

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1033

TITLE JOHN J. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY,
ET AL., Petitioners V. CAROLYN ROBINSON

PLACE Washington, D. C.

DATE October 8, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN J. KELLY, CONNECTICUT CHIEF :
STATE'S ATTORNEY, ET AL., :

Petitioners :

v. : No. 85-1033

CAROLYN ROBINSON :

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Washington, D.C.

Wednesday, October 8, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:53 o'clock p.m.

APPEARANCES:

CARL J. SCHUMAN, ESQ., Wellington, Conn.;
on behalf of Petitioners.

FRANCIS X. DINEEN, ESQ., New Haven, Conn.;
on behalf of Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Schuman, you may start whenever you're ready.

ORAL ARGUMENT OF
CARL J. SCHUMAN, ESQ.
ON BEHALF OF PETITIONERS

MR. SCHUMAN: Mr. Chief Justice and may it please the Court:

The issue in this case is whether the Congress of the United States intended to allow a convicted criminal sentenced to make restitution to escape punishment by filing a petition of bankruptcy and listing the restitution order as a dischargeable debt. In broader terms, the issue is whether Congress intended the bankruptcy process to interfere with the orderly administration of criminal justice.

The state of Connecticut, the amici states supporting the state of Connecticut, the amici state and local organizations, submit that Congress had no such intention. We make this submission in light of the history and language of the Bankruptcy Code and the public policy purposes behind it.

In July of 1980, the Respondent, Carolyn Robinson, pleaded guilty to larceny in the second degree as a result of her unlawful receipt of \$9,932.95 in

1 welfare benefits while she was simultaneously receiving
2 social security benefits.

3 She was sentenced to one to three years in
4 prison, execution suspended, placed on probation for
5 five years, and ordered to make restitution at the rate
6 of \$100 per month over the five year period. She was to
7 make her first payment in January of 1981.

8 In February of 1981, February 5th, only 20
9 days later, she filed a petition in Bankruptcy Court.
10 State agencies did not file any exceptions to discharge
11 and the Petitioner -- the Respondent received a
12 discharge in bankruptcy in May of 1981.

13 The Respondent filed an adversary complaint in
14 Bankruptcy Court to determine the dischargeability of
15 the restitution obligation when in February of 1984
16 state agencies took action to revoke the Respondent's
17 probation as a result of her failure to make restitution
18 payments.

19 The bankruptcy and the district courts held
20 that restitution is not a debt within the meaning of the
21 Bankruptcy Code and, in the alternative, that it was
22 excepted from discharge. The Second Circuit, however,
23 reversed.

24 The Second Circuit's conclusion is at odds
25 with, in the first place, the judicial history predating

1 the Bankruptcy Code. This Court has followed the rule
2 that if Congress intends to change a judicially created
3 concept it will do so explicitly. In 1978, at the time
4 when Congress re-enacted the Bankruptcy Code, it had
5 become judicially accepted that criminal monetary
6 obligations were not debts subject to bankruptcy.

7 As early as 1848, in fact, this Court
8 summarily affirmed a New York Court of Appeals decision
9 holding that a criminal contempt fine was not a
10 bankruptcy debt. Subsequent to that decision and in
11 part relying on it, at least six cases, both federal and
12 state, have held or stated in clear terms that criminal
13 monetary obligations, including restitution were not
14 bankruptcy debts.

15 Now, contrary to the Respondent's position,
16 these decisions did not turn on whether or not the debts
17 were proveable or allowable, but rather stated quite
18 clearly that criminal monetary sanctions were not debts
19 of any sort.

20 In 1978 --

21 QUESTION: I'd like to ask, Mr. Schuman, are
22 there some states that do treat restitution orders as
23 debts and collectable as civil judgments?

24 MR. SCHUMAN: There are some states, Your
25 Honor, that do treat restitution orders as collectable,

1 similar to civil judgments.

2 QUESTION: I guess in the state of Connecticut
3 they're not so treated?

4 MR. SCHUMAN: That's correct, Your Honor.

5 QUESTION: Well, what would the result be in a
6 state where they are treated as collectable civil
7 judgments, under your theory?

8 MR. SCHUMAN: The result would be no
9 different. In both cases --

10 QUESTION: Why is that?

11 MR. SCHUMAN: Because in those states in which
12 the states have treated the restitution order as in part
13 collectable similar to a civil judgment, they have just
14 chosen different and perhaps innovative ways of
15 enforcing their criminal statutes.

16 In a sense, in those states victims become
17 private attorney generals that enforce their criminal
18 statutes. I would note that --

19 QUESTION: But for purposes of the bankruptcy
20 law, do you normally look to the state law to determine
21 whether something is a collectable debt?

22 MR. SCHUMAN: No, the question of whether it's
23 a debt within the meaning of the Bankruptcy Code is a
24 federal question. But in interpreting whether it is a
25 debt or not I think it's relevant to say, it's as a

1 matter of fact crucial to say, that a restitution order
2 is punishment, not a debt.

3 Certainly the definition of a debt within the
4 meaning of the Bankruptcy Code must be applied. But
5 even if you apply that definition in those states that
6 force their restitution -- or allow for enforcement of
7 restitution by way of a civil judgment, restitution is
8 still not a debt.

9 I'd like to explain why. Restitution is an
10 integral part of the criminal justice system. It allows
11 judges the middle ground between jail on the high end
12 and lesser forms of punishment on the lower.

13 QUESTION: Well, I just -- if you look at the
14 language of the statute, though, under the Bankruptcy
15 Code, it becomes a little bit tricky, because it says a
16 debt means liability on a claim, and a claim means a
17 right to payment, whether or not it's reduced to
18 judgment.

19 So in a state that treats it as a right to
20 payment on the part of the victim, it makes it more
21 difficult to follow your argument, I suppose.

22 MR. SCHUMAN: Well, even in those cases, Your
23 Honor, that conclusion would mean that the victim would
24 be the creditor in Bankruptcy Court. I don't think it's
25 conceivable to say that Congress intended that victims,

1 who have already suffered enough for their crimes, would
2 have to come into Bankruptcy Court in order to preserve
3 a restitution order from being discharged.

4 QUESTION: But in any event, it wouldn't
5 prevent the state, in your view, from coming in and
6 getting it --

7 MR. SCHUMAN: Well, if Your Honor is
8 suggesting --

9 QUESTION: This is a peculiar case, though,
10 because here the state was also the victim.

11 MR. SCHUMAN: Yes, but we would submit that it
12 makes no difference whether the state is the victim in
13 terms of the ultimate outcome.

14 If Your Honor is suggesting that the fact that
15 a victim may have a right of civil enforcement in some
16 states creates a right to payment, it would create a
17 right to payment to the victim, and I don't think that
18 Congress intended victims to have to come into
19 Bankruptcy Court in order to preserve restitution orders
20 from being dischargeable.

21 I would add that under federal law a fine,
22 under the Criminal Fine Enforcement Act, can be enforced
23 civilly, under a new 1984 federal statute. Now, the
24 fact that a criminal punishment can be enforced civilly
25 does not somehow convert it into an ordinary civil debt,

1 as would a breach of contract.

2 A criminal fine surely is not a debt within
3 the meaning of the Bankruptcy Code, and restitution is
4 not, merely because states may have chosen innovative
5 ways to enforce a criminal sanction.

6 QUESTION: Mr. Schuman, you stated the agency
7 or the state did not file objections to the discharge.
8 Is there a reason for that? Would you feel a little
9 more comfortable if they had?

10 MR. SCHUMAN: No, Your Honor. There is -- let
11 me answer the first question first. There is perhaps a
12 reason for that. I would not feel any differently if
13 they had.

14 The real reason, if it is one, is that this
15 was the first time this issue had arisen in Connecticut
16 and state agencies were admittedly somewhat confused on
17 how to handle it.

18 But our position is that the state -- the
19 Congress did not intend prosecutors to have to file
20 exceptions in Bankruptcy Court, and so it would make no
21 difference in our view whether we thought we should have
22 or not.

23 QUESTION: Yes, but a claim was filed, wasn't
24 it?

25 MR. SCHUMAN: The state did not file a proof

1 of claim, Your Honor, no. We did not file exceptions,
2 we did not file proof of claim. Our position --

3 QUESTION: Mr. Schuman, there's no suggestion
4 in this case that if this restitution order or this
5 claim is discharged, that the state could not say this
6 is a breach of probation and put them in jail?

7 MR. SCHUMAN: We concede that, Your Honor. If
8 this Court concludes that the restitution obligation was
9 discharged, we cannot under Perez and the
10 anti-discrimination clauses of the Bankruptcy Code then
11 proceed to incarcerate the Respondent.

12 QUESTION: You may?

13 MR. SCHUMAN: No, we believe --

14 QUESTION: You may not?

15 MR. SCHUMAN: We believe that if this Court
16 finds that restitution was discharged that the
17 anti-discrimination clauses of the Bankruptcy Code --

18 QUESTION: Well, it was a condition of his
19 probation that he not be -- that he make restitution.

20 MR. SCHUMAN: Yes, Your Honor.

21 QUESTION: And maybe he can avoid some civil
22 action against him in bankruptcy, but that's all that
23 the discharge does, isn't it?

24 MR. SCHUMAN: The civil obligation is
25 discharged. The question is whether the criminal one

1 is.

2 QUESTION: Well, do you concede that the
3 discharge of the civil obligation means that the state
4 can't say he's breached his probation?

5 MR. SCHUMAN: As I understood your question,
6 Your Honor, you were assuming --

7 QUESTION: Can you put him in jail for
8 claiming his discharge in bankruptcy?

9 MR. SCHUMAN: We can't put him in jail -- we
10 can put him in jail if this Court concludes that the
11 restitution obligation was not discharged.

12 QUESTION: Oh, yes, oh, yes. But if it is
13 discharged, you say he's completely free of his criminal
14 sentence?

15 MR. SCHUMAN: No. No, not at all.

16 QUESTION: Well, what is he free of?

17 MR. SCHUMAN: He's free -- she in this case is
18 free of the obligation to make restitution. That is by
19 virtue of the anti-discrimination clauses.

20 QUESTION: But is she also free -- does her
21 criminal sentence -- does her probation end?

22 MR. SCHUMAN: No, her probation continues.
23 The criminal conviction remains, and she would be
24 subject to any other --

25 QUESTION: But that condition that she make

1 restitution is just wiped out?

2 MR. SCHUMAN: If this Court concludes that
3 restitution is a debt, yes.

4 QUESTION: Mr. Schuman, are you going to get
5 to the waiver point?

6 MR. SCHUMAN: Yes, Your Honor. If you're
7 referring to the consequences --

8 QUESTION: You brought up the waiver point.

9 MR. SCHUMAN: -- the consequences of our
10 failure to file exceptions, yes, Your Honor. The
11 state's position --

12 QUESTION: At your own time.

13 MR. SCHUMAN: Thank you very much, Your
14 Honor.

15 The state's position is that the notion that
16 prosecutors should have to file exceptions in Bankruptcy
17 Court is so irrational and leads to absurd results that
18 Congress could not conceivably have intended it. This
19 notion conflicts with fundamental public policy.

20 QUESTION: May I interrupt there for just a
21 second. If you had filed objections, you would have
22 protected these claims from being discharged, wouldn't
23 you?

24 MR. SCHUMAN: In all probability we would have
25 in this case.

1 QUESTION: Well, why is it irrational, if a
2 statute has time to become known in the legal community,
3 why is it irrational to have the prosecutor just
4 recognize this is one thing he has to do in these
5 cases?

6 MR. SCHUMAN: Because in the next case it will
7 be extremely difficult, and in the case after that it
8 will --

9 QUESTION: Why is it difficult? I mean,
10 creditors always file objection. You're just another
11 creditor.

12 MR. SCHUMAN: Let's say, Your Honor, the next
13 case is a drunk driving case in which restitution has
14 been imposed, and which it is on occasion in
15 Connecticut. Now, the Bankruptcy Code has an exception
16 to discharge for injuries occurring as a result of a
17 driver operating while legally intoxicated.

18 In Connecticut, however, in order to be
19 convicted of a drunk driving offense the proof is only
20 of a person's operating under the influence or operating
21 with greater than .1 percent alcohol in his blood. So
22 if that defendant who is sentenced to make restitution
23 in that drunk driving case then went into Bankruptcy
24 Court, the state would then have to in that case present
25 additional proof that not only was that person operating

1 under the influence, which the Connecticut Supreme Court
2 has said is a different standard than legally
3 intoxicated; the state would then have to prove part of
4 its case all over again.

5 QUESTION: You're saying some other case might
6 present your problem. But how about a case just like
7 this one. There's no problem on a case like this, is
8 there?

9 MR. SCHUMAN: Well, ultimately we would
10 probably win if we filed an exception to discharge.

11 QUESTION: Probably? Wouldn't you certainly?
12 Doesn't the statute expressly -- I can't remember the
13 section number -- have an express provision for cases
14 like this?

15 MR. SCHUMAN: Yes, Your Honor. But this case
16 is unusual in that it does fit within the express
17 exception.

18 QUESTION: Well, but that's the only case we
19 have to decide today. It fits squarely within the
20 express exception.

21 MR. SCHUMAN: Well, I would submit, Your
22 Honor, that the decision in this case, if this Court
23 concludes that restitution is a debt subject to
24 bankruptcy, will affect restitution in all other cases,
25 in which it will be hard in some cases and impossible in

1 other cases for state -- for prosecutors to file
2 exceptions to bankruptcy.

3 I would note, Your Honor, even in the case
4 like this one, in which there is a neatly fitting
5 exception to discharge, that there are burdens, burdens
6 that Congress presumably did not intend to impose on
7 prosecutors.

8 The notion that several years after the crime
9 prosecutors should have to start filing complaints in
10 Bankruptcy Court and participating as supplicants in a
11 federal court --

12 QUESTION: Well, that's not just the
13 prosecutor. You have a probation department, there's a
14 probation officer making sure she's making her monthly
15 payments. If she doesn't make the payments, presumably
16 he follows up on it.

17 Don't you have some kind of a checkoff system
18 on people on probation?

19 MR. SCHUMAN: Certainly.

20 QUESTION: And when a person defaults, isn't
21 there a follow-up procedure that's set up? And why is
22 it so hard to say that they have filed for bankruptcy
23 when you've got to file a form in the Bankruptcy Court?

24 I just don't understand this impossibility
25 argument. I presume you've got good lawyers in

1 Connecticut.

2 QUESTION: If this case is so important, why
3 didn't you go into Bankruptcy Court? You say this case
4 is so important.

5 MR. SCHUMAN: Again, Your Honor, in this case
6 I will admit that state agencies were a little perplexed
7 because this was the first time it happened. But our
8 position is that Congress did not intend for prosecutors
9 to have to participate in bankruptcy, and the reason is
10 in part in the drunk driving case that I've explained.

11 It's also, for example, in a negligent
12 homicide case. If restitution is imposed in a negligent
13 homicide case, there will be no applicable exception to
14 discharge, because the only one that's close pertains to
15 willful and malicious injury.

16 QUESTION: What kind of restitution could you
17 have in a negligent homicide case? Is that a common
18 remedy in a death case?

19 MR. SCHUMAN: Well, in Connecticut restitution
20 has been imposed in a negligent homicide case to pay the
21 victim's funeral expenses, for example.

22 QUESTION: I see.

23 MR. SCHUMAN: Now, take for example a drug
24 case. In some cases, not in Connecticut but in other
25 states, restitution has been imposed in a drug sale case

1 in order to force the defender, the defendant, to pay
2 the Government the costs of the Government's undercover
3 operations which elicited or which brought out the drug
4 sale.

5 Now, there's nothing in the Bankruptcy Code
6 that's even close to a drug sale. There would be no way
7 that the state or Federal Government, for that matter,
8 could file an exception in Bankruptcy Court in order to
9 prevent a criminal defendant from escaping the
10 consequences of his crime.

11 QUESTION: Well, Mr. Schuman, you've certainly
12 given us some very good practical reasons why we would
13 want to find in your favor. But you're dealing with a
14 very complicated bankruptcy statute, with a very broad
15 definition of claim, very broad definition of debt, that
16 made sweeping changes from what the law was before
17 1978.

18 And it seems to me you ought to devote some of
19 your discussion to, you know, why this isn't a debt or a
20 claim as that term is defined in the bankruptcy
21 statute.

22 QUESTION: I asked you about that initially, I
23 think, and I still have real difficulty understanding
24 why this isn't a right to payment. Certainly the state
25 has a right to enforce the payment of the restitution

1 order, and I think that argument falls awfully flat, to
2 say that it isn't a claim and isn't a debt.

3 I'm wondering why you don't try to fit the
4 thing under the exception in 5523(a)(7), which as I
5 understand the code says -- would not require the state
6 to go in and file a claim. It would be automatically
7 excluded under the Bankruptcy Code itself if the thing
8 -- if the restitution order is considered a debt for a
9 fine, penalty, or forfeiture, payable to or for the
10 benefit of a governmental unit.

11 Now, the problem there, of course, is the
12 additional clause of "and is not compensation for actual
13 pecuniary loss." In this particular case maybe it's a
14 pecuniary loss to the state, but in most criminal cases
15 it would not be, would it?

16 MR. SCHUMAN: Well, we contend, Your Honor,
17 that a restitution order, although it has a compensatory
18 effect and does constitute compensation in terms of its
19 effect, in purpose does not serve to compensate people.
20 It serves to vindicate the societal interest. It is
21 punishment in a milder form, because it forces the
22 offender to confront the consequences of its act, of his
23 act, in a way --

24 QUESTION: (Inaudible) your loss and this
25 replaces it.

1 MR. SCHUMAN: That's the effect of it, Your
2 Honor.

3 QUESTION: Well, isn't that enough to satisfy
4 (a)(7)?

5 MR. SCHUMAN: Well, Your Honor, that is an
6 alternative argument. I must mention that. We believe
7 that 523(a)(7) does not primarily refer to criminal
8 fines and penalties. 523(a)(7) says that to the extent
9 a debt is for a fine or penalty and then goes on. It is
10 not a definitional section.

11 The historical note and the predecessor
12 provision under the Bankruptcy Act clearly state, or
13 suggest at least, that this is designed to refer to
14 civil fines and penalties.

15 QUESTION: Well, is a criminal fine a debt?

16 MR. SCHUMAN: No. Criminal fines would stand
17 in the same place as criminal restitution. It would be
18 outside of bankruptcy completely.

19 I think that this is perhaps clearest from the
20 history of the cases predating the Bankruptcy Code,
21 because, as I've stated, these cases made clear that
22 criminal monetary obligations were outside of
23 bankruptcy.

24 Now, in 1978 Congress did nothing to alter
25 this settled view. It did expand the concept of debt to

1 bring in matters that were outside of bankruptcy
2 previously because they were non-proveable or
3 non-allowable or too contingent or unliquidated. But it
4 did nothing to alter the fact that certain criminal
5 obligations were outside of bankruptcy for reasons
6 unrelated to their speculative nature.

7 And the fact that Congress expanded the
8 concept of debt in some ways to bring in non-proveable
9 claims, but not in other ways, is the strongest
10 indication, or at least a strong one, that Congress did
11 not intend to do so.

12 The fact is, Congress specifically stated that
13 the bankruptcy laws are not designed to be a haven for
14 criminal offenders, but are designed to give relief from
15 financial overextension. That was the reason that
16 Congress broadened the concept of debt. It was to bring
17 in speculative debts.

18 It manifested no intention whatsoever to
19 change the settled view of the law whereby --

20 QUESTION: That comment that you're referring
21 to in the House report was really made with regard to
22 the provision for automatic stays, where the Congress
23 was saying that criminal proceedings don't have to be
24 automatically stayed.

25 I don't think that comment refers at all to

1 whether a resulting criminal fine is a debt.

2 MR. SCHUMAN: Well, Your Honor, the comment is
3 associated in the historical note, or in the legislative
4 history, with the automatic stay. But it would make no
5 sense for Congress to exempt criminal actions from an
6 automatic stay and only to then nullify in part the
7 result of that criminal prosecution.

8 There was a reason that Congress made explicit
9 the exception from the automatic stay for criminal
10 obligations or for criminal actions, and that was
11 because in the 1970's, as this Court in Midlantic
12 observed, courts had started broadening the effect of
13 the automatic stay.

14 So Congress thought it wise to specify the
15 exceptions from the automatic stay, and that's why it
16 did so with regard to criminal actions. But there was
17 no need for Congress to change the settled view of the
18 law that had kept criminal obligations outside of
19 bankruptcy altogether.

20 QUESTION: 523(a)(7) isn't very helpful,
21 arguably not helpful in this case, because it is
22 compensation for actual pecuniary loss.

23 MR. SCHUMAN: Well, Your Honor, we would
24 submit that that might be its effect, but it's not its
25 purpose, and that for the most part --

1 QUESTION: No, I'm saying it wouldn't fit here
2 because here it is compensation for actual pecuniary
3 loss, wouldn't you say?

4 MR. SCHUMAN: No, I wouldn't.

5 QUESTION: Why not?

6 MR. SCHUMAN: Well, for two reasons. One is
7 peculiar to this case, in that the amount that the
8 debtor had to pay was less than the amount of the loss.
9 But moving beyond that --

10 QUESTION: Does that mean it's not
11 compensation for actual --

12 MR. SCHUMAN: Well, it's certainly not full
13 compensation. But moving beyond -- and it suggests that
14 the sentencing court had other purposes in mind in
15 compensating the state. Restitution was designed to
16 achieve punitive purposes and not compensatory
17 purposes.

18 QUESTION: Well, of course. But every --
19 that's the purpose of every fine, penalty, or
20 forfeiture. When you use the language "fine, penalty or
21 forfeiture," as (a)(7) does, you're assuming that part
22 of the purpose may well be penal.

23 But in addition to the penalty, it can't be
24 compensation for actual pecuniary loss. If it's part of
25 each, it doesn't qualify. I assume that's how you read

1 it. I don't know how else you can read it.

2 MR. SCHUMAN: Well, we would submit, Your
3 Honor, that again restitution is not a compensatory
4 device. It is a punitive one, and for the most --

5 QUESTION: Even if it were, though, (a)(7)
6 wouldn't be very useful in most cases anyway because --
7 are these restitution remedies normally payable to a
8 governmental unit? In other states, are they ever
9 payable directly to the victim?

10 MR. SCHUMAN: Not to my knowledge. They're
11 usually filtered through a governmental unit, dispersed
12 by the governmental unit. But it might be for --
13 governmental unit in the Bankruptcy Code is defined to
14 include the state as a larger entity. So it might --
15 since restitution serves punitive purposes, it might be
16 for the benefit of the polity as a whole.

17 I'd like to make clear, however, that it
18 appears from the history of 523(a)(7) that it refers
19 primarily to civil fines and penalties, and that
20 criminal fines and penalties were considered outside of
21 bankruptcy altogether and so there was no need for --
22 there would be no need for prosecutors to have to file
23 exceptions to bankruptcy.

24 QUESTION: Well, why do you suppose Congress
25 didn't say so?

1 MR. SCHUMAN: Because, Your Honor, it did not
2 need to. And the rule that this Court -- and that was
3 true in Midlantic as well, where there was a judicial
4 exception to the trustee's abandonment power. This
5 Court found that Congress did not need to specify that
6 that exception would carry through, but because it did
7 not manifest any intent to change the prior history this
8 Court presumed that the Congress intended to carry it
9 through.

10 And that's certainly the case here. Now, I
11 would note, in addition to the burdens that I've
12 mentioned of filing exceptions to discharge, this Court
13 in Imbler v. Pachtman clearly stated that a prosecutor's
14 energy and commitment should be to prosecuting criminal
15 cases.

16 And I think it would be contrary to this
17 Court's prior decision in Imbler and the public policy
18 surrounding it for prosecutors to start becoming
19 bankruptcy lawyers and supplicants in Bankruptcy Court.
20 I think that there are some cases in which --

21 QUESTION: Don't the U.S. Attorney's Offices
22 have a civil division?

23 MR. SCHUMAN: Yes, they do, Your Honor, yes.
24 But in Connecticut state prosecutors would have to
25 represent the division of criminal justice, and it would

1 be I think contrary to notions of federalism and
2 contrary to notions of finality for prosecutors to
3 become supplicants in Bankruptcy Court.

4 QUESTION: Would it cost them any more than
5 this case has?

6 MR. SCHUMAN: I'm sorry, Your Honor, I didn't
7 hear the question.

8 QUESTION: Would it cost the state any more to
9 have gone into Bankruptcy Court than it has cost you to
10 date in this case?

11 MR. SCHUMAN: Perhaps in this case no --

12 QUESTION: Yes or no?

13 MR. SCHUMAN: No.

14 QUESTION: Thank you.

15 MR. SCHUMAN: In other cases, the cost to
16 society will be that a person sentenced to make
17 restitution will be able to commit the perfect crime.

18 I'd like to reserve the remainder of my time.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Schuman.

21 We'll hear now from you, Mr. Dineen.

22 ORAL ARGUMENT OF

23 FRANCIS X. DINEEN, ESQ.

24 ON BEHALF OF RESPONDENT

25 MR. DINEEN: Mr. Chief Justice and may it

1 please the Court:

2 The question presented in this case is whether
3 under the specific facts of this case the state was
4 obligated to come into the Bankruptcy Court and file a
5 complaint seeking a determination of
6 non-dischargeability of this criminal restitution
7 order.

8 And if I may please, I would just like to
9 address three factual matters before I continue with
10 the argument. One is, there was a statement made about
11 the amount of money that was being paid under the
12 restitution order. The restitution order entered by the
13 court was in the amount of \$9,932.95. That was the
14 precise amount of the welfare overpayment that was
15 involved.

16 Although the order did say that it was to be
17 paid at the rate of \$100 per month, Your Honors will
18 note that in the record on page 22A there is a reference
19 in the letter that we received three years after the
20 discharge that the state was now seeking to collect from
21 the debtor a total at that point of \$9,482. So they
22 were seeking really the full amount, less the amount she
23 had paid up until that time.

24 And again, in the record at page 44A you will
25 see in the complaint that was filed against the debtor

1 for the revocation of the probation, again we have a
2 figure of the balance owing at \$9,382.95, again seeking
3 the full amount of that restitution order. So it
4 appears twice that the state was seeking the full amount
5 as the compensation.

6 QUESTION: And therefore it isn't a discharge
7 -- it is discharged regardless of 523(a)(7)?

8 MR. DINEEN: Therefore, I present those facts
9 to show that this really is -- that simply illustrates
10 that this was really compensation for actual pecuniary
11 loss, and therefore the non-dischargeability section,
12 523(a)(7), simply does not apply because, one, it was
13 compensation for actual pecuniary loss; and two, as has
14 been discussed, even though it had a penal function, it
15 would have to have a penal function for 423(a)(7) to
16 apply in the first instance.

17 QUESTION: Well, it's interesting that the
18 pecuniary loss language appears in the section with
19 respect to a fine, penalty, or forfeiture. Do you know
20 of any fines, penalties, or forfeitures that are
21 actually compensation for pecuniary loss?

22 MR. DINEEN: Other than restitution, no.

23 QUESTION: No, do you think restitution is a
24 fine, penalty, or forfeiture?

25 MR. DINEEN: If it is not a fine, penalty, or

1 forfeiture, then --

2 QUESTION: My question is, do you know of any
3 fines, penalties, or forfeitures that are compensation
4 for pecuniary loss.

5 MR. DINEEN: Yes.

6 QUESTION: What?

7 MR. DINEEN: Restitution, as in this case.

8 QUESTION: So you think restitution is a fine,
9 penalty, or forfeiture?

10 MR. DINEEN: Yes, I think restitution is. I
11 would say it's a form of a penalty and it does represent
12 compensation for actual pecuniary loss. Our claim is if
13 restitution is not at all a fine, penalty, or
14 forfeiture, then the non-dischargeability provision of
15 423(a)(7) simply would not apply at all.

16 So in order for it to apply in the first
17 instance, we must first determine is criminal
18 restitution a fine, penalty, or forfeiture. If it is
19 not, 523(a)(7) doesn't apply.

20 If it is, then we look at 523(a)(7) and see
21 whether it applies. Indeed, 523(a)(7) has two
22 exceptions to it.

23 QUESTION: Yes, but if you decided restitution
24 is not a fine, penalty, or forfeiture, but that there
25 were some fines, penalties, or forfeitures that were

1 compensation for pecuniary loss, you would certainly
2 conclude that Congress intended some fines to be
3 dischargeable if they were compensation for pecuniary
4 loss.

5 MR. DINEEN: Yes, some fines. Some fines, if
6 they are compensation for pecuniary --

7 QUESTION: Are dischargeable.

8 MR. DINEEN: Well, 523(a)(7) doesn't say they
9 are dischargeable. It simply says they are not
10 dischargeable and they may be non -- they may be
11 non-dischargeable under some other section.

12 A fine doesn't become dischargeable -- is
13 fact, 523(a)(7) says fines, penalties, and forfeitures
14 are not going to be discharged.

15 QUESTION: Unless.

16 MR. DINEEN: Unless, and one exception is if
17 they're payable for the benefit of a private
18 individual.

19 QUESTION: So you think if it fit under one of
20 the other exceptions, so be it?

21 MR. DINEEN: If it fit under one of the other
22 exceptions, that it would be non-dischargeable. And
23 indeed, in this case, even though this was a criminal
24 restitution order which was compensation for actual
25 pecuniary loss and therefore 523(a)(7) did not apply, it

1 may well be, and we essentially concede, that under some
2 other provision of 523(a) it may still be a
3 non-dischargeable debt, because 523(a)(4) states
4 explicitly that a debt for larceny is a
5 non-dischargeable debt. But --

6 QUESTION: But the creditor has to come in.

7 MR. DINEEN: But the creditor has to come in
8 under 523(c). And indeed, this Court made special note
9 of that particular requirement in the case of Brown
10 against Felson, which I would like to give Your Honors
11 the citation for, 442 U.S. 127, a 1979 case in which it
12 was held by this Court that collateral estoppel with
13 respect to a state court creditor's judgment ought not
14 to apply in the Bankruptcy Court -- in that case, it was
15 being sought to apply by the debtor in an adversary
16 proceeding relating to non-dischargeability -- because
17 the issues are different.

18 That is to say, the creditor's judgment was
19 related to a collection action on the one hand in the
20 state court, and the question of whether the underlying
21 transaction was one involving fraud was a different kind
22 of issue which was, as this Court said, something that
23 belonged within the exclusive province of the Bankruptcy
24 Court as a result of those amendments in 1970 which
25 required that certain kinds of non-dischargeable debts

1 -- and those are the ones under 523(a)(2), (4), and (6)
2 -- although they're non-dischargeable, must be brought
3 into the Bankruptcy Court for a determination by the
4 Bankruptcy Judge as to whether they are dischargeable or
5 not under the meaning of those sections in the
6 Bankruptcy Code.

7 And then 523(c) goes on to say, if the
8 creditor does not come in -- the language is very clear
9 -- the debt shall be discharged. And that really brings
10 me to the second factual point that I wanted to make
11 clear, and that is in this case both the Office of Adult
12 Probation and the Department of Income Maintenance were
13 listed in the schedules. Both were given notice by the
14 court of the bankruptcy, and indeed they had a total of
15 66 days under the notice in which to come in and file
16 their complaint.

17 And in fact, they could have asked for
18 additional time to come in if they wished, but they
19 simply did not do so.

20 QUESTION: Mr. Dineen, what sort of
21 proceedings would have taken place in the Bankruptcy
22 Court if the state had filed a proof of its claim and
23 made an objection?

24 MR. DINEEN: Well, the normal proceeding is
25 what we call an adversary proceeding. They file a

1 complaint and it simply proceeds in the manner of a
2 regular civil proceeding, as such proceedings may go in
3 federal court.

4 QUESTION: What are the elements that the
5 state would have to prove?

6 MR. DINEEN: In this case, it would have to
7 prove that this was a debt for larceny. That is the
8 language in the Bankruptcy Code, so they would allege
9 essentially that. They would say that the taking was a
10 wrongful taking at the time of the taking and that it
11 was with intent to remain --

12 QUESTION: Would the state court judgment be
13 admissible or would it be conclusive on those issues?

14 MR. DINEEN: This Court ruled in Brown against
15 Felson that, although res judicata does not apply, that
16 collateral estoppel may well apply with respect to
17 issues that had been litigated in the state court, with
18 respect to factual findings that had been litigated. So
19 very likely a good deal of what had happened would be
20 admissible, certainly, under the --

21 QUESTION: Well, Mr. Dineen, if you're right,
22 though, then a good many restitution orders that are
23 typically entered all around the country, as in
24 negligent homicide cases, just wouldn't qualify at all,
25 would they?

1 MR. DINEEN: There are some, Your Honor --

2 QUESTION: Well, there are many. And it seems
3 to me under your view as a practical matter, if you're
4 right there will be an enormous disincentive for any
5 judge in the country to ever consider ordering
6 restitution instead of just sending somebody to jail,
7 because they'll know that there is a complete incentive
8 for someone who's struggling to meet restitution
9 payments to just file for bankruptcy.

10 And I can't believe that if Congress had
11 thought about this problem for one minute, that we would
12 have a decision like we have to review here. And I
13 think the consequences of sustaining your position are
14 absolutely frightening, and I'd like you to comment on
15 it.

16 MR. DINEEN: Your Honor, I think a good deal
17 of the restitution orders that would be entered would
18 fit within the ambit of the various non-dischargeability
19 sections as they appear in 523(a). That is to say --

20 QUESTION: Some of them might.

21 MR. DINEEN: Yes, Your Honor. All the fraud,
22 all the false pretenses, all the false financial
23 statements, all the defalcation, larceny, embezzlement,
24 willful and malicious injury to person and property --
25 all of those are non-dischargeable under the Bankruptcy

1 Code, as well as others.

2 It may be that in certain instances where
3 there would be a restitution obligation that might be
4 contemplated and a court at that time would say, well,
5 this is a kind that, if the debtor were to file, this
6 individual were to file bankruptcy, might be
7 dischargeable in bankruptcy, and therefore, just like
8 any other creditor in considering whether to sue
9 somebody or not, because if I do and I get a judgment
10 and I spend all that time and money and get down to the
11 end, then they're going to file bankruptcy. So why
12 should I do it.

13 Those kinds of considerations that are really
14 considered on a regular basis by creditors when they
15 proceed would be considered by a judge at the time of
16 entering a sentence, and he might say: Well then, maybe
17 I can't do it, maybe I ought not to do it, and so
18 forth.

19 Now, may I just add one thing, Your Honor,
20 with respect to that, and it's this. As this Court
21 decided in the case of Beardon against Georgia, there
22 are people who are poor and against whom restitution
23 orders are entered, who may be unable for financial
24 reasons to pay the restitution order.

25 And as I understand the ruling in Beardon

1 against Georgia, that fact alone ought not to be a basis
2 for revoking their probation and bringing the person
3 back in and re-instituting the sentence and the rest.
4 But if a good faith effort had been made to work to
5 obtain money and so forth and wages to pay, that ought
6 to be taken into consideration.

7 And so there's a concern in Beardon against
8 Georgia about the poor person who is unable to pay the
9 restitution order, and that really does dovetail into
10 the Bankruptcy Code, because in the Bankruptcy Code we
11 now have Section 707(b) that says that a regular
12 bankruptcy may be dismissed by the Bankruptcy Judge if
13 he finds that it would create a substantial abuse of
14 that chapter.

15 And that means that if somebody comes into
16 bankruptcy and is able to pay on their bills, but is
17 going to file a bankruptcy but has future income and can
18 pay, that kind of a bankruptcy is subject to dismissal
19 under 707(b) as a substantial abuse of that chapter.
20 And if you then were to try and go into chapter 13 and
21 file a wage-earner plan under chapter 13, that again is
22 subject to a Section 1325(b) which says that that
23 chapter 13 plan has got to include all of your
24 disposable income over the next three years.

25 So there's a dovetailing of these provisions

1 that forces somebody who is able to pay to have to pay
2 if the debt fits within the ambit of those that might be
3 a discharge debt in the bankruptcy.

4 QUESTION: Mr. Dineen, as to those, as to
5 those restitution orders that the provisions of the
6 Bankruptcy Code don't happen to provide for -- and you
7 must admit, it seems to be sort of haphazard as to
8 whether they will provide for them or not -- it's not
9 only a question of the judge when entering such a
10 restitution order having to have in mind what the
11 consequences will be, as you've describe them and as any
12 creditor must do, although it seems strange to analogize
13 a judge giving a sentence to a creditor.

14 It isn't only a matter of that. When these
15 provisions were enacted, there were presumably a number
16 of restitution orders already extant, that had already
17 been promulgated by state judges. And it seems to me a
18 very considerable step for the Federal Government to be
19 saying: We are going to set aside state criminal
20 penalties.

21 It isn't just a matter of having the judges
22 having to take account of the federal law. They would
23 have been setting aside state criminal penalties on the
24 basis of, you must admit, less than very explicit
25 indication.

1 MR. DINEEN: There was a time gap between the
2 enactment --

3 QUESTION: That's right.

4 MR. DINEEN: -- and the promulgation of the
5 code, and actually the code taking effect, tcc.

6 QUESTION: And you're asking us to read the
7 statute to in effect amount to the Federal Government
8 saying: Yes, there are a lot of state criminal
9 penalties out there, but we're going to set them aside.
10 It's extraordinary.

11 MR. DINEEN: Well, yes, the Bankruptcy Code
12 does establish a set of priorities, a set of kinds of
13 conduct that are not going to be discharged. And other
14 kinds of indebtedness obligations that are not so
15 enumerated in 523(a) will then be discharged. And I
16 think that really represents a determination by the
17 Congress, the elected representatives of all the many
18 states, that this is the kind of relief that's going to
19 be available in the bankruptcy system.

20 QUESTION: Well, Congress may have had in mind
21 only, though, those obligations arising out of the civil
22 system, and perhaps it didn't have in mind at all
23 abrogating existing systems of criminal law and
24 procedures in the various 50 states.

25 MR. DINEEN: The reason why we claim that this

1 provision relates to criminal fines and penalties and
2 forfeitures, I've stated them generally in the brief.
3 That title itself, "fines, penalties, and forfeitures,"
4 is lifted as a chapter heading in title 18 of the United
5 States Code and clearly represents criminal fines,
6 penalties, and forfeitures. That's the precise term.

7 But in addition to that, there is a harmony or
8 a balance in the Bankruptcy Code between what is
9 dischargeable on the one hand under 523(a), 523(a) for
10 example, and that particular non-dischargeability
11 Section 523(a)(7), and on the other hand what is allowed
12 and what is going to be paid as allowed claims under
13 726.

14 And 726(a)(4) does set up some priorities, and
15 it allows fines and penalties and forfeitures now for
16 the first time to participate in the estate and to be
17 paid. As you may recall or may know, under the old
18 Bankruptcy Act, Section 57(j) did not allow penalties
19 and forfeitures. There were not --

20 QUESTION: They were not discharged.

21 MR. DINEEN: That is correct, they were not
22 discharged nor were they allowed. And so here we have a
23 major change.

24 QUESTION: And you didn't have to file.

25 MR. DINEEN: I beg your pardon, Your Honor?

1 QUESTION: You didn't have to file. You
2 didn't have to file a claim or anything else.

3 MR. DINEEN: You did not have to file a
4 claim.

5 QUESTION: And they weren't considered a
6 debt.

7 MR. DINEEN: That is correct. The rationale
8 that had developed was that fines and penalties were not
9 considered debts, and the language that was used in
10 those cases was because they were not proveable. Debt,
11 as you recall, under the old Bankruptcy Act had within
12 it in the definitional section that it had to be
13 proveable, as well as in the discharge section saying
14 that you were discharged from your proveable debts. So
15 twice the concept of proveability appeared in the old
16 Act.

17 Proveability --

18 QUESTION: How would restitution have been
19 treated under the old Act, restitution orders? They
20 were certainly in existence then.

21 MR. DINEEN: Well, it's interesting, Your
22 Honor --

23 QUESTION: You said a while ago that a
24 restitution order, a criminal restitution order, could
25 very well be considered a fine, penalty, or forfeiture.

1 MR. DINEEN: And as I said --

2 QUESTION: And hence, under the old law it
3 shouldn't have been dischargeable, shouldn't have been
4 proveable, wouldn't have been a debt. So how did it
5 suddenly become one?

6 MR. DINEEN: Because the Congress made a
7 significant change both in the definition of what is a
8 debt, what is a claim, and the legislative history that
9 this Court has cited in the case of Ohio against Kovacs
10 said it's the broadest possible definition. So that all
11 possible claims, all possible obligations, will be
12 treated in the bankruptcy case.

13 That is the language in the legislative
14 history that this Court cited in Ohio against Kovacs.

15 QUESTION: Did the non-dischargeability of
16 fines and forfeitures under the old law appear in the
17 non-dischargeability section?

18 MR. DINEEN: Under the old law, no.

19 QUESTION: No, it didn't. But it does here.

20 MR. DINEEN: Yes.

21 QUESTION: And you don't have -- to say
22 something is non-dischargeable, you're excluding those
23 claims or debts that are not dischargeable?

24 MR. DINEEN: You're saying that they're not
25 dischargeable, but on the other hand you're allowing

1 them --

2 QUESTION: Well, you're saying the reason
3 they're not dischargeable, the reason you say that
4 they're not dischargeable is because they are a claim,
5 and you want to exclude certain claims from
6 dischargeability.

7 MR. DINEEN: Yes, I'm saying fines and
8 penalties and forfeitures are --

9 QUESTION: Otherwise it wouldn't be in (a)(7).

10 MR. DINEEN: That's correct. They are
11 non-dischargeable.

12 QUESTION: So that tends to support your
13 argument that fines and penalties are debts, because
14 otherwise they wouldn't be excepted from discharge.

15 MR. DINEEN: Precisely, Your Honor. They
16 would not --

17 QUESTION: (Inaudible) possibilities, of
18 course.

19 MR. DINEEN: That's a possibility. But I
20 think when you look at the 1973 Commission report, which
21 for the first time in the evolution of the Bankruptcy
22 Code talks about introducing this question of whether
23 fines and penalties ought to be discharged or not, it
24 says in the legislative history there in the 1973
25 Commission report that prior to this fines and penalties

1 had not been discharged because they had not been found
2 to be proveable.

3 And it says, it is well settled, and they cite
4 Collier. And if you look at the Collier sections, there
5 are these cases, the criminal fines, the criminal
6 penalty cases. They're all there.

7 That's exactly what the Commission report was
8 talking about.

9 QUESTION: But the non-dischargeability,
10 so-called, wasn't written into the statute, was it,
11 under the old law?

12 MR. DINEEN: Under the old law, it was not, it
13 was not.

14 QUESTION: You couldn't find anything about
15 fines and penalties in the old law.

16 MR. DINEEN: Only in the allowability section,
17 57(j), which said penalties and forfeitures were not
18 allowed.

19 QUESTION: Not allowed.

20 MR. DINEEN: But in the dischargeability, no,
21 you could not find it. And what the courts had
22 developed was this concept that they were not proveable,
23 therefore, because we had proveability in those days,
24 they could not be discharged. If they're not proveable,
25 they're not dischargeable.

1 What I'm saying is that the code has abolished
2 proveability, has enlarged greatly the whole concept of
3 claim and debt, and has included now, as the legislative
4 history says, all possible claims to come within the
5 bankruptcy case.

6 QUESTION: But claims or debts are still
7 allowable or not allowable.

8 MR. DINEEN: Yes, fines and penalties and
9 forfeitures are now allowed and will be paid, but they
10 have a reduced level of priority in the code. But it
11 goes on to say, for the first time explicitly, fines and
12 penalties and forfeitures now explicitly are
13 non-dischargeable.

14 But the code makes two exceptions to that.
15 One is if they're payable to a private individual and
16 the other one is if they represent compensation for
17 actual pecuniary loss. Those are the exceptions, which
18 simply means then that we are thrown back on the other
19 non-dischargeability section in 523(a).

20 QUESTION: Is it possible that that second
21 exception, not for pecuniary loss, might mean loss to
22 the Government itself, the governmental entity imposing
23 the fine, and be limited to that? Do we have enough
24 history about that phrase to know what was intended?

25 MR. DINEEN: Well, we have some history about

1 the phrase to the extent that really that language came
2 out of 57(j). The language in part came from the
3 Commission report, which talks about and makes it very
4 clear that certain kinds of fines are going to be
5 discharged. The Commission report says that.

6 So there is a blending. There is a blending
7 of the language that came from the 1973 Commission
8 report on the one hand and there is the history that we
9 had under 57(j) on the other hand, because that said
10 penalties and forfeitures are not allowed except as they
11 may be compensation for pecuniary loss.

12 In that case, there were some criminal costs.
13 There were two cases. There was a Buckingham Trust case
14 and there was a In Re Capanigri case, both of which held
15 that, although criminal fines would not be allowed to
16 participate in the distribution of the estate in a
17 bankruptcy case, those costs that were taxed represented
18 pecuniary loss to the -- these were fines and penalties,
19 so that those costs would be allowed and would be paid
20 out of the estate.

21 So that history comes out of, to some extent,
22 out of 57(j). I must say that the old cases that are
23 cited in the Petitioner's brief, really all of them up
24 to 1978 represent these situations of fines and
25 penalties.

1 Criminal restitution appears in the Moseson
2 case, which is a 1974 case, which is after the
3 Commission report had been prepared. And then there's
4 another one, the Washburn case, a California case, 1979
5 case, which is after the Code was enacted.

6 So there had not really developed -- I don't
7 think it is fair to say that there had developed a
8 judicially created concept within the meaning of
9 Midlantic that criminal restitution orders are not
10 debts. I don't think that that had developed as such.
11 I think the only case that we had on a criminal
12 restitution order up to 1978 was that Moseson case, a
13 New York trial court case.

14 QUESTION: (Inaudible)

15 MR. DINEEN: Up to, up to. The claim is made
16 that since there was a judicially developed concept,
17 that that gets carried over into the code.

18 QUESTION: I see.

19 MR. DINEEN: And I'm saying there wasn't any
20 judicially developed concept in existence with respect
21 to criminal restitution orders at the time of the
22 enactment of the code. We only had that one case. At
23 least that's the only one that's cited.

24 QUESTION: But it was perfectly clear that
25 criminal fines --

1 MR. DINEEN: Absolutely.

2 QUESTION: -- were not proveable, they weren't
3 considered proveable claims.

4 MR. DINEEN: That is correct. That is
5 absolutely correct, and that was the basis on --

6 QUESTION: Well, it seems to me that if you
7 say that a criminal restitution order should be treated
8 as a fine, penalty, or forfeiture, that you would treat
9 it just like a criminal fine, a real criminal fine.

10 MR. DINEEN: Yes, and with respect --

11 QUESTION: And that the courts should have
12 been doing it that way under the old law.

13 MR. DINEEN: And with respect to criminal
14 fines and penalties, the code has very explicitly now
15 dealt with that in a manner quite different from the way
16 it did under the Act. It has now explicitly stated that
17 fines and penalties and forfeitures are being dealt
18 with, but they're being dealt with as: one,
19 non-dischargeable to the extent that they are true
20 fines, penalties, and forfeitures; and two, they're
21 being dealt with because they are being allowed to
22 participate in the estate.

23 QUESTION: But only if -- only if the state
24 files a claim, isn't that right?

25 MR. DINEEN: Yes, of course. The state has to

1 file a claim in order to participate in the distribution
2 from the estate.

3 QUESTION: And the code doesn't say in so many
4 words that it's criminal fines, penalties, and
5 forfeitures. It says fines, penalties, and forfeitures,
6 doesn't it?

7 MR. DINEEN: That is correct.

8 QUESTION: So that it's possible to construe
9 it as meaning only civil fines, penalties, and
10 forfeitures?

11 MR. DINEEN: I don't think so, Your Honor. I
12 don't believe it is, because of the history that we have
13 under 57(j) and because of the history, the legislative
14 history we have in the 1973 Commission report. I think
15 it's very clear that what's being talked about in the
16 references to Collier's there and in the reference to
17 fines and penalties being non-proveable is these
18 criminal fines and penalties, these very cases.

19 QUESTION: Well, were civil penalties
20 proveable under the old statute?

21 MR. DINEEN: Penalties were treated as
22 penalties.

23 QUESTION: Well then, I don't see why that
24 necessarily proves your point.

25 MR. DINEEN: Because the doctrine that had

1 developed was this doctrine with respect to criminal
2 fines and penalties. In the Parker case, a civil
3 penalty was found to be dischargeable. So there was a
4 diversity of view with respect to civil penalties.

5 QUESTION: Mr. Dineen, are you sure -- are you
6 entirely confident that you're not going to win the case
7 and lose the client? Is it clear to you that the
8 consequence of the discharge in bankruptcy will not be
9 the ability of the state to revoke the parole, one of
10 its conditions not having been met, or the probation?

11 MR. DINEEN: Well, the debtor will remain on
12 probation. The debtor is on probation, and there are
13 conditions --

14 QUESTION: I'm not talking about remaining.
15 One of the conditions of the probation was that the
16 debtor pay these particular amounts. Now, to be sure
17 the obligation to pay them has been removed by the
18 Bankruptcy Act if you win this case.

19 Does that mean that the state cannot revoke
20 the probation?

21 MR. DINEEN: Well --

22 QUESTION: Since one of its conditions, thanks
23 to the supervening power of the Federal Government, has
24 not been met?

25 MR. DINEEN: It would be our claim that it

1 could not revoke the probation solely on the basis of
2 her refusal to pay after it has been discharged. If
3 they revoke the probation solely on that basis, our
4 claim would be that that would violate 525, the
5 anti-discrimination clause in the Bankruptcy Code.
6 Indeed --

7 QUESTION: (Inaudible)

8 MR. DINEEN: Yes, yes. That really evolves
9 out of the Perez against Campbell case, Your Honor, and
10 that's a provision in which the Congress has really
11 adopted the Perez against Campbell ruling and elaborated
12 and enlarged upon it and said that a governmental unit
13 cannot discriminate in granting any kind of benefits or
14 whatever on the basis solely because somebody either
15 filed a bankruptcy or discharged a debt in bankruptcy.

16 So 525 has taken the Perez against Campbell
17 ruling and really codified it now into the Bankruptcy
18 Code and enlarged upon it.

19 QUESTION: (Inaudible) If this restitution
20 order -- do you think this restitution order was
21 enforceable in court before bankruptcy? Could somebody
22 sue on it? Could somebody actually collect it?

23 MR. DINEEN: It was enforceable in the sense
24 that the probation officer could, if she wasn't paying
25 -- and in fact, I should point out she wasn't paying for

1 three years. We sent a letter --

2 QUESTION: All right, but not otherwise? The
3 person the money went to, I mean --

4 MR. DINEEN: Oh, yes, they could have sued
5 them -- they could have sued her for the debt.

6 QUESTION: Well, the discharge certainly
7 prevents suing.

8 MR. DINEEN: Oh, yes, there's no question.
9 The Bankruptcy Court and the district court --

10 QUESTION: But why should it also prevent the
11 state from saying, well look, whether we can sue or not,
12 there's been a breach of our condition and we're going
13 to put you back in jail? Why do you think that violates
14 the bankruptcy law?

15 MR. DINEEN: I believe that violates 525 of
16 the Bankruptcy Code because --

17 QUESTION: Has anybody ever tested that out?

18 MR. DINEEN: Well, we're not there yet, I
19 don't think.

20 QUESTION: Does your argument on this point go
21 so far as to say that the judge at the time he imposes
22 sentence, including the restitution order, could make it
23 a condition of parole that the defendant not file any
24 bankruptcy proceeding during the period of parole?

25 MR. DINEEN: I think the judge, in the

1 situation where it's the kind of a debt, let's say, that
2 would not --

3 QUESTION: This kind of case. Let's stick to
4 this kind of case.

5 MR. DINEEN: Oh, in this kind of case I don't
6 think the judge could make that condition, to answer you
7 very directly on your question. But I think in this
8 kind of a case the judge wouldn't need to, because the
9 judge would know now, and everybody would know, that the
10 prosecutor simply has to come in and file a complaint to
11 determine non-dischargeability.

12 But if the judge wanted to as a condition of
13 the order say, I'm ordering you to pay restitution and
14 I'm also ordering that you not file a bankruptcy, as a
15 condition of bankruptcy --

16 CHIEF JUSTICE REHNQUIST: Your time has
17 expired, Mr. Dineen.

18 MR. DINEEN: Ch, I'm sorry. I was trying to
19 answer His Honor's question.

20 CHIEF JUSTICE REHNQUIST: It is expired.

21 MR. DINEEN: Thank you, Your Honors.

22 CHIEF JUSTICE REHNQUIST: Mr. Schuman, you
23 have four minutes left. Do you have anything more to
24 say?

25 REBUTTAL ARGUMENT

1 OF CARL J. SCHUMAN, ESQ.

2 ON BEHALF OF PETITIONERS

3 MR. SCHUMAN: Yes, Mr. Chief Justice.

4 If Congress had intended to work a wholesale
5 change in criminal justice whereby large groups of
6 restitution orders in crimes such as negligent homicide,
7 drugs, and, as I've pointed out, in other crimes, surely
8 it would have been explicit. It was not.

9 Now, not only are there large categories of
10 crimes in which restitution orders would be
11 dischargeable without any remedy for the state, but
12 there's a category of bankruptcy in which a debtor could
13 escape other restitution orders. If a debtor went into
14 chapter 13 instead of chapter 7 as in this case, there
15 would probably be no applicable exception to discharge
16 for any sort of restitution order, because the only
17 exceptions to discharge in chapter 13 pertain to
18 long-term debts and alimony or child support.

19 There is no larceny exception to discharge in
20 chapter 13. So if this Court rules that restitution is
21 dischargeable, then defendants ordered to pay
22 restitution may just circumvent it by going into chapter
23 13.

24 The second point I would like to make is that
25 the state believes that its inability or its possible

1 inability to incarcerate a person who has -- for failure
2 to pay restitution when the restitution has been
3 discharged, if this Court so rules, is an interpretation
4 of Perez v. Campbell.

5 Now, it may be possible that what the Perez
6 Court really meant was that the debtor in bankruptcy
7 gets a clean economic slate, but does not get a clean
8 criminal record as a result of a bankruptcy discharge.

9 Thank you very much.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Schuman.

12 The case is submitted.

13 (Whereupon, at 2:50 p.m., the argument in the
14 above-entitled case was submitted.)
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#85-1033 - JOHN J. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,

Petitioners V. CAROLYN ROBINSON

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Paul A. Richardson

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