IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO. 13-3620

IN RE:

JOSE ANTONIO LOPEZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL NO. 2-12-CV-5037
ORDER ENTERED JULY 30, 2013

BRIEF OF APPELLANT, JOSE ANTONIO LOPEZ

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STATEMENT OF JURISDICTION

This is an appeal of a final order of the district court, entered on July 30, 2013, affirming the final order of the bankruptcy court, entered July 18, 2012, dismissing the adversary proceeding filed by the plaintiff.

The notice of appeal to this court was timely filed on August 26, 2013. This court has jurisdiction over the final order of the district court affirming the decision of the bankruptcy court pursuant to 28 U.S.C. § 158(d).

The district court had jurisdiction over the appeal from the final order of the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). The notice of appeal to the district court was timely filed on July 30, 2012.

The bankruptcy court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 1334(b), which grants jurisdiction to the district court (referred to the bankruptcy court under 28 U.S.C. § 157(a)) over all proceedings arising under title 11 or arising in a case under title 11.

STATEMENT OF THE ISSUE FOR REVIEW

Whether the costs that were assessed against the debtor in connection with state court criminal proceedings are nondischargeable under 11 U.S.C. § 523(a)(7). This issue was raised in the Complaint that initiated the adversary

proceeding in the bankruptcy court, the debtor's motion for summary judgment in the adversary proceeding, and in the debtor's appellate briefs in the district court. The issue was ruled upon in the decision of the bankruptcy court and order dismissing the adversary proceeding, and in the order of the district court affirming the bankruptcy court's decision and order.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this court previously. Appellant is not aware of any cases or proceedings that are related to this case, completed, pending, or about to be presented in this court or any other court.

STATEMENT OF THE CASE

This appeal arises out of an adversary proceeding filed by the plaintiff in the bankruptcy court to determine whether certain costs assessed against him in connection with state court criminal proceedings were discharged in his chapter 7 bankruptcy case. After the pleadings closed, the plaintiff filed a motion for summary judgment to which defendants responded. The bankruptcy court heard oral argument and ruled in favor of defendants, dismissing the proceeding. The district court affirmed the decision of the bankruptcy court.

STATEMENT OF FACTS

The facts, which were undisputed, are as follows:

The plaintiff was a debtor in a chapter 7 bankruptcy case in which he received a discharge. Among his debts were certain charges for costs related to several state court criminal proceedings. These costs were:[1]

1. $40.90 for State Court costs.

2. $41.70 for Commonwealth costs - HB627.

3. $183.40 for County Court costs.

4. $18.20 for the Crime Victims Compensation fund.

5. $50.00 for Domestic Violence Compensation costs.

6. $25.00 for the Victim Witness Services fund.

7. $24.00 for Judicial Computer Project (JCP) fees.

8. $6.00 for Access to Justice (ATJ) costs.

9. $150.00 for CQS Fee costs.

10. $238.57 for Collection Fees (ACS). These fees were assessed after the Debtor's bankruptcy petition for the collection of charges incurred before the petition.

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[1] All of the costs listed were stipulated by the parties in the Joint Statement Filed by Henry J. Sommer and Christopher Vandermark on behalf of First Judicial District of Philadelphia, Jose Antonio Lopez, David Wasson, III.

11. $15.00 for the Firearm Education and Training Fund.

12. $74.00 for Lien Filings costs.

13. $115.00 for Diversion Program Fees.

14. $250.00 for Offender Supervision Program (OSP) costs.

15. $135.00 for Criminal Lab fees.

The debtor also owed criminal restitution and fines which he does not contend were discharged.

The imposition of these costs was not based on a sentencing judge's discretionary determination of the amount necessary to punish or rehabilitate a defendant. Instead, the imposition was automatic. *See* Declaration of Bradley Bridge, attached to Plaintiff's Motion for Summary Judgment, ¶ 3. ("Bridge Declaration") Typically, the imposition of costs is not argued or even discussed at the sentencing of a defendant. The judge simply declares the amount imposed. *Id.*

Demonstrating the lack of judicial discretion, most of the same costs are similarly assessed automatically for defendants who are placed in the Accelerated Rehabilitative Disposition Program (ARD). These defendants have a plethora of costs imposed upon them even though these defendants never go to trial, are never found guilty and, if they complete the pre-trial program, will have their records expunged so that their status is the same as if they had been found not guilty. *Id.*

¶ 4. Costs may be ordered to be paid during, for example, the period a defendant is on probation or parole. However, if the probation or parole period expires before the costs have been paid, these unpaid costs are converted into a civil judgment. *Id*. ¶¶ 5, 6; Answer to Complaint, Exhibit A, page 5 (showing entry of civil judgment). If the judgment is not paid, it is referred to a private collection agency. *See* Answer to Complaint, Exhibit A, page 6 (showing referral to collection agency).

The costs assessed against plaintiff were not a condition of probation. Plaintiff's probation has ended even though those costs have not been fully paid. *See* Plaintiff's Motion for Summary Judgment Exhibit A.

SUMMARY OF THE ARGUMENT

The courts below grounded their decisions primarily on the principle that bankruptcy courts "should not invalidate the results of state criminal proceedings." The Supreme Court and this Court have held that this principle does not override the plain language of the Bankruptcy Code, and that some debts arising from criminal proceedings can be discharged if the language of the Code so provides.

Code section 523(a)(7) makes nondischargeable debts for fines, penalties, and forfeitures. The Supreme Court held in *Kelly v. Robinson*, 479 U.S. 36 (1986) that a debt must have a purpose of punishment or rehabilitation to be a "penalty"

under this provision, and that criminal restitution was nondischargeable because the criminal court imposed it, in the court's sentencing discretion, as a condition of probation. Under Pennsylvania law, costs are neither discretionary nor a condition of a criminal sentence. Further, other parts of section 523(a) reference "costs", showing that they were not intended to be included in section 523(a)(7).

Analysis of the costs imposed on the debtor in this case shows that they did not have a penal purpose. Some have been specifically held to be nonpunitive by Pennsylvania courts. Many are imposed on people who are never convicted of a crime or even involved in criminal cases, and can be imposed with no judicial hearing. Rather than having a penal purpose, these costs have the pecuniary purpose of payment for services or of funding the court system and other expenses. Therefore, these costs are not penalties within the meaning of section 523(a)(7).

ARGUMENT

STANDARD OF REVIEW

The issues in this case are all issues of law. The standard of review is plenary – whether the courts below committed error in formulating or applying legal precepts.

INTRODUCTION

A principal purpose of chapter 7 bankruptcy is to provide a fresh start for the debtor through the discharge of most debts, "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244 (1934). *See also* H.R. Rep. No. 95-595, at 125 (1977). The Bankruptcy Code contains a limited list of carefully delineated exceptions to the discharge. *Bullock v. BankChampaign, N.A.,* 133 S. Ct. 1754, 1760 (2013)("exceptions to discharge should be confined to those plainly expressed.") As with other issues of Code interpretation, the plain language of the statute should determine the interpretation of these exceptions. *Lamie v. United States Tr.,* 540 U.S. 526, 534 (2004)("when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.") Because of bankruptcy's underlying concern for affording a new beginning, statutory exceptions to discharge are generally construed "narrowly against the creditor and in favor of the debtor." *Boston Univ. v. Mehta (In re Mehta),* 310 F.3d 308, 311 (3d Cir. 2002).

Plaintiff/Debtor Jose Lopez filed this adversary proceeding to determine the dischargeability, under 11 U.S.C. § 523(a)(7), of certain costs assessed against him

in connection with past criminal court proceedings. Although the debtor has paid significant amounts towards these costs, and has paid fines and restitution, some costs remain owing. The costs fall in a variety of categories, and must be analyzed with respect to whether they come within the scope of section 523(a)(7), which excepts from discharge a "penalty . . . payable to . . . a governmental unit", *i.e.* whether it was imposed for a penal purpose. As demonstrated below, the costs assessed did not have such a purpose and therefore should be found dischargeable by this Court.

I NEITHER THE SUPREME COURT NOR THIS COURT HAS HELD THAT ALL DEBTS ARISING FROM CRIMINAL PROCEEDINGS ARE NONDISCHARGEABLE

Both the district court and the bankruptcy court grounded their decisions primarily on principles of federalism. (District Court Opinion, pp.3-4; Bankruptcy Court Opinion, pp.6-7). Each cited language in *Kelly v. Robinson*, 479 U.S. 36, 50 (1986) stating the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings."

Neither court mentioned the Supreme Court's decision, just four years later, in *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990). In that case, the Supreme Court was faced with the issue of whether state court criminal restitution obligations were dischargeable in a chapter 13 bankruptcy case. The

Commonwealth of Pennsylvania, as well as many amicus briefs, argued that discharging such obligations was an unwarranted interference with the states' criminal justice systems. *See*, *e.g., Davenport, Brief for Petitioners* at 40-41; *Amici Curiae Brief of Alabama, et.al.* at 8-12*; Amici Curiae Brief of Council of State Governments et.al.* at 6-12 *; Amici Curiae Brief of Washington Legal Foundation et.al.* at 14-18. The dissent took the same position. *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. at 573 ("The majority's holding turns Kelly around. The Kelly Court stressed this compelling federalism concern terming it 'one of the most powerful of the considerations that should influence a court considering equitable types of relief,' and recognized that it 'must influence our interpretation of the Bankruptcy Code.'") However, the seven-justice majority did not accept that argument and ruled that the obligations were dischargeable.[2]

Principles of federalism do not turn on whether a case is filed under chapter 7 or chapter 13. Read in light of *Davenport*, the *Kelly* decision must be taken at its word – that principles of federalism were not controlling in the case, but were merely an "influence" in interpreting the Code. *Kelly* at 49. Ultimately, as discussed further below, *Kelly* turned on the Court's interpretation of the language

[2] Congress amended the Code after the *Davenport* decision to reverse its result, but as discussed below, that amendment supports the debtor's position in this case.

of the statute. And, as the Court held in *Davenport,* when the language of the Code clearly shows Congressional intent, the function of the courts "is to enforce the statute according to its terms." *Davenport* at 564. This Court had come to the same conclusion in the decision the Supreme Court affirmed. *In re Johnson-Allen,* 871 F.2d 421, 428 (3d Cir. 1989)("where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of this court to cure any perceived 'defects' in that legislation. That authority is granted to Congress alone.")

Similarly, in *City of Philadelphia v. Nam (In re Nam)*, 273 F.3d 281 (3d Cir. 2001), this Court held that a bail bond debt was a nondischargeable "forfeiture" under section 523(a)(7) based on the language of the Code. 273 F.3d at 286-288. Having found that language and earlier case law "a sufficient basis for deciding" the appeal, the decision also found principles of federalism and comity to be "of concern." 273 F.3d at 293. But it did not hold that the language of the Code could be disregarded in service of those principles.

The Bankruptcy Code, of course, is enacted pursuant to the Bankruptcy Clause of the Constitution. Article 1, Section 8, Clause 4. The Supreme Court has held that even the sovereign immunity of states does not override the power of Congress to determine the reach of bankruptcy laws within the scope of the

Bankruptcy Clause. "As demonstrated by the First Congress' immediate consideration and the Sixth Congress' enactment of a provision granting federal courts the authority to release debtors from state prisons, the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere." *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 375-377 (2006).

Therefore, this case must be decided based upon the language of the Bankruptcy Code.

II COURT COSTS THAT ARE NOT IMPOSED FOR A PENAL PURPOSE ARE NOT PENALTIES UNDER SECTION 523(a)(7).

The plain language of the Bankruptcy Code does not support the lower courts' conclusion that costs assessed in the debtor's criminal case are nondischargeable. Section 523(a)(7) of the Bankruptcy Code makes nondischargeable a debt:

> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, [other than certain tax penalties].

If a debt is not a fine or forfeiture, it must be a penalty to be nondischargeable. And, by definition, a penalty must have a purpose of punishment. Those debts serving a pecuniary purpose are not penalties within the scope of the exception to

discharge. To simply hold that all debts arising from criminal proceedings are nondischargeable would require complete disregard of the careful drafting of section 523(a)(7).

This Court has never followed that path. As in *Johnson-Allen, supra,* the language of section 523(a)(7) was determinative of this Court's decision in *In re Rashid*, 210 F.3d 201 (3d Cir. 2000). That decision looked to the plain language of the provision to find that a criminal restitution debt payable to a private party was not within the scope of section 523(a)(7) because it was not "payable to and for the benefit of a governmental unit."

The careful drafting of provisions related to debts arising in criminal proceedings was further demonstrated by the post-*Davenport* amendments to section 1328(a) narrowing the scope of a chapter 13 discharge. Congress did not amend that provision to say that all debts arising from criminal proceedings were not dischargeable. Instead, Congress crafted more specific and limited language, section 1328(a)(3), which excepts from the chapter 13 discharge a debt

> for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime. . .

Congress very clearly drew distinctions among debts arising from criminal proceedings, and did not make them all nondischargeable. Had the debtor in this

case filed a chapter 13 case, there is no doubt that the obligations for criminal costs would have been dischargeable, since they were not fines or restitution. Far from supporting the conclusion that the post-*Davenport* amendments evidenced an intent to make all debts arising from criminal proceedings nondischargeable, those amendments clearly show that Congress had no such intent.

Similarly, several other statutory provisions belie any Congressional intent to completely exempt from discharge all debts arising from criminal proceedings. In fact, the only mentions of costs related to criminal proceedings with respect to discharge are in section 523(a)(17) and section 523(a)(19).

Section 523(a)(19)(B)(iii) excepts from discharge any "damages, *fine*, *penalty*, citation, restitutionary payment, disgorgement payment, attorney fee, *cost,* or other payment" imposed in cases related to securities violations, illustrating that for purposes of section 523(a) costs are differentiated from fines or penalties. (Emphasis supplied) It is a narrowly targeted provision that is limited to costs in a very specific category of proceedings.

Section 523(a)(17) excepts from discharge a debt for

> a fee imposed on a prisoner by any court for the filing of a case, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a

> similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law).

This provision, enacted in 1996 as part of a package of laws intended to control litigation initiated by prisoners, Pub. L. No. 104-134, § 804(b), also shows that Congress knew how to use the word "costs" when it meant to include costs in a bankruptcy nondischargeability provision. Section 523(a)(17) excepts costs from discharge only when the costs were imposed on a prisoner.

Under basic rules of statutory construction, the inclusion of the specific terms "costs" and "cost" in these parts of section 523(a), contrasted with the failure to include the term in section 523(a)(7), another subsection of the same statutory section, compels the conclusion that costs were not intended to be included in section 523(a)(7). As in *Davenport,* particular types of criminal proceeding debts are excepted from discharge in certain circumstances and not in others because the language in the governing statutory provisions is different. *See also Lamie v. United States Tr.*, 540 U.S. 526, 541 (2004)(inclusion of language authorizing debtor's attorney's fees in more narrow provision showed intent to exclude them in broader provision).

Thus, the rationale of the decisions below does not withstand scrutiny. Congress has always been careful in the terms it used in the Bankruptcy Code. It is

for that reason that the Supreme Court carefully analyzed the wording of section 523(a)(7) in *Kelly v. Robinson, supra.* Had the court wanted to adopt a blanket principle of federalism precluding the discharge of any debt arising in a criminal proceeding, the analysis in that decision of whether the debt had a penal or rehabilitative purpose would have been unnecessary. Instead, *Kelly* went to some lengths to explain that criminal restitution is an integral part of sentencing and punishment, serving the "penal goals of the state". 479 U.S. at 52. Thus, the Court held that, even though criminal restitution may be measured by pecuniary loss, it served a penal or rehabilitative purpose and was nondischargeable[3]:

> In our view, neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in Pellegrino: "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to

[3] The debtor is not seeking to discharge any debts for criminal restitution or fines.

> rehabilitate an offender by imposing a criminal sanction intended for that purpose."

479 U.S. at 52.

The Court emphasized the discretionary nature of restitution, as a "flexible remedy tailored to the defendant's situation" and looked to relevant state law, which authorized a judge to impose restitution as a condition of probation related to rehabilitation in such amount as the judge deemed appropriate. 479 U.S at 52-53.

Under the case law that has developed interpreting section 523(a)(7) after *Kelly*, the touchstone of whether a debt is to be discharged is whether the debt has a penal purpose. This Court has not directly addressed the issue, but has indicated that costs imposed in a criminal proceeding are not necessarily nondischargeable. In *City of Philadelphia v. Nam (In re Nam)*, 273 F.3d 281 (3d Cir. 2001), which involved a bail bond debt, the court in a footnote stated, "As the District Court correctly noted, the $18.50 in costs might be regarded as compensation for a pecuniary loss on the part of the court system." 273 F.3d at 286 n.4.

Other courts, following *Kelly,* have also looked to whether a particular assessment of costs had a penal goal. For example, in *State Bar v. Taggart (In re Taggart)*, 249 F.3d 987 (9th Cir. 2001), the Court of Appeals for the Ninth Circuit examined costs imposed in an attorney disciplinary proceeding. The court looked

to several factors to determine that the costs were dischargeable. First, the court noted that the costs were distinct from monetary sanctions that could be imposed in the proceeding. As the court stated, "This supports the impression that the California legislature intended monetary sanctions under § 6086.13, but not costs awards under § 6086.10, as punishment." 249 F.3d at 992. Second, the court noted that the costs were similar to costs imposed on losing parties in civil proceedings, and therefore were just importing principles that applied in civil litigation, rather than having a punitive intent. *Id.* at 992-993. Finally, the court noted legislative history indicating that the costs were not intended as punishment. *Id.* at 993.[4]

Where costs have been found to be nondischargeable, courts have emphasized that those costs were discretionary, and that when they were imposed it was with the purpose of further punishing the debtor. In *Richmond v. N.H. Supreme Court Comm. on Prof'l Conduct*, 542 F.3d 913, 918 (1st Cir. 2008), distinguishing *Taggart,* the court stated:

> The discretionary nature of New Hampshire cost assessments strongly suggests that they should be viewed as penalties. While Richmond believes that the costs are awarded in a perfunctory manner, the New Hampshire Supreme Court has stated on several occasions that the cost assessments are viewed as part of the sanction. . . .

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[4] The California statute at issue was later amended to specify that the costs were intended as punishment, causing a different result in a later decision. *State Bar v. Findley (In re Findley)*, 593 F.3d 1048, 1050 (9th Cir. 2010).

> Further, the New Hampshire Supreme Court has made clear that the "appropriateness" of the costs sanction is based on the disciplined attorney's conduct. . . . This is strong evidence that the cost assessments are being imposed as part of a sanction. Cf. Kelly, 479 U.S. at 52 ("[T]he decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant."); see also In re Bertsche, 261 B.R. 436, 438 (Bankr. S.D. Ohio 2000).
>
> The discretionary nature of the cost assessments also distinguishes this case from In re Taggart, 249 F.3d 987 (9th Cir. 2001), on which Richmond relies. In that case, costs were assessed pursuant to a provision that required cost awards in all cases in which an attorney had been disciplined. Id. at 991-92. The Ninth Circuit distinguished this provision from a separate provision that made the cost assessments discretionary, and it found that costs assessed automatically under the first provision were dischargeable. Id. In re Taggart, then, is inapposite here.

542 F.3d at 918 (state court citations omitted).

Similarly, in *Disciplinary Bd. of the Supreme Court of Pa. v. Feingold (In re Feingold),* 730 F.3d 1268, 1273-75 (11th Cir. 2013), the court looked to Pennsylvania law to determine the penal purpose of the assessment of costs in a disciplinary proceeding, and emphasized that the assessment of costs was a matter of discretion and intended as a sanction.

Therefore, the costs assessed against the debtor in this case must be analyzed to determine whether their purpose was penal, or rather simply to fund the court system, and this Court should look to factors that aid in that analysis including,

importantly, whether the costs are discretionary and how state courts have characterized such costs.

All of the costs at issue in this case were imposed in addition to the fines and restitution that were intended as penal sanctions. The Pennsylvania Supreme Court has held that "[t]he imposition of costs in a criminal case are not part of the sentence, but rather are incident to the judgment. The liability for costs is not part of the statute which provides for the punishment of an offense." *Commonwealth v. Nicely*, 536 Pa. 144, 152, 638 A.2d 213,217 (1994)(citations omitted).

Thus, the costs in this case were not a "condition a state criminal court impose[d] as part of a criminal sentence", the description the Supreme Court gave to the restitution in *Kelly.* 479 U.S. at 50. The costs were not even a part of the sentence, much less a condition.

Unlike in *Kelly*, the costs were not imposed as a condition of probation.[5] If they had been, that might have indicated a penal or rehabilitative purpose. The supervision of Mr. Lopez by the Adult Probation and Parole Department has concluded, as evidenced by the letter attached to Plaintiff's Motion for Summary Judgment as Exhibit A. If costs have not been paid when probation is concluded,

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[5] This fact also distinguishes *In re Hollis*, 810 F.3d 106 (6th Cir. 1987), which turned on the fact that costs were imposed as a condition of probation.

they are converted to a civil judgment. *See* Bridge Declaration ¶ 3. This further demonstrates their lack of penal or rehabilitative purpose. Unlike the restitution order in *Kelly,* the imposition of costs is automatic. 42 Pa.C.S. § 9728(b.2) *See also* Bridge Declaration ¶ 3. It is not discretionary or based upon any consideration of guilt or rehabilitative purpose, except that the court has discretion to waive some costs due to a person's inability to pay. Pa. R. Crim. P. 706(c).

The district court simply ignored the Pennsylvania Supreme Court's authoritative interpretation of state law and these other distinctions from *Kelly*. It found, in a footnote, that the costs were penal, but saying that is so does not make it so. In support of its conclusion, the court cited only *Thompson v. Virginia (In re Thompson)*, 16 F.3d 576 (4th Cir. 1994).[6] Besides the fact that *Thompson* concerned the law of a different state, *Thompson* also ignored *Kelly's* use of state law to determine whether a debt had a penal purpose, disregarding a state statute and state case law defining costs as non-penal. 16 F.3d at 578-579. *See also Nam, supra,* 273 F.3d at 288-289 (looking to state law to determine whether debt was a forfeiture). The district court's citation of *Thompson* for its holding that the "assessment of costs operates 'hand-in-hand with the penal and sentencing goals of

[6] District Court Order, p.5, n.2. As the district court noted, the bankruptcy court had held that whether the costs were penal was irrelevant.

the criminal justice system'" flies in the face of the Pennsylvania Supreme Court's holding in *Nicely* and ignores the undisputed facts of this case.

III EXAMINATION OF THE SPECIFIC COSTS IMPOSED ON THE DEBTOR DEMONSTRATES THAT THEY WERE NOT INTENDED TO BE PENAL

Each item of costs assessed against the debtor can be analyzed to determine its purpose. In holding that the costs were nondischargeable, the lower courts never examined the particulars of the various charges, which further demonstrate that they were not intended to be penal.

Among the costs assessed against the debtor were probation costs – Offender Supervision Program costs, denominated as "Philadelphia/State OSP". These costs are imposed pursuant to 18 P.S. § 11.1102, which allocates the funds collected to the state and county governments. The Pennsylvania Supreme Court, in *Nicely, supra,* ruled that "the supervisory fee is administrative in nature and not intended to be punitive or otherwise interfere with the probation order of the court." 536 Pa. 144, 152, 638 A.2d 213,217 (1994).

This conclusion is buttressed by the fact that probation costs are imposed on participants in diversion programs such as the Accelerated Rehabilitative Disposition (ARD) program. 37 Pa. Code § 68.1 provides for the assessment of such fees against:

> Offenders placed on probation, parole, accelerated rehabilitative disposition, probation without verdict or intermediate punishment under the jurisdiction of a county within this Commonwealth.

37 Pa. Code § 68.21 provides:

> The sentencing judge of the court of common pleas *shall* impose upon an offender, as a condition of supervision, a monthly supervision fee unless the court or a supervising agency designated by the court determines that it should be reduced, waived or deferred based upon one or more of the following criteria [relating to hardship]. (emphasis supplied)

Indeed, a court order is not even necessary for these costs to be imposed. 18 P.S. § 11.1101(e) provides: "No court order shall be necessary in order for the defendant to incur liability for costs under this section."

Thus, the supervision fees are mandatory, not imposed as a matter of judicial discretion, and not based on guilt or innocence. In fact, individuals placed in the ARD program have not been found guilty and, upon completion of the program are treated as if they were not convicted, with their records expunged.[7] In the event that the program is successfully completed and the charges are dismissed, no conviction ever results. *Commonwealth v. Knepp*, 307 Pa. Super. 535; 453 A.2d 1016, 1019 (Pa. Super. 1982). Admission into an ARD program does not

[7] The ARD Program is established by local courts pursuant to Pa. R. Crim P. 301-320. Successful completion of the program ordinarily leads to dismissal of the criminal charges and expungement of the arrest record. Pa. R. Crim. P. 319-20.

constitute a "conviction" for purposes of impeachment of a witness at trial. *Commonwealth v. Krall*, 290 Pa.Super. 1, 434 A.2d 99 (1981). It necessarily follows that no "penalty" is imposed upon a defendant who is never found guilty of a crime. Other diversionary programs involving probation costs treat participants as if they had never even been arrested. *See Commonwealth v. Benn*, 544 Pa. 144, 147-8, 675 A.2d 261, 263 (1996)(probation without verdict).

The ARD Rules permit the assessment of certain costs, including "a reasonable charge relating to the expense of administering the program." Pa. R. Crim. P. 312 In Philadelphia, these costs include a Diversion Program Fee and a Clerk of Quarter Sessions (CQS) fee, costs that were assessed against the debtor. Where fees, such as the supervisory fees and costs of administering a program for individuals who are in a diversion program resulting in dismissal of charges are automatically assessed regardless of whether there is any finding of guilt, those fees cannot have a penal purpose. Rather, like many other court fees assessed against civil and criminal litigants, these fees had the pecuniary purpose of payment for services provided by the court system.

Some of the costs for which the debtor was liable are costs assessed to support various court system programs, such as computerization and access to justice. These costs are designated as JCP (Judicial Computer Project) and ATJ

(Access to Justice). They are imposed in civil appeals by the Supreme, Superior and Commonwealth Courts, "for each initial filing for which a fee, charge or cost is now authorized." 42 Pa. C.S. § 3733(a.1)(1)(i) They are charged by prothonotaries, clerks of orphans' courts, and registers of wills "for the initiation of any civil action or proceeding." 42 Pa. C.S. § 3733(a.1)(1)(ii) And they are imposed for the initiation of any criminal proceeding for which a fee or cost is authorized. 42 Pa. C.S. § 3733(a.1)(1)(iii) They are even charged for services that do not involve judicial proceedings, by the recorders of deeds and clerks of court, or by any officials designated to perform similar functions, for each filing of a deed, mortgage or property transfer for which a fee, charge or cost is now authorized. 42 Pa. C.S. § 3733(a.1)(1)(v)

Obviously, such fees have nothing to do with punishing anybody. They are simply user fees designed to support the judicial system and other worthy goals. They have no penal purpose.

Moreover, in addition to being imposed when a criminal proceeding is initiated, the fees are also "charged and collected when a defendant is granted entry into Accelerated Rehabilitative Disposition or any other pretrial diversionary program. 42 Pa. C.S. § 3733(a.1)(1)(iii), (iv). As discussed above, participants in

such programs have not been found guilty of anything and fees imposed on them cannot be considered as penal.

Also among the fees owed by the debtor were fees designated as "ACS State and Local Solutions".[8] These fees are assessed to pay a private collection agency pursuant to 42 Pa. C.S. 9730.1. That statute permits referral of "the collection of costs, fines and restitution of a defendant to a private collection agency whether or not the defendant's maximum sentence or probationary term has expired with or without holding a hearing pursuant to this section. Such collection agency shall adhere to accepted practices in accordance with applicable Federal and State law to collect such costs, fines and restitution." 42 Pa. C.S. 9730.1(a). The collection agency is to be paid its contractual percentage fee before any of the funds are distributed for other fees. 42 Pa. C.S. 9730.1(b).

Thus, these collection fees are not imposed when a defendant is sentenced, and they can be imposed with no judicial hearing. They are imposed if a debt is not paid. They are the result of a private contract with a collection agency, similar to that which might be entered into by a private creditor, and are paid for the costs of collection to a private entity, not "to and for the benefit of a governmental unit" as

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[8] ACS is apparently a subsidiary of Xerox, and provides "business process and information technology services" to private and governmental entities. http://www.acs-inc.com/about_acs.aspx

required by 11 U.S.C. § 523(a)(7). They are not imposed for punishment, but simply as a cost similar to costs and attorney's fees that are charged in private collections.[9] The collection agencies are required to act as they would in collecting any civil debt, complying with state and federal law governing collection practices. 42 Pa. C.S. 9730.1(a)

Another category of collection costs consists of fees to file liens for costs. These fees, paid to the First Judicial District, are presumably the same court costs assessed for filing liens with respect to civil collections. The purpose of filing of a lien is to attach property.

The purpose of these provisions and these fees is not to punish. It is to collect debts. They create additional debts that are no different than other indisputably dischargeable civil collection fees that pay for collection services. Therefore, they are not within the scope of 11 U.S.C. § 523(a)(7). And, as discussed above and below, this is doubly true when the debts being collected are themselves not within the scope of that provision.

Other costs assessed against the debtor are for the Crime Victims Compensation Fund, the Victim Witness Services Fund and the Firearm Education

[9] Pennsylvania law also authorizes fees to be paid to collection attorneys, but it does not appear that the debtor in this case owed such fees.

and Training Fund. Each of these costs is assessed not only against persons who are convicted, but also those who are never found guilty and whose cases are dismissed after completion of ARD.

The Crime Victims Compensation Fund is established by 18 P.S. § 11.1101(b)(1). That provision directs its funding with funds collected, *inter alia*, under 18 P.S. § 11.1101(a)(2), requiring payments by a "person placed in a diversionary program" which includes persons placed in ARD.

Similarly, the Victim Witness Services Fund, established under 18 P.S. § 11.1101(b)(2), is funded by the same mechanism, which includes payments by persons in ARD, who are never found guilty of any crime.

Yet another such fee is the fee designated as Criminal Lab Fee, imposed under 42 Pa.C.S. § 1725.3. As provided in section 1725.3(a), this fee is imposed on, among others, a person who receives Accelerated Rehabilitative Disposition.

And the Firearm Education and Training Fund, established by 61 Pa. C.S. § 6308, collects money from the same group of people, both guilty and not guilty. 61 Pa. C.S. § 6308(b) imposes costs for this fund on, among others, a person who accepts Accelerated Rehabilitative Disposition.

All of these costs provide funding for worthy causes. However, that does not make them nondischargeable fines, penalties or forfeitures. Instead, it

demonstrates their pecuniary purpose of raising revenues. The fact that they are imposed on every person who is brought into the criminal court system is not enough to show a penal purpose; it shows the opposite. These costs are imposed on people who have never been found guilty and whose cases are dismissed. They are imposed automatically, not as part of any sentencing discretion.

Several types of costs assessed against the debtor are designated as State Court Costs under Act 204 of 1976, County Court Costs under Act 204 of 1976 and Commonwealth Costs under Act 167 of 1992.[10] Some or all of these costs are codified in 42 Pa. C.S. § 1725.1(b). In addition, some costs are designated as "payable to municipality."

Notably, section 1725.1 also sets forth costs for civil cases in 42 Pa. C.S. § 1725.1(a), as did both Act 204 and Act 167,[11] demonstrating that these are filing fees and not any kind of penal sanction. Like the other costs described above, they are imposed automatically to fund the courts, and not as a part of sentencing discretion exercised in determining an appropriate sentence for a crime.

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[10] The county court costs, state costs, and commonwealth costs are assessed in ARD cases. *See* Declaration of Bradley Bridge, Exhibit 1, attached to Plaintiff's for Summary Judgment.

[11] Pennsylvania legislative acts may be found at http://www.legis.state.pa.us/cfdocs/legis/CL/Public/cl_view.cfm

CONCLUSION

For all the reasons discussed above, the fees and costs assessed against the debtor, other than fines and restitution, are not within the scope of section 523(a)(7). They are not penal in nature and are similar to costs imposed on the losing party in a civil case. They are in the nature of user fees charged to participants in the court system to fund that system and, in many cases, are charges for services provided, assessed against people who are never found guilty of any crime. Some are fees also charged to civil litigants who have never even been charged with a crime and to individuals who are not litigants at all. Therefore, this Court should reverse the decision of the district court and hold that the costs were discharged in the debtor's bankruptcy case.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of the Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE WITH RULES

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This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman type.

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I, HENRY J. SOMMER, hereby certify that the foregoing brief was served, on the date below, by first class mail, postage prepaid, upon:

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