The Burger Court Opinion Writing Database

Linda R. S. v. Richard D.

410 U.S. 614 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

6

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

CHAMBERS OF
THE CHIEF JUSTICE

January 26, 1973

Re: No. 71-6078 - Linda R. S. v. Richard D.

Dear Thurgood:

I can join your first per curiam. I agree with the objections to a remand.

Regards,

WEB

Mr. Justice Marshall

Copies to a Conference

SUPREME COURT OF THE UNITED STATES

No._____

Dexter, et al.,)
) Ninth Circuit Court of Appeals
v.)
)
Schrunk, et al.)

Application for a restraining order.

Under Dombrowski v. Pfister, 380 U.S. 479, petitioners make out a strong case for federal protection of their First Amendment rights. But Dombrowski, a five to four decision decided in 1965, is up for re-examination in cases set for reargument this fall. If the present case were before the Conference, I am confident it would be held pending the cases to be reargued. Hence, as Circuit Justice, I do not feel warranted in taking action contrary to what I feel the Conference would do. Accordingly, I deny the restraining order requested.

August 29, 1970

William O. Douglas

COPY

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

Dexter v. Schrunk } Ninth Circuit Court of Appeals

application for a restraining order

Under Dombrowski v. Pfister, 380 U.S. 479 petitioner makes out a strong case for federal protection of First Amendment rights. But Dombrowski, a five to four decision decided in 1965, is up for reexamination in cases set for reargument this Fall. If the movant were here before the Conference I am confident it would be held pending those cases to be reargued. Hence, as Circuit Justice, I do not feel warranted in taking action contrary to what I feel the Conference would do. Accordingly I deny the restraining order requested.

Wm O Douglas

Aug 29, 1970

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 10, 1973

Dear Thurgood:

Please join me in your Per Curiam of January 10 in No. 71-6078- Linda R. S. v. Richard D.

W. O. D.

Mr. Justice Marshall

cc: Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 8, 1973

Dear Thurgood:

In 71-6078, Linda v. Texas I liked your other version rather than the one circulated Feb. 8th.

But even so I'm still with you.

William O. Douglas

Mr. Justice Marshall

cc: The Conference

February 9, 1973

Dear Thurgood:

As respects 71-6078, Linda v. Texas I have wobbled a bit as you know. I think I'll finally land with Harry Blackmun whose dissent I have just seen.

William O. Douglas

Mr. Justice Marshall

WOD

February 17, 1973

Dear Harry:

In 71-6078 Linda v. Richard I sent you earlier a note to add me to your dissent. I have however reconsidered and am now joining Byron's dissent.

William O. Douglas

Mr. Justice Blackmun

WD

(3)

M

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 17, 1973

Dear Byron:

Please join me in your dissent in 71-6078, Linda v. Richard.

W.O.D.

William O. Douglas

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 9, 1973

RE: No. 71-6078 Linda R.S. v. Richard D.

Dear Harry:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 10, 1973

No. 71-6078 - Linda R. S. v. Richard D.

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.
1.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 10, 1973

No. 71-6078 - Linda R. S. v. Richard D.

Dear Thurgood,

I am totally opposed to remanding this case for reconsideration in the light of our proposed decision in Gomez. Even if I agreed with the proposed disposition of Gomez, I could never join an opinion suggesting that a member of the public has standing to attack the constitutionality of a criminal statute on the ground that it does not go far enough.

Sincerely yours,

P.S.
I.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 15, 1973

Re: No. 71-6078, Linda R. S. v. Richard D.

Dear Thurgood,

I am glad to join your opinion in this case, as recirculated February 15.

Sincerely yours,

P.S.
1.

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnqu

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 2-14-

No. 71-6078

Recirculated: _____

Linda R. S. et al., Appellants, v. Richard D. and Texas et al. | On Appeal from the United States District Court for the Northern District of Texas.

[February —, 1973]

MR. JUSTICE WHITE, dissenting.

Appellant alleged that she is the mother of an illegitimate child and that she is suing "on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father." Appellant sought a declaratory judgment that Art. 602 is unconstitutional and an injunction against its continued enforcement against fathers of legitimate children only. Appellant further sought an order requiring Richard D., the putative father, "to pay a reasonable amount of money for the support of his child."

Obviously, there are serious difficulties with appellant's complaint insofar as it may be construed as seeking to require the official appellees to prosecute Richard D. or others or to obtain what amounts to a federal child-support order. But those difficulties go to the question of what relief the court may ultimately grant appellant. They do not affect her right to bring this class action. The Court notes, as it must, that the father of a legitimate child, if prosecuted under Art. 602, could properly raise the statute's under-inclusiveness as an affirmative defense. See *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949). Presumably, that same

father would have standing to affirmatively seek to enjoin enforcement of the statute against him. Cf. *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966); see also *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). The question then becomes simply: why should only an actual or potential criminal defendant have a recognizable interest in attacking this allegedly discriminatory statute and not appellant and her class? They are not, afterall, in the position of members of the public at large who wish merely to force an enlargement of state criminal laws. Cf. *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). Appellant, her daughter, and the children born out-of-wedlock whom she is attempting to represent have all allegedly been excluded intentionally from the class of persons protected by a particular criminal law. They do not get the protection of the laws that other women and children get. Under Art. 602, they are rendered nonpersons; a father may ignore them with full knowledge that he will be subjected to no penal sanctions. The Court states that the actual coercive effect of those sanctions on Richard D. or others "can, at best, be termed only speculative." This is a very old statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfil their support obligations to their legitimate children.

Unquestionably, Texas prosecutes fathers of legitimate children on the complaint of the mother asserting nonsupport and refuses to entertain like complaints from a mother of an illegitimate child. I see no basis for saying

Record argument did not Texas say they did enforce this law

that the latter mother has no standing to demand that the discrimination be ended, one way or the other.

If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them. Appellant and her class have no less interest in challenging their exclusion from what their own State perceives as being the beneficial protections that flow from the existence and enforcement of a criminal child-support law.

I would hold that appellant has standing to maintain this suit and would, accordingly, reverse the judgment and remand the case for further proceedings.

BN

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice M
Mr. Justice B
Mr. Justice P
Mr. Justice R

2nd DRAFT

From: White, J.

Circulated:

Recirculated: 2-2

SUPREME COURT OF THE UNITED STATES

No. 71–6078

Linda R. S. et al., Appellants, v. Richard D. and Texas et al. } On Appeal from the United States District Court for the Northern District of Texas.

[February —, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Appellant Linda R. S. alleged that she is the mother of an illegitimate child and that she is suing "on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father." Appellant sought a declaratory judgment that Art. 602 is unconstitutional and an injunction against its continued enforcement against fathers of legitimate children only. Appellant further sought an order requiring Richard D., the putative father, "to pay a reasonable amount of money for the support of his child."

Obviously, there are serious difficulties with appellant's complaint insofar as it may be construed as seeking to require the official appellees to prosecute Richard D. or others or to obtain what amounts to a federal child-support order. But those difficulties go to the question of what relief the court may ultimately grant appellant. They do not affect her right to bring this class action. The Court notes, as it must, that the father of a legitimate child, if prosecuted under Art. 602, could properly raise the statute's under-inclusiveness as an affirmative defense. See *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949). Presumably, that same

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

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JAN 8 1973

Recirculated: _____

No. 71-6078

Linda R. S. et al., Appellants,
v.
Richard D. and Texas et al.

On Appeal from the United States District Court for the Northern District of Texas.

[January —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner, the mother of an illegitimate child, brought this action in United States District Court on behalf of herself, her child, and others similarly situated to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code. A three-judge court was convened pursuant to 28 U. S. C. § 2281, but that court dismissed the action for want of standing.[1] See *Linda R. S.* v. *Richard D.*, 335 F. Supp. 804 (ND Tex. 1971). We postponed consideration of jurisdiction until argument on the merits, 405 U. S. 1064, and now affirm the judgment below.

Article 602, in relevant part, provides: "any parent who shall wilfully desert, neglect or refuse to provide

[1] The District Court also considered an attack on Art. 4.02 of the Texas Family Code, which imposes civil liability upon "spouses" for the support of their minor children. Petitioner argued that the statute violated equal protection because it imposed no civil liability on the parents of illegitimate children. However, the three-judge court held that the challenge to this statute was not properly before it since petitioner did not seek an injunction running against any state official as to it. See 28 U. S. C. § 2281. The Court therefore remanded this portion of the case to a single district judge. See 335 U. S., at 807. The District Court's disposition of petitioner's Art. 4.02 claim is not presently before us.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 10, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 71-6078 - Linda R.S. v. Richard D.

At the time I circulated my initial opinion in this case, it appeared that Gomez v. Perez would be dismissed as improvidently granted. However, it now seems that there is majority support for reversal in Gomez, and that the civil analogue to Article 602 will be declared unconstitutional. In light of this development, I wonder if it would not be more appropriate to dispose of Linda R.S. by remanding to consider the effect of Gomez on this litigation. I have made a tentative stab at such an approach, and am circulating a draft per curiam for your comments. If there is not a court for this approach, we may then proceed with consideration of the draft as initially circulated.

T.M.

114-1

p. 3

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

2nd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-6078

Recirculated: JAN 10 1973

Linda R. S. et al., Appellants,
v.
Richard D. and Texas et al.

On Appeal from the United States District Court for the Northern District of Texas.

[January —, 1973]

PER CURIAM.

Petitioner, the mother of an illegitimate child, brought this action in United States District Court on behalf of herself, her child, and others similarly situated to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code. A three-judge court was convened pursuant to 28 U. S. C. § 2281, but that court dismissed the action for want of standing.[1] See *Linda R. S.* v. *Richard D.*, 335 F. Supp. 804 (ND Tex. 1971). We postponed consideration of jurisdiction until argument on the merits, 405 U. S. 1064.

Article 602, in relevant part, provides: "any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child

[1] The District Court also considered an attack on Art. 4.02 of the Texas Family Code, which imposes civil liability upon "spouses" for the support of their minor children. Petitioner argued that the statute violated equal protection because it imposed no civil liability on the parents of illegitimate children. Cf. *Gomez* v. *Perez, ante.* However, the three-judge court held that the challenge to this statute was not properly before it since petitioner did not seek an injunction running against any state official as to it. See 28 U. S. C. § 2281. The Court therefore remanded this portion of the case to a single district judge. See 335 U. S., at 807. The District Court's disposition of petitioner's Art. 4.02 claim is not presently before us.

WD

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 6, 1973

Re: No. 71-6078 - Linda R.S. v. Richard D.

MEMORANDUM TO THE CONFERENCE

Since there does not appear to be a Court for a remand in this case, I shall adhere to my initial draft.

T.M.

5

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

2nd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-6078

Recirculated: FEB 8 1973

Linda R. S. et al., Appellants, v. Richard D. and Texas et al. } On Appeal from the United States District Court for the Northern District of Texas.

[January —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant, the mother of an illegitimate child, brought this action in United States District Court on behalf of herself, her child, and others similarly situated to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code. A three-judge court was convened pursuant to 28 U. S. C. § 2281, but that court dismissed the action for want of standing.[1] See *Linda R. S.* v. *Richard D.*, 335 F. Supp. 804 (ND Tex. 1971). We postponed consideration of jurisdiction until argument on the merits, 405 U. S. 1064, and now affirm the judgment below.

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WJ

1

5

1,2,4,6

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

3rd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: [illegible]

Recirculated: FEB 15 1973

No. 71-6078

Linda R. S. et al., Appellants, *v.* Richard D. and Texas et al. | On Appeal from the United States District Court for the Northern District of Texas.

[January —, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant, the mother of an illegitimate child, brought this action in United States District Court on behalf of herself, her child, and others similarly situated to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code. A three-judge court was convened pursuant to 28 U. S. C. § 2281, but that court dismissed the action for want of standing.[1] See *Linda R. S.* v. *Richard D.*, 335 F. Supp. 804 (ND Tex. 1971). We postponed consideration of jurisdiction until argument on the merits, 405 U. S. 1064, and now affirm the judgment below.

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WP

(7)

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 11, 1973

Re: No. 71-6078 - Linda R.S. v. Richard D.

Dear Thurgood:

I am pleased to join your proposed per curiam as recirculated January 10.

Sincerely,

H.A.B.

Mr. Justice Marshall

cc: The Conference

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

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 2/9/73

No. 71-6078

Recirculated: _____

Linda R. S. et al., Appellants, *v.* Richard D. and Texas et al. | On Appeal from the United States District Court for the Northern District of Texas.

[February —, 1973]

MR. JUSTICE BLACKMUN, dissenting.

By her complaint appellant challenged Texas' statutory exemption of fathers of illegitimate children from both civil and criminal liability. Our decision in *Gomez* v. *Perez*, 409 U. S. — (January 17, 1973), announced after oral argument in this case, has important implications for the Texas law governing a man's civil liability for the support of children he has fathered illegitimately. Although appellant's challenge to the civil statute, as the Court points out, is not procedurally before us, *ante*, — n. 1, her brief makes it clear that her basic objection to the Texas system concerns the absence of a duty of paternal support for illegitimate children. The history of the case suggests that appellant sought to utilize the criminal statute as a tool to compel support payments for her child. The decision in *Gomez* may remove the need for appellant to rely on the criminal law if she continues her quest for paternal contribution.

The standing issue now decided by the Court is, in my opinion, a difficult one with constitutional overtones. I see no reason to decide that question in the absence of a live, on-going controversy. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955). *Gomez* now has beclouded the state precedents relied upon by both parties in the District Court. Thus "intervening circumstances may well have altered the views

of the participants," and the necessity for resolving the particular dispute may no longer be present. *Protective Committee for Independent Shareholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U. S. 414, 453–454 (1968). Under these circumstances I would remand the case to the District Court for clarification of the status of the litigation.

9

p. 1

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

2nd DRAFT

From: Blackmun, J.

Circulated: _____

Recirculated: 2/1

SUPREME COURT OF THE UNITED STATES

No. 71-6078

Linda R. S. et al., Appellants, v. Richard D. and Texas et al. | On Appeal from the United States District Court for the Northern District of Texas.

[February —, 1973]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

By her complaint appellant challenged Texas' statutory exemption of fathers of illegitimate children from both civil and criminal liability. Our decision in *Gomez* v. *Perez*, 409 U. S. — (January 17, 1973), announced after oral argument in this case, has important implications for the Texas law governing a man's civil liability for the support of children he has fathered illegitimately. Although appellant's challenge to the civil statute, as the Court points out, is not procedurally before us, *ante*, — n. 1, her brief makes it clear that her basic objection to the Texas system concerns the absence of a duty of paternal support for illegitimate children. The history of the case suggests that appellant sought to utilize the criminal statute as a tool to compel support payments for her child. The decision in *Gomez* may remove the need for appellant to rely on the criminal law if she continues her quest for paternal contribution.

The standing issue now decided by the Court is, in my opinion, a difficult one with constitutional overtones. I see no reason to decide that question in the absence of a live, on-going controversy. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955). *Gomez* now has beclouded the state precedents relied upon by both parties in the District Court. Thus "inter-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 9, 1973

Re: No. 71-6078 Linda R. S. v. Richard D.

Dear Thurgood:

Please join me.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss
cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 22, 1973

No. 71-6078 Linda R. S. v. Richard D.

Dear Thurgood:

For reasons generally similar to those stated by Potter and Bill Rehnquist, I am not able to join your second draft per curiam.

I am still with you on the first if you go back to it.

Sincerely,

Lewis

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 8, 1973

Re: No. 71-6078 - Linda R.S. v. Richard D. and Texas

Dear Thurgood:

Please join me.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 10, 1973

Re: No. 71-6078 - Linda R.S. v. Richard D. and Texas

Dear Thurgood:

While I joined your original draft per curiam, I cannot join your second draft which would vacate and remand for reconsideration. As you suggest in your first draft, the peculiar nature of the criminal law really does not admit of broadening the narrow construction of a criminal statute on equal protection grounds. I simply do not think it is realistic to suggest that the District Attorney of Dalls County would, in the light of the disposition in Gomez, go ahead and prosecute on the assumption that the Texas courts would now overrule their Beaver decision.

Sincerely,

WEBR

Mr. Justice Marshall

Copies to the Conference

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

December 13, 1972

MEMORANDUM FOR THE CONFERENCE

Subject: Linda R. S., et al. v. Richard D. and Texas, et al.
(No. 71-6078)
(Motion for the appointment of counsel)

At the direction of the Chief Justice, this memorandum is submitted on the above-entitled matter. The motion appeared on the Conference List for December 8 and will be discussed at the December 15 Conference.

FACTS - Background

This case involves, basically, the constitutionality of a state statutory scheme which, as interpreted by the state courts, obligates a parent to support his legitimate children but not his illegitimate children. The Appellants are a class of unwed mothers and their illegitimate children. The case was originally heard in the Northern District of Texas (judgment entered on November 1, 1971) and appealed directly to this Court. This Court noted probable jurisdiction on April 17, 1972 and, on the same date, granted Appellants' motion to proceed in forma pauperis. The Court heard oral argument on December 6, 1972. Several days before, on November 29, 1972, the named Appellant submitted this motion requesting that Windle Turley, Esquire, a member of the bar of this Court, be appointed her counsel. Mr. Turley has been counsel for the Appellants since May 1970 and presented the case to the District Court. The motion claims that he has received "almost no payment for his services since that time." The Clerk advises that, at the time certiorari was granted, the attorney discussed this motion with him and was advised that, if such a motion were submitted, the Court could appoint another member of the bar to represent the party here. The Clerk's office printed the Appellants' brief and the appendix in this case.

DISCUSSION

Since the Criminal Justice Act of 1964 (18 U.S.C. 3006 A) is not applicable here, this motion is governed by Rule 53(7). Neither this rule nor any other rule sets a specific point in the proceedings for the entertainment of such a motion. This Court has granted a motion for appointment of counsel submitted after oral argument. Mancusi v. Stubbs, No. 71-237, motion granted May 19, 1972. A fair reading of Stern and Gressman implies that the motion for appointment of counsel is a logical "next step" after the Court grants certiorari, notes probable jurisdiction, or defers the question of jurisdiction until argument. The same authors note that the Court may sometimes have the Clerk inquire as to the wishes of the party at this point or, in rare instances, appoint counsel sua sponte.

When this Court grants a motion for leave to proceed in forma pauperis, the Clerk's office, in arranging for the preparation of the case, normally informs the party (or the counsel who represented him below) that he may request the appointment of counsel but that this Court is not bound to accept any recommendation or request for a particular attorney. See Douglas v. California, 368 U.S. 912 (1961). The Clerk's office has noted that many attorneys who have "invested" considerable time and effort into a case are reluctant to risk replacement when the litigation approaches its ultimate resolution here. According to Mr. Rodak, many are willing to risk denial of the motion after argument (and the accompanying absorption of expenses) rather than the risk of surrendering their case to another attorney. (The attorney who is the subject of this motion expressed such sentiments to Mr. Rodak.)

There are, of course, sound reasons for not establishing a practice of always appointing the attorney who handled the case in th other forums. The final resolution of serious constitutional questior (or statutory matters which raise serious public policy considerations may well require different assistance than was required in the initia stages of the litigation. On the other hand, the thorough and energet representation of suits involving serious questions of public policy ir the early stages of litigation must also be encouraged.

It would seem appropriate, in considering future changes to the Rules, to avoid situations such as the present one where the Court is confronted with a request for compensation for services already provided. A rule requiring the resolution of the representation question within a specified time after the Court decides to hear the case, coupled with a long-standing policy of appointing the original counsel in all but the exceptional cases, seems to provide adequate assurance and adequate encouragement to members of the bar. At the same time, it would permit this Court to decide the appointment question in a business-like manner without being faced with a fait accompli.

Respectfully submitted:

Kenneth F. Ripple

Kenneth F. Ripple

71-6078

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

January 5, 1973

MEMORANDUM FOR THE CONFERENCE

Subject: Linda R. S., et al. v. Richard D. and Texas, et al.
(Motion for the Appointment of Counsel)

At the direction of the Chief Justice, this memorandum is submitted to supplement my memorandum of December 13 on the above-entitled matter. I have been asked to discuss the law governing payment of counsel in civil cases and to distinguish that situation from payment in criminal cases.

Reimbursement of counsel is basically covered by the Criminal Justice Act of 1964 (as amended), 18 U.S.C. 3006A, and this Court's Rule 53(7) (8). The scope and the standards of each are substantially different.

Cases Under the Criminal Justice Act

As amended,[1] this Act applies, basically, to federal criminal proceedings[2] and collateral attacks under 18 U.S.C. 2241, 2254, 2255 or 18 U.S.C. 4245.[3] It provides representation and ancillary services

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1/ This Act was extensively revised in 1970, primarily as a result of a study by Professor Oaks under the auspices of the Office of Criminal Justice of the Department of Justice and the Committee to Implement the Criminal Justice Act of the Judicial Conference of the United States. See: 1970 U.S. Code Congressional and Administrative News p. 3984-85.

2/ The exact scope is set forth at 18 U.S.C. 3006A(a) and includes juvenile proceedings based on federal law, violation of probation, arrest situations.

3/ See next page.

"for any person financially unable to obtain adequate representation."[4] In addition to reimbursement for expenses, the appointed attorney may be compensated at an hourly rate,[5] with a maximum fee of $1000 in an appellate court.[6] The Rules of this Court reflect the scope of the

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[3] 18 U.S.C. 3006A(g) notes that representation may be furnished in such collateral attack situations "when the court determines that the interests of justice so require. . . ." The inclusion of this area was a result of the 1970 revision: "Although there is currently no constitutional or statutory right to assigned counsel in any of these proceedings each frequently raises serious complex issues of law and fact. . . . In circumstances where the court deems it essential to appoint counsel the attorney should be entitled to compensation and the benefit of other resources provided by the Criminal Justice Act." H. Rep. 91-1546, Sept. 30, 1970. 1970 U.S. Code Cong. Admin. News 3992-3993.

[4] 18 U.S.C. 3006(a). The legislative history notes that elibibility for assistance was deliberately phrased in terms of financial inability to obtain adequate representation rather than indigency. Compare: 28 U.S.C. 1915.

[5] 18 U.S.C. 3006A(d)(1) -- $30/hr. in court, $20/hr. out of court or as fixed by the judicial counsel.

[6] 18 U.S.C. 3006A(d)(2). The maximum can be waived if "the amount of the excess payment is necessary to provide fair compensation."

Act prior to its 1970 revisions and limit compensation under the Act to cases "arising on direct review of a judgment in a criminal case originating in federal court." 7/

Cases Not Under the Criminal Justice Act

Cases which do not fall within the scope of the Criminal Justice Act 8/ are governed by Rule 53(7). This subsection antedates the Criminal Justice Act 9/ and makes no distinction on the basis of the type of case involved. The standard under this Rule is indigency (see: 28 U.S.C. 1915) as opposed to financial inability to obtain adequate representation. 18 U.S.C. 3006A. See note 4, supra.

The appointment of counsel in purely civil matters 10/ has been and still is considered a discretionary matter. 11/ There is ample precedent for such appointments in this Court. 12/

7/ Rule 53(8). The revisions to the Act were enacted several months after the promulgation of the Rules. In the original legislative history, it is quite clear that the defendant's right to have counsel appointed was to include Supreme Court review. See: Conference Report No. 1709, 1964 U.S. Code Congressional and Administrative News p. 3000.

8/ 18 U.S.C. 3006A.

9/ See: Rule 53(7), 1954.

10/ Refusal to appoint counsel in criminal or quasi-criminal ca (revocation of parole, probation) not covered by the Criminal Justice would, of course, raise substantial constitutional questions in light of the Court's decisions.

11/ See next page.

12/ See next page.

In the companion case to the above-entitled matter, Gomez v. Perez, No. 71-575, Joseph Jaworski, Esquire, was invited to brief and argue the case as amicus curiae in support of the judgment below.

11/ See: 28 U.S.C. 1915(d); Ehrlich v. Van Epps, 428 F.2d 363 (7 Cir. 1970), citing Knoll v. Socony Mobil Oil Company, 369 F.2d 425 (10 Cir. 1966), cert. den., 386 U.S. 977, reh. den., 386 U.S. 1043; Massengale v. Commissioner, 408 F.2d 1373 (4 Cir. 1969), cert. denied, 396 U.S. 923 (1969). Expansion of the right to counsel in civil cases has been urged by some authors. Note, 'The Right to Counsel in Civil Litigation," 66 Columbia L.J. 1322 (1966); note, "The Indigent's Right to Counsel in Civil Cases," 76 Yale L.J. 545 (1967). See generally: Sandoval v. Rattisen, dissent from denial of certiorari by Mr. Justice Fortas, 385 U.S. 901 (1966).

12/ E.g., Griffin v. Breckenridge, 403 U.S. 88 (1971) -- argue Jan., 1972, decided June 7, 1971 -- whether 42 U.S.C. 1985(3) embrac private conspiracies to interfere with rights of national citizenship. W. Moore, Esq., argued for respondents by appointment, 400 U.S. 1006 (1/18/71), travel fees - $263.60. Richardson v. Perales, 402 U.S. 389 (1971), argued Jan. 13, 1971, decided May 3, 1971 -- whether written reports of physicians who have examined claimant for disability insurance benefits under Social Security Act constitute "substantial evidence" supporting a nondisability finding under § 205. Richard Jinsman, Esq., argued for respondent by appointment, 398 U.S. 902 (5/19/70), travel fees - $309.49; Huffman v. Boersen, 406 U.S. 337 (1972), argued Apr 1972, decided May, 1972. -- review of the Nebraska statute under whi Petitioner's appeal from judgment annulling marriage and dismissing countersuit claiming paternity and custody of child was dismissed for to deposit cash or bond security for costs. Leo Eisenstatt, Esq., arg by appointment of the Court, 404 U.S. 998 (12/20/71), travel fees - $ Carleson v. Remillard, 406 U.S. 598, argued April, 1972, decided Ju 1972 -- class action for injunctive and declaratory relief by a child an mother denied benefits of Aid to Families with Dependent Children (AF program by California. Carmen L. Massey, Esq., argued the case f appellees and filed brief by appointment, 405 U.S. 951 (2/28/72), trav expenses $394.37.

The undersigned was informed by the Clerk's office that the Court receives a separate appropriation for reimbursement under Rule 53(7).

408 U.S. 942. He was informed, at the time of his appointment, that he would be compensated under Rule 53(7) and has submitted a voucher. In another pending case, Brown v. Chote, No. 71-1583, this Court appointed counsel despite the petitioner's desire to argue his own case.13/

In sum, in those cases which are within the scope of the Crimina Justice Act, the appointed counsel may receive the statutory fee set for in the statute as well as statutory reimbursement for his reasonable expenses. In all other cases, counsel are only permitted reimburseme for necessary travel expenses in accordance with Rule 53(7).

Respectfully submitted:

Kenneth F. Ripple

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13/ See: Memorandum of the Chief Justice to the Conference, dated Nov. 24, 1972, noting the broad public policy implications of th case.