University of Richmond Law Review

Volume 9 | Issue 2 Article 10

1975

Constitutional Law-Equal Protection-Reimbursement of Appointed Counsel Fees as a Condition of Probation Held Not Violative of the Equal Protection Clause

Constitutional Law—Equal Protection— REIMBURSEMENT OF APPOINTED COUNSEL FEES AS A CONDITION OF PROBATION HELD NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE—*Fuller v. Oregon*, 94 S. Ct. 2116 (1974).

Every defendant facing criminal prosecution that may result in imprisonment is guaranteed the right to counsel.[1] The Supreme Court has required appointed counsel for indigents in widening classes of cases[2] and at different stages of prosecution.[3] This trend has increased the burden on public revenues,[4] and many states, in an effort to recover some of the costs, have enacted recoupment statutes.[5] Several state courts have expressed

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1. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This provision of the Bill of Rights is made applicable to the states by the fourteenth amendment which states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the refusal of a state court to appoint counsel for one charged with a felony a violation of the sixth amendment's guarantee of counsel made obligatory upon the states by the fourteenth amendment). *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether misdemeanor or felony, unless represented by counsel at trial).

2. *See* Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent accused must be afforded counsel on appeal); note 1 *supra*.

3. Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel at preliminary hearing); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at proceedings for revocation of probation and imposition of deferred sentence); United States v. Wade, 388 U.S. 218 (1967) (right to counsel at post indictment police lineup); Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel at police interrogation).

4. The greater number of appointments of counsel to indigent defendants demands increased expenditures by the states in order to provide legal representation as required by the Court.

5. State recoupment statutes are as follows: ALA. CODE tit. 15, § 318(12) (Cum. Supp. 1973); ALAS. STAT. § 12.55.020 (1972); ARIZ. R. CRIM. P. 6.7(d) (1973); FLA. STAT. ANN. § 27.56 (1974); GA. CODE ANN. § 27-3211 (1972); IDAHO CODE § 19-858 (Cum. Supp. 1973); IND. ANN. STAT. § 9-3501 (Cum. Supp. 1974); KAN. STAT. ANN. § 22-4510 (Cum. Supp. 1973); MD. ANN. CODE art. 26, § 12c (Repl. Vol. 1973); N.H. REV. STAT. ANN. § 604-A:9 (Supp. 1973); N.M. STAT. ANN. § 41-22-7 (Repl. Vol. 1972); N.D. CENT. CODE § 29-07-01.1 (Repl. Vol. 5A, 1974); OHIO REV. CODE ANN. § 2941.51 (1974); ORE. REV. STAT. § 161.665 (1974); S.C. CODE ANN. § 17-283 (Cum. Supp. 1973); S.D. COMP. LAWS § 23-2-3.5 (Supp. 1974); VT. STAT. ANN. tit. 13, § 5255 (1974); VA. CODE ANN. § 14.1-184.1 (Cum. Supp. 1974); W.VA. CODE ANN. § 62-3-1 (Cum. Supp. 1974); WIS. STAT. ANN. § 256.66 (1971); WYO. STAT. § 7-9.8 (Cum. Supp. 1973).

The federal recoupment provision is found at 18 U.S.C. § 3006A(f) (1969).

The variance among these statutes is great. At one end of the spectrum are statutes, such as Oregon's, which are very specific as to the requirements and conditions of their operation. *See* note 12 *infra*. At the opposite end of the spectrum lie statutes which are very broad in their application and lack specific requirements and conditions concerning any exemptions accorded the defendant. An example of this latter type of statute is the Virginia recoupment statute which consists of only one sentence:

unfavorable opinions as to the constitutionality of these statutes.[6] The first Supreme Court decision to focus on a state recoupment statute[7] struck it down[8] as violative of the equal protection clause.[9]

In *Fuller v. Oregon*,[10] the Supreme Court examined the Oregon recoupment statute. Fuller was sentenced to five years probation,[11] contingent on reimbursing the county for the costs[12] of his court-appointed counsel.[13]

If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution and, if collected, the same shall be paid to the Commonwealth, or county, city or town, as the case may be. VA. CODE ANN. § 14.1-184.1 (Cum. Supp. 1974).

6. *See* State *ex rel.* Brundage v. Eide, 83 Wash. 2d 676, 521 P.2d 706 (1974) (requirement to pay appointed counsel fees held to be an unconstitutional impairment of defendant's right to counsel); *In re* Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969) (condition imposed on probation that accused reimburse county for court-appointed counsel held invalid as an impediment to free exercise of right to counsel); Opinion of the Justices, 109 N.H. 508, 256 A.2d 500 (1969) (advisory opinion—statute making indigent defendants personally responsible for the payment of ten percent of legal fees for appointed counsel held invalid).

7. James v. Strange, 407 U.S. 128 (1972); see note 9 *infra*.

8. KAN. STAT. ANN. § 22-4513 (Supp. 1971).

9. In James v. Strange, 407 U.S. 128 (1972), the Court held the Kansas recoupment statute violative of the equal protection clause, although recognizing ". . . that state recoupment statutes may betoken legitimate state interests. . . ." *Id.* at 141. The Court did not reach the question whether the Kansas statute impermissibly burdened the right to counsel, but did hold that the statute violated the rationality requirement of equal protection by subjecting convicted indigent defendants to discriminatory conditions of repayment. The Kansas statute ". . . strip[ped] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors. . . ." *Id.* at 135.

10. 94 S. Ct. 2116 (1974) (7-2 decision).

11. Petitioner Fuller pleaded guilty to an information charging him with third degree sodomy. *Id.* at 2119. In addition to being contingent on the reimbursement of expenses, Fuller's probation was also conditioned upon his satisfactory completion of a work-release program at the county jail that would allow him to attend college. *Id.*

12. ORE. REV. STAT. § 161.665 (1974) provides:

(1) The court may require a convicted defendant to pay costs.

(2) Costs shall be limited to expenses specially incurred by the State in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for the remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose

Dismissing Fuller's contention that the state could not constitutionally include the repayment condition in his probation, the Oregon Court of Appeals affirmed,[14] and the Supreme Court of Oregon denied Fuller's petition for review.

The Oregon statute[15] permits in some cases the repayment to the state of all or part of the " . . . expenses specially incurred by the State in prosecuting the defendant,"[16] and also authorizes this to be made a condition of probation.[17] The requirement of repayment is never mandatory but may only be imposed when the convicted defendant[18] will be able to pay without undue hardship.[19] In addition, a convicted defendant may at any time petition the court for remission of the payment of costs.[20] Finally, a

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manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675.

ORE. REV. STAT. § 161.675 (1974) provides:

(1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence.

The costs also included the fee of the investigator, amounting to $375. State v. Fuller, 12 Ore. App. 152, ____ n.3, 504 P.2d 1393, 1399 n.3 (1973).

13. ORE. REV. STAT. § 135.050(3)(a) (1974) requires that counsel be appointed for indigent defendants charged with a crime.

14. State v. Fuller, 12 Ore. App. 152, 504 P.2d 1393 (1973) (2-1 decision). The Court of Appeals of Oregon held that given the substantial limitations on the trial court's authority to revoke probation for non-payment of costs, a sentence that places a defendant on probation conditioned on the requirement that he repay costs has no constitutional infirmity. Rejecting the reasoning in *In re Allen*, the court of appeals upheld the statutory requirement without citation of cases to support its conclusion.

Justice Fort's dissent in *State v. Fuller* was very persuasive and was followed by the Washington Supreme Court in *State ex rel.* Brundage v. Eide, 83 Wash. 2d 676, 521 P.2d 706 (1974).

15. ORE. REV. STAT. § 161.665 (1974).

16. *Id.* § 161.665(2). The costs cannot include expenses inherent in providing a jury trial or expenditures in connection with the maintenance and operation of government agencies that have to be made by the public regardless of specific violations of the law. *Id.* Most costs on the prosecution side of the case, including police investigations, district attorney's salaries, and sheriff's salaries, cannot be charged to the defendant under the statute. 94 S. Ct. at 2125 n.2.

17. ORE. REV. STAT. § 161.675(2) (1974).

18. *Id.* § 161.665(1).

19. *Id.* § 161.665(3).

20. *Id.* § 161.665(4). The court may remit if payment ". . . will impose manifest hardship on the defendant or his family. . . ." *Id.*

convicted defendant may not be held in contempt for failure to pay if he shows that his default was not intentional or that he made a good faith effort.[21] In summarizing the effect of Oregon's recoupment statute, the Court found that a lawyer is provided, at the state's expense, to any defendant who is unable to hire one, and the obligation to repay accrues only to those who will be able to do so without hardship.[22]

Fuller contended that the recoupment statute denied him equal protection of the laws,[23] in that the statute affected only convicted criminal defendants, thereby distinguishing them from other civil judgment debtors. The Court, however, distinguished this case holding that the Oregon statute was free from the kind of discrimination found to be offensive[24] because the defendant is accorded all of the exemptions accorded other judgment debtors. Fuller further contended that the statute violated the equal protection clause in that it discriminated between convicted and

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21. ORE. REV. STAT. § 161.685 (1974) provides:

(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or specified part thereof, is paid.

(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each $25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount . . . or revoking the fine or the unpaid portion thereof in whole or in part.

(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected.

22. 94 S. Ct. at 2121.

23. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

24. *See* note 9 *supra*.

non-convicted defendants. Using the *rational basis* test,[25] the Court found the classification to be rational.[26]

Fuller argued that the knowledge that a defendant may become obligated to repay the costs of appointed counsel might impel him to decline the services of an appointed attorney, thereby *chilling* his constitutional right to counsel.[27] The Court held that the Oregon system for providing counsel does not deprive any defendant of legal assistance, and noted that "[t]he fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to pay the costs of these services in no way affects his eligibility to obtain counsel."[28]

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25. "Our task is merely to determine whether there is 'some rationality in the nature of the class singled out.'" 94 S. Ct. at 2122, *quoting*, Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966). *Fuller* provided the Court with an opportunity to use the *strict rationality* approach which requires the state to articulate its goal or purpose for the legislation in question. *See* McGinnis v. Royster, 410 U.S. 263 (1973). The Court in unanimity has applied such a test in other cases involving equal protection questions without expressly labeling the test as such. *See* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972). *See also* Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

26. . . . Oregon could surely decide with objective rationality that when a defendant has been forced to submit to a criminal prosecution that does not end in conviction, he will be freed of any potential liability to reimburse the State for the costs of his defense. This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns. 94 S. Ct. at 2123.

27. This is the view taken by several state courts. *See* note 6 *supra*. The California Supreme Court stated its position as follows:

> [W]e believe that as knowledge of [the recoupment] practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the [Supreme] Court in *Gideon*. . . . *In re* Allen, 71 Cal. 2d 388, ___, 455 P.2d 143, 144, 78 Cal. Rptr. 207, 208 (1969) (holding the condition imposed on probation that accused reimburse county for court-appointed counsel invalid as an impediment to free exercise of the right to counsel).

28. 94 S. Ct. at 2124. The opinion states that the statute does not deny indigent defendants the right to counsel since it does not affect the defendant's eligibility to obtain counsel. At no point in the opinion, however, does the Court rule directly on the question whether the statute *chills* the exercise of the constitutional right to counsel. In his concurring opinion, Justice Douglas treats this issue directly by stating that ". . . the 'chill' on the exercise of the right to counsel is no greater than that imposed on a nonindigent defendant without great sums of money." *Id.* at 2126.

The majority judged *Fuller* to be fundamentally different from those decisions invalidating

Justice Marshall,[29] dissenting, found the statute to be violative of the equal protection clause and contrary to established principles.[30] Taking the position that the Court had previously struck down a similar statute because it failed to provide the same treatment to indigent defendants as was given other judgment debtors, the dissent found similar unequal treatment in the Oregon recoupment statute. Criticizing the majority for ". . . obfuscat[ing] the issue . . . by focusing solely on the question whether the Oregon statute affords an indigent defendant the same protective exemptions provided other civil debtors,"[31] Justice Marshall argued that the treatment of indigent defendants due to the Oregon statute is unequal in a more fundamental respect. He reasoned that since reimbursement could be made a condition of probation, the defendant's failure to pay could result in his imprisonment, and concluded that this was a denial of equal protection of the laws.[32]

Fuller does not answer all the questions which may arise in this area.[33] An important question not raised involves a possible due process issue.[34] Was the defendant advised that should he accept appointed counsel, he might be required to repay such costs to the state? It would seem that the preliminary warnings so highly regarded by the Court in *Miranda v.*

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state and federal laws which penalize the exercise of constitutional rights in that the Oregon statute's primary purpose was not ". . . to chill the assertion of constitutional rights by penalizing those who choose to exercise them." United States v. Jackson, 390 U.S. 570, 581 (1968).

29. Justice Brennan joined Justice Marshall in the dissent.

30. *See* note 9 *supra*.

31. 94 S. Ct. at 2128.

32. Justice Marshall stated that the Court in *James* held the Kansas recoupment statute unconstitutional under the equal protection clause because it did not provide equal treatment between indigent defendants and other judgment debtors. He found similar unequal treatment between indigent defendants and other civil judgment debtors to exist under the Oregon recoupment statute. *Id.*

33. One unanswered question, as acknowledged in the opinions, involves the apparent inconsistency between Oregon's recoupment statute and article I, section 19 of the Oregon Constitution which states that "[t]here shall be no imprisonment for debt, except in case of fraud or obsconding debtors." Since this issue was not argued before the state courts but was only brought to the attention of the Court by the amicus curiae brief submitted by the National Legal Aid and Defender Association, the Court refrained from considering the issue. However, *Fuller* cannot be assumed to have implicitly rejected such an argument since the Court will not rule on questions substantively different from those presented to the state courts. *See* Wilson v. Cook, 327 U.S. 474, 483-84 (1945). Such an obvious and important question is certain to surface in future litigation.

34. The petitioner raised a due process question in his brief submitted to the Supreme Court but the issue was not raised nor discussed in the state courts, therefore, the Court did not consider it. 94 S. Ct. at 2123 n.11. *See* note 33 *supra*.

Arizona[35] would be rendered inaccurate or at least misleading by *Fuller*.[36]

While partially retreating from its demand of equal treatment among judgment debtors by upholding Oregon's recoupment statute, the Court ignored the end effect of the statute. This end effect allows collection of a civil judgment through a criminal procedure,[37] with a possible result for non-payment being imprisonment. Since only several of the possible issues were raised, more litigation concerning this statute is inevitable.[38] Although the Court ruled on the questions presented, the ultimate disposition of the other constitutional issues concerning the Oregon recoupment statute is yet to come.

B.C.S.

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35. 384 U.S. 436 (1966). When making an arrest, agents of the FBI must advise the suspect that ". . . he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and . . . that he has a right to *free* counsel if he is unable to pay." *Id.* at 483 (emphasis added). The Court in *Miranda* proposed that "[t]he practice of the FBI can readily be emulated by state and local enforcement agencies." *Id.* at 486.

36. Although under the Oregon recoupment statute, a *Miranda* warning would be accurate in its most literal sense because a person who *remains* unable to pay will not be required to do so, it would be difficult to argue that such a warning would not be misleading to those who are most affected by a recoupment statute.

"It would appear utterly inconsistent to advise a defendant of his entitlement to the free service of counsel and later exact repayment through the medium of a condition of probation." 71 Cal. 2d at 391, 455 P.2d at 146, 78 Cal. Rptr. at 209.

37. ORE. REV. STAT. § 137.180 (1974) provides: "A judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect. . . ."

38. In addition to the potential issues not raised in *Fuller*, any legislature considering Oregon's recoupment statute as a model act should evaluate the numerous policy considerations inherent in this field since the Court has acknowledged that it will not inquire as to whether the legislation is desirable or wise but will only judge its rationality. James v. Strange, 407 U.S. 128, 133 (1972).

There have been several studies made concerning recoupment procedures, each culminating in recommendations as to recoupment legislation. The American Bar Association Project on Minimum Standards For Criminal Justice has published the approved draft of *Standards Relating to Providing Defense Services*, section 6.4 of which provides that reimbursement of defense costs should not be required except in the case of fraud. The Commentary observes that the practice of enforcing the obligation of repayment as a condition of probation raises serious constitutional questions: whether due process is denied if the accused is not informed of a repayment obligation at the time counsel is assigned; whether a waiver of counsel by an indigent defendant, if made because of the defendant's unwillingness to accept counsel on such condition, is effective; whether such a conditional probation amounts to imprisonment for debt. A.B.A. Standards, *Providing Defense Services*, § 6.4, Commentary (1968). The Commentary also notes the discouraging effect such reimbursement practices could have on accepting appointed counsel, and also, the negligible amounts collected through such programs. *See also* Kamisar and Choper, *The Right to Counsel in Minnesota—Some Field*

Findings and Legal Policy Observations, 48 MINN. L. REV. 1, 26 (1963); Note, *Charging Costs of Prosecution to the Defendant*, 59 GEO. L.J. 991 (1971); Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 MICH. L. REV. 1404 (1969).

The UNIFORM LAW COMMISSIONERS' MODEL DEFENSE OF NEEDY PERSONS ACT, section 8(b) provides:

> The [county] attorney . . . may recover payment or reimbursement, as the case may be, from each person . . . who has received legal assistance under this Act and who, on the date on which suit is brought, is financially able to pay or reimburse the county for it according to the standards of ability to pay applicable under sections 1(3), 2(a), and 4(b), but refuses to do so. Suit must be brought within 3 years after the date on which the benefit was received. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 331 (1966).