or vitiate rights already accrued under an injunction. *U.S. Phillips*, at 1094.

In the present case, Judge Beetlestone's *nunc pro tunc* interpretations resulted in modifications that put new life into an expired preliminary injunction whose terms could not in 2016 support a motion for contempt or a subsequent declaration of imprisonment. That was only possible if the preliminary injunction was integrated expressly into the final judgment, or if the final judgment were, itself, modified. Neither occurred.

It is hornbook law that a court uses contempt to enforce its valid orders, not to create new orders. It serves no logical purpose to simply ask an accused contemnor if he knew that a preliminary injunction was issued in 2013 if, as a matter of law, it was *ipso facto* dissolved long before the contempt proceeding. The rule of *U.S. Phillips* (and all the various Circuits) reaffirms the observation in *University of Texas* that a preliminary injunction is only supposed to preserve the status quo until trial on the merits.

The conflict of law in this case cost an unsuspecting and educated person two years of his life. It could happen again tomorrow, anywhere, if an interpretation by a new judge can breathe life into an otherwise dead order.

B. Mootness of the preliminary injunction required that it be vacated because a court could not enforce it.

This case reveals another serious and directly related problem: what the Third Circuit should have done after declaring a controversy moot, and what it did

not do to prevent enforcement of the superseded preliminary injunction by contempt and imprisonment in the District Court.

In October 2013, Petitioner appealed the preliminary injunction entered by the district court. The Circuit Court never considered the merits, and dismissed the appeal in May 2015, stating that the matter of the preliminary injunction was "moot" after the district court completed its trial and entered its judgment in March 2015. *Accord U.S. Phillips, Inc., supra; Fudicao Tupy, supra; Madison Square Garden, supra.*

This Court has told the lower courts how to respond when they declare a matter moot. A Court of Appeals has a "duty" to reverse, vacate, and order the moot order stricken from the record of the district court. *See Duke Power Company v. Greenwood County*, 299 U.S. 259, 267 (1936); cited with approval in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). This case animates the sound reason for the "duty" since an unvacated order of record in the Third Circuit can be used to imprison a person who was denied appellate review of that order. There is some disagreement as to whether a person must ask the Circuit Court to vacate. That concern is irrelevant here, because in his appeal Petitioner asked the Third Circuit to recognize that he was entitled under the rule of *Munsingwear* to have that order vacated, and the District Judge should have known it as a function of that Court's docket maintenance. A vacated order is no order, and its existence on a docket could not be argued logically as implicit incorporation into a subsequent final judgment. A judge would have to be very clear, which seems to be the requirement

of Rule 65(d). *International Longshoremen v. Marine Trade Assn.,* 389 U.S. 64, 75 (1967).

Not only did the Circuit Court not vacate, it specifically said that the preliminary injunction is still enforceable. It thus appears that the *Munsingwear* decision should be clarified such that the declaration of mootness of an appeal of a preliminary order also, *ipso facto*, renders that order reversed and vacated for all purposes. It cannot be correct that the duty to vacate evaporates at the option of the Court of Appeals. There is no need for any order that has been declared moot to remain as a landmine in the federal court docket. Such moot but unvacated orders can only hurt people without any societal or historical legal justification.

If the appeal of the injunction was moot, as the Third Circuit said, because the district court granted final relief, there was no further actual controversy regarding the terms of the preliminary orders. The only issues on appeal in this case after the declaration of mootness could only have been those of the specific terms of final judgment.

The rule outside the Third Circuit is that a superseded preliminary injunction is *ipso facto* invalid -- not sometimes invalid -- and cannot be modified or enforced. Such injunctions, therefore, cannot be the objects of the motions for contempt used by the Secretary. If the Ninth and District of Columbia Circuit Courts have concluded correctly that the issue is one of mootness, a constitutional limitation, not just a procedural issue involving the Rule 65 distinction between preliminary and final orders, then the Third Circuit was doubly wrong in this case.

This case allows the Court to resolve the direct and latent problems. It can do so by declaring the correctness of the nationally-embraced rule and declaring that a preliminary injunction is (i) *ipso facto* invalid for all purposes, upon entry of a final judgment; and (ii) *ipso facto* moot such that courts have no jurisdiction to enforce (by contempt or otherwise) the elements of orders that are not expressly restated in a final judgment. This outcome is also consistent with the object of Rule 65, F.R.C.P., because it will reinforce the need for parties to obtain specific orders to declare any preliminary relief intended to be permanent after judgment.

II. THE COURT OF APPEALS WAS WRONG.

A. IT DISREGARDED THIS COURT'S COMMAND OF SPECIFICITY IN A CONTEMPT ORDER.

It has long been held by this Court that in an action for contempt relating to disobedience of an injunction, the starting point is Rule 65(d), F.R.C.P. "[A]n equitable decree compelling obedience under the threat of contempt is an "order granting an injunction" within the meaning of Rule 65(d)." *International Longshoremen v. Marine Trade Assn.,* 389 U.S. 64, 75 (1967). The Rule requires that injunctive orders be "specific in terms" and "describe in reasonable detail the act or acts sought to be restrained." *Id.,* see also *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)(per curiam). The order must be clear enough so that an ordinary person knows precisely what acts are prohibited. *International Longshoremen,* 389 U.S. at 75.

Rule 65(d) of the Federal Rules of Civil Procedure provides, in relevant part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .

The order here falls far short of satisfying the second and third clauses of Rule 65 (d). Neither the brief judgment order nor the accompanying opinion is "specific" in outlining the "terms" of the injunctive relief granted; nor can it be said that the order describes "in reasonable detail . . . the act or acts sought to be restrained."

Contrary to the conclusion of Judge Beetlestone, there was no order issued by Judge McLaughlin that commanded Petitioner to transfer "title, deeds, rights, or incidents of ownership" with respect to any of the Listed Assets in the Contempt Order of April 26, 2016. [Dkt. 1307; 1391]. Judge McLaughlin's orders and opinions contain no specific reference to the Listed Assets, except to label $1.68 million and the payments for real estate contracts as components of a money judgment.

B. PETITIONER WAS IMPRISONED TO COLLECT A MONEY JUDGMENT DEBT.

The prohibition against imprisonment for debt finds its roots in the 1800s. *See Low v. Durfee,* 5 F. 256, 257 (C.C. D. Mass. 1880). All the states have banned imprisonment for debt. Forty-one states have constitutional provisions.[6] In nine

---

[6] Ala. Const. art. I, § 20; Alaska Const. art. I, § 17; Ariz. Const. art. II, § 18; Ark. Const. art. II, § 16; Cal. Const. art. I, § 10; Colo. Const. art. II, § 12; Fla. Const. art. 1, § 11; Ga. Const. art. I, § 1, ¶ XXIII; Haw. Const. art. I, § 19; Idaho Const. art. I, § 15; Ill. Const. art. I, § 14; Ind. Const. art. I, § 22; Iowa Const. art. I, § 19; Kan. Const. Bill of Rights, § 16; Ky. Const. § 18; Md. Const. art. III, § 38; Mich. Const. art. I, § 21; Minn. Const. art. I, § 12; Miss. Const. art. III, § 30; Mo. Const. art. I, §

states, the ban is statutory.[7] Pennsylvania has both. *See McDonald's Corp. v. Victory Investments*, 727 F.2d 82 (CA3 1983) (citing 42 Pa. C.S. §5108). Those bans are also federal substantive law. 28 U.S.C.§2007.

The Pennsylvania Act of July 12, 1942 (P.L. 339, §1) provides:

> No person shall be arrested or imprisoned on any civil process issuing out of any court...in any suit or proceeding instituted for recovery of any money judgment or decree.

By its plain terms, that statute applies to any proceeding where an object is collection of a monetary award arising from "judgments" issued by courts of law or "decrees" issued by chancellors in equity. Over a century ago, federal courts recognized that Pennsylvania's ban on imprisonment in civil matters applied to both judgments at law and in equity, and were to be construed liberally in favor of debtors. *Nelson, Morris & Co. v. Hill*, 89 F. 477 (C.C. W.D. Pa. 1898) (construing predecessor to 28 U.S.C. 2007. Federal Courts must follow state law in matters of execution. Rule 69(a)(1), F.R.C.P. ("The procedure on execution and in

---

11; Mont. Const. art. II, § 27; Neb. Const. art. I, § 20; Nev. Const. art. I, § 14; N.J. Const. art. I, ¶ 13; N.M. Const. art. II, § 21; N.C. Const. art. I, § 28; N.D. Const. art. I, § 15; Ohio Const. art. I, § 15; Okla. Const. art. II, § 13; Or. Const. art. I, § 19; Pa. Const. art. I, § 16; R.I. Const. art. I, § 11; S.C. Const. art. I, § 19; S.D. Const. art. VI, § 15; Tenn. Const. art. I, § 18; Tex. Const. art. I, § 18; Utah Const. art. I, § 16; Vt. Const. ch. II, § 40(3), para. 4; Wash. Const. art. I, § 17; Wis. Const. art. I, § 16; Wyo. Const. art. I, § 5. The language of these is collected at Appendix, State Bans on Debtors' Prisons and Criminal Justice Debt, 129 Harv. L. Rev. F. 153 (2015), http://harvardlawreview.org/2015/11/state-bans-on-debtors-prisons-and-criminal-justice-debt-appendix.

[7] Connecticut, Delaware, Louisiana, Maine, Massachusetts, New Hampshire, New York, Virginia, and West Virginia.

proceedings supplementary to or in aid of judgment or execution - must accord with the procedure of the state where the court is located..."). The Rule supplements the statutory ban of 28 U.S.C. § 2007.

The present federal statute, 28 U.S.C. 2007, asks if a person has been imprisoned for a debt by writ of execution or process issued from a federal court. While subsection (a) appears linked to the question of what "debt" is, subsection (b) looks only to the question of whether the person has been arrested pursuant to "writ of execution or other process" from a federal court; and if so, "the requirements for discharge applicable" under state law apply. In other words, if a person would not be denied release under state law, a magistrate should order release. Subsection (b) coincides with the broader language of Rule 69(a), F.R.C.P. which compels obedience to any state procedures "on execution" or "supplementary" to a judgment or decree. Given the application of the Pennsylvania statute to any "process" [*i.e.*, order] in "any suit or proceeding," the "debt" language of 28 U.S.C. § 2007(a) appears only marginally consequential. After all, any obligation is a debt - the logical conclusion supported by the expansive definitions of "debt" and "claim" found in the federal Bankruptcy Code. *See, e.g.,* 11 U.S.C. §101(12) (debt is a liability on a claim); 11 U.S.C. §101(5) ("claim" is a right to payment, whether or not reduced to judgment, or a right to an equitable remedy if failure to perform gives rise to a right to payment).

The federal courts have regularly repeated that imprisonment for debt is illegal. Unfortunately, for just as long, courts have been trying to camouflage

imprisonment for debt simply by saying, as the Third Circuit did here, that Petitioner was imprisoned for not complying with an order, and the order was one to surrender money or property already included in a judgment debt. *See, e.g., Samel v. Dodd,* 142 F. 68, 70 (5th Cir. 1906); *Boarman v. Boarman,* 556 S.E.2d 800, 804–06 (W. Va. 2001); *State v. Burrows,* 5 P. 449, 449 (Kan. 1885); *State v. Becht,* 23 Minn. 411, 413 (1877) ("[T]he imprisonment is for the contempt and not for the debt."); see also J.C. Thomson, Imprisonment for Debt in the United States, 1 Jurid. Rev. 357 (1889). In *Samel v. Dodd,* the panel agreed that a court could order turnover of property, and violation of that direct order could possibly be contempt,

> But it is not within the power of the court * * * *to render judgment for the value of property* ascertained to be in the possession of, and contumaciously withheld by, a [debtor], *and attach him for contempt* upon his refusal to pay. Such procedure would approach dangerously near the line, if it did not overstep it, of imprisonment for debt.

Id., 71 (emphasis added). In other words, a judgment that includes the value of property is a judgment debt that supersedes the availability of contempt as a remedy. There cannot be a simultaneously enforceable order for turn-over of property and money; if only because equity does not act in the presence of an adequate remedy at law. Equity never granted double remedies.

The current Third Circuit law of civil contempt derives from *American Trust Co. v. Wallis,* 124 F. 464, 466 (3d Cir. 1902), which adopted the "strongly reasoned judgment" of *Boyd v. Gluckich,* 116 F. 131 (8th Cir. 1902), a case that echoed *Samel, supra*:

> [W]hat it cannot do directly, it cannot do by indirection under another name. It [the court] cannot * * * lawfully order * * * [delivery of] money

> or property the [the debtor] has not got in his possession or under his control, and, imprison him if he does not comply. * * * Plainly, that would be imprisonment for debt, and the order is not relieved of that illegal and odious quality by calling it "imprisonment for contempt."

Id. at 136. *See Hicks v. Feiock,* 485 U.S. 624, 631 (1988) ("[T]he critical features are the substance of the proceeding and the character of the relief that the proceeding will afford.").

Imprisonment for debt thus has a procedural element that implicates due process and goes beyond labels. *Id.* The Third Circuit acknowledged the importance of multiple procedures to prevent imprisonment for debt in *Toplitz v. Walser,* 27 F.2d 196 (3d Cir. 1928) and *Epstein v. Steinfeld,* 210 F. 236, 238-39 (3d Cir. 1914)) (affirming *In re Epstein*, 206 F. 568, 570 (E.D.Pa.1913)). There was no need to question the meaning of the term "debt" or the plain fact that a person who owes money or equivalent value under a legal or equitable order is a "debtor." That seemed pretty clear, until now.

In *Oriel v. Russell,* 338 U.S. 358, 366 (1929) this Court quoted *In re Epstein* and agreed that the foregoing Third Circuit cases reflected "more nearly . . . the correct view." *Id.* Contemnors must have "ample opportunity in the original hearing to be heard as to the fact of concealment, and [afterward] in the motion for contempt to show their inability to comply with the turnover order." *Id.* See also *In re Eisenberg,* 130 F.2d 150, 162 (3d Cir. 1960) (the *Oriel* court "followed our practice of separating the issues dealt with in turnover and contempt proceedings").

This Court has twice reaffirmed *Oriel's* basic message. This Court held in *Maggio v. Zeitz,* 333 U.S. 56 (1948) and *United States v. Rylander,* 460 U.S. 752,

757 (1983) that a contempt proceeding cannot properly ensue without a prior action for enforcement of a demand to turnover property, documents, or things which have been determined to be in his possession (by clear and convincing evidence). *Rylander,* a non-bankruptcy case involving failure to comply with an I.R.S. subpoena, cites *Maggio. Rylander, at 760. Maggio,* in turn, equates "debtor's prison" with a contempt proceeding not preceded by a judicial decree of possession. 333 U.S. at 63-64. To that end, *Maggio* holds that the finding of possession at the first hearing does not bar a later showing of inability to comply; and *Rylander* clarifies that a tax debtor is bound by the finding of possession in the first proceeding until he proves otherwise. *Rylander* at 760. In *Rylander,* this Court equated a "turnover order" with a subpoena enforcement order. *Id.*

This Court's discussion of *Maggio* and *Rylander* in other settings offers no hint that their rules only applied to bankruptcy or income tax settings. See *Hicks v. Feiock,* 485 U.S. 624, 628, fn. 9 (1988); *id.* at 646 (O'Connor, J., Rehnquist, C.J. and Scalia, J., dissenting) (child support). Petitioner cannot find a case from any jurisdiction that confines the "current possession" rule or the required "first hearing" to only bankruptcy cases. Such a proposition also presupposes that the state courts, which have no jurisdiction in federal bankruptcy matters, are also not bound by the rules of law announced in *Maggio* or *Rylander.* The search engines are chock full of state cases and judicial opinions with the opposite conclusion.

In its nonprecedential opinion below, the Third Circuit panel knew that neither Judge Beetlestone nor Judge McLaughlin conducted a hearing to determine

Petitioner's possession and control of the Listed Assets he did not turn over, and there was no such finding of fact at trial [Dkt. 1134] or in the final judgment order [Dkt. 1149]. In 2014, Judge McLaughlin refused to declare contempt relating to a failure to turn over Listed Assets and never had to declare possession. [Dkt. 990]. Petitioner was not held in contempt after the judgment, when the Independent Fiduciary did not secure any part of the "$1.68 million," because he told Judge McLaughlin that he did not take possession for fear of violating her order. [Dkt. 1195, 1201, 1204].

Nevertheless, the Circuit Court said that it had never applied the requirement of a prior determination of possession, at a full hearing before any contempt proceeding, outside of bankruptcy.[8] The Court cited *Toplitz v. Walser,* 27 F.2d 196 (3d Cir. 1928) as authority, a case arguably modified by *Maggio.*

The Third Circuit's position in this case follows from an erroneous supposition that the procedures discussed in *Maggio* and *Oriel* were ever limited to only bankruptcy cases. Congress did not create turn-over in the Bankruptcy Act and it was never unique to bankruptcy. *Maggio,* at 61. Rather, the two-step process is derived from the common law and equity practices. The "order of 'turnover' finds its analogy in the inquiry in contempt cases for violating an injunction issued by a court of general jurisdiction." *Oriel,* at 365 (citations

[8] The court split some hairs. In *Chadwick v Janecka,* 312 F. 3d 597, 610-11 (3d Cir. 2002), the court discussed the rationale of *Maggio v. Zeitz, supra* and *Oriel v. Russell, supra,* quite extensively in connection with a contemnor's failure to turn over property in a domestic relations case. The court denied habeas corpus relief to Chadwick, although he had been imprisoned over a decade, because the state court judge made a finding of possession and control in the divorce proceedings.

omitted). In discussing the first action, before contempt, this Court explained:

> [T]he theoretical basis for this remedy is found in the common law actions to recover possession -- detinue * * * and replevin . [T]he object -- possession of specific property-- is the same. * * * It is essentially a proceeding for restitution . * * * The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds and possession by the defendant at the time of the [first] proceeding.

Maggio, supra, at 63-64. *See Brune v. Fraidin*, 149 F.2d 325, 327 (4th Cir. 1945) (tracing the procedure to English Bankruptcy Law).

Before the obligation to surrender property matures, long before any proceeding by contempt to enforce that obligation, a court must first declare that a person is in possession, with the ability to comply, upon presentation of proof, by clear and convincing evidence, no matter how difficult, by the party seeking turnover. *Maggio, supra,* at 64. That requirement of fundamental fairness has never been confined to bankruptcy. *See United States v. Gippetti,* 153 Fed. Appx 865, 868 (3d Cir. 2005)(nonprec.)("an express determination of possession or control is required" or "enforcement must be denied.").

The Third Circuit has thus endorsed imprisonment for debt in two different ways. First, it refused to recognize that this Court's extensive discussion of the procedures in *Rylander* never limited the holdings of *Maggio* and *Oriel* to either bankruptcy or income tax proceedings. Second, as the old *Samel* case recites, a judgment for money usually and completely reveals that the real object of a related contempt procedure is to collect money.

C. THE DISGORGEMENT JUDGMENT AND INCARCERATION ARE NOT, IN TANDEM, AMONG ERISA'S LIMITED APPROPRIATE OR EQUITABLE RELIEF.

ERISA, 29 U.S.C. § 1132(a)(2) allows a participant, beneficiary or the Secretary of Labor to sue for appropriate relief under § 1109; or each can seek injunction or "appropriate equitable relief" under § 1132(a)(3) or §1132(a)(5). The district court entered its judgment for disgorgement under subsection § 1132(a)(2), not (a)(5). The Third Circuit, however, incorrectly held that contempt and garnishment were allowed under (a)(5), and disgorgement remains an equitable remedy when the court demands money.

This Court has held that ERISA's list of plaintiffs, and the limited remedies available for each, are sufficiently indicative of Congressional intention not to include others. *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U. S. 134, 148 (1985). The statutory language does not give the Secretary of Labor authority to act like a collection agency and pursue judgment debtors for monetary amounts owed to the fiduciaries of ERISA plans. Just as the Third Circuit held, any powers of execution exist if they are part of a judicially-developed fabric of "appropriate equitable relief" under § 1132(a)(5) and do not conflict with other applicable federal statutes or historical limits of equitable relief. (16a).

In *Great West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209 (2002) (quoting *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 258 n.8 (1993)) this Court explained that "'[e]quitable' relief must mean something less than all relief," implying that there must exist at least some remedies which do not follow on the

coattails of injunctive authority. The Court provided an example of a non-equitable remedy in *Tull v. United States,* 481 U.S. 412, 422 (1987), holding that civil penalties are not available as a remedy to courts sitting in equity. In *Russell, supra,* this Court said that extracontractual damages (including punitive damages) are not intended within the § 1132(a)(2) remedies.

Russell, Great-West and Tull thus set the bar in an ERISA case like this. Anything that looks or smells penal, or extracontractual, or not traditionally within the exclusive bailiwick of equity, is not permitted. On its face, § 1132(a) does not permit creation of "appropriate" relief simply because it might be desirable for the Secretary to want to help a potential ERISA litigant. Government is in the law enforcement business, and equity courts were never the venue for law enforcement or statutory claims. *Tull, supra.*

This Court's jurisprudence, evident in *Mertens* and *Great-West,* demands that an appropriate ERISA remedy cannot be one that dissolves the historical distinction between law and equity. Since the dawn of the Republic, federal courts could not adjudicate suits in equity "in any case where plain, adequate and complete remedy may be had in law." *See Buzard v. Houston,* 119 U.S. 347, 352 (1886). The basis for equitable relief has always been irreparable harm and inadequacy of the legal remedy. *Rondeau v. Mosinee,* 426 U.S. 49, 61 (1975). There is no duty to enter an equitable decree simply because the government requests it, especially when another order is "more appropriate" for the "evil" at hand. *Hecht Co. v. Bowles,* 321 U.S. 321, 328-9 (1944).

In ERISA cases, the remedies in 29 U.S.C. § 1132(a) are disjunctive, and only "appropriate" relief will do. For example, relief is not "appropriate" under §1132(a)(3) if another provision offers an adequate remedy. *See Varity v. Howe*, 516 U.S. 489, 515 (1996). The same interpretation applies to the Secretary under §1132(a)(5). *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 256 (1993).

Nevertheless, "appropriate equitable" relief does not include any decree seeking money. *Great West Life & Annuity Ins. Co., v. Knudson*, 534 U.S. 204, 213 (2002), That limitation logically restricts post-judgment remedies. Once the district court declared a money judgment, no other relief like contempt could be "appropriate" or "equitable."

In *Great-West,* 534 U.S. at 210-11, this Court restated the difference between a suit for damages (that seek "compensation for loss resulting from the defendant's breach of legal duty"), and an equitable action enforceable by contempt. An injunction to compel the payment of money or specific performance of monetary obligations was not typically available in equity." *Id.* Only in "rare cases" would a court of equity decree specific performance * * * to transfer funds * * * to prevent future losses that were either incalculable or would be greater than the sum awarded." *Id.* (citing *Bowen v. Massachusetts,* 487 U. S. 879, 918 -19 (1988) (Scalia, J. ,dissenting). Justice Scalia clarified the distinction:

> Suit for a sum of money is to be distinguished from suit for specific currency or coins. Specific relief is available * * * at law for replevin or detinue * * * or through a suit in equity for injunctive relief if the

> currency or coins in question are unique or have incalculable value. That obviously is not the case here. Respondent seeks fungible funds, not particular notes in the United States Treasury.

Bowen, supra, & n.3. Further, "restitution in the judicial context commonly consists of money damages," *id.,* n.2, especially in an ERISA case. *Great-West,* at 212-213. *See also, Maggio v. Zeitz, supra* at 63-64. An action "to recover damages for the withholding or value of property" is an action in "trespass or trover" for money, and not for equitable restitution. *Great-West, supra; Maggio, supra.* Regardless of whether the Third Circuit or a district judge used the term "disgorgement," it was still a monetary remedy in this case, just as "restitution" was in *Great-West.*

In the record of this case, there is nothing to suggest the characteristics of "uniqueness" or "incalculable value," i.e., irreparable harm, prerequisite to any injunction or declaration of specific relief. Judge McLaughlin never ordered turn-over of the Nevis real estate assets, as demonstrated by her order denying the Secretary's first motion for contempt in September 2014 [Dkt. 990]. She included every dime the Secretary "proved" that Petitioner paid to the Nevisian real estate developer and his lawyer. See Dkt. 1134, par. 109-110; Dkt. 1134-1, lines 4, 5, 22, 247, 248, 249, 250, 251, 256, 257.

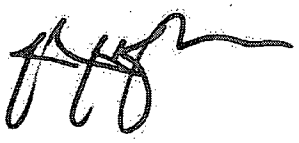
One way or the other, the garnishment was illegal. The Secretary admitted it used the incarceration to facilitate collection of somebody's debt. Nevertheless, the disgorgement judgment was a money judgment, and that monetary element eliminated any argument that the relief was "appropriate" or "equitable." The

district court had no authority to grant the double remedy or to enforce it with punitive incarceration in this ERISA case -- or any other.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully,



John J. Koresko, V
Petitioner, Pro Se

November 9, 2018