ORIGINAL

In the

Supreme Court of the United States

FRANCIS RICK FERRI,

PETITIONER

V.

DANIEL ACKERMAN,

RESPONDENT.

No. 78-5981

Washington, D. C.
October 2, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS RICK FERRI,	:	
Petitioner,	:	
v.	:	No. 78-5981
DANIEL ACKERMAN,	:	
Respondent.	:	

Washington, D.C.
Tuesday, October 2, 1979

The above-entitled matter came on for argument at 10:04 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:

JULIAN N. EULE, ESQ., Klein Hall, 1719 North Broad Street, Philadelphia, Pennsylvania 19122; on behalf of the Petitioner.

JOHN P. ARNESS, ESQ., Hogan & Hartson, 815 Connecticut Avenue, N.W., Washington, D.C. 20006; on behalf of the Respondent.

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 first this morning in Ferri against Ackerman.

Mr. Eule, you may proceed whenever you are ready.

ORAL ARGUMENT OF JULIAN N. EULE, ESQ.

ON BEHALF OF PETITIONER

MR. EULE: Mr. Chief Justice and may it Please the Court:

This case should never have come before the United States Supreme Court. At its inception, it involved no more than a state common-law malpractice action commenced in a state court involving two private parties, an attorney and his client.

Because, however, the attorney received compensation for his services under the Criminal Justice Act, the Pennsylvania State Courts concluded that federal common law afforded him absolute immunity from such a state cause of action.

It is Petitioner's contention that this erroneous invocation of federal law is all that has necessitated review by this Court.

Two obviously related and often intertwined questions are presented by this case.

First, does federal common law have any rightful place in a state law action for malpractice commenced by an individual against a private attorney in a state court who was appointed to represent him in a federal criminal proceedings under the

Criminal Justice Act?

Second, if, in fact, Federal Common law is applicable, what is the nature of that Federal Common Law?

Is the immunity that this Court has afforded to judges and prosecutors equally applicable to the office of Court-appointed counsel?

Francis Rick Ferri, Petitioner herein, was indicted by a Federal Grand Jury sitting in the Western District of Pennsylvania. He was charged with violation of both the United States Criminal Code and the Internal Revenue Code but because he was an indigent, counsel was appointed to represent him.

Mr. Daniel Ackerman, the Respondent herein, was appointed to represent Mr. Ferri in this criminal proceeding.

Although the three-year statute of limitations on the Internal Revenue Code counts had run by the time the indictment was filed, Mr. Ackerman at no time moved to dismiss the indictment nor in any other way raised the statute of limitations defense.

Mr. Ferri was convicted and sentenced to 20 years on the counts under the Criminal Code and 10 years to run consecutive to the Criminal Code counts on the Internal Revenue Code counts.

On appeal to the United States Court of Appeals for the Third Circuit, Mr. Ferri, who was by this time represented by new counsel, did raise the statute of limitations issue. The Third Circuit, in a judgment order, concluded that the Statute of Limitations had been waived by its failure to have been raised at

trial.

It is this failure to raise the Statute of Limitations defense that constitutes the thrust of Mr. Ferri's present malpractice issue, malpractice common-law action that he instituted in the Pennsylvania courts.

Pennsylvania courts dismissed the suit on the ground that Federal Common Law provided an absolute right of immunity against suits. The Pennsylvania Supreme Court concluded first of all that they were required by this Court's decision in Howard versus Lyons to apply federal law to the question of potential liability here and second of all, that the Federal Common Law Rule of Immunity that has applied to judges, federal judges under Bradley versus Fisher and federal prosecutors under Yaselli versus Goff applied with equal force to court-appointed counsel.

Petitioner submits that they were wrong on both aspects of this case on their decision to invoke Federal Common Law and second, in their ascertaining what, in fact, that Federal Common Law was.

QUESTION: If we should agree with you on the first premise, that they were wrong in believing that Federal Common Law was applicable, I suppose the appropriate action on the part of this Court would then be to remand the case to the Pennsylvania courts for them to decide it under state law, would it not?

MR. EULE: Yes, that is what the Petitioner seeks and I think that is what -- even if the Court decides the question on

the second issue and concludes that there is Federal Common Law but that Federal Common Law does not afford immunity, I think that the question of state law and whether state law affords immunity will be open nevertheless.

QUESTION: Well, if we agree with the Pennsylvania courts that Federal Common Law is what is governing here, then we would proceed to decide whether or not we agree with them as to what the Federal Common Law is.

MR. EULE: Well, that is correct and --

QUESTION: And there would be no remand, would there?

MR. EULE: Well, I would think, Your Honor, that if this Court concluded that Federal Common Law was applicable --

QUESTION: Yes.

MR. EULE: -- and that Federal Common Law afforded no immunity, I think it would still be within the --

QUESTION: Well, then there would be a remand but if we agree with the Pennsylvania Supreme Court that Federal Common Law is applicable and that it grants the kind of immunity that Pennsylvania believed it did, that is the end of the case.

MR. EULE: That is correct, Your Honor.

QUESTION: Howard against Lyons was a diversity action, was it not?

MR. EULE: Yes, it was. It was in the federal court.

QUESTION: But -- it was in the federal courts but they were required to apply either some sort of Federal Common

Law privilege or the law of the state applicability. It was not brought under any federal basis of jurisdiction other than publicity.

MR. EULE: No, it was purely a diversity, a State Common Law action for defamation.

QUESTION: So it was akin to this case in that it --

MR. EULE: Except that that was instituted in the federal court and this was instituted in the state court but aside from that, it is akin to this case.

I should bring to Your Honors' attention that the Pennsylvania Supreme Court currently has before it a case dealing with the question of whether or not there is immunity under state law.

QUESTION: It has done what with that question?

MR. EULE: It has that case currently before it now. The case --

QUESTION: It has not decided it.

MR. EULE: That is correct. The case is Reece versus Danforth. The case has been briefed. The case has been argued but no decision has been rendered on that particular case.

QUESTION: Where, in the Court of Common Pleas? Or has it gone beyond that?

MR. EULE: It has come from the Superior Court. It is presently before the Pennsylvania Supreme Court. And the Pennsylvania Supreme Court did choose to hear the decision from

the Superior Court.

QUESTION: On some sort of an interlocutory appeal?

MR. EULE: No, the lower court dismissed the action on the grounds that there was an absolute immunity under state law.

QUESTION: And that question is now pending.

MR. EULE: And that question is currently before the Pennsylvania Supreme Court, yes.

QUESTION: That was was an appointed counsel?

MR. EULE: A state public defender.

QUESTION: In a state court.

MR. EULE: That is correct.

QUESTION: A public defender in a state court.

MR. EULE: It is in a civil Commitment action. It is not in a criminal proceedings. It is in a civil commitment proceedings that that has taken place.

The lower court concluded that there was immunity and both sides referred to that case in the lower court decision.

QUESTION: Right.

MR. EULE: It has subsequently come before the Pennsylvania Supreme Court.

QUESTION: The Pennsylvania rule, if it is a state law rule, would not be binding, I suppose, in a 1983 action against this lawyer whom you refer that it is presently pending in the Supreme Court?

MR. EULE: No, it definitely would not. Indeed, it

is my argument that the decisions in the 1983 actions, many of which have been dismissed for want of color of law, are entirely consistent with my position that this is not a federal office and therefore, there is no need to apply federal law to this particular case.

QUESTION: What would you say if this involved an employee of the United States, an employee as a public defender?

In some districts they take care of the constitutional right of defendants by having a public defender's office.

MR. EULE: I believe that every district has a mixed plan.

QUESTION: Well, what about a public defender?

MR. EULE: A public defender --

QUESTION: An employee of the United States.

MR. EULE: A public defender does raise different situations, a different problem. I do think, not insofar as the immunity question but certainly insofar as whether that person constitutes a federal officer. More of an argument could be made because the trappings of office are present in that particular case.

QUESTION: Well, in that case let us assume that the public defender, an employee of the United States, did such a bad job of representing the defendant who was convicted that his conviction was reversed because of -- that he had inadequate counsel. It was so bad that a conviction was reversed, that the

defendant was denied his constitutional right and then the defendant sued the counsel who had been representing him for -- to recover under a Bivens type of action.

What would you say then? Would not that be a federal issue then?

MR. EULE: Well, I think that in that particular type of case if it was under Bivens or if it was against the United States' Government under the Federal Court Claims Act, certainly more of an argument could be made that there was a color of law provision.

The Seventh Circuit, in Robinson versus Bergstrom, for example, recently distinguished the public defender's office --

QUESTION: Do you think that if you agree that federal law would govern the public defender, do you think that the rule would apply to his colleague who was just appointed?

MR. EULE: Well, I think that the answer in both cases would be that there would be no immunity. I think whether or not there ought to be no immunity as a matter of federal law or state law is different. The public defender is potentially -- may be potentially the subject of a suit against the United States Government under the Federal Court Claims Act. He may be deemed to be an employee. No circuit has yet decided that question.

It has been decided, however, that a court-appointed -- private court-appointed lawyer is not an employee of the government and therefore no suit lies against the government.

I think that --

QUESTION: Under our cases under the Federal Tort Claims Act, is it not reasonably clear that if it is a federal function, it is a discretionary federal function, it would be exempt from any liability on the government as distinguished from the individual.

MR. EULE: Well, Your Honors, I think that what took place in this particular case is not a question of discretionary judgment. I think failure to know the Statute of Limitations --

QUESTION: Oh, no, no, I did not use discretion in that sense; discretion in the sense that it is used, a discretionary governmental function in the sense that is used under the Federal Tort Claims Act and under our cases relating to that Act and I am only speaking to the liability of the government, not the liability of the individual.

MR. EULE: Perhaps there would be no liability to the government under the Federal Tort Claims Act but not, I think, on the ground that that individual was not an employee. The cases dealing with private court-appointed attorneys have been decided on the ground that that individual is not even an employee who falls within the Federal Tort Claims Act.

The 1983 actions similar against court-appointed counsel have almost uniformly been dismissed for want of color of law. The courts, at least the lower courts, have treated the public defenders somewhat differently.

My contention is that on the question of immunity, while there are different considerations, I think one of the most important different considerations that are involved is that a public defender is prohibited from the private practice of law. That is, 100 per cent of all his cases would be appointed cases.

The private court-appointed lawyer appointed under the Criminal Justice Act is not so prohibited. Indeed, most of them do have a substantial portion of their practice in the private-retained domain. I think that --

QUESTION: If I could change that a little bit, could Congress by statute grant absolute immunity to a Criminal Justice Act-appointed counsel and public defenders and do so consistently with the Constitution, in your view?

MR. EULE: Your Honors, I believe that it might be possible. In that particular case I think a very different constitutional problem would be raised that is raised by this particular case. There would then be a legislative judgment, an empirical finding of the interest of the Federal Government and the danger that it posed to the representation of indigents to have potential liability. I do think that it might --

QUESTION: The first question would be one of Congressional power, under the Constitution, would it not?

MR. EULE: Whether Congress could grant that. I think, however, Your Honor, that Congress would be able to.

QUESTION: Under what provision of the Constitution?

Under which one of its constitutional powers?

MR. EULE: Well, probably pursuant -- perhaps pursuant to the spending clause. If, in fact, they were allocating money they might be able to put limitations on the receipt of that money under the spending clause.

I think, however, it might create some Sixth Amendment problems. If, in fact, the source of the individual's right to be represented is not Congress but is the Constitution, as this Court has made clear, then all Congress is doing is compensating and if, in fact, it is concluded that the immunity that is granted provides for less-effective representation than if a person is potentially liable, I think it would have Sixth Amendment problems.

QUESTION: It may be true that you can talk that way about Congress but if you talk about the United States, the interest of the United States is broader. It seems to me to be a horizon of the Constitution. It is doing its Constitutional duty to appoint counsel and it is a federal -- it certainly is a federal function and I suppose you would agree that whether or not the counsel has performed his duty in the federal court adequately is a matter of federal law.

MR. EULE: Well, Your Honor, not entirely.

QUESTION: Well, I am sure it would be if the defendant appealed on the grounds that he had had such inadequate counsel that his conviction should be reversed.

MR. EULE: Perhaps under 2255. It is, however,

within the domain of all the State Supreme Courts of these United States to adjudge the quality of representation and take disciplinary action against lawyers, even if that representation took place in a federal criminal proceeding and in those cases I would believe that the state laws, disciplinary laws which control conduct would be the governing rules on the appropriate discipline to be taken against lawyers.

QUESTION: Would you think that Congress could not prescribe the standards for lawyers who were operating in the federal courts?

MR. EULE: No, I would have no difficulty with that type of legislation.

QUESTION: And including those who were appointed to represent indigents.

MR. EULE: Certainly I think --

QUESTION: And providing for liability if they breach those standards.

MR. EULE: Certainly I think that Congress could do that. Whether Congress -- I believe that Congress could perhaps even grant immunity to private court-appointed lawyers. I do think it would create some equal protection problems. I do not think it creates anywhere near the amount of equal protection problems that are created where we have a rule that is not subject of Congressional action where there is no need for the deference to the wisdom of the law or the deference to the legislative

judgment or the majoritarian will or the empirical fact-finding that has been, in fact, engaged in by the legislative process.

I think the scrutiny of a common-law action ought to be greater than that when we deal with -- when this Court deals with Congressional legislation.

QUESTION: Let's back that up with another hypothetical. Suppose the judge who made the appointment was guilty of such gross negligence in appointing an obviously incompetent person.

Would there be any liability on the judge? Or would he have absolute immunity under our holdings?

MR. EULE: I think he would have absolute immunity. I think certainly a state judge under Stump versus Sparkman, Pierson versus Ray and the federal judges as well, I think that there would be no difficulty with that question; as well with the prosecutor. I think the prosecutor would be in the same position as the judge.

There is a very different situation presented here, not only because an individual is much more clearly not only an officer of the government but indeed, represents the government.

But I think policy-wise there is a very different situation that the judge or the prosecutor is in than the court-appointed counsel. The judge and the prosecutor owe their duty to the public, not to the specific individual. Their overriding duty is to the public and very often they may have to act and indeed, do act in ways that are not in the best interest of that

particular individual because their duty is to act in the best interest of the public.

When we deal with court-appointed counsel we deal with a person who owes his primary duty to the client. Therefore, the creation of liability at the hands of the very person to whom if not the sole, certainly the primary duty is owed does not create the potential conflict that subjecting a judge or a prosecutor would.

QUESTION: What is your understanding about the obligation of an attorney in your state or in your district to respond to an appointment? Is, I suppose -- would a judge hold a person in contempt if he declined to represent a defendant?

MR. EULE: I am not sure, Your Honor, because the present procedures for the Western District of Pennsylvania do not utilize that type of involuntary appointment.

QUESTION: Well, anyone who wants out can get out in your district.

MR. EULE: The person would have to volunteer to be put on the list, yes.

QUESTION: I see. So he is voluntarily walking into a situation that -- well, at least he is not involuntary. He is not performing some involuntary service.

MR. EULE: That is correct. He is being compensated and he has also volunteered.

QUESTION: And if he volunteers he then at least

purports to be competent to accept and discharge an appointment.

MR. EULE: Well, that is correct except that the District does engage in a certain type of standards, standard-making themselves in looking into the qualifications of the particular individual and people are, in fact --

QUESTION: Well, at least it is not a situation where he says, "Judge, I just am not a criminal lawyer. I do not know anything about it. I do not want to do it." He is not forced to do it.

MR. EULE: That is correct and I believe --

QUESTION: And he purports to be able to satisfy the standard.

MR. EULE: That is correct. As to whether a person could, in fact, be forced to and whether that, in fact, would create some constitutional problems as has been suggested, I do not know. It has not come up in that district because there is no such procedure that exists in that particular district.

Howard versus Lyons application to a federal officer is undisputed. What is contended by Petitioner is that this individual is simply not a federal officer. His source of authority is not the Federal Government. It is the state that licenses the lawyers. It is the state that judges standards for lawyers. While one would have to be admitted to that particular district, most of the United States District Courts have almost an automatic admission policy for individuals solely upon their

admission to that state bar.

QUESTION: It is your position, then, that Pennsylvania could go either way as to immunity in this case as a matter of state law.

MR. EULE: That is correct, Your Honor. I do not know how Pennsylvania will go in that particular case and I believe it is possible that they will go either way.

I should like to call to Your Honors' attention, although it is certainly not binding on the Pennsylvania Supreme Court, that neither counsel in that case has argued for absolute immunity. They have only argued for qualified immunity in that particular case. Certainly the Pennsylvania Supreme Court is not bound by that decision and they may conclude that there is absolute immunity but in any event, it is somewhat distinguishable on its facts from this particular case and may not govern in any event in that that is a civil proceeding and not a criminal proceeding that is involved.

There is a public defender who has represented an individual in a civil commitment action.

QUESTION: Mr. Eule, as a matter of Pennsylvania law, what sort of immunity does a judge and a prosecutor get?

MR. EULE: Absolutely the same, Your Honor.

QUESTION: Do you think that there would be a difference between the responsibility of the counsel in a civil case and a criminal case?

MR. EULE: Yes, Your Honor. I think that when you deal with the individual's right, the individual has a constitutional right to be represented by counsel in the criminal action and so we are dealing with more than a right that is afforded as a matter of --

QUESTION: That is a federal right.

MR. EULE: That is correct. It is a federal right but it also applies in state proceedings as well. But that right may distinguish a civil commitment proceedings in that the problem which is faced when one deals with civil proceedings is that very often what one has is all volunteers, individuals who take pro bono cases.

Now, that would not be the case, certainly, in a federal criminal action unless that individual wished to take it without the compensation offered by the Criminal Justice Act.

Whether volunteers would create a different situation or not, it certainly would not be a matter of federal law if an individual volunteered to represent a person in a particular action.

QUESTION: Well, supposing you are counsel for a defendant who is convicted in a federal court and you are suing the lawyer who represented him in the federal court and you are suing him under state law just like in this action and he raises a defense of immunity under state law. I take it you would not move to strike that defense as wholly improper.

MR. EULE: No, indeed, I would think that under Erie that the Federal Court would be bound to --

QUESTION: This would not be the Federal Court. You are suing him in state court.

MR. EULE: Then certainly the state creating immunity to a cause of action it itself has created would create no problems insofar as the choice of law problem.

The individual who is bringing the action here, is bringing an action against an individual who owes him a duty, owes him the duty of effective representation. As I indicated earlier, this distinguishes the judge. It distinguishes the prosecutor, those individuals.

This Court's grant of immunity to those individuals has been precisely because the Court did not wish to create the conflict between on the one hand the duty imposed by law, the duty to the public and the public interest and on the other hand, the duty to the particular individual or at least the fear that the particular individual before him will subsequently sue him for malpractice or potential liability.

QUESTION: Is it your position -- you do not really contend that neither the prosecutor nor the judge owes the defendant in a criminal trial any duty at all? You do not contend that, do you?

MR. EULE: No, I do not contend that but I do contend that the problem is that there is a conflicting duty there and

that the judge's public duty is to decide in the best interests of the public.

QUESTION: Well, there are some constraints on counsel representing a client, too.

MR. EULE: Well, there certainly are with regard to the disciplinary rules that govern his conduct. Incidentally, one of those disciplinary rules is the rule that an attorney may not contract with his client to provide immunity from suit.

In any event, the suit against the counsel would, however, be with regard to a duty that was primarily owed to the client and the conflict between the self-preservation instinct which this Court has recognized in those immunity cases and the duty that is imposed would not be present because here they would coalesce. That is, the self-preservation instinct would be protected in the very same way that the performance of the duty imposed by law would be protected.

This Court, I think that it is the case that I find most clearly on point, in Mirec versus DeKalb County, concluded that in a state cause of action, in a state court, between two private parties, even where the Federal Government had provided compensation which had, in fact, in that case created the duty -- the duty to provide for safety in the Mirec case, this Court concluded unanimously that there was no need for federal law to apply.

The analogy, I think, is quite clear. We have a

contractual arrangement. The government is providing funds. The recipient of the funds has not performed the duty imposed upon him when those funds were granted and the individual, whether he is suing as an implied beneficiary of that contract or suing instead in malpractice, which is in itself a combination of a tort action and a malpractice action, the potential liability of that individual, even though they are a recipient of federal funds, should be a matter of state law.

We contend, however, not only that it should be a matter of state law but that, in fact, if federal law is found to be applicable, that that federal interest here would not be an interest in immunity but would be in accountability.

In Butz, this Court indicated that an individual who seeks immunity from suit has the burden of proving that there is a need for such immunity. I think here the burden has not been sustained. Immunity would discourage precisely that which immunity is designed to encourage, the vigorous performance of duty.

QUESTION: This part of your argument, at this stage in your argument, you are assuming that you lose on the -- and that Federal Common Law is applicable.

MR. EULE: That is correct. Correct. As I indicated, even if this Court concludes that Federal Common Law is applicable and that Federal Common Law affords no immunity, I think that it would still be within the right of the state court to impose immunity itself, even if the federal --

QUESTION: Yes, yes, yes. But now you are assuming that your first argument, that Federal Common Law is inapplicable, has been rejected --

MR. EULE: That is correct, yes.

QUESTION: -- and now you are arguing that the Federal Common Law --

MR. EULE: The second issue is not necessarily to be reached if the first is decided.

QUESTION: Right. Right.

MR. EULE: The Federal Government's interest, if any here, is in a standard of care for indigents. The purpose of the Criminal Justice Act was to improve those standards. Immunity is a logical way to approve those standards. Not only are the policy reasons clearly against it but this Court ought to be concerned with the appearance of justice as well, the appearance of treating the indigent, who is unable to afford his attorney, differently than it treats an individual who can retain attorneys; the mistrust that exists between lawyers, court-appointed lawyers and the indigent is hardly likely to be helped by the absolute grant of immunity on the part of the Federal Government.

At this point in time, it seems to me, an unwise thing for -- in view of the cynical attitudes that have developed around the legal profession in general -- that a different rule should be established with regard to lawyers than has been established with regard to doctors.

Physicians are liable even if they receive MedicAid funds. The mere receipt of MedicAid funds does not distinguish the case from a physician who, in fact, has been paid, has been retained by --

QUESTION: But the government does not give MedicAid funds pursuant to the United States Constitution, does it?

MR. EULE: That is correct.

QUESTION: There is the difference.

MR. EULE: That is correct. In this case it would be even stronger but in that case where it is weaker, the Federal Government interests certainly -- or the indigent's interest is weaker. Nevertheless the legal profession has treated the fully-paid physician the same as it has treated the one who is the recipient of a federal funding program.

QUESTION: That is not a case from this Court, is it?

MR. EULE: No, that is certainly not a case from this Court. The physicians who do work for the Federal Government, that is, Veteran's Administration physicians, public health physicians and Armed Forces physicians, Congress has legislated as to all three of those and Congress has created an exclusive remedy against the United States Government and has in turn afforded immunity of sorts to those physicians in return for creating the absolute or exclusive right of action under the Federal Court Claims Act and Connecticut has adopted a similar approach with regard to public defenders and court-appointed

attorneys.

The Connecticut Supreme Court held that there was potential liability on the part of public defenders and that there was no immunity as a matter of state law.

Connecticut legislature has subsequently passed the statute and that statute has created an exclusive right of action against the state in return for immunity.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Arness.

ORAL ARGUMENT OF JOHN P. ARNESS, ESQ.

ON BEHALF OF RESPONDENT

MR. ARNESS: Mr. Chief Justice and May it Please the Court:

The issue in this case is not whether immunity would best serve the private interests of an indigent defendant or whether immunity would best serve the private interests of a court-appointed attorney but rather whether the Doctrine of Immunity would best serve the public interest, particularly in insuring the proper function of the criminal justice system.

We contend that the considerations found determinative in this Court's prior decisions are fully applicable to this case. These include the fact that the threat of litigation may influence the manner in which the person involved performs his duty.

The fact of litigation will inflict harassment upon such persons so as to deflect their energies from the duties which

they are obliged to perform in order to analyze and meet the charges with which they will be faced.

The threat of litigation would make service in an already-burdened system less attractive and make it more difficult to encourage well-motivated and competent --

QUESTION: And yet in this case, all this case tells the defense counsel is, "Be sure and raise your defenses."

Is that what this case tells us?

And my second question, if so, how does that hurt due process of law?

MR. ARNESS: Your Honor, because that same theory or same set of situations could govern almost all of the activity of the appointed attorney and if he had to guard --

QUESTION: I do not know how many appointed attorneys run up against the statute. Not many, I am sure.

MR. ARNESS: But whether or not to plead the statute of limitations --

QUESTION: That is what this case is.

MR. ARNESS: That is what this case is. Yes, Your Honor.

QUESTION: And you cannot read that out of this case.

MR. ARNESS: That is correct but it is no more blatent, Your Honor, than --

QUESTION: This man is serving 20 years because of what this man did.

MR. ARNESS: No, the 20 years, Your Honor, was for putting a bomb in a car and injuring someone. The 10 years on top of that was with reference to the Internal Revenue count.

QUESTION: Well, I am wrong on 10 years.

MR. ARNESS: Yes.

QUESTION: But he got 10 years. That is a long time.

MR. ARNESS: Yes and he has now filed a motion under 2255, as the Reply Brief of Petitioner has shown, which is perfectly capable of curing that error, if, indeed, it be error.

You know, the statute of limitations, Your Honor, if I may digress for just a moment, is not just the responsibility of counsel. But the United States Attorney indicted, apparently. The judge did not pick it up.

QUESTION: Well, you cannot sue the United States Attorney.

MR. ARNESS: No, Your Honor.

QUESTION: And you can't sue the judge.

MR. ARNESS: And we respectfully submit --

QUESTION: And now you can't -- so in a situation where the judge is asleep, the U.S. Attorney is asleep and the defense counsel is asleep, you have got 10 years coming.

MR. ARNESS: Yes and Your Honor, you --

QUESTION: Is that what this case is?

MR. ARNESS: In that context, certainly, Your Honor, it is. But we respectfully submit that the Criminal Justice Act

and the system is not well-served by permitting just anyone to sue anyone who is an integral performing an integral part of the judicial process. There are much better means of handling that situation, both for the indigent defendant involved and for the public. Now, the --

QUESTION: Well, this case, if liability is to be imposed or immunity is to be granted, involves a great deal more than just forgetting about the Statute of Limitations. It involves every aspect of the trial of the case, does it not?

MR. ARNESS: Yes, indeed, Your Honor. And as I pointed out, this Court has never been dissuaded from handling the policy considerations involved by the particular conduct. If it were, then the suppression of evidence by Mr. Pachtman would not have been tolerated and in the Imbler case there would not have been declared absolute immunity.

You cannot, we respectfully submit, handle cases that have such far-reaching policy considerations behind them on the basis of the particular conduct being charged in a particular case and whether or not this conduct was reprehensible, of course, would be decided on a trial of the merits and we do not know that but that is not before the Court.

The problem before the Court is whether public policy requires the Doctrine of Immunity to be available so as not to have an adverse impact on the function in the criminal justice system.

QUESTION: Let me give you a hypothetical. Suppose after the defendant was convicted the defendant brought suit for malpractice saying that the defense counsel told him there was no chance of an acquittal unless he testified, that that was the considered judgment of defense counsel.

And so the defendant decided to testify and then was exposed, of course, to the usual cross-examination and now his claim is on one thing only, namely, that that was bad advice, that exposed him to the conviction and brought about the conviction.

That would be grounds for a malpractice suit, would it not?

MR. ARNESS: Yes, Your Honor, it would.

QUESTION: Under a holding of liability.

MR. ARNESS: If malpractice suits are to be permitted, any grounds which would smack of a counsel giving improper advice would be grounds for that action as a matter of law.

Now, you would have to prove it, of course, under the standards.

QUESTION: Or if the defense counsel decided not to cross-examine a prosecution witness, that might be a basis for a malpractice suit, too.

MR. ARNESS: Yes, Your Honor.

QUESTION: Is not that true today? Is it not true that despite this case that if it is paid counsel that is possible?

MR. ARNESS: Yes, it is, Your Honor. The difference is --

QUESTION: In all this hypothetical, if it is paid counsel, you can try them for malpractice.

MR. ARNESS: Yes, Your Honor. There are two important distinctions, however; the paid counsel does not have an involuntary relationship where the threat of litigation is as real as it is in an involuntary relationship such as court-appointed counsel has.

Secondly, the private attorney is not performing a governmental function.

Now, it is because this Court in Johnson versus Zerbst and in Gideon versus Wainwright and then Congress has enacted the Civil Criminal Justice Act -- has made this function a governmental function.

QUESTION: Why is not the privately-paid counsel performing a governmental function? He is performing it because the court has said the Constitution requires that there be counsel.

MR. ARNESS: Yes, Your Honor.

QUESTION: Is that not so?

MR. ARNESS: I think my answer would be, Your Honor, that court has said that that is a constitutional right.

Congress could have said, in the Criminal Justice Act that all people, regardless of means, are entitled to free appointed counsel. Congress did not. Congress chose to implement the decision of this Court by depriving people of means of that benefit and giving it only to people who can show that they

cannot afford it. That is a legislative decision .

QUESTION: But the root of the matter, the root of the matter, that is, the requirement of the presence of counsel stems from the Constitution in both cases, does it not?

MR. ARNESS: It does, Your Honor. Yes, it does and Respondent would be perfectly happy for the purpose of this policy argument to have it apply across the board. However, we maintain that it is the performance of a governmental function that distinguishes this case from others that that is the critical area.

Both public defenders and private attorneys appointed under the Criminal Justice Act are performing a governmental function as the Criminal Justice Act intended they perform it.

QUESTION: Mr. Arness?

MR. ARNESS: Yes, Your Honor.

QUESTION: Could I ask you a couple of questions about the first branch of your adversary's argument? It is the question of the source of this rule and why it is a federal rule.

You do not contend the rule itself is constitutionally required, do you? The immunity.

MR. ARNESS: We do not.

QUESTION: You do not contend --

MR. ARNESS: We contend that it is constitutionally required.

QUESTION: And you do not contend that it sources any statute?

MR. ARNESS: It is not the source of any statute.

QUESTION: So there is a Federal Common Law rule on which you rely.

MR. ARNESS: It is a rule based upon declared public policy, Your Honor.

QUESTION: Now, if it is a Federal Common Law rule independent of statute, would it have applied to court-appointed counsel before the money was appropriated to pay him, you know, a lot of us used to do this sort of work without any money. Would immunity have been available there?

MR. ARNESS: I think it would. Once this Court declared Johnson versus Zerbst--

QUESTION: So it really has nothing to do --

MR. ARNESS: -- that that be a function, a governmental function, I think it would.

QUESTION: So it really has nothing to do with the fact that the Criminal Justice Act pays these people.

MR. ARNESS: My friend has argued that all Congress did was provide payment. Congress did not do that, Congress implemented a system or designed a system to implement this Court's constitutional ruling of providing counsel.

Now, this Court in its wisdom left to Congress the devising of the means to accomplish this end. Congress did that. Congress has provided for a mixed system of public defenders and private lawyers appointed under the Criminal Justice Act to

perform this very vital public service and we are --

QUESTION: But that is irrelevant to the rule, as I understand it.

MR. ARNESS: I beg your pardon?

QUESTION: If I understand you correctly, that is all irrelevant to the rule. That is not the source of the rule that you advocate.

MR. ARNESS: That is -- that --

QUESTION: It would be the same right to immunity if you were appointed by a local bar association pursuant to some committee procedure or something like that and everybody worked free, to defend defendants in criminal cases because it helped the system work.

MR. ARNESS: The federal court is involved because this attorney was appointed under the Federal Criminal Justice Act in performing a federal governmental function. Now, I would think the public policy applicable would be equally applicable to a state lawyer.

QUESTION: Well, no but supposing instead of being appointed under the Federal Criminal Justice Act the Philadelphia Bar Association where they had a committee that young lawyers did this on a volunteer basis and they appointed such a lawyer to defend the defendant in a criminal case, would such a lawyer be entitled to the immunity under the rule that you are advocating that we should recognize? And if not, why not?

MR. ARNESS: I think so, on the basis of public policy but I believe it was --

QUESTION: Well, that is all you have got going for you, isn't it? There are no statutes or anything else.

MR. ARNESS: That is correct.

QUESTION: Yes.

MR. ARNESS: We have going for us the public policy considerations which this Court has paid attention to in every case of this kind that has been before the Court. We contend that they are identically applicable to this case plus we have this Court's decision in the Criminal Justice Act making this particular function a federal governmental function and that is why it would be incongruous, Your Honors, to have 50 states deciding, on their own, under state constitutions --

QUESTION: Mr. Arness --

MR. ARNESS: -- whether a Criminal Justice Act attorney, appointed under the Federal Act, had immunity or not. There has to be a federal rule on that.

QUESTION: Let's get away from 50 states to one state, Pennsylvania.

MR. ARNESS: Yes, Your Honor.

QUESTION: There are two defendants, hypothetical. One is paid for and one is court-appointed and they both pay no attention to the Statute of Limitations. The paid one gets sued and the appointed one cannot be sued. Right?

MR. ARNESS: That is correct, Your Honor. Yes.

QUESTION: Mr. Arness, I take it from the briefs that neither you nor your opponents think that Barr against Matteo has any bearing in the case. Am I correct in that understanding?

MR. ARNESS: We think Barr against Matteo has been superceded by this Court's decision in Imbler versus Pachtman and in Butz versus Economou, Your Honor.

QUESTION: By "superceded," you mean overruled?

MR. ARNESS: No, Your Honor, certain parts of Barr versus Matteo, we contend, are still good law in problems that do not arise to the dignity of constitutional rights, for instance. In ordinary questions we think Barr versus Matteo has still standing under the Constitution and there should be absolute immunity.

QUESTION: Well, I would think -- you are not -- there is no claim in this case that there has been any violation of constitutional right. It is just a state negligence action and I don't know why Barr would not -- if the federal law governs this I would not know why Barr would not be perfectly --

MR. ARNESS: I think it would, Your Honor. I think the two -- I think --

QUESTION: I think your big problem is that federal law controls and that Pennsylvania law has not got anything to do with it.

MR. ARNESS: Your Honor, yes. Your Honor, that

certainly is the thrust of Petitioner's argument here. However, we think there can be no question about the applicability of federal standards because it is the administration of a federal statute and a federal governmental function that is involved here.

QUESTION: What about a case where a defendant chooses to exercise the constitutional right that the Feretta case accorded him and decides to represent himself and the court appoints stand-by counsel? Is that stand-by counsel immune from later suit by the defendant who elected to go pro se?

MR. ARNESS: If he is performing a governmental function and he stays within the scope of that governmental function, Your Honor, we respectfully submit that he has absolute immunity.

QUESTION: And do you think that he is performing a governmental function?

MR. ARNESS: If he is appointed under the Criminal Justice Act to perform that service that indigents are constitutionally entitled to, yes, Your Honor.

QUESTION: Well, but are they constitutionally entitled under Ferretta to have stand-by counsel?

MR. ARNESS: Well, I think the reason stand-by counsel is appointed, Your Honor, is to provide, even when the defendant does not want to have some semblance of effective assistance of counsel and that is a constitutional right.

QUESTION: Well, let us suppose that a federal

defendant is convicted and he claims that his constitutional rights were violated by the inadequate performance of his counsel and his conviction is affirmed, his claim is rejected because in that court the standard for performance is a mockery or a farce. Is that still a standard in the Third District?

MR. ARNESS: No, it is not.

QUESTION: What is it?

MR. ARNESS: It is not, Your Honor. As a matter of fact standing is everywhere.

QUESTION: Well, let's just assume that the standard in the federal courts is farce or mockery and that the lawyer's performance was within that. Then the defendant who was convicted turns around and sues under state law and he says, well, it may be that you satisfied your obligations under the Federal Constitution but the state is entitled to require you, to hold you to a higher standard, namely, just negligence. And you were negligent.

Now, you are saying that he has no right to go into state court to make that sort of a claim.

MR. ARNESS: I am not saying that, Your Honor. I am saying that if he goes into a state court and it is shown that he was performing a federal governmental function, his rights are to be governed by the public policy attendant to that which gives him immunity.

QUESTION: Well, you are saying that he would have an immunity defense to any state law claim.

MR. ARNESS: Yes, Your Honor. Yes.

QUESTION: And that the state is not --

MR. ARNESS: Because he -- the liability he is being charged with arose during the course of his performance of a federal governmental function.

QUESTION: What possible reason -- what are the reasons for affording immunity? Absolute or qualified?

MR. ARNESS: Your Honor --

QUESTION: The reason is that you do not want to deter, by a fear of liability, any of the performance of the officer's duty. Now, a prosecutor, you want him to be fearless.

MR. ARNESS: That is one of the reasons. The other --

QUESTION: Now, just apply that to a defense counsel. Now, how could he possibly be deferred from doing anything by fear of liability?

MR. ARNESS: Well, Your Honor, one of the ready things that comes to mind is, if his involuntary client insists that he --

QUESTION: It is not involuntary.

MR. ARNESS: Your Honor, he voluntarily becomes a Criminal Justice Act attorney but once he becomes on that list then he gets an appointment. He doesn't choose it and the indigent defendant does not choose him. There is an involuntary relationship created by the very essence of the Act.

QUESTION: Now, wait a minute. Did you say that if he went to the judge and said, "I just can't handle this," he

could not get out?

MR. ARNESS: Your Honor, the standards do not permit him to get out just because he does not like the situation. That is correct. And the standards of getting out or substituting or withdrawing are very difficult.

QUESTION: Nevertheless he has held himself out as being a competent lawyer, competent enough to represent defendants in criminal cases by volunteering.

MR. ARNESS: That is correct. He has held himself out to be competent. That is correct. Any lawyer who is admitted to the bar and practices holds himself out to be competent in the things he undertakes but the question is whether there is an involuntary relationship created so as to distinguish that situation from the situation that confronts privately-retained attorneys.

QUESTION: All right, well, go ahead, tell me why he is entitled to immunity; what would he be deterred from doing if he did not have immunity?

MR. ARNESS: There are three reasons. His judgment would necessarily be affected, Your Honor, because if he thought that a certain trial tactic was in the best interest of his client and his client insisted on something else, then he is put in an untenable position of either acceding to the client's request or subjecting himself to a malpractice action.

QUESTION: Let us put it on a concrete --

MR. ARNESS: This would have a dampening effect on

his representation.

QUESTION: Well, how does that differ from hired counsel?

MR. ARNESS: Hired counsel, because of the voluntary relationship and particularly the right of choice, is chosen because the defendant thinks their judgment is worth having and they are paying for it and they are more prone to follow it and be satisfied with it.

One of the first and essential requirements of handling a criminal case is to have the lawyer in charge so that he can do the best job for his client. Now, that you can insist on in a private relationship.

That is almost impossible in an involuntary relationship and that is one of the major reasons why that the public policy demands that court-appointed counsel be given immunity.

QUESTION: So that he might be tempted to follow his client's requests and orders when, if he were hired counsel, he would not?

MR. ARNESS: Yes, Your Honor. Every court that has considered this problem, that we know of, has stated that to be the case.

QUESTION: And then what follows from that?

MR. ARNESS: What follows from that is that in order to put him in a posture where he can effectively represent and do his duty, immunity should be granted, for that and for two other

reasons.

QUESTION: Yes, but suppose he does follow his client's directions where otherwise he would not? What happens then?

MR. ARNESS: If he follows his client's directions, that is the path of the easiest way out. His client probably is not well-served but he maybe dodges a malpractice action and that is exactly what the Criminal Justice Act should not do.

QUESTION: Have there not been occasions where a defense counsel, paid, now, for the moment, a paid defense counsel privately retained, has informed the court out of the hearing of the jury that he has advised the defendant not to take the stand and that he wants the court to know that he has given that advice but the defendant insists on taking the stand.

Now, taking that hypothetical, is the situation any different for a privately-retained lawyer or a public defender such as we have here?

MR. ARNESS: That situation, in its essence, of course is no different, Your Honor. But it is almost inevitable that it will occur in an involuntary relationship where it should not occur in a private voluntary relationship.

QUESTION: Is the fearlessness factor any different in the two? If the lawyer is skilled enough to realize that that is, in the particular situation that that is a desirable thing to do for his own protection.

MR. ARNESS: Yes, because the privately-retained

attorney can say, "If you do not want my advice, then here is your money and you can get another lawyer."

QUESTION: Well, but in the middle of a trial, that is not very easy.

MR. ARNESS: Well, that should have been worked out long before the middle of the trial, Your Honor. Obviously, there can occur things during the middle of a trial where even a privately-retained lawyer could have a disagreement with his client. There is no doubt about that.

The question is whether or not the involuntary relationship increases the risk and hazard of litigation.

QUESTION: Mr. Arness, I question the basic premise on which you are arguing. You are suggesting a situation in which a lawyer in his professional judgment thinks he should do A and the client says, "I would rather have you do B" and the lawyer thinks it would be stupid to do B so he does B anyway to protect himself from a suit.

I submit he is more likely to be guilty of malpractice if he follows the stupid request of his client and does not follow his own professional judgment.

MR. ARNESS: Your Honor, the public policy --

QUESTION: I do not think that would be a defense to a malpractice suit to say that "My client asked me to do this stupid thing."

MR. ARNESS: I think you are absolutely right, Your

Honor but that is not the question. The public policy considerations here are not because there may be ultimate liability in a malpractice suit. We would presume that in most instances a malpractice action, because we argue in our brief that it is not well-calculated to serve the interests -- would not be availing.

The public interest is in freeing the lawyer from having to go through and prove and being sued and spending the money and harassed and having to prove that his judgment was correct and --

QUESTION: Mr. Arness, one of the costs --

MR. ARNESS: -- that the conviction would have happened anyway.

QUESTION: One of the costs of taking on cases like this is exposure to the risks of complaints before the Ethics Committee, the Bar Association, malpractice suits, all these sorts of things. There are these complaints that are going to be filed against lawyers who take on this litigation, no matter what the rules are.

MR. ARNESS: Yes and we contend respectfully that post-conviction relief procedures, court disciplinary procedures, Bar Association disciplinary procedures are much better-calculated to handle the situation that can be conjured up.

Malpractice, because of the burden of proof requirements, because of the defenses that are available and because of the fact that 2255 relief is a concommitant of the thing where you

could well have a court rule that there be a requirement to exhaust judicial remedies and then you would have collateral estoppel problems. Malpractice is really not well-designed to get at the problem that we are talking about here, which is the competency of counsel.

QUESTION: Mr. Arness, you told us earlier that there were three reasons and you gave one and then we hardly gave you an opportunity to talk about the other two. Have you now given them to us?

MR. ARNESS: Yes, Your Honor.

QUESTION: The 2255 and the disciplinary.

MR. ARNESS: No. Those are important considerations but the other two are these, Your Honor. This Court has held that the reason for immunity of the public policy is to prevent harassment -- I have talked about that --

QUESTION: Right.

MR. ARNESS: And secondly, the recruiting problem. It is absolutely essential for the proper functioning of the criminal justice system to draw well-meaning and competent counsel into this. If you read the legislative history, such as it is, with the Criminal Justice Act, it is apparent that Congress wanted the participation of the private Bar.

Now, that participation is something that is necessary unless we are going to have a system where all defense is provided by public defender systems, which would not be a good thing and

this, as I say, the recruiting element has been discussed in most of the cases that have considered the immunity and we think it is a real concern. And those are the other two.

QUESTION: Do you think the actual fear of liability, damages liability, would deter? Because there is nothing you can do about, as Brother Stevens says, these complaints before Bar Associations and surely in the Federal Court itself if the defendant is so-minded he can claim that he was inadequately represented and that the conviction should be reversed and I suppose that he could, if -- let's assume he appealed and his conviction was reversed on the grounds that his counsel has inadequately represented him and had violated his constitutional right. I suppose the defendant could turn around and sue him in the Federal Court in a Bivens-type action for violating his right to counsel.

MR. ARNESS: Yes, Your Honor, he could but --

QUESTION: You would not suggest it? You would not suggest there would be absolute immunity there, would you?

MR. ARNESS: Well, we do not believe that the Bivens situation is applicable here. That was a Fourth Amendment problem. That would not be within the scope of the duty of a court-appointed attorney.

Your Honor, the 2255 relief which this very Petitioner could have filed more than two years ago has just been filed in the month of September. Why? The record is silent. But that

relief is much more appropriate and that will do away completely with the 10-year sentence that he is complaining about here if, indeed --

QUESTION: It will do away with his lawsuit, too.

MR. ARNESS: Pardon?

QUESTION: It will do away with his damages and his lawsuit, too.

MR. ARNESS: Yes, it would render this case moot and probably -- either that or it would probably grant him certiorari.

QUESTION: Having rendered his case moot, how would it stop the man from having done the wrong that he allegedly did?

MR. ARNESS: Your Honor, that should be done by courts and by Bar Associations disciplinary procedures.

QUESTION: Well, why have malpractice at all?

MR. ARNESS: Well, Your Honor --

QUESTION: You want malpractice on one but not the other.

MR. ARNESS: I can only argue immunity on the basis of governmental function, Your Honor.

QUESTION: Well, do you support malpractice for private attorneys?

MR. ARNESS: Yes, I do.

QUESTION: Do you think that is fine?

MR. ARNESS: I think malpractice is--as a form of civil relief--is fine when a governmental function is not

involved, and when public policy does not contraindicate it.

QUESTION: You don't consider a private attorney as performing a governmental function?

MR. ARNESS: I do not.

QUESTION: Did you ever read the oath that you took?

MR. ARNESS: I hope so, Your Honor. I hope it's ingrained in my mind.

QUESTION: Mr. Arness?

MR. ARNESS: Yes, Your Honor.

QUESTION: Does the record show, or do you happen to know, what an individual officer of the court would have to pay as a premium for malpractice insurance now, assuming he were regularly defending criminal defendants pursuant to appointment?

MR. ARNESS: I do not know, but I assume it would be high. But I think that the question is not whether lawyers should have better malpractice coverage. That--it isn't the threat of ultimate financial liability. It's the threat of the harrassment--

QUESTION: Well, why do you give that point away so quickly, if you were a sole practitioner, didn't have a law firm to provide malpractice insurance, would you rush to volunteer to defend these cases?

MR. ARNESS: No, and I don't give it away too quickly, Your Honor. All I say is that malpractice can cover that threat.

QUESTION: If you have the funds--

MR. ARNESS: If you can afford it, yes.

QUESTION: Doctors, I understand, are paying, $20-, $25,000 a year premium.

MR. ARNESS: Yes. And it's certainly a meaningful factor. But far more meaningful is that there are alternate ways to get at this problem which cannot be protected against, and which the Court can control.

QUESTION: Mr. Arness, do you happen to know how many states there's a rule in cases like this that the criminal defendant in order to recover in a malpractice action has to prove that he was innocent? I think that some states require that to show actual harm.

MR. ARNESS: Your Honor, I think the substantial weight and the authority requires that in a malpractice action. And one of the ills, of course, is the thought of trying a criminal action over again in a civil environment with a lay jury is something public policy again should not countenance.

QUESTION: There's a pretty large proportion of these cases where the plaintiff in the malpractice action could never carry that burden of proof, as a practical matter?

MR. ARNESS: I think it would be very, very difficult, Your Honor.

I see my white light is on. I'd like to close, Your Honor, by stating that it's respondent's position here in this case, that the public policy considerations which this Court

has applied, and every federal court--we do not know of a single federal appellate decision that has ever refused to grant a governmental function immunity.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:04 o'clock, a.m., the case in the above-entitled matter was submitted.]