



10-1973

## Fuller v. Oregon

Lewis F. Powell Jr.

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<sup>done</sup>  
Call for Response

Response Received

The response notes that this statute, unlike that in James, does not give preferential treatment to an attempt to enforce this obligation as compared to other financial obligations of the defendant. The same exemptions are apparently available. I would deny, but it's not an uninteresting question. On balance I think the statute is OK because it's grounded on an ability to pay. jgj

Call for Response jgj

PRELIMINARY MEMO

Nov. 2, 1973  
List 2, Sheet 4

16

No. 73-5280

Cert to Ct App Oregon  
(Schwab, Foley; Fort dissenting)

FULLER

State-criminal

v.

OREGON

Timely

1. Petr challenges a condition of probation requiring him to reimburse the county for the cost of his court-appointed attorney's fees.

2. FACTS: Petr entered a guilty plea to an information charging him with third degree sodomy. Petr had no prior convictions, except for a misdemeanor trespass. The judge suspended imposition of sentence and placed petr on a term of



five years' probation with the following conditions:

(1) That defendant be confined to Multnomah County Correctional Institution for a period of one year, said confinement to allow defendant to continue school; and,

(2) That defendant pay the cost of his attorney's fees and \$375 for the cost of the defense attorney's investigator.

Petr appealed to the Court of Appeals of Oregon. The court ruled that the Oregon statutes<sup>\*/</sup> authorizing the imposition of such costs did not violate petr's Sixth Amendment right to counsel and did not deny him Equal Protection of the law.

The court reasoned that the assessment of costs under the statute, to include attorney's fees, did not deprive a defendant of Sixth Amendment rights because the statute is not mandatory and because discretion always resides in the court to determine ability to pay. The court was impressed that the statutes required a showing that a defendant "is or will be able to pay costs" and that, in assessing costs, a court must consider "the nature of the burden that payment of costs will impose," including "manifest hardship on the defendant or his immediate family."

The court distinguished this Court's recent decision in James v. Strange, 407 U.S. 128 (1972), in which a Kansas recoupment statute was invalidated on Equal Protection grounds because it denied exemptions from execution afforded to other judgment debtors<sup>\*\*/</sup>. No such distinctions are drawn in the Oregon statute.

The court also held that the possibility of parole revocation for nonpayment of costs did not unduly discriminate against defendants because such revocation can occur only in sharply

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\*/ The statutes are attached to this memo.

\*\*/ The Court reserved the question in this case. "Whether the statutory obligations for repayment impermissibly deter the exercise of [the right to counsel] is a question we need not reach, for we find the statute before us constitutionally infirm on other grounds."



limited circumstances.

Judge Fort dissented. He adopted the view taken by the California Supreme Court that recoupment "constitutes an impediment to the free exercise of a right guaranteed by the Sixth Amendment." In re Allen, 71 Cal.2d 388, 78 Cal. Rptr 207, 455 P.2d 143, cert denied, 396 U.S. 994 (1969). Judge Fort noted that this recoupment statute, unlike the Kansas statute in James, is a part of the criminal process. As such, it could well inhibit a defendant, particularly in matters carrying a lesser penalty, from exercising to the full the rights guaranteed to him not only under the Sixth Amendment but also under concepts of fundamental fairness enshrined in the Fifth and Fourteenth Amendments. "In my view it constitutes an invidious discrimination between the indigent defendant and the well-to-do defendant." Judge Fort also would hold the statute unconstitutional under James because "nothing in the challenged statute here affords the defendant in a revocation proceeding to the exemptions provided debtors generally under Oregon law."

Petr appealed to the Supreme Court of Oregon which denied his petition for review on May 22, 1973.

### 3. CONTENTION S:

A. Petr raises the point that the statute is no different from the one in James and does not afford exemptions provided other debtors generally under Oregon law.

B. Petr also contends that the statute is patently unconstitutional in that it applies only to indigent defendants who have been convicted of crime, and does not apply to those

indigent defendants who, although they may have been represented by court-appointed counsel, were fortunate enough to have their cases dismissed or who were acquitted after trial by jury. Petr cites Rinaldi v. Yeager, 384 U.S. 305 (1966). In the Yeager case, this Court held unconstitutional a New Jersey statute that authorized county treasurers to recover costs incurred in preparing a trial transcript for indigent defendants incarcerated in state institutions. Indigent defendants not incarcerated in these institutions were not required to pay. The Court held that "[t]o fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions... is to make an invidious discrimination."

C. Petr finally alleges a denial of his Sixth Amendment rights. He relies on In re Allen, where the California Supreme Court reasoned:

[W]e believe that as knowledge of this 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 Court in Gideon.

Petr analogizes the effect generated by the Oregon statute to cases where statutory provisions have been held to deter defendants in their exercise of the Fifth Amendment right against self-incrimination. United States v. Jackson, 390 U.S. 570 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men Assoc. v. Commissioner, 392 U.S. 280 (1968); Griffin v.



California, 380 U.S. 609 (1965).

Petr asserts that in order to be consistent with the Oregon court ruling, any time a criminal indigent defendant is advised of his Miranda rights, he should also be advised that should he be convicted, he may well have to reimburse the county for the costs of his court appointed attorney's fees.

4. DISCUSSION: I would note first that there is no response to this petition. Petr's claim that the Oregon statute is no different from the one in James, all things being equal, may not hold water since the statute, as construed by the majority, does not contain the infirmity found in James. The statutes are not similar, however, in that James involved a civil statute and the one here is part of the criminal process, perhaps rendering a more direct impact on those defendants who are indigents.

The distinction drawn between convicted and nonconvicted indigents may not be so unreasonable as it sounds at first glance. An indigent wrongfully brought to the bar of justice should not be expected to bear the burden of paying for the state's mistakes. The statute here, moreover, is not mandatory, and is grounded on an ability to pay.

The real question is whether knowledge of possibly forced payment of attorney's fees will, in fact or in all probability, deter or discourage a defendant from accepting the offer of counsel to which he is entitled if he is indigent and charged with a crime.

Again, there is no response.

10/18/73

Knically

Op Ore Ct App in  
Petr's Appx.

FOOTNOTES

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ORS 161.665 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 ORS 161.675."

2

ORS 161.675 provides:



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

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

9           ORS 161.685 provides:

10           "(1) When a defendant sentenced to pay  
11 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,  
13 and may issue a show cause citation or a  
warrant of arrest for his appearance.

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

20           "(3) When a fine is imposed on a cor-  
21 poration or unincorporated association, it  
is the duty of the person authorized to make  
22 disbursement from the assets of the corpora-  
tion or association to pay the fine from  
23 those assets, and his failure to do so may  
be held to be contempt unless he makes the  
24 showing required in subsection (2) of this  
section.



1           "(4) The term of imprisonment for con-  
2           tempt for nonpayment of fines shall be set  
3           forth in the commitment order, and shall not  
4           exceed one day for each \$25 of the fine, 30  
5           days if the fine was imposed upon conviction  
6           of a violation or misdemeanor, or one year  
7           in any other case, whichever is the shorter  
8           period. A person committed for nonpayment of  
9           a fine shall be given credit toward payment  
10           for each day of imprisonment at the rate  
11           specified in the commitment order.

12           "(5) If it appears to the satisfaction  
13           of the court that the default in the payment  
14           of a fine is not contempt, the court may  
15           enter an order allowing the defendant addit-  
16           ional time for payment, reducing the amount  
17           thereof or of each instalment or revoking  
18           the fine or the unpaid portion thereof in  
19           whole or in part.

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

2           ORS 137.180 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, as provided in ORS 18.320, 18.350 and  
          18.400."

3           ORS 137.450 provides:



1 "A judgment against the defendant in  
2 a criminal action or the private prose-  
3 cutor, so far as it requires the payment  
4 of a fine or costs and disbursements of  
5 the action, or both, may be enforced as a  
6 judgment in a civil action."

7 4 It is clear from the Proposed Criminal Code, § 80,  
8 pp 76-7, that the Criminal Law Revision Commission in-  
9 tended the "costs" defined in ORS 161.665(2) include the  
10 costs of legal assistance furnished an indigent. Former  
11 ORS 137.205 provided for taxation against a defendant for  
12 the cost of legal assistance furnished to him, and the  
13 Proposed Criminal Code states, see Table, p XXV, that the  
14 intent of the Commission was that the substance of former  
15 ORS 137.205 be retained by placing it in what is now ORS  
16 161.665(2).

17 5 ORS 137.540(10) provides:

18 "The court shall determine, and may  
19 at any time modify, the conditions of  
20 probation, which may include, as well as  
21 any others, that the probationer shall:

22 "(10) Make reparation or restitu-  
23 tion to the aggrieved party for the damage  
24 or loss caused by offense, in an amount to  
be determined by the court."

25 6 The opinion of the California Supreme Court indicates  
26 that at least as of the date of that opinion California  
27 had no recoupment statutes similar to Oregon's.

28 "The condition of probation under  
29 attack is the requirement that the petitioner





Recoupment of attys fees, imposed as cond. to probation.  
 See the Ore Ct's interpretation of statute - A 12.  
 In view of these protections afforded the  
 probationer

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Jimmy Seigel  
 of 3 arguments, chilling of ~~the~~ 6<sup>th</sup> amend. Rts  
 is strongest

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Kuhner (for Petr)

No empirical data in this record.

Every A must be advised prior to  
 trial that he may be required to  
 pay for counsel.

Relies heavily on "chilling" effect.

- but see Op - A 12

Cites ABA Project (but I doubt it  
 had the provision



## Kuhn (cont)

Ore. Ct. ~~dist.~~ J. v. Shouse, but Kuhn relies on dissenting op. to support view that Ore. statute & Kan. statute were alike.

(But statute in Ore. is permissive - within discretion of trial judge. ~~It~~ I should compare this with Kan. statute).

Patten noted that all kinds of conditions may be imposed on probation - w/o statute. Kuhn agreed, assuming the cond. is const. valid.

## Gillette (56 of Ore)

As to chllng. effect, except in Calif. the wt. of auth. is that a condition ~~to~~ reprob may be imposed to probation as matter of gen. power or under a statute.

Counsel is usually applied at arraignment or preliminary hearing (initial appearance).

As to "notice" - see AG's brief 22, 23, etc

→ Unless this statute is const., one couldn't write a recoupment statute that would be.

Ct. of appeals may only say same exemptions are applicable to Δ as to all others

Opinion 7 to 2

The Chief Justice opinion in D16

Douglas, J. Opinion

Brennan, J. Reverend

Agree with Calif. Ct.

Stewart, J. Opinion

Statute as ~~written~~  
construed is "perfectly  
valid".



White, J.

Affirm

Agrees with Palton

Marshall, J.

Reverse

On merits

But willing to sign.

Blackmun, J.

Affirm

Power exists - apart from statute.

Powell, J.

Affirm

Rehnquist, J.

Affirm

What in the world is "invidious discrimination?" Obviously its a talisman to be employed in place of legal analysis.

The result here may be right, although the question is very close after Rinaldi and your James opinion, 407 U.S. 128. But the paucity of analysis is very troubling. I think you should review **2nd DRAFT** your James opinion and consider

a short concurrence. The tension between this and James ought to be addressed and resolved Prince Eric Fuller, by the Petitioner, author of v. James. State of Oregon.

**SUPREME COURT OF THE UNITED STATES**

No. 73-5280

On Writ of Certiorari to the Court of Appeals of Oregon.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
~~Mr. Justice Powell~~  
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: MAY 6 1974

Recirculated: \_\_\_\_\_

Jack

[May —, 1974]

*joined by  
Rehnquist  
Douglas  
White*

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon to determine whether Oregon may constitutionally require a person convicted of a criminal offense to repay to the State the costs of providing him with effective representation of counsel, when he is indigent at the time of the criminal proceedings but subsequently acquires the means to bear the costs of his legal defense.

The petitioner Fuller pleaded guilty, on July 20, 1972, to an information charging him with sodomy in the third degree.<sup>1</sup> At the hearing on the plea and in other court proceedings he was represented by a local member of the bar appointed by the court upon the petitioner's representation that he was indigent and unable to hire a lawyer. Fuller's counsel in turn hired an investigator to aid in gathering facts for his defense, and the investigator's fees were also assumed by the State. Fuller was subsequently sentenced to five years of probation, conditioned upon his satisfactorily complying with the requirements of a work-release program at the county jail that

<sup>1</sup> Other charges contained in the information against Fuller were dismissed when his guilty plea was accepted.



would permit him to attend college, and also upon his reimbursement to the county of the fees and expenses of the attorney and investigator whose services had been provided him because of his indigent status. On appeal to the Oregon Court of Appeals, his principal contention was that the State could not constitutionally condition his probation on the repayment of these expenses.<sup>2</sup> With one judge dissenting, the imposition of his sentence was affirmed, — Ore. App. —, 504 P. 2d 1323, and the Supreme Court of Oregon subsequently denied Fuller's petition for review. — Ore. —, — P. 2d —. Because of the importance of the question presented and the conflict of opinion on the constitutional issue involved,<sup>3</sup> we granted certiorari, — U. S. —.

## I

We begin with consideration of the plan and operation of the challenged statute. By force of interpretation of

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<sup>2</sup> In addition, Fuller argued that the section of the Oregon recoupment statute authorizing an obligation to repay "expenses specially incurred by the state in prosecuting the defendant." Ore. Rev. Stat. § 161.655 (2), see n. 5, *infra*, was not intended by the state legislature to include counsel fees. This issue of state law was resolved against the petitioner in the state court, and properly is not raised here, *Murdock v. City of Memphis*, 87 U. S. (20 Wall.) 590.

<sup>3</sup> Courts of some other States, in reviewing legislation similar to that in question here, have expressed views on the constitutionality of the recoupment of defense costs inconsistent with the decision of the Oregon Court of Appeals in this case. *In Re Allen*, 71 Cal. 2d 388, 78 Cal. Rptr. 207, 455 P. 2d 143; *Opinion of the Justices*, 109 N. H. 508, 256 A. 2d 500; *State ex rel. Brundage v. Eide*, — Wash. —, — P. 2d — (No. 42,995, Apr. 25, 1974). Cf. *James v. Strange*, 323 F. Supp. 11230 (Kan.), *aff'd* on other grounds, 407 U. S. 123. See generally, A. B. A., Project on Providing Defense Services, 58-59 (Approved Draft 1968); Comment, Reimbursement of Defense Costs as a Condition of Probation for Indigents, 67 Mich. L. Rev. 1404 (1969); Note, Charging Costs of Prosecution to the Defendant, 59 Geo. L. J. 991 (1971).



the State's Constitution and comprehensive legislation, Oregon mandates that every defendant in a criminal case must be assigned a lawyer at state expense if "[i]t appears to the court that the defendant is without means and is unable to obtain counsel." Ore. Rev. Stat. § 133.625.<sup>4</sup> As part of a recoupment statute passed in 1971, Oregon requires that in some cases all or part of the "expenses specially incurred by the state in prosecuting the defendant" be repaid to the State, and that when a convicted person is placed on probation repayment of such expenses may be made a condition of probation.<sup>5</sup>

<sup>4</sup> Ore. Rev. Stat. § 133.625 (3) (2) directs that counsel be appointed for an indigent defendant when he is "[c]harged with a crime for which a felony sentence could be imposed." Ore. Rev. Stat. § 161.595 defines a misdemeanor as a crime for which a convicted defendant may be sentenced to as much as one year in prison. See also Ore. Rev. Stat. § 161.615. The extension of the right to counsel to those charged with any crime was accomplished by the Supreme Court of Oregon in *Stevenson v. Holzman*, 254 Ore. 94, 458 P. 2d 414 (1969), thus satisfying in advance the requirements of *Argersinger v. Hamlin*, 407 U. S. 25.

<sup>5</sup> Ore. Rev. Stat. § 161.665 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,



These expenses include the costs of the convicted person's legal defense.<sup>6</sup>

As the Oregon appellate court noted in its opinion in this case, however, the requirement of repayment "is

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."

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 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 non-

[Footnote 6 is on p. 5]

*Contempt*



never mandatory

73-5280—OPINION

FULLER v. OREGON

5

never mandatory." — Ore. App., at —, 504 P. 2d, at 1395. Rather, several conditions must be satisfied before a person may be required to repay the costs of his legal defense. First, a requirement of repayment may be imposed only upon a *convicted* defendant; those who are acquitted, whose trials end in mistrial or dismissal, and those whose convictions are overturned upon appeal face no possibility of being required to pay. Ore. Rev. Stat. § 161.665 (1). Second, a court may not order a convicted person to pay these expenses unless he "is or will be able to pay them." Ore. Rev. Stat. § 161.665 (3). The sentencing court must "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Ibid.* As the Oregon court put the matter in this case, no requirement to repay may be imposed if it appears at the time of sentencing that "there is no likelihood that a defendant's indigency will end . . . ." 504 P. 2d, at 1397. Third, a convicted person under an obligation to repay "may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof." Ore. Rev. Stat. § 161.665 (4). The court is empowered to remit if payment "will impose

payment 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 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."

<sup>6</sup> See n. 2, *supra*.

These conditions  
virtually  
render  
statute  
← meaningless



manifest hardship on the defendant or his immediate family . . . ." *Ibid.* Finally, no convicted person may be held in contempt for failure to repay if he 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 payment . . . ." Ore. Rev. Stat. § 161.685.

Thus, the recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation. Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no "manifest hardship" will result. The contrast with appointment of counsel procedures in States without recoupment requirements<sup>7</sup> is thus relatively small: a lawyer is provided at the expense of the State to all defendants who are unable, even momentarily, to hire one, and the obligation to repay the State accrues only to those who later acquire the means to do so without hardship.

## II

The petitioner's first contention is that Oregon's recoupment system violates the Equal Protection Clause of the Fourteenth Amendment because of various classifications explicitly or implicitly drawn by the legislative provisions. He calls attention to our decision in *James v. Strange*, 407 U. S. 128, which held invalid under the

<sup>7</sup> The recoupment provisions of other States are set out in the Court's opinion in *James v. Strange*, 407 U. S. 128, 132-133 and n. 8. The federal reimbursement provision is found at 18 U. S. C. § 3006A (f).

Hardly a burden on any court. right



Equal Protection Clause a law enacted by Kansas that was somewhat similar to the legislation now before us. But the offending aspect of the Kansas statute was its provision that in an action to compel repayment of counsel fees "[n]one of the exemptions provided in the code of civil procedure [for collection of other judgment debts] shall apply to any such judgment . . . ." Kans. Stat. Ann. § 22-4513 (a) (Supp. 1971), a provision which "strip[ped] from the indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors . . ." 407 U. S., at 135.<sup>8</sup> The Court found that the elimination of the exemptions normally available to judgment debtors "embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *Id.*, at 142.

The Oregon statute under consideration here suffers from no such infirmity. As the Oregon Court of Appeals observed, "No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes." — Ore. App., at —, 504 P. 2d, at 1397. Indeed, a separate provision directs that "[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 . . ." Ore. Rev. Stat. § 137.180. The convicted person from whom recoupment is sought thus retains all the exemptions accorded other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs of his legal defense will impose "manifest hardship," *ante*, pp. 5-6. The legislation before us, there-

<sup>8</sup> The Kansas statute allowed only one exception from the blanket denial of exemptions usually available to judgment debtors, permitting debtors upon whom judgments for costs of legal defense were executed to maintain their homesteads intact, *Id.*, at 135.

Law in  
Strangers  
somewhat  
similar

W ←



fore, is wholly free of the kind of discrimination that was held in *James v. Strange* to violate the Equal Protection Clause.

The petitioner contends further, however, that the Oregon statute denies equal protection of the laws in another way—by discriminating between defendants who are convicted, on the one hand, and those who are not convicted or whose convictions are reversed, on the other. Our review of this distinction, of course, is a limited one. As the Court stated *James v. Strange, supra*, “We do not require whether this statute is wise or desirable . . . . Misguided laws may nonetheless be constitutional.” 407 U. S., at 133. Our task is merely to determine whether there is “some rationality in the nature of the class singled out.” *Rinaldi v. Yeager*, 384 U. S. 305, 308–309. See also *McGinnis v. Royster*, 410 U. S. 263; *McGowan v. Maryland*, 366 U. S. 420. In *Rinaldi* the Court found impermissible New Jersey’s decision to single out prisoners confined to state institutions for imposition of an obligation to repay to the State costs incurred in providing free transcripts of trial court proceedings required by this Court’s decision in *Griffin v. Illinois*, 351 U. S. 12. The legislative decision to tax those confined to prison but not those also convicted but given a suspended sentence, probation, or a fine without imprisonment was found to be invidiously discriminatory and thus violative of the requirements of the Equal Protection Clause. In the case before us, however, the sole distinction is between those who are ultimately convicted and those who are not.<sup>9</sup>

<sup>9</sup> The petitioner also claims in his brief that a requirement to repay legal defense expenses has been imposed only on convicted defendants placed on probation, and “has not been applied to those convicted, indigents who were sentenced to terms of imprisonment.” While this distinction might well be justified on the ground that those released on probation are more likely than those incarcerated, to have the

Query...

alleged  
discrimination  
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convicted &  
those not

Rinaldi is a  
problem.



We conclude that this classification is wholly non-invidious. A defendant whose trial ends without conviction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged. The imposition of such dislocations and hardships without an ultimate conviction is, of course, unavoidable in a legal system that requires proof of guilt beyond a reasonable doubt and guarantees important procedural protections to every defendant in a criminal trial. But 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.<sup>10</sup>

*That certainly has  
the ring of authority*

ability to earn money to repay, we need not reach this issue since the statute itself makes no such distinction, and the petitioner has not demonstrated on this record that the State has engaged in any pattern or practice embracing it.

<sup>10</sup> The petitioner's brief also raises, without extended discussion, various due process claims that imposition of the conditional obligation to repay was made without sufficient notice or hearing. Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here. "[T]his Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U. S. 576, 582. We note in passing, however, that the recoupment stat-



## III

The petitioner's second basic contention is that Oregon's recoupment statute infringes upon his constitutional right to have counsel provided by the State when he is unable because of indigency himself to hire a lawyer. *Gideon v. Wainwright*, 372 U. S. 335; *Argersinger v. Hamlin*, 407 U. S. 25. The argument is not that the legal representation actually provided in this case was ineffective or insufficient. Nor does the petitioner claim that the fees and expenses he may have to repay constitute unreasonable compensation for the defense provided him. Rather, he asserts that a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus "chill" his constitutional right to counsel.

This view was articulated by the Supreme Court of California, in a case invalidating California's recoupment legislation, in the following terms:

"[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

ates, including a schedule of fees, were published in the Oregon Revised Statutes at the time of the petitioner's plea, and further that both Oregon's judgment execution statute and her parole revocation procedures provide for a hearing before execution can be levied or probation revoked.

Non-sense



despite the gravity of the need for such representation as emphasized by the [Supreme] Court in *Gideon* . . . .”

*In re Allen*, 71 Cal. 2d 388, —, 78 Cal. Rptr. 207, —, 455 P. 2d 143. We have concluded that this reasoning is wide of the constitutional mark.

*What a lovely construction.*

The focal point of this Court's decisions securing the right to state-appointed counsel for indigents was the “noble ideal” that every criminal defendant be assured not only “procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law,” but also the expert advice necessary to recognize and take advantage of those safeguards. *Gideon v. Wainwright*, *supra*, 372 U. S., at 344. In the now familiar words of the Court's seminal opinion in *Powell v. Alabama*, 287 U. S. 45:

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”



*Id.*, at 68–69, quoted in *Gideon v. Wainwright*, *supra*, 372 U. S., at 344–345.

Oregon's system for providing counsel quite clearly does not deprive any defendant of the legal assistance necessary to meet these needs. As the State Court of Appeals observed in this case, an indigent is entitled to free counsel "when he needs it"—that is, during every stage of the criminal proceedings against him. — Ore. App., at —, 504 P. 2d, at 1396. The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so.<sup>11</sup> Those who remain indigent or for whom repayment would work "manifest hardship" are forever exempt from any obligation to repay.

We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise. A defendant in a criminal case who is just above

<sup>11</sup> The limitation of the obligation to repay to those who are found able to do so also disposes of the argument, presented by an *amicus curiae*, that revocation of probation for failure to pay constitutes an impermissible discrimination based on wealth. See *Tate v. Short*, 401 U. S. 395; *Williams v. Illinois*, 399 U. S. 235. As the Court stated in *Tate v. Short*, *supra*, "We emphasize that our holding does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U. S., at 400.

Similarly, the wording of Oregon's statute makes clear that a determination that an indigent "will be able" to make subsequent repayment is a condition necessary for the initial imposition of the obligation to make repayment, but is not itself a condition for granting probation, or even a factor to be considered in determining whether probation should be granted.



the line separating the indigent from the nonindigent 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.

This case is fundamentally different from our decisions relied on by the petitioner which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right. See *Uniformed Sanitation Men Assn., Inc. v. Commissioner*, 392 U. S. 280; *Gardner v. Broderick*, 392 U. S. 273; *United States v. Jackson*, 390 U. S. 570. Unlike the statutes found invalid in those cases, where the provisions "had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them," *United States v. Jackson, supra*, 390 U. S., at 581, Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.

The judgment of the Court of Appeals of Oregon is affirmed.



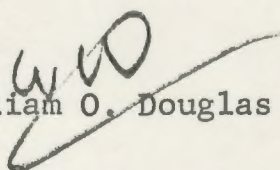
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

May 7, 1974

Dear Potter:

Please join me in your opinion in No. 73-5280, Fuller v. Oregon. I may decide to file a separate opinion. But whether or not I do so I am still with you.

  
William O. Douglas

Mr. Justice Stewart

cc: The Conference

This is troubling -- the pressure is building up for you to say something about James.  
Jack

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Author: Marshall, J.

No. 73-5280

Circulated: MAY 8 1974

Recirculated: \_\_\_\_\_

Prince Eric Fuller,  
Petitioner,  
v.  
State of Oregon.

On Writ of Certiorari to the Court of Appeals of Oregon.

[May —, 1974]

MR. JUSTICE MARSHALL, dissenting.

In my view, the Oregon recoupment statute at issue in this case discriminates against indigent defendants in violation of the Equal Protection Clause and the principles established by this Court in *James v. Strange*, 407 U. S. 128 (1972). In that case we held unconstitutional under the Equal Protection Clause a Kansas recoupment statute because it failed to provide equal treatment between indigent defendants and other civil judgment debtors. We relied on the fact that indigent defendants were not entitled to the protective exemptions Kansas had erected for other civil judgment debtors.

The Oregon recoupment statute at issue here similarly provides unequal treatment between indigent defendants and other civil judgment debtors. The majority obfuscates the issue in this case by focusing solely on the question whether the Oregon statute affords an indigent defendant the same protective exemptions provided other civil debtors. True, as construed by the Oregon Court of Appeals, the statute does not discriminate in this regard. But the treatment it affords indigent defendants remains unequal in another, even more fundamental respect. The important fact which the majority ignores is that under Oregon law, the repayment of the indigent defendant's debt to the State can be made a condition of his probation, as it was in this case. Petitioner's

Reviewed  
See my  
office  
memo.



But probation is part of a sentence of imprisonment, with the latter suspended so long as the conditions of probation are met. E.g. if the prisoner leave the state, he goes to prison.

73-5280-DISSENT

2. FULLER v. OREGON

failure to pay his debt can result in his being sent to prison. In this respect the indigent defendant in Oregon, like the indigent defendant in *James v. Strange*, is treated quite differently from other civil judgment debtors.

Petitioner's "predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense." 407 U. S., at 128. Article 1, § 19 of the Oregon Constitution provides that "There shall be no imprisonment for debt, except in case of fraud or absconding debtors." Hence, the nonindigent defendant in a criminal case in Oregon who does not pay his privately retained counsel, even after he obtains the means to do so, cannot be imprisoned for such failure. The lawyer in that instance must enforce his judgment through the normal routes available to a creditor—by attachment, lien, garnishment, or the like. Petitioner, on the other hand, faces five years behind bars if he fails to pay his "debt" arising out of the appointment of counsel.

Article 1, § 19 of the Oregon Constitution is representative of a fundamental state policy consistent with the modern rejection of the practice of imprisonment for debt as unnecessarily cruel and essentially counterproductive. Since Oregon chooses not to provide imprisonment for debt for well-heeled defendants who do not pay their retained counsel, I do not believe it can, consistent with the Equal Protection Clause, imprison an indigent defendant for his failure to pay the costs of his appointed counsel.<sup>1</sup> For as we held in *James v. Strange*, a State

<sup>1</sup>The majority argues that we have recognized no constitutional infirmity in imprisoning a defendant with the means to pay a fine who refuses or neglects to do so. *Ante*, at — n. 11. This case does not involve a fine, however, but rather enforcement of a debt for legal services. The fact remains that Oregon imprisons a defendant with appointed counsel who refuses or neglects to pay his debt for legal services even though able to pay, but does

The classification of convicted persons differs from persons who not convicted can in this context - should be said to be without rationality. State interest is legitimate & means are reasonably related to the State interest.

good point

But he has no defenses



may not "impose unduly harsh or discriminatory terms solely because the obligation is to the public treasury rather than to a private creditor." 407 U. S., at 138.

I would therefore hold the Oregon recoupment statute unconstitutional under the Equal Protection Clause insofar as it permits payment of the indigent defendant's debt to be made a condition of his probation.<sup>2</sup> I respectfully dissent.

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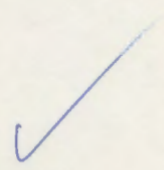
not imprison a defendant with retained counsel in the same circumstances.

<sup>2</sup>In light of my disposition of the equal protection claim, I have no occasion to consider petitioner's contention that some other defendant's knowledge that he may have to reimburse the State for providing him legal representation might impel him to decline the services of an appointed attorney and thus chill his Sixth Amendment right to counsel. In any event, in my view such a claim could more appropriately be considered by this Court in the context of an actual case involving a defendant who, unlike petitioner, had refused appointed counsel and contended that his refusal was not a knowing and voluntary waiver of his Sixth Amendment rights because it was based upon his fear of bearing the burden of a debt for appointed counsel or upon his failure to understand the limitations the State imposes on such a debt.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. May 8, 1974



RE: No. 73-5280 Fuller v. Oregon

Dear Thurgood:

Please join me in your dissenting  
opinion in the above.

Sincerely,

Mr. Justice Marshall  
cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

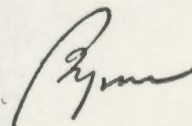
May 8, 1974

Re: No. 73-5280 - Fuller v. Oregon

Dear Potter:

I agree with your opinion in this case.

Sincerely,



Mr. Justice Stewart

Copies to Conference



I gave the original of this to Justice Stewart & suggested he reply to Marshall.

My File

No. 73-5280 FULLER v. OREGON

Comments on dissenting opinion

The dissenting opinion of Mr. Justice Marshall argues that the Oregon statutory scheme is discriminatory as between indigent defendants who may be placed "behind bars" upon a ~~failure~~ failure to reimburse the state and "other civil judgment debtors". Infra at 1. The dissent singles out for comparison the "well heeled defendants who do not pay their [privately] retained counsel". Id. at 2. James v. Strange, 407 U.S. 128 (1972) is relied upon in concluding that this "unequal treatment" violates the Equal Protection Clause.

Reliance upon James v. Strange is misplaced. Both the Kansas statute there involved and the statute now before the Court were designed to recoup expenses, including the providing of free counsel, incurred by the state on behalf of indigent defendants. Apart from this common purpose, the two statutory schemes for recoupment have little in common. As outlined in the Court's opinion, the Oregon



statute provides broadly protective conditions which must be satisfied before repayment liability arises. Thus, rather than discriminate against indigent defendants as compared with other judgment debtors, Oregon imposes the repayment obligation only when it appears that the convicted defendant "is or will be able to pay them", and that payment "will impose [no] manifest hardship on the defendant or his immediate family . . ." Supra, at 5,6. Indeed, in view of the extent of the protection accorded by the Oregon statute as interpreted by the Supreme Court of Oregon, one wonders as to its practical efficacy.

The ~~the~~ dissent, citing the Oregon constitutional provision against imprisonment for debt, emphasizes the distinction between the "cruel and essential counter-productive" (infra, at 2) sanction of imprisonment and the normal remedies available for the nonpayment of civil indebtedness. The dissent misappreciates the situation. This is a case in which imprisonment for contempt may result. It is not a case of imprisonment for failure to pay for an indebtedness. There is no automatic



remission to prison in the event of the failure by some specified time to reimburse the state for costs incurred on behalf of the indigent. The conditions above mentioned first must be satisfied as to ability to pay and absence of hardship; in addition the failure to pay must be "an intentional refusal to obey the order of the court. . . ." Ore. Rev. Stat. § 161685. Imprisonment for deliberate contempt of a court's order is hardly to be compared with imprisonment for indebtedness arising out of private contractual relationship.

Moreover, in this case, we have a probation order following conviction on a criminal charge, and the reimbursement of the state - subject to the statutory protective provisions - is a condition of the probation. A sentencing court has broad discretion in imposing conditions on probation and such conditions customarily impose restrictions and obligations on the convicted defendant which would be facially invalid if applied to free citizens.\* In this case, the requirement that

\*Among the most commonplace of these, for example, is a restriction against the right to travel.



indebtedness owed the state be repayed by respondent during the probationary period, if and when the petitioner <sup>is</sup> was able to do so, ~~could hardly be deemed~~ <sup>is not</sup> an unreasonable condition to the special status of probationee.

The state has a legitimate interest, indeed perhaps a duty, to seek recoument of taxpayer funds made available to indigent defendants if and when such defendants are able to reimburse the state. See James v. Strange, supra, at 141. The classification embracing such defendants is reasonable and in furtherance of the state interest. Such defendants constitute a class different in obvious respects from citizens not convicted of crime and who have no obligation to repay public funds. The dissent<sup>s</sup> attempt<sup>s</sup> to analogize between respondent and a defendant who may be indebted to his privately retained counsel. The asserted analogy is inept. Apart from the special ,protections afforded convicted indigents relating to ability<sup>s</sup> to pay, which are not afforded the ordinary debtor, there is the special interest of the state in recovery of sums owed to it. See James v. Strange, id. at 137,138. The means adopted by Oregon for facilitating recovery cannot be said to be unreasonable.



May 10, 1974

No. 73-5280 Fuller v. Oregon

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

lfp/ss

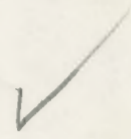
cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 10, 1974



Re: No. 73-5280 - Fuller v. Oregon

Dear Potter:

I am glad to join your opinion for this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", is written below the word "Sincerely,".

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 14, 1974

Re: 73-5280 - Fuller v. Oregon

Dear Potter:

Please join me.

Regards,

WRB

Mr. Justice Stewart

Copies to the Conference



