ORIGINAL

In the

Supreme Court of the United States

GEORGE MARTINEE, ET AL.,

APPELLANTS,

V.

THE STATE OF CALIFORNIA, ET AL.,

RESPONDENTS.

No. 78-1268

Washington, D. C.
November 5, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE MARTINEZ, et al.,	:	
Appellants,	:	
v.	:	No. 78-1268
THE STATE OF CALIFORNIA, et al.,	:	
Respondents.	:	

Washington, D. C.

Monday, November 5, 1979

The above-entitled matter came on for argument at 11:02 o'clock, a.m.

BEFORE

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

APPEARANCES

DONALD McGRATH II, ESQ., Thompson, Sullivan, McGrath & McDonald, 1200 Third Avenue, San Diego, California 92101; on behalf of the Appellants.

JEFFREY T. MILLER, ESQ., Deputy Attorney General, State of California, 110 West "A" Street, Suite 700, San Diego, California 92101; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Martinez against California, No. 78-1268.

Mr. McGrath, I think you may proceed when you're ready.

ORAL ARGUMENT OF DONALD McGRATH II, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. McGRATH: Thank you, Your Honor.

Mr. Chief Justice, if it please the Court:

The instant case involves three participants, one an innocent 14-year-old--or 15-year-old girl; the other a hopelessly and terrible sexual psychopath; and the third, his legal guardian, state parole officials of the State of California.

The two former individuals' paths crossed in Tecolote Canyon, San Diego, California, in August of 1975, and Mary Ellen Martinez came away the loser, for she was brutally murdered by June-Jordan Thomas.

Thomas, on the other hand, was returned to the place from which he never should have been released, the State prison.

Indeed, had this been a case of owners of a dangerous animal who allowed that animal to get loose and do injury, we would have long since had a verdict favorable to our clients in the lower court.

This individual was released in spite of the fact that in 1969 he terrorized young females of the same age category that Mary Ellen was in.

QUESTION: Well, you don't claim that the defendants here, or the respondents, should be treated as if they were the parents or owners of the criminal actor, do you?

MR. McGRATH: I do, Your Honor. I think the Chief Justice, when he was on the Court of Appeals, stated in a case called Kaiser v. Reed that there is a parens--patria relationship between parole officials and prisoners.

QUESTION: It was quite a different setting, wasn't it?

MR. McGRATH: But it was a good quote for the purposes of argument. I think that--

[Laughter.]

MR. McGRATH: --Your Honor, it isn't that much different. They let these people go when they know they're dangerous. And the restatement tells us that someone who is in charge of a known dangerous entity or animal or person and releases that person should be held liable for the consequences of the actions of the person released.

QUESTION: The restatement isn't talking about public officials.

MR. McGRATH: It doesn't delineate between

categories of people. But it holds responsibility or accountability for someone under your control who is hopelessly, incurably insane is released in the public, there must be liability, Your Honor.

QUESTION: Well, what if a judge, faced with these same facts, had decided to grant probation rather than sentence and confine, and the next--10 days later the person commits another rape?

Would you say that the judge was liable?

MR. McGRATH: I would say so, but I would follow the law in Stump v. Sparkman and say he cannot be liable. He's absolutely immune. But only that class of individual; not this class.

QUESTION: How--why is there that much difference between them?

MR. McGRATH: Because the procedural safeguards set down by this Court in the Butz case says, we look to see what due process is available. With the judge, there is appeals, there is transcripts, there is right to counsel, public hearing, open courtrooms.

This little girl, the only thing she did wrong was put on her sandals. And she never had any of those things.

QUESTION: Well, the--nobody had any right to appeal when a judge sentences someone, says, "I'll give you probation instead of putting you in jail for 10 years."

The State has noright to appeal that.

MR. McGRATH: But the public policy set down by the Court in Stump v. Sparkman and Imbler, and no further yet, is that the judiciary must be kept separate. The judiciary is faced with an inherent conflict of interest in hiring counsel from the executive branch.

These officials are executives. And they don't, in their own realm, they're not voted in, they're not elected, they're not controlled by anybody.

QUESTION: Aren't we talking--doesn't my brother Rehnquist suggest--his present question suggest, at least, that we're talking about two different things, or both--two separate things, and intermingling them?

One is, have you stated a cause of action under Section 1983? And would you have stated a cause of action against the judge in my brother Rehnquist's hypothetical?

And the second is, even if there is a cause of action, is this particular defendant immune?

Now those are two quite separate questions. And don't--let's not mix them up.

MR. McGRATH: It's a difficult area for us, Your Honor, but I agree with that.

QUESTION: I know it is. But I think it'll be less difficult if we keep the two questions separate.

MR. McGRATH: All right. On the first question,

I say Scheuer v. Rhodes; exact same facts: wrongful death; violation 1983; parents asserting rights; code sections the same; our wrongful death the same as the Ohio statute.

QUESTION: I thought Scheuer v. Rhodes involved only the immunity of the defendant, didn't it?

MR. McGRATH: But, Your Honor, that's where I have trouble, is to determine whether the defendant is acting in good faith.

QUESTION: Well, first of all, let's--if there was no question of this defendant being immune from suit, the question would still remain: Have you stated a cause of action under 1983?

MR. McGRATH: Yes, sir.

QUESTION: And conversely, if there were no question but what you had stated a cause of action under 1983, the question still remains: Is this particular defendant immune from suit, or immune from liability under 1983?

Those are two quite separate questions. And as you say, it's a difficult enough case without mixing those two questions up.

MR. McGRATH: Yes, Your Honor.

We've stated a cause of action under 1983 for the deprivation of the right of this little girl's life.

QUESTION: Well, that's a question which your brother greatly argues.

MR. McGRATH: Yes, sir.

QUESTION: Mr. McGrath, it's a deprivation of life without due process of law, isn't that the--

MR. McGRATH: Yes, sir.

QUESTION: What is the failure to follow due process that the defendant is guilty of?

MR. McGRATH: The defendant knew, or should have known, as the Court said in Wood v. Strickland, that the medical people, the psychiatric people, in California said Thomas was hopelessly incurable.

And Judge Neilsen, when he sentenced him, said "Don't let him out until you either cure him or the full term goes by."

Instead, they let him out in four years instead of twenty.

QUESTION: Wasn't there some evidence or some practice of letting people out at a certain stage of their incarceration that would support the decision to--wasn't it arguable as to whether or not he should have been let out?

MR. McGRATH: No, I don't--I think that it was arguable that a lot of prisoners got out early because of an overcrowding situation.

But this man was medically incurable. And I take

him as a separate, distinct individual.

QUESTION: But doesn't that go to the merits of the decision as to whether to grant him parole, rather than the procedure followed by the Parole Board? Are you challenging the procedure that the Parole Board followed?

MR. McGRATH: I'm challenging--

QUESTION: When you say there was no due process of law?

MR. McGRATH: Yes, Your Honor, I am challenging the procedure.

QUESTION: Then what was the error in procedure that you allege?

MR. McGRATH: They ignored his known dangerous propensities, and the fact that he had not been cured.

QUESTION: That's not procedure.

MR. McGRATH: Well, the steps--I suppose you can--it's mixed procedure and substance.

QUESTION: They made an incorrect decision. Is that an error in procedure?

MR. McGRATH: They ignored their own procedures in that they should check to see that a person was safe to let into the community. They did not check to do that. I mean, he was not safe.

QUESTION: Well, safety is a conclusion, isn't it?

MR. McGRATH: The problem was--

QUESTION: Whether he's safe or not is a conclusion which the trier of fact must reach, isn't that so?

MR. McGRATH: Yes, sir. I'd like to get to the trier of facts. We've never--so many of these questions I can't answer, because we were stopped, as was Scheuer, and--

QUESTION: Mr. McGrath, doesn't the case come to us on the assumption that there was a violation of constitutional rights?

MR. McGRATH: Yes, sir.

QUESTION: The basis for the decision below was immunity. And so we approach it on the basis that even if there was a good cause of action stated, even if there was a knowing violation, a deliberate violation, there is immunity.

Isn't that the basis of this?

MR. McGRATH: I believe that's the basis, and I think that's what Justice Stewart was trying to tell me to confine me to.

QUESTION: On the other hand, your opponent urged that the judgment below be upheld on the grounds that there was no violation of constitutional law.

MR. McGRATH: Well, that's why I said that I thought Justice Stewart put me in a position where I had to answer both questions: A, a fundamental right to life; B, what standard of immunity, be it absolute, as the State

wishes--State's attorney, or be it qualified, as the Chief Justice held in Scheuer.

The fundamental right is a right to life that's been denied. And, as Justice White says, we--you take our facts as true, so we've stated a cause of action. Now, what's the standard?

QUESTION: But your Scheuer argument seems to me to lack a good deal in analogy, because there the National Guard troops were at least arguably the agents of Governor Rhodes. And here, certainly, the person paroled was not the agent of the Parole Board.

MR. McGRATH: No, but the parolling officer was the agent of the higher authority of the State, just as was Governor Rhodes. I don't have any trouble with--

QUESTION: Yes, but don't you have a break in causation of some sort when you get to a private individual who is--by hindsight, obviously, mistakenly released, but who is not a state employee, who is detained against his will by the State for a period of time and then finally released?

MR. McGRATH: No, sir, no more than the National Guardsmen. I think the Scheuer case is harder than our case.

QUESTION: You didn't join the parole officer as a defendant?

MR. McGRATH: The--after the fact, the supervisory officer? Is that what you mean, Your Honor?

QUESTION: Yes.

MR. McGRATH: We have numerous Does but--and we suspect a lack of supervision of this individual, and we've generally pled it. But we don't know the name of his parole officer, for we were stopped at the demur stage in the lower court.

QUESTION: Well, are you pinning the case not on release but on lack of supervision?

MR. McGRATH: I think we're pinning--primarily the answer is yes, Your Honor. But we're alleging in the alternative, as we're allowed to do under our law and under Federal law, each and every cause of action we suspect.

But supervision subsequently, we suspect there was a lack of supervision. And we'd like the opportunity to discover that issue.

QUESTION: In California, whose responsible for that, the judges? Do they supervise the control--the probation officers?

MR. McGRATH: No, the Parole Department, an executive branch, supervises the parole or probation officers, It's an executive function, not judicial.

We state, Your Honors, that in contravention of this man's known dangerous propensities he was released into the community prematurely. The Martinez family asked, by filing their complaint, and believed, that there was a violation

of Section 1983 of the Civil Rights Act. They further believe that the Fourteenth Amendment, the due process clause, had been violated. They believe they could prove the facts they allege in their complaint, and they believe the right to life was violated and was a fundamental right.

They believe these officials should be held accountable, just as was the Governor and/or the National Guard in Scheuer v. Rhodes.

They were turned down by all of the courts of California. Accordingly, we are here.

Immunity has been held to be the exception; accountability, the rule. This Court has not allowed 1983 to be circumvented by immunity claims.

It's been so held in Scheuer v. Rhodes, in Wood v. Strickland and in Procunier v. Navarette. Indeed, this Court held in Butz that the burden of proof was on the state to show the need for an absolute immunity.

We return again to Scheuer and state, our claims are exactly the same. For therein, they claimed an absolute immunity, the Governor did; therein, the case was prematurely dismissed at the very earliest stage; therein, the Governor abused his discretion, called out the National Guard, an injury occurred; herein--

QUESTION: In the Rhodes case, Scheuer v. Rhodes, did Ohio law purport to grant absolute immunity to the

defendant?

MR. McGRATH: As I recall it did not. The subject was argued, but the holding--

QUESTION: It wasn't as clearcut as California law is in this case then, was it?

MR. McGRATH: No, sir, it was not. And they were in a Federal court; we're in our own state court.

As I recall the briefs of appellant, there was a--it was not a claim of absolute immunity. What form it came under, I don't recall, Your HOnor.

QUESTION: But was there reliance on state law, as there is in this case?

MR. McGRATH: Yes, there was as to the executive function, and the emergency of the Governor needing to call out the National Guard, the lack of foreseeability: calling out National Guard, would that kill students at Kent State?

Our case, we think, is better on the--

QUESTION: Well, then it's a matter of the merits again, not of immunity, isn't it?

MR. McGRATH: Yes, Your Honor. Being on appeal, we're not always sure just exactly what you want us to address.

There, in Scheuer as here, there was a wrongful death action. There, there were violations of 1983 fundamental rights. We believe this case is on all fours with Scheuer v.

Rhodes.

We understand the state's position is that parole is a difficult decision, and there's a lot of discretion involved. We have a hard time understanding how there would be more discretion in parole than being the Governor of a state of this Union.

We think that if the state's position is carried to its logical conclusion, then the cases allowing policemen to be sued must be overruled. For policemen have the ultimate discretion, much more so than parole officials. They can take a life in an instant; they can take liberty in an instant.

We don't think that's the Court's position. We think the state in Navarette v. Procunier, admitted that the same Procunier we sue here today was only qualifiedly immune by admission in Navarette.

Here, Mr. Procunier claims absolute immunity.

We believe the test of Wood follows, that these parole officials knew, or should have known, when they released June-Jordan Thomas, that he would have committed a crime similar to the one committed, and his victim was more foreseeable than was the students in Scheuer v. Rhodes. For indeed, Thomas had molested girls of tender age in Tecolote Canyon in '69; as soon as he was released, shortly thereafter, he returned to Tecolote Canyon and killed a girl of tender age.

QUESTION: Mr. McGrath, just so I can be sure I have your case, you're--we're only concerned with the fifth cause of action in your complaint, is that not correct?

MR. McGRATH: Yes, Your Honor, and its incorporation of the other causes of action.

QUESTION: The other allegations.

Is it perfectly clear to you that the California court rejected the fifth claim on the basis of the California immunity statute?

MR. McGRATH: Yes, it is.

QUESTION: Because they just end up by saying there's no liability to plead under the Civil Rights Act. And I think it's arguable in their opinion that they were just saying there's no cause of action under the Federal statute.

MR. McGRATH: I didn't feel they said that. I felt they said that in this fact situation, that absolute immunity was appropriate to achieve the goal of the state.

QUESTION: But they don't cite the statute in their rejection of that--the fifth claim, in that portion of their opinion.

MR. McGRATH: It may not be in that particular portion, but I found them discussing 1983 fairly carefully at one point.

QUESTION: In Federal cases on immunity.

MR. McGRATH: Yes.

QUESTION: Fitzgerald v. Procunier.

MR. McGRATH: Yes, Your Honor.

QUESTION: But I--the question I'm asking you is, I don't really think it's fair to say they relied on the California statute in disposing of that claim. That's what I really wanted to suggest to you.

MR. McGRATH: I can't say I agree or disagree. I don't they discussed it.

QUESTION: Yes.

MR. McGRATH: But when you lose at that level, you don't think they even saw the 1983. I don't think they knew of Scheuer at that time, or they didn't understand the impact of it.

I thought that your dissent in Procunier, Your Honor, was the test. We've got an affirmative defense being alleged, and we get knocked out at the demur stage. What you said is, let's look at the official and his job function. Let's see if he was in good faith. If not, we create a rebuttable presumption.

And, as Justice Burger said, then we go to summary judgment, and it gets tougher.

But I think we should be able to go back and rebut that presumption of good faith. And we think the Grimm v. State of Arizona case is a logical extension, that those who act grossly negligently cannot be absolutely--or qualifiedly

immune, or they are not acting in good faith.

QUESTION: The cases in which--in this Court on which you rely involve, as the previous questions of my brother Rehnquist imply, a situation where--which would be analogous here--if a member of the Parole Board had raped and murdered little Miss Mary Ellen Martinez; you see what I mean?

There's another step in this case.

MR. McGRATH: No, sir. I think that my opening statement--

QUESTION: In other words, the National Guard in Scheuer v. Rhodes were the ones who actually did the shooting and injury to the plaintiff, injuries and deaths of the plaintiffs.

MR. McGRATH: At the Governor's--

QUESTION: Here--here it was a third person. And the analogy here would be if a member of the Parole Board had raped and murdered Miss Martinez.

MR. McGRATH: No, sir, the Governor sent the National Guard out.

QUESTION: Yes.

MR. McGRATH: The Parole Board sent Thomas out. It's the same. I see the same--

QUESTION: But not direct--the Parole Board didn't send Thomas out to represent the Parole Board, or to act for it. It simply returned Thomas to private life.

QUESTION: Yes.

MR. McGRATH: But should they have, with knowledge of the facts?

QUESTION: That's quite a different inquiry.

MR. McGRATH: Excuse me, Your Honor, did you have any--?

We would ask that we would return to the San Diego Superior Court to try and litigate our case. We realize we have a difficult burden of proof; indeed, we could lose this case.

But we would like to go back with a good faith qualified immunity applicable to these parole officials. We would ask that the gross negligence standard set down in Grimm be at least the standard applicable to the instant case.

We would state that Economou v. Procunier was a case of negligence, and that still is the law in the Ninth Circuit. And therein, a prisoner's mail was opening in violation of his First Amendment rights, and it was negligently opened.

Herein, we have the taking of a life. Accordingly, a good faith gross negligence standard would no be unreasonable, nor would a negligence standard.

Following the principles, Your Honors, that no man is above the law, set down by this Court, it would place

these equal--these people in an equal position with every other citizen, that of being held accountable for their actions and for the natural consequences of their actions, as stated by Justice Douglass in Monroe v. Pope.

QUESTION: Well, judge are above the law, according to Stump v. Sparkman.

MR. McGRATH: I think what the Court says is that the judges are the law. And that's easier for me to say. Because judges aren't above the law. They are the law.

Nobody is above the law, according to U.S. v. Lee.

QUESTION: Well, but judges may make just as botched up decisions as parole officers.

MR. McGRATH: But they don't have--the parole officers don't have the inherence conflicts that do judges. I mean, you're going to have to get an attorney from the DA's office to help you, and there he is prosecuting; you've got a terrible conflict built in.

And somebody must be the law. Judges and prosecutors are the law. Parole officers aren't officers of the court; they don't have public hearings.

Finally, and most importantly, the victim is the only class of person not asking for and receiving due process to date by this Court. By a decision in favor of the Martinez family, the victim would finally be accorded due process due him.

Indeed, this Court has extended the protection of the Constitution, to every minority, to every class, and to every known entity except the victim. That's not because the courts turn down the victim, it's because this is the first time the victim has really been here.

It is respectfully submitted that if this country is to maintain the tradition that no man is above the law, and that government is indeed the servant and not the master of the people, then it is desirable to do away with the ancient notion that the king can do no wrong, but his servants can do it for him.

We think that the drafters of the Civil Rights Act and of the constitution would have it no other way.

QUESTION: Mr. McGrath, I just have to question you once more about this notion of being above the law.

There's no suggestion that, in anything other than the performance of his regular job, this individual, or indeed the Judge in the Stump case, was above the law.

The question is whether the law gives a damage remedy when someone is performing his official duty; isn't that the issue?

MR. McGRATH: Yes, sir.

QUESTION: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Miller.

ORAL ARGUMENT OF JEFFREY T. MILLER, ESQ.,

ON BEHALF OF THE APPELLEES.

MR. MILLER: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to turn initially to the question of immunity. In the 1983 cases handed down by this Court, this Court has indicated that as part of its analysis we should enter into a considered inquiry into the immunity accorded the relevant public official at common law, and the public policy considerations in favor of that immunity.

Turning to the history, the judicial history, of Section 1983, and the question of immunity, with respect to parole officials and their determinations to release prisoners, on parole, we see near-unanimity in the Federal opinions.

The Third, Fourth, Fifth, Sixth and Ninth Circuits have all unanimously held that there's an absolute quasi-judicial immunity which attaches to a parole official in connection with his determination to release a prisoner.

No Federal Court of Appeals has decided to the contrary.

We've cited in our brief numerous opinions issued by the Federal district courts for the same proposition. We've quoted extensively from the cases of Wright v. Commonwealth of Pennsylvania and Pate v. Alabama Board of Pardons and Paroles.

In both of thosecases the question of Section 1983 immunity for parole officials was placed in issue as a result of a parolee being released into society and either killing or seriously injuring a member of the society.

And in both of those cases the absolute quasi-judicial immunity was held to apply.

Against that rather unanimous backdrop of application and recognition of the quasi-judicial immunity for parole officials for a determination to release a parolee into society, the appellants have been able to cite only two cases, namely the cases of Grimm v. Arizona Board of Pardons and Paroles, and Semler v. Psychiatric Institution of Washington, D.C. Semler was cited by amicus on behalf of appellant.

We would submit that neither one of those cases is relevant to the issues in this case. In Grimm the Arizona Supreme Court chose that as a vehicle to abolish what had previously existed as a common law rule in Arizona immunizing all discretionary--all administrative officials in connection with discretionary activity.

Rather than engaging in an analysis of the common law history of quasi-judicial immunity accorded parole officials, rather than determining the public policy considerations in favor of that immunity, the court based its decision solely on the question of, in what branch of government the position of, quote, parole official, reposed

in Arizona.

And finding that it reposed in the executive or administrative branch, it held that therefore judicial immunity, or quasi-judicial immunity could not attach.

In the case of--well, it comes as no surprise to us that the majority opinion in Grimm was mocked by the dissent and has not been followed by any other jurisdiction.

In Semler v. Psychiatric Institute, cited by amicus in support of the appellants, the Fourth Circuit Court of Appeals held that a probation officer could be liable under Virginia common law in connection with a ministerial act of negligence consisting of participating in the transference of a dangerous mental patient from a high-risk, high-security facility to a facility of lesser security.

QUESTION: Before you proceed, General Miller, may I simply ask, was the Grimm case a 1983 case?

MR. MILLER: No, Your Honor, it was not a 1983 case.

QUESTION: So that was just a matter of the STate tort laws saying we're not going to give absolute immunity to this defendant?

MR. MILLER: That's true, Your Honor, it was--

QUESTION: In a State court action. That's nothing involving Federal law, was it?

MR. MILLER: You're correct, Your Honor. Nothing

involving Federal law, but it has been relied upon very extensively by the appellants in their brief. And for that matter, I thought it might be referred to.

QUESTION: Yes, I understand your feeling that it was necessary to mention it.

MR. MILLER: Also--

QUESTION: But am I correct in saying that it didn't involve anything except state tort law?

MR. MILLER: Yes, you're correct, Your Honor.

After--after an inquiry into the judicial history of the immunity accorded the relevant public official, we must engage in an analysis of the public policy considerations in favor of applying an immunity. And before engaging in a parity of reasoning between quasi-judicial immunity on the part of judges and prosecutors, which this Court has recognized in cases we cited in our brief, I'd like to make a few remarks concerning the unique discretionary nature of the parole process.

This Court, in 1972, in the case of Morrissey v. Brewer, indicated that for the past 60 years the process of releasing prisoners on parole had become an integral part of our penological system; that the purpose of parole is to reintegrate officials into society as constructive individuals as soon as they are able, without confining them for the terms of the sentence imposed, and that the process of parole

mitigates the cost to society of keeping people incarcerated.

In the recent case of Greenholtz v. Nebraska Penal Inmates, decided May 31st of this year, this Court painted a very comprehensive picture of the unique and discretionary nature of the parole process. The Court all but implied it's a fragile process, still in the experimental stage, and it consists of a synthesis of record fact and personal observation of the parole official, filtered through the sum total of his experience, and resulting in an equity type of judgment, taking into account psychological, sociological, biological and genetic factors of the individual under consideration; and that that kind of decision does not always lend itself to traditional findings of fact or conclusions of law.

It emphasizes not what a man has done, but what a man is and what a man can become. And it's against--it's against that backdrop, that critical and unique purpose of parole, that we must engage in an inquiry of the public policy considerations in favor of granting quasi-judicial immunity to parole officials.

In 1967, this Court, in one of its cases, recognized the common law immunity which benefitted judges from civil liability in connection with the 1983 action. That was Pierson v. Ray. And in 1976, in the landmark case of Imbler v. Pachtman, this Court extended that rule of immunity to State

prosecutors upon the rationale that to permit angry or disgruntled litigants to file lawsuits against these officials alleging reckless or improper conduct would have a chilling effect on these decision-making processes. And that chilling effect would result in harassment and intimidation, rather than fearless and principled decision-making.

QUESTION: General Miller, let me go back to Semler. I take it you feel your case is just as solid if we went along with the principle in Semler?

MR. MILLER: First, Mr. Justice Blackmun, we can't see how the principle of Semler is at all relevant to this kind of an inquiry.

QUESTION: Well, as I read the Court of Appeals' decision, they didn't stop at the break that Semler would represent, to wit, the ministerial act as distinguished from the other.

MR. MILLER: My understanding of the opinion was that the official in question was not exercising any discretionary or quasi-judicial function in that case, but was merely engaging in a ministerial kind of activity and--

QUESTION: And therefore I ask you whether the Semler decision is at all embarrassing to your decision; and I take it your answer is no?

MR. MILLER: That's correct, Your Honor.

QUESTION: Isn't it also true with respect to Semler that the Court of Appeals for the Fourth Circuit looked to Virginia law, and if one were to perform the analogous function here of looking to California law, clearly California law says there should be no liability.

MR. MILLER: That's true, Your Honor. And furthermore, with respect to that point, Mr. Justice Rehnquist, in Semler, a Fourth Circuit opinion, the Court of Appeals in that case did not modify, nor even question, its own rule of absolute quasi-judicial immunity that it had already recognized in favor of parole officials in connection with a determination to release or to deny release, to a parolee.

We believe there's a parity of reasoning between the public policy considerations in favor of prosecutors and judges and granting them immunity and granting a quasi-judicial immunity for parole officials.

As it was foreseeable on the part of--in the context of a state prosecutor that numerous lawsuits could be filed by unhappy litigants unable to accept the wisdom of the result of a particular case, we can perceive a multitude of lawsuits being filed by victims of violent crime committed by parolees who will transmute the loss, the shock, the wrath, and the other emotions they've suffered into ascriptions of reckless and improper conduct against a parole official, allegations that are easily made and, in the absence of a

total quasi-judicial immunity, can only be disproven with a full evidentiary hearing. That would deflect a great deal of energy and time on the part of parole officials from making these important decisions to defending past decisions. And in some cases, decisions that have taken place years before they will have to come into court and establish to the satisfaction of a jury good faith.

That imposes an intolerable burden. Furthermore, the Court indicated in Imbler that it would be highly improper and risky to permit lay juries to pass on technical issues such as prosecutorial strategy of what witnesses to call, what evidence to seek introduction of, what kind of a case to prosecute.

We feel there's a parity of reasoning there. Because if we were to open up the door even a crack to liability on the part of parole officials under 1983, juries would be expected to resolve issues such as the--all of the individualized and highly subjective issues which argue in favor of release for a particular individual.

The jury would be responsible for assimilating the sum total experience of a parole official. For as Greenholtz instructs, the process of parole is a synthesis of record fact and personal observation of the parole official filtered through his own career, his own experience. And we would put a jury in the--

QUESTION: Can I interrupt you with a question?

Assume you don't have that kind of--I want to find out the scope of the immunity that you're arguing for.

Supposing you had a corrupt parole official who was asked to find a trigger man to kill somebody. And the parole official said to an inmate, "I'll let you out if you'll kill Mr. X." And he let him out.

Would there be a cause--immunity for that kind of conduct?

MR. MILLER: Yes, Your Honor, we would still argue in that kind of a case, there would. The actual--the actual cause of action under 1983 would be immune.

However, we feel that--

QUESTION: Do you concede there is a cause of action under 1983 in this case?

MR. MILLER: No, Your Honor, we don't. We feel that there's no cause of action stated under 1983.

QUESTION: It's your view is, that if there's a cause of action, no matter how extreme and no matter what it covers, there is total immunity?

MR. MILLER: Yes, in the example--in the hypothetical you posed, Mr. Justice Stevens, that would be our position. And we would analogize that to the state prosecutor, for example, suborning perjury.

QUESTION: There's total immunity of the parole board with respect to their decision to release somebody. There's not total immunity of the parole board if a member of the--if the parole board itself directly injured the person; is that right?

QUESTION: Or commits any other crime?

QUESTION: Yes.

MR. MILLER: That's correct.

QUESTION: Well, then your answer to Mr. Justice Stevens was perhaps--was a little too hasty. You said there'd be absolute immunity. What if the parole officer went out and shot somebody himself. He'd--there'd be no immunity, would there? No part of his official function?

MR. MILLER: I would agree with that.

QUESTION: Well, then if he hires--if he induces the parolee to kill someone on the basis that he will be released for that purpose, that's not within the scope of his official function, is it?

MR. MILLER: It's--

QUESTION: You really think--

MR. MILLER: It's arguably within the--he is exercising a power. He is aexercising a jurisdiction. And that jurisdiction is exercised by his decision-making process. And if, in California, one parole official had that kind of power; and if a prospective parolee was before him eligible

for parole; and if he made that kind of decision and released, pursuant to some kind of conspiracy or agreement this individual into society, I think it's arguable that he would still be immune under 1983 liability as he did not clearly--he did not act in clear excess of his jurisdiction. The test--

QUESTION: Would he not be subject to liability though under California criminal law?

MR. MILLER: Exactly. Exactly, Mr. Justice Rehnquist; he would. And that would be the judicial check on that kind of abuse of powers.

We--getting back to the public policy considerations in favor of--

QUESTION: But General Miller, would he be--wouldn't he be immune under the California statutes if the decision was made--if it was injury resulting from determining whether to parole or release a prisoner?

The statute, it seems to me, reads right on my case.

MR. MILLER: Your question, Mr. Justice Stevens, is whether or not--

QUESTION: I will vote--I have the authority to release you. I will release you, provided you agree to kill somebody I want killed.

And that's going to be the real reason why I do that.

And that's an injury resulting from determining whether to parole or release a prisoner, is what the statute says.

MR. MILLER: I think the motivation or the intention behind an actual release in any particular case is irrelevant; and certainly, if this case had been brought solely under California common law we would have urged, as we did in this case, the application of the immunity under 845 point--

QUESTION: But I suppose you could say there are two grounds that--for liability, one is the release, which you say there is absolute immunity for; but you wouldn't claim any immunity for conspiring with somebody else to kill somebody?

MR. MILLER: No, I would not, Your Honor.

QUESTION: If you--if the parole officer went around to a prisoner and said, "Why don't you escape and I'll pay you and you kill this fellow?" Or after he was out and already paroled, on parole, if his parole officer said, "Why don't you kill this fellow and I'll pay you?" he certainly wouldn't be immune, would he?

MR. MILLER: In that kind of a hypothetical, I don't think he would, Mr. Justice White; where the individual was actually out on parole, and they entered into a private agreement for the purpose of taking the life of a member of society, I don't think that there would be any immunity.

under 1983.

QUESTION: Well, you couldn't state a cause of action.

QUESTION: General Miller, the complaint also alleges, I think in the fourth cause of action, a breach of the duty to supervise.

Are you going to address that also?

MR. MILLER: I will address it now, Mr. Justice Powell.

First of all, we don't feel that the--that that matter has even been briefed by the appellants in this case. They seem to rely solely on the decision to release aspect of this case for purposes of alleging a 1983 claim exists.

But we would also submit that the process of supervision is but a finely spun attenuation of the determination to release itself. Supervision involves making sure that the terms and conditions of aparole are being complied with. And that kind of activity has relevance only insofar as a decision to revoke parole may be made, or a decision not to revoke parole.

That kind of activity doesn't exist in the abstract. The point I'm trying to make is, it has relevance to further a decision-making process for which, we would argue, the parole official is absolutely immune under the quasi-judicial immunity.

QUESTION: In California, does the Board have, as

a matter of fact, responsibility to supervise the conduct of parolees?

MR. MILLER: No, Your Honor, it does not.

QUESTION: Who does that?

MR. MILLER: Individual parole agents, parole officers do that. And they are employed by the Department of Corrections; they are not employed by the Adult Authority, which was the Board empowered to make decisions to release parolees when this case arose.

QUESTION: Are any of those correctional officials parties defendant to this suit?

MR.MILLER: No, they are not, Mr. Justice Powell.

QUESTION: And you're telling us that the parole board members themselves have no responsibility whatever for the supervision of parolees?

MR. MILLER: Thatis correct, Your Honor.

QUESTION: Let me understand your answer to Mr. Justice Powell on the fourth cause of action: The statute doesn't read on the--doesn't provide immunity for incorrect supervision, does it?

MR. MILLER: The statute does not make any express reference to the supervision of parolees once they've been released, Mr. Justice Stevens. However, the Adult Authority was given the power to adopt terms and conditions of parole,

and presumably, the terms and conditions of parole may be related to the supervisorial process.

However California law itself has acknowledge, we have case law in California to the effect that, the function of parole supervision is part and parcel of a decision to release, for the reasons that I've previously indicated, that--

QUESTION: Yes, on the revocation. But say, theoretically at least, you could have a case in which a parole officer might abuse his authority over a paricular parolee, and they can do work for him, in order to stay out. Say he just exploited his relationship, and made the parolee, just as an example, made him wash his car every Saturday or something like that; just to--would he be immune from any claim from the parolee for abuse of authority in that kind of situation?

MR. MILLER: No, Mr. Justice Stevens, I would not argue that. But that would be outside the context of his authority, of his jurisdiction. And there--and liability could lie for whatever tort--

QUESTION: It would only go to the--basically to his authority to decide whther or not the man belonged on parole?

MR. MILLER: That's correct, Your Honor.

QUESTION: If indeed the parole board members are

liable, for a bad decision to release, an erroneous decision to release, would it follow that they would also have some liability for a wrong decision not to release?

MR. MILLER: Yes, Your Honor, we--

QUESTION: A deprivation of liberty claimed by the prisoner who said, "I should have been released two years ago."

MR. MILLER: Yes, Mr. Chief Justice, that would certainly be a logical result; and that would even create a greater burden on this vital aspect of our rehabilitation process.

We feel that under that kind of pressure--we feel, in the initial case, that any prospect of liability under 1983 for the determination of a release of a prisoner, whether it comes from a member of the public victimized by a parolee, or from an inmate who has been denied parole, would create a chilling process--a chilling effect on the ability of the individuals to exercise the vast amount of discretion we repose in them for the purpose of vindicating this aspect of our penological system.

We feel--getting back to the question of the incredible burden that we would impose on juries, we feel that juries would be presented with all kinds of highly technical and improper decisions for them to make, such as the predictability of violence in general terms, and also

in specific terms with respect to a particular parolee; and that ultimately they would be required to come up with the ultimate finding of fact, in the form of a jury verdict, a process which this Court has already acknowledged is not appropriate for the kind of determination that a parole official will have to make.

These decisions will be made in an emtional melting pot, with the benefit of 20-20 hindsight; and it'll be easy for a jury to ascribe reckless conduct or improper conduct on the part of a parole official in an emotional reaction to the gravity of the offense that was committed.

So our position is that we should not--we should not submit parole officials to make this treacherous choice of opting for continued confinement for their own personal protection on the one hand, and opting for the release of an individual into society at the risk of incurring personal liability.

We feel that that would have a chilling effect on this decision-making process, and result in thousands upon thousands of inmates throughout the penal institutions in our country worthy of parole being incarcerated longer for unjustifiable periods of time.

Furthermore, if we were to impose liability under

Section 1983 in this particular set of circumstances, and appellants have argued that we should impose liability only for gross negligence or recklessness, we would in effect be creating a privileged class of crime victims, if you will; those people victimized by recidivistic acts committed by parolees who have been released as a function of gross negligence or other grievous misconduct.

Crime victims who suffer at the hands of parolees who haven't been released as a result of any improprieties would have no redress under 1983, nor would people victimized by probationers, or first time criminals, for that matter.

QUESTION: Under California law, I assume that the victim here had a tort cause of action against the actor, whether or not he was judgment-proof I suppose might be a question; but there's no question of immunity on the part of the person who actually raped her?

MR. MILLER: Mr. Justice Rehnquist, that's absolutely correct. The statute in question in no way abridges the common law right of the individual to proceed against a person who committed the offense.

And furthermore, in California we feel that we dealt with--or we're in the process of dealing with the separate question of compensating people in a more appropriate manner than imposing liability on the part of parole officials.

In California, we've adopted a comprehensive

scheme known as the Victim of Violent Crimes legislation, whereby we compensate, to a limited degree, and within the context of special damages suffered by individuals, victims of all crime, not just crime committed by released parolees or released probationers or first-time criminals.

Furthermore--and this gets into the area of what alternative means there are which might be preferable to Section 1983 in California at the time this happened, and at the present day, we can promptly remove a parole official who is incompetent or can't exercise his--the discretion that is reposed in him, or for any other reason. We can also reduce the amount of discretion that we vest in parole officials, and provide for a greater involvement of interested law enforcement agencies and, indeed, the public, as we've done in California.

There's been some suggestion that because of the absence of formalistic judicial safeguards the parole process is not--is--should be controlled by the imposition of tort liability upon parole officials. And in their briefs the appellants made reference to the quasi-judicial--not the quasi-judicial, but the judicial safeguards enunciated by this Court in Butz v. Economou, and indicate that in the absence of that kind of safeguard liability should be imposed as a necessary check.

First of all, the Butz opinion itself did not impose

as a condition precedent the existence of any judicial safeguards on the Federal administrative law process before it granted--before it decided it was to grant quasi-judicial immunity to administrative law judges and prosecuting attorneys within the executive branch of the Federal Government.

And furthermore, as this Court has indicated in Stump, particularly in footnote 12 of Stump, there are all kinds of activities in which a judge may engage which are outside the adversarial process, such as the decision to issue a search warrant, or issue an ex parte order such as a temporary restraining order. And there are no procedural safeguards at that particular time, but we have still recognized absolute immunity in that kind of a content.

Within the context of prosecutors, we will totally immunize them for many of their decisions which are ex parte, wif you want to call it that, in nature, which are not made within the context of the adversary process, such as a decision of when to prosecute a case, what case to prosecute, what evidence to seek introduction of and what witnesses to call.

Finally, we turn to the subject that the parole decision itself really does not lend itself to the adversary process. It's a quasi-judicial function outside the traditional mold of adjudication, as the Court indicated

in Greenholtz, and there are all kinds of equitable, and intangible, and highly subjective factors to be taken into account, and the process results in an equity kind of predictive judgment, not a traditional finding of fact.

It's been likened by this Court in Greenholtz to the sentencing judge's choice, and in Williams v. New York this Court held that in the context of sentencing there were no due process or other requirements which could justify the injection into a sentencing process of the right to counsel or formalistic rules of evidence; because if that were done, as the Court recognized in Williams, we would have a situation where judges would not be able to rely on information in which--upon which they traditionally rely for that important decision, such as probation reports and other information.

The Court indicated that that kind of information won't normally come in under classic rules of evidence. It furthermore will impose a great burden on--a great cost burden on society.

My final remark with respect to appellant's contention that we need judicial safeguards in this area is that if we were to impose that kind of condition, we feel that it will be done at the risk of creating a greater self consciousness of the quasi-judicial function of the parole decision, which in and of itself could have a

chilling effect on the process. It could be transformed into a prosecutorial environment where the emphasis would not be placed upon rehabilitation of the individual but rather on continued and unjustified confinement.

Thank you.

MR. CHIEF JUSTICE BURGER: Your time has expired, counsel.

Do you have something further?

REBUTTAL ARGUMENT OF DONALD McGRATH II, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. McGRATH: Briefly, Your Honor.

I think the end result of what the State's attorney is saying is that already the public must assume the risk of first offenders. That we can't do anything about. We must assume--

QUESTION: What would you do about a jury? Suppose he had been acquitted by a jury, not guilty by reason of insanity verdict. The man was out of the street, with all of the same propensities, all the same record you have here.

MR. McGRATH: Procedural due process would have--

QUESTION: Would you hold the jury liable?

MR. McGRATH: No, I would not.

QUESTION: For a bad decision?

MR. McGRATH: No, sir, I would not. And there would have been at least the airing of his mental capacity

in an open courtroom with a fair and honest decision.

But as it now stands, we assume the risk of first offenders; we can't do anything about that. We assume the risk of people who have allegedly been rehabilitated.

Now, says Mr. Miller--State's position--that we must also assume the risk of sexual psychopaths who we know have not been cured. And I don't think that's--that we have to go that far.

We don't need to assume, or we shouldn't be made to assume, as members of the public, the risk of known crazy individuals being released into society. I am not--

QUESTION: Well, you can go to the California legislature tomorrow and get them to pass a law that gives damages in your situation, can't you?

MR. McGRATH: But 1871, we had Section 1983 ,and damages tend to discourage this type of behavior, so says the Court.

QUESTION: Yes, but you're talking about general policy terms about why we, the public, shouldn't have to endure this. I mean, the California legislature could change it over night.

MR. McGRATH: Well, I 'm sure they could, but they haven't. And we have a Federal right that's being violated.

QUESTION: Well, that's the question.

MR. McGRATH: You know, by maniacs; and that's what

Thomas was.

I don't want a holding--and the Martinez family has not asked me to come here--they are people who believe in a second chance. A parolee who has said--and looks good and gets out and commits another crime, he's not the entity that we seek. He's not the person we're after.

He's tried; he's done a good job; so he commits a crime. No liability.

This man was declared crazy. And he's still crazy. And they let him go. And he kills this little girl. Not fair.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereuopn, at 11:56 o'clock, a.m., the case in the above-entitled matter was submitted.]

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