

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN J. KORESKO ,v

Petitioner,

v.

SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
[Third Circuit No. 17-1140]**

**Directed to the Honorable Samuel Alito, Circuit Justice
for the United States Court of Appeals for the Third Circuit**

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To the Honorable SAMUEL ALITO, Circuit Justice:

Petitioner John J. Koresko, V, requests an extension of time until November 9, 2018 to file his Petition for Writ of Certiorari, and in support thereof states the following:

BACKGROUND

1. Petitioner intends to file a Petition for Writ of Certiorari relating to the order of the Third Circuit Court of Appeals, filed June 12, 2018, which denied Petitioner's Motion for Rehearing in case number 17-1140, styled *Secretary, U.S Department of Labor v. John J Koresko, V, et al.*¹
2. The Petition would be due in this Court on September 10, 2018, 90 days after the Order.
3. Petitioner requests an extension of 60 days.
4. A copy of the nonprecedential opinion and the order denying rehearing is attached.
5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

¹ The Third Circuit Court "consolidated" this case for purposes of argument and briefing with NO. 16-3806; however, that court granted Petitioner's request for additional briefing volume due to the discrete issues involved in 17-1140. Petitioner is treating the cases separately here.

NATURE OF THE MATTER

6. This is a case of first impression for this Court, arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C § 1001, et seq. (“ERISA”). It deals with the authority of the Secretary of Labor to continue suit against Petitioner, a fiduciary of a fully-insured multiple employer welfare benefit trust, on behalf of noncorporeal “plans” which could not be injured as a matter of law. No benefits were vested. The trustee reported a surplus of over \$80 million, in addition to the contractual promises of life insurance policies that provided complete indemnification for death benefits, the only benefits promised by the trust arrangement. As long as the insurance policies existed, there was no threat to benefits, regardless of other money in the fund. Any plans were thus “fully-funded.” Benefits would never be payable at all unless a participant died while a plan remained operational and affiliated with the Trusts that owned the insurance policies. There was no proof in the case that any activity of Petitioner caused the Trusts to be unable to pay benefits. The ultimate question is whether the Secretary could sue and execute on account of some theoretical damage to theoretical plans when no beneficiary or participant suffered any injury to an interest in plan assets sufficient to trigger standing of the latter.

a. Petitioner incorporates by reference the Background and discussion of authorities contained in his **APPLICATION FOR**

**EXTENSION OF TIME TO FILE PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT relating to Third Circuit No. 16-3806,**
filed contemporaneously with this Application.

b. The courts below allowed the Secretary to sue and proceed under ERISA to allegedly “protect” amounts owned by a welfare benefit trust that were never promised to participants and which participants could not obtain in any suit on their own. The United States District Court for the Eastern District of Pennsylvania held that the Secretary of Labor had authority to freeze all the assets of the arrangement, and thus, put the Petitioner and his affiliates out of business. The court denied them indemnification for legal fees and expenses necessary for the lawyers and experts necessary to show at trial there was no possible injury or ERISA violation. The district court classified payments made for the operation of the trusts as “prohibited transactions,” even though not one penny expended was necessary to fund past, present or future benefits. *See Perez v. Koresko*, 86 F.Supp 3d 293 (E.D. Pa. 2014). The court entered a money judgment for over \$38 million (but immediately declared that \$18,429,747.49 was unpaid). ECF 1149, dated March 13, 2015. The district court then allowed the Secretary to enforce part of that judgment, against a

single individual, by way of contempt of court and imprisonment. ECF 1307 (April 26, 2016); ECF 1311 (May 5, 2016). However, the district court never granted any final judgment to the Secretary of Labor,

c. The courts below allowed the Secretary to enforce a judgment that on its face gave the Secretary no relief. The courts below then allowed the Secretary to put Petitioner into federal prison for 25 months, including eight months of solitary confinement, for alleged contempt of court as a means of enforcing a money judgment that does not anywhere grant the Secretary a dime.

d. This is the first case in which a court has sustained incarceration as “appropriate equitable relief” for purposes of ERISA § 502(a). The decisions below contradict this Court’s jurisprudence that ERISA’s remedies are intended to exclude those not articulated by Congress. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). In an ERISA case, the term “appropriate equitable relief” does not mean “all relief an equity court might give,” but rather, only the relief that was exclusive to courts of equity, like injunction. *Mertens v. Hewitt Associates*, 508 U. S. 248, 256 (1993). “Appropriate equitable” relief does not include any decree seeking money. *Great West Life & Annuity Ins. Co., v. Knudson*, 534 U.S.

204, 213 (2002), or logically, any means of directly or indirectly enforcing one.

e. This is also the first reported case in which a Circuit Court of Appeals has held that a person can be incarcerated for contempt on account of a preliminary order, over a year after issuance of a final order that did not include the preliminary order, in apparent disregard of Rule 65(d), F.R.C.P. In this case, after an initial preliminary injunction dated September 16, 2013, that imposed an asset freeze and displaced Petitioner as fiduciary, ECF 496, the district court subsequently issued three additional pre-judgment orders: ECF 898 (modifying ECF 496); ECF 990 (denying the Secretary's first motion for contempt, allowing Petitioner to show medical cause in lieu of travelling overseas to procure money in a foreign bank account); and ECF 1033 (ordering Petitioner to sign a power of attorney with respect to the foreign bank account in lieu of physical procurement). There is no dispute that Petitioner complied with the orders of District Judge Mary McLaughlin to sign the powers of attorney she demanded. Judge McLaughlin did not incorporate those preliminary orders into the final judgment. A year after the final money judgment, after Judge McLaughlin retired, a new judge (Hon. Wendy Beetlestone) found (without any sworn evidence) that Petitioner violated those pre-judgment orders. The Third Circuit has now

created a split in the Circuits, holding that the new judge could step into the shoes of the retired judge, and find contempt of pre-judgment orders that the retired judge never declared. There is now a split among the Circuits, as to the enforceability of preliminary orders after final judgment. It was universally held, since at least 1903, that preliminary orders are no longer enforceable after issuance of a final judgment. This case eradicates the requirement in Rule 65, F.R.C.P. of specific language in a permanent injunction such that preliminary orders cannot be incorporated by reference

f. The Third Circuit held here that the Secretary did not violate the ban on debtor's prison contained in 28 U.S.C. §2007. Now, in the Third Circuit, a third-party governmental non- creditor can use contempt of court to collect money that is part of a money judgment, so long as a district court ordered turn-over of a particular fund which it also included in the money judgment total. Since 1842, debtor's prison has been illegal in the federal courts of virtually all the states, like Pennsylvania, that abolished imprisonment for debt. Pennsylvania law, which is also incorporated into the limit on post-judgment remedies pursuant to Rule 69(a), F.R.C.P., forbids imprisonment on account of any monetary award rendered pursuant to judgment at law or decree in equity. In this case, the district judge said that "\$1.68 million" of the money judgment could be enforced by

imprisonment because failure to turn it over was violation of a court order. .

Yet, there is no language in any injunction order in the case that ever compelled Petitioner to turn over “\$1.68 million” or other assets the new judge demanded. See ECF 496, 990, 1033, 1134, 1149.

g. The Third Circuit Court sustained the Secretary’s execution activities after the Secretary seized \$50,000 in a garnishment action after it caused Petitioner to be illegally imprisoned. The Third Circuit became the first modern court to embrace the use of imprisonment in aid of collection of a money judgment awarded to somebody else in an ERISA case. Further, the Third Circuit implicitly approved the Secretary’s argument that the Federal Debt Collection Procedure Act, 28 U.S.C. § 3205 allowed the Secretary to collect the \$50,000, even though the Act only permits collection of debts owed to the United States. No other Circuit Court has applied that Act in such a manner. There was no debt to the United States.

h. The courts below rejected the express declaration by this Court in *Turner v. Rogers*, 436 U.S. 431 (2011), that Petitioner was entitled to counsel, pre-incarceration procedures to determine ability to pay, or both as a condition of procedural due process. He got neither, and was condemned to defend himself, pro se, while enduring solitary confinement.

i. In this case, the injuries to Petitioner continue daily, and he will suffer the effects forever without relief from this Court. Not only has the Secretary destroyed Petitioner's career, left him unable to defend his reputation, and caused him to be incarcerated for 25 months, the district court is dissipating the trust corpus and the ability of Petitioner to recover indemnification from every employer, employee and plan involved. These matters are not moot.

GOOD CAUSE FOR EXTENSION

7. The extension of time is necessary because:

a. After the Third Circuit issued its order, Petitioner was again placed into solitary confinement from June 1, 2018 to June 22, 2018. Petitioner did not eat during that period of time, and suffered severe and negative effects on his health as a result. He was not permitted to have a pencil, paper or a typewriter while being held in a concrete room which did not have either running water or a toilet.

b. Petitioner was released from Federal Detention Center – Philadelphia on June 22, 2018, 25 months after being illegally seized on May 5, 2016 in connection with the Secretary's execution activities.

c. Petitioner has been traumatized and suffers continuing effects from the incarceration and solitary confinement. In particular, Petitioner had to receive treatment and testing in the University of Pennsylvania Health System during June and July, 2018 because of extreme and unusual swelling in his legs and feet. Petitioner also needed to have two teeth extracted during three hours of oral surgery in the first week of August, 2018. He has suffered extreme pain and discomfort which has continued for weeks and interrupted his ability to prepare the Petition.

d. Petitioner's mother died on May 31, 2018, and he has been required to attend to family matters and her affairs since his release.

e. An extension would provide Petitioner with additional time to obtain the assistance of counsel for the preparation and filing of its certiorari petition consistent with Petitioner's ability to pay.

f. No meaningful prejudice would arise from an extension.

For the reasons set forth above, Petitioner prays that this Honorable Court grant this request for extension.

Respectfully submitted,



John J. Koresko, V