YOU ONLY GET WHAT YOU PAY FOR? THE CURRENT STATUS OF MALPRACTICE IMMUNITY FOR INDIGENT DEFENSE COUNSEL

I. INTRODUCTION

Given the proliferation of motion pictures and television shows about police officers and lawyers, the phrase “Read him his rights” has become almost cliché. While there are some semantic differences between the different iterations of the Supreme Court’s language, it is all based on the Court’s *Miranda v. Arizona*\(^1\) model where a suspect “has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”\(^2\) The last word of that statement, “appointed,” has been a point of contention since the Supreme Court in *Gideon v. Wainwright*\(^3\) found in 1963 that the indigent had a constitutional right to counsel in felony cases. Until recently, the right to appointed counsel has included the right to pursue him or her in a malpractice action, should the lawyer commit actionable negligence.\(^4\) However, a growing number of states, and to some degree the federal government, are limiting, if not denying, the right of an indigent criminal defendant to pursue malpractice claims against appointed counsel. This note examines the trend toward granting some sort of immunity to public defenders and other indigent legal service providers by exploring the lack of immunity held by public defenders at common law and the different ways in which the states are changing that tradition.

II. THE COMMON LAW NO-IMMUNITY DOCTRINE

A. *The Early State Cases*

For the first eleven years after the Supreme Court’s decision in *Gideon*, no court faced the question of whether a public defender should

\(1\) 384 U.S. 436 (1966).
\(2\) Id. at 444.
\(3\) 372 U.S. 335 (1963)
have immunity from suit by a client. The issue first surfaced in 1975, with the Connecticut case of Spring v. Constantino.\textsuperscript{5} In Spring, the public defender was charged with malpractice for failing to inform his client that certain bail procedures were available that could have secured her release.\textsuperscript{6} He asserted two immunity defenses: first, that he was covered by the doctrine of judicial immunity,\textsuperscript{7} and second, that as a state employee, he was covered by the doctrine of sovereign immunity.\textsuperscript{8} The Connecticut Supreme Court rejected both of these arguments, finding that defense attorneys "are in no sense judicial officers"\textsuperscript{9} and therefore were not afforded judicial immunity. The court dispensed with the sovereign immunity argument by saying that "[a] public defender in representing an indigent is not a public official \ldots\"\textsuperscript{10}

Four years later, in Reese v. Danforth,\textsuperscript{11} the Supreme Court of Pennsylvania concurred with the decision reached by the Connecticut Supreme Court with regard to sovereign immunity. The court characterized the relationship between a public defender and the state as more like that of an independent contractor than an employee.\textsuperscript{12} The court further agreed that when representation of a client begins, the attorney's "public or state function," and therefore any sovereign immunity, is abrogated and he becomes the equivalent of a private attorney.\textsuperscript{13}

\textit{B. The Supreme Court Weighs In}

Shortly before the Pennsylvania court returned its decision in Reese, the United States Supreme Court heard oral arguments as to whether there should be a federal malpractice immunity for public defenders in Ferri v. Ackerman.\textsuperscript{14} The Court agreed with the state courts, holding that no federal immunity existed for publicly-provided counsel in federal court.\textsuperscript{15} Further, the Court agreed that "the primary rationale for granting

\begin{enumerate}
\item 362 A.2d 871 (Conn. 1975).
\item Id. at 873.
\item Id.
\item Id. at 875.
\item Spring, 362 A.2d at 874.
\item Id. at 875.
\item 406 A.2d 735 (Pa. 1979).
\item Id. at 738.
\item Id. at 739.
\item 444 U.S. 193 (1979).
\item Id. at 205.
\end{enumerate}
immunity to [other court officers] does not apply to defense counsel sued for malpractice by his own client."16 However, the Court did not bar the states from finding immunity if they should so choose.17 According to the Court, "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law."18

Two years later, however, with the case of Polk County v. Dodson,19 the Supreme Court made a decision that became somewhat of a turning point in the evolution of public defender immunity. The Court found that public defenders are "[h]eld to the same standards of competence and integrity as a private lawyer,"20 and should be "free of state control."21 These have been among the primary rationales in finding against immunity for public defenders. However, the Court here found that under these circumstances, in the process of defending a client, a public defender was not acting "under color of state law"22 and consequently a claim against him under 28 U.S.C. § 1983 was ineffectual. Up to that time, § 1983 claims, along with state tort claims, had been the primary avenues of redress for criminal defendants who felt that their defense had been negligent.23 This finding barred such claims and forced clients of public defenders to pursue their claim under state tort law.

II. THE CURRENT STATE OF PUBLIC DEFENDER MALPRACTICE LIABILITY

The first part of this note was arranged in chronological order for the sake of convenience and simplicity. In the same vein, this part will be arranged categorically, in order to both highlight the different ways in which the states have lifted the burden of potential malpractice from the shoulders of public defenders and also to show those jurisdictions holding to the common law doctrine.

16. Id. at 204.
17. Id. at 198.
18. Id. at 198.
20. Id. at 321.
21. Id. at 322.
22. Id. at 324.
A. Absolute Immunity

A small number of states have either by statute or case law given total immunity from malpractice liability to those participating in the defense of the indigent. A recent example is *Coyazo v. State*, 24 decided by the New Mexico Supreme Court in 1995. The court found that public defenders would be "public employee[s]" 25 for purpose of protection under New Mexico's Tort Claims Act. However, the court went on to say that even if public defenders were to be considered independent contractors, they would be shielded by the immunity clause of the state's Indigent Defense Act, which offers absolute immunity to public defenders employed or appointed under it. 26

A state with a similar statute is Tennessee. 27 It has a similar blanket statute that eliminates liability by giving no state court jurisdiction over claims brought against state public defenders or employees thereof. This legislation has spawned no case law; therefore, it is uncertain whether "employees" of a state public defender would include any private attorneys appointed to defend the indigent.

In other jurisdictions, the high courts have taken the lead in providing total immunity to public defenders. The Minnesota Supreme Court decided in *Dziubak v. Mott*, 28 that "public defenders are immune from suit for malpractice." 29 The court based its decision not on case law or statute, but purely on public policy grounds. Among those grounds asserted were: 1) that public defenders should be able to pursue their clients' defenses "without weighing every decision in terms of potential civil liability;" 30 2) "a public defender may not reject a client, but is obligated to represent whomever is assigned to her or him, regardless of her or his current caseload or the degree of difficulty the case presents;" 31 and 3) "to free government officials from the burdensome consequences of litigation." 32

25. *Id.* at 238.
26. *Id.*
28. 503 N.W.2d 771 (Minn. 1993).
29. *Id.* at 773.
30. *Id.* at 775.
31. *Id.*
32. *Id.* at 776.
Aside from Minnesota, no other state has provided carte blanche immunity for its public defenders. However, New York’s public defenders are afforded almost as much immunity. In Scott v. City of Niagara Falls,\textsuperscript{33} the court extended the doctrine of judicial immunity to its public defenders. It rejected the common law arguments regarding the functional differences between prosecutors and judges on the one hand, and public defenders on the other.\textsuperscript{34} The caveat is that public defenders are immune from errors in their discretion or judgment but not from “clerical or ministerial error.”\textsuperscript{35} While the trend seems to be flowing their way, New Mexico, Tennessee, Minnesota, and New York are still in the minority of jurisdictions.

B. Qualified or Court of Claims Immunity

A number of states have afforded some degree of protection to their public defenders in the form of statutory qualified immunity. In these jurisdictions, a public defender is considered to be the same as any other state employee, and consequently, claims may only be brought against him or her in the state’s court of claims. For example, in Nevada, public defenders are specifically included in the definition of “public officer.”\textsuperscript{36} The definition also includes “an attorney appointed to defend a person for a limited duration with limited jurisdiction,”\textsuperscript{37} eliminating the need to worry about appointed counsel.

The California court in Briggs v. Lawrence\textsuperscript{38} was one of the first to find that public defenders met the test for public employee and were consequently entitled to some degree of immunity. However, the court was unclear as to whether such protection would be afforded attorneys appointed to representation and who are not salaried public defenders. It is possible, given other language in the opinion, that these attorneys would not be afforded that protection.\textsuperscript{39}

\begin{footnotes}
34. “We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders.” \textit{Id.} at 105.
35. \textit{Id.} at 106.
37. \textit{Id.}
39. The court stated that if the public defenders “should be deemed to have acted . . . as independent contractors paid by the county but in professional privity
In Vermont, the state's statute does not specifically mention public defenders, but their courts have found that public defenders and appointed counsel are to be included within that definition. Connecticut, the first state to consider this question, has recently found that its public defenders are "'state officer[s] or employee[s]' for purposes of the protection of sovereign immunity." Nebraska has recently joined in this trend, finding that any suit against a public defender would previously have been subject to sovereign immunity, and therefore under its statute must be tried in its court of claims.

Many states have court of claims acts that are similar to those mentioned above but there have been no rulings as to whether these acts protect public defenders or other indigent counsel. One example is South Carolina, which defines an employee as "any officer, employee, or agent of the State or its political subdivisions, . . . and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation . . . ." One commentator has suggested that public defenders would "fall within the auspices of the Act by its own definition." However, the Attorney General of South Carolina has warned that, given the unsettled nature of case law, its public defenders should carry malpractice insurance until such time as the issue is settled in that jurisdiction.

C. The Middle Ground—Increased Burdens on Malpractice Plaintiffs

There are some states that partially shield all criminal defense counsel, including public defenders, from malpractice actions by requiring a higher evidentiary burden of plaintiff clients. For example, in Massachusetts, a criminal defendant who seeks to obtain monetary damages from

with [their clients], then their liability would be essentially that of private attorneys.”

Id. at 610-11.


his or her attorney must prove that he or she was innocent.\textsuperscript{46} Essentially, the burden of proof is reversed, where the plaintiff-client must exonerate himself or herself by a preponderance of the evidence.\textsuperscript{47}

Pennsylvania has taken the Massachusetts approach and added to it. For example, in Bailey v. Tucker,\textsuperscript{48} the Pennsylvania Supreme Court held that for any criminal defendant to recover in a malpractice action against his attorney, he or she must show that he or she "is innocent of the crime or any lesser included offense."\textsuperscript{49} In addition, the defendant must go beyond a showing of simple negligence on the part of his or her counsel and prove a "gross dereliction in his duty."\textsuperscript{50} The court found that the first part of the test was justified because of the possibility of "a defendant actually profiting from his crime."\textsuperscript{51} The court found the higher degree of culpability necessary because it felt that in the case of simple negligence by criminal defense counsel, "justice is satisfied by the grant of a new trial. However, if an innocent person is wrongfully convicted due to the attorney's dereliction, justice requires that he be compensated for the wrong which has occurred."\textsuperscript{52}

Other states require that a criminal defendant obtain some sort of post-conviction relief before seeking damages from their attorney. For example, the Supreme Court of Alaska compared the criminal defense of malpractice to the tort of malicious prosecution, noting that in an action for the latter, "establishing the tort requires the plaintiff prove an unsuccessful prosecution occurred."\textsuperscript{53} The court focused its decision first on policy considerations, especially "judicial economy,"\textsuperscript{54} and then equated the unsuccessful prosecution element of malicious prosecution to post-conviction relief in a malpractice action.\textsuperscript{55} The Supreme Court of Oregon has also ruled that a criminal defendant must obtain post-conviction relief prior to commencement of civil action.\textsuperscript{56} The court there found

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\bibitem{46} Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991).
\bibitem{47} Id.
\bibitem{48} 621 A.2d 108 (Pa. 1993).
\bibitem{49} Id. at 113.
\bibitem{50} Id.
\bibitem{51} Id.
\bibitem{52} Id.
\bibitem{54} Id. at 1361.
\bibitem{55} Id. at 1362.
\bibitem{56} Stevens v. Bispham, 851 P.2d 556 (Or. 1993).
\end{thebibliography}
that a criminal defendant does not suffer an actionable harm "unless and until he [is] exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise."\textsuperscript{57}

In \textit{Johnson v. Schmidt},\textsuperscript{58} the Missouri Court of Appeals made post-conviction relief a condition precedent to a malpractice action.\textsuperscript{59} The defendant in \textit{Johnson} was a public defender who appealed the lower court's rejection of his immunity defense.\textsuperscript{60} However, by finding that the plaintiff must first obtain a criminal remedy, "the question of whether [public defenders are] protected from such claims by the doctrine of official immunity is neither reached nor ruled."\textsuperscript{61}

\textbf{D. Staying the Course—States With No Protection of Public Defenders}

While the states above have shielded their public defenders by either providing some form of immunity, or by entitling public defenders to defenses given to all criminal defense attorneys, a number of other states have held fast to the common law doctrine and found no defense for public defenders. When Michigan encountered the issue shortly after \textit{Ferri}, the court in \textit{Donigan v. Finn}\textsuperscript{62} "decline[d] to draw a distinction between appointed and retained counsel in criminal cases when it comes to questions of malpractice."\textsuperscript{63} The court stated one of the primary arguments used by those who disagree with the idea of immunity for public defenders: "[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."\textsuperscript{64} The court also countered the argument used by proponents of immunity that public defenders cannot pick their clients by pointing out that "an indigent defendant is not entitled to choose a particular lawyer and can change appointed attorneys only upon a showing of adequate cause."\textsuperscript{65}

The Florida courts, when faced with the judicial immunity argument,
have likewise been unmoved. For example, in *Windsor v. Gibson*, the court found that prosecutors are "officer[s] of the state whose duty it is to see that impartial justice is done, the public defender is an advocate, who once appointed owes a duty only to his client . . . ." The court found that this did not differentiate a public defender from private counsel.

Similarly, when faced with a qualified immunity defense under that state's tort claim act, the Indiana court in *White v. Galvin* found that public defenders did not meet the definition of state employee. The court found that the nexus required for a public defender to be considered a "public employee" was not present because "[t]he only connection [the government] had was in payment. It did not even control the appointment, for the court performed that function."

Finally, the courts in New Jersey have agreed that "[o]nce the appointment of a public defender in a given case is made, his public or state function ceases, and thereafter, he functions purely as a private attorney . . . ."

**III. Conclusion**

Over the past few years, the reputation and general public esteem for criminal defense attorneys has been, to say the least, negative. From O.J. Simpson to the Menendez brothers, the public perception has grown that justice can be bought if you have the money for the right defense attorney. However, far from the glamour of such high profile cases, public defenders toil as overworked, underpaid, yet essential cogs in the machine that is American justice. We know that paid counsel have liability to their clients for their negligence. The question remains what to do about public defenders. Some argue that the indigent deserve the same standard of care as those who can assemble a "Dream Team" for their defense. Others argue that the rule for the standard of care should be "you get what you pay for," pointing to the ever growing case loads of public defenders and ever increasing number of indigents needing coun-

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67. *Id.* at 889.
68. *Id.*
70. *Id.* at 804.
71. *Id.*
sel. The trend seems to be leaning, at least currently, toward the latter viewpoint. Most of the more recent cases have found immunity in some form or fashion, while those more remote in time tend to agree with Ferri and its progeny. This controversy is not likely to die soon; not in those states that have had some judicial or legislative edict like those above, nor in states like my native Alabama where there has been no guidance, be it statutory or judicial. It is well settled that indigent defendants have the right to counsel; however, the question still to be resolved is whether that right includes the right to pursue damages against that counsel when he or she fails to perform with the same care as that of paid counsel.

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