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Criminal Law - Counsel - Court-Appointed Attorney Held Absolutely Immune From Suit Under Federal Civil Rights Statute

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CRIMINAL LAW—Counsel—Court-Appointed Attorney Held Absolutely Immune From Suit Under Federal Civil Rights Statute. *Minns v. Paul,* 542 F.2d 899 (4th Cir. 1976).

In January 1975, E. George Minns, a Virginia state prisoner, requested that his court-appointed attorney aid him in filing a petition for habeas corpus.[1] John Gray Paul had been appointed to represent Minns pursuant to a Virginia statute[2] under which indigent convicts could be provided with an attorney to advise them "regarding any legal matter relating to their incarceration, other than that pending in any court"[3] for which the inmate had already obtained an attorney.

When assistance was not forthcoming, Minns brought suit against the attorney under section 1983 of the Civil Rights Act.[4] Minns alleged that his attorney, while acting under color of state law,[5] had deprived him of rights guaranteed under the fourteenth amendment of the United States Constitution. He argued that the deprivation arose through the failure of his court-appointed attorney to respond to his request for aid in filing a petition for habeas corpus.[6] Defen-

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1. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).
2. VA. CODE ANN. § 53-21.2 (1974).
3. *Id.*
4. 42 U.S.C. § 1983 (1970) provides:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. The presence of a statute authorizing the appointment of Paul to represent Minns is important to Minns' contention that Paul acted under color of state law. Although private attorneys have long been considered "officers of the court," this status alone is not enough to activate the provisions of 42 U.S.C. § 1983 (1970) which requires action under color of state law. Gozansky and Kertz, *Private Lawyers' Liability Under 42 U.S.C. § 1983,* 25 EMORY L.J. 959 (1975); *see* Christman v. Pennsylvania, 275 F. Supp. 434 (W.D. Pa. 1967), *cert. denied sub nom.* Christman v. Lesher, 393 U.S. 885 (1968). In *Christman* the court examined the appointment of a private attorney to represent an indigent client in a habeas corpus action. Although the attorney's appointment was made pursuant to a state statute the court determined that this attorney did not act under color of state law. His actions under a Pennsylvania statute did not affect his status as a private individual. *Id.* at 435. *Accord,* Hamrick v. Norton, 322 F. Supp. 424 (D. Kan. 1970), *aff'd,* 436 F.2d 940 (10th Cir. 1971).

6. Minns alleged that in early January he telephoned attorney Paul and was assured that Paul would be back in contact with him. When he received no response, Minns wrote to Paul on January 18; had a prison officer call on his behalf on February 5 and finally wrote a second

dant denied this allegation and also contended that as a court-appointed attorney he should be absolutely immune from suits arising under section 1983.[7]

The district court dismissed the complaint and the Court of Appeals for the Fourth Circuit affirmed.[8] The court of appeals found that Paul enjoyed absolute immunity from a section 1983 suit by virtue of his position as a court-appointed attorney.[9] Because the court agreed with Paul's contention concerning absolute immunity, it found it unnecessary to decide whether Paul was acting under color of state law.[10]

The language of section 1983 provides no basis for granting immunity from its sanctions to any class of persons. Although the statute is addressed to "every person"[11] the courts have determined that certain intrinsic immunities were not abrogated by this strong congressional language.[12]

The exact reach of the phrase "every person" was first construed by the Supreme Court in *Tenney v. Brandhove.*[13] In *Tenney,* plaintiff alleged that a state legislative committee had called him to testify, not in a legitimate quest for knowledge, but in an effort to harass and silence him.[14] A strict reading of section 1983 would suggest that those legislators could be subject to suit under the statute, but the Supreme Court noted that legislators had traditionally been accorded absolute immunity for their official actions both at common law and under the Constitution.[15] It concluded that Congress did not intend to abrogate those immunities that were

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letter on February 6. Minns claimed that Paul failed to answer any of these efforts to contact him. 542 F.2d at 900.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* note 4 *supra.*

12. Imbler v. Pachtman, 96 S. Ct. 984 (1976) (prosecutors held to be immune); Wood v. Strickland, 420 U.S. 308 (1975) (public school officials held to have qualified immunity); Scheuer v. Rhodes, 416 U.S. 232 (1974) (executive members of government held to have qualified immunity); Pierson v. Ray, 386 U.S. 547 (1967) (judges held to be immune); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators held to be immune); Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), *cert. denied,* 412 U.S. 950 (1973) (public defender held to be immune); Pierpont v. Allen, 415 F. Supp. 1386 (D. Md. 1976) (grand jurors held to be immune).

13. 341 U.S. 367 (1951).

14. *Id.* at 371.

15. *Id.* at 372-73.

"well grounded in history and reason. . . ."[16] Thus, despite any impropriety in the actions of the legislative committee, the legislators were immune from suit under section 1983 as long as they were performing their legislative functions.[17] The *Tenney* decision established that the strict language of section 1983 does not preclude a thorough examination of common law principles in determining if immunity from suit should be accorded to any additional classes of persons.

In *Pierson v. Ray*,[18] the Supreme Court reiterated the same flexible standards. Again, an examination of common law precepts was necessary to determine if judges and policemen were immune from suit under section 1983. The Court noted that judges historically had been accorded absolute immunity "from liability for damages for acts committed within their judicial jurisdiction. . . ."[19] The consideration in this instance was not the protection of the judge but rather that of the public, "whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[20]

Recognition of this absolute immunity in *Pierson* may be compared with the Court's treatment of the policemen who were also sued under section 1983.[21] The Court recognized that "[t]he common law has never granted police officers an absolute and unqualified immunity . . . ."[22] It was willing, however, to grant that policemen enjoyed a qualified immunity subject to the traditional common law test of "good faith" and "probable cause."[23]

The question of absolute immunity from section 1983 suit has also

16. *Id.* at 376. *See also*, Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Court reviewed the background of legislative and judicial immunity. *Id.* at 239 n.4.

17. 341 U.S. at 377. The Court was careful to point out that legislators will be protected only when "acting in the sphere of legitimate legislative activity." It deemed committee investigations to be sufficiently within the traditional functions of legislators that their motives in conducting such investigations were irrelevant in establishing section 1983 liability. *Id.* at 376-78.

18. 386 U.S. 547 (1967).

19. *Id.* at 554.

20. *Id.* The Supreme Court reiterated the reasoning of *Tenney v. Brandhove* in which section 1983 immunity was seen as a benefit running directly to the public rather than to the individual granted that immunity.

21. *Id.* at 555.

22. *Id.*

23. *Id.* at 556-57.

arisen in cases concerning state executive officers[24] and public school officials.[25] In both instances, the Supreme Court determined that at best such officials could enjoy only a qualified immunity, which would vary in degree depending upon the officials' discretion and responsibility[26] or the intention of the officials in performing a particular act.[27]

Imbler v. Pachtman[28] marked the first opportunity for the Supreme Court to consider whether a state prosecutor could be held liable for damages in a section 1983 suit. In that case, petitioner Imbler contended that he had been deprived of his constitutional rights by the prosecutor who was acting under color of state law.[29]

Petitioner urged the Supreme Court to deny protection from section 1983 suits contending that the prosecutor was a member of the Executive Branch and thus not entitled to protection under any theory of "quasi-judicial" immunity.[30] In so contending, Imbler urged the Court to adopt the same limited type of immunity for prosecutors as it had adopted in recent cases concerning executive officers of government. The Supreme Court rejected this reasoning and reiterated the test by which prior questions of section 1983 immunity had been decided, and stated that immunity from suit must not be made to depend upon an individual's affiliation with a particular branch of the government but rather upon that "immunity historically accorded the relevant official at common law and the interests behind it."[31]

The Court then analyzed those considerations that underlie the traditional immunity of the prosecutor from common law tort actions. It observed that the common law immunity accorded the

24. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the governor of Ohio was sued under section 1983. Petitioners alleged that his wanton and reckless deployment of the Ohio National Guard resulted in the deaths of several students. *Id.* at 235.

25. In Wood v. Strickland, 420 U.S. 308 (1975), public school authorities were sued under section 1983. Petitioners alleged that in their expulsion from school for the use of intoxicating beverages they had been denied due process of law.

26. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

27. Wood v. Strickland, 420 U.S. 308, 322 (1975).

28. 96 S. Ct. 984 (1976).

29. *Id.* at 988.

30. *Id.* at 990. Petitioner argued that immunity from suit must derive from the same species of immunity that the court identified in holding judges immune from section 1983 suits in Pierson v. Ray, 386 U.S. 547 (1967).

31. 96 S. Ct. at 990.

prosecutor is based upon the same principles that have created common law tort immunity for judges and grand jurors:[32]

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.

After reviewing these common law justifications for prosecutorial immunity, the Supreme Court decided to accord absolute immunity to prosecutors sued under section 1983. The Court reasoned that a prosecutor who was forced to make decisions tempered by fears of potential personal liability simply could not fulfill the duties of his office.[33] Any possibility of qualified immunity for prosecutors was firmly rejected as the Court distinguished between prosecutors and other "executive or administrative officials."[34] These other officials, accorded qualified immunity from section 1983 suits, would face a far smaller burden than a prosecutor in defending such suits. The prosecutor could not even begin to defend them. The very nature of his office, handling numerous trials and indictments, lends itself to frequent suit. Absent absolute immunity, the prosecutor would have to answer and defend each suit.

In protecting prosecutors from section 1983 suits, the Supreme Court conceded that the defendant with a legitimate complaint is left without a civil remedy.[35] It reasoned that the alternative of offering qualified immunity would dilute the efforts of the prosecutor by requiring him to defend even the most frivolous suit. Moreover, the wronged defendant is not completely without remedy, nor is the public left at the mercy of an unscrupulous prosecutor. The Court noted that neither judges nor prosecutors are "beyond the reach of the criminal law,"[36] and the prosecutor is subject to

32. *Id.* at 992, *quoting* Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935).
33. 96 S. Ct. at 992.
34. *Id.*
35. *Id.* at 993.
36. *Id.* at 994. 18 U.S.C. § 242 (1970) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any

discipline by his professional peers.[37]

The court in *Minns* recognized that a decision to grant section 1983 immunity to a court-appointed attorney would have to be based upon the common law principles enunciated in *Pierson* and *Imbler*.[38] The court noted that "there is virtually no common law with respect to the personal liability of court appointed-counsel."[39] It chose to analogize his role with that of the prosecutor as discussed in *Imbler* and readily concluded that the court-appointed attorney should enjoy the same immunity accorded the state prosecutor. The court of appeals pointed out the three-fold role of government in criminal proceedings; the government provides the prosecutor, the judge, and the defense counsel for indigents.[40] With significant government involvement at both counsel tables the court concluded that many of the policy reasons requiring prosecutorial immunity should operate equally in securing immunity for the court-appointed attorney.[41]

The *Minns* court took particular notice of the Third Circuit's decision in *Brown v. Joseph*[42] in which the court concluded that state-appointed and state-subsidized defenders should enjoy immunities equal to those enjoyed by judges and prosecutors. The Third Circuit cogently expressed the policy reasons that require court-appointed attorneys and state prosecutors to be treated in the same manner for purposes of section 1983 immunity:[43]

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rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

37. 96 S. Ct. at 994 n.30. At this point the Supreme Court was careful to delineate the boundaries of its holding. Prosecutors were to be immune from section 1983 suits only when initiating a prosecution and presenting the State's case. *Id.* at 995. This concept of prosecutorial immunity was applied recently in Pierpont v. Allen, 415 F. Supp. 1386 (D. Md. 1976) where the court determined that when a prosecutor functions as a policeman he will be accorded a more limited species of immunity; unqualified immunity is reserved for the chief functions of the prosecutor's office.

38. 542 F.2d at 900-01.

39. *Id.* at 901. The court observed that the obligation to provide counsel for indigent defendants has arisen only since the relatively recent decision in Gideon v. Wainwright, 372 U.S. 335 (1963). *Id.*

40. 542 F.2d at 901.

41. *Id.*

42. 463 F.2d 1046 (3d Cir. 1972).

43. *Id.* at 1048-49, *quoted in* Minns v. Paul, 542 F.2d at 901. *See also* John v. Hurt, 489

> We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders. Implicit in the extension of judicial immunity to prosecutors was the recognition of a public policy encouraging free exercise of professional discretion in the discharge of pre-trial, trial, and post-trial obligations. Indeed, the very reasons advanced to assert that the Public Defender acts under color of state law because of the favorable comparison of his activities with those of public prosecutors, would, *a fortiori*, support an argument in favor of the public defender on the immunity issue.

The *Minns* court approved the policy considerations mentioned in *Brown*.[44] It determined that the policy reasons requiring absolute immunity for court-appointed attorneys were: (1) fear of liability under section 1983 might deter able attorneys from representing indigents; and (2) attorneys must be permitted to exercise professional discretion in planning their clients' defenses.[45]

Minns expressed the hope that absolute immunity would encourage representation of indigents by full and part-time public defenders as well as by private attorneys appointed by the court.[46] But the court's principal discussion of the policy considerations focused on the issue of professional discretion. In order to function effectively, the court-appointed attorney must be free "to decline to press the frivilous" and "to assign priorities between indigent litigants . . . ."[47] This concept of professional discretion takes on a special character in the case of an indigent litigant. Indigents experience no financial constraints on the advancement of frivilous claims.[48] Moreover, the court-appointed attorney does not have the option of turning away those clients who persist in pressing unsound claims.[49]

Minns gave particular attention to the distinction between absolute and qualified immunity. Citing *Imbler*,[50] the *Minns* court noted that qualified immunity, while offering some protection, would require that the merits of most section 1983 suits be determined at

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F.2d 786, 788 (7th Cir. 1973) in which the court determined that those factors which mandate section 1983 immunity for prosecutors also mandate section 1983 immunity for public defenders.

44. 542 F.2d at 901.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 901-02.
49. *Id.*
50. 96 S. Ct. 984, 992 (1976).

trial. This would be overly burdensome for the court-appointed attorneys who could better devote their time to the defense of other indigents. The court recognized the natural inclination of an unsuccessful litigant to blame his court-appointed attorney. Given such fertile ground for the propagation of section 1983 suits, the court reasoned that absolute immunity, which would defeat a suit before trial, was the only reasonable response to the problem.[51]

The court offered the facts of the instant case to demonstrate the need for absolute rather than qualified immunity. Minns brought suit thirty-seven days after a written request for aid from his court-appointed attorney. The court noted that thirty-seven days was not an unusual delay,[52] but without the protection of absolute immunity Paul would be required to defend the suit at trial. Presumably, if the suit were to proceed, the services of a second court-appointed attorney would be required to aid Minns in suing Paul.

The *Minns* court also expressed great concern over the possible existence of insidious subconscious influences to which judges could be subjected if court-appointed attorneys were denied the protection of absolute immunity.[53] It noted the Supreme Court's observation in *Imbler*[54] that judges charged with appellate review should be concerned only with the fairness of appellant's trial and not with the possibility that a reversal could prompt a section 1983 suit against the prosecutor.[55] Similarly, prosecutors should not be discouraged, even if subsconsciously, from bringing evidence favorable to the accused to the attention of the court.[56] An important factor in the *Minns* decision was the presence of other remedies through which a defendant could seek redress for the deprivation of any constitutionally secured rights. These included "direct appeal,

51. 542 F.2d at 902.

52. *See* note 3 *supra*. The court did not seem troubled by the possibility that absent the present suit, Paul might never have answered Minns. Although the court focused on the thirty-seven day delay and found that it was not excessive, the actual time which elapsed between Minns' first contact with Paul and the present suit could have been as much as forty-seven days. 542 F.2d at 900.

53. 542 F.2d at 902.

54. *Id.*

55. 96 S. Ct. at 999 (White, J., concurring).

56. *Id.* at 993 n.25. The Court noted that it was District Attorney Pachtman's own efforts to present new findings favorable to defendant Imbler that provided the grounds for Imbler's section 1983 suit. *Id.*

a state post-conviction remedy, or . . . federal habeas corpus."[57] Additionally, a defendant not satisfied with the performance of his court-appointed attorney "may proceed *pro se.*"[58] In extreme instances involving deliberate deprivation of constitutional rights, the offending court-appointed attorney would be subject to criminal sanctions.[59] Finally, court-appointed attorneys are subject to professional disciplinary proceedings, including disbarment, when they do not properly fulfill the duties of their office.[60]

The granting of absolute immunity to court-appointed attorneys is a sound extension of the reasoning advanced by the Supreme Court in *Tenney,*[61] *Pierson*[62] and *Imbler.*[63] Indigent convicts represented by court-appointed attorneys will benefit in the long run.[64] To accord less than absolute immunity would discourage private attorneys from representing indigents. Once a private attorney is appointed, he should be free to exercise the full range of his professional discretion without constant fear of having to answer in damages to subsequently disgruntled clients.[65]

Although the goal of efficient representation of indigents is probably best served when the court-appointed attorney is held immune from section 1983 suits, there are certain dangers in this holding. *Minns* has pointed to a wide variety of remedies of which the aggrieved defendant may avail himself, but it is doubtful that these

57. 542 F.2d at 902, *citing* Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972). *But see* Stone v. Powell, 96 S. Ct. 3037, 3051 (1976) in which the Supreme Court held that federal habeas corpus will not be available to defendants who have had an adequate forum in the state courts. This holding suggests that federal habeas corpus is not nearly as effective a remedy as the courts implied in *Minns.*

58. 542 F.2d at 902, *citing* Faretta v. California, 422 U.S. 806 (1975).

59. *See* note 36 *supra.*

60. *See* Imbler v. Pachtman, 96 S. Ct. 984, 994 (1976).

61. 341 U.S. 367 (1951).

62. 386 U.S. 547 (1967).

63. 96 S. Ct. 984 (1976).

64. *But see* Pierson v. Ray, 386 U.S. 547, 558-67 (1967) (Douglas, J., dissenting); Tenney v. Brandhove, 341 U.S. 367, 381-83 (1951) (Douglas, J., dissenting). Mr. Justice Douglas in *Pierson* urged the Court to adopt a very strict reading of section 1983 and hold that the words "every person" mean exactly that and admit to no exceptions. 386 U.S. at 559.

65. The direction taken by the courts in recent years suggests that it makes little difference whether the court-appointed attorney is appointed under state statute or is a member of a legal aid or public defender organization. It appears that the courts are reluctant to consider an attorney to be acting under color of state law merely because some public agency pays him to represent indigent clients. *See* note 12 *supra.*

remedies are as effective as potential section 1983 liability in deterring improper conduct by the court-appointed attorney.[66] Thus, courts must be vigilant in guarding against any tendency by the inexperienced attorney to "practice" on indigent clients or to treat the indigent client with any less respect that he would accord his private clients.

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66. *See* note 57 *supra*.