

In re Hucke, Case No. 390-35394-H13

Hucke v. State of Oregon, et al., Adv. Pro. No. 91-3124-H

Civ No. 91-672-Pa

7-10-91 Panner, J. Affirming HLH Published

The US District Court affirmed Judge Hess's ruling below that a state court order revoking the debtor's probation for failure to pay a restitution obligation according to the terms of the state judgment after filing chapter 13 was VOID as having been entered in violation of the automatic stay. The court ordered the immediate release of the debtor from the state prison.

The court's reasoning closely tracked the reasoning of the lower court which reasoning was summarized previously and is reproduced immediately following.

The debtor was convicted of a crime and sentenced in the state court to probation upon certain conditions including that he pay his victim restitution. Thereafter, the debtor filed this chapter 13 case and listed the state as a creditor. The plan was confirmed without objections. Thereafter, without seeking relief from the stay, the state court ordered the debtor to appear for a probation revocation hearing for his failure to make the restitution payments as ordered by the state court. The hearing was held, the debtor's probation was revoked and he was incarcerated in the state prison. The debtor filed this adversary proceeding seeking an order of the bankruptcy court voiding the state court's judgment revoking probation and an injunction requiring the debtor's release.

The court held that the automatic stay prohibits a state court from conducting a probation revocation hearing after a chapter 13 case has been filed where the sole ground for the hearing is the failure to pay restitution as ordered by the state court. The exception in §362(b)(1) for "criminal proceedings" does not apply in such a case since a restitution obligation is a "claim" under § 101(4), see Davenport, 110 S. Ct. 2126 (1990) [restitution is a dischargeable claim in a chapter 13 case], and the hearing was therefore conducted to enforce a claim, in violation of §362(a).

The defendants argued that, although there were no other violations of the terms of probation, the state did not revoke probation for the failure to pay, but, rather because the purposes of probation were not being served as evidenced by the debtor's failure to pay. This analysis would render the holding in Davenport meaningless, as a practical matter, since the state court could always assert that there was some previously unarticulated, subjective factor that caused the revocation when there was no objective factor supporting the revocation except the debtor's failure to pay restitution as ordered by the state court. This would result in the lawful incarceration of the debtor and the resultant failure of the debtor's plan even though the only action taken by the debtor was the exercise of his lawful right to file a bankruptcy petition.

The state also argued that the complaint actually sought a writ of habeas corpus that the bankruptcy court did not have the power to issue and which was not available to the debtor until he had exhausted his state remedies. The court held that §105(a) controlled rather than the habeas statutes; that exhaustion was not necessary where the state remedies were inadequate but there was a question of the bankruptcy court's power to issue an order requiring the debtor's release. Thus, the court voided the state court's judgment revoking probation and requested that the US District Court review the matter and enter an order requiring the debtor's

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immediate release.

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CLERK U.S. BANKRUPTCY COURT  
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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In re )  
SCOTT MATTHEW HUCKE, )  
Debtor. )  
----- )  
SCOTT MATTHEW HUCKE, )  
Plaintiff, )  
v. )  
STATE OF OREGON, by and )  
through the Division of )  
Corrections, Department of )  
Human Resources; and HARL H. )  
HAAS, individually and in )  
his capacity as a Circuit )  
Court Judge for the Fourth )  
Judicial District, )  
State of Oregon, )  
Defendants. )

Bankruptcy Case No.  
390-35394-H13

Adversary Case No.  
91-3124

CV 91-672-MA

OPINION

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P91-7(32)

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11 Attorneys for Defendants.

12 **PANNER, J.**

13 Plaintiff, a debtor in bankruptcy, brings this adversary  
14 action seeking his release from state custody for a probation  
15 violation. I find the state in violation of the automatic  
16 stay of the Bankruptcy Code and direct plaintiff's release  
17 from custody.

18 **FACTUAL BACKGROUND**

19 On May 29, 1990, plaintiff, Scott Hucke, pled guilty to  
20 first degree rape. Multnomah County Circuit Court Judge Harl  
21 H. Haas sentenced plaintiff to five years' probation. Judge  
22 Haas also ordered plaintiff to pay to the Multnomah County  
23 Court Administrator's Office a \$50 penalty assessment, \$1,135  
24 restitution to the victim, and a \$20,000 compensatory fine.

25 On October 10, 1990, plaintiff filed a petition for  
26 relief under Chapter 13 of the United States Bankruptcy Code

2 - OPINION

1 in the United States Bankruptcy Court for the District of  
2 Oregon. Plaintiff listed the Office of the Multnomah County  
3 Court Administrator and three other unsecured creditors on his  
4 schedules. Plaintiff's plan proposed to pay his creditors,  
5 including the Court Administrator, approximately 20% of his  
6 debt under a three-year plan. No creditors appeared at the  
7 meeting of creditors, and none filed objections. On January  
8 11, 1991, the Bankruptcy Court confirmed plaintiff's plan.

9 No creditor sought or obtained relief from the automatic  
10 stay imposed by 11 U.S.C. § 362(a).

11 On January 14, 1991, Judge Haas sent plaintiff a letter  
12 alleging plaintiff was in violation of his probation, and  
13 scheduling a probation revocation hearing. On February 5,  
14 1991, plaintiff filed an action in this court seeking to  
15 enjoin Judge Haas from conducting the probation revocation  
16 hearing. District Judge James A. Redden denied the motion and  
17 dismissed the action without prejudice. (No. CV91-117-RE,  
18 Feb. 8, 1991).

19 On February 8, and March 1, 1991, Judge Haas conducted  
20 the probation revocation hearing. Representing the state, the  
21 deputy district attorney explained to the court:

22 The case before the court is a probation violation  
23 hearing, the defendant having failed to comply with  
the court order of payment of restitution.

24 Judge Haas found plaintiff in violation of his probation.  
25 Judge Haas revoked probation and sentenced plaintiff to three

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1 years' imprisonment. Plaintiff was immediately incarcerated  
2 and is now serving that sentence.

3 Plaintiff brought this adversary action in Bankruptcy  
4 Court against the State of Oregon and Judge Haas<sup>1</sup> for  
5 violating the automatic stay of the Bankruptcy Code. Granting  
6 plaintiff's motion for summary judgment, Henry L. Hess, Jr.,  
7 United States Bankruptcy Judge, entered an Order declaring  
8 "void" the state court's judgment revoking probation.

9 According to Judge Hess, the following is undisputed:  
10 (1) But for plaintiff's failure to pay, there would have been  
11 no revocation hearing; and (2) there is no evidence of any  
12 problem with plaintiff's conduct while on probation other than  
13 plaintiff's failure to pay. (Opinion at 8). The materials  
14 submitted to this court do not contradict those facts.

15 Judge Hess held that the subjective motive behind  
16 revoking plaintiff's probation is irrelevant. "[W]here the  
17 state can point to no violation of the conditions of the  
18 probation obligation after filing a [chapter 13 bankruptcy],  
19 resentencing is prohibited by the automatic stay." (Opinion  
20 at 10).

#### 21 PROCEDURAL ISSUES

22 Judge Hess declined to order plaintiff's release.  
23 Instead, Judge Hess forwarded his opinion to this court with a  
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25 <sup>1</sup>Plaintiff sued Judge Haas individually and in his official  
capacity. The Bankruptcy Judge dismissed the action against  
Judge Haas in his individual capacity. That ruling was  
uncontested, and I see no reason to disturb it.

1 proposed order for this court to adopt his findings and  
2 conclusions and order the immediate release of plaintiff. The  
3 State of Oregon filed objections and an appeal from Judge  
4 Hess' Order and filed a motion for withdrawal of reference  
5 from the Bankruptcy Court. Plaintiff filed a motion seeking  
6 expedited consideration of the order to release plaintiff from  
7 custody.

8 An adversary proceeding in a bankruptcy case can reach  
9 the district court in three different ways. First, one or  
10 both of the parties can appeal a final decision concerning a  
11 "core" matter of the bankruptcy court. 28 U.S.C. § 158.  
12 Second, sua sponte, or on the motion of a party, the district  
13 court can withdraw its reference to the bankruptcy court  
14 pursuant to 28 U.S.C. § 157 (d). Third, the bankruptcy judge  
15 can submit to the district court its proposed findings of fact  
16 and conclusions of law concerning any bankruptcy-related  
17 matter that is not a "core" matter. The district court will  
18 then review de novo any matter to which any party has filed  
19 objections. 28 U.S.C. § 157(c)(1).

20 Here, it is uncertain whether this court is sitting on  
21 appeal, entertaining objections, or acting at the request of  
22 the bankruptcy judge.

23 To clear up the procedural confusion, I grant defendant's  
24 motion for withdrawal of reference from the bankruptcy court.  
25 28 U.S.C. § 157(d). I will review this matter de novo.

26 / / /

1 DISCUSSION

2 The following legal issues are presented: (1) Whether the  
3 state court violated the automatic stay by revoking probation;  
4 and (2) Whether plaintiff must exhaust all state court  
5 remedies before filing an action in federal court.

6 1. State Court Remedies

7 The state argues that plaintiff's claim lies properly as  
8 a petition for a writ of habeas corpus. The state contends  
9 that such a petition in this case was untimely because  
10 plaintiff did not exhaust his state court remedies. 28 U.S.C.  
11 § 2254 provides, in part:

12 An application for a writ of habeas corpus in  
13 behalf of a person in custody pursuant to the  
14 judgment of a State court shall not be granted  
15 unless it appears that the applicant has exhausted  
16 the remedies available in the courts of the State,  
17 or that there is either an absence of available  
18 State corrective process or the existence of  
19 circumstances rendering such process ineffective to  
20 protect the rights of the prisoner.

21 In Preiser v. Rodriguez, 411 U.S. 475, 488-89 (1973), the  
22 Supreme Court held that prisoners challenging the duration of  
23 their confinement could not circumvent the habeas corpus  
24 exhaustion requirement by bringing their cases as civil rights  
25 violations under 42 U.S.C. § 1983.

26 The state argues that since plaintiff is challenging  
confinement, he must first exhaust his state court remedies  
before bringing a habeas action.

Judge Hess rejected that argument on several grounds.  
First, Judge Hess held that the Bankruptcy Code empowers the

1 Bankruptcy Court to issue any order necessary or appropriate  
2 to carry out the provisions of the code. Unlike 42 U.S.C. §  
3 1983, the Bankruptcy Code includes a provision giving the  
4 court broad powers. 11 U.S.C. § 105(a) provides:

5 The court may issue any order, process, or judgment  
6 that is necessary or appropriate to carry out the  
provisions of this title.

7 Therefore, according to Judge Hess, a debtor seeking to  
8 enforce rights under the Bankruptcy Code is not limited to a  
9 petition for writ of habeas corpus.

10 Second, Judge Hess ruled that, even if habeas corpus is  
11 the only procedural remedy, plaintiff was exempt from  
12 exhausting state remedies because of the "existence of  
13 circumstances rendering such process ineffective to protect  
14 the rights of the prisoner." 28 U.S.C. § 2254(b). Judge Hess  
15 reasoned that the state court appeal process would have been  
16 so delayed and uncertain as to render it ineffective.

17 The state contends that the Bankruptcy Code should be  
18 construed no broader than the civil rights laws. The state  
19 reasons that, since deprivation of liberty alone is  
20 insufficient to waive exhaustion, rights under the Bankruptcy  
21 Code should not constitute cause to waive the requirement.

22 I agree with Judge Hess. Plaintiff's incarceration not  
23 only deprives plaintiff his liberty, it interferes with  
24 plaintiff's right to meet his obligations under his confirmed  
25 bankruptcy plan; it interferes with the rights of his

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1 creditors, including the rape victim; and it interferes with  
2 the Bankruptcy Court's administration of the debtor's estate.

3 Plaintiff charges that the state court judgment was  
4 imposed in violation of the federal bankruptcy laws. The  
5 specific inquiry in plaintiff's action is whether the state  
6 court violated the Bankruptcy Code by incarcerating plaintiff.  
7 The viability of the bankruptcy is hanging in the balance.  
8 The state should not be permitted to detain plaintiff while  
9 the state appellate system takes its time to determine an  
10 issue of bankruptcy law. Original jurisdiction of bankruptcy  
11 cases is exclusively in the Bankruptcy Court for the district  
12 in which the debtor resides.

## 13 2 The Automatic Stay

14 The more significant inquiry is whether the state court  
15 violated the automatic stay of the Bankruptcy Code. The  
16 filing of a bankruptcy petition "operates as a stay,  
17 applicable to all entities, of . . . any act to collect,  
18 assess, or recover a claim against the debtor that arose  
19 before the commencement of the case under this title." 11  
20 U.S.C. § 362(a)(6). However, it does not operate as a stay  
21 "of the commencement or continuation of a criminal action or  
22 proceeding against the debtor." 11 U.S.C. § 362(b)(1).

23 The state argues that the state's revocation of probation  
24 did not violate the stay because the state was not attempting  
25 to collect on a debt. Rather, the state revoked probation  
26 because the purposes of probation were not being served. The

1 state concedes that the debt is dischargeable through  
2 plaintiff's Chapter 13 plan.

3 There is no dispute that, but for the bankruptcy filing,  
4 there would have been no revocation hearing. There is also no  
5 dispute that the only condition of probation plaintiff  
6 "violated" was his failure to pay restitution.

7 The Supreme Court recently held that a state-imposed  
8 restitution obligation arising from a criminal proceeding is a  
9 dischargeable debt under chapter 13. Pennsylvania Dep't of  
10 Public Welfare v. Davenport, 110 S. Ct. 2126 (1990). In that  
11 case, after the discharge order was entered, the state court  
12 did not revoke probation, but it found that the debt was still  
13 owing.

14 Judge Hess wrote, it would be incongruous to rule that a  
15 restitution debt is dischargeable, but that the automatic stay  
16 does not protect a debtor from being punished for providing  
17 for such discharge in a chapter 13 plan. I agree. The United  
18 States Bankruptcy laws are historically grounded in protecting  
19 citizens from the debtors' prisons existing in 19th Century  
20 England.

21 The state also argues that the probation revocation  
22 hearing was a criminal proceeding excepted from the automatic  
23 stay. That argument is also unavailing. In Davenport, the  
24 Court acknowledges that the automatic stay is not a bar to  
25 prosecution of alleged criminal offenses. However, the stay  
26 "preclude[s] probation officials from enforcing restitution

1 orders while a debtor seeks relief under Chapter 13."  
2 Davenport, 110 S. Ct. at 2132. If the state court could  
3 simply jail a debtor who seeks to discharge a restitution  
4 obligation, Davenport would be, in Judge Hess' word,  
5 emasculated.

6 Defendant cites the possible chilling effect on future  
7 probation sentences if plaintiff is ordered released from  
8 jail. That concern is insignificant. After Davenport and  
9 this case, Congress amended the bankruptcy laws to except  
10 criminal restitution from discharge under Chapter 13. See  
11 Pub. L. 101-581, 104 Stat. 2865 (Nov. 15, 1990)(adding 11  
12 U.S.C. § 1328(a)(3)).

13 Applying Davenport, the state violated the automatic  
14 stay, and the judgment revoking probation is void. In re  
15 Stringer, 847 F.2d 549 (9th Cir. 1988). Accordingly,  
16 plaintiff should be released and his plan be permitted to  
17 continue.

18 CONCLUSION

19 Defendants' motion for withdrawal of reference is  
20 granted. Plaintiff's motion for summary judgment is granted,  
21 except that the action is dismissed against defendant Haas in  
22 his individual capacity. The state court judgment of March 5,  
23 1991, revoking plaintiff's probation is declared VOID, in

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violation of 11 U.S.C. § 362(a). Defendants shall immediately  
cause the release of plaintiff from custody.

DATED this 9 day of July, 1991.

  
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OWEN M. PANNER, United States  
District Court Judge

U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
FILED

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re	)	
	)	No. 390-35394-H13
SCOTT MATTHEW HUCKE,	)	
	)	
Debtor.	)	
_____	)	
SCOTT MATTHEW HUCKE,	)	
	)	Adv. No. 91-3124-H
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF OREGON, by and through the	)	
Division of Corrections, Department	)	
of Human Resources; and HARL H. HAAS,	)	
individually and in his capacity as a	)	OPINION
Circuit Court Judge for the Fourth	)	
Judicial District, State of Oregon,	)	
	)	
Defendants.	)	

This matter came before the court upon the defendants' motion to dismiss and the plaintiff's motion for summary judgment. The defendants are represented by Daniel Rosenhouse, Assistant Attorney General for the State and the plaintiff is represented by Michael R. Blaskowsky and Todd

1 Trierweiler both of Portland, Oregon.

2 The complaint herein alleges that, after the plaintiff  
3 filed a chapter 13 bankruptcy petition, the state revoked his  
4 probation because he failed to pay a restitution obligation  
5 according to the terms of the state court's probation order.  
6 The prayer seeks an order declaring the state court's judgment  
7 revoking the plaintiff's probation to be void as having been  
8 entered in violation of the automatic stay provided by 11  
9 U.S.C. §362(a) and for a mandatory injunction requiring the  
10 release of the plaintiff from the state correctional facility.

11 The following facts are undisputed. On May 29, 1990,  
12 Multnomah County Circuit Judge Harl Haas sentenced the  
13 plaintiff to a period of probation on certain conditions.  
14 Among the conditions was that the plaintiff pay the victim  
15 restitution and a compensatory fine.

16 On October 10, 1990, the plaintiff filed a chapter 13  
17 proceeding in this court. The plaintiff listed the state and  
18 three other unsecured creditors. On October 16, 1990, the  
19 bankruptcy court notified the state of the filing of the  
20 bankruptcy case and the imposition of the automatic stay.

21 The chapter 13 plan dated 10-8-90 proposed to pay holders  
22 of allowed unsecured claims approximately 20% of the amount of  
23 their claims over a 36 month period. No objections to the  
24 plan or other pleadings were filed by any creditor including  
25 the state. On December 17, 1990, the bankruptcy court held a  
26 confirmation hearing to consider the debtor's proposed plan.

1 No creditors appeared at the hearing and the court confirmed  
2 the plan by an order dated 1-11-91. The confirmation order  
3 was not appealed. The state has never filed in this case a  
4 motion for relief from the automatic stay of 11 U.S.C.  
5 §362(a).

6 On January 14, 1991, the state court caused a letter to  
7 be mailed to the plaintiff. The letter alleged that the  
8 plaintiff was in violation of the conditions of his probation  
9 and ordered him to appear in Multnomah County Circuit Court  
10 for a hearing to consider revocation of his probation.

11 On February 8, 1991, the plaintiff appeared as ordered.  
12 At the hearing, Mr. Jim McIntyre, Deputy District Attorney,  
13 appeared on behalf of the State of Oregon. Mr. McIntyre's  
14 opening statement included the following:

15 "The case before the court is a probation  
16 violation hearing, the defendant having  
17 failed to comply with the court order of  
18 payment of restitution."

19 After some discussion about the reasons for the  
20 plaintiff's failure to pay the court-ordered restitution, the  
21 hearing was continued to March 1, 1991.

22 On March 1, 1991, the probation revocation hearing was  
23 resumed.

24 Thereafter, on March 5, 1991, the state court entered a  
25 judgment revoking the plaintiff's probation and sentencing him  
26 to 36 months confinement at the Oregon State Corrections  
27 Facility. The plaintiff is currently incarcerated at that

1 facility.

2 The defendants filed a motion to dismiss the complaint on  
3 the grounds that the complaint fails to state a claim for  
4 relief and that this court is without subject matter  
5 jurisdiction to determine the matter. The defendants'  
6 memorandum in support of the motion to dismiss clarifies the  
7 grounds for the motion. This opinion addresses those grounds  
8 as well as the plaintiff's motion for summary judgment.

9 A. Does the Automatic Stay Prohibit the State Court from  
10 Revoking the Plaintiff's Probation?

11 Upon the filing of a petition in bankruptcy, a federal  
12 restraining order is automatically imposed against all  
13 entities to prohibit the commencement or continuation of a  
14 judicial proceeding against the debtor that was or could have  
15 been commenced before the bankruptcy case was filed or to  
16 recover a claim against the debtor that arose before the  
17 filing of the bankruptcy petition. 11 U.S.C. §362(a). This  
18 federal law preempts any contrary state law and is the supreme  
19 law of the land pursuant to the United States Constitution and  
20 well-recognized principles of constitutional law. In other  
21 words, where state and federal law conflict, state law must  
22 fail. See, e.g., International Longshoremen's Association,  
23 AFL-CIO v. Davis, 476 U.S. 380, 393, 106 S. Ct. 1904 (1986).

24 The defendants argue that: "The automatic stay has  
25 nothing to do with this case." Defendants' Reply Memorandum  
26 Re Motion to Dismiss, p.3. In support of this statement, the

1 defendants urge that the probation revocation action was  
2 excepted from the automatic stay pursuant to 11 U.S.C.  
3 §362(b)(1) which excepts the commencement or continuation of  
4 a criminal action or proceeding against the debtor. Thus, the  
5 defendants recognize that, in fact, a determination of the  
6 scope of the automatic stay is vital to this case.

7 In Pennsylvania Dept. of Public Welfare v. Davenport,  
8 \_\_\_ U.S. \_\_\_, 110 S. Ct. 2126 (1990), the United States  
9 Supreme Court held that restitution is a "debt" as that term  
10 is used in §1328(a) and in §101(11). Accordingly, the Supreme  
11 Court held that a state-imposed restitution obligation arising  
12 from a criminal proceeding is a dischargeable debt under  
13 chapter 13.

14 According to the Supreme Court in Davenport, a  
15 restitution obligation is a "debt" as defined in §101(11).  
16 The term "debt" is defined as "liability on a claim." Id. It  
17 therefore follows that restitution is a "claim" under §101(4).  
18 Since a restitution obligation is a "claim," it is subject to  
19 the provisions of §362(a) which prohibit commencing or  
20 continuing actions to collect a "claim".

21 It would be incongruous to rule that a restitution  
22 obligation can lawfully be provided for in a chapter 13 plan  
23 (and discharged upon completion of the payments required under  
24 the plan), but that the automatic stay does not protect the  
25 debtor from punishment for doing so. This result runs  
26 completely contrary to the underlying principle of chapter 13

1 bankruptcy: That a debtor should be granted relief from  
2 collection efforts while he attempts to repay his creditors  
3 over time and to the best of his ability so that he may obtain  
4 a fresh start. Such a result would eviscerate those remaining  
5 chapter 13 cases involving dischargeable restitution debts by  
6 making it impossible for the debtor to comply with the terms  
7 of a confirmed plan where his probation has been revoked and  
8 he is incarcerated with no means to complete the plan.

9 The language used in Davenport clearly indicates the  
10 Supreme Court's view concerning probation revocation  
11 proceedings based on the debtor's failure to pay a restitution  
12 obligation:

13 Moving beyond the language of §101,  
14 the United States, appearing as amicus in  
15 support of petitioners, contends that  
16 other provisions in the Code,  
17 particularly the exemption to the  
18 automatic stay provision, §362(b)(1), and  
19 Chapter 7's distribution of claims  
20 provision §726, reflect Congress' intent  
21 to exempt restitution orders from  
22 discharge under chapter 13. We are not  
23 persuaded, however, that the language or  
24 the structure of the Code as a whole  
25 supports that conclusion.

26 Section 362(a) automatically stays a  
27 wide array of collection and enforcement  
28 proceedings against the debtor and his  
29 property. Section 362(b)(1) exempts from  
30 the stay "the commencement or  
31 continuation of a criminal action or  
32 proceeding against the debtor."  
33 According to the Senate Report, the  
34 exception from the automatic stay ensures  
35 that "[t]he bankruptcy laws are not a  
36 haven for criminal offenders." S. Rep.  
37 No. 95-989, supra, at 51. Section  
38 362(b)(1) does not, however, explicitly  
39 exempt governmental efforts to collect

1 restitution obligations from a debtor.  
2 Cf. 11 U.S.C. §362(b)(2) ("collection of  
3 alimony, maintenance, or support" is not  
4 barred by the stay). Nonetheless, the  
5 United States argues that it would be  
6 anomalous to construe the Code as  
7 eliminating a haven for criminal  
8 offenders under the automatic stay  
9 provision while granting them sanctuary  
10 from restitution obligations under  
11 Chapter 13. (footnote omitted.)

12 We find no inconsistency in these  
13 provisions. Section 362(b)(1) ensures  
14 that the automatic stay provision is not  
15 construed to bar federal or state  
16 prosecution of alleged criminal offenses.  
17 It is not an irrational or inconsistent  
18 policy choice to permit prosecution of  
19 criminal offenses during the pendency of  
20 a bankruptcy action and at the same time  
21 to preclude probation officials from  
22 enforcing restitution orders while a  
23 debtor seeks relief under Chapter 13.  
24 Congress could well have concluded that  
25 maintaining criminal prosecutions during  
26 bankruptcy proceedings is essential to  
27 the functioning of government but that,  
28 in the context of Chapter 13, a debtor's  
29 interest in full and complete release of  
30 his obligations outweighs society's  
31 interest in collecting or enforcing a  
32 restitution obligation outside the  
33 agreement reached in Chapter 13 plan. Id.

34 The defendants argue that the ruling in Davenport only  
35 prohibits actions to enforce restitution obligations. They  
36 further argue that the case at bar was not such an action.  
37 According to the defendants, the probation revocation hearing  
38 was a "criminal proceeding" under §362(b)(1) conducted to  
39 further the state's interest in protecting its citizens. The  
40 defendants argue that the bankruptcy filing and attempt to  
41 affect the restitution obligation was merely evidence that the  
42 state court judge considered in deciding that the purposes of

1           probation weren't being served.

2           The defendants continue that, since the plaintiff was  
3 attempting to alter the restitution obligation in bankruptcy,  
4 he was not demonstrating the appropriate remorse or contrition  
5 for his crime and was therefore no longer a candidate for  
6 probation. This analysis leads the defendants to conclude  
7 that the proceedings in question were actually criminal in  
8 nature and not an effort to enforce payment of a debt.

9           The problems with this analysis are that it ignores the  
10 fact that the hearing would not have occurred but for the  
11 plaintiff's failure to pay as ordered and, as a practical  
12 matter, it would emasculate the holding in Davenport.

13           The defendants have never disputed that the plaintiff was  
14 summoned to appear in state court for the revocation hearings  
15 as a result of his failure to pay. Counsel for the defendants  
16 admitted in court that, "but for" the plaintiff's failure to  
17 pay, there would have been no revocation hearings in state  
18 court. There is nothing in the record to indicate any problem  
19 with the plaintiff's conduct since probation was ordered  
20 except for the fact of bankruptcy and the plaintiff's  
21 subsequent failure to pay the restitution obligation as  
22 ordered by the state court.<sup>1</sup>

23           Recognizing that the ruling in Davenport would prohibit

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24           <sup>1</sup> The defendants do not point to any specific fact that  
25 supports the claim that the plaintiff is any greater threat to  
26 society today than he was when he was released on probation by the  
27 state court.

1 probation revocation on that basis, however, the defendants  
2 argue that objective facts supporting the revocation of  
3 probation need not be present, rather, that the subjective  
4 motive behind revoking probation is critical. The defendants  
5 contend that the motive was not debt collection but rather to  
6 protect society's interests.

7 If that argument prevails, a debtor with a restitution  
8 obligation would never be able to successfully assert that his  
9 probation was revoked for failure to pay. Instead, the state  
10 would always be able to assert, as it has done in this case,  
11 before or after the fact, that, despite the fact that no  
12 condition of probation was violated except the failure to pay,  
13 the true reason for revoking probation was not non-payment  
14 but, rather, some subjective standard that the probationer  
15 failed to meet. Unfortunately, only the state court judge  
16 would be able to set that standard and evaluate the  
17 probationer's performance against that unarticulated standard.  
18 It is apparent that the defendants' analysis of this issue  
19 would, as a practical matter, overrule the holding in  
20 Davenport and render the automatic stay ineffective in this  
21 context.

22 In this court's opinion, the subjective motive behind  
23 revoking the plaintiff's probation is irrelevant. This court  
24 holds that where the state can point to no violation of the  
25 conditions of the probation sentencing order other than the  
26 failure to pay a restitution obligation after filing a

1 petition under chapter 13 of the Bankruptcy Code, re-  
2 sentencing is prohibited by the automatic stay.

3 In this case, then, there is no genuine issue of material  
4 fact remaining. The court must conclude that probation was  
5 revoked solely because the plaintiff exercised his legal right  
6 to file a petition in bankruptcy and altered the restitution  
7 payment schedule. Thus, under the holding in Davenport, the  
8 proceeding in question was not a criminal proceeding and not  
9 excepted from the automatic stay.

10 Therefore, the automatic stay prohibited the defendants  
11 from taking any action to collect on the claims in question  
12 without first obtaining an order granting them relief from the  
13 stay.<sup>2</sup>

14 It is not disputed that the state did not ask for relief  
15 from the automatic stay before continuing the judicial  
16 proceedings against the plaintiff. Thus, without obtaining  
17 relief from the automatic stay, the state court ordered the  
18 plaintiff's probation revoked.

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19 <sup>2</sup> The fact that Congress has subsequently amended the law  
20 to except restitution obligations from the discharge provisions of  
21 chapter 13 does not change the result. This case was filed before  
22 that law became effective. Further, in changing the result  
23 mandated by Davenport, Congress could have, but did not amend  
24 §362(a) or 362(b) to except probation revocation proceedings from  
25 the scope of the automatic stay. There is no reason to conclude  
26 that Congress intended chapter 13 debtors to be subject to  
27 imprisonment for a probation violation relative to a restitution  
28 obligation that is dealt with in a chapter 13 plan. This is true  
29 since it is possible for a debtor to propose to repay a restitution  
30 obligation in full under a chapter 13 plan yet under different  
31 terms than those ordered as a result of the criminal proceedings.

1           In sum, the actions taken by the state in revoking the  
2 plaintiff's probation were in violation of the automatic stay.  
3 Actions taken in violation of the stay are void. In re  
4 Stringer, 847 F.2d 549 (9th Cir. 1988). Accordingly, the  
5 court will enter an order declaring the judgment revoking the  
6 plaintiff's probation void.

7           Some would argue that this result is undesirable in that  
8 a convicted criminal will be allowed to avoid incarceration by  
9 filing bankruptcy. This argument has been addressed by the  
10 United States Supreme Court in Davenport, supra.

11           In addition, however, the practical ramifications of the  
12 state court proceedings warrant comment. The plaintiff was  
13 employed and free on probation when the state court violated  
14 the automatic stay and revoked his probation. The only  
15 objective basis for conducting the proceedings and revoking  
16 the plaintiff's probation was that he was not paying the  
17 restitution obligations according to the terms ordered by the  
18 state court.

19           As previously discussed, there was no allegation or proof  
20 that the plaintiff violated any other provision of his  
21 probation or that he was any more of a threat to society than  
22 he was when the state ordered his release on probation.

23           As a result of the state court proceedings, the plaintiff  
24 is no longer able to work to repay his creditors (including  
25 the victim). The defendants concede that this debt is  
26 dischargeable, Memorandum in Support of Defendants' Motion to

1 Dismiss, p. 5, and this court has previously ruled from the  
2 bench that a chapter 13 case will not be dismissed for failure  
3 to make payments where the failure was occasioned by  
4 circumstances beyond the debtor's control.

5 Thus, the practical effect of the action of the state  
6 court is to require the plaintiff to remain incarcerated for  
7 36 months without making any payment to his victim or other  
8 creditors. At the end of that time, his chapter 13 plan will  
9 be complete and he will be entitled to a discharge of all his  
10 debts, including the restitution obligations, without having  
11 paid anything to the victim or to any of his other creditors.  
12 In this particular case, it would appear that the interests of  
13 the victim and society would be better served by allowing the  
14 plaintiff to remain free on probation while he attempts to  
15 make amends to the best of his ability.

16 It also appears from the transcripts of the hearings that  
17 the state court felt the plaintiff should have attempted to  
18 contact the state court to reduce his monthly restitution  
19 payments before filing for protection under the federal  
20 bankruptcy laws. This ignores the fact that the state court  
21 cannot stay the collection actions of other creditors while it  
22 considers the plaintiff's financial condition. The bankruptcy  
23 court and the bankruptcy laws, however, are specifically  
24 designed to offer such protection while the debtor attempts to  
25 resolve his financial problems. This also ignores the fact  
26 that the plaintiff has the right to file for relief under the

1 bankruptcy laws without seeking permission from the state  
2 court.

3 B. The Writ of Habeas Corpus is Not the Debtor's  
4 Exclusive Remedy.

5 The defendants argue that the plaintiff seeks an order  
6 releasing him from custody and that such relief must be  
7 obtained, if at all, through a writ of habeas corpus. The  
8 state relies heavily upon Preiser v. Rodriguez, 411 U.S. 475,  
9 93 S. Ct. 1827 (1973) for this proposition. In Preiser, the  
10 court held that, in determining whether the habeas corpus  
11 statutes, 28 U.S.C. §2241 and 2254, control over the  
12 potentially conflicting provisions of the Civil Rights Acts,  
13 42 U.S.C. §1983, Congressional intent revealed that the habeas  
14 statutes control:

15 "In amending the habeas corpus laws in  
16 1948, Congress clearly required  
17 exhaustion of adequate state remedies as  
18 a condition precedent to the invocation  
19 of federal judicial relief under those  
20 laws. It would wholly frustrate explicit  
21 congressional intent to hold that  
22 respondents in the present case could  
23 evade this requirement by the simple  
24 expedient of putting a different label on  
25 their pleadings." (emphasis added.) Id.  
26 at 489-90.

27  
28 While it may be true that there is no clear indication  
29 that the Civil Rights Act was intended by Congress to provide  
30 an alternative to the habeas statutes, such is not the case in  
31 bankruptcy.

32 In 1978, Congress passed the Bankruptcy Reform Act (the

1 "Code") which has been codified at 11 U.S.C. §101 et seq.  
2 Section 105(a) of Title 11 provided then, as it does today,  
3 that:

4 "The court may issue any order, process,  
5 or judgment that is necessary or  
6 appropriate to carry out the provisions  
7 of this title."  
8

9 The legislative history accompanying that section  
10 indicates that Congress intended to give the court as much  
11 power as possible to issue any order necessary or appropriate  
12 to carry out the provisions of the Code:

13 "Section 105 is similar in effect to the  
14 All Writs Statute, 28 U.S.C. 1651, under  
15 which the new bankruptcy courts are  
16 brought by an amendment to 28 U.S.C. 451.  
17 HR 8200 §213. The section is repeated  
18 here for the sake of continuity from  
19 current law and ease of reference, and to  
20 cover any powers traditionally exercised  
21 by a bankruptcy court that are not  
22 encompassed by the All Writs Statute.  
23 This section is also an authorization  
24 under 28 U.S.C. 2283, for a court of the  
25 United States to stay the action of a  
26 State court." HR Rep. No. 595, 95th  
27 Cong., 1st Sess. 316-317 (1977).  
28

29 It is important to note that Congress intended to bring  
30 the bankruptcy courts within the purview of the All Writs  
31 Statute, 28 U.S.C. §1651, by amending 28 U.S.C. §451 at the  
32 time the Code was adopted. The All Writs Statute, as the name  
33 implies, authorizes courts to issue writs of all kinds,  
34 including writs of habeas corpus. It is apparent from the  
35 legislative history just recited, that writs of all kinds,  
36 including writs of habeas corpus, were considered by Congress

1 when it adopted §105(a). If Congress had intended to limit  
2 the court's ability to order a prisoner's release to the  
3 issuance of a writ of habeas corpus pursuant to 28 U.S.C.  
4 §2254, it surely would have so indicated. Instead, Congress  
5 authorized the bankruptcy courts to issue any order necessary  
6 or appropriate to carry out the provisions of the Code.

7 The fact that Congress's effort to give bankruptcy courts  
8 as much power as possible was later limited by the holding in  
9 Northern Pipeline Construction Co. v. Marathon Pipeline Co.,  
10 458 U.S. 50, 102 S. Ct. 2858 (1982), does not change the  
11 conclusion. The relevant inquiry, after Preiser, is  
12 Congressional intent concerning the exclusivity of the habeas  
13 remedy in a bankruptcy context. Congress could have limited  
14 the scope of §105(a) when it amended the Code in 1984 to  
15 attempt to cure the defects noted in Marathon. Instead,  
16 §105(a) was left intact and the legislative history indicates  
17 that §105 was amended by adding subsection (c) to make "the  
18 necessary modifications to accommodate the continued  
19 jurisdiction of the District Court and its officers."  
20 (Emphasis added.) 130 Cong. Rec. S6085, daily ed. May 21,  
21 1984.<sup>3</sup> This court therefore concludes that Congress did not

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22 <sup>3</sup> The defendants also argue that the fact that 28 U.S.C.  
23 §2256 never became effective evidences Congress's intent to limit  
24 habeas powers in the bankruptcy context. As plaintiff correctly  
25 notes, however, the same fact could be used to argue that Congress  
26 did not intend to limit the court's habeas powers in the bankruptcy  
27 context. Perhaps the most likely explanation for this anomaly in  
28 the law is that Congress was attempting to deal with the problems  
29 posed by the ruling in Marathon, rather than attempting to limit

1 intend to limit the federal courts, in the bankruptcy context,  
2 to the habeas statutes. Thus, the holding in Preiser is not  
3 controlling in this case and the plaintiff's potential  
4 remedies include an appropriate order pursuant to 11 U.S.C.  
5 §105(a) as well as a writ of habeas corpus.

6 Even if the habeas statutes were the exclusive remedy  
7 available to the plaintiff in this case, it does not follow,  
8 as the defendants argue, that the complaint must be dismissed.  
9 The defendants argue that the habeas statute, 28 U.S.C. §2254,  
10 requires that the plaintiff exhaust his state remedies before  
11 he may seek a writ of habeas corpus and that he has not yet  
12 done so. This argument ignores the express language of the  
13 statute in question.

14 28 U.S.C. §2254(b) provides:

15 "An application for a writ of habeas  
16 corpus in behalf of a person in custody  
17 pursuant to the judgment of a State court  
18 shall not be granted unless it appears  
19 that the applicant has exhausted the  
20 remedies available in the court of the  
21 State, or that there is either an absence  
22 of available State corrective process or  
23 the existence of circumstances rendering  
24 such process ineffective to protect the  
25 rights of the prisoner." (Emphasis  
26 added.)  
27

28 Thus, if the court finds that circumstances exist that  
29 would render the state appeals process ineffective to protect

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30 the scope of §105(a). As discussed elsewhere in this opinion,  
31 Congress amended §105 in 1984 by adding subsection (c). This would  
32 have been the ideal opportunity to limit the scope of §105(a) vis-  
33 a-vis the habeas corpus statutes, yet Congress did not do so.

1 the plaintiff's rights, the plaintiff need not exhaust his  
2 state remedies.

3 In this case, the plaintiff exercised his right to file  
4 a bankruptcy petition under the laws of the United States. At  
5 the time he did so, he was a free man. As noted above, solely  
6 as a result of exercising a lawful right, the state court  
7 deprived the plaintiff of his liberty. This action severely  
8 undermined, if not destroyed, the plaintiff's rights under  
9 federal bankruptcy law. This action was also taken in  
10 violation of the automatic stay, as discussed earlier.

11 If the plaintiff is precluded from bringing the matter  
12 before the federal courts, he is forced to appeal to the state  
13 court system. The record reflects that the plaintiff's  
14 request for a stay of incarceration pending appeal was denied  
15 by the state court. The plaintiff is now incarcerated and is  
16 left with the delay and uncertainty attendant an appeal in the  
17 state system. See O.R.S. Chapter 138.

18 If the defendants had agreed to release the plaintiff  
19 while he pursued his state appeal rights, the defendants'  
20 argument would be more persuasive. When asked if this was  
21 acceptable, however, counsel for the defendants advised this  
22 court it was not. Thus, the plaintiff's remedies under state  
23 law are ineffective.

24 It must also be remembered, as just discussed, that this  
25 court, as a unit of the U.S. District Court, is charged with  
26 administering the federal bankruptcy laws as envisioned by the

1 U.S. Constitution and as adopted by Congress. Said  
2 Constitution and laws are the supreme law of the land.

3 "This Constitution, and the Laws of the  
4 United States which shall be made in  
5 Pursuance thereof ... shall be the  
6 supreme Law of the Land; and the Judges  
7 in every State shall be bound thereby,  
8 any Thing in the Constitution or Laws of  
9 any State to the Contrary  
10 notwithstanding." U.S. Constitution,  
11 Article VI, cl. 2.  
12

13 There is ample precedent for the proposition that a  
14 federal court will intervene in state court proceedings where  
15 there is an interference by the state court with the federal  
16 constitution or federal laws. For a discussion of this  
17 principle, see Minnesota v. Brundage, 180 US 499, 21 S. Ct.  
18 455 (1901).

19 It has also been held by the Supreme Court that  
20 exhaustion is not necessary or appropriate where the state  
21 court is acting without jurisdiction. Ohio v. Thomas, 173  
22 U.S. 276, 19 S.Ct. 453 (1899). The Supreme Court has also  
23 held that a petition in bankruptcy deprives a state court of  
24 jurisdiction to rule on matters affecting the debtor or  
25 property of the estate. Kalb v. Feuerstein, 308 U.S. 433  
26 (1940). In this case, the state court was deprived of  
27 jurisdiction to revoke the plaintiff's probation for failure  
28 to make payments immediately following the filing of the  
29 bankruptcy petition. It would not make sense to require the  
30 plaintiff to pursue remedies in a court that had no  
31 jurisdiction to rule on the question in the first place. It

1 is axiomatic that the law does not require a futile act.

2 The legal basis for the plaintiff's argument that his  
3 probation cannot be revoked arises solely under the federal  
4 bankruptcy laws. The state court is not the proper forum for  
5 the resolution of this issue. There is no reason to require  
6 the plaintiff to seek relief through the state appeals process  
7 when that court lacks jurisdiction and complete and immediate  
8 relief can be granted by the federal courts.

9 Accordingly, even if the habeas corpus statutes were the  
10 exclusive remedy available to this plaintiff, the court would  
11 rule that the complaint be treated as a petition for a writ of  
12 habeas corpus and that circumstances exist that would render  
13 the state process ineffective and, therefore, the plaintiff is  
14 not required to exhaust his state remedies before proceeding  
15 in federal court.

16 C. Does the Bankruptcy Court have the Power to Order the  
17 Release of the Plaintiff?

18 The defendants correctly point out that there is some  
19 question as to this court's power to order the release of the  
20 plaintiff. After Marathon, supra, it is unclear whether such  
21 an order would require execution by an Article III judge  
22 rather than an Article I bankruptcy judge. While there is  
23 some question whether this court can effectively order the  
24 plaintiff's release, there is no question that the U.S.  
25 District Court has the power to enter such an order. This  
26 court, for the reasons discussed above, hereby recommends to

1 the U.S. District Court for the District of Oregon, that an  
2 order be entered requiring the defendants to immediately  
3 release the plaintiff. A proposed order is attached hereto as  
4 Exhibit "A."

5 D. Must the State Court Judge be Dismissed as a Party to  
6 this Proceeding?

7 The defendants argue that the state court judge who  
8 violated the stay was acting in his official capacity. They  
9 point out that there is no allegation to the contrary in the  
10 complaint and no basis for the judge to be named as a party in  
11 his individual capacity.

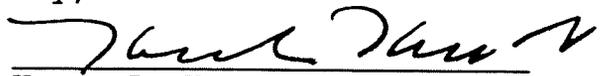
12 The complaint seeks declaratory relief and a mandatory  
13 injunction requiring the release of the plaintiff. There is  
14 no express request for relief against the judge in his  
15 individual capacity for violation of the plaintiff's rights  
16 other than by way of requiring that court to order the release  
17 of the plaintiff. Accordingly, the court will enter an order  
18 dismissing the complaint as to the judge in his individual  
19 capacity without prejudice to the plaintiff's rights to assert  
20 any legally cognizable claim for damages he may have against  
21 this individual under applicable state or federal law and  
22 without implying that he is not required to take any official  
23 action necessary to carry out any order entered by this court  
24 and the U.S. District Court in this proceeding.

25 Conclusion

26 The court will enter an order granting summary judgment

1 in favor of the plaintiff. The judgment shall void the state  
2 court judgment revoking the plaintiff's probation and  
3 recommend that the United States District Court enter an  
4 appropriate order requiring the state to immediately release  
5 the plaintiff from custody on the condition that he comply  
6 with all the conditions of his probation except for the  
7 payment of the restitution and compensatory fine obligations.  
8 The payment of those obligations is governed by the  
9 plaintiff's confirmed chapter 13 plan. This opinion  
10 constitutes the court's findings of fact and conclusions of  
11 law and in accordance with B.R. 7052 they will not be  
12 separately stated.

13 DATED this 7th day of May, 1991.

14   
15 Henry L. Hess, Jr.  
16 Bankruptcy Judge  
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23 cc: Michael R. Blaskowsky  
24 Daniel Rosenhouse

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In Re	)	
SCOTT MATTHEW HUCKE,	)	No. 390-35394-H13
	)	
Debtor.	)	
<hr/>		
SCOTT MATTHEW HUCKE,	)	
	)	Adv. No. 91-3124-H
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF OREGON, by and through the	)	
Division of Corrections, Department	)	
of Human Resources; and HARL H. HAAS,	)	
individually and in his capacity as a	)	ORDER
Circuit Court Judge for the Fourth	)	
Judicial District, State of Oregon,	)	
	)	
Defendants.	)	

The United States Bankruptcy Court having entered its opinion and order herein and this court having adopted the findings and conclusions contained therein, now, therefore, it is hereby

ORDERED that the defendants in this adversary proceeding cause the immediate release of the plaintiff, Scott Matthew

