

IN THE  
SUPREME COURT  
OF FLORIDA

**FILED**

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NO. 70,533  
CLERK, SUPREME COURT

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IN RE: ADVISORY  
OPINION OF THE GOVERNOR  
REQUEST OF MAY 12, 1987

REPLY BRIEF OF  
JAMES M. RUSS, EDWARD R. SHOHAT  
AND THEODORE KLEIN ON BEHALF OF  
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ARGUMENT

I

NO SALES TAX MAY BE PLACED  
UPON A CRIMINAL DEFENDANT'S  
EXERCISE OF HIS RIGHT TO COUNSEL

We do not waiver from our argument. No sales tax can be levied against a person who has hired a lawyer to defend his life or liberty in a state or federal prosecution.

The Governor is right--we have no decision which so expressly holds. That is only because no state has attempted to condition the exercise of the right to counsel on the payment of a sales tax.

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), is, contrary to the Governor's view, the proper precedent for our argument. Harper recognized that "where fundamental rights and liberties are asserted," state laws which "might invade or restrain them must be carefully scrutinized and carefully confined." Id., at 670 (emphasis supplied). And Harper held that "the right to vote is too precious, too fundamental to be so burdened or conditioned" by a \$1.50 tax. Ibid (emphasis supplied).

A tax which forces the criminal defendant to pay the State hundreds or thousands of dollars in order to exercise his fundamental right to counsel burdens or conditions the right and demands very close scrutiny. The Governor's view that the State may do as it pleases as long as it does not

"deny access to counsel" or "interfere with the ability of counsel to communicate or represent his client" (Governor's Brief at 44) misreads the case law and misunderstands the nature of the right at stake. The right to counsel obviously includes the non-indigent person's right to hire a lawyer to defend him against criminal charges:

The reasoning underlying these decisions makes it clear that the sixth amendment generally protects a defendant's decision to select a particular attorney to aid him in his efforts to cope with what would otherwise be an incomprehensible and overpowering governmental authority."

United States v. Laura,  
607 F.2d 52,55-56  
(3rd Cir. 1979).

See also, Powell v. Alabama, 287 U.S. 45,53 (1932):

It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his choice.

The strong language protecting the guarantee of counsel comes from cases where that right was rendered meaningless because of a defendant's indigency. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 467 U.S. 25 (1972). Those cases stressed the special importance of counsel and extended the right to counsel to indigents. They did not

negate the principle that people capable of hiring counsel were exercising a fundamental constitutional guarantee. It is that guarantee of counsel which the State is now burdening or conditioning with its sales tax.

How precious is that right? In a very real way it is more important than other fundamental rights, including the right to vote or the First Amendment guarantee of freedom of speech. One can live without voting, without speaking, or without conveying one's thoughts through the media. But one cannot live if the state successfully imposes its death penalty. Even if one lives, life in a prison vitiates the right to vote and transforms First Amendment rights into a mere theoretical concept. The right to counsel is the ultimate guarantor of the right to save life and liberty from being lost to the state. It preserves, for a person charged with a crime, all the other rights guaranteed by the Constitution, including the full spectrum of rights accorded to people charged with crimes.

Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

United States v. Chronic,  
466 U.S. 648,654 (1984).

So Harper's premise that some rights are "too precious, too fundamental to be so burdened or conditioned"

by even a \$1.50 tax has great force in this case. If one acknowledges the dangers posed by criminal prosecution and recognizes that counsel is often the only protection interposed between the defendant and prison, then one must conclude that a 5% sales tax is an unconstitutional burden on a fundamental and precious right, the right to counsel.<sup>1/</sup>

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<sup>1/</sup> Other facts of this case exacerbate the State's attempt to burden fundamental rights. The State should not be allowed to financially benefit from the exercise of fundamental rights the State itself has forced a person to utilize. Indeed, there should not even exist the appearance of an improper motive when the State makes an individual a criminal suspect or defendant. See generally, Tumey v. Ohio, 273 U.S. 510, 532-533 (1927); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). In addition, criminal suspects or defendants who use legal services to defend their life or liberty from the State are involuntary purchasers. Unlike choosing to vote, running for office, or advertising, criminal suspects or defendants are effectively forced by the State to exercise their constitutional right to secure counsel. Counsel is a necessity without which they would be overpowered by governmental authority. See, Gideon v. Wainwright, *supra*; United States v. Laura, *supra*. Taxing those who are compelled by State action to defend themselves is far more onerous than taxing those who voluntarily choose to run for office, vote or advertise.

II

IF THE EXERCISE OF THE RIGHT  
TO COUNSEL BY A CRIMINAL  
DEFENDANT MAY BE TAXED, IT  
CAN OCCUR ONLY AS A LAST  
RESORT FOR RAISING REVENUE

The Governor does not address the cases demanding strict scrutiny of burdens placed on fundamental rights. The lesson of those cases is that burdens on fundamental rights must be "carefully confined" (Harper, supra, at 670) and utilize the narrowest or least drastic means for achieving the governmental purpose. Shelton v. Tucker, 364 U.S. 479,488 (1960); Shapiro v. Thompson, 394 U.S. 618,634 (1969).

The governmental purpose here is raising revenue. The State has not carefully confined the burden by choosing the least drastic means for raising money. Taxing persons seeking to preserve their life and liberty and exempting persons having their hair cut or getting their nails done is not the kind of narrow tailoring required by the Constitution. The State has ample lesser restrictive alternatives to raising the revenue it believes it needs.



III

THE SALES TAX EXEMPTION  
SCHEME FOR CRIMINAL  
DEFENDANTS VIOLATES THE  
EQUAL PROTECTION CLAUSE

The Governor has missed the point of our equal protection arguments.

First, the classifications do affect fundamental rights and are therefore subject to strict scrutiny. The Governor's claim that Minneapolis Star and Arkansas Writers' Project trigger strict scrutiny only if a fundamental right is "singled out" (Governor's Brief at 46) is not responsive to our contention. We did not rely on those cases for our equal protection strict scrutiny analysis, and the cases which do support our position (Criminal Defense Brief at 12) are never mentioned by the Governor.

Our position is simple. The State has one expressed interest in the sales tax statute: raising revenue. Therefore there should be no exemptions for any users of legal services. Refunding the tax to the acquitted or to those whose charges are dropped is antithetical to the governmental purpose of raising revenue.

The Governor responds by saying:

From the perspective of the Legislature, the issue is whether it was rational to permit a refund of taxes paid by a person who has, by operative standards (acquittal or dismissal) been wrongly subjected to the burdens of the criminal justice process in the first place.

Governor's Brief, at 49.  
(emphasis supplied)

That argument thus concedes that the sales tax is a tax only on "guilty" consumers of criminal defense legal services. Therefore, it is not truly a sales tax; it is a governmental assessment based on criminal culpability. Once the state creates exemptions based on a lack of culpability, the question which must be addressed is: What compelling governmental interest is served by exempting only the "charged innocent" from the tax? The Governor says:

[I]t is clearly rational for the Legislature to have concluded that those actually charged with crimes (but who are innocent) suffer greater burdens attendant to charges being brought than those who avoid charges being brought and that as a matter of legislative grace, the state will not add taxes to the burdens of those who were wrongfully charged.

Governor's Brief, at 51.  
(emphasis in original)

A sales tax scheme based on culpability, however, is hardly rational. Taxation based on a fee set by a lawyer simply bears no relation to culpability. In addition, the "uncharged innocent" have an equal if not greater lack of culpability than the "charged innocent" but must still pay the tax. And those who were wrongfully charged on 99 out of 100 counts,<sup>2/</sup> who reversed their convictions and established their innocence on appeal, who hire a lawyer to preserve

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<sup>2/</sup> How much sales tax would Bernhard Goetz owe if his prosecution had occurred in Florida?

their Fifth Amendment rights, or who, when the State wrongfully seeks death, hire a lawyer to save their lives must all still pay the tax. "Legislative grace" is simply no answer to an equal protection challenge based on classifications affecting fundamental rights.<sup>3/</sup>

#### CONCLUSION

The sales tax upon legal services rendered to persons suspected of, charged with or prosecuted for violations of state or federal criminal laws should be declared unconstitutional.

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<sup>3/</sup> Although neither the Legislature nor the Governor mention it with reference to our arguments, a "glitch bill", Chapter 87-72, was enacted "on the evening of June 5, 1987." Notice of Amendment to Law filed by the Governor on June 8, 1987. That law, Section 212.0591(10), states in part:

It is the intent of the Legislature to exempt from the tax on services only those services for which exemptions are expressly provided. Therefore, if any exemption is declared facially unconstitutional by a court of competent jurisdiction, it is the intent of the Legislature that the exemption be deemed inoperative as to all persons and not expanded to encompass services or persons not expressly exempted from the tax.

If this "glitch bill" is interpreted to mean that the Legislature in June cured the equal protection defects it created in May, then we withdraw our equal protection arguments based on the underinclusiveness of the statutory exemptions.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Reply Brief of James M. Russ, Edward R. Shohat and Theodore Klein on Behalf of Florida Criminal Defense Lawyers" has been furnished by Federal Express to (1) THE HONORABLE BOB MARTINEZ, Governor, The Capitol, Tallahassee, Florida 32301; (2) THE HONORABLE ROBERT BUTTERWORTH, Attorney General, The Capitol, Tallahassee, Florida 32301; (3) ALAN C. SUNDBERG, Esquire, CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A., Special Counsel to the Governor, Post Office Drawer 190, Tallahassee, Florida 32302; and (4) TALBOT D'ALEMBERTE, Esquire, College of Law, Florida State University, Tallahassee, Florida 32306-1034, this 18<sup>th</sup> day of June, 1987.

  
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BRUCE ROGOW

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