In the

Supreme Court of the United States

PRINCE ERIC FULLER,)
)
Petitioner,)
)
v.) No. 73-5280
)
OREGON)

Washington, D.C.
March 26, 1974

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PRINCE ERIC FULLER, Petitioner,	:	
v.	:	No. 73-5280
OREGON	:	

Washington, D.C.

Tuesday, March 26, 1974

The above-entitled matter came on for argument at 2:15 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justive

APPEARANCES:

J. MARVIN KUHN, ESQ., Deputy Public Defender, 110 Labor and Industries Building, Salem Oregon 97310
for Petitioner

W. MICHAEL GILLETTE, ESQ., Solicitor General of Oregon, State Office Building, Salem, Oregon 97310
for Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-5280, Prince Eric Fuller versus Oregon.

Mr. Kuhn, you may proceed whenever you are ready.

ORAL ARGUMENT OF J. MARVIN KUHN, ESQ.,

ON BEHALF OF PETITIONER

MR. KUHN: Mr. Chief Justice and may it please the Court:

Petitioner in this case entered a plea of guilty to the charge of sodomy in Multnomah County, was placed on a term of five years' probation and as a condition of the probation, was ordered to reimburse the county for the cost of his court-appointed attorney fees as well as the total of $375 for the cost of the investigator hired by his court-appointed attorney.

Petitioner believes that these conditions of probation, of reimbursement, deny him due process as well as equal protection and are an impermissable burden upon his right to counsel as guaranteed by the Sixth and Fourteenth Amendments.

Now, Petitioner believes that this condition of probation, that he repay his court-appointed attorney's fees, are an impediment to the free exercise of his right to counsel as guaranteed by this Court in Gideon versus Wainwright and recently reinforced in Argersinger versus Hamlin. The

Oregon practice which is beginning now -- this is one of the first cases -- will have the effect of placing a financial penalty upon those indigents who need legal help but cannot afford to retain their own counsel.

Now, this issue recently was decided by the Supreme Court in the State of California in the case of In re Allen.

Now, the California Supreme Court held that the same type condition of probation as we have here was unconstitutional because it would place an impermissible burden upon the Petitioner's right to counsel in that case.

The California court reasoned that even though there was no indication there that the Petitioner had been denied her right to counsel since she actually was represented by court-appointed counsel, that the record did not show that she was ever advised of this potential liability as to the repayment and reimbursement to the county for the cost of this counsel.

Petitioner submits that such advice is also absent in the present record that we have here.

The California court also felt that if the Petitioner had had knowledge that she may have to repay the costs of her court-appointed counsel, and as the knowledge of this potential burden spreads, that it could very well chill future indigents from exercising their Sixth Amendment

right to counsel rather than risking having to repay them as a condition of the probation, should they be fortunate enough to receive probation.

QUESTION: Does the record have any empirical evidence on that fact, Mr. Kuhn?

MR. KUHN: The -- our record has none at all. There was the -- the defendant or the petitioner in this case, there is nothing to indicate he was ever advised that he would have to repay counsel until such time as the conditions of probation were imposed at the sentencing.

QUESTION: Well, was this speculation on the part of the California court, then, in the Allen case?

MR. KUHN: This was in the Allen case, yes, your Honor.

QUESTION: Was it speculation on the part of the court?

MR. KUHN: It was and it was based upon that, that it would be a chilling effect. There was -- I saw no empirical evidence in the Allen case indicating that this would be so, but I did have the feeling that under California practice, such would be the case.

QUESTION: Well, except I gather, under our cases, the criminal trials could not proceed without counsel to represent the accused.

MR. KUHN: Counsel can be waived, your Honor, yes,

assuming there is full advice as to the right to counsel, counsel may be waived. Now --

QUESTION: What if a man says on arraignment, "I've got $50,000 in the bank, but I'll be damned if I'll use it to hire a lawyer with." Do you think, under the United States Constitution, a trial court is obligated to appoint counsel for him?

MR. KUHN: No, I do not, your Honor. I believe that the cases -- the Gideon cases, all the subsequent cases indicate that the man cannot afford counsel.

In that case where the man has indicated he does have sufficient funds to retain counsel but he will not do it, then I do not believe the Constitution requires counsel to be appointed for him. I believe that the thrust of Gideon, Argersinger are to the effect that an indigent, a man who cannot afford counsel or where it would work a hardship upon him has a right to appointed counsel but under no other conditions.

Now, it is this chilling effect, the possible limiting of the right to counsel, that the Petitioner believes is at issue here and is the main issue.

Now, this is assuming that he is told by the court prior to appointment of counsel that should he be convicted and placed on probation, that he will -- he perhaps may have this obligation to repay the cost of court-appointed

counsel. This is one provision that is not currently done in Oregon practice today.

QUESTION: Mr. Kuhn, suppose you didn't have your Oregon statute? Could a court on its own impose this as a condition of probation?

MR. KUHN: I believe that without the statute, under the decisions of Oregon, I believe that it could as an inherent power of the sentencing court.

QUESTION: Well, is it your position, then, that a court must in every case prior to trial advise counsel as a possibility as to what it might do?

MR. KUHN: Yes, your Honor, it is my opinion that should this Court -- I beg your pardon, your Honor?

QUESTION: Even without the presence of your statute?

MR. KUHN: Yes, your Honor, I believe that as long as the petitioner or defendant is subject to the criminal statutes of repayment as a condition of probation, that in order to fully insure an understanding as to his right to counsel, that at the time, the court must inform him of this possible liability.

QUESTION: Let me start over again. I am assuming Oregon does not have this kind of a statute, as most states do not and then I thought I asked you whether a court on its own could impose this as a condition of

probation, and I thought you said yes.

MR. KUHN: Oh, I'm sorry, your Honor, I thought that perhaps you meant whether Oregon had a statute that specifically allowed this as a condition of probation.

I do believe that the court could impose this condition without such a statute in Oregon.

QUESTION: And then my next question was, then must the court in every criminal case so advise the defendant?

MR. KUHN: Yes, my answer is the same. If the indigent appears without counsel and at the time advice of counsel is given, this possibility should be explained to him.

QUESTION: And if he does not, then the condition may not be imposed?

MR. KUHN: That is our position, yes. However, I believe that even if counsel -- if it is explained to him that the condition itself is an impediment to the free exercise of the right.

QUESTION: Would you say how often the condition should be imposed?

MR. KUHN: This is perhaps -- this is the first case I have heard about in Oregon, your Honor, this one here. Subsequent to this, I am aware of the practice being carried on in Washington County, Oregon and in Lane County, Oregon.

QUESTION: Every case?

MR. KUHN: Not in every case, no, your Honor.

QUESTION: What are the criteria which determine whether it shall be imposed?

MR. KUHN: That, I am not clear on. I would assume it is on the -- depending upon each individual defendant that appears before the court at the time of sentencing and agreed amount as to what appears in the pre-sentence report.

QUESTION: And does the practice differ among judges, too?

MR. KUHN: Yes, it does, your Honor.

QUESTION, Some do and some won't?

MR. KUHN: That is correct, and within the same county.

QUESTION: Mr. Kuhn, what are the elements of court costs that may be imposed on a convicted defendant under the Oregon statute, in addition to counsel?

MR. KUHN: In addition to counsel, I believe that the statute is worded to the effect that costs cannot include those costs that are inherent in a affording the defendant his rights to jury trial, such as subpoenas, jury fees, fees and costs of the district attorney are not included. It is more of a statute of exclusion, I believe, rather than inclusion.

QUESTION: It is not very substantial, then, I take it from what you describe?

MR. KUHN: It could be, the possible costs, your Honor, if expert investigators are hired, such as here, as Judge Forte pointed out in his dissenting opinion, he, the defendant, may become liable for that also.

In response to the former question, this is a case in Douglas County now.

As to the cost of the psychiatrist, the cost of the investigator, these may all become conditions of reimbursement and made conditions of probation.

Now, the possibility of this chilling effect, I believe that the --

QUESTION: Well, of course, in those cases, you don't have the argumentive burden on assistance of counsel, do you?

MR. KUHN: Not as to the Sixth Amendment right to counsel, no, your Honor.

QUESTION: What, then, would -- or do you make any point of those?

MR. KUHN: I believe for such as that, it may be an impingement on his right to jury trial as guaranteed by the Sixth Amendment.

QUESTION: Including reimbursement of psychiatric costs?

MR. KUHN: Yes, your Honor, if the defendant has obtained these witnesses in order to present a complete

defense, then I believe that it would impinge on his right to trial by jury.

QUESTION: But suppose he were to have a jury-waived trial?

MR. KUHN: I believe that it would be the same, since the right to trial by jury has, as I understand it, includes the right to put on a defense, whether or not it is before a jury or before the court who becomes the tryer of fact.

Now, it is this possible chilling effect here that I believe the Oregon court's opinion did not recognize, as the court held that the defendant is given counsel when he needs it but petitioner believes that this does not answer the question since it is the possible chilling effect and of those possible indigents who just won't accept counsel if they are made aware of the fact that they may have to repay the county and then this repayment then becomes a condition of probation.

As Mr. Chief Justice Burger indicated in the concurring opinion in Argersinger versus Hamlin, representation by counsel is desirable in criminal cases from both the viewpoint of the defendant and society. The defendant would submit here that the Oregon practice injures not only the particular indigent facing the criminal trial, of which he is presumed to be innocent, but of society as a whole

because if such a condition, as we believe it does, discourages counsel to those who need it most, when they need it, the entire judicial framework within which society lives, the defendant believes is weakened.

Now, this possible chilling effect was noted by the American Bar Association project on providing defense services in which they pointed out that the practice would discourage the acceptance of counsel in their opinions and recommended that reimbursement for providing counsel should not be required except on the ground where fraud is used in obtaining court-appointed counsel or in presenting indigency to the court.

QUESTION: What sort of sanctions attach under Oregon law to the failure of a defendant who is required to pay counsel fees? What is it, citation for contempt if he fails to do it?

MR. KUHN: The recoupment statute indicates that he may be cited for contempt.

QUESTION: Is it a defense on his part in the contempt hearing that he is unable to do it, like, for instance, a contempt hearing on a support order in a matrimonial case?

MR. KUHN: Now, in a contempt hearing, I believe that would be a defense. However, here, where it is a condition of probation, under the Oregon statute 137.550,

when it is made a condition of probation, he does face the possibility of being sent to prison for the failure to pay.

The Oregon Court of Appeals, in its opinion -- majority opinion --

QUESTION: They cancel probation.

MR. KUHN: I beg your pardon, your Honor?

QUESTION: Because they cancel probation.

MR. KUHN: Yes, your Honor, as he did not live up to the term of probation of repayment, he therefore may have his probation revoked and be sent to prison.

QUESTION: Do we know anything about the position of the Oregon law as to whether if, on a probation revocation hearing, he were to say, I simply am not able to make the payment whether they would nonetheless revoke his probation?

MR. KUHN: The Oregon Court of Appeals in the opinion in this case indicated that pursuant to the statute a defendant may not be revoked unless the court finds he is unable to pay and that he did not pay as a result of an intentional contumacious default.

In other words -- or, if the court finds he had the ability to pay and he didn't pay, intentionally, then he could be revoked. Without those two findings, according to the majority opinion, he could not be revoked.

However, the --

QUESTION: Well, how about that? Do you accept

that?

MR. KUHN: No, your Honor. As to --

QUESTION: Don't we accept that, though, as an authoritative construction of Oregon law?

MR. KUHN: Yes, your Honor. However, that is this case. That was the majority opinion in this case.

QUESTION: If a person knows that he is not going to have to pay as a condition of probation unless he has the money and deliberately refuses to pay, is that much of a deterrent? Is it much of a drag on the right to counsel?

MR. KUHN: I believe it is. It is the risk, your Honor, as to trying to separate the revocation from the original advice as to the rights of counsel. In the initial stages, the damaging part of this condition of probation, in my opinion, is that at the time, even is an indigent decides or is told he may incur another debt -- now, that may be all he hears and at that time, if he says -- if he believes, in his own mind that, this id going to burden me with another debt that I may have to pay on time and because of that if he then gives up his right to counsel, then this is the chilling effect and this, I believe, is the infringement on the constitutional right. It chills it.

QUESTION: How can you assume that the average indigent criminal fears another debt?

MR. KUHN: My personal experience for one thing,

your Honor. I have had this occur on appeals at one time -- on many occasions.

QUESTION: And that was the only reason they didn't want a lawyer?

MR. KUHN: That is correct.

QUESTION: Well, that is not my experience and I have been with legal aid socities for a long time. I had just the opposite. They will sign anything.

MR. KUHN: The penitentiary inmates at one time -- prior to this, your Honor --

QUESTION: Oh, I know there are a lot of penitentiary inmates that don't want the Public Defender, period.

MR. KUHN: No, they wished to appeal until we felt that we had to advise them that at the time, subsequent to the conclusion of the appeal, that we would file a cost bill as to our costs pursuant to the Oregon law that they would then, perhaps, become a lien and they would be required to pay and have given up.

QUESTION: A lien? Well, how many of your clients in the penitentiary know what a lien is?

MR. KUHN: Quite a few.

QUESTION: You got some hig class ones in Oregon.

MR. KUHN: Yes, your Honor.

Now, although this Court did not reach this issue in James versus Strange, it has held that an individual cannot be penalized for exercising a constitutional right and penalty as defined by Malloy versus Hogan is any sanction that makes the assertion of the privilege costly and Petitioner submits that this would be very costly and one of the most costly things I could think of if he did waive the right to counsel in order to avoid further debt.

The court has protected the Fifth Amendment right in United States versus Jackson, Gardner versus Broderick, and Sanitation Men Association versus the Commissioner. The latter case is holding that the petitioners could not be dismissed from their positions for asserting their Fifth Amendment rights against self-incrimination.

We submit that the right to counsel is as fundamental a constitutional right as the right to silence protected under the Fifth Amendment.

Now, I think the position was succinctly stated by Judge Forte, who dissented in the instant case when he indicated that if an accused is represented by court-appointed counsel and does avail himself of the procedures, such as calling witnesses or calling an investigator or other experts to present a defense and loses, he faces a double prospect for having, in good faith, utilized the adversary system of repayment of a debt and possible

imprisonment for failure to repay.

Now, the Petitioner also submits that the condition of probation denies him equal protection. The Oregon court distinguished the Oregon recruitment statutes from the one condemned in James versus Strange because the Oregon statute did not contain within it a denial of the exeptions from execution afforded to other judgment debtors.

However, as Judge Forte indicated in his dissenting opinion, there is nothing to support such a construction , as there is nothing in ORS 161.675 paragraph 2 or ORS 137.550 that affords a defendant in a revocation proceedings the same exemptions provided other Oregon judgment debtors as appears in chapter 23 of the Oregon revised statutes.

For this reason, Judge Forte and Petitioner believes that the Oregon statute is essentially no different from the statute condemned in James versus Strange.

Another difference is that the Kansas statute was civil in nature. The Oregon statute, as applied as a condition of probation, is part of the criminal procedure and that, as an effect of this, that an indigent whose probation is revoked, is, in effect, being punished for a debt owed to the state and it does create a gulf between the man with money and the man without money.

Now, even though the court of appeals did hold

that a probationer in Oregon could not be imprisoned for the failure to pay unless the default was intentional.

The court, when it made that statement, did not attempt to distinguish the Oregon statute from the Kansas statute there as nothing was said about the petitioner being able to claim his exemptions in a revocation hearing, the same as other judgment debtors are allowed to do so in Oregon in civil proceedings against them.

Now, for this reason, Petitioner believes that Oregon law discriminates against those convicted indigent defendants who are placed on probation.

Now, it does not apply to any other convicted indigents who are sentenced to the penitentiary and for this reason, Petitioner submits that it does not make sense to carve a class out of a class, such as convicted indigents carved out of that class, a class of convicted indigents who are put on probation and apply the condition and requirement that they repay against them only when, as a matter of practice, I have been unable to find any case where a man sentenced to the penitentiary has, in fact, been sentenced to pay and required to pay the cost of his court-appointed attorney, although he is assessed other costs, I have found no case that indicates that he has been required to repay the cost of his court-appointed attorney's fees, as only probationers are now required to do in Oregon.

QUESTION: Mr. Kuhn, I think you told us that, first of all, the statute by its terms is permissive. It authorizes the judge to do this. It doesn't require him to.

MR. KUHN: Yes.

QUESTION: And you told us that there is a good deal of variation in various --

MR. KUHN: Yes, your Honor.

QUESTION: -- courts in Oregon, depending upon a particular judge and, I suppose, in any court, upon the particular case.

MR. KUHN: Yes, I believe that is the reason.

QUESTION: My brother Blackmun asked you this question, but I would like to floow it up. Do you suppose that even in the total absence of this statute, wouldn't it arguably be a permissible condition of probation to require that the convicted person put on probation should repay the court-appointed lawyer to the extent that he could, when he could?

Certainly, it is a very usual thing to require the as a condition of probation reparation for the victim, for example, is it not?

MR. KUHN: Yes, it is, your Honor. I believe there is a difference between reparation to the victim --

QUESTION: I appreciate that they are not exactly the same and that is the reason that I am asking

the question.

Generally speaking, all kinds of conditions can be imposed on probation, can they not?

MR. KUHN: Yes, they may, your Honor.

QUESTION: Staying away from various people, staying away from various places, getting a steady job.

MR. KUHN: Under our statute, it does indicate without the recoupment statute, I believe, that the court would still be authorized to impose such a condition of probation.

QUESTION: You mean, any court, anywhere?

MR. KUHN: Yes, your Honor.

QUESTION: Unless there were a specific statutory provision against it.

MR. KUHN: I believe they would be. I believe that this would be inherent in the power of the court --

QUESTION: As a condition of probation.

MR. KUHN: Yes, your Honor, assuming it was not an impermissible burden.

QUESTION: So this statute really doesn't have much to do with it, it is just whether or not it is a valid condition.

MR. KUHN: Yes, your Honor, that is the main issue, I believe, here, is whether or not this condition of probation is valid. It is our main position, naturally, that

it is not because it is an unnecessary infringement upon the right to counsel.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF W. MICHAEL GILLETTE, ESQ.,

ON BEHALF OF RESPONDENT

MR. GILLETTE: Mr. Chief Justice and may it please the Court:

A number of questions from the Court today have raised the essential issues in the case and I should like, if I may, to simply refer back to those questions and deal with the approach that the State of Oregon would like to take with regard to those questions.

First of all, with regard to the chilling effect question, the question was raised by Mr. Justice Blackmun as to whether or not in any case, in any jurisdiction, a judge could impose a condition such as the one imposed on Prince Eric Fuller in this case and we would submit that, with the exception of California, which apparently has decided in In re Allen that you can't do that, the answer is probably yes in most jurisdictions. Certainly, I would believe it is yes in Oregon and, in fact, there is, in the Federal District Court in Oregon at this time another case, Washington versus Music, which has been stayed pending the result in this case, where the judge purported to make exactly this condition of probation based upon his inherent

power and not upon any statutory power.

QUESTION: That was a federal decision?

MR. GILLETTE: No.

QUESTION: No.

MR. GILLETTE: It is a district judge in a county in northern Oregon. His explanation of why he imposed the condition was that he believed that he had the inherent power to do it.

QUESTION: But he also had the statute.

MR. GILLETTE: He also had the statute which he didn't even know about. That's what happened. The case in other respects is similar to this one. It would appear that the defendant, in fact, was capable of paying but I want to point out to the Court that the way attorneys are appointed in these situations is usually -- usually arises as a result of a relatively summary proceeding.

An individual is brought before an arraigning magistrate and the first concern of the magistrate is that the individual be advised that he has been charged with criminal offense and, secondly, to determine whether or not the individual has counsel and since usually he does not, in Oregon or, for that matter, almost anywhere else, the next inquiry is, can you afford one?

And the answer frequently is not a simple yes or no. The answer is "I don't know," because the individual

may be for the first time encountering the question of whether or not he can afford counsel.

The court will, in most instances, err on the side of appointing an attorney rather than let the defendant go without counsel any longer and I would submit tht that is definitely the best choice. The individual needs help then and the court, in a rather summary fasion, is going to get him a lawyer unless the court is convinced that he can get his own.

Now, it may turn out, subsequently --

QUESTION: This happens when, at the initial appearance?

MR. GILLETTE: At the initial arraignment, the initial appearance, that's right. This usually, although not always, usually arises because the individual was arrested without a warrant pursuant to having been arrested on probable cause.

QUESTION: How soon after the arrest does this usually take place in Oregon?

MR. GILLETTE: Well, the decision on his release has to be made within 36 hours. It could take as long as two and a half days for the arraignment to occur if he is arrested on a Friday night and he is not arraigned till Monday morning.

The difference between the release decision and

the attorney decision is simply based upon the fact we haven't quite caught up procedurally in the latter matter with the former. I would expect that within two years or so we are going to get to the point where we arraign every day, no matter whether it is a weekend or not. That certainly is desirable.

QUESTION: An arraignment is not the same as an initial appearance, is it?

MR. GILLETTE: Not always, no. Usually it is because the way we process things, if an individual has been arrested even on probable cause, an information of felony or an information of misdemeanor, the charging document has been prepared by the time he appears in court, even if it is a matter of three or four hours.

QUESTION: That is an information. You don't have indictments out there?

MR. GILLETTE: We have indictments, but normally speaking, the individual who has been arrested is appearing before an inferior magistrate at that time and the grand jury hasn't had time to proceed yet.

We have a bifurcated system in which the individual gets arraigned, gets a chance for a preliminary hearing --

QUESTION: And then is bound over to the grand jury.

MR. GILLETTE: And then is bound over to the grand jury, that is right. So he gets -- in fact, he gets attorneys appointed twice if he goes through that process.

QUESTION: I see.

MR. GILLETTE: The same one is normally appointed the second time around but the concern is always, does he have a lawyer? If he hasn't, let's get him one because we want to get on with the rest of the procedure.

Now, the question was raised by Mr. Justice Brennan as to which counties follow this practice in Oregon and to what extent and because no one had ever tried to figure this out, I conducted what is, unfortunately, a most informal poll, but it appears in addendum to my brief at page 30. It indicates that the majority of counties are utilizing the practice, although to a limited extent, I think the largest amount collected during calendar year 1973 was $9,220. That is a fairly sensible figure in view of the fact that it is seldom going to happen that an individual who is genuinely indigent at the time he seeks counsel improves upon his conditions by the time he is found guilty of the charge.

QUESTION: How do they fix the amount? This was $350 here, was it, or something?

MR. GILLETTE: $375 as investigator's fees and I cannot for the moment remember what the record discloses as

to the attorney's fees. Part of the problem here is that the decision to pay them was made on an informal basis outside the courtroom door. The defendant's father actually paid the money because the defendant's father was very wealthy and had flown out from Philadelphia and suddenly become concerned with his son's affairs, finally, after he had been arrested, and, on a delayed basis, retained the lawyer and paid him so we have a less then perfect fact situation in that regard, anyway.

QUESTION: Well, in those other cases where the condition has been imposed, was there any -- is there any criterion by which they fix the amount?

MR. GILLETTE: Yes, sir, there is. First of all, there is a statutory scheme which sets forth the minimum fee and that is usually the maximum fee, as it turns out. It is usually the fee paid.

In extraordinary cases the judge will, upon a proper showing by affidavit from the attorney, grant certain additional amounts, but it is rare that he does it.

QUESTION: Does it depend, for example, on whether there is a guilty plea or whether there is a trial and how long a trial it is?

MR. GILLETTE: That is right. The statute itemizes the various dispositions that may be made and sets forth the fees that are to be paid in each case. They are very low. It would be hard to make a living on them, at least.

QUESTION: Mr. Gillete, in your addendum, I noticed that for Multnomah County, which I assume is by far the most populous county in the state, the answer is yes, they do utilize this system but there is nobody making payment and there has been nothing collected in 1973. Is there anything peculiar about Multnomah?

MR. GILLETTE: The peculiarity in Multnomah County is that they wouldn't talk to me. They said yes we are doing it but we don't have the statistics and we are too busy to give them to you.

QUESTION: Well, that is the metropolitan part of the state, isn't it?

MR. GILLETTE: That is right. That is Portland.

QUESTION: So they probably have more things to do, more important things to do than trying to enforce this statute.

MR. GILLETTE: My experience has been that that, at least, is their judgment, yes, sir.

QUESTION: Then the number zero under the number of individuals presently making payment really means that you don't know the answer.

MR. GILLETTE: That is right. That is right. I should have explained that, I think, in the Addendum.

QUESTION: In at least one other place you do have a zero.

MR. GILLETTE: Yes.

QUESTION: Which I take it is a positive answer.

MR. GILLETTE: That is right. We got an answer specifically to that question.

QUESTION: Did you say that $9,000-some was the total amount collected in the whole state in one year?

MR. GILLETTE: No, $9,220 was the total amount collected in Clackamas County, which is a bedroom county adjacent to Multnomah County based upon, I think, 30 or 40 individuals paying and that was the largest amount that was reported to us. I necessarily conducted this survey over a brief period of time. I suspect however this case turns out that Oregon Law Review will finally find out what the true facts are and publish an article on it.

QUESTION: Do you know how long this practice has been followed?

MR. GILLETTE: It has been going on sporadically for perhaps the last eight or ten years, but it is rare.

QUESTION: How old is the statute?

MR. GILLETTE: I think it was passed in 1961.

But the practice has been relatively rare because, as I say, while the judges may not have uniformly followed the fuller interpretation which was placed on the statute by the court of appeals, and may not have always limited themselves to those individuals who, in fact, really were not

indigent in making the requirement, at least now, where the court of appeals has affirmatively said, that is what they must find, that the man really is not indigent and that he can make a payment without hardship either to himself or to his family, the amount recovered is going to be limited.

QUESTION: Did Gideon persuade them to pass this statute?

MR. GILLETTE: I don't know. I wasn't at all involved in the matter at that time and I have no idea what they had in mind.

QUESTION: Well, this is certainly a very narrowing construction of this statute by the Supreme Court, is it not?

MR. GILLETTE: I think it is fair to say that the court of appeals believed that if the statute couldn't survive constitutional muster under this construction, you couldn't write one that provided recoupment. So we believe. I hesitate to make a statement quite that hyperbolic but I think it comes close to that.

The court was concerned to say what was being done and so they limited it as much as they could.

In examining this Court's decisions in Rinaldi versus Yeager and in the Strange case, it was clear that this Court was going to examine not just the face of the statute, but the way it was applied and so the Court wanted to be sure,

absolutely sure, that the formula of words used in the statute wasn't just given lip service that, in fact, the person who was required to make these payments was affirmatively not indigent, in fact, was capable of making the payments and, in fact, even saying that he is non-indigent may be inaccurate because whatever indigency is, the ability to make a payment without hardship to ones' self or to one's family is probably a financial condition better than not being indigent.

QUESTION: Have you had any experience, Mr. Solicitor General, actually, since Fuller was decided how, what kind of hearings a sentencing judge has before making these determinations?

MR. GILLETTE: No, I have not had the opportunity to find out. This is the one record I have seen on the question. I have encountered one case under an older statute where -- with regard to something Mr. Kuhn said -- where the statute provided that a losing appellate would have costs on appeal assessed against him.

We had a situation there where an individual had costs assessed against him in what appeared to be an unfair situation. That statute was never challenged and, frankly, I think was unconstitutional because it applied to individuals who obviously could not have paid and, in fact, were incarcerated. But the legislature had a good chance to

repeal it before we were faced with trying to come up with a construction that would have saved it and the particular case that gave rise to this information which occurred about a month ago, I think we got resolved by simply pointing out that it wasn't fair.

But I have not had an opportunity to see a hearing under this new procedure. I don't think there are going to be very many. This condition is rarely imposed.

QUESTION: Do you think judges will just give up?

MR. GILLETTE: No, I don't think there are going to be many hearings, at least with regard to revocation, under this situation because in some respects this is the easiest condition to meet.

If an individual is really determined to survive on probation, rather than have it revoked, he is going to meet this, if anything. It is the easiest affirmative index to give to the court that he is meeting the terms of probation, and so we are confident that it is going to work in those few instances in which it is applied.

Now, Justice Rehnquist asked about sanctions and the answer to that I think was fairly well covered. The sanction is contempt and the sanction applies not just to individuals placed on probation. The sanction speaks to all convicted individuals who have this condition imposed upon them.

Now, Mr. Kuhn has suggested this has never happened with respect to a penitentiary inmate. We have no statistics to show that one way or another. Practically speaking, however, I suspect that is true not because the courts as a matter of practice are trying to distinguish between those who are placed on probation and those who are not, but simply because people who go to jail, by and large, have even less chance to improve on their original condition of indigency than do those who remain outside and, in fact, one of the reasons, sometimes, that an individual is granted probation in addition to other considerations is the fact that he has got a job. He is maintaining the job and he is caring for his family and he has shown in other ways that he is a contributing citizen, whatever his particular offense may have been.

So I think the reasons for that distinction, if, in fact, they are accurately portrayed, and I am willing to concede that they probably are, are reasons which arise out of the particular concern involved and there is really no way ever to get around that kind of problem.

QUESTION: Would it be fair to say that this statute will have almost no application except in a situation where a defendant, an accused, comes in with a -- whether we call it plea negotiation or plea discussion, whatever it is, there is presented to the court the idea that the man will

enter a plea of guilty if he receives probation and that the probation is urged because he has a good job with a substantial income and a family and then the court would say, I'll accept the plea and grant probation provided you pay $25 a month until the total cost of your defense is made up." Something like that?

MR. GILLETTE: I am not sure I would say -- I follow that. I am not sure I can say it will arise in a case --

QUESTION: And only that.

MR. GILLETTE: -- that is that limited but they will be nearly so limited --

QUESTION: Yes.

MR. GILLETTE: -- simply because of the nature of the condition that the Fuller decision places on imposing that requirement.

Part of the reason I hesitate on that is because judges rarely, in Oregon, want to list any recomm endation with regard to sentence and that is not part of plea negotiation, normally, with the exception of one county. D.A.'s don't make such recommendations and judges would not listen if they did, regarding that as their province and not the District Attorney's.

QUESTION: That might come in from the defendant, however, with the District Attorney taking no position at all.

MR. GILLETTE: That happens. That is right.

Now, with regard, if I may, to the equal protection question, counsel has urged this Court -- as it was urged upon the Oregon court -- that James versus Strange is applicable here because the Oregon statute, just like the Kansas statute, in some way affirmatively denies to individuals subjected to this condition, those exemptions which are granted to other judgment debtors.

In practice, that just is not so. The court of appeals decision specifically says that is not so. It says these people are entitled to the same exemptions everybody else is. I've set forth the statutory scheme in my brief and I think it shows that those exemptions are afforded in the same way they are afforded to every other judgment debtor.

So I would submit that if that ground in James versus Strange, was the full reason this Court felt, in Strange, to strike that statute, then James versus Strange is just not in point at all in this litigation.

Now, I see from my notes that I have covered the other particular points that I wanted to mention to the Court.

Mr. Chief Justice, unless the Court has other questions, I am finished.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Do you have anything further, Mr. Kuhn?

MR. KUHN: Nothing further, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 2:55 o'clock p.m., the case was submitted.]