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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: PENNSYLVANIA DEPARTMENT OF PUBLIC  
WELFARE, ET AL., Petitioners  
V. EDWARD J. DAVENPORT, ET UX.

CASE NO: 89-156

PLACE: Washington, D.C.

DATE: February 20, 1990

PAGES: 1 - 49

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IN THE SUPREME COURT OF THE UNITED STATES

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PENNSYLVANIA DEPARTMENT OF :  
PUBLIC WELFARE, ET AL., :  
Petitioners :  
V. : No. 89-156  
EDWARD J. DAVENPORT, ET UX. :  
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Washington, D.C.  
Tuesday, February 20, 1990

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:00 p.m.

APPEARANCES:

WALTER W. COHEN, ESQ., First Deputy Attorney General of  
Pennsylvania, Harrisburg, Pennsylvania; on behalf  
of the Petitioners.  
DAVID A. SEARLES, ESQ., Philadelphia, Pennsylvania; on  
behalf of the Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
WALTER W. COHEN, ESQ.	
On behalf of the Petitioners	3
DAVID A. SEARLES, ESQ.	
On behalf of the Respondents	25
<u>REBUTTAL ARGUMENT OF:</u>	
WALTER W. COHEN, ESQ.	
On behalf of the Petitioners	48

P R O C E E D I N G S

(1:00 p.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 89-156, Pennsylvania Department of Public  
5 Welfare v. Edward J. Davenport.

6 Mr. Cohen.

7 ORAL ARGUMENT OF WATER W. COHEN

8 ON BEHALF OF THE PETITIONERS

9 MR. COHEN: Mr. Chief Justice, and may it please  
10 the Court:

11 The issue before the Court in this case is  
12 whether Congress in enacting the Bankruptcy Code of 1978  
13 intended that a criminal convicted of welfare fraud and  
14 sentenced to pay restitution as a condition of probation  
15 in a state court can walk out of the state courthouse and  
16 into the federal courthouse to have the judge's criminal  
17 restitution order wiped out in a bankruptcy process.

18 The facts of the case are not in dispute. The  
19 defendants in September of 1986 entered guilty pleas.  
20 They were sentenced to pay restitution in the amount of  
21 \$4,145 at the rate of \$208 per defendant per month payable  
22 to the county probation department.

23 A period of months passed. They failed to pay  
24 and they then proceeded in a Chapter 13 bankruptcy filing.  
25 The probation department of the county filed a pre-

1 violation notice and subsequently held a hearing and then  
2 the bankruptcy court instituted an adversary proceeding at  
3 the instance of the Respondents and an order was entered  
4 discharging the state court restitution sentence as a  
5 debt.

6 That decision was reversed by the judge in the  
7 Eastern District based upon this Court's reasoning in  
8 Kelly v. Robinson. But the Third Circuit in a two-to-one  
9 decision reversed and the order of discharge stood, cert  
10 was granted by this Court to address the question of  
11 whether a restitution order is a debt that is  
12 dischargeable in a Chapter 13 bankruptcy proceeding.

13 It is Petitioners' position that Congress did  
14 not intend to void a lawful state court criminal sentence  
15 in any way through the bankruptcy process or in particular  
16 here through a Chapter 13 proceeding.

17 To have done so would have trampled on the  
18 principles of federalism in comity that this Court in 1971  
19 in Younger v. Harris discussed so thoroughly where the  
20 Court recognized the fundamental policy in our system of  
21 government against federal interference with state  
22 criminal prosecutions.

23 Further, the language of the Bankruptcy Code  
24 does not clearly spell out that criminal court orders of  
25 this nature are to be voided through discharge in a

1 Chapter 13 proceeding.

2           Additionally, there was a string of pre-Code  
3 cases going back as far as the case of In re Moore in  
4 Kentucky Bankruptcy Court in 1901 where courts refused to  
5 discharge criminal restitution sentences.

6           That is very important under the test that the  
7 Supreme Court set forth in the Midlantic case and the  
8 Court said that if Congress intends for legislation to  
9 change the interpretation of a judicially-created concept,  
10 it makes that intent specific.

11           QUESTION: Mr. Cohen, were criminal monetary  
12 sanctions considered debts in pre-Code Chapter 13-type  
13 proceedings?

14           MR. COHEN: They were not, Justice O'Connor.

15           QUESTION: Were they dischargeable?

16           MR. COHEN: The criminal court orders were not  
17 -- they were dischargeable, but under the definition of  
18 debt. I'm sorry, they were not dischargeable. But under  
19 the definition of debt, which was a much narrower  
20 definition at that time, they did not fall under that  
21 definition.

22           QUESTION: Are there cases that you cite holding  
23 that criminal monetary sanctions were nondischargeable?

24           MR. COHEN: Yes, Your Honor, and In re Moore is  
25 one of them. But it's -- it's a whole string of cases

1 cited in our brief that stands for that proposition.

2 In the Ron Pair Enterprises case, this Court  
3 also said that we must look very carefully to its clear  
4 expression of congressional intent when there is a clear  
5 conflict with state and federal laws of great importance.

6 Here the conflict is between the Bankruptcy Code  
7 and the criminal laws of the Commonwealth of Pennsylvania.  
8 In Kelly v. Robinson, this Court said you must look to --  
9 one must look to the whole law. And if we do that, we  
10 find no solid specific evidence of any congressional  
11 intent to change that pre-Code law to allow for discharge  
12 of criminal sentences.

13 QUESTION: Well, what's the language that's  
14 involved here? What's the claim? What makes it -- why is  
15 it claimed to be dischargeable? Because it is said to be  
16 a debt?

17 MR. COHEN: Because it is said to be a debt.

18 QUESTION: Well, --

19 MR. COHEN: A debt is defined as a liability on  
20 a claim. A claim is a right to payment --

21 QUESTION: So why don't we have to -- aren't you  
22 going to have to tell us what a debt is or isn't?

23 MR. COHEN: A debt is a liability on a claim and  
24 claim is a right to payment. It is our position that  
25 there is no right to payment when you have a situation of

1 the probation department essentially being the payee after  
2 a criminal court judge has ordered that a sentence of  
3 restitution be imposed as a condition of probation.

4 QUESTION: And it isn't -- it isn't -- it's -- I  
5 suppose he is supposed to pay it, isn't he.

6 MR. COHEN: Your Honor, it is a sentence. It's  
7 not a debt. He must pay it --

8 QUESTION: Well, he's suppose to pay it, isn't  
9 he?

10 MR. COHEN: He is suppose to pay it if he is to  
11 follow the sentencing --

12 QUESTION: And if he doesn't, he'll be in jail.

13 MR. COHEN: That's correct, if he has the  
14 ability to pay it. Under Bearden v. Georgia the Court  
15 very properly clearly held that you cannot send somebody  
16 to jail.

17 QUESTION: That's right.

18 MR. COHEN: We don't have debtor's prisons.

19 QUESTION: That's right.

20 MR. COHEN: You can't send somebody to jail if  
21 they cannot afford to pay it. But a sanction of going to  
22 jail does not give the victim in this case, the  
23 Pennsylvania Department of Public Welfare, any right to  
24 collect the money. This is not a civil judgment order, in  
25 other words. It is a criminal sentence.



1 QUESTION: Well, I suppose if someone qualifies  
2 for bankruptcy, that's pretty good evidence that they  
3 don't have the ability to pay.

4 MR. COHEN: Yes, Your Honor, but a criminal  
5 restitution sentence -- and this is specifically in  
6 Pennsylvania, but I don't think that we're asking this  
7 Court to just hold for Pennsylvania obviously -- but  
8 specifically in the Pennsylvania statute, a restitution  
9 order for welfare fraud can continue even beyond the term  
10 of possible sentence for the underlying crime, which in  
11 this case was seven years.

12 So that the probation order and the restitution  
13 order can continue far beyond the three-year period of  
14 consideration for the issue of what is available for the  
15 creditors in the bankruptcy proceeding.

16 QUESTION: Does the probation -- does the  
17 welfare department have a right of setoff against future  
18 payments for the nonpayment of the fine?

19 MR. COHEN: The department would be able to  
20 proceed to recoup if the individuals are still on welfare.  
21 There is no process in Pennsylvania --

22 QUESTION: Well, that's -- that's -- that's  
23 exercising a right -- a right of payment, I take it.

24 MR. COHEN: It's an exercise of recoupment for  
25 the money that was taken, but that is --

1 QUESTION: Well, you call it -- you call it  
2 recoupment.

3 MR. COHEN: Not under the criminal court order,  
4 Your Honor. Only in a separate process, which is not the  
5 process before the Court.

6 QUESTION: Well, what do they have to do in  
7 order to recoup other than just read the court order?

8 MR. COHEN: They have to proceed civilly.

9 QUESTION: And how do -- how do they do that?

10 MR. COHEN: The welfare department does not  
11 recoup on the basis of the criminal restitution order. So  
12 there --

13 QUESTION: How it does it proceed civilly?

14 MR. COHEN: It proceeds by going into court and  
15 seeking a civil judgment for the money unlawfully paid.  
16 And the standards that the department uses are -- are the  
17 standard basically for proceeding civilly as opposed to  
18 criminally is a lower standard.

19 If they are proceeding criminally, they are  
20 looking at the intent. They are looking at the prior  
21 history, the intent of the individuals involved and if  
22 they determine that it is risen to the level of a criminal  
23 prosecution, then they prosecute criminally. But the  
24 restitution order of the court is a sentence of the court.

25 QUESTION: So the recoupment can only be after a

1 civil proceeding?

2 MR. COHEN: That's correct, Your Honor.

3 QUESTION: I suppose that wouldn't make -- make  
4 it a debt that was dischargeable.

5 MR. COHEN: If it were in a civil proceeding.

6 QUESTION: Yes.

7 MR. COHEN: If this Court had a civil judgment  
8 order in front of it. But what this Court has is a  
9 criminal sentence from another court, a court that is  
10 enforcing the criminal laws of the state, a court that is  
11 making a judgment of what is the purpose of the sentencing  
12 process.

13 And it is our position, which we advance of  
14 course in the briefs, that the purpose of a restitution  
15 sentence is the same as any other sentence. It is for  
16 purposes of rehabilitation of the defendant. It is for  
17 deterrence, retribution, punishment, but it is not to  
18 collect the debt that is owed.

19 QUESTION: If you had a state where the welfare  
20 department could recoup simply based on the criminal  
21 judgment, would the debt be -- would the transaction be a  
22 debt in those states?

23 MR. COHEN: Your Honor, there are some states  
24 that in fact have in the criminal statute a civil process  
25 to enact a -- to proceed civilly toward a civil judgment.

1 But it is still our position that Congress did not intend  
2 to set up in the bankruptcy process, a method that people  
3 convicted of crimes can escape from their sentence.

4 QUESTION: Well, wouldn't -- wouldn't you say  
5 that this bankrupt owed the -- the -- is it the state, the  
6 city -- the -- Pennsylvania -- is it the state that we are  
7 talking about?

8 MR. COHEN: The Department of Public Welfare  
9 paying out --

10 QUESTION: Didn't the bankruptor owe them some  
11 money?

12 MR. COHEN: As a result of the sentence --

13 QUESTION: No, no, no. No. Just -- from the  
14 moment he -- he committed a fraud he owed them some money  
15 didn't he?

16 MR. COHEN: That's correct.

17 QUESTION: And couldn't he have listed that as a  
18 debt that he owed to --

19 MR. COHEN: He did do that.

20 QUESTION: He did do that and why isn't that  
21 debt dischargeable?

22 MR. COHEN: Because that is different from the  
23 criminal sentence itself.

24 QUESTION: Well, I know, but isn't that debt  
25 dischargeable? He lists this as is a debt. I defrauded

1 the department and I owe them some money and he lists it  
2 as a debt. Now isn't that dischargeable?

3 MR. COHEN: Oh, because -- that process and  
4 what the court did here was to actually end up with \$120  
5 paid out to the creditors and said that that was one of  
6 the debts -- one of many debts that was dischargeable.  
7 But we are not looking at a civil judgment or a civil  
8 claim. We are looking a criminal court sentence.

9 QUESTION: But the restitution order -- isn't it  
10 measured by what the fellow took from somebody else?

11 MR. COHEN: It can be.

12 QUESTION: Wasn't it here?

13 MR. COHEN: And in this case it was. But at the  
14 same time a restitution order can be entered and has been  
15 entered in Pennsylvania in 1987 in 5,000 cases measured  
16 not by the total loss, but by some judgment as to what in  
17 terms of rehabilitation of the defendant, what amount of  
18 money would indicate to that defendant that he or she is  
19 paying back money for something that he or she did  
20 wrongly.

21 QUESTION: I suppose that he could have been  
22 convicted for some fraud but he might just have  
23 independently paid the money back to the -- to the city or  
24 to the department of welfare.

25 MR. COHEN: To the state.

1 QUESTION: He might have done that and still  
2 been convicted mightn't he?

3 MR. COHEN: That would be possible.

4 QUESTION: But there certainly wouldn't be any  
5 restitution order.

6 MR. COHEN: That's correct under those  
7 circumstances, Your Honor.

8 QUESTION: Then why should there be if his debt  
9 has been discharged?

10 MR. COHEN: The restitution order came before  
11 any proceeding in bankruptcy. The restitution order was a  
12 valid order. If he were to challenge that order, that  
13 should be challenged through the state court process.

14 QUESTION: But suppose it didn't. Suppose --  
15 suppose the discharge is first and the criminal proceeding  
16 second?

17 MR. COHEN: I still don't think it matters, Your  
18 Honor, because I think that --

19 QUESTION: Well, the question is does -- does  
20 the Pennsylvania criminal court have authority to impose  
21 the restitution order even if the debt has been  
22 discharged.

23 MR. COHEN: It is our position that they do.

24 QUESTION: Restitution for something that he  
25 doesn't owe?

1 MR. COHEN: Restitution for something that the  
2 bankruptcy court has said that he doesn't owe but that the  
3 criminal court judge can still say is a violation of the  
4 laws of the Commonwealth of Pennsylvania in the judgment  
5 made by the state legislature.

6 And that's why in this discussion I think we are  
7 pointing out the whole problem of did Congress of the  
8 United States intend to limit the authority of a state  
9 court judge or to wipe out the sentence of a state court  
10 judge where the judge is enforcing the laws of the  
11 Commonwealth, laws that the state legislature are suppose  
12 to be able to enact to protect the citizens and laws, in  
13 fact in this instance, that this Court in Bowen v. Roy  
14 indicated were important laws -- the ability of the state  
15 to police welfare fraud.

16 QUESTION: Mr. Cohen, you say there has to be  
17 some -- some indication in the statute -- clear  
18 indication, or whatever terminology you use. Why isn't  
19 there?

20 I mean claim is defined -- is defined -- well,  
21 debt -- debt means liability on a claim. Claim means  
22 right to payment essentially. And then you have Section  
23 523(a)(7) which makes it very clear that -- that a debt  
24 includes a fine, penalty or forfeiture.

25 It says that -- that a discharge will not

1 discharge an individual from any debt to the extent such  
2 debt is for a fine, penalty, or forfeiture.

3 MR. COHEN: And --

4 QUESTION: It seems to me clear that Congress  
5 thinks that a fine, penalty or forfeiture, criminal though  
6 it be, is a debt.

7 MR. COHEN: Your Honor, in Kelly v. Robinson  
8 this Court did act based upon that section of the  
9 Bankruptcy Code and acted to uphold the restitution order  
10 basically in that Connecticut case.

11 But the issue of whether a sentence --

12 QUESTION: Because it said it did not exclude  
13 it. Right?

14 MR. COHEN: It said to the extent that it is a  
15 debt it is not dischargeable.

16 QUESTION: Well, they didn't reach the question.  
17 They really didn't reach the question.

18 MR. COHEN: They didn't reach --

19 QUESTION: All right.

20 MR. COHEN: That's -- that's correct, Your  
21 Honor.

22 QUESTION: Well, I don't care about the  
23 question, I'm talking about the text. To the extent --  
24 the text says to the extent such debt is for a fine,  
25 penalty or forfeiture. And you're telling us that that



1 language is meaningless because a debt can never be for a  
2 fine, penalty or forfeiture.

3 MR. COHEN: No, Your Honor. I -- I would say in  
4 response directly to your question that the fine, penalty  
5 or forfeiture that the Congress is speaking of there is a  
6 civil fine, penalty or forfeiture, not a criminal fine,  
7 penalty or forfeiture.

8 There is no discussion -- and that's why we are  
9 standing here talking about congressional intent -- there  
10 is no discussion of criminal fines, penalty, or  
11 forfeiture. In fact, the Congress said that the  
12 bankruptcy laws are not to be a have for criminal  
13 offenders. The bankruptcy laws are intended to protect  
14 honest debtors attempting, when they are financially  
15 overextended, to have a fresh start and not to protect  
16 criminal offenders.

17 QUESTION: I -- I -- I've heard of a civil  
18 penalty in a civil forfeiture. I must say I've never  
19 heard of a civil fine. A civil fine. I thought a fine  
20 was always a criminal exaction.

21 I mean, we're just talking about words here, but  
22 that's --

23 MR. COHEN: That's the case.

24 QUESTION: -- what our statutes happen to be  
25 written in.

1 QUESTION: May I ask on the -- on your view  
2 under -- in Pennsylvania. Supposing you have the same  
3 judgment you've got here and you call it criminal  
4 restitution and the person who owes the money dies. Would  
5 you be able to recover from -- and say there's plenty of  
6 money in the estate -- could you recover on the claim from  
7 the estate? From the decedent's estate?

8 MR. COHEN: I don't think so, Your Honor.

9 QUESTION: You don't think you could? MR.  
10 COHEN: Because --

11 QUESTION: If you went in and said this is a  
12 debt --

13 MR. COHEN: -- I think it is a --

14 QUESTION: -- that's owed?

15 MR. COHEN: -- it is a sentence to the -- to the  
16 individual. It is not a debt that would be owed from the  
17 estate. If it were a civil judgment, then that would be  
18 different.

19 Now, there is some case law to the contrary on  
20 that.

21 QUESTION: Is there any case law supporting your  
22 position?

23 MR. COHEN: No, Your Honor. Not that I am aware  
24 of.

25 QUESTION: But there is some to the contrary.

1 QUESTION: Is there case law to the contrary in  
2 Pennsylvania?

3 MR. COHEN: No.

4 In Kelly v. Robinson this Court -- Justice  
5 Powell, in fact, writing for the majority quoted Justice  
6 Powell writing for the dissent in TVA v. Hill, the  
7 Snaildarter case, and he said -- this was in the majority  
8 opinion -- that if Congress had intended to discharge  
9 state criminal sentences, we can be certain that there  
10 would have been hearings, testimony, and debate concerning  
11 consequences so likely to arouse public outrage.

12 In other congressional acts, such as the Victim  
13 and Witness Protection Act of 1982, Congress very clearly  
14 intended to highlight restitution as a criminal sanction.  
15 In the Financial Institutions Reform, Recovery and  
16 Enforcement Act of 1989, Congress showed its intent again  
17 that restitution be a sanction in the savings and loan  
18 scandals.

19 In the automatic stay provision which is where  
20 the -- during the course of the debate on the automatic  
21 stay, where the Congress indicated that the bankruptcy  
22 laws -- and they didn't just the automatic stay provision,  
23 they said the bankruptcy laws are not intended to be a  
24 haven for criminal offenders.

25 And that section -- it would be contradictory to

1 then allow an offender to escape a sentence if in fact  
2 there is an exception to a stay to allow criminal  
3 proceedings to commence or to continue.

4 In the preferential transfer provisions, which  
5 weighed transfers for the benefit of a creditor on account  
6 of a debt owed within 90 days -- in that situation, under  
7 the ruling of the Third Circuit, the criminal restitution  
8 order is a debt and the Department of Public Welfare here  
9 is a creditor, the Department would have to pay back the  
10 money. They would have to refund the restitution payments  
11 made under the state court judge's order.

12 QUESTION: (Inaudible) preferences?

13 MR. COHEN: Because it would be within the 90-  
14 day period and a preference, a debt, would have to be paid  
15 back.

16 So, the issue of federalism -- the issue of  
17 the --

18 QUESTION: Excise me. But would that also be  
19 the case -- it doesn't make any difference whether this is  
20 a restitution order or just a plain -- plain fine?  
21 Suppose it was just a -- just a fine. It doesn't go  
22 ultimately to the victim at all? It just goes into the  
23 state treasury?

24 MR. COHEN: I think, Your Honor, that that is  
25 different because a restitution order -- well, I guess a

1 fine would still be a sentence. So I suppose that would  
2 be correct. It would be the same. A restitution order  
3 being a sentence, the fine being the sentence. But the  
4 greater concern here --

5 QUESTION: But my -- my point is a fine would  
6 also be voidable you would say if we accept the --

7 MR. COHEN: If you accept the position of the  
8 Third Circuit. So what the --

9 QUESTION: Because there is no contemporary  
10 consideration paid for each of the installments, is that  
11 why it is voidable?

12 MR. COHEN: No, because under what Justice  
13 Scalia would be saying --

14 QUESTION: Well, I can ask him in conference.

15 MR. COHEN: -- it was a debt.

16 QUESTION: I'm asking you now.

17 (Laughter.)

18 MR. COHEN: It was -- it is a debt. That would  
19 be why.

20 QUESTION: Well, but it's not all debts that are  
21 preferences. I mean if a payment is made on a debt within  
22 90 days, the reason it's a preference is because there's  
23 nothing exchanged for the time. It's a pre-existing debt.  
24 Isn't that the reason?

25 MR. COHEN: That's correct and it's money that

1 otherwise should be available to all of the creditors in  
2 the context of the bankruptcy proceeding.

3 I'm sorry, I thought Justice Scalia was not  
4 focused on the preferential transfer provision, but on the  
5 underlying issue before the Court.

6 The whole question of the role of the federal  
7 government vis-a-vis role of the state government, the  
8 issues raised by this Court in *Younger v. Harris* lead to  
9 an infringement on the sovereignty of the states if the  
10 federal court can determine that a criminal court judge  
11 cannot take into consideration all of the factors, all of  
12 the sanction alternatives that are left available to the  
13 court in a criminal sentence and decide what is the most  
14 appropriate sentence to rehabilitate, to protect the  
15 people and to punish the offender.

16 QUESTION: As a matter of fact, Mr. Cohen, in  
17 Pennsylvania is restitution often imposed as the only  
18 criminal sanction or is it usually accompanied by a fine  
19 or a -- or a criminal sentence?

20 MR. COHEN: In this case, for example, Your  
21 Honor, it was a condition of probation imposed along with  
22 court costs so that court costs were separate from the  
23 restitution order which was a condition of the probation  
24 sentence of one year.

25 But it can be imposed in a variety of different

1 ways. It was, as I mentioned, 5,000 times it was imposed  
2 as a sentence or as a condition of probation, but in many  
3 of those instance it was a --

4 QUESTION: Do you think if -- if the Third  
5 Circuit view prevails, the Pennsylvania criminal court  
6 would have difficulty revoking probation for failure to  
7 pay the restitution?

8 MR. COHEN: It would have difficulty. I think  
9 that they could still do that, but the problem would be  
10 they could only do that once there was a determination at  
11 the time that the court was proceeding to the probation  
12 hearing that the person had the ability to pay.

13 Now in the discussion -- in the oral argument --

14 QUESTION: Well, why -- why would ability to pay  
15 be critical in deciding whether or not because the -- it's  
16 dischargeable in bankruptcy, you could nonetheless revoke  
17 probation for failure to pay it?

18 MR. COHEN: Because you can't -- under *Bearden*  
19 *v. Georgia*, state court or federal court cannot revoke  
20 probation without making that determination of the ability  
21 of the defendant --

22 QUESTION: Well, okay. But that's a totally  
23 different line of cases from -- from the bankruptcy  
24 aspect.

25 MR. COHEN: That's correct.

1                   QUESTION: Well, supposing there was a  
2                   determination that the defendant did have the ability to  
3                   pay, but nonetheless the Third Circuit's view is upheld  
4                   here and we say this is a debt dischargeable in  
5                   bankruptcy. Do you think the Pennsylvania criminal court  
6                   could revoke probation for failure to pay it?

7                   MR. COHEN: No, I don't think under those  
8                   circumstances.

9                   QUESTION: Can you --

10                  MR. COHEN: But I think that what that then does  
11                  in the future is set up a system where people convicted of  
12                  welfare fraud would go to prison.

13                  QUESTION: Well, why is that if -- if the  
14                  defendant wishes to avoid incarceration and he can come up  
15                  with the money to pay, he just pays it despite the fact  
16                  there's been a discharge.

17                  MR. COHEN: I thought the --

18                  QUESTION: He has his choice. He goes to jail  
19                  or he pays.

20                  QUESTION: But if it is --

21                  MR. COHEN: If he wants to rely on the  
22                  discharge, he goes to jail.

23                  MR. COHEN: Even under that circumstance,  
24                  Justice Kennedy, I think then we create a system that does  
25                  not give the proper balance between what the bankruptcy



1 court can do and what the criminal court trial judge can  
2 do.

3 So I think that judges will, faced with a  
4 decision by this Court upholding the Third Circuit, they  
5 will sentence people initially to prison. And the whole  
6 restitution process, the whole victim's rights movement  
7 that has grown so strongly in the '80s as a part of the  
8 criminal justice system, will take a large step backwards.

9 QUESTION: If this restitution order is  
10 considered a debt, do you lose?

11 MR. COHEN: We lose this case.

12 QUESTION: There is no way of saying that the --  
13 that the restitution order is not dischargeable under the  
14 provisions of the Code?

15 MR. COHEN: No, not at all, because the  
16 523(a)(7) applies to Chapter 7 but not to Chapter 13  
17 bankruptcies under Section 1328(a). So we have to rise or  
18 fall on the question of whether a restitution order is a  
19 sentence or is a debt.

20 QUESTION: But by the same token then you say  
21 you shouldn't use (a)(7) to show that this is a debt  
22 because this --

23 MR. COHEN: I -- I would say that. Yes, Your  
24 Honor. And may I reserve the remainder of my time?

25 QUESTION: Yes, you may, Mr. Cohen.

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Mr. Searles.

ORAL ARGUMENT OF DAVID A. SEARLES  
ON BEHALF OF THE RESPONDENTS

MR. SEARLES: Thank you, Mr. Chief Justice.

QUESTION: Mr. Searles, if the Third Circuit view is upheld here, do you think that a Pennsylvania criminal court could revoke this particular Respondents' probation for failure to make the restitution payment?

MR. SEARLES: Your Honor, I think it depends whether the restitution order is an independent component of the criminal sentence or whether it's a condition of probation. In this case it was originally a condition of probation, but the probation has expired. All that remains is the order to pay restitution.

And if the criminal court were to try to compel payment of the restitution after discharge, I think that would be inappropriate under Section 524, under the statutory injunction against collecting discharged debts.

If there were still a condition of probation and the restitution had been discharged, then I think the answer would depend on state law, which is could the state court judge modify or revoke probation when the original conditions of probation have proved impossible or infeasible.

QUESTION: But you wouldn't see the federal

1 Bankruptcy Code as a bar to revocation of probation in the  
2 latter situation.

3 MR. SEARLES: It would be a bar insofar as in an  
4 attempt to collect money that had been discharged -- a  
5 debt that had been discharged. But I think the answer  
6 would be up to the state courts to determine on a case-  
7 to-case basis which is, depending on state law, having to  
8 do with an original condition of probation having become  
9 infeasible. What does that leave the state court judge to  
10 do?

11 QUESTION: I'm -- I'm not sure I understand your  
12 answer because the first part sort of read out the last  
13 part. You'd -- you'd say it would be -- it would not be  
14 permissible under the bankruptcy law insofar as it's an  
15 attempt to collect a debt. But it is an attempt to  
16 collect a debt.

17 The state court says, I don't care if it's been  
18 discharged, you either pay it up or your probation is  
19 revoked.

20 MR. SEARLES: I think what --

21 QUESTION: Do you consider that an attempt to  
22 collect a debt? That's -- that's what we're asking. Can  
23 a state court say either pay up or your probation is  
24 revoked?

25 MR. SEARLES: I think that --

1 QUESTION: If state law provides that, is it  
2 allowable under federal law?

3 MR. SEARLES: I think that 524 would bar that.

4 QUESTION: Okay.

5 MR. SEARLES: That's -- court -- the Congress'  
6 statutory injunction against collection of a discharged  
7 debt. But I think what the defendant in that case would  
8 do would be to go to state court, present his thorough law  
9 defense. As the Third Circuit has held in the Davis case,  
10 we can presume that state courts are going to uphold  
11 federal law defenses and let the state court decide that  
12 based on state law.

13 QUESTION: Well, but are -- you know, the last  
14 clause is almost meaningless so far as I can tell. If  
15 federal law prevents the revocation of probation after the  
16 debt has been discharged in bankruptcy, why say let state  
17 courts decide according to state law?  
18 It's being controlled by federal law, isn't it?

19 MR. SEARLES: That would be the defense, that  
20 federal law precludes collection of the debt.

21 QUESTION: Well, does the state court have any  
22 option if the federal defense is a good one? You don't  
23 just say, well, let them decide it for themselves. I  
24 mean, they have to give controlling federal law the nod  
25 don't they?

1 MR. SEARLES: I believe that's true.

2 QUESTION: Mr. Searles, before you get into your  
3 argument, could you help me out on one -- this is not a  
4 bankruptcy, this is a Chapter 13, isn't it?

5 MR. SEARLES: Yes, it is.

6 QUESTION: It reads more like a reorganization.

7 MR. SEARLES: Yes.

8 QUESTION: Now, what is the difference between  
9 the -- your client's obligation under the plan of --  
10 whatever the plan he had was, and his obligation had there  
11 been no plan? He did have an obligation to pay it even  
12 under the plan, didn't he?

13 MR. SEARLES: Yes.

14 QUESTION: Yeah, well, what --

15 MR. SEARLES: What a debtor in a Chapter 13 does  
16 is -- is sets forth what his disposable income is and  
17 proposes that be paid to the trustee on a periodic basis  
18 and the trustee takes that money and pays it to the  
19 various creditors who have filed claims.

20 QUESTION: Well, why d-- why doesn't the state  
21 get paid in full in this case?

22 MR. SEARLES: They did not file a claim.

23 QUESTION: But if they had filed a claim,  
24 wouldn't they have been paid in full?

25 MR. SEARLES: They would not have been paid in

1 full. They would have been paid to the extent that the  
2 debtor could afford it --

3 QUESTION: I see.

4 MR. SEARLES: -- based on the bankruptcy judge's  
5 determination of what he could afford.

6 QUESTION: But if, for example, this was the  
7 only debt he had -- or assuming its a debt for -- I don't  
8 suppose they would approve of the plan if -- if it was  
9 just a means to get rid of this one obligation, would  
10 they? It would either be a bankruptcy case or nothing,  
11 wouldn't it?

12 MR. SEARLES: Well, I think bankruptcy courts  
13 have -- have the power to dismiss bankruptcies or deny  
14 confirmation of bankruptcy plans if they feel, based on  
15 all the circumstances that exist --

16 QUESTION: Isn't there a good faith requirement?

17 MR. SEARLES: -- that it's not a proper --

18 QUESTION: Isn't there a good faith requirement?

19 MR. SEARLES: -- that doesn't meet the good  
20 faith requirement. The state didn't even come to court to  
21 object on that ground or any other ground. If they --

22 QUESTION: What percentage of payment did this  
23 plan call for?

24 MR. SEARLES: This called for a very low  
25 percentage. I'm not sure exactly what it was.

1 QUESTION: 10 percent?

2 MR. SEARLES: It may have been lower than 10  
3 percent.

4 QUESTION: I see.

5 MR. SEARLES: The Davenport's only income was  
6 Social Security disability benefits. After all their  
7 expenses they had left over a very small amount and that's  
8 what was proposed to pay into the plan.

9 QUESTION: Well, if his -- if his filings were  
10 correct -- I'm sorry I shouldn't -- if his filings were  
11 correct, he really wouldn't have been able to pay this  
12 money anyway then, would he?

13 MR. SEARLES: After the bankruptcy?

14 QUESTION: On the schedule.

15 MR. SEARLES: After the bankruptcy, he would not  
16 have been able to pay.

17 QUESTION: Yeah.

18 MR. SEARLES: In fact, that's what happened.  
19 During the bankruptcy when there was motion to revoke  
20 probation, the Davenports voluntarily went back to state  
21 court. We did not try to restrain the state court from  
22 proceeding, and the Davenports appeared and they testified  
23 about their inability to pay, and the state court judge  
24 found that there was inability to pay, denied the motion  
25 to revoke probation, and the probationary period expired.

1           There was -- there was no interference with the  
2 state court system here. But their main intention --

3           QUESTION: Can you -- can you explain to me why  
4 -- why you -- you say that 523(a)(7) does mean when it  
5 says fine, penalty or forfeiture -- under your theory it  
6 means both civil and criminal. Right?

7           MR. SEARLES: That's correct.

8           QUESTION: Why -- why -- why did Congress not  
9 apply that to Chapter 13? Just an accident or what?

10          MR. SEARLES: I think it has to do with the  
11 purposes of Chapter 13, which is, instead of liquidating  
12 your property and distributing the non-exempt assets to  
13 your creditors, which is what you do in 7, a 13 is a means  
14 to keep property and pay your creditors to the extent that  
15 you are able to.

16                 So it's a broader discharge in a Chapter 13  
17 because the result in most cases is going to be that all  
18 the debtor's disposable income is going to committed to  
19 the plan and paid to the creditors. And to the extent  
20 that the creditors don't get 100 percent, well, Congress  
21 has made a decision that debts are not going to hang over  
22 the debtors head ad infinitum and at that point they  
23 receive a discharge.

24                 So what Congress has done is provide for a  
25 broader discharge in some Chapter 13 cases, the ones that



1 are completed under 1328(a), and provide for a discharge  
2 of all debts listed with two exceptions. One of them  
3 being long-term debts and the other being alimony and  
4 support. But all the 5 -- the other 523(a) exceptions in  
5 Chapter 7 were not -- were specifically not incorporated  
6 into 1328(a).

7 QUESTION: Criminal fines would be discharged?

8 MR. SEARLES: That's correct.

9 QUESTION: What are -- what are the advantages  
10 for a debtor of taking Chapter 7 over Chapter 13?

11 MR. SEARLES: A debtor who perhaps didn't have  
12 -- couldn't meet the eligibility requirements of Chapter  
13 13, who didn't have regular income, or who had more debts  
14 than he can have under Chapter 13, might be forced to  
15 liquidate rather than to reorganize.

16 QUESTION: But I take it the requirement for  
17 regular income is not terribly demanding under Chapter 13,  
18 if Social Security alone is enough.

19 MR. SEARLES: It has to be regular. But it also  
20 has to be enough to pay the claims that are filed in  
21 accordance with the priority scheme set up by the -- by  
22 the court.

23 QUESTION: But it would be enough -- I take it  
24 it was deemed enough in this case to pay 10 percent?

25 MR. SEARLES: It was deemed enough -- I'm not

1 sure what the percentage was, but yes, it was deemed  
2 enough. The trustee reviewed the plan, recommended  
3 confirmation of the court, and the court confirmed.

4 No creditor came into court to object and both  
5 the Petitioners in this case had prior notice of the  
6 bankruptcy well before the confirmation deadline for  
7 objecting. They didn't file proofs of claim and they did  
8 not object.

9 Our main contention is that it -- restitution is  
10 a right to payment under the Code because there is a state  
11 court order requiring the Davenports to pay the money and  
12 the state order is pursuant to a state court statute  
13 mandating repayment in these kinds of cases.

14 The state court judge had no flexibility in  
15 imposing a sentence. He had to order restitution in these  
16 kinds of cases and the restitution is enforceable through  
17 contempt proceedings or in some states, by civil actions.  
18 And under any common sense reading of the term, the  
19 relationship between the parties here is one that created  
20 a right to payment on behalf of the petitioners.

21 QUESTION: When he -- when the -- the 13 --  
22 Chapter 13 proceeding was filed, he did list his debt to  
23 the Department, didn't he?

24 MR. SEARLES: Yes, he did.

25 QUESTION: But the Department never filed a

1 claim.

2 MR. SEARLES: That's correct.

3 Besides the definition of claim in Section 101,  
4 there are two other sections of the Code which treat  
5 restitution as a debt. One is 523(a)(7), which refers to  
6 debts that are fines, penalties, and forfeitures, which  
7 represents Congress' codification of the pre-Code judicial  
8 exception to dischargeability of criminal and civil  
9 penalties.

10 Congress has now upheld that those exception --  
11 Congress has -- excuse me -- written the law in a way that  
12 preserves those exception to discharge in Chapter 7,  
13 Chapter 12, some Chapter 11 and some Chapter 13 cases. So  
14 the fact that they acted expressly to protect those debts  
15 in some cases but not others indicates that they did  
16 consider them debts. And, as I said, that they  
17 incorporated those exceptions in 13 for some kinds of  
18 debts but not others, including fine, penalty and  
19 forfeiture, that also indicates that it was a debt.

20 Another section of the code, which is 726,  
21 provides for distribution of the property of the estate in  
22 payment of fines, penalties, and forfeitures. The same  
23 phrase from 523(a)(7). And also fines, penalties, and  
24 forfeitures was the title heading of a chapter in the  
25 crimes code at the time the Bankruptcy Code was enacted,

1 which is another indication that Congress meant to include  
2 criminal penalties as well.

3 By providing for distribution on fines,  
4 penalties, and forfeitures, which wasn't the case under  
5 the Act -- because these kinds of claims were not  
6 allowable, were not entitled to share in the distribution  
7 of the estate -- Congress has shown it's intention that  
8 these are debts that should be paid.

9 And there's very good reason for including them  
10 in distribution, because if they weren't included, the  
11 entire estate could be liquidated and distributed without  
12 any payment to the restitution victim. And this, we  
13 submit, would not make any sense because in some cases  
14 that distribution might represent the victim's best chance  
15 of recovering any money.

16 QUESTION: But -- as between the pre-Code  
17 situation and the post-Code situation, the state and the  
18 restitution victim I take it would prefer the pre-Code  
19 situation were -- it was not -- it was not includible or  
20 allowable, but is also dischargeable. You just didn't  
21 touch it. Isn't that right?

22 MR. SEARLES: That is right. It would -- it  
23 would pass through the bankruptcy and remain owing after  
24 the bankruptcy was over.

25 QUESTION: Yeah.

1 MR. SEARLES: But what Congress has said now is  
2 that these are claims that are to be paid through the  
3 distribution of the bankruptcy estate.

4 QUESTION: Yeah, you may well be right as to  
5 that's what Congress has said. But certainly it's not any  
6 advantage to the potential recipient of restitution to  
7 have had that done.

8 MR. SEARLES: Well, but this time -- this time  
9 they get paid to the extent that there is an estate that  
10 has assets in it.

11 QUESTION: Which would be in this particular  
12 case 10 percent?

13 MR. SEARLES: Or --

14 QUESTION: Less?

15 MR. SEARLES: Whatever it was. But Congress has  
16 made a decision that they should get -- they should share  
17 equally in the estate with other creditors.

18 QUESTION: Yes. And that may well be Congress'  
19 decision. My only point is it should not be painted as a  
20 benefit to the recipient of restitution as opposed to the  
21 pre-Code situation.

22 MR. SEARLES: Well, I think it represents  
23 Congress' intent that all creditors share equally. Just  
24 because you have a restitution order shouldn't give you  
25 preferential treatment over other possible victims of

1 crimes or serious torts who have not obtained restitution  
2 orders.

3 If fines and penalties were not included in  
4 distribution, this would set up a conflict between the  
5 federal courts and the state courts over the  
6 administration of the debtor's assets. And by giving  
7 bankruptcy court sole jurisdiction over the debtor's  
8 estate in Section 1334(d) of Title 28 Congress has  
9 expressed its intention that it's the federal -- for the  
10 bankruptcy court, a single forum, that administers the  
11 debtor's affairs.

12 QUESTION: Was there a great deal of conflict  
13 during the 80 years of the previous regime, from 1898 to  
14 1978?

15 MR. SEARLES: I'm not aware of any cases  
16 discusses that, but it appears to me that there could have  
17 been conflict because the debtor's estate was being  
18 distributed without the holder of the penalty or  
19 forfeiture claim getting any money.

20 Finally, if you look outside the bankruptcy law,  
21 at the Federal Crimes Code, there is a section in there  
22 that shows that Congress obviously intended criminal fines  
23 to be debts, which is Section 3613(f) of Title 18 which  
24 was amended in 1984 to make federal criminal fines  
25 nondischargeable in any bankruptcy.

1           There would be no point in Congress writing that  
2 exception unless they thought fines were debts in the  
3 first place. And when Congress did take this step to  
4 accept federal criminal fines, it did not do so for state  
5 criminal fines.

6           The Petitioners throughout the case have raised  
7 policy concerns which they believe support the notion that  
8 restitution should not be considered a debt. What they  
9 fail to focus on is that their concerns are already met  
10 and already addressed in Chapter 13.

11           Chapter 13 is basically a new system for  
12 consumer debt and it's singular in its approach. Unlike  
13 old Chapter 13, or Chapter 11, a debtor can now reorganize  
14 his affairs as long as he meets certain guidelines set  
15 forth in the Code. He no longer needs affirmative voting  
16 approval from his creditors.

17           What Congress has done in Chapter 13 has been to  
18 balance the rights of the debtor and the creditors, and to  
19 establish guidelines that are designed to ensure that the  
20 creditors get fair and equal treatment.

21           They suggest that Chapter 13 can be used as a  
22 vehicle for criminals to escape the consequences of their  
23 act. And this is simply not the case. Many criminal  
24 defendants would not be eligible for Chapter 13. There is  
25 a ceiling on the amount of debt you can have to be

1 eligible. And defendants who have been assessed large  
2 penalties for convictions for insider trading or toxic  
3 torts, or defrauding savings and loans, they will not be  
4 eligible to use Chapter 13.

5 QUESTION: What is the limit?

6 MR. SEARLES: It's \$100,000 of unsecured debt.  
7 Anyone penalized above that would not be eligible for  
8 Chapter 13. In addition, a debtor must have regular  
9 income and the bankruptcy filing must be in good faith.  
10 And bankruptcy courts have not hesitated to dismiss  
11 bankruptcies or deny confirmations of plans where they  
12 felt the circumstances warranted it.

13 Beyond the restrictions on debtors, Congress has  
14 given a number of rights to creditors to assure that they  
15 can demand and assure that a debtor cannot use a 13 to  
16 avoid debts which he can't afford to pay.

17 The creditors can come into court, scrutinize  
18 the debtor's income and expenses, demand that all  
19 disposable income is being paid into the plan. They can  
20 demand to receive at least as much as they would receive  
21 in Chapter 7 liquidation, and they can object to  
22 confirmation if they feel that the plan isn't paying them  
23 what they are entitled to.

24 In other words Chapter 13 has already provided  
25 Petitioners here with all--



1 QUESTION: I take it they're not about to get  
2 paid what they are entitled to.

3 MR. SEARLES: They are not going to be paid --  
4 in this case, it depends --

5 QUESTION: They're not being paid in full.

6 MR. SEARLES: Well, if they felt that was a  
7 valid objection, they could come to court and make it and  
8 it would be up to the judge to decide whether the plan  
9 comported with the code.

10 QUESTION: All you mean is that they are  
11 entitled to -- they're entitled to be paid whatever the  
12 plans calls them -- calls for them to get paid.

13 MR. SEARLES: Assuming the plan is a confirmable  
14 plan. If there are problems with the plan, they are  
15 entitled to object and bring that to the attention to of  
16 the court. The Petitioners in this case did not -- chose  
17 not to exercise any of these rights that Congress has  
18 given them.

19 But if their argument is accepted and  
20 restitution is declared to be something other than a debt,  
21 the result is going to frustrate fundamental bankruptcy  
22 policy because it's going to result in preferential  
23 treatment for some creditors over others. Including, as I  
24 said before, perhaps other victims of crimes or serious  
25 torts who had not obtained restitution orders and who, in

1 some people's eyes, may have more sympathetic claims.

2 It would also result in a conflict between the  
3 state court system and the federal court or the  
4 administration of the debtor's property where Congress has  
5 already expressed its intention that that property be  
6 administered through a single forum, which is the  
7 bankruptcy court.

8 QUESTION: Well, I take it -- I take it there  
9 are quite a number of states filed in this case amicus who  
10 don't think your position is very beneficial to them.

11 MR. SEARLES: I think that results from their  
12 misunderstanding of the nature of Chapter 13.

13 QUESTION: You mean all these states, they don't  
14 know a thing about bankruptcy?

15 MR. SEARLES: They may know something, Your  
16 Honor, but I don't believe they understand the purpose of  
17 Chapter 13, and the rights that they have in Chapter 13.  
18 What the Petitioners have --

19 QUESTION: Well, I think that they -- they must  
20 think that if their restitution order is not  
21 dischargeable, it can -- it can be used to collect this  
22 money for over -- for years.

23 MR. SEARLES: I think that's what they -- that's  
24 true. But I think what Congress has decided is that at  
25 some point your debts do not any long hang over your head.

1 And, to that extent, if there is a conflict between those  
2 two systems, that's a result of what Congress has decided  
3 when they wrote Chapter 13. And if Congress feels that's  
4 wrong, that's up to Congress to change.

5 QUESTION: Yeah, but then the answer to Justice  
6 White's question isn't that the states are mistaken, but  
7 the states are not mistaken, but Congress has chosen to  
8 another concern rather than the one they have --

9 MR. SEARLES: There are some cases where there  
10 is a conflict and that's right, Congress has expressed its  
11 concern. But there are many other cases which they failed  
12 to --

13 QUESTION: Well, it hasn't just expressed its  
14 concern. It's laid down a rule of law.

15 MR. SEARLES: That's correct.

16 QUESTION: Which the states don't like very  
17 well.

18 MR. SEARLES: But I think if the states  
19 understood the nature of Chapter 13 and their rights there  
20 to compel the debtor to pay as much as they can, the  
21 states wouldn't object as vociferously.

22 QUESTION: You mean they're going to be --  
23 they're going to be -- get as much as they can this way  
24 anyway.

25 MR. SEARLES: In many Chapter 13s they would be

1 paid as much as they would get absent the bankruptcy.  
2 That's correct, and they have the right to assure that  
3 that happens.

4 QUESTION: Yes, but there is a big difference  
5 it seems to me, because if in many of these cases the only  
6 substantial debt is the one for restitution or something  
7 like that, --

8 MR. SEARLES: I'm not sure that that's the case.  
9 We had three companion -- two companion cases to this one  
10 before the Third Circuit dismissed the other two and those  
11 bankruptcies were filed primarily by the debtors to cure  
12 the mortgage arrears on their homes. The restitution debt  
13 was an incidental debt --

14 QUESTION: I see.

15 MR. SEARLES: -- that was included in their --  
16 in their statement. And many of the Chapter 13 consumer  
17 bankruptcies, if not most, have to deal with the debtor  
18 trying to keep a house or a car that they need to go to  
19 work so that they can continue to pay their debts.

20 QUESTION: I see. And in those cases -- if it  
21 -- if it were, as I supposed, the main obligation was the  
22 restitution, then they simply wouldn't get in bankruptcy  
23 court at all, is what would happen if the states win.

24 MR. SEARLES: If the states went to court?

25 QUESTION: No, if the states win in this -- in

1 this case. Then in cases where the main obligation of the  
2 -- of the bankrupt or the debtor is the restitution  
3 obligation, there would be no point in going into  
4 bankruptcy court. So you just wouldn't have these  
5 bankruptcy proceedings.

6 MR. SEARLES: That's correct.

7 QUESTION: But you say that that really is not  
8 the fact. That there's lots of these in which there's an  
9 ongoing obligation on a car or a house or something.

10 MR. SEARLES: The vast majority of consumer  
11 Chapter 13 plans are designed to -- to prevent foreclosure  
12 of homes primarily because it's -- it's something that  
13 really wasn't available prior to Chapter 13.

14 QUESTION: I see.

15 MR. SEARLES: Because you stop foreclosure, pay  
16 the arrears at the rate that you can afford and then pick  
17 up your payments and life goes on.

18 QUESTION: Well, all the horrible results that  
19 you say would ensue if we agreed with the states that  
20 conflict between state collection and federal law. Why  
21 don't those same consequences arise under Chapter 7 and  
22 Chapter 11 anyway? And is it -- why would it be more  
23 horrible under Chapter 13?

24 MR. SEARLES: Well, a Chapter 7 isn't designed  
25 to help a debtor maintain his home. Chapter 7 is --

1           QUESTION: Well, that may well be, but you're  
2 still going to have conflict between the -- between, you  
3 know, the federal policy and the --

4           MR. SEARLES: Well, in a Chapter 7, if there's  
5 assets to be distributed, it's going to be done through  
6 the bankruptcy court and the parties, such as Petitioners,  
7 who have claims for these kinds of obligations must share  
8 in the distribution.

9           QUESTION: Yeah, but what does the state do?  
10 The state says I -- I want it all.

11          MR. SEARLES: Absent the bankruptcy, in some  
12 cases the state may not be able to have it all. Under  
13 Bearden and similar -- similar law.

14          QUESTION: Well, the claims under 7 aren't going  
15 to be dischargeable.

16          MR. SEARLES: That's correct. They would pass  
17 -- they would pass through.

18          QUESTION: Well, I know they would pass through.  
19 But when the -- what happens when the court is about to  
20 distribute all of this stuff to other people, the state is  
21 standing there saying what a minute, I -- you know, I want  
22 a --

23          MR. SEARLES: Well, in a Chapter 7, the state  
24 would get what it's entitled to under the priority  
25 sections of the Code, but the debt would pass through --

1 QUESTION: I see. Okay.

2 MR. SEARLES: - and the state would still have  
3 the ability to --

4 QUESTION: The priority section -- the priority  
5 section does cover.

6 MR. SEARLES: Yes. They -- they're included.

7 QUESTION: I see. Okay.

8 MR. SEARLES: They have 726(a)(4). They have --

9 QUESTION: They're approvable?

10 MR. SEARLES: Yes.

11 QUESTION: They're approvable as debts?

12 MR. SEARLES: Yes. They're allowable.

13 QUESTION: Allowable. Yes.

14 MR. SEARLES: Before they were not allowable.  
15 They couldn't share in the estate.

16 QUESTION: Yeah.

17 MR. SEARLES: Now they can. That's correct.

18 And also throughout the case what Petitioners have argued  
19 is that how Chapter 13 unduly interferes with state court  
20 proceedings. But as I was explaining before, the -- that  
21 -- the fallacy of that argument is proved by the facts of  
22 this case.

23 While the bankruptcy was pending, the state was  
24 free to file a motion to revoke probation, which they did.  
25 There was not effort to restrain the state court from

1 proceeding. The Davenports voluntarily appeared there and  
2 testified on the issue, which was whether they had the  
3 ability to pay, whether they had violated probation.

4 The state court judge, completely unimpeded by  
5 the federal court, denied the motion to revoke probation,  
6 decided that the Davenports had done what they were  
7 suppose to have done under the law. Probation expired.

8 The state judge's power to rule is completely  
9 unaffected by the bankruptcy and in most cases, if the  
10 Third Circuit's ruling is -- is affirmed, that is not  
11 going -- the result is not going to affect the powers of  
12 state court judges.

13 And the reason that there is no undue  
14 interference in state court proceedings is that the  
15 underlying goal of the 13 and the restitution is  
16 substantially similar, which is that the debtor pay the  
17 restitution order to the best of his ability. That is  
18 what the Davenports intended to do through their  
19 bankruptcy and the state court judge found nothing to the  
20 contrary.

21 In conclusion, what I want to emphasize is that  
22 treating restitution as a debt is consistent with the  
23 plain language of the code and with federal bankruptcy  
24 policy that a debtor deal with all his legal obligations  
25 in one form and that the creditors receive equal



1 treatment.

2 Congress has designed Chapter 13 in such a way  
3 that the legitimate rights of creditors are protected and  
4 they have the tools necessary to protect their interests  
5 if they choose to utilize them. Although Petitioners  
6 expressed fear of interference in state court proceedings,  
7 that fear is just not justified.

8 To the extent that there is any tension between  
9 the two court systems, that arises from the Bankruptcy  
10 Clause in the Constitution as implemented by the Code. If  
11 there is a difference balance to be struck, it's up to the  
12 Legislature to decide that and not to the Judiciary.

13 We request that the decision below be affirmed.  
14 Thank you.

15 QUESTION: Thank you, Mr. Searles.

16 Mr. Cohen, you have three minutes remaining.

17 REBUTTAL ARGUMENT OF WALTER W. COHEN

18 ON BEHALF OF THE PETITIONERS

19 MR. COHEN: Let me just call the Court's  
20 attention to the Joint Appendix page 14a and 15a which  
21 sets forth the plan to indicate that the payment in this  
22 case was 1 percent to the creditors and not even 10  
23 percent.

24 Thank you.

25 QUESTION: Did the state file any claim here --

1 MR. COHEN: No, Your Honor.

2 QUESTION: -- for the underlying obligation?

3 MR. COHEN: No, the claim was listed in the  
4 plan, but the state -- and I think that that indicates the  
5 state prosecutors have a order of a court and we believe  
6 it would be unseemly for the prosecutor to have to go in  
7 to enforce a criminal court judge's sentence in bankruptcy  
8 court.

9 QUESTION: The debt is listed and if you're  
10 right, your debt wouldn't be dischargeable, but meanwhile  
11 you could get your 1 percent if you filed a claim.

12 MR. COHEN: That's only 1 percent, Your Honor,  
13 of a judge's --

14 QUESTION: Well, it might be --

15 MR. COHEN: -- order on the --

16 QUESTION: -- 20 the next time.

17 MR. COHEN: -- of a commission of a crime.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.  
19 The case is submitted.

20 (Whereupon, at 1:52 p.m., the case in the above-  
21 entitled matter was submitted.)

22

23

24

25

CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

#89-156 - PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, ET AL., Petitioners

V. EDWARD J. DAVENPORT, ET UX

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Leona M. May  
(SIGNATURE OF REPORTER)

LEONA M. MAY  
(NAME OF REPORTER - TYPED)

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