No. 10-796

FEB 28 2011

In The Supreme Court of the United States

STATE COMPENSATION INSURANCE FUND,

Petitioner,

v.

NANCY ZAMORA, Chapter 7 Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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I. THE QUESTION WHETHER CRIMINAL RESTITUTION IS AN AVOIDABLE PREFERENCE IS AN IMPORTANT ISSUE WARRANTING THIS COURT'S REVIEW.

The petition raises an important issue of law that has not been settled by this Court. As the court of appeals noted in its opinion, the question whether the preference statute applies to criminal restitution is a "novel" one. (Pet. App. at 2.) This Court has not yet answered that question. *Zimmerman v. Itano Farms, Inc. (In re Currey)*, 144 B.R. 490, 493 (Bankr. D. Idaho 1992) ("while restitution orders have been given attention by the Supreme Court and Congress in the particular context of dischargeability under the Bankruptcy Code, no study has been given by these bodies to the preference issue").

In her opposition to the petition for certiorari, the Trustee argues that there are no compelling reasons to review the question whether criminal restitution constitutes an avoidable preference, claiming the court of appeals' opinion does not conflict with other appellate decisions and the petition does not "decide[] an important federal question that has not been settled by this Court." (Opp'n at 1.)

On the contrary, the issue is an important one that should be addressed. "Every State and the District of Columbia presently authorize the use of [criminal] restitution orders." *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 572-73 (1990) (Blackmun, J., dissenting) (citing Lisa A.

Upson, *Criminal Restitution As A Limited Opportunity*, 13 New Eng. J. on Crim. & Civ. Confinement 243, 243-44, n.9 (1987)). The question whether restitution can constitute a preference potentially impacts any criminal case in which restitution is ordered and bankruptcy of the criminal defendant is a possibility. As explained in the petition, treating criminal restitution as a preference can, among other things, interfere with the sentences imposed by the state in criminal matters. (Pet. at 16-17.) This was one of the same concerns addressed by this Court in *Kelly v. Robinson*, 479 U.S. 36, 49 (1986) in determining that restitution orders were not dischargeable in a Chapter 7 bankruptcy. Just as the question of the dischargeability of criminal restitution payments warranted this Court's attention in *Kelly*, the avoidability of such payments as preferences warrants similar attention by this Court.

II. THE TRUSTEE IGNORES THE FEDERALISM CONCERNS THAT MUST BE CONSIDERED IN INTERPRETING THE PREFERENCE STATUTE.

The Trustee advocates a strict interpretation of the preference statute, 11 U.S.C. § 547(b), claiming that the statute's plain language does not except criminal restitution payments from its scope. (Opp'n at 2-3.) However, she ignores the principal thrust of the petition – that in interpreting the preference statute, as in interpreting all provisions of the Bankruptcy Code, the court must construe the statute in

light of the state's interest in unfettered administration of its criminal justice system. (Pet. at 21.) State Fund's petition explained that taking criminal restitution away from the victim as a preference would interfere with the state's criminal justice system in a number of ways: (1) it would interfere with the state's deterrence goal by potentially allowing the criminal defendant to escape the obligation of making restitution altogether; (2) it would interfere with the state's rehabilitation goal by potentially precluding a defendant from being able to expunge his or her criminal record upon compliance with all probationary requirements, including payment of restitution; (3) it would interfere with the criminal court's sentencing decisions in determining the amount of restitution in cases in which the criminal defendant potentially faced bankruptcy; and (4) it would burden state officials and victims by requiring them to be a party to an adversary action to recover the restitution payment. (Pet. at 12-18.)

In her opposition, the Trustee does not mention, much less address, these concerns. Instead, she focuses her argument solely upon the interest of the creditors, claiming the preference statute was designed to ensure equality of distribution among creditors. (*See* Opp'n at 2-3.) But a criminal restitution judgment is not the same as a debt owed to a civil creditor. The restitution payment is owed as *punishment*, not compensation. The province of the Bankruptcy Code does not, and should not, extend to

punishments. *In re Moore*, 111 F. 145, 150 (W.D. Ky. 1901).

The Trustee also argues that one purpose of the preference statute is to ensure that the debtor does not pay off nondischargeable debts prior to the bankruptcy, leaving all other debts to be discharged during bankruptcy. (Opp'n at 4.) But the Trustee ignores the fact that a debtor *must* make the restitution payment as a condition of his or her criminal sentence. Failure to make the payment could result in the revocation of probation. Accordingly, a payment of criminal restitution during the preference period is much more likely to be made in order to fulfill the goals of the state's criminal laws – deterrence and rehabilitation – than it is to defraud the debtor's civil creditors. The goals of the state's criminal justice system therefore should take precedence over any concerns about fraud.

III. CRIMINAL RESTITUTION PAYMENTS ARE NOT MADE "TO OR FOR THE BENEFIT OF A CREDITOR"

As explained in State Fund's petition, the preference statute's requirement that the payment made during the preference period must be "'to or for the benefit of a creditor'" does not encompass criminal restitution payments when viewed with federalism concerns in mind. (Pet. at 21-25.)

The Trustee acknowledges this Court's holding in *Kelly* that criminal restitution payments are for the benefit of society (which is not a creditor), but claims

that the holding does not preclude a finding that the restitution is also for the benefit of the victim (a creditor). (Opp'n at 5.) But *Kelly* squarely rejected this argument, holding that a sentence of criminal restitution is *not* primarily to benefit victims of crime, but to benefit society as a whole. *Kelly*, *supra*, 479 U.S. at 52.

The fact that the restitution obligation could be enforced as if it were a civil judgment does not change its character as a criminal sentence. (*See* Opp'n at 7.) As this Court in *Kelly* explained, the court has to look at the context in which restitution is imposed to determine whether restitution is "'to and for the benefit'" of the victim. *Kelly*, *supra*, 479 U.S. at 51. Here, State Fund had no power over the decision to award restitution because the restitution sentence did not arise out of any contractual, statutory, or common law duty. *See id.* Although the amount of restitution was based upon State Fund's estimate of its loss, State Fund had no legal right to claim an award in that amount. Rather, State Fund was simply an incidental beneficiary of the state's decision to impose this particular penalty to accomplish its deterrence and rehabilitation goals. Accordingly, the restitution sentence was not "'to and for the benefit'" of State Fund.

CONCLUSION

For the reasons stated in State Fund's petition and this reply, this Court should grant certiorari.

Respectfully submitted,

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