5-1-1971

# Thirty Dollars or Thirty Days: Equal Protection for Indigents

Thomas Tansey

and the other which demands the truth from a witness.[32] A "cautious balancing" is necessary. For Burger and the majority of this Court, the second objective is more important to the administration of justice. The Court reasons that if a prior statement of the defendant cannot be used against him for impeachment *or* as evidence, there is more of a tendency on the part of the defendant to perjure himself by contradicting his prior statement with his in-court testimony. On the other hand, the majority of the impeachment cases, the majority in *Miranda,* and the dissent in *Harris* would give the first objective—that of prohibiting the use of illegally obtained evidence—a definite priority.

The result in this case cannot be considered surprising in view of the change in the composition of the Court. Justices Harlan, Stewart and White were in the dissent in *Miranda.* Chief Justice Burger was the district court judge in *Johnson v. United States*[33] which permitted the use of an "improperly" obtained confession for impeachment purposes, and he also wrote the opinion in *Tate v. United States,* exemplifying the same view. With the instant decision the Court is in effect undercutting both *Miranda*'s attempt to supply adequate safeguards to keep the fifth amendment self-incrimination clause intact and to more effectively "police the police" and the *Weeks* exclusionary rule which *Walder* does not claim to have overruled.

The Court is in essence adopting the position of a minority of states by holding that impeachment by means of illegally obtained evidence is permissible. However, the Court makes no mention of these cases, relying instead on the cases which have eroded the exclusionary rule of *Weeks.* In this author's opinion, the Court by so doing, ignores a possibly more valid method—that of following an established line of cases—which it could have used to arrive at its desired result.

JAN NOVACK

## THIRTY DOLLARS OR THIRTY DAYS: EQUAL PROTECTION FOR INDIGENTS

Two defendants, convicted of arson, were granted probation on the condition that each pay a fine of $2500 plus a penalty assessment of $625, or in lieu of payment, serve one day in the county jail for each $10 unpaid. This procedure was authorized by statute.[1] One defendant paid and was summarily released from custody. The other defendant, Antazo, was an indigent and therefore began serving his default sentence. While incarcerated, he petitioned the California Supreme Court for a writ of

32. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960).
33. 344 F.2d 163 (D.C. Cir. 1964).

1. CAL. PENAL CODE § 1205 (Deering 1960).

habeas corpus. The court, recognizing that habeas corpus would lie in special circumstances even though a remedy by appeal might be available, *held:* Ordering a convicted indigent to serve out a fine and penalty at a specified rate per day because of his inability to pay constitutes an invidious discrimination on the basis of wealth in violation of the equal protection clause of the fourteenth amendment.[2] *In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

Imprisonment for default originated in thirteenth century England.[3] In the United States, such practice is generally authorized by statute, and the Supreme Court has upheld such statutes.[4] Over the years convicted indigents have sought relief through constitutional provisions, the most significant of which are the eighth amendment,[5] the thirteenth amendment[6] and the "equal protection" clause of the fourteenth amendment.[7] The eighth amendment has offered the indigent defendant little hope as a defense. When a sentence includes a fine, most authorities reject the assertion that imprisonment for nonpayment constitutes "cruel and unusual" punishment.[8] This is especially true when the period of confinement is within the statutory maximum for the substantive offense.[9] Generally, the courts have refused to consider a defendant's ability to pay in determining whether "cruel or unusual" punishment was involved.[10] The eighth amend-

2. U.S. CONST. amend. XIV, § 1, provides that:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 275 (6th ed. 1960).

4. Williams v. Illinois, 399 U.S. 235 (1970); Hill v. United States *ex rel.* Wampler, 298 U.S. 460 (1936); *Ex parte* Jackson, 96 U.S. 727 (1877).

5. U.S. CONST. amend. VIII which states
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

6. U.S. CONST. amend. XIII, § 1, which states
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

7. U.S. CONST. amend. XIV, § 1.

8. Board of Health v. Elmwood Terrace, Inc., 85 N.J. Super. 240, 204 A.2d 379 (1964); People *ex rel.* Crockett v. Redman, 41 Misc. 2d 962, 246 N.Y.S.2d 861 (Sup. Ct. Erie Cty. 1964); Adjmi v. State, 139 So.2d 179 (Fla. 3d Dist. 1962); Lee v. State, 103 Ga. App. 161, 118 S.E.2d 599 (1961); *Ex parte* Carr, 365 P.2d 392 (Okla. Crim. 1961); People v. Magoni, 73 Cal. App. 78, 238 P. 112 (1925); Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925); State v. Tullock, 118 Wash. 496, 203 P. 932 (1922); *Ex parte* Converse, 45 Nev. 93, 198 P. 229 (1921); Berkenfield v. People, 191 Ill. 272, 61 N.E. 96 (1901); State v. Peterson, 38 Minn. 143, 36 N.W. 443 (1888).

9. Smith v. United States, 273 F.2d 462 (10th Cir. 1959); Hadley v. State, 196 Ark. 307, 117 S.W.2d 352 (1938); Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943); Lawrence v. State, 2 Md. App. 736, 237 A.2d 81 (1968); State v. Bethea, 272 N.C. 521, 158 S.E.2d 591 (1968); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948); State v. Pratt, 36 Wis. 2d 312, 153 N.W.2d 18 (1967).

10. *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833); Burlington C.R.& N. Ry. Co. v. Dey, 82 Iowa 312, 48 N.W. 98 (1891); Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925). *But see Ex parte* Tuicher, 69 Iowa 393, 28 N.W. 655 (1886).

ment sanctions were only recently made mandatory upon the states,[11] and as yet have not been used as a valid defense to such imprisonment.[12]

The thirteenth amendment has also failed to provide assistance to the defendant who is without funds. The weight of authority holds that it is not "involuntary servitude" to put a defendant in jail in default of payment of a fine.[13]

The most successful avenue of attack on default sentencing appears to be through the "equal protection" clause of the fourteenth amendment. The aegis of this clause has been specifically extended to indigents in a barrage of recent decisions.[14] The United States Supreme Court set the trend by recognizing that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[15] In *Williams v. Illinois*,[16] a convicted indigent was fined and given the maximum prison term allowed for the substantive violation. Should there be a default of payment of the fine, the defendant was to satisfy it by an additional period of incarceration at a specified daily rate. The Court, relying upon the "equal protection" clause, held that default sentencing could *not* be applied *if* the effect would be to extend the length of confinement beyond the statutory substantive limit.[17] In *Williams*, the Court impliedly gave reluctant approval to the practice of default sentencing of indigents under certain conditions.

The "equal protection" safeguards are finally finding limited expression in state court decisions involving default sentencing of indigents. Traditionally, lower courts have approved of incarceration for nonpayment

---

11. Robinson v. California, 370 U.S. 660 (1962). State court decisions prior to this frequently relied upon *state* constitutions in deciding whether the provisions against "cruel and unusual" punishment were violated.

12. *See* State v. Hampton, 209 So.2d 899 (Miss. 1968); People v. Collins, 47 Misc. 2d 210, 261 N.Y.S.2d 970 (Orange Cty. Ct. 1965). *But see* People v. McMillan, 53 Misc. 2d 685, 279 N.Y.S.2d 941 (Orange Cty. Ct. 1967), where the court ordered the release of a prisoner confined to serve out a fine at $1 per day, saying that the formula used to equate the fine and punishment was excessive by today's economic standards.

13. Goode v. Nelson, 73 Fla. 29, 74 So. 17 (1917); City of Chicago v. Kunowski, 308 Ill. 206, 139 N.E. 28 (1923); City of Topeka v. Boutwell, 53 Kan. 20, 35 P. 819 (1894); State v. McGuire, 152 La. 953, 94 So. 896 (1922); *Ex parte* Hollman, 79 S.C. 9, 60 S.E. 19 (1908); City of Milwaukee v. Horvath, 31 Wis. 2d 490, 143 N.W.2d 446 (1966). *But cf.* Anderson v. Ellington, 300 F. Supp. 789 (M.D. Tenn. 1969); Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968), where it was held that default sentencing to work off the costs of prosecution contravened the thirteenth amendment since costs are not part of the punishment.

14. Williams v. Illinois, 399 U.S. 235 (1970); Roberts v. LaVallee, 389 U.S. 40 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967); Long v. District Court, 385 U.S. 192 (1966); Rinaldi v. Yaeger, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Eskridge v. Washington State Bd. of Prison Terms, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956).

15. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

16. 399 U.S. 235 (1970).

17. The holding was specifically restricted to the situation where incarceration for nonpayment of the fine would result in imprisonment for a term longer than that authorized by statute for violation of the substantive law.

of a fine.[18] However, where the court is faced with an indigent defendant who could possibly be incarcerated beyond the statutory maximum, recent decisions have afforded the indigent relief through the fourteenth amendment "equal protection" clause.[19]

The "equal protection" clause does not require that a state statute apply with absolute and complete equality to all persons.[20] It does allow a state to differentiate in its treatment so long as the result does not amount to an invidious discrimination.[21] In California, the test used to determine whether the discrimination is invidious is whether there is a compelling state interest which justifies the law and whether the distinctions drawn by such law are necessary to implement this interest.[22]

In *Antazo*, the court recognized that the state had a compelling and legitimate interest in collecting fines, but found that this interest was not promoted by conditioning probation upon payment of the assessed fine[23] and declared the statute[24] invalid as applied.[25] However, in granting a writ of habeas corpus, the court did not totally relieve Antazo of obligation which might be owing by virtue of his probation order.[26]

---

18. Callahan v. United States, 371 F.2d 658 (9th Cir. 1967); Panno v. United States, 203 F.2d 504 (9th Cir. 1953); United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956); State v. Hansen, 67 Idaho 359, 181 P.2d 192 (1947); State v. Gray, 225 La. 38, 72 So.2d 3 (1954); Moulden v. State, 217 Md. 351, 142 A.2d 595 (1958); State v. Hampton, 209 So.2d 899 (Miss. 1968); State v. Johnson, 432 S.W.2d 284 (Mo. 1968); People v. Watson, 204 Misc. 467, 126 N.Y.S.2d 832 (Ct. of Gen. Sess. N.Y. Cty. 1953); *Ex parte* Carr, 365 P.2d 392 (Okla. Crim. 1961); Foust v. Ford, 209 S.W.2d 941 (Tex. Civ. App. 1948). *Accord* United States v. Buchanan, 195 F. Supp. 713 (E.D. Ky. 1961); Hankins v. United States, 120 A.2d 590 (D.C. Mun. Ct. App. 1956); *In re* Benedict, 142 Ohio St. 632, 53 N.E.2d 646 (1944).

19. Arthur v. Schoonfield, 315 F. Supp. 548 (D. Md. 1970); Lucas v. United States, 268 A.2d 524 (D.C. Cir. 1970); Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Cir. 1968); People v. Mackey, 18 N.Y.2d 755, 221 N.E.2d 462, 274 N.Y.S.2d 682 (1966); People v. Saffore, 18 N.Y.S.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966); People v. Collins, 47 Misc.2d 210, 261 N.Y.S.2d 970 (Orange Cty. Ct. 1965); Strattman v. Studt, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969). *Accord* Spinler v. State, 152 Mont. 69, 446 P.2d 429 (1968). *Cf.* Dillehay v. White, 264 F. Supp. 164 (M.D. Tenn. 1966); *In re* Cole, 17 Ohio App. 2d 207, 245 N.E.2d 384 (1968). *But see* Wade v. Carsley, 221 So.2d 725 (Miss. 1969).

20. Rinaldi v. Yeager, 384 U.S. 305 (1966); Douglas v. California, 372 U.S. 353 (1963).

21. Douglas v. California, 372 U.S. 353 (1963).

22. Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

23. Actually the respondent, Sheriff of Santa Clara County, argued that the default sentence could be substantiated on two grounds: 1.) as a method of enforcing payment and 2.) as "relating to rehabilitation." The Court summarily discarded the respondent's second reason as untenable. The first ground was attacked by a dual approach. First, the court could not envision how imprisonment could force a man to pay when he was without funds. Second, even if it could be assumed that such imprisonment serves the state's collection mechanism it is not necessary in a Constitutional sense.

24. CAL. PENAL CODE § 1205 (Deering 1960).

25. A statute can be discriminatory on its face, Brown v. Board of Education, 347 U.S. 483 (1954); or as applied, Hernandez v. Texas, 347 U.S. 475 (1954); Fowler v. Rhode Island, 345 U.S. 67 (1953); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

26. The Court, without elucidating, made reference to modes of collecting fines as an alternative to confinement. 3 Cal. 3d at 117, 473 P.2d at 1010, 89 Cal. Rptr. at 266.

Prior to 1971, default sentencing in Florida was provided for by statute.[27] Florida courts had consistently permitted such sentencing[28] as long as the statutory maximum was not exceeded.[29] State constitutional provisions[30] prohibiting "excessive fines" or "cruel and unusual punishment" have not been successfully employed when the total period of confinement does not extend beyond the limit authorized by statute for conviction of the substantive offense.[31] Even when default sentencing is involved,[32] the prohibition against "imprisonment for debt"[33] is not applicable to criminal fines.[34]

Since the legislature has copiously provided for the indigent defendant, it is doubtful that Florida courts would at this time be inclined to extend the *Williams*[35] interpretation of "equal protection" to the interpretation given by the court in *Antazo*. Statutes permit, under certain circumstances, the abatement of costs,[36] credit for time served,[37] and the

27. FLA. STAT. § 921.14 (1969) *repealed*, Laws of Florida § 180, Ch. 70-339 (1970), provided as follows:

> Whenever a court shall sentence and adjudge a person to pay a fine or a fine and costs of prosecution such court shall also provide in such sentence a period of time for which such person shall be imprisoned in default of the payment of the same. Such term of imprisonment shall be served in the county jail if the offense for which sentence is imposed is a misdemeanor and in either the state prison or the county jail if the offense for which the sentence is imposed is a felony, and the sentence shall specify where such term is to be served.

However, the following statute remains in force: FLA. STAT. § 56.011 (1969).

> [N]or shall the body of any defendant be subject to arrest or confinement for the payment of money, except it be for fines imposed by lawful authority.

28. Dixon v. Mayo, 64 So.2d 176 (Fla. 1953); Williams v. State, 158 Fla. 415, 28 So.2d 691 (1947); *Ex parte* Peacock, 25 Fla. 478, 6 So. 473 (1889).

29. Schreck v. State, 240 So.2d 873 (Fla. 4th Dist. 1970); Gary v. State, 239 So.2d 523 (Fla. 4th Dist. 1970). *Accord* Lyle v. Walter, 100 Fla. 1457, 131 So. 383 (1930); *Ex parte* Brandamour, 91 Fla. 889, 108 So. 895 (1926).

30. FLA. CONST. DECL. OF RIGHTS § 17.

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

31. La Barbera v. State, 63 So.2d 654 (Fla. 1953).

32. Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943).

33. FLA. CONST. DECL. OF RIGHTS § 11 provides that "[N]o person shall be imprisoned for debt, except in cases of fraud."

34. Lanz v. Dowling, 92 Fla. 848, 850, 110 So. 522, 525 (1926) held that:

> [T]he authorities are unanimous in holding that the debts intended to be covered by such provisions [against imprisonment for debt] of the Constitution must be those arising exclusively from actions ex contractu, and was never meant to include . . . fines, penalties, and other impositions imposed by the courts in criminal proceeding as punishments for crimes committed against the common or statute law.

*See also* Turner v. State *ex rel.* Gruver, 168 So.2d 192 (Fla. 3d Dist. 1964) (garbage collection fee held to be a "debt").

35. The Florida District Court of Appeal, Fourth District, has already adopted *Williams*. Schreck v. State, 240 So.2d 873 (Fla. 4th Dist. 1970); Gary v. State, 239 So.2d 523 (Fla 4th Dist. 1970).

36. FLA. STAT. § 939.05 (1969).

> In all cases less than capital, when it appears from due proof made in open court that the person convicted is wholly unable to pay costs, and that the judgment has in other respects been complied with, the court before which such person was convicted may discharge him without payment of costs.

37. FLA. STAT. § 951.15 (1969).

> Every working prisoner shall be entitled to receive, together with subsistence, a credit at the rate of thirty cents per diem, on account of fines and costs adjudged against him.

release of an incarcerated indigent.[38] In *Schreck v. State*,[39] the court recognized that imprisonment plus the levying of a fine was permissible[40] when the statute in question[41] provided for either imprisonment *or* a fine. In light of *Williams*, the case was remanded to the trial court for "imposition of a proper sentence." The decision, in essence, presupposed that default sentencing is constitutionally permissible.[42] The *Schreck* case appears to represent the judicial and legislative climate in Florida at the time of this writing.

In this author's opinion, *Antazo* could well be the harbinger of another step to afford the indigent defendant the "equal protection" of the laws.[43] Incarceration is not the only means available for enforcing the collection of fines.[44] Certainly the indigent should have the option to satisfy the fine by an alternative method without automatically having to default and go to jail.[45]

THOMAS TANSEY

38. FLA. STAT. § 922.04 (Supp. 1970).

> When the court determines on the written application of a prisoner that he has been imprisoned for sixty days solely for failure to pay a fine or costs which total not more than three hundred dollars and that the prisoner is indigent and unable to pay the fine or costs, the court shall order the prisoner discharged from custody.

*See Ex parte* Cutchen, 148 Fla. 345, 4 So.2d 373 (1941).

39. 240 So.2d 873 (Fla. 4th Dist. 1970).

40. FLA. STAT. § 775.06 (1969).

> [A]nd whenever the punishment is prescribed to be a fine or imprisonment . . . the court may, in its discretion, proceed to punish by both fine and such imprisonment.

41. FLA. STAT. § 811.021(2) (1969), relating to grand larceny.

42. Of course the *Williams* doctrine must be followed.

43. While this article was being prepared for publication the *Williams* philosophy was reiterated in Tate v. Short, 91 S. Ct. 668 (1971). In *Tate* the defendant, an indigent, was convicted of several traffic offenses and sentenced to pay a fine. Texas law provided only for a fine as the substantive sentence, although default sentencing was authorized if the fine was not paid. The Court held that default sentencing could not be automatically imposed on indigents such that the statutory maximum for the substantive violations would be exceeded. Such a procedure of sentencing would be a denial of *equal protection*. Since the statutory provisions only provided for a fine in such cases, *any* jail time as a default sentence would exceed the maximum sentence for the substantive violation. *Tate* did not preclude default sentencing in principle. Such sentencing would be allowed under *Tate* for a defendant with the ability to pay the fine but who refused to do so. Also an indigent who was offered an alternate method of payment could be sentenced if collection of the fine still proved unsuccessful.

Because *Tate* relied on *Williams* for its holding it appears that a state could still automatically sentence an indigent to serve out a fine so long as the maximum jail sentence provided by statute was not exceeded by the default sentence. Of course, in California *Antazo* would prohibit this practice even though the statutory maximum was not surpassed by the default sentence.

44. FLA. STAT. § 922.02 (Supp. 1970).

> Execution on a sentence imposing a fine may be issued in the same manner as execution on a judgment in a civil action, whether or not the sentence also imposes imprisonment.

45. One method that has been suggested is installment payments. This at least affords the defendant an opportunity to pay the fine and avoid incarceration. *See generally* Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938 (1966); Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611 (1969).