

In the
Supreme Court of the United States

GARY ROBINSON,

Petitioner,

v.

JERRY HIGGINS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION
OF RESPONDENT JERRY HIGGINS

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PARTIES TO THE PROCEEDINGS

Petitioner

- Gary Robinson

Respondent on this Brief in Opposition

- Jerry N. Higgins

Other Respondents

- Alyssa Cochran
- Judge Mary M. Shaw
- Master Commissioner Carole C. Schneider
- State of Kentucky
- Tax Ease Lien Servicing, LLC

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RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Gary Robinson (“Robinson”) brought the underlying suit under 42 U.S.C. § 1983, alleging that his constitutional rights were violated when a Kentucky state court foreclosed upon, and ordered the sale of, his property. Attorney Higgins represented Robinson’s opponent in that state-court action.

This matter originated in January of 2017, when foreclosure proceedings against Robinson were initiated based upon his delinquent property tax lien. (App.29a). Attorney Higgins represented Kentucky Tax Lien, which was a lienholder against Robinson in the Kentucky Foreclosure Action. (App.12a). At some point during the state litigation, Kentucky Tax Lien moved for judgment requesting an order of sale against Robinson. (App.30a). Such action was granted, and the foreclosed property was sold and the proceeds distributed. (*Id.*).

Robinson then filed a Section 1983 action against various defendants, including Higgins, the Commonwealth of Kentucky, presiding judge Mary Shaw, and Master Commissioner Carole Schneider. (App.10a). In his complaint, Robinson “appears to allege” that the defendants deprived him of his due process rights during the foreclosure proceedings. (App.12a). Each Defendant moved to dismiss the claims against it, which the district court granted. (*Id.*).

Robinson subsequently appealed to the Sixth Circuit Court of Appeals, alleging in pertinent part that Attorney Higgins was acting under color of state

law. (App.3a). The Sixth Circuit reviewed the district court’s dismissal order under a *de novo* standard of review, allowing the appellate court to affirm the decision for any reason supported by the record. (App.4a). Upon review, the Sixth Circuit affirmed, finding that Attorney Higgins was subject to dismissal from the lawsuit because he was not a state actor. (*Id.*).

Robinson now seeks this Court’s certiorari review, maintaining his assertion that his constitutional rights were violated.



STATEMENT OF THE CASE

Robinson presents four issues within his Petition for Writ of Certiorari. Robinson alleges issues under (1) the Fifth and Fourteenth Amendments; (2) a violation of 42 U.S.C. § 1983; (3) a violation of the Tucker Act, codified at 28 U.S.C. §§ 1346(a) and 1491; and (4) the Administrative Procedure Act, codified at 5 U.S.C. § 551.

Robinson does not introduce any argument under the *Rooker-Feldman* doctrine, nor any contention disputing the issues below regarding service of process and removal. As such, he has waived these contentions. Accordingly, Attorney Higgins does not provide any argument in support of the lower court’s rulings as they should not be part of this certiorari proceeding. To the extent if any this Court considers the propriety of these rulings, Attorney Higgins relies upon the arguments he made before the district court and the Sixth Circuit.



REASONS FOR DENYING THE PETITION

ROBINSON HAS NO COGNIZABLE CONSTITUTIONAL CLAIM AGAINST ATTORNEY HIGGINS

Robinson advances that Certiorari should be granted because his Fifth and Fourteenth Amendment rights have been violated. However, there is no nexus between this claim and any alleged action of Attorney Higgins. To be sure, Attorney Higgins was a private attorney—he was never acting under the color of state law. Nor was he a state actor. The Courts below have repeatedly (and properly) determined that that Robinson has no viable Section 1983 claims against Attorney Higgins given the latter’s status as a private attorney. All of Robinson’s allegations of constitutional misconduct are inapplicable as it relates to Attorney Higgins.

Evidence of this truth is apparent in Robinson’s Petition for Writ of Certiorari, as there is no explicit mention—nor incorporation by reference—of Attorney Higgins anywhere in Robinson’s Petition. Robinson does not advance any argument within his Petition demonstrating error by the Sixth Circuit, or the district court, in their respective determinations that Attorney Higgins is/was not a state actor. Even more so, Robinson does not make any argument within his Petition to support the notion that Attorney Higgins acted under the color of state law. Nor could he.

Robinson’s failure to adequately implicate Attorney Higgins in any constitutional wrongdoing is not unique to this Petition. Robinson’s district court complaint, as well as his Sixth Circuit Appellant’s Brief, failed to articulate a claim against Attorney Higgins as a

state actor. The only claim against Attorney Higgins that Robinson's suit made was an alleged civil rights violation, brought pursuant to 42 U.S.C. § 1983, based upon Attorney Higgins's representation of Kentucky Tax Lien Fund (Robinson's opponent) in the underlying State Foreclosure Action. Robinson's argument—that he was not provided adequate notice, deprived of a fair hearing, and that he was not provided the opportunity to conduct discovery—were not actions over which Attorney Higgins had the authority to exercise dominion. To be sure, Attorney Higgins simply represented a lienholder who happened to be an adverse party to Robinson. The district court, which was ultimately affirmed in dismissing Robinson's action against Attorney Higgins, found that Robinson's allegations were insufficient because "private counsel do not act under color of state law. (App.15a).

A claimed violation pursuant to Section 1983 is limited in scope to only those deprivations of rights that are accomplished "under the color of the law of any State or Territory." *See District of Columbia v. Carter*, 409 U.S. 418, 424 (1973). It does not reach purely private conduct. *Id.* Acting "under color of state law" has been interpreted consistently with conduct that would satisfy "state action" required under the Fourteenth Amendment. *See West v. Atkins*, 487 U.S. 42, 49 (1988). To constitute "state action" the "deprivation must be caused by the exercise of some right or privilege created by the State... or by a person for whom the State is responsible," and the "party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* To be successful on such a claim under Section 1983, however, a plaintiff must establish two essential elements: that (1) a right

secured by the Constitution or laws of the United States was violated, and (2) the alleged violation was committed by a “person acting under the color of state law.” *Id.*

Robinson’s reliance upon existing Section 1983 and Due Process precedent is unmoving, as Robinson fails to even remotely explain how it arises to any purported wrongdoing by Attorney Higgins. Surely, this is not a matter concerning misapplication of existing precedent, but for the simple fact that Attorney Higgins was not in a position to violate the precedent. Robinson’s claims of Section 1983 and Due Process violations cannot be attributed to the actions of a private attorney who merely represented an adverse party. A private attorney representing private citizens is not acting under the color of state law. *Otworth v. Vanderploeg*, 61 Fed. Appx. 163, 165 (6th Cir. 2003) (citing *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981)). Despite Robinson’s extensive arguments regarding conflict with existing precedent, Robinson fails to explain how a private attorney supposedly acted inappropriately.

This failure hardly seems subject to a meritorious rebuttal. After all, the district court’s decision dismissing Attorney Higgins under Rule 12(b)(6) was reviewed *de novo* by the Sixth Circuit and the result was the same. The Sixth Circuit properly noted in affirming the district court that “an attorney, despite being an officer of the court, it is not a *de facto* state actor for purposes of Section 1983.” (App.5a). Further, state action by a private actor may be found only if there is such a close nexus between the state and the challenged action that seemingly private behavior may be treated as that of the State itself. (*Id.*). The

Sixth Circuit explicitly notes that despite Robinson's attempts, his complaint does not establish a close nexus but, instead, described commonplace interactions between private individuals, a corporate debt collector, attorneys, and judicial officers. (*Id.*).



CONCLUSION

The district court and the Sixth Circuit were correct, and Supreme Court intervention is not necessary. This case does not rise to the caliber of warranting this Court's discretionary review on certiorari.

Respectfully submitted,

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