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INTRODUCTION

The Sixth Amendment right of a criminal defendant to adequate representation by counsel has long been recognized by the U.S. Supreme Court as being a requisite of a fair and meaningful trial.[1] In order that the scope of the right be not dependent on the individual's financial ability,[2] an indigent defendant will be appointed counsel in federal court[3] and, more recently by virtue of the Fourteenth Amendment, in state courts.[4] The result is that without an intelligent waiver, no person may be imprisoned for any offense unless represented by qualified counsel at his trial.[5]

The implimentation of the constitutionally implied right to appointed counsel of indigent criminal defendants, has imposed a financial burden upon the individual states, of some significance.[6] Inevitably, many states have attempted to recoup some of these monies from the defendants themselves. Though diverse in their approach, these efforts at requiring reimbursement of the costs of defense raise common issues as to their constitutional propriety.[7] Among the challenges most frequently asserted against recoupment schemes are: that they deny due process when payment is required of an acquitted defendant;[8] that conditioning release upon repayment results in imprisonment for debt;[9] that the existence of such a plan would render invalid any waiver of counsel;[10] and that a "chilling" of a constitutionally protected right would result.[11] A

1. Powell v. Alabama, 287 U.S. 45 (1932).
2. Miranda v. Arizona, 384 U.S. 436 (1966).
3. Johnson v. Zerbst, 304 U.S. 458 (1938).
4. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).
5. Argersinger v. Hamlin, 407 U.S. 25 (1972).
6. Opinion of the Justices, 109 N.H. 508, 256 A.2d 500 (1969).
7. *See generally*, Comment, Reimbursement of Defense Costs as a Condition of Probation for Indigents, 67 MICH. L.R. 1404 (1969).
8. Woodbury County v. Anderson, 164 N.W.2d 129 (Ia. 1969); Giaccio v. Pennsylvania, 382 U.S. 399 (1966).
9. Anderson v. Ellington, 300 F. Supp. 789, 793 (M.D. Tenn. 1969); Wright v. Mathews, 209 Va. 246, 249, 163 S.E.2d 158, 159-60 (1968); *see also*, Charging Costs of Prosecution to the Defendant, 59 Geo. L.J. 991, 999-1002 (1971) and 67 MICH L.R. 1404, 1418-1419 (1967).
10. Argersinger v. Hamlin, 407 U.S. 25 (1972).
11. State *ex rel.* Brundage v. Eide, 83 Wash. 2d 676, 521 P.2d 706 (1974);

study of these and other potential infirmities in light of the practical realities of the situation, by an ABA committee chaired by Chief Justice Burger, has resulted in a recommendation against the application of recoupment schemes.[12]

Though the Supreme Court had constitutionally limited the methods of state recoupment provisions, it generally avoided predicating its decisions on Sixth Amendment grounds by finding a violation of the Equal Protection clause of the Fourteenth Amendment, and not reaching the more specific issue.[13] Only in dicta had the court expressed an opinion on the propriety of charging costs to an indigent defendant at all.[14] The absence of a ruling on the point created a judicial vacuum which fostered conflicting decisions in state and lower federal courts.[15] It was with the purpose of bringing order to the area, that the court decided the case of *Fuller v. Oregon*.[16]

THE CASE

Prince Eric Fuller was charged by information with sodomy in the third degree. Due to his assertion of indigence, a local attorney was appointed by the court pursuant to statute,[17] and represented him at all subsequent court proceedings. Counsel incurred investigative fees in aid of Fuller's defense which were assumed by the county as well. Following his plea of guilty to the charge, Fuller was sentenced to five years of probation conditioned upon his completion of a one year work release program at the county jail which would enable him to attend college, and reimbursement of the county for the costs of his defense which it incurred as a result of his indigent status.

Strange v. James, 323 F. Supp. 1230 (D. Kan. 1971), *aff'd on other grounds*, 407 U.S. 128 (1972); *In re* Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969).

12. A.B.A., Standards Relating to Providing Defense Services, 58-59 (approved draft 1968).

13. James v. Strange, 407 U.S. 128 (1972); Rinaldi v. Yeager, 384 U.S. 305 (1966).

14. Rinaldi v. Yeager, 384 U.S. 305, 309-10 (1966).

15. *Compare*, State v. Foust, 13 N.C. App. 382, 185 S.E.2d 718 (1972), *and* Opinion of the Justices, 109 N.H. 508, 526 A.2d 500 (1969), with citations *supra* note 11.

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

17. ORE. REV. STAT. § 135.320(3)(a) (1974).

The statutory provisions under which repayment was required are detailed with respect to the personal protection provided the defendant. Under Oregon law a convicted person could be required to repay all or a portion of the specially incurred costs of his prosecution. Such costs do not include those arising from a constitutionally guaranteed jury trial or for the support of any public agency, such as the prosecutor's office, which are incurred irrespective of the particular offense. Costs can be assessed only to the extent that the defendant will be able to repay in light of his financial situation and the potential burden they impose. The court, on petition, may remit all or any part of costs so charged, on a showing of "manifest hardship" on the defendant or his immediate family.[18] The terms of repayment may be established by the court, and the court may condition probation or suspension of sentence on fulfillment of the prescribed terms.[19] A default in payment, unless shown to be unintentional, or not as a result of a failure to make a good faith effort to pay, may result in a finding of contempt of court and imprisonment for a defined period. Additionally, a default in payment may be collected by any legal means authorized for enforcement of a judgement.[20]

Fuller on appeal, contended that his Sixth and Fourteenth Amendment rights had been breached by conditioning probation upon repayment of the costs of his defense. The Oregon Court of Appeals, with a single dissent, affirmed the sentence imposed by the lower court, finding the challenged statutory sections to be sufficiently well drafted to provide the indigent with a level of protection which would minimize any chilling effect, and an absence of invidious discrimination in the manner in which it was to be applied.[21] After the State Supreme Court denied a petition for review, the U.S. Supreme Court, in light of the conflicting authorities, granted certiorari. The issue as framed was whether a state may require repayment of the costs of furnishing counsel to a convicted defendant who, though indigent at the time of the proceeding, subsequently obtains the means necessary to satisfy such costs.

The Sixth Amendment Issue

Does the possibility of imposition of costs on an indigent defendant infringe upon his right to the assistance of court appointed counsel? A provision, the purpose of which is to "chill" the asser-

18. Ore. Rev. Stat. § 161.665 (1974).
19. Ore. Rev. Stat. § 161.675 (1974).
20. Ore. Rev. Stat. § 161.685 (1974).
21. State v. Fuller, 12 Ore. App. 152, 504 P.2d 1393 (1973).

tion of constitutional rights by penalizing those who choose to exercise them is unconstitutional.[22] The leading case finding such a "chilling" effect in recoupment statutes is the California Supreme Court's decision of *In re Allen.*[23] On facts similar to *Fuller*, a lower court had exercised its statutory authority[24] to impose all "other reasonable conditions," on probation by requiring repayment of costs. The California Supreme Court concluded that the very existence of such authority would discourage the acceptance of the services of counsel deemed essential by *Gideon.* Additionally, the validity of any waiver would be suspect under the mandate of *Argersinger.* The *Allen* decision was found persuasive by other courts[25] and provided the essence of Fuller's argument with regard to this issue.

The California rule has been subjected to valid criticism. The apparently prohibitive, high costs of a court action have not been deemed to be a sufficient excuse for the failure of a non-indigent to assert a right in a civil matter.[26] No "chilling" effect of constitutional proportions is recognized in such a case. In light of this holding, it has been inferred that the *Allen* position has perverted the purpose of the Supreme Court in its *Gideon* and *Miranda* decisions of, "making indigents equal with other members of society before the bar of justice and not putting them in a preferred position."[27] That such an application of the Sixth Amendment would result in discrimination against non-indigents, especially those of meager financial resources, has been the basis of decisions expressly disavowing *Allen.*[28]

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22. U.S. v. Jackson, 390 U.S. 570, 581 (1968).
23. 71 Cal. 2d 388, 78 Cal. Rptr. 207, 455 P.2d 143 (1969).
24. CAL. PENAL CODE § 1203.1 (West 1970).
25. *Supra* note 11.
26. Ackerman v. U.S., 340 U.S. 193, 202 (1950) held that a defendant's failure to appeal within the statutory period from a judgment of denaturalization, because his attorney advised him that he would have to sell his home to pay the costs, was not "excusable neglect" under Rule 60(b)(6) of the Federal Rules of Civil Procedure, such as would allow relief from judgment.
27. 58 CALIF. L. REV. 255, 257 (1970).
28. State v. Fuller, 12 Ore. App. 152, 504 P.2d 1393 (1973); State v. Foust, 13 N.C. App. 382, 185 S.E.2d 718 (1972).

In his argument, Fuller relied on *U.S. v. Jackson* and its progeny,[29] asserting that though his appointed counsel had been adequate, his Constitutional right to representation had in fact been chilled by the knowledge that he might be required to bear the defense costs. The court, however, criticized the reasoning of *Allen*, noting the infirmities alluded to above.[30] The crux of the Sixth Amendment guarantee is the availability of counsel whose presence is required to ensure a fair trial. Given the realities of legal representation in modern society, it is not necessarily of constitutional significance that an indigent may be called upon to pay his costs at some future time.

> A defendant in a criminal case who is just above the line separating the indigent from the non-indigent, must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.[31]

The reliance on *Jackson* and related decisions was found by the court to be inappropriate.[32] Statutes invalidated by the rule of these cases had no proper purpose but the chilling of a constitutional right,[33] while the decision of the *Fuller* majority implies that the recoupment of funds by a State is a constitutionally valid purpose.[34] This is the first decision by the Supreme Court to that effect.[35]

The Fourteenth Amendment Issue

Fuller also contended that the Oregon recoupment statutes violated the Equal Protection Clause of the Fourteenth Amendment by classifying defendants in a constitutionally improper manner in

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29. Uniformed Sanitation Men Assn., Inc. v. Commissioner, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); U.S. v. Jackson, 390 U.S. 570 (1968).

30. Fuller v. Oregon, 417 U.S. 40, 51-54 (1974).

31. *Id.* at 53-54.

32. *Id.* at 54.

33. *Supra* note 22.

34. The use of similar authority in *In re Allen* is criticized as not being supported by the facts of that case, since the others were decided to remedy substantial injury while the only detriment facing defendant in *Allen*, would be being placed on the same ground as a non-indigent defendant. *Supra* note 27 at 257-258.

35. The court, in dicta, had stated earlier, "We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefitted from county expenditures." Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

two respects.[36] The court had previously struck down other state recoupment systems on this ground.[37] In his first Equal Protection argument Fuller relied on *James v. Strange* which invalidated a Kansas recoupment statute specifically denying to a convicted criminal defendant, most rights afforded other debtors. This was held to be an invidious discrimination in violation of the Fourteenth Amendment. Fuller argued that the Oregon statute, as applied, suffered from the same constitutional defect.

The court however, distinguished the Kansas case since the Oregon Court of Appeals had interpreted the challenged statute, which docketed costs as a civil debt,[38] as not denying any of the exemptions from execution available to judgment debtors.[39] The majority's ruling that the statutory scheme was not discriminatory as applied, was a matter viewed by the dissent as being of ultimate significance to the outcome. Under Oregon law, a convicted criminal defendant, having costs assessed against him, could have his probation revoked and thus be imprisoned for his failure to pay this civil debt. In contrast, a non-indigent defendant who refuses to pay the fees of an attorney retained for his defense, cannot be imprisoned, under Article I, section 19 of the Oregon Constitution which forbids imprisonment for debt. This aspect of the Equal Protection argument, raised for the first time on appeal, in an amicus brief filed by the National Legal Aid and Defender Association, was viewed as not having been properly preserved, by both the majority and Mr. Justice Douglas in his concurring opinion. Yet the majority rendered an advisory opinion on the issue presented.[40]

The majority indicates that the revocation of probation resulting in imprisonment would be for *deliberate* non-compliance with a court order rather than the mere failure to satisfy a debt.[41] The

36. *Supra* note 16.
37. *Supra* note 13.
38. ORE. REV. STAT. § 137.180 (1974).
39. State v. Fuller, 12 Ore. App. 152, 159, 504 P.2d 1393, 1397 (1973).
40. In his concurring opinion, Justice Douglas criticizes the dissent's result as being based on a construction of a state constitution never rendered by a court of that state. He also comments on the inappropriateness of giving an advisory opinion in a "vacuum", i.e., not supported by any record below, as done by the majority. *Supra*, 417 U.S. at 58-59.
41. *Id.* at 46.

sanction would be imposed on the defendant not in his status as a civil debtor in default, but as a probationor who has willfully violated the condition of his probation. Therefor the conditioning of probation on repayment does not, "impose unduly harsh or discriminatory terms solely because the obligation is to the public treasury rather than a private creditor,"[42] but merely provides the court with the customary means of enforcing its commands. The dissent disputes the majority's reasoning[43] and distinguishes the willful failure to pay a fine on order, properly a contempt of court and violation of condition of probation from a situation involving default on a civil debt not susceptible to such penal measures.[44]

The second Equal Protection question raised dealt with the recoupment statute's imposition of costs only on convicted indigent defendants and not those who are acquitted or against whom charges are dismissed. The court, applying the "rational basis" test, concluded that this aspect of the statute represents a rational classification based on the equities of the situation, and is therefor wholly non-invidious, comporting well with prior decisions relating to the issue.[45]

Conclusions

The *Fuller* decision presents a refinement in scope of the Sixth Amendment. It does not at all erode the absolute right of the indigent criminal defendant to have competent counsel appointed by the court irrespective of his present or potential financial status. To this extent the holding reaffirms the belief that effective legal representation is essential to the accomplishment of complete justice.[46] Yet, the court's ruling requires that even the indigent, in determining the course and quality of his defense, be influenced by the economic realities of the decision. However fiscally realistic the decision, its impact would be unduly harsh but for the narrowness of the rule it formulates. The case's true significance appears not to be in the redefinition of a constitutional right, but rather the requirements now imposed on recoupment systems affecting the exercise of that right.

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42. James v. Strange, 407 U.S. 128, 138 (1972).
43. *Supra* 417 U.S. at 61, n.1.
44. *Ex parte* Wilson, 183 N.E.2d 625 (Ohio Ct. App. 1962).
45. State v. Foust, 13 N.C. App. 382, 185 S.E.2d 718 (1972). Opinion of the Justices, 109 N.H. 508, 256 A.2d 500 (1969).
46. Powell v. Alabama, 287 U.S. 45 (1932).

A chilling effect of constitutional proportions will exist if costs are to be assessed during defendant's indigency. A statute, carefully drawn to provide that reimbursement will be required only if, and to the extent, that solvency is attained, will reduce the chill exerted to a degree no greater than that which generally confronts the marginal non-indigent. Such a scheme should provide a mechanism for the reconsideration of the measure of costs so imposed, to prevent the debtor from being unduly burdened by a change in circumstance.[47] Since the exercise of the Sixth Amendment right will be based on defendant's understanding of the recoupment system, to eliminate any resulting claim of chill, a court, at the time that indigence is established, should take care to explain the exact nature of the financial obligations which the indigent may possibly incur by his decision to accept the services of court appointed counsel.[48] The defendant's perception of the nature of his rights is as critical to their enjoyment as the structure of the statutes guaranteeing them.

The controversy among the members of the court as to the Fourteenth Amendment issue detracts from the force of the decision. The difference of opinion primarily arose over the efficacy of considering a state constitutional issue upon which the state courts had not had the opportunity of interpreting. It is by no means certain that a like result would have obtained had the discriminating characteristic seized upon by the minority, been found constitutionally valid by the state courts. Yet the majority, consistent with its prior rulings,[49] recognized the burden levied upon reimbursement plans by the Equal Protection Clause. Such plans must be free of arbitrary discriminations which place the indigent in a position inferior to that occupied by non-indigents or other civil debtors. But neither the singling out of indigent criminal defendants nor the limitation of its application to convicted persons, constitutes the type of irrational distinction necessary to invalidate the plan.

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47. The prerequisites of a constitutional recoupment scheme have been anticipated. *See supra*, 67 MICH. L.R. at 1413-1414.
48. *Id.* at n.78.
49. *Supra* note 13.

It is apparent then, that within narrow limits, the States may institute a practice of recouping at least a portion of their costs of criminal prosecution. The extent to which they choose to do so will depend upon the somewhat doubtful practical wisdom[50] of pursuing such a course now that the constitutional obstacles have been more clearly defined.

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50. *Supra* note 12.