

No. 17-

IN THE
Supreme Court of the United States

PHILIPPE TANGUY, 13500 AIR EXPRESS, L.L.C.,
13500 AIR EXPRESS, L.P. AND PTRE HOLDINGS, L.P.,

Petitioners,

v.

WILLIAM WEST, AS CHAPTER 7 TRUSTEE
OF RICHARD DAVIS, DEBTOR, AND EVA S.
ENGELHART, RECEIVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TEXAS, FIRST DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent West filed suit in the Bankruptcy Court on a promissory note against Petitioners Tanguy and 13,500. App. B; P. 3a-4a, cert. denied 134 S. Ct. 1002 (2014).

Petitioners Tanguy and 13,500, non-creditors in the Bankruptcy proceeding that did not file proofs of claim, filed a counter-claim and demanded a jury trial. *In Re: Davis*, 538 Fed. Appx. 440, cert. denied, 134 S.Ct. 1002 (2014)

The Bankruptcy Judge denied Petitioners' demand for jury trial and signed a judgment in favor of Bankruptcy Trustee West on his claim for breach of contract. App. B; P. 3a-4a.

Later, Respondent West "domesticated" the Bankruptcy judgment in the Harris County District Court under the Uniform Enforcements of Foreign Judgment Act. Texas Civil Practice and Remedies Code Sections 35.001 - 35.008, et seq. App. A; P. 1a-2a.

The State Court granted Respondent West's Motion to Appoint a Receiver and for turnover of Petitioners' property to that Receiver. App. C; P. 9a.

Petitioners, Tanguy, 13,500, and PTRE, appealed those orders to the State Court of Appeals. App. C; P. 9a.

The State Court of Appeals issued a first Opinion on April 28, 2016 in Petitioners' favor reversing the Orders appointing Receiver and for turnover of property. App. C; P. 7a-21a.

Bankruptcy Trustee West sold Petitioner's non-exempt property which had been turned over to the Receiver without the State Court's knowledge, authorization, or approval, while the State Court of Appeal was pending. App. D; P. 29a.

The Court of Appeals in a second Opinion dated October 27, 2016, vacated its prior Opinion in favor of Petitioners on mootness grounds based on Bankruptcy Trustee West's illegal sale in violation of the State Court Receivership's jurisdiction. App. D; P. 29a.

The Supreme Court of Texas denied Petitioners' Petition for Discretionary Review. App. E; P. 32a.

From all of the above, and the authorities hereinafter cited, the following important questions are presented by this Petition:

1. WHETHER ARTICLE III'S PROHIBITION AGAINST THE EXERCISE OF THE DISTRICT COURT'S TRADITIONAL POWERS BY BANKRUPTCY COURTS CAN BE WAIVED BY THE CONDUCT OF THE PARTIES SUCH AS THE FILING OF COUNTER-CLAIMS AGAINST THE TRUSTEE FOR HIS POST-PETITION CONDUCT?
2. WHETHER AN INTENTIONAL ACT OF CONTEMPT OR OTHER INEQUITABLE CONDUCT COMMITTED BY A PARTY CAN SERVE AS GROUNDS TO VACATE AN APPELLATE OPINION UNFAVORABLE TO THAT PARTY UNDER THE MOOTNESS DOCTRINE?

**PARTIES TO THE PROCEEDINGS BELOW
AND RULE 29.6 STATEMENT**

The following list provides the names of all parties to the proceedings below:

Petitioner, Philippe Tanguy, was an Appellant in the Court of Appeals.

Petitioner, 13500 Air Express, L.L.C., was an Appellant in the Court of Appeals. 13500 Air Express, L.L.C. has no parent corporation and no publicly-held company owns 10% or more of its stock.

Petitioner, 13500 Air Express, L.P., was an Appellant in the Court of Appeals. 13500 Air Express, L.P. has no parent corporation and no publicly-held company owns 10% or more of its stock.

Petitioner, PTRE Holdings, L.P., was an Appellant in the Court of Appeals. PTRE has no parent corporation and no publicly-held company owns 10% or more of its stock.

Joe Alfred Izen, Jr. was the attorney representing Appellants in the Court of Appeals and Texas Supreme Court.

Respondent, William G. West, Trustee, is the Chapter 7 Trustee of the bankruptcy estate of Richard D. Davis and was an Appellee in the Court of Appeals.

Joshua Wolfshol of Porter and Hedges, was the attorney representing Respondent West in the Court of Appeals and Texas Supreme Court.

Respondent, Eva S. Engelhart, is the Receiver in the State Court Receivership and was an Appellee in the Court of Appeals.

Lynne Liberato of Haynes and Boone, LLP, was the attorney representing Respondent Engelhart in the Court of Appeals and Texas Supreme Court.

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Petitioners, Philippe Tanguy (“TANGUY”), 13,500 Air Express, L.L.C., 13,500 Air Express, L.P., (“13,500”), and PTRE Holdings, L.P., (“PTRE”) respectfully petition for a Writ of Certiorari to review the Judgment of the Texas Supreme Court.

OPINIONS BELOW

The April 28, 2016 Opinion of the Court of Appeals (App. C; P. 5a-21a) is unpublished. The October 27, 2016 Opinion of the Court of Appeals (App. D; P. 22a-31a) is unreported. The Order of the Texas Supreme Court denying Petition for Review (App. E; P. 32a) is unreported.

JURISDICTION

The Judgment of the Texas Supreme Court was entered on August 25, 2017. This Court enlarged the time within which Petition for Writ of Certiorari could be filed by Petitioners to December 26, 2017, by order of Justice Alito. This Court has jurisdiction to entertain a timely filed Petition for Writ of Certiorari pursuant to 28 U.S.C. §1257.

The notification required by Rule 29.4(b) has been made to the Solicitor General of the United States by providing a copy of this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1 of the Constitution provides:

The judicial Power of the United States shall be vested in one supreme Court, and in such

inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. Art III, 1.

Amendment V of the Constitution provides:

Amendment V. Due process.

U.S. Constitution - Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

Texas Uniform Enforcement of Foreign Judgments Act.

Texas Civil Practice and Remedies Code Section 35.001- 35.008.

Texas Turnover Statute. Texas Civil Practice and Remedies Code Section 31.002(b)(3).

STATEMENT OF THE CASE

A. BANKRUPTCY JUDGE SIGNS JUDGMENT AWARDING BREACH OF CONTRACT DAMAGES WITHOUT ARTICLE III JURISDICTION.

In *Stern v. Marshall*, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) this Court preserved the “separate” powers of the federal judicial branch created by the United States Constitution by holding that Article III of the United States Constitution, providing for creation of the federal judiciary, nullified any Congressional effort to assign non-Article III Bankruptcy Judges judicial authority to preside over certain bankruptcy proceedings involving private, statutory, or common law rights.

Respondent West filed suit against Petitioners Tanguy, and 13500 in the Bankruptcy Court for the Southern District of Texas seeking to collect a debt from Petitioners under a promissory note. The Bankruptcy Court denied Petitioners, Tanguy and 13500’s, demand for jury trial and ultimately entered judgment in favor of Respondent West and against Petitioners, Tanguy and 13500, on Respondent West’s claim for breach of contract. App. D; P. 23a-24a.

**B. RESPONDENT WEST’S SECOND SUIT TO
“DOMESTICATE” RESPONDENT WEST’S VOID
BANKRUPTCY JUDGMENT.**

Respondent West then filed a second suit to “domesticate” the Bankruptcy Judgment with the District Clerk of Harris County, Texas under the Texas version of the Uniform Enforcement of Foreign Judgments Act. (Texas Civil Practice and Remedies Code Section 35.001-35.008 et seq. , App. D; P. 25a-26a).

The Bankruptcy judgment which Respondent West “domesticated” into a State Court judgment under Texas law is void on its face due to the rendering Bankruptcy Judge’s lack of Article III jurisdiction. App. B; P. 2a-4a.

**C. RESPONDENT WEST AND HIS ATTORNEYS
FILE FOR AND THE STATE COURT GRANTS
APPOINTMENT OF A RECEIVER AND
TURNOVER OF PETITIONERS’ PROPERTY.**

After “domesticating” the void Bankruptcy judgment, Respondent West filed motions under Texas state law for appointment of a Receiver and for a turnover of Petitioner Tanguy and 13500’s non-exempt assets to the Receiver. See Tex.Civ.Prac. and Rem.Code Sec. 31.002(b)(3). App. D; P. 25a.

The 270th Judicial District Court of Harris County, Texas appointed Respondent Eva S. Engelhart (“RECEIVER”) as Receiver based on West’s recommendations. App. D; P. 25a-26a.

During the course of the Receivership proceedings which Respondent West's filings created in the Harris County State District Court, Petitioner, PTRE Holdings, L.P., ("PTRE") filed an intervention asserting equitable subrogations claims for money that it had previously advanced Petitioner Tanguy for care and maintenance of part of the property turned over to the Receiver. App. C; P. 8a-9a.

D. PETITIONERS' STATE COURT APPEAL OF RECEIVERSHIP AND TURNOVER ORDERS.

Petitioners appealed the State Court orders appointing a Receiver and directing turn over and sale of the Petitioners' non-exempt property to the State Court of Appeals at Houston, Texas and, thereafter, to the Supreme Court of Texas by Petition for Review. App. C, D, and E.

During the course of the state appeals, the Houston Court of Appeals first reversed the State District Court's orders appointing a Receiver and directing turnover and sale of property and, thereafter, set its first Decision aside and vacated a portion of its first Opinion based on mootness grounds raised by Respondent Engelhart in a Motion for Rehearing. App. C; P. 20a-21a and App. D; P. 31a.

In her Motion for Rehearing, Respondent Engelhart claimed that Respondent West's sale of Tanguy's non-exempt real estate at 1714 Driscoll Street, Houston, Texas at an unauthorized execution sale held by West's attorneys, mooted the issue of whether the order directing the sale of the property as a non-exempt asset of Petitioner Tanguy was legal under state law. App. D; P. 24a.

Acting on Respondent Engelhart's Motion for Rehearing and Alternative Motion to Dismiss, the First Court of Appeals reversed its previous holding that the orders appointing Receiver were illegal and then vacated a portion of its original opinion holding the turnover orders were illegal because it found that Trustee West and his attorneys' illegal sale of Petitioner's Driscoll Street property without the State Court Receivership's approval mooted that issue. App. D; P. 29a-30a.

Petitioners appealed the second Appeals Court Opinion dated October 27, 2016 to the Texas Supreme Court which denied Petition for Review. App. E; P. 32a.

REASONS FOR GRANTING THE PETITION

1. THE BANKRUPTCY COURT JUDGMENT ON WHICH THE RECEIVERSHIP AND TURN OVER ORDERS ARE BASED IS VOID FOR LACK OF ARTICLE III JURISDICTION.

Trustee West based his initial application for a turnover order on an order domesticating a bankruptcy judgment signed by a Bankruptcy Judge of the Southern District of Texas.

The basis of West's Bankruptcy judgment is set out on the face of the Bankruptcy Judgment and proves that the Bankruptcy Judge signed a judgment disposing of Tanguy's common law and statutory private claims and defenses over which that Judge had no Article III jurisdiction under the United States Constitution. (Breach of warranty, breach of contract, fraud, unlawful interference with property, conspiracy, etc.). App. B, P. 3a-4a.

Although a Panel of the Fifth Circuit held that the Bankruptcy Court had constitutional Article III subject matter jurisdiction over Tanguy’s common law and statutory private claims and defenses because Tanguy waived the lack of subject matter jurisdiction by filing a counter-claim in an “unpublished” “non-precedential” opinion. *In Re: Davis* 538 F. Appx. 440, *cert. denied*, 134 S.Ct. 1002 (2014), a later Panel Opinion of the same Court in *In Re: BP RE L.P.*, 735 F.3d 279, 289-290 (5th Cir. 11-11-2013) *aff’d* 744 F.3d 1371 (5th Cir. 2-28-2014) (en banc) changed the law of the Fifth Circuit -- holding that constitutional Article III subject matter jurisdiction cannot be waived by the voluntary or involuntary acts of the parties before the Federal Courts. Taking into account the Fifth Circuit’s earlier opinion in *Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313, 318-319 (5th Cir. 2013) -- which held that a judgment signed by a Bankruptcy Judge disposing of a statutory Texas Deceptive Trade Practices claim was void -- the original Panel in *BP* applied *Frazin’s* reasoning across the board and declared the bankruptcy judgment disposing of the D.T.P.A. claim(s) void:

Comparing the proceedings in *Stern* to those in *Frazin*, the *Frazin* panel reasoned that [t]he court’s concern for separation of powers and the independence of the judiciary is equally as sharp with respect to the state-law counterclaims brought by Frazin as it was with the counter-claim brought by Vickie in *Stern*. Based on the reasoning in the opinion, we see no basis for treating *Frazin’s* state-law counterclaims . . . any differently than the Court treated Vickie’s counterclaim.” *Id.* (footnote

omitted). The court rejected the contention that *Frazin* consented to the bankruptcy court's jurisdiction and waived objection by filing his claims there, observing that when "separation of powers is implicated in a given case, the parties cannot by consent cure the constitutional difficulty. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.*, at 320 n. 3 (quoting *Schor*, 478 U.S. at 850-51, 106 S.Ct. 3245) (brackets in *Frazin*). "Thus, structural concerns cannot be ameliorated by *Frazin's* consent or waiver." *Id.*

To determine whether the DTPA claim could be finally ruled upon by the bankruptcy court, *Frazin* employed "the test from *Stern* to determine whether any of these counterclaims would necessarily have been resolved" in the claims-allowance process." *Id.* at 320 (footnote omitted). The court answered that question in the negative "[b]ecause it was not necessary to decide the DTPA claim to rule on the Attorneys' fee applications," *id.* at 323, such fee applications being matters that were properly before the bankruptcy court for final judgment under *Stern*.

Just three months later in *IN RE BP RE, L.P.*, 744 F.3d 1371 (5th Cir. 2-28-2014) (en banc), the whole Fifth Circuit, voting en banc, upheld the "alteration" wrought by the Panel Opinion in BP I and confirmed that in the

Fifth Circuit Bankruptcy Judges may not sign judgments disposing of common law and statutory claims and defenses and that the Bankruptcy Court's lack of constitutional Article III subject matter jurisdiction cannot be waived by the acts of the parties.

The domesticated Texas State Court judgment issued by the Clerk of the Trial Court, which is based on West's void bankruptcy judgment, is likewise void due to lack of Article III subject matter jurisdiction.

Petitioners Tanguy and 13500 did not file any Proofs of Claim in the Davis bankruptcy in which they were sued by Trustee West. PTRE, a third party, did not participate in the bankruptcy proceeding at all and its intervention claims are not barred by any judgment issued against Petitioner Tanguy in his individual capacity. A void judgment can be collaterally attacked at any stage of the legal proceedings. See *Scheel v. Alfaro*, 406 S.W.3d 216, 224 (Tex.App.-San Antonio 2013). *Stewart v. USA Custom Paint and Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994).

An attack on a void judgment can be brought at any time. A turnover order which is based on a void judgment is, itself, void.

The U.S. Supreme Court in *Stern v. Marshall*, 564 U.S. ____; 131 S.Ct. 2894; 180 L.Ed.2d 475 (2011) held that Bankruptcy Judges had no jurisdiction to sign bankruptcy judgments deciding common law and statutory private claims because they lacked the required power of Article III Judges under the United States Constitution.

Although the Supreme Court of the United States in its later decision in *Executive Benefits Insurance Agency v. Arkinson*, No. 12-2000 134 S.Ct. 2165, 139 L.Ed.2d 83, 82 USLW 4450, did not specifically address the issue of whether lack of Article III subject matter jurisdiction by the Bankruptcy Court could be waived by any action of the parties before it and “left that issue for another day,” the current law of the Fifth Circuit, changed by that Court’s en banc opinion in *BP* renders West’s domesticated bankruptcy judgment and the Trial Court’s Turnover Order(s) void due to manifest change in constitutional law. This Court noted the conflict in the circuits in its *Executive Benefits* opinion which failed to reach that ground.

Res judicata and collateral estoppel cannot save West’s bankruptcy judgment. Where a “manifest change in constitutional law” -- including those affecting the subject matter jurisdiction of the Federal or other Courts -- occurs between the first judgment and the second judgment, the party filing the claims addressed and disposed of by the second judgment is not barred where the alteration and change in constitutional law renders the first judgment void. This rule, applicable under both federal as well as Texas State Court precedent, was described by the US Supreme Court in *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 160, 65 S.Ct. 573, (1945):

We are advised that appellant has pending in the Wisconsin courts another suit in respect to the license year commencing May 1, 1944. Wisconsin has the familiar rule that though the validity of the law in question might have been determined in an earlier suit, the prior judgment is not res judicata where the second

suit is on a different cause of action in absence of evidence to show that the question was actually presented to the court and decided in the earlier litigation. *Wentworth v. Racine County*, 99 Wis. 26, 31, 74 N.W. 551; *Grunert v. Spalding*, 104 Wis. 193, 213-214, 79 N.W. 606, 80 N.W. 589; *Lindemann v. Rusk*, 125 Wis. 210, 237, 104 N.W. 119. *But if that principle is inapplicable here it is nevertheless the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation.* 2 *Freeman on Judgments* (5th ed. 1925) 713; *Blair v. Commissioner*, 300 U.S. 5, 9; *West Coast Life Ins. Co. v. Merced Irrigation Dist.*, 114 F.2d 654, 662; *In re Pomeroy*, 51 Mont. 119, 151 P. 333; *Hurd v. Albert*, 214 Cal. 15, 26, 3 P.2d 545. We cannot find that Wisconsin has a different rule.

The Texas Supreme Court in *Marino v. State Farm Fire & Cas. Ins. Co.*, 787 S.W.2d 948, 949-950 (Tex. 1990) adopted the same federal rule the U.S. Supreme Court set out in *Duel* as Texas law:

Our past decisions do make clear, however, that a judgment in one suit will not operate as res judicata to a subsequent suit on the same question between the same parties “where, in the interval, the facts have changed, or new facts have occurred which may alter the legal rights or relations of the parties.” *City of Lubbock v. Stubbs*, 160 Tex. 111, 327 S.W.2d

411, 414 (1959); *Cowling v. Colligan*, 158 Tex. 458, 312 S.W.2d 943, 947 (1958) (a judgment is res judicata “only of present and not future conditions”). Texas courts have since broadened this rule to apply to situations where a change in statutory law or decisional law has taken place. See, e.g., *Powell v. Powell*, 703 S.W.2d 434, 436 (Tex.App.-Waco 1985, writ ref’d n.r.e.); *Colorado County Federal Sav. & Loan Ass’n v. Lewis*, 498 S.W.2d 723, 731 (Tex.Civ. App. - Austin 1973, writ ref’d n.r.e.); see also *Murchard v. Berenson*, 307 F.2d 368, 369-70 (5th Cir.1962), cert. denied, 371 U.S. 962, 83 S.Ct. 541, 9 L.Ed.2d 509 (1962). *These cases follow the well-accepted rule that res judicata is not a defense in a subsequent action if there has been a change in the material facts, the applicable statutory law, or the decisional law between the first judgment and the second suit.* [fn1] The rationale underlying this rule is that no judgment can affect subsequently arising rights and duties. See 2 *Freeman on Judgments* (5th ed. 1925) Sec. 713; *Wagner*, 64 So.2d at 268; *Blevins*, 344 S.W.2d at 377; *Lasasso*, 63 A.2d at 528; *Mullane*, 199 N.E. at 625.

See *Marino* at fn 1. Citing *Duel* at P. 162.

(General rule is that res judicata is no defense “where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation.”)

When West filed in the Texas State Court to domesticate his judgment, he initiated a new suit (second suit). The new suit was an action to enforce a constitutionally void bankruptcy judgment. The Fifth Circuit's decision in *BP* "altered" and "changed" the constitutional law and rendered the bankruptcy judgment void. Neither *res judicata* nor collateral estoppel can save West's void judgment. This Court should hold that the State Court Turnover Orders are void because they are based on a State Court judgment which, in turn, is based on a bankruptcy judgment which is void for lack of constitutional Article III subject matter jurisdiction. The only proper action for this Court is to dismiss since Respondent West's Bankruptcy Judgment is void.

**2. AN ACT OF CONTEMPT COMMITTED BY
BANKRUPTCY TRUSTEE WEST CANNOT
SERVE AS A BASIS FOR A "MOOTNESS"
DISMISSAL OF PETITIONERS' APPEAL.**

Receivership property is in *custodia legis*. Sale of Receivership property must be authorized by Order of the Receivership Court. See *Pratt v. Amrex, Inc.*, No. 04-11-00119-CV. (Tex. App.,[San Antonio - 4th Dist.] 2011)(m.o.):

When the Receiver deeded the Uvalde property to the receivership estate, the property was placed in *custodia legis*. Property held in *custodia legis* is "in the custody of the law." BLACK'S LAW DICTIONARY 783 (8th ed. 2004). No one, even a lienholder under a prior deed of trust, has authority to sell property held in *custodia legis* by a court-appointed receiver, unless the court in which the receivership is

pending authorizes the sale. *First S. Props., Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976). Any sale or transfer of property in violation of this rule is void as a matter of law. *Id.* at 342.

The Federal Courts have consistently followed the same rule and hold that a creditor's sale of Receivership property is an illegal act punishable by contempt.

The State Court of Appeals Opinion under review here speculated, that Tanguy "...always wanted..." West's illegal act of contempt and relied on Bankruptcy Trustee West's illegal sale of Petitioner's property in violation of the State Receivership Court orders, a fact outside of its own appellate record and brought to the Court of Appeals' attention by the Respondent Receiver's Motion to Vacate its first Opinion, as a basis for mootness dismissal.

This Court admonished all others in our bilateral Federal Legal System under which State Courts must decide Federal and Constitutional issues as follows:

Equitable principles have always been implicit in this Court's exercise of the vacatur power, and the principal equitable factor to which the Court has looked is whether the party seeking vacatur caused the mootness by voluntary action. Where mootness results from settlement, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the extraordinary equitable remedy of vacatur. It is irrelevant that the party who won below also agreed to the settlement, since

it is the losing party who has the burden of demonstrating equitable entitlement to vacatur. This result is supported by the public interest in the orderly operation of the federal judicial system; petitioner's countervailing policy arguments are not persuasive.

See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994)

Both Bankruptcy Trustee West, his Counsel, and the Receiver, if complicit in the illegal sale, had UNCLEAN HANDS and were not entitled to vacature of the Court of Appeals' Original Opinion that favored Petitioners. If a nonprevailing party's voluntary act that creates mootness disqualifies that party from obtaining the equitable relief of mootness dismissal, how much more disqualifying is a party's wilful act of misconduct such as the illegal sale in this case?

The record supports the conclusion that West's illegal sale was a ploy to deprive the Appeals Court of jurisdiction. Such intentional misconduct should disqualify the plotters from any entitlement to a "mootness" vacature of an Appeals Court's opinion. See *Ind. v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1214 (10th Cir., 2015).

While this Court has never recognized a constitutional due process right to an appeal in criminal and civil cases, this Court has recognized that once a party prevails on an appellate opinion, that decision cannot be vacated on mootness grounds voluntarily created by the party that seeks mootness dismissal.

Whether an illegal immigrant races to obtain what may be an illegally-funded abortion before the legal propriety of the lower Court decision can be determined or, as here, a Bankruptcy Trustee sells Receivership property without Court authorization and without bothering to wait for the determination of the legality of the Receivership and the propriety of the turnover of property to the Receiver, the goal is the same -- to evade appellate review under the judicial process.

Both the illegal immigrant that obtained a taxpayer-funded abortion and Bankruptcy Trustee West who illegally sold state Receivership property, committed voluntary acts. While the accelerated abortion evaded review by enforcing the lower Court's order before this Court could determine its illegality, Respondent West's action, on the other hand, was clearly contrary to law when committed and required no appellate review to establish its illegality.

If a party can intentionally commit an illegal act in order to obtain a dismissal of an unfavorable appellate opinion under the mootness doctrine, then the Courts, including this one, have lost control of judicial review under the appellate process.

Although it has not ruled on this precise point presented by West's conduct, this Court has recognized an exception to the mootness doctrine under which mootness cannot serve as a grounds for dismissal of an appeal where an illegal act has been committed simply because the guilty party disclaims any intent to continue to commit such acts in the future. The voluntary cessation of allegedly illegal conduct does not deprive a tribunal of power to hear and determine the case i.e. does not make

the case moot. See 40 164 *DeFunis v. Odegaard*, 8212 235, 416 U.S. 312, 318, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

This Court's rationale in *DeFunis* is analogous to the mootness issue presented by this Petition. Both *DeFunis* and this case involve commission of illegal acts. *DeFunis* and its predecessor authorities allow the Court to proceed to determine illegality of an act and prevent a mootness dismissal and evasion of review where an act is claimed to be illegal, but the illegality of such act has not been finally determined on appeal. This Court should grant certiorari in this case and set a bright line rule holding that the intentional commission of an illegal act cannot serve as a means to evade review of an illegal act or to strip a party of the benefits of an already-decided appellate opinion.

Anything else will encourage commission of illegal acts calculated to evade unwanted juridical review and undermine both the accuracy and fairness of our appellate process.

Without such a rule promulgated by this Court, the appellate judicial process has no adequate control over the mootness doctrine and it can be manipulated, as it was in the current case, to prevent appellate review of illegal conduct.

The sense of unfair treatment felt by victims of inadequate procedure is precisely the sort of individual harm that constitutional rights and judicial review are meant to protect against.

See *Carey v. Pitkins*, 435 U.S. 247, 262 (1968). See also *Douglas Laycock*. Due Process and Separation of Powers: The effort to make the Due Process Clause non-justiciable, 60 Tex.L.Rev. 875, 887 (1982).

CONCLUSION

This Petition for Writ of Certiorari should be granted. The Court should enter judgment dismissing this case based on lack of Article III jurisdiction in the underlying judgment on which these proceedings were based.

In the alternative, this Court should issue an order directing the Supreme Court of Texas and the Court of Appeals for the First Supreme Judicial District of Texas to vacate their opinions and judgments to the extent those Opinions and Judgments were based on mootness grounds.

Respectfully submitted,

JOE ALFRED IZEN, JR.

Counsel of Record

5222 Spruce Street

Bellaire, Texas 77401

(713) 668-8815

jizen@comcast.net

Counsel for Petitioners

APPENDIX

**APPENDIX A — LETTER FROM PORTER
HEDGES LLP TO CHRIS DANIEL, HARRIS
COUNTY DISTRICT CLERK, FILED
NOVEMBER 8, 2013**

**PORTER
HEDGES LLP**

November 8, 2013

Chris Daniel
Harris County District Clerk
201 Caroline, Suite 420
Houston, Texas 77002
Filed November 8, 2013

Re: *William G. West, Trustee v. Philippe
Tanguy, 13,500 Air Express, LLC, and
13,500 Air Express, LP (In re Richard
Davis)*, Adversary No. 09-3096, in the
United States Bankruptcy Court for the
Southern District of Texas

Dear Mr. Daniel:

Enclosed are the following documents in the above-
referenced matter:

1. An authenticated copy of the Judgment entered
in *William G. West, Trustee v. Philippe Tanguy,
13,500 Air Express, LLC, and 13,500 Air Express,
LP (In re Richard Davis)*, in the United States
Bankruptcy Court for the Southern District of
Texas, Adversary No. 09-3096 to be filed with
the Harris County District Court;

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Appendix A

2. The original and two (2) copies of the Affidavit of Names and Addresses;
3. A check in the amount of \$247.00 to cover your fee for domestication of the Bankruptcy Court Judgment

Please stamp the copies your file mark to acknowledge receipt and return them to the undersigned.

If you have any questions regarding these documents do not hesitate to call my office.

Sincerely,

/s/
Joshua W. Wolfshohl

3a

**APPENDIX B — JUDGMENT OF THE UNITED
STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON
DIVISION, FILED MARCH 30, 2010**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 07-33986-H3-7
ADV. NO. 09-3096

IN RE

RICHARD DAVIS,

Debtor,

WILLIAM G. WEST, TRUSTEE,

Plaintiff,

v.

PHILIPPE TANGUY, 13,500 AIR EXPRESS, L.L.C.,
AND 13,500 AIR EXPRESS, L.P.,

Defendants.

JUDGMENT

Based on the separate Memorandum Opinion signed
this same date, it is

4a

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ORDERED that Defendants are liable to Plaintiff, jointly and severally, in the amount of \$1,183,090.80 for principal and interest, plus \$31,180.75 for attorney fees. It is further

ORDERED that this amount bears interest at the applicable federal rate of 0.42% from fourteen days after the date of entry of this Judgment.

Signed at Houston, Texas on March 30, 2010.

/s/
LETITIA Z. PAUL
UNITED STATES BANKRUPTCY
JUDGE

5a

**APPENDIX C — OPINION OF THE COURT OF
APPEALS, FIRST DISTRICT OF TEXAS, DATED
APRIL 28, 2016**

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

NO. 01-14-00455-CV

PHILLIPPE TANGUY, 13500 AIR EXPRESS,
L.L.C. AND 13500 AIR EXPRESS, L.P., AND PTRE
HOLDINGS, L.P.,

Appellants

v.

WILLIAM G. WEST, AS CHAPTER 7 TRUSTEE
OF RICHARD DAVIS, DEBTOR, AND EVA S.
ENGELHART, RECEIVER,

Appellees

Appeal from the 270th District Court of Harris
County. (Tr. Ct. No. 2013-67779).

This case is an appeal from the appealable orders signed by the trial court on April 25, 2014, May 30, 2014, and October 10, 2014. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there was reversible error in the trial court's orders. Accordingly, the Court **reverses** the trial court's orders and **remands** the case to the trial court for further proceedings.

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The Court **orders** that the appellees, William G. West, as Chapter 7 Trustee of Richard Davis, Debtor, and Eva S. Elgelhart, Receiver, jointly and severally, pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered April 28, 2016.

*Appendix C***OPINION**

After the trial court domesticated a foreign judgment against appellants Philippe Tanguy, 13500 Air Express, LLC, and 13500 Air Express, L.P., it entered several orders that (1) appointed a receiver; (2) ordered appellants to turn over property to satisfy the judgment; and (3) authorized the receiver to sell certain property. On appeal, appellants collaterally attack the judgment that was domesticated and directly attack the post-domestication orders entered by the trial court. We reverse and remand.

BACKGROUND

In 2007, Richard Davis filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and appellee, William G. West [“the Trustee”], was named the Chapter 7 Trustee. West filed an adversary proceeding against appellant, Philippe Tanguy, and two businesses owned and operated by him, Air Express, LLC and Air Express, LP [collectively, “appellants”], based on a promissory note that appellants had issued to Davis in conjunction with the purchase of an airplane, which had since become a part of Davis’s bankruptcy estate. The Bankruptcy Court entered a judgment in favor of the Trustee in the amount of \$1,183,090.80 for the principal and interest on the note, plus \$31,180.75 in attorney’s fees. *See West v. Tanguy (In re Davis)*, Bankruptcy No. 07-33986-H3-7, 2010 Bankr. LEXIS 1072, 2010 WL 1330232 (Bankr. S.D. Tex. Mar. 30, 2010).

Appellants appealed to the U.S. District Court, which (1) concluded that *Stern v. Marshall*, 564 U.S. 462, 131 S.

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Ct. 2594, 180 L. Ed. 2d 475 (2011)¹ was not applicable to the appeal, (2) affirmed the Bankruptcy Court’s opinion and dismissed the appeal; and (3) assessed fees and costs against appellants for filing a frivolous appeal. *See Tanguy v. West (In re Davis)*, No. H-10-1194, 2012 U.S. Dist. LEXIS 95785, 2012 WL 2871662 (S.D. Tex. July 10, 2012).

Appellants appealed to the Court of Appeals for the U.S. Fifth Circuit, which (1) held that *Stern* did not apply, and the bankruptcy and district courts had both properly exercised jurisdiction, and (2) affirmed the district court’s judgment and adopted its analysis in full; appellants’ subsequent petition for certiorari to the United States Supreme Court was denied. *See Tanguy v. West*, 538 F. App’x 440 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1002, 187 L. Ed. 2d 851 (2014).

The Trustee then domesticated the federal court’s judgment in the 270th District Court of Harris County. *See, e.g., Tanner v. McCarthy*, 274 S.W.3d 311, 318-20 (Tex. App.—Houston [1st Dist. 2008, no pet.] (holding that foreign judgment that may be domesticated under Chapter 35 of Texas Civil Practices and Remedies Code includes judgment of federal court located in Texas). PTRE Holdings, L.P. [“PTRE”] intervened seeking to

1. *Stern* held that the bankruptcy court lacked subject matter jurisdiction over counterclaims asserted by the bankruptcy estate against a creditor when the claim is a “state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor’s proof of claim in the bankruptcy.” 564 U.S. at 487, 131 S. Ct. at 2611. Instead, such claims had to be resolved by an Article III court. *Id.*

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recover money it paid to Tanguy for mortgage payments on and improvements to real property located at 1714 Driscoll Street, Harris County, Texas.

The trial court entered three orders complained of on appeal. On April 25, 2014, the trial court signed an Order Granting Turnover and Appointing Receiver and Master, which appointed Eva Engelhart as the Receiver [“the Receiver Order”], and also made her master in chancery. On May 30, 2014, the trial court signed an Order to Compel Turnover of Non-Exempt Real Estate [“the Turnover Order”], specifically, the real property located at 1714 Driscoll Street. And, on October 10, 2014, the trial court entered its Third Amended Order to Sell Property at 1714 Driscoll Street. [“the Sale Order”].

On appeal, appellants challenge these three orders, contending that:

- (1) The bankruptcy court judgment on which the trial court’s orders were based is void for lack of Article III subject matter jurisdiction under the United States Constitution, is subject to collateral attack, and requires dismissal.
- (2) Real property subject to execution and sale by ordinary legal process cannot serve as a basis for a turnover order appointing a receiver. The credit against judgment to be received by the judgment debtor for the sale of such property cannot be reduced by receiver broker fees and costs.

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- (3) The [Receiver Order] failed to specifically describe any property to be turned over and must be reversed.
- (4) The [Receiver Order, Turnover Order, and Sale Order] are not supported by any proof that the debtors (Tanguy, 13500 Air Express, LLC and 13500 Air Express, LP) own any non-exempt property which is not subject to sale by ordinary legal process.
- (5) The [Receiver Order, Turnover Order, and Sale Order] are not supported by legally or factually sufficient evidence that the debtors (Tanguy, 13500 Air Express, LLC and 13500 Air Express, LP) own any non-exempt property which is not subject to sale by ordinary legal process.
- (6) Appellants, Tanguy, 13500 Air Express, LLC and 13500 Air Express, LP and [Intervenor] PTRE Holdings, L.P., were entitled to a Jury Trial on the contested fact issues raised by their answer, counterclaim, and intervention petition.
- (7) The trial court's [Receiver Order, Turnover Order, and Sale Order] appointing the receiver a master, appointing a biased receiver, and awarding a 25% receiver's fee without proof of reasonableness were an abuse of discretion.

*Appendix C***COLLATERAL ATTACK ON
BANKRUPTCY JUDGMENT**

In their first issue on appeal, appellants contend that the bankruptcy court judgment is void, and that, therefore, the domesticated judgment is likewise void. Specifically, appellants claim that the “Bankruptcy Judge signed a judgment disposing of Tanguy’s common law and statutory private claims and defenses over which that Judge had no Article III jurisdiction under the United States Constitution.”

However, appellants raised this jurisdictional argument both in the U.S. District Court and on appeal to the U.S. Court of Appeals for the Fifth Circuit, where the issue was resolved against them. *See In re Davis*, 538 F. App’x. at 443 (“We are unpersuaded by Tanguy’s argument that neither the bankruptcy court, the district court, nor this Court have subject matter jurisdiction over these proceedings . . .”). When a federal court has decided the question of its jurisdiction as a contested issue, a state court has no power, in the absence of allegations of fraud, to inquire again into such question. *See Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S. Ct. 134, 138, 83 L. Ed. 104 (1938); *see also Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1052-53 (5th Cir. 1987).

Because the issue of the bankruptcy court’s jurisdiction was fully tried in the federal courts, the issue cannot be retried here. *See Stoll*, 305 U.S. at 172, 59 S. Ct. at 138; *see also Durfee v. Duke*, 375 U.S. 106, 111-12, 84 S. Ct. 242, 245, 11 L. Ed. 2d 186 (1963) (applying *Stoll* even

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when jurisdiction was fully litigated in sister state court rather than federal court); *Baker & Taylor Drilling Co. v. Amend*, 438 S.W.2d 144, 149 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.) (refusing to address issue of federal court's jurisdiction when that issue had been decided by both federal district court and federal court of appeals). As such, appellants' collateral attack on the bankruptcy court's judgment fails.

We overrule appellants' first issue on appeal.

COMPLIANCE WITH TURNOVER STATUTE

In four related issues on appeal, appellants contend the trial court abused its discretion in entering the Receiver Order, the Turnover Order, and the Sale Order.

We review the entry of a turnover order for an abuse of discretion. *Tanner v. McCarthy*, 274 S.W.3d 311, 320 (Tex. App.—Houston [1st Dist.] 2008, no pet.). A turnover order is proper if the conditions of the turnover statute, Texas Civil Practice and Remedies Code section 31.002, are met. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (West 2015); *Tanner*, 274 S.W.3d at 322. The trial court “must have some evidence before it that establishes that the necessary conditions for the application of 31.002 exist.” *Tanner*, 274 S.W.3d at 322.

Section 31.002(a) provides:

- (a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through

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injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

- (1) ***cannot readily be attached or levied on by ordinary legal process***; and
- (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (emphasis added).

Once the predicate showing is made under section 31.002(a), the trial court may grant relief under 31.002(b) as follows:

- (1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;
- (2) otherwise apply the property to the satisfaction of the judgment; or
- (3) appoint a receiver with the authority to take

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possession of ***the nonexempt property***, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

Id. § 31.002(b) (emphasis added).

Appellants contend that the Receiver Order, and the subsequent orders based thereon, were erroneously entered because there was no evidence that ***each*** piece of property that the receiver later sought to have turned over could not have been readily attached or levied on by ordinary legal process. Specifically, appellants claim that all three orders, as they relate to the house at 1714 Driscoll Street, are erroneous because 1714 Driscoll Street is real property located within Texas, and, as such, may be readily attached or levied on by ordinary legal process. *See Suttles v. Vestin Realty Mortg. I, Inc.*, 317 S.W.3d 412, 418 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Appellant’s counsel indicated to the trial court that he would prefer to sell the property by ordinary legal process, i.e., a sheriff’s sale, because he believed his clients would recover more money to go toward the judgment if they did not have to pay a receiver’s fee or a broker’s fee.

In response, the Trustee contends that once the predicate set forth in 31.001(a) is met by showing that the judgment debtor has ***any*** non-exempt property that cannot be readily attached or levied on by ordinary legal process, then the court can grant the relief in section 31.002(b) as to ***all*** non-exempt property the debtor may have, even property that ***can*** be readily attached or levied

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on by ordinary legal process. The Trustee does not claim that the real property at 1714 Driscoll Street could not have been readily attached or levied on by ordinary legal process. Instead, it claims that it did not have to make such a showing. Specifically, the Trustee claims that once it showed **any** non-exempt property that could not be readily attached or levied on—here, an airplane in Georgia and accounts receivable in connection with rental income—the receiver was entitled to require the judgment debtor to turn over **all** non-exempt property, including 1714 Driscoll Street, which the parties agree is property that could be readily attached and levied on.

In the trial court, before signing the Turnover Order, the parties discussed the issue raised in this appeal as follows:

[Appellants' counsel]: We believe—we believe that the turnover statute does not allow a Receiver to sell property that's nonexempt that is subject to legal process, and we believe that they are—and this specific property was not mentioned. This is generally all the property in the first receivership order.

. . . . The question is, if the Debtor has one nonexempt piece of property that's not subject to legal process, does that mean the Receiver gets to sell all the property?

[Trial court]: That's been my general experience, yeah.

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[Appellants' counsel]: Some of which is nonexempt and is subject to legal process? That's the only reason why I'm down here.

[Trial court]: That's my general understanding, yeah.

There is substantial authority holding that property may be subject to a turnover order if (1) the judgment debtor owns the property, (2) the property is property that a creditor cannot readily attach or levy by ordinary process, and (3) the property is not exempt. *See Holland v. Alker*, No. 01-05-00666-CV, 2006 Tex. App. LEXIS 3125, 2006 WL 1041785 (Tex. App.—Houston [1st Dist.] Apr. 20, 2006, pet. denied); *Europa Intern., Ltd. v. Direct Access Trader Corp.*, 315 S.W.3d 654, 656 (Tex. App.—Dallas 2010, pet. denied); *Black v. Shor*, 443 S.W.3d 170, 175 (Tex. App.—Corpus Christi 2013, no pet.); *see also Schultz v. Fifth Judicial District Court of Appeals*, 810 S.W.2d 738 (Tex. 1991) (“The statute requires a factual showing that the judgment debtor has non-exempt property that is not readily subject to ordinary execution . . . Upon proof of the necessary facts, it authorizes the trial court to order affirmative action by the judgment debtor and others to assist the judgment creditor in subjecting such non-exempt property to satisfaction of the underlying judgment.”); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991) (characterizing the turnover statute as “the procedural device by which judgment creditors may reach assets of a debtor that are otherwise difficult to attach or levy on by ordinary legal process”). Similarly, a factual showing that the judgment debtor has property

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that is not readily subject to ordinary execution is of particular importance in applying 31.002. *See Main Plain Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 628 (Tex. App.—Fort Worth 2006, pet. denied).

However, the Trustee provides no authority, and we can find none, to support the expansive reading of section 31.002 that he urges. We find not one case in which a court has allowed the turnover of non-exempt property that is, without dispute, readily subject to attachment or levy by ordinary process simply because the judgment creditor had other non-exempt property that was not. The supreme court has recognized that “[t]he purpose of the turnover statute is to give courts the power to satisfy a judgment by reaching the judgment debtor’s property that cannot be attached or levied on by ordinary procedures.” *Ex parte Swate*, 922 S.W.2d 122, 125 (Tex. 1996).

In interpreting a statute, we focus not on isolated words or phrases, but on the statute as a cohesive, contextual whole. *Tex. Student Housing Auth. v. Brazos Cty. Appraisal Dist.*, 460 S.W.3d 137, 141 (Tex. 2015). The full context of section 31.002 makes evident that “the nonexempt property” referenced by section 31.002(b)(3) and subject to disposition through receivership is the same nonexempt property previously referenced by the predicate laid in section 31.002(a), that is, nonexempt property that “cannot readily be attached or levied on by ordinary legal process.” This accords with the interpretive principle *ejusdem generis*, which provides that “when words of a general nature are used in connection with the designation of particular objects or classes of persons or

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things, the meaning of the general words will be restricted to the particular designation.” *Hilco Elec. Co-op. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003) (citing *Carr v. Rogers*, 383 S.W.2d 383, 387 (Tex. 1964)).

Thus, to the extent that the orders complained of in this appeal require appellants to turn over the real property located at 1714 Driscoll Street—property which even the Trustee admits can be readily attached or levied on by ordinary legal process, and there being no evidence to the contrary—the orders are an abuse of discretion. Accordingly, we sustain issues two, four, and five. We reverse the orders and remand for further proceedings. Having found reversible error, we need not address the remaining issue three regarding the sufficiency of the Receiver Order, and decline to do so. *See* TEX. R. APP. P. 47.1.

RIGHT TO JURY TRIAL

In issue six, appellants and the intervenor, citing *Steenland v. Tex. Commerce Bank N.A.*, 648 S.W.2d 387, 390 (Tex. App—Tyler 1983, writ ref’d n.r.e).² contend that they were entitled to a jury trial because there was a fact issue as to whether the real property at 1714 Driscoll Street was “not subject to sale under ordinary legal process.” The Trustee responds that no jury trial is available in receivership proceedings. We need not decide the issue because, in this case, there is no fact issue. This

2. In *Steenland*, the Tyler Court of Appeals held that the judgment debtor was entitled to a jury trial to determine the excess nonexempt value of his homestead. 648 S.W.2d at 390.

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Court has held that real property in Texas, as a matter of law, is subject to sale under ordinary process, stating:

Real property in Texas may be attached. *See* TEX. R. CIV. P. 593 (writ of attachment “shall be directed to the sheriff or any constable within the State of Texas” and “shall command him to attach and hold . . . the property of the defendant . . . as shall be found within his county”); *see also Pillitteri v. Brown*, 165 S.W.3d 715, 722 (Tex. App.—Dallas 2004, no pet.) (noting real property outside of Texas is subject to turnover order because “ordinary legal process by which property is attached or levied upon” is writ and writ directs “a sheriff or constable in the State of Texas . . . to attach and hold the defendant’s property as shall be found within his county”). Because the Victoria County property is real property located within Texas, it may be readily attached or levied on by ordinary legal process. *See* TEX. R. CIV. P. 593, 639; *see also Pillitteri*, 165 S.W.3d at 722. Thus, the requirements of the turnover statute are not met. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a)(1) (providing turnover order available if judgment debtor owns property that “cannot be attached or levied on by ordinary legal process”).

Suttles, 317 S.W.3d at 417-18.

There being no fact issue regarding whether the real property at 1714 Driscoll Street was subject to attachment

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by ordinary legal process, the trial court did not err in denying a jury trial.

We overrule issue six.

APPOINTMENT OF MASTER IN CHANCERY

In issue seven, appellants contend the Receiver Order, the Turnover Order, and the Sale Order are abuses of discretion because, in the Receiver Order the trial court also gave the receiver the powers of a master in chancery. However, this Court has held that we have no appellate jurisdiction to consider an order appointing a master in chancery, even when such order is embedded within a turnover-and-receivership order. *See Sheikh v. Sheikh*, 248 S.W.3d 381, 394 (Tex. App.—Houston [1st Dist.] 2007, no pet.) We note, as this Court did in *Sheikh*, that, inasmuch as we have reversed the orders complained of, the trial court, on remand, may reconsider whether the receiver should also be appointed master in chancery. *See id.* at 394-95.

We dismiss issue seven for lack of jurisdiction.

CONCLUSION

We reject appellants' collateral attack on the bankruptcy court judgment, and we have no jurisdiction to address on appeal appellants' complaints about the order appointing a master in chancery. However, because the trial court's orders compelled the turnover of real property located in Texas, which, by definition, *can* be

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readily be attached or levied on by ordinary legal process, those orders constitute an abuse of discretion. Accordingly, we reverse the Receiver Order, the Turnover Order, and the Sale Order, and remand for further proceedings. We express no opinion as to whether appellants' possess other property that meets the requirements of the turnover statute, as that issue is not before us in this appeal. *See* TEX. R. APP. P. 47.1.

/s/

Sherry Radack
Chief Justice

**APPENDIX D — OPINION OF THE COURT
OF APPEALS, FIRST DISTRICT OF TEXAS,
DATED OCTOBER 27, 2016**

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

NO. 01-14-00455-CV

PHILLIPPE TANGUY, 13500 AIR EXPRESS,
L.L.C. AND 13500 AIR EXPRESS, L.P.,
AND PTRE HOLDINGS, L.P.,

Appellants

v.

WILLIAM G. WEST, AS CHAPTER 7 TRUSTEE
OF RICHARD DAVIS, DEBTOR, AND EVA S.
ENGELHART, RECEIVER,

Appellees

October 27, 2016, Opinion Issued

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2013-67779.

OPINION

Appellee, Eva S. Engelhart, has filed a motion
to dismiss, or, alternatively, a motion for rehearing,

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contending that, while on appeal, this case has become moot. Appellants, too, have filed a motion for rehearing. We agree that certain issues in the case have been rendered moot since this Court's opinion was issued on April 28, 2016. Accordingly, we grant the motion to dismiss in part, withdraw our previous opinion and judgment, and issue this opinion and judgment in their stead. In light of our new opinion, we deny both parties' motions for rehearing as moot. *See* TEX. R. APP. P. 49.1; *see, e.g., Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 41 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (holding that issuance of new opinion renders motion attacking previous opinion moot).

After the trial court domesticated a foreign judgment against appellants Philippe Tanguy, 13500 Air Express, LLC, and 13500 Air Express, L.P., it entered several orders that (1) appointed a receiver; (2) ordered appellants to turn over property to satisfy the judgment; and (3) authorized the receiver to sell certain property. On appeal, appellants collaterally attack the judgment that was domesticated and directly attack the post-domestication orders entered by the trial court. We affirm.

BACKGROUND

In 2007, Richard Davis filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and appellee, William G. West [“the Trustee”], was named the Chapter 7 Trustee. West filed an adversary proceeding against appellant, Philippe Tanguy, and two businesses owned and operated by him, Air Express, LLC and Air Express,

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LP [collectively, “appellants”], based on a promissory note that appellants had issued to Davis in conjunction with the purchase of an airplane, which had since become a part of Davis’s bankruptcy estate. The Bankruptcy Court entered a judgment in favor of the Trustee in the amount of \$1,183,090.80 for the principal and interest on the note, plus \$31,180.75 in attorney’s fees. *See West v. Tanguy (In re Davis)*, Bankruptcy No. 07-33986-H3-7, 2010 Bankr. LEXIS 1072, 2010 WL 1330232 (Bankr. S.D. Tex. Mar. 30, 2010).

Appellants appealed to the U.S. District Court, which (1) concluded that *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011)¹ was not applicable to the appeal, (2) affirmed the Bankruptcy Court’s opinion and dismissed the appeal; and (3) assessed fees and costs against appellants for filing a frivolous appeal. *See Tanguy v. West (In re Davis)*, No. H-10-1194, 2012 U.S. Dist. LEXIS 95785, 2012 WL 2871662 (S.D. Tex. July 10, 2012).

1. *Stern* held that the bankruptcy court lacked subject matter jurisdiction over counterclaims asserted by the bankruptcy estate against a creditor when the claim is a “state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor’s proof of claim in the bankruptcy.” 564 U.S. at 487, 131 S. Ct. at 2611. Instead, such claims had to be resolved by an Article III court. *Id.*

Appendix D

Appellants appealed to the Court of Appeals for the U.S. Fifth Circuit, which (1) held that *Stern* did not apply, and the bankruptcy and district courts had both properly exercised jurisdiction, and (2) affirmed the district court's judgment and adopted its analysis in full; appellants' subsequent petition for certiorari to the United States Supreme Court was denied. *See Tanguy v. West*, 538 F. App'x 440 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1002, 187 L. Ed. 2d 851 (2014).

The Trustee then domesticated the federal court's judgment in the 270th District Court of Harris County. *See, e.g., Tanner v. McCarthy*, 274 S.W.3d 311, 318-20 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding that foreign judgment that may be domesticated under Chapter 35 of Texas Civil Practices and Remedies Code includes judgment of federal court located in Texas). PTRE Holdings, L.P. ["PTRE"] intervened seeking to recover money it paid to Tanguy for mortgage payments on and improvements to real property located at 1714 Driscoll Street, Harris County, Texas.

The trial court entered three orders complained of on appeal. On April 25, 2014, the trial court signed an Order Granting Turnover and Appointing Receiver and Master, which appointed Eva Engelhart as the Receiver ["the Receiver Order"], and also made her master in chancery. On May 30, 2014, the trial court signed an Order to Compel Turnover of Non-Exempt Real Estate ["the Turnover Order"], specifically, the real property located at 1714 Driscoll Street. And, on October 10, 2014, the trial court entered its Third Amended Order to Sell Property

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at 1714 Driscoll Street. [“the Sale Order”].

On appeal, appellants challenge these three orders, contending that:

- (1) The bankruptcy court judgment on which the trial court’s orders were based is void for lack of Article III subject matter jurisdiction under the United States Constitution, is subject to collateral attack, and requires dismissal.
- (2) Real property subject to execution and sale by ordinary legal process cannot serve as a basis for a turnover order appointing a receiver. The credit against judgment to be received by the judgment debtor for the sale of such property cannot be reduced by receiver broker fees and costs.
- (3) The [Receiver Order] failed to specifically describe any property to be turned over and must be reversed.
- (4) The [Receiver Order, Turnover Order, and Sale Order] are not supported by any proof that the debtors (Tanguy, 13500 Air Express, LLC and 13500 Air Express, LP) own any non-exempt property which is not subject to sale by ordinary legal process.
- (5) The [Receiver Order, Turnover Order, and Sale Order] are not supported by legally or factually sufficient evidence that the debtors (Tanguy, 13500 Air Express, LLC and 13500 Air Express,

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LP) own any non-exempt property which is not subject to sale by ordinary legal process.

- (6) Appellants, Tanguy, 13500 Air Express, LLC and 13500 Air Express, LP and [Intervenor] PTRE Holdings, L.P., were entitled to a Jury Trial on the contested fact issues raised by their answer, counterclaim, and intervention petition.
- (7) The trial court's [Receiver Order, Turnover Order, and Sale Order] appointing the receiver a master, appointing a biased receiver, and awarding a 25% receiver's fee without proof of reasonableness were an abuse of discretion.

**COLLATERAL ATTACK ON
BANKRUPTCY JUDGMENT**

In their first issue on appeal, appellants contend that the bankruptcy court judgment is void, and that, therefore, the domesticated judgment is likewise void. Specifically, appellants claim that the "Bankruptcy Judge signed a judgment disposing of Tanguy's common law and statutory private claims and defenses over which that Judge had no Article III jurisdiction under the United States Constitution."

However, appellants raised this jurisdictional argument both in the U.S. District Court and on appeal to the U.S. Court of Appeals for the Fifth Circuit, where the issue was resolved against them. *See In re Davis*, 538 F. App'x. at 443 ("We are unpersuaded by Tanguy's argument that neither the bankruptcy court, the district

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court, nor this Court have subject matter jurisdiction over these proceedings . . .”). When a federal court has decided the question of its jurisdiction as a contested issue, a state court has no power, in the absence of allegations of fraud, to inquire again into such question. *See Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S. Ct. 134, 138, 83 L. Ed. 104 (1938); *see also Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1052-53 (5th Cir. 1987).

Because the issue of the bankruptcy court’s jurisdiction was fully tried in the federal courts, the issue cannot be retried here. *See Stoll*, 305 U.S. at 172, 59 S. Ct. at 138; *see also Durfee v. Duke*, 375 U.S. 106, 111-12, 84 S. Ct. 242, 245, 11 L. Ed. 2d 186 (1963) (applying *Stoll* even when jurisdiction was fully litigated in sister state court rather than federal court); *Baker & Taylor Drilling Co. v. Amend*, 438 S.W.2d 144, 149 (Tex. Civ. App.—Amarillo 1969, writ ref’d n.r.e.) (refusing to address issue of federal court’s jurisdiction when that issue had been decided by both federal district court and federal court of appeals). As such, appellants’ collateral attack on the bankruptcy court’s judgment fails.

We overrule appellants’ first issue on appeal.

COMPLIANCE WITH TURNOVER STATUTE

In issues two, four, and five, appellants contend the trial court abused its discretion in entering the Receiver Order, the Turnover Order, and the Sale Order. Appellants contend that the Receiver Order, and the subsequent orders based thereon, were erroneously entered because

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there was no evidence that all three orders, as they relate to the house at 1714 Driscoll Street, are erroneous because 1714 Driscoll Street is real property located within Texas, and, as such, may be readily attached or levied on by ordinary legal process. *See Suttles v. Vestin Realty Mortg. I, Inc.*, 317 S.W.3d 412, 418 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Appellant’s counsel indicated to the trial court that he would prefer to sell the property by ordinary legal process, i.e., a sheriff’s sale, because he believed his clients would recover more money to go toward the judgment if they did not have to pay a receiver’s fee or a broker’s fee.

However, on May 3, 2016, while this case was pending on appeal, the Constable’s Office, after issuing a Notice of Sale and Levy on the Driscoll Property, sold it at an execution sale without incurring the fees of a receiver. A case becomes moot if at any stage there ceases to be an actual controversy between the parties. *Nat’l Collegiate Athletic Ass’n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). This sale of the Driscoll Property by ordinary legal process renders issues two, four, and five moot because it extinguishes the only controversy between the parties that was raised in appellants’ brief relating to those issues.

Accordingly, we dismiss issues two, four, and five as moot.

SPECIFICITY OF TURNOVER ORDER

In issue three, appellants contend the Turnover Order must be reversed because it “failed to specifically

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describe any property to be turned over[.]” We disagree. “[S]ection 31.002 does not require that a judgment creditor seeking a turnover order identify all, or even any, of the judgment debtor’s assets that are to be the subject of the turnover order, nor does the statute require the trial court to identify the specific property subject to turnover in its turnover order.” *Tanner v. McCarthy*, 274 S.W.3d 311, 321 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

Accordingly, we overrule issue three.

RIGHT TO JURY TRIAL

In issue six, appellants and the intervenor, citing *Steenland v. Tex. Commerce Bank N.A.*, 648 S.W.2d 387, 390 (Tex. App—Tyler 1983, writ ref’d n.r.e).² contend that they were entitled to a jury trial because there was a fact issue as to whether the real property at 1714 Driscoll Street was “not subject to sale under ordinary legal process.” For the same reason we dismissed issues two, four, and five as moot, we also dismiss issue six.

APPOINTMENT OF MASTER IN CHANCERY

In issue seven, appellants contend the Receiver Order, the Turnover Order, and the Sale Order are abuses of discretion because, in the Receiver Order the trial court also gave the receiver the powers of a master in chancery.

2. In *Steenland*, the Tyler Court of Appeals held that the judgment debtor was entitled to a jury trial to determine the excess nonexempt value of his homestead. 648 S.W.2d at 390.

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However, this Court has held that we have no appellate jurisdiction to consider an order appointing a master in chancery, even when such order is embedded within a turnover-and-receivership order. *See Sheikh v. Sheikh*, 248 S.W.3d 381, 394 (Tex. App.—Houston [1st Dist.] 2007, no pet.) We note, as this Court did in *Sheikh*, that, inasmuch as we have reversed the orders complained of, the trial court, on remand, may reconsider whether the receiver should also be appointed master in chancery. *See id.* at 394-95.

We dismiss issue seven for lack of jurisdiction.

CONCLUSION

We reject appellants' collateral attack on the bankruptcy court judgment. We dismiss issues two, four, five, and six as moot. We dismiss issue seven for lack of jurisdiction.

Having either dismissed or overruled all of appellants' issues on appeal, we affirm the trial court's orders.

Sherry Radack
Chief Justice

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**APPENDIX E — DENIAL OF PETITION FOR
REVIEW BY THE SUPREME COURT OF TEXAS,
DATED AUGUST 25, 2017**

RE: CASE NO. 17-0371

COA #: 01-14-00455-CV
TC#: 2013-67779

TANGUY

v.

WEST

DATE: 8/25/2017

Today the Supreme Court of Texas denied the petition
for review in the above-referenced case.