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RECOUPMENT OF LEGAL EXPENSES

Fuller v. Oregon, 417 U.S. 40 (1974)

In *Fuller v. Oregon*¹ the Supreme Court held that a state may constitutionally require a person convicted of a criminal offense to repay to the state the costs of providing him effective legal representation when he is indigent at the time of the criminal proceedings against him but later acquires the means to bear the costs of his legal defense.

Fuller, an indigent defendant, was represented by court-appointed counsel in criminal proceedings charging him with sodomy in the third degree. After pleading guilty, Fuller received a five-year probationary sentence conditioned upon complying with a work-release program at the county jail which would allow him to attend college, and also upon reimbursing the county for the fees of his attorney and a private investigator hired by the attorney to aid in gathering facts for the case. Under the Oregon recoupment scheme a defendant would not be denied counsel if he were indigent at the time of criminal proceedings, but he could be required to repay to the state the costs of furnishing him with effective representation of counsel if and when he acquired the means to do so. The Oregon statutes authorize, but do not mandate, recoupment of defense costs and the imposition of an obligation to repay such costs as a condition of probation; however, they impose such an obligation only upon those who actually become able to meet it without hardship. Contending that his probation could not constitutionally be conditioned on the repayment of legal expenses, Fuller appealed his sentence to the Oregon Court of Appeals which affirmed its imposition.² The Supreme Court of Oregon subsequently denied a petition for review.³ The Supreme Court of the United States granted certiorari⁴ because of the importance of the question presented and the con-

flict of opinion on the constitutional issue involved.⁵

In the right to counsel cases such as *Gideon v. Wainwright*⁶ and beginning with a line of "new equal protection cases"⁷ such as *Griffin v. Illinois*,⁸ the Court had imposed on the states a range of obligations to remove financial barriers to indigents struggling in the criminal process; yet it had remained hesitant to determine whether the state had a right to seek reimbursement for expenditures incurred in fulfilling those obligations. In *Rinaldi v. Yeager*⁹ the Court considered a New Jersey statute which required only those prisoners confined to state institutions to pay for the costs of transcripts of trial court proceedings needed on appeal. The Court held that the statute violated the equal protection clause because it individually discriminated between convicted persons confined to prison and those given a suspended sentence, probation, or a fine without imprisonment. The Court assumed that a state could validly provide for recoupment of the cost of appeals from those who became able to pay, if such a provision were applied with an even hand.¹⁰ It was permissible to replenish the county treasury from those who benefited from its expenditures, but it was an invidious discrimination to fasten this finan-

⁵ The Court points out that courts in some other states reviewing similar recoupment schemes have reached different conclusions than the Oregon Court of Appeals in the present case. 417 U.S. at 42, n.3. *In re Allen*, 71 Cal. 2d 388, 455 P.2d 143 78 Cal. Rptr. 207 (1969); Opinion of the Justices, 109 N.H. 508, 256 A.2d 500 (1969); *State ex rel. Brundage v. Eide*, 83 Wash. 2d 676, 521 P.2d 706 (1974). Cf., *James v. Strange*, 323 F. Supp. 1230 (D. Kan. 1971), *aff'd on other grounds*, 407 US 123 (1972).

⁶ 372 U.S. 335 (1962). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963).

⁷ For a discussion of the development of a new equal protection doctrine in the Burger Court, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁸ 351 U.S. 12 (1956).

⁹ 384 U.S. 305 (1966).

¹⁰ *Id.* at 311.

¹ 417 U.S. 40 (1974).

² *State v. Fuller*, 12 Ore. App. 152, 504 P.2d 1393 (1973).

³ In its decision, the Supreme Court noted that the Oregon Supreme Court had denied a petition for review of the appellate court's decision. 417 U.S. at 42.

⁴ *Fuller v. Oregon*, ___ U.S. ___ (1973).

cial burden only upon those unsuccessful appellants confined to state institutions because such selection bore no rational relationship to the fiscal objective of the statute.¹¹ The Court did not determine whether the New Jersey statute unduly burdened an indigent's right to appeal.¹² Then in *James v. Strange*,¹³ a unanimous Court noted that state statutes seeking to recoup costs expended by the state to provide indigent criminal defendants with legal representation were not necessarily unconstitutional and might serve legitimate state interests. It nonetheless held a Kansas recoupment statute unconstitutional as a violation of the equal protection clause since it denied to indigent defendants all of the exemptions provided other judgment debtors and thus singled out a class of judgment debtors for discriminatory treatment for no rational reason. The Court again refused to base its decision on whether the Kansas statute involved had an unconstitutional "chilling effect," but looked instead to the violation of equal protection.¹⁴ Because state recoupment laws differed widely in their content, the Court maintained that it was inappropriate to make "any broadside pronouncement on their validity."¹⁵ Although recoupment statutes may represent legitimate state interests, the Court asserted that such interests would not be furthered by a statute, such as the Kansas statute, that embodied "elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law."¹⁶

Fuller v. Oregon lays to rest the question of whether a state can require an indigent person convicted of a criminal offense to repay to the state the costs of providing him legal representation if he acquires the means to bear such costs.¹⁷ In an opinion by Mr. Justice

Stewart a majority of six justices affirmed the state court's holding. Examining the plan and operation of the Oregon scheme, the Court found little difference between it and the appointment of counsel procedures in states without recoupment provisions. Oregon law requires that every defendant in a criminal case must be assigned counsel at state expense if it "appears to the court that the defendant is without means and unable to obtain counsel."¹⁸ In some cases all or part of the "expenses specially incurred by the state in prosecuting the defendant" are to be repaid to the state; when a convicted person is placed on probation, repayment may be made a condition of that probation.¹⁹ Although the costs of a

L. REV. 1, 23-27 (1963); Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 MICH. L. REV. 1404 (1969); Comment, *Conditions of Probation Imposed on Wisconsin Felons: Costs of Prosecution and Restitution*, 1962 WIS. L. REV. 672 (1962); Note, *Requirement that a Convicted Indigent Reimburse County for Assigned Counsel as a Condition of Probation Held to Violate Sixth Amendment*, 38 FORDHAM L. REV. 333 (1969); Note, *Charging Costs of Prosecution to the Defendant*, 59 GEO. L.J. 991 (1971).

¹⁸ ORE. REV. STAT. § 135.050(1)(d) (1971). ORE. REV. STAT. § 135.050(3)(a) mandates that counsel be appointed for an indigent defendant "[c]harged with a crime."

¹⁹ The Oregon recoupment statutes are as follows: ORE. REV. STAT. § 161.655 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 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 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 Ore. Rev. Stat. § 161.675.

¹¹ *Id.* at 309-10.

¹² *Id.* at 307-08.

¹³ 407 U.S. 128 (1972).

¹⁴ *Id.* at 134.

¹⁵ *Id.* at 133.

¹⁶ *Id.* at 141-42.

¹⁷ The controversy over recoupment plans can be followed in the following: ABA, PROJECT ON PROVIDING DEFENSE SERVICES, 58-59 (Approved Draft 1968); D. OAKES, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS, Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 58-59 (Comm. Print 1969); Kamisar and Choper, *The Rights to Counsel in Minnesota—Some Field Findings and Legal-Policy Observations*, 48 MINN.

convicted person's legal defense are included in these expenses,²⁰ repayment is not necessarily mandatory. Several conditions must first be

ORE. REV. STAT. § 161.675 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.

ORE. REV. STAT. § 161.685 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 a specified part thereof, is paid.

(3) When a fine is imposed on a 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 thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

(6) A default in the payment of a fine or cost 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.

²⁰ Fuller argued that the section of the Oregon recoupment statute authorizing an obligation to

met: (1) repayment may be imposed only upon convicted defendants;²¹ (2) the court cannot order a convicted person to pay expenses unless he "is or will be able to pay them;"²²

(3) a convicted person under an obligation to repay expenses may petition the sentencing court at any time for "remission of the payment of costs or of any portion thereof" if such payment would result in hardship;²³ and (4) no convicted person may be held in contempt for failure to repay if he demonstrates that such failure "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 payment."²⁴ Thus, the Oregon scheme does provide a lawyer at the expense of the state to all defendants facing criminal charges who are unable, even temporarily, to hire one. The obligation to repay affects only those who later acquire the means to do so without hardship.

Having examined the statute, the majority rejected petitioner's first contention, based on *James v. Strange*,²⁵ that Oregon's recoupment system violates the equal protection clause of the fourteenth amendment because of various discriminatory classifications explicitly or implicitly drawn by legislative provisions. The Court distinguished *James v. Strange* on the grounds that the Oregon recoupment scheme did not suffer from the same infirmity as the Kansas statute in *James* which denied to an indigent defendant the exemptions available to other judgment debtors.²⁶ Under Oregon law, a convicted person from whom reimbursement is sought retains all the safeguards accorded other judgment debtors, plus an opportunity to demonstrate "manifest hardship" at any time.²⁷ Accordingly, the majority found the Oregon legislation to be "wholly free of the kind of

repay "expenses specially incurred by the state in prosecuting the defendant," ORE. REV. STAT. § 161.665(2), was not intended to include counsel fees. The state court resolved this issue of state law against the petitioner, 12 Ore. App. at 157, 504 P.2d at 1396. The Supreme Court did not examine on the basis of *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

²¹ ORE. REV. STAT. § 161.665(1) (1971).

²² ORE. REV. STAT. § 161.665(3) (1971).

²³ ORE. REV. STAT. § 161.665(4) (1971).

²⁴ ORE. REV. STAT. § 161.685 (1971).

²⁵ 407 U.S. 128 (1972).

²⁶ KAN. STAT. ANN. § 22-4513 (Supp. 1973).

²⁷ ORE. REV. STAT. § 161.665(4) (1971).

discrimination that was held in *James v. Strange* to violate the Equal Protection Clause."²⁸

Nor did the Oregon statute deny equal protection by discriminating between defendants who are convicted and those who are not convicted or whose convictions are ultimately reversed. The Court asserted that there need only be "some rationality in the nature of the class singled out"²⁹ and held the distinction forwarded by petitioner noninvidious:

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 attempt to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.³⁰

The majority also rejected the equal protection argument that the requirement to repay defense expenses was imposed only on convicted defendants placed on probation, and not those sentenced to terms of imprisonment. Although such a distinction might be justified on the grounds that a person placed on probation would be more likely to earn funds needed to repay the state, the Court discarded the contention because the statute itself made no such distinction nor did the record demonstrate that Oregon engaged in such a practice.³¹

The majority went on to examine petitioner's second basic contention³² that Oregon's re-

coupment statute infringed upon his constitutional right to appointed counsel if indigent, because knowledge that he might have to repay the expenses might also impel him to decline appointed counsel. This might chill his constitutional right to counsel under the sixth amendment.³³ Since such knowledge by the defendant did not affect his eligibility to obtain counsel, and since the Oregon scheme did not deprive him of necessary legal assistance, the Court found that defendant's right to counsel was not infringed.³⁴ In rejecting petitioner's sixth amendment contention, the majority emphasized that the present case was "fundamentally different" from decisions relied upon by Fuller which invalidated laws placing a penalty on the exercise of a constitutional right.³⁵ Those cases dealt with provisions that "had no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them,"³⁶ while, on the other hand, Oregon's recoupment statute does not penalize the indigent defendant who accepts court-appointed counsel, but merely imposes an obligation to reimburse the state for its expenses on those with a foreseeable ability to meet such an obligation and enforces such obligation only against those who could meet it without hardship.³⁷

Mr. Justice Douglas concurred with the result of the majority's decision but not with its reasoning. In a separate opinion he relied upon the narrow construction given the recoupment scheme by the Oregon Court of Appeals³⁸ to dispose of petitioner's claim that the statute

²⁸ 417 U.S. at 48.

²⁹ 417 U.S. at 49 (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966)).

³⁰ 417 U.S. at 50.

³¹ *Id.* at 49, n.10.

³² The Court refused to rule upon claims by Fuller that imposition of the conditional obligation to repay was made without sufficient notice or hearing and was therefore in violation of due process, because such contentions were not raised in the state courts and were not discussed by the Oregon Court of Appeals, thus leading to the assumption that the omission was "due to want of proper presentation in the state courts." *Street v. New York*, 394 U.S. 576, 582 (1969). The Court did note, however, that the recoupment scheme, including a schedule of fees, was published in the Oregon Revised Statutes at the time of petitioner's plea and that "both Oregon's judgment execution and her parole revocation procedures provide for a hearing before execution can be levied or probation revoked." 417 U.S. at 50 n.11.

³³ This right to counsel is secured in *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The California supreme court expressed the view that a defendant's knowledge that he may remain under an obligation to repay expenses might create a chilling effect in *In re Allen*, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969), holding a California recoupment statute invalid. The Court here concluded that the California court's reasoning was "wide of the constitutional mark." 417 U.S. at 52.

³⁴ 417 U.S. at 53.

³⁵ See *Uniformed Sanitation Men Ass'n., Inc. v. Commissioner*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *United States v. Jackson*, 390 U.S. 570 (1968).

³⁶ *United States v. Jackson*, 390 U.S. 570, 581 (1968).

³⁷ 417 U.S. at 54.

³⁸ *State v. Fuller*, 12 Ore. App. 152, 504, P.2d 1393 (1973).

"chilled" the exercise of his right to counsel.³⁹ Mr. Justice Douglas asserted that under the state court's construction of the statute, repayment cannot be required until a defendant is able to pay the costs of his defense and probation cannot be revoked for nonpayment unless there is a specific finding by the sentencing court that payment would not cause hardship on the defendant or his family; thus, any "chill" that existed would be no greater than that imposed on a nonindigent defendant who is just above the indigency cut-off point. Such a nonindigent defendant may be ready to accept free counsel but receives no such choice since the Constitution does not require a state to provide counsel for such persons.⁴⁰ The concurring opinion also found no denial of equal protection in the assessment of costs against only those defendants who stand convicted. Mr. Justice Douglas maintained that it was rational for a state to recover costs from a defendant who has been found guilty beyond a reasonable doubt while not assessing such costs to defendants against whom the state had not proven its charges.⁴¹

Mr. Justice Marshall, joined by Mr. Justice Brennan, dissented from the majority's opinion on the grounds that the Oregon recoupment statute, insofar as it permits payment of an indigent defendant's debt to be made a condition of his probation, violated equal protection requirements by providing unequal treatment between indigent defendants and other civil judgment debtors. Petitioner's failure to pay his debt could result in imprisonment, and in that respect, the indigent defendant, like the indigent defendant in *James v. Strange*, is treated quite differently from other civil judgment debtors.⁴² Mr. Justice Marshall pointed to article I, § 19 of the Oregon constitution, which provides that "there shall be no imprisonment for debt, except in the case of fraud or absconding debtors." Accordingly, if a nonindigent defendant in a criminal case fails to pay

his privately retained attorney, he cannot be imprisoned for that failure; the lawyer must enforce his judgment through the normal routes available to the creditor. Yet, petitioner, an indigent defendant, could be imprisoned for five years if he failed to pay for his court-appointed counsel. Thus, since Oregon does not provide imprisonment for nonindigent defendants who fail to pay their retained counsel, the dissent asserted it cannot imprison an indigent defendant for his failure to pay the costs of appointed counsel without creating an invidious discrimination on the basis of wealth in violation of the equal protection clause.⁴³

The dissent seems to present a powerful argument, especially in light of article I, § 19 of the Oregon constitution. However, both the majority and the concurring opinions rejected this reasoning on the grounds that its contention, raised by amicus curiae,⁴⁴ was not properly before the Supreme Court. The majority observed that such a contention had not been made in petitioner's brief or oral argument, nor had it been raised in the state courts; the Supreme Court did not have the power to decide state law questions involving the applicability of a provision of the Oregon constitution.⁴⁵ Mr. Justice Douglas, in his concurring opinion, also argued that this equal protection point was not properly before the Court since it was not raised in or considered by the state courts. "The proper construction of state law and the proper resolution of the dependent equal protection claim would properly be raised by another litigant or by petitioner by way of collateral attack."⁴⁶

³⁹ 417 U.S. at 61 (Marshall, J., dissenting).

⁴⁴ The article I, § 19 problem was brought to the attention of the Court in the amicus curiae brief of the National Legal Aid and Defender Association. 417 U.S. at 58 n.5 (Douglas J., concurring).

⁴⁵ 417 U.S. at 48, n.9.

⁴⁶ 417 U.S. at 59 (Douglas, J., concurring), Mr. Justice Douglas stated that the Court will not pass on questions substantively different from those presented to the state courts, even when the federal claim is nominally based on the same federal constitutional clause relied on before the state courts, referring to *Wilson v. Cook*, 327 U.S. 474, 483-84 (1946). He also asserted that the equal protection clause would only be violated if a particular construction of the state law were adopted by the state courts. The Court could not assume that construction and thereby invalidate the state statute.

³⁹ 417 U.S. at 56 (Douglas, J., concurring).

⁴⁰ *Id.*

⁴¹ *Id.* at 57.

⁴² The dissent recognized that Oregon's recoupment scheme did not fail to provide the same protective exemptions afforded other civil judgment debtors, the focus of the Court's analysis in *James v. Strange*, 407 U.S. 128 (1972). 417 U.S. at 60 (Marshall, J., dissenting).

In *Fuller v. Oregon* the Court has at last stated that recoupment statutes do not necessarily burden an indigent's right to counsel, nor do they necessarily constitute an invidious discrimination in violation of the equal protection clause, at least if worded as carefully as the Oregon scheme. Recoupment may be a wealth-dependent burden on an indigent's access to legal representation, but it is now held to be a constitutionally permissible burden with a rational relationship to the ends sought by the state, especially when the indigent is not forced to undergo hardship to meet the state's demands. Although state statutes will have to undergo individual examination because they are so diverse,⁴⁷ a recoupment scheme will not infringe upon an indigent's right to counsel as long as it does not affect his eligibility to obtain counsel or deprive him of necessary legal assistance.⁴⁸ The equal protection clause will not be violated as long as indigent defendants

required to repay the state for their defense costs receive the same exemptions afforded other judgment debtors⁴⁹ and as long as the system used is "rational."⁵⁰

Yet, despite this new delineation, the crux of petitioner's appeal—the question as to whether a person placed on probation conditioned on repayment of his defense costs can constitutionally be imprisoned if he fails to repay—still remains unanswered. After asserting that the dissent's equal protection contention was not properly before the Court, the majority opinion went on to point out that under the Oregon statute, revocation is not a collection device used to enforce debts but a sanction imposed by the state courts. Since that sanction is only imposed under certain conditions, there is no violation of the equal protection clause.⁵¹ In his concurring opinion, however, Mr. Justice Douglas correctly observed that since the dissent's contention was not properly before the Court and was furthermore dependent upon a particular construction of state law, this finding by the majority was little more than an advisory opinion rendered in a vacuum.⁵² Thus, due to this deficiency in the record, the Court has not solved the conditional probation issue and may very well have to face the problem again someday when confronted with a more appropriate case.

⁴⁷ Some examples of recoupment schemes are: ALA. CODE Tit. 15, § 318(12) (Supp. 1973); ALASKA STAT. § 12.55.020 (1972); FLA. STAT. ANN. § 27.56 (Supp. 1973-74); IDAHO CODE § 10-858 (Supp. 1973); IND. ANN. STAT. § 9-3501 (Supp. 1974); IOWA CODE ANN. § 775.5 (Supp. 1974-75); MD. ANN. CODE Art. 26, § 12C (1973); N.M. STAT. ANN. § 41-22-7 (1972); N.D. CENT. CODE § 29-07-01.1 (1974); S.C. CODE ANN. § 17-283 (Supp. 1973); TEX. CODE CRIM. PROC., Art. 1018 (1966); VA. CODE ANN. § 14.1-184 (1973); W. VA. CODE ANN. § 62-3-1 (Supp. 1973); WIS. STAT. ANN. § 256.66 (1971). The federal reimbursement provision is 18 U.S.C. § 3006A (f) (1970).

⁴⁸ 417 U.S. at 52.

⁴⁹ *Id.* at 47.

⁵⁰ *Id.* at 50.

⁵¹ *Id.* at 48, n.9.

⁵² *Id.* at 59 (Douglas, J., concurring).