

No. _____

In The
Supreme Court of the United States

JOHN DUNCAN FORDHAM,

Petitioner,

v.

GEORGIA DEPARTMENT OF
ADMINISTRATIVE SERVICE and
GREAT AMERICAN INSURANCE COMPANY,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

JOHN B. LONG, Esq.
Counsel of Record

THOMAS W. TUCKER, Esq.
Attorneys for Petitioner

Of Counsel:

TUCKER LONG, P.C.
P. O. Box 2426
453 Greene Street (30901)
Augusta, GA 30903
(706) 722-0771
(706) 722-7028 Fax
jlong@tuckerlong.com

QUESTIONS PRESENTED

1. Do funds collected from a defendant under the Mandatory Victims Restitution Act, 18 U.S.C. § 3664, vest in a claimant when received or are such funds subject to recoupment under the Doctrine of Money Had and Received after the issuance of a Presidential Pardon granting a full and unconditional pardon for the conviction, including the restitution amount?
2. Does a Presidential Pardon setting aside a total conviction and a total restitution amount allow claimants who have submitted themselves to the jurisdiction of the United States District Court have the effect of allowing those claimants to retain the funds collected even though in equity and good conscience those funds should be refunded to the defendant?

PARTIES TO THE PROCEEDINGS

Petitioner is John Duncan Fordham. Respondents are the Georgia Department of Administrative Services (GDAS) and Great American Insurance Company (GAIC).

RELATED CASES

John Duncan Fordham v. Georgia Department of Administrative Services, Great American Insurance Company, 2023 WL 5747709 (11th Cir., September 6, 2023).

John Duncan Fordham v. Georgia Department of Administrative Services, Great American Insurance Company, 2023 WL 2616926 (S.D. Ga., March 23, 2023).

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**PETITION FOR A WRIT OF CERTIORARI
OPINIONS BELOW**

The Eleventh Circuit decision is reported at 2023 WL 5747709 (11th Cir., September 6, 2023) and is reprinted in App. 1-7. The District Court order is reported at 2023 WL 2616926 (S.D. Ga., March 23, 2023) and reprinted at App. 8-13.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this matter under 28 U.S.C. § 1254(1) for a Writ of Certiorari from a decision of the United States Court of Appeals for the Eleventh Circuit. The date of the Order sought to be reviewed is September 6, 2023. There have been no petitions for rehearing in the Eleventh Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Article 2, Sec. 2, Para. 1 of the United States Constitution:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power

to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

STATUTORY PROVISIONS

18 U.S.C. § 3663(a)(1)(A):

The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502 or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

18 U.S.C. § 3664:

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the

extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d) (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of

the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f) (1) (A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3) (A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g) (1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j) (1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any

restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil

proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m) (1) (A) (i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including

inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

STATEMENT OF THE CASE

Petitioner was a pharmacist operating a pharmacy in Richmond County, Georgia when the East Central Georgia Community Health Center (CMHC), a federal program receiving federal funds, wanted to outsource the CMHC's pharmacy to a private pharmacist. Fordham agreed to this outsourcing arrangement and operated the CMHC's pharmacy in a profitable manner.

Fordham was asked to pay a finder's fee to an individual who arranged this outsourcing, which Fordham paid. Fordham, along with other individuals, was charged and Fordham was convicted of one count of health care fraud in violation of the Honest Services Statute, 18 U.S.C. § 1347. After his conviction, the district court entered a final order of forfeiture on August 1, 2005 holding that Fordham and his pharmacy, doing business as Duncan Drugs, as well as the other defendants, should be required to pay restitution to each of the respondents, jointly and severally. The parties who were identified as victims submitted a claim claiming all funds paid to Fordham. (App. 47; App. 49-69; App. 70-71). The District Court retained jurisdiction for twenty (20) years for purposes of enforcing its order as permitted by 18 U.S.C. § 3613.

After Fordham's conviction, Fordham's pharmacy was taken over and the District Court appointed Mr. Coleman as Receiver and the Receiver proceeded to sell Fordham's assets. (App. 70-71). Funds that

were paid to Fordham by CMHC, were claimed as restitution under 18 U.S.C. § 3664 by CMHC and its bonding company, GAIC. (App. 49-64; App. 52). After serving approximately five (5) years at a federal correctional camp, Fordham was released and directed by the United States Attorney's Office to pay \$500 per month towards his restitution, which he paid until he was granted a full pardon. The Department of Justice (DOJ) delegates the duties of collecting restitution to the Fraud Litigation Units (FLUs) within each of the ninety-four (94) United States Attorney's Offices.

Subsequent to being released from prison, Fordham's lawyer wrote a letter to President Donald J. Trump requesting a pardon for Fordham based upon this Court's decision in *Skilling v. U.S.*, 561 U.S. 358 (2010). Following the November, 2020 presidential election, a second letter was sent to President Trump again requesting a pardon. On January 19, 2021, President Trump entered an order granting a full and unconditional pardon of Fordham from his conviction and from the \$1,021,888 restitution and the \$100 special assessment.

Fordham had not been given a full accounting as to how his property was disbursed to GDAS and its surety, GAIC, by the U.S. Attorney's Office or the Clerk of Court until the District Court ordered an accounting on June 30, 2022. Once an accounting was furnished showing how funds were disbursed, a demand for the refund of these amounts was made to both

GDAS and GAIC. When the refund of these payments was refused, this action for money had and received was filed.

REASONS TO GRANT THIS PETITION

The decision of the Eleventh Circuit is a decision in conflict with the Tenth Circuit's opinion in *Lorance v. Commandant, U.S. Disciplinary Barracks*, 13 F.4th 1150 (10th Cir. 2021). There, Lorance was given a full and unconditional presidential pardon. Lorance contended that he still had a Petition for Habeas that was viable. Fordham's claims for a refund of money paid should likewise remain viable.

In *Nelson v. Colorado*, 581 U.S. 128 (2017), this Court reversed the Colorado Supreme Court's holding that Plaintiffs Nelson and Madden were not entitled to all the costs, fees and restitution that they had paid after their convictions were reversed or vacated. This Court held that the State was obligated to refund fees, court costs and restitution and held that for the lower court to hold that restitution paid to others is not recoverable offends the guarantee of due process of law guaranteed by the Fourteenth Amendment.

The cases from this Court relied upon by the court below, *Knote v. United States*, 95 U.S. 149 (1877); *Ex Parte Garland*, 71 U.S. 333 (1866); and *Osborn v. United States*, 91 U.S. 474 (1875) are post-Civil

War cases that relied upon a general pardon, not a specific pardon such as that relieving Fordham of a specific conviction, plus a specific sum of \$1,021,888 in restitution, and a \$100 special assessment. In other post-Civil War cases where the owner of the property sold had remained loyal to the United States, *United States v. Padelford*, 76 U.S. 531 (1869); *United States v. Anderson*, 9 Wallace 65, 76 U.S. 56 (1869), this Court held that those parties could recover in the Claims Court the value of the property seized and sold.

Fordham has a viable claim for money had and received which in equity and good conscience GDAS and GAIC should not be allowed to retain. Fordham made a demand for repayment and he has a viable claim for money had and received. GDAS and GAIC will still have a claim and will receive restitution funds from the other defendants whose convictions remain intact.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

This 29th day of November, 2023.

Respectfully submitted,

JOHN B. LONG, ESQ.
Counsel of Record

THOMAS W. TUCKER, ESQ.

Attorneys for Petitioner

Of Counsel:

TUCKER LONG, P.C.
P. O. Box 2426
453 Greene Street (30901)
Augusta, GA 30903
(706) 722-0771
(706) 722-7028 Fax
jl Long@tuckerlong.com