STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, DEPARTMENT OF FINANCE, SECURITIES BUREAU, *Plaintiff*, vs. **JACK LEE SMILEY.** *Defendant*.	Case No. **CV 2007 2341** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR RELIEF**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

In 2004, defendant Jack Lee Smiley (Smiley) planned to purchase Iraqi currency, Dinar, while such currency was bottomed-out and then resell it once the Iraqi economy recovered. Smiley solicited money from investors allegedly promising a return of $1 million on an investment of $1,000.00. Smiley claims he merely promised that $1,000.00 United States currency would purchase one million Iraqi Dinar. Smiley would transact these purchases and sales of currency through a contact he had in Iraq, a third party known only as "Ali." In Exhibit A to the June 15, 2009, hearing, Smiley attached a last name of "Ali Agha, a 2nd generation Currency dealer." Exhibit A, p. 3. The State of Idaho Department of Finance (State) learned of Smiley's "scheme" and issued a Cease and Desist Order on June 2, 2005. The State alleged that Smiley entered into 63 agreements, which Smiley named "Joint Venture Agreements", before the Order was issued, and 98 agreements after the Order issued.

On April 2, 2007, the State filed this lawsuit against Smiley, seeking injunctive relief, restitution, attorney fees, civil penalty, and "disgorgement of all money rightfully belonging to the victims." Verified Complaint, pp. 10-11, ¶¶ 1-8. Amended Verified Complaint, pp. 12-16, ¶¶ 1-17. The State alleged Smiley violated the Idaho Commodity Code, I.C. § 30-1501 *et seq,* and other violations.

On May 22, 2008, the State filed a Motion for Summary Judgment. At summary judgment, the State argued Smiley violated the Idaho Uniform Securities Act and the Idaho Commodity Code. Smiley argued that whether the joint venture agreements constituted a "security" is a question for the jury which this Court could not resolve on summary judgment, that questions of material fact remained, and that the State was not entitled to judgment as a matter of law. Both sides briefed the issue and submitted affidavits. Oral argument was held on July 28, 2008. On August 28, 2008, this Court granted the State's motion for summary judgment as to all issues. On August 21, 2008, this Court entered a Temporary Restraining Order restraining Smiley from taking the Dinars from the possession of his attorney, Susan Weeks. On August 22, 2008, an Amended Temporary Restraining Order was entered by this Court, requiring Smiley to "…surrender possession of the Dinars, and all of them, to his counsel Susan Weeks, or alternatively to the Clerk of the Court of the First District Court, no later than 5:00 p.m. Pacific Daylight Time on Tuesday, August 26, 2008. Smiley failed to do so.

On September 23, 2008, this Court entered its Judgment, a permanent injunction, and appointed a receiver. On October 22, 2008, the Court entered an Order for a Warrant of Attachment. The State sought an Order of Contempt for Smiley's refusal to turn over the Dinars. Oral argument on that motion was held on October 29, 2009. Smiley testified at that hearing and made it quite clear he would not, under any

circumstances, turn over the Iraqi Dinars. At the conclusion of that hearing, the Court held Smiley in contempt and Smiley was taken into custody at that time. The Court entered an Order regarding the same on November 6, 2009. Smiley has remained in custody at the Kootenai County Jail since that time.

On May 1, 2009, Smiley filed a Motion for Relief from the Contempt Order, requesting that he be released from custody on the grounds that: "He has been incarcerated for approximately six months as a result of his adamant continued refusal to surrender the Iraqi Dinars", "As a result of his said conduct the Court should make a finding that continued and further incarceration for civil contempt Under Rule 75(l) of the Idaho Civil Rules of Procedure will not coerce the delivery of the Iraqi Dinars to the Receiver", and "In light of said facts the continued, indefinite incarceration of Jack Smiley on said civil contempt charges will no longer serve the purposes of civil sanction and may, if continued indefinitely violate the provisions of the Eight Amendment of the United States Constitution against cruel and unusual punishment." Motion for Relief, p. 2. Oral argument on Smiley's Motion for Relief was held June 15, 2009. Smiley testified at that hearing. Smiley also presented a five-page letter to the Court, defendant's Exhibit A, which was admitted. At the conclusion of the hearing, this Court denied Smiley's Motion for Relief, briefly stating the reasons for that decision, and indicating the Court would issue an opinion detailing the reasons for that decision.

II. STANDARD OF REVIEW.

The Idaho Supreme Court set forth the standard of review for contempt orders in *In re Weick,* 142 Idaho 275, 278, 127 P.3d 178, 181 (2005):

> The sanction or penalty imposed under a contempt order is reviewed under an abuse of discretion standard. The determination of whether a sanction or penalty should be imposed is within the discretion of the trial court. This Court does not weigh the evidence, but rather reviews the

> district court's findings to determine if they are supported by substantial and competent evidence. Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. When the trial court exercises its discretion, this Court will not interfere unless the lower court clearly abused its discretion. (citations omitted).

See also Steiner v. Gilbert, 144 Idaho 240, 243, 159 P.3d 877, 880 (2007). "Since a prediction is involved and since that prediction concerns such uncertain matters as the likely effect of continued confinement upon a particular individual, we think a district judge has virtually unreviewable discretion both as to the procedure he will use to reach his conclusion, and as to the merits of his conclusion." *In the Matter of State Grand Jury Investigation In re: Acceturo v. Zelinski,* 242 N.J.Super. 281, 290, 576 A.2d 900, 905 (Sup.Ct.N.J. 1990), *citing Simkin v. United States,* 715 F.2d 34, 38 (2d.Cir 1983). Due to the gravity of the situation as pertains to Smiley's freedom, this Court certainly takes this discretion seriously, and does not perceive its discretion to essentially be "unreviewable".

III. ANALYSIS.

Smiley moves the Court to release him from custody "on the ground that continued incarceration will not coerce him to deliver the Iraqi Dinars to the appointed Receiver." Brief in Support of Motion for Relief, p. 2. Smiley argues that civil contempt sanctions lose their remedial characteristics and become punishment where there is no substantial likelihood that continued incarceration will accomplish the coercive purpose. *Id.,* citing *Soobzokov v. CBS, Inc.,* 642 F.2d 28, 31 (2d.Cir. 1981); *Lambert v. Montana,* 545 F.2d 87 (9th Cir. 1976). Smiley argues there is no indication his incarceration "is resulting in any coercive effect on him to release the Dinars" and that his "recalcitrant position [is] based upon principle and his perception that he is a victim of unjust laws and the legal system." Brief in Support of Motion for Relief, p. 3.

In response, the State argues that Smiley has not met the standard of proving that continued incarceration will not coerce his cooperation. Memorandum Opposing Defendant's Motion for Relief, p. 2. The State points out Smiley has not made a showing as to whether there is a substantial likelihood that continued confinement would cause Smiley to change his mind and cooperate. *Id.*, p. 3. The State goes on to argue Smiley "has an incentive to protest loudly and firmly that he will go to the grave before he will give up the Dinars" as such statements, if believed by the Court, may result in his being released from jail. *Id.,* p. 4. The State's final argument is that Smiley has not yet experienced the full coercive effect of incarceration and "[i]f Defendant truly believes that he will be in jail indefinitely, until he talks, incarceration will have its coercive effect." *Id.,* p. 5.

Smiley has cited four cases in his memorandum. First is *Shillitani v. United States,* 384 U.S. 364, 86 S.Ct. 1531 (1966), for the proposition that a civil contempt sanction is a coercive device, imposed to secure compliance with a court order. Brief in Support of Motion for Relief, p. 2. This Court has read *Shillitani.* The pertinent portion of Shillitani reads:

> 'It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish' civil from criminal contempt. *Gompers v. Buck Stove & Range Co.,* 221 U.S. 418, 441, 31 S.Ct. 492, 498 (1911). Despite the fact that Shillitani and Pappadio were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner-to coerce, rather than punish. As such, they relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify. *See Nye v. United States,* 313 U.S. 33, 42-43, 61 S.Ct. 810, 812-813, 85 L.Ed. 1172 (1941). The test may be stated as: what does the court primarily seek to accomplish by imposing sentence? Here the purpose was to obtain answers to the questions for the grand jury.
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> III.
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> There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. *United*

> *States v. United Mine Workers,* 330 U.S. 258, 330-332, 67 S.Ct. 677, 713-714, 91 L.Ed. 884 (1947) (Black and Douglas, JJ., concurring in part and dissenting in part); *United States v. Barnett,* 376 U.S. 681, 753-754, 84 S.Ct. 984, 1019-1020, 12 L.Ed.2d 23 (1964) (Goldberg, J., dissenting). And it is essential that courts be able to compel the appearance and testimony of witnesses. *United States v. Bryan,* 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). A grand jury subpoena must command the same respect. *Cf. Levine v. United States,* 362 U.S. 610, 617, 80 S.Ct. 1038, 1043, 4 L.Ed.2d 989 (1960). Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance. *McCrone v. United States,* 307 U.S. 61, 59 S.Ct. 685, 83 L.Ed. 1108 (1939); *Giancana v. United States,* 352 F.2d 921 (C.A.7th Cir.), cert. denied, 382 U.S. 959, 86 S.Ct. 437, 15 L.Ed.2d 362 (1965). The conditional nature of the imprisonment-based entirely upon the contemnor's continued defiance-justifies holding civil contempt proceedings absent the safeguards of indictment and jury, *Uphaus v. Wyman,* 364 U.S. 388, 403-404, 81 S.Ct. 153, 155, 5 L.Ed.2d 148 (1960) (Douglas, J., dissenting), provided that the usual due process requirements are met.

384 U.S. 364, 369-71, 86 S.Ct. 1531, 1535-36. (footnotes omitted). The next case cited by Smiley is *Soobzokov v. CBS, Inc.,* 642 F.2d 28 (2d.Cir. 1981), for the proposition that: "[w]hen it becomes obvious that sanctions are not going to compel compliance, they lose their remedial characteristics and take on more of the nature of punishment." Brief in Support of Motion for Relief, p. 2. This Court has read *Soobzokov.* Soboozokov failed to honor a subpoena to attend a deposition in a civil case, then appeared but did not answer two key questions. The federal magistrate ordered Soboozokov to answer the questions and he refused. The magistrate held Soboozokov in contempt, and ordered him into custody. After eleven days, the magistrate released Soboozokov, finding his confinement "will not achieve the purpose for which it was intended", and ordered Soboozokov to pay $50 per day for each day he continued to refuse to answer. 642 F.2d. 28, 30. A key factor in that judge's decision and on appeal was:

> The court stated that "(t)he impossibility of the Court's determining the relevance of the information sought without the plaintiff's counsel knowing

> the answers still continues. The witness cannot determine for himself, the parties, and the Court, that the information is irrelevant."

Id. Obviously, if the relevance of Soboozokov's answers to the questions he refused to answer was not known, that would affect whether a judge should enter *any* contempt sanction, imprisonment or a fine. That feature is not present in Smiley's case. The relevance of the Iraqi Dinars is patent. The next case cited by Smiley is *Lambert v. Montana,* 545 F.2d 87 (9th Cir. 1976), for the proposition that: "When a recalcitrant witness is jailed for refusing to follow instructions from a court, it has been held that at some point in what otherwise would be an indefinite period of confinement due process considerations oblige a court to release a contemnor from civil contempt if the contemnor has then shown that there is no substantial likelihood that continued confinement will accomplish its coercive purpose." Brief in Support of Motion for Relief, p. 2. Lambert was ordered by a Montana State Court judge to testify in a Montana State Court criminal proceeding. Lambert refused and was incarcerated for contempt. Lambert sought a writ of habeas corpus in federal court. The federal district judge denied the writ of habeas corpus. The Ninth Circuit Court of Appeals affirmed, but remanded as follows:

> We remand the cause for a hearing on the issue of whether the commitment has lost its coercive power and whether there is substantial likelihood that continued confinement will accomplish the purpose of the order on which the commitment was based. We note that petitioner bears the burden of proving that continued confinement will not cause him to change his mind and testify.

545 F.2d 87, 91. Thus, the burden is on Smiley to convince this Court that continued confinement will not cause Smiley to change his mind and surrender the Iraqi Dinars. *See also Catena v. Seidl,* 65 N.J. 257, 264, 321 A.2d 225, 229 (1974); *Acceturo v. Zelinski,* 242 N.J. Super. 281, 287, 576 A.2d 900, 903 (App.Div. 1990) and *United*

States v. Rylander, 460 U.S. 752, 757, 103 S.Ct. 1548, 1552 (1983). The next case cited by Smiley is *In re Farr,* 36 Cal.App.3d 577, 111 Cal.Rptr. 649 (1974). Brief in Support of Motion for Relief, pp. 2-3. Smiley cites *Farr* for the same proposition he cited *Lambert.* Farr was a reporter who instigated two attorneys to violate an order prohibiting the dissemination of any testimony from the first degree murder trial of Charles Manson. Farr was compelled to identify those attorneys and refused. As a result, he was ordered incarcerated but was granted a stay of that incarceration until his appeal was heard. On appeal, the trial court was affirmed. 22 Cal.App.3d 60, 99 Cal.Rptr. 342 (Cal.App.2.Dist. 1971). On remand, the trial court held a hearing giving Farr an opportunity to purge his contempt, and he refused. Farr filed the petition for habeas corpus in California State court, which is reported in 36 Cal.App.3d 577, 111 Cal.Rptr. 649. In denying Farr's petition for habeas corpus relief, the California Court of Appeal held in pertinent part:

> Petitioner's contention that his commitment until he complies with the order of court constitutes cruel and unusual punishment is contrary to compelling precedent and misconstrues the order itself.
>
> An order of commitment incarcerating a person until he complies with a valid order of court is coercive and not penal in nature. (*Morelli* v. *Superior Court*, 1 Cal.3d 328, 332 [82 Cal.Rptr. 375, 461 P.2d 655].) Its purpose is not to punish but to enforce an order of court made by it to comply with its legal obligation - here, to supplement the record of the Manson trial for the purpose of appeal and to control the court's officers and attaches. (See *United States v. Mine Workers*, 330 U.S. 258, 303-304 [91 L.Ed. 884, 917-918, 67 S.Ct. 677]; *In re Salkin*, 5 Cal.App.2d 436, 438 [42 P.2d 1041].) Moreover, the term of commitment imposed by the order in the case at bench limited by the construction given it in the later portions of this opinion is appropriate to the purpose of confinement. Thus we conclude that petitioner's commitment is neither punishment, cruel, nor unusual.
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> Petitioner argues that the order imposes "an indeterminate sentence" and a "life term." The argument misconstrues the order in the context of the case at bench. A coercive incarceration to compel compliance with an order of court presents a special problem where disobedience of the order is based upon an established articulated moral principle. (See Goldfarb, The Contempt Power (1963), p. 60.) In such a

> situation, it is necessary to determine the point at which the commitment ceases to serve its coercive purpose and becomes punitive in character. When that point is reached so that the incarceration of the contemner becomes penal, its duration is limited by the five-day maximum sentence provided in Code of Civil Procedure section 1218. (See *In re McKinney*, 70 Cal.2d 8, 10-11 [73 Cal.Rptr. 580, 447 P.2d 972].) Analogy to an area in which a similar need exists to determine the distinction between commitment for a proper civil purpose and incarceration to punish establishes that the test of the distinction lies in the presence or absence of a substantial likelihood that continued commitment will accomplish the purpose of the order upon which the commitment is based. (See *In re Davis*, 8 Cal.3d 798, 801 [106 Cal.Rptr. 178, 505 P.2d 1018], imposing an implied "substantial likelihood" limitation upon a commitment pursuant to Penal Code section 1367 for lack of capacity to stand trial; see also *Jackson v. Indiana*, 406 U.S. 715, 738 [32 L.Ed.2d 435, 450-451, 92 S.Ct. 1845]; *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 [32 L.Ed.2d 719, 723, 92 S.Ct. 2083].)
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> Thus by proper proceedings before the superior court a determination may be made whether petitioner's continued incarceration will accomplish the purpose of the order requiring that he reveal the identity of the persons who had violated the trial court's order prohibiting prejudicial pretrial publicity releases. The ultimate fact to be determined by the trial court is the presence or absence of a substantial likelihood that petitioner's continued commitment will serve that purpose, i.e., the supplementation of the Manson record on appeal and the effective discipline of the offending two attorneys of record in that case, within a period in which the purpose will be effective.

36 Cal.App.3d 577, 583-84. The final case cited by Smiley is *Catena v. Seidl,* 65 N.J. 257, 321 A.2d 225 (1974) (*Catena I*). In that case, the Supreme Court of New Jersey discussed the well-established principle that:

> The legal justification for commitment for civil contempt is to secure compliance. Once it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated.

65 N.J. 257, 262, 321 A.2d 225, 228. Catena was found in contempt and served three years and eleven months when the trial court ordered his release. The investigatory body sought a stay pending appeal, which was granted. As such, Catena was incarcerated at least six more months while the appeal progressed. The Supreme Court of New Jersey held:

The argument is made that Catena's age, condition of health and his persistent silence for four years, without more, establish a Prima facie case that his commitment has failed as a coercive measure. We cannot agree. As heretofore noted, Catena's past silence can be rationally attributed to considerations other than an adamant refusal to purge himself of contempt despite the consequences.

Applying the subjective test heretofore indicated, and considering all of the relevant factors appearing in the present record, our determination is that Catena has not demonstrated that the order of commitment no longer has any coercive impact and has become primarily punitive. Catena was and still is in contempt. If he is now to avoid the sanctions imposed, he has the burden of showing that there is no reasonable likelihood that continued incarceration will cause him to break his silence. He has not done so on the present record.

Plaintiff's remaining contentions require brief comment. He argues, (1) continued confinement under the circumstances of this case constitutes cruel and unusual punishment, (2) the contempt order is unconstitutionally vague, (3) he has a statutory defense under 18 U.S.C. s 2515 to a contempt resulting from illegal surveillance, (4) the contempt is constitutionally invalid because it stems from a subpoena prompted by illegal electronic surveillance, (5) a portion of plaintiff's interrogation by the S.C.I. was without proper purpose, and (6) the changes in composition of the S.C.I. have invalidated the contempt.

The trial court rejected point 1, found points 2 and 5 to be completely without merit and point 6 to be frivolous. We are in full agreement with these rulings and affirm them.

As to points 3 and 4, plaintiff in his complaint herein alleged that if questions which he declined to answer were derived from unlawful electronic surveillance he has a federal statutory defense under 18 U.S.C. s 2515 to a resulting charge of contempt. He also believed and alleged that the subpoena to testify issued by the S.C.I. stemmed from illegally obtained information. As to this latter contention, see In re *Zicarelli, Supra,* 55 N.J. at 274-275, 261 A.2d 129.

At the hearing below, plaintiff, while presenting no proof of unlawful electronic surveillance, asked for the opportunity to introduce evidence in support of these allegations should his other contentions be rejected. However, since the trial court found that plaintiff's confinement no longer had any coercive impact and must therefore be terminated, it found it unnecessary to receive this evidence or to rule on the legality of these contentions. We cannot consider such issues in the absence of a record. The matter must be remanded to the trial court to hold an evidentiary hearing as to plaintiff's contentions of unlawful electronic surveillance, the applicability of 18 U.S.C. s 2515 to plaintiff's situation and plaintiff's standing under 18 U.S.C. s 2518(10)(a) to invoke the statute if it is otherwise applicable.

The order of the trial court dated February 26, 1974 directing that Gerardo Catena be released from further confinement forthwith, is hereby vacated and the matter remanded to the trial court for further proceedings

> in accord with this opinion. We retain jurisdiction for the purpose of reviewing the ruling of the trial court on the matters covered by the remand.

65 N.J. 257, 264-65, 321 A.2d 225, 229-30. Two items are apparent from the above quote. **First,** as noted above, it is Smiley's burden on this Motion for Relief. The burden falls upon the party committed to show that the commitment lacks coercive effect and has become punitive. *See Acceturo v. Zelinski,* 242 N.J. Super. 281, 287, 576 A.2d 900, 903 (App.Div. 1990) and *United States v. Rylander,* 460 U.S. 752, 757, 103 S.Ct. 1548, 1552 (1983) (Once a party has been found in civil contempt for violating a valid court order, the burden shifts to the contemnor). **Second,** it is Smiley's burden to prove his incarceration "no longer has *any* coercive impact and has become primarily punitive." *Catena,* 65 N.J. 257, 264, 321 A.2d 225, 229. (emphasis added). While Smiley testified that he will not ever turn over the Iraqi Dinars, and while Smiley wrote: "I won't ever turn the Dinars over to the State of Idaho, they don't deserve it." (Exhibit A, p. 5), those claims are not determinative or binding on this Court.

> At what point incarceration no longer serves a coercive purpose is a matter left to the discretion of the trial court to decide on a case by case basis. Incarceration for civil contempt may continue until the trial court finds, "after a conscientious consideration of the circumstances pertinent to the individual contemnor, that the contempt power has ceased to have a coercive effect". (citations omitted)

Sanders v. Shephard, 258 Ill.App.3d 626, 630, 630 N.E.2d 1010, 1014 (Ill.App. 1 Dist. 1994); *In re Crededio,* 759 F.2d 589, 591 (7th Cir. 1985). And Courts have held mere statements by a contemnor that he or she will not comply insufficient to demonstrate that there is no "substantial likelihood" they will comply with an order. *In re Grand Jury Investigation (Braun),* 600 F.2d 420, 425 (3rd Cr. 1979); *Catena v. Seidl,* 68 N.J. 224, 228, 343 A.2d 744 (1975) (*Catena III*) ("However, we want to make it perfectly clear that in similar circumstances a person's insistence that he will never talk, or confinement for

a particular length of time does not automatically satisfy the requirement of showing 'no substantial likelihood.'").

Cases must be decided on independent evaluation of all particular facts, including: age, state of health and length of confinement, *inter alia*, with the critical question being whether or not confinement will serve any coercive purpose. *Catena III,* 68 N.J. 224, 229, 343 A.2d 744.

> What we must not lose sight of is the fact that the refusal to testify is willful and contumacious. It is to counter such willful conduct that courts have inherent power to incarcerate to enforce compliance with their lawful order through civil contempt. *See Spallone v. United States,* 493 U.S. 265, 276, 110 S.Ct. 625, 632 (1990); *Shillitani v. United States,* 384 U.S. 364, 370, 86 S.Ct. 1531, 1535 (1996); *United States v. United Mine Workers,* 330 U.S. 258, 330-32, 67 S.Ct. 677, 713-15 (1947).

Acceturo, 242 N.J.Super. 281, 288, 576 A.2d 900.

> The civil contempt power would be completely eviscerated were a defiant witness able to secure his release merely by boldly asserting that he will never comply with the court's order.

Braun, 600 F.2d 420, 425. In *Acceturo, supra,* the Superior Court of New Jersey noted the trial court held:

> My purpose is not punitive. My order provides that he may be released from incarceration, if he testifies. The law says that he is required to testify, so all he has to do is to comply with the order that he testify and he will be released. The purpose of my incarcerating him is to coerce him in to [*sic*] obeying the Court's order and obeying the law. I am attempting to persuade him to testify.... Mr. Acceturo has apparently taken a position that he never has in the past testified and that he never will in the future testify. *I doubt if there has ever been a party who was incarcerated for failure to testify who has not taken the same position. If that and that alone were sufficient to avoid an order coercive in nature such as I have entered, no order would ever be enforceable. To suggest that because in the past he has refused to testify and that that is a basis for his not testifying at the present time would only mean that one who refused to testify previously would then be immune to orders that he do so at a future time.* I don't think that at this time we have a situation where Mr. Acceturo can be said to have never testified in the past and will never testify again. I say he may never have testified in the past but maybe he will testify under

> the coercive order of the Court. And that we must wait and see what transpires.

242 N.J. Super. 281, 287, 576 A.2d 900, 902-03. (emphasis added). The italicized portion could not be more applicable to Smiley's situation.

Arguing his incarceration will not result in any coercive effect on him to release the Dinars, Smiley writes:

> Indeed, the letter of April 9, 2008, Defendant Smiley sent to counsel and the Court demonstrates he considers his recalcitrant position to be based upon principle and his perception that he is a victim of unjust laws and the legal system. Mr. Smiley, who is 73 years old, has notified the Court that he believes he is suffering from health problems while incarcerated in the Kootenai County Jail. Continued incarceration will likely only reinforce these perceptions by Defendant Smiley and be counterproductive to the objective of the Court's Order.

Brief in Support of Motion for Release, p. 3. Smiley has an incentive to claim this Court's contempt sanction has had, and will continue to have, no coercive effect on him. The State speculates that continued incarceration could provide the desired coercive effect because Smiley has possibly "been holding out for the six-month mark, believing that he will be released after the expiration of that amount of time." Memorandum Opposing Defendant's Motion for Relief, p. 5. This Court need not engage in such speculation. It is sufficient that this Court finds that continued *indefinite* incarceration may well cause Smiley to change his position and surrender the Dinars. Specifically, at this juncture it is Smiley's burden to prove his incarceration "no longer has *any* coercive impact and has become primarily punitive." *Catena,* 65 N.J. 257, 264, 321 A.2d 225, 229. As reiterated by the New Jersey Supreme Court: "The critical question is whether or not confinement will serve any coercive purpose." *Catena III,* 68 N.J. 224, 229, 343 A.2d 744, 747 (N.J. 1975). After three separate appeals and over five years of incarceration, the New Jersey Supreme Court held:

> We have made our own evaluation of the evidence. R. 2:10-4. Catena is now 73 years of age and in the twilight of his life. He has been confined for more than five years in an effort to get him to testify. His condition of health has been deteriorating and his physician has advised him that it is dangerous to his heart condition to remain confined. Despite all this, he has refused to break his silence and has continued to insist that 'they'd have to carry me out of there feet first.' The trial judge who had the opportunity to see and hear Catena was satisfied that he would never answer any questions for the Commission.
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> Based on the foregoing, it now appears that there is no substantial likelihood that further confinement will accomplish the purpose of the order upon which Catena's commitment was based. However, we want to make it perfectly clear that in similar circumstances a person's insistence that he will never talk, or confinement for a particular length of time does not automatically satisfy the requirement of showing 'no substantial likelihood.' Each case must be decided on an independent evaluation of all of the particular facts. Age, state of health and length of confinement are all factors to be weighed, but the critical question is whether or not further confinement will serve any coercive purpose.
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> We are not condoning Catena's defiance of the S.C.I. investigation, nor are we subscribing to his reasons for remaining silent, whatever they may be. We hold only that it now appears that there is no substantial likelihood that further confinement will serve any coercive purpose and cause him to testify.

68 N.J. 224, 229-30, 343 A.2d 744, 747. In the present case, this Court is not at all convinced that Smiley will not comply. Smiley has failed to demonstrate for the Court that no coercive purpose will be met through his continued incarceration. Only Smiley's arguably self-serving statements, that his recalcitrant position is based on his belief that he is a victim of the legal system and its unjust laws and that his position will not change, have been provided. Under the reasoning found in *In re Grand Jury Investigation (Braun),* and *Catena v. Seidl,* 68 N.J. 224, 228, 343 A.2d 744 (1975) (*Catena III*), these statements do not suffice to demonstrate that there is no substantial likelihood continued incarceration will accomplish this Court's coercive purpose. Smiley is the only one who knows the location of the Dinars, and Smiley has been ordered by the Court to surrender them. Smiley continues to disregard this Court's order.

Catena III, 68 N.J. 224, 229, 343 A.2d 744, 747; *Acceturo,* 242 N.J.Super. 281,

288, 576 A.2d 900, 904 and *Lambert,* 545 F.2d 87, 90, all recognize that a person's age, state of health and length of confinement are all facts to be weighed, but the critical question is whether or not confinement will serve *any* coercive purpose. Smiley is 74 years old. Exhibit A, p. 4. Smiley has been in custody for seven months and one week. Smiley claims he has health problems. Exhibit 3-5. Smiley testified that he was hospitalized for hypertension (high blood pressure) for seven days in October 2007, and for another period of time in September 2008. The last hospitalization occurred not long before beginning his incarceration on November 6, 2008. Smiley has not had the need of a hospitalization since he has been incarcerated. The Court has been furnished no medical records regarding Smiley either before his incarceration or during his incarceration. At his hearing, Smiley appeared healthy physically and as he responded appropriately to questions, he appeared cognitively intact. Smiley claims his incarceration has been "stressful" (Exhibit A, p. 3), and this Court can understand and appreciate that fact. However, there is no medical evidence that this "stressful" situation is producing unsafe hypertension or any other physical or mental problems. Smiley claims he has constipation, dizzy spells, blurred and double vison. *Id.,* pp. 3-4. Smiley writes he fainted which resulted in a three and one half hour trip to the emergency room. *Id.,* p. 4. However, no medical records were produced. Smiley states he has frequent numbness in both thumbs and two adjoining fingers, numb toes, discolored feet and swollen ankles. *Id.* Smiley states he has pain in his left shoulder and forearm, hip and knee pain, and difficulty sleeping. *Id.* With all these complaints, there has not been a single medical record to document any of these complaints. Most importantly, Smiley has submitted no medical evidence as to the *cause* of such complaints. The Court also notes Smiley's Motion for Relief makes no mention of his physical condition or any

physical problems. Smiley's Brief in Support of Motion for Relief makes only passing reference that he "…has notified the Court that he believes he is suffering from health problems while incarcerated in the Kootenai County Jail." Brief in Support of Motion for Relief, p. 3. In the final analysis, that is all this Court has at present, Smiley's "belief", and not a shred of medical evidence.

At all times over the past two years since this case has been assigned to this Court, Smiley has claimed that he is most concerned about his investors, the many people who gave them his money. Yet, at the hearing, when asked if he had made any arrangements regarding the location of the Dinars if he should die, Smiley testified that he had not, and as regards to his investors: "We win together, we lose together." This Court finds Smiley not credible in his previously stated concern for his investors. That lack of concern for his investors makes incarceration perhaps the *only* coercive tool.

From the tone of Smiley's letter (Exhibit A), Smiley seems to respect this Court ("I am very grateful for the time and effort you are putting into this lawsuit, and, I appreciate your support under these extraordinary conditions", *Id.,* p. 1), while openly showing disdain for the State of Idaho, Department of Finance, Securities Bureau. What Smiley seems to fail to recognize is that the only reason he is in jail is not because of the Department of Finance, but because he violated this Court's order. At all times Smiley has been adamant that he will not turn over the Dinars to the Department of Finance, when this Court ordered him to provide the Dinars to his attorney or to the Court.

Smiley will remain in custody indefinitely until he complies. It is not impossible for Smiley to comply. Smiley is capable of complying. Smiley simply refuses to do so. The United States Supreme Court has "…recognized that indefinite detention until the contemnor complies with a court order is the 'paradigmatic coercive, civil contempt

sanction.'" *United States v. Harris,* 2008 WL 482347 (D.N.J. 2008), citing *International Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 828 (1994), *and Chadwick v. Janecka,* 312 F.3d 597, 608-09.

This Court has read *Armstrong v. Guccione,* 470 F.3d 89 (2dCir. 2006), and finds it to be very on point. In that case, Martin Armstrong was the corporate officer who was compelled to turn over corporate records and assets totaling about $16 million. Armstrong was held in contempt by a federal district judge. On appeal, the United States Court of Appeals, Second Circuit began its decision as follows: "It has been said that a civil contemnor who is incarcerated to compel compliance with a court order holds the key to his prison cell: Where defiance leads to the contemnor's incarceration, compliance is his salvation." 470 F.3d 89, 92. At the time *Armstrong* was authored, Armstrong had spent from January 14, 2000, to the date of the decision, November 27, 2006, in custody for his contempt. The Second Circuit Court of Appeals had no difficulty with that fact:

> We turn to whether the length of Armstrong's confinement is determinative of whether there is "no wilful disobedience but only an incapacity to comply." *Maggio,* 333 U.S. at 74, 68 S.Ct. 401. As the Supreme Court explained in *Maggio:*
>
> > [An incarcerated contemnor's] denial of possession is given credit after demonstration that a period in prison does not produce the goods. The fact that he has been under the shadow of the prison gates *may be enough,* coupled with his denial [that he possesses the goods] and ... evidence [of present conditions or intervening events, which would corroborate his denial], *to convince* the court that his [denial] is not a wilful disobedience which will yield to coercion.
>
> *Id.* at 76, 68 S.Ct. 401 (emphasis added).
>
> The Court's statement in *Maggio* can be viewed as an "inference that may be drawn under most circumstances when a contemnor, despite long confinement, fails to comply with an order." *Chadwick v. Janecka,* 312 F.3d 597, 611 (3d Cir.2002) (Alito, J.). "Thus, in most cases, after a certain period, the inference that the contemnor is unable to comply becomes overwhelming." *Id.* at 612. Armstrong's case, however, is not the ordinary case. Fifteen million dollars is a life-altering amount of

> money. We think that the value of the concealed property is a significant factor to the extent that it would lead the contemnor to conclude that the risk of continued incarceration is worth the potential benefit of securing both his freedom and the concealed property. *See Armstrong III,* 284 F.3d at 406 ("True, Armstrong has been confined for more than two years, but the length of confinement must be viewed in the light of the value of the concealed property, which is unusually great.").

470 F.3d 89, 110-111. In the present case, the amount of money involved from over 120 victims was about one million dollars. Amended Verified Complaint, p. 5, ¶ 18. This Court finds that is a "life-altering amount of money". This Court finds "the value of the concealed property is a significant factor to the extent that it would lead [Smiley] to conclude that the risk of continued incarceration is worth the potential benefit of securing both his freedom and the concealed property."

This Court has gone to great lengths in its analysis in this decision to point out to Smiley that it is not the Department of Finance that is the cause of Smiley's predicament. Smiley lost on summary judgment due to undisputed factual issues, due to the mandates of the Idaho Uniform Securities Act and the Idaho Commodity Code, and due to the great weight of case law on the issue. Smiley has not appealed from that summary judgment. Smiley was held in contempt because of the decision he made to disregard this Court's order (not the Department of Finance's order) by failing to turn over the Dinars to his attorney or to the Court. Smiley will remain in custody indefinitely due to two indisputable facts: 1) Smiley's continued decision to disregard this Court's order in light of 2) the great weight of legal authority on this issue, which has been discussed above. Smiley "holds the key to his prison cell." *Armstrong,* 470 F.3d 89, 92. He can choose to use that key any time. "Where defiance leads to the contemnor's incarceration, compliance is his salvation." *Id.*

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IV. ORDER.

IT IS HEREBY ORDERED, for the reasons stated above, defendant Smiley's Motion for Relief is DENIED.

Entered this 16th day of June, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Alan Conilogue	208-332-8016	Susan P. Weeks	208-664-1684
John L. Runft	208-3433246		

Jack Lee Smiley, c/o Kootenai County Jail

_____
Jeanne Clausen, Deputy Clerk