

In the

Supreme Court of the United States

POLK COUNTY ET AL.,

Petitioners

v.

RUSSELL RICHARD DODSON

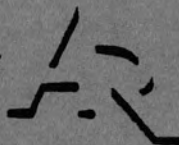
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NO. 80-824

Washington, D. C.
October 13, 1981

Pages 1 thru 50

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REPORTING

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POLK COUNTY ET AL., :

Petitioners, : No. 80-824

v. :

RUSSELL RICHARD DODSON :

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Washington, D. C.

Tuesday, October 13, 1981

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
2:20 o'clock p.m.

APPEARANCES:

NORMAN G. JESSE, ESQ., First Assistant Polk
County Attorney, Des Moines, Iowa;
on behalf of the Petitioners.

JOHN D. HUDSON, ESQ., Des Moines, Iowa;
on behalf of the Respondent.

EDWIN S. KNEEDLER, ESQ., Office of the
Solicitor General, Department of Justice,
Washington, D. C.; amicus curiae supporting
Respondent.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
NORMAN G. JESSE, ESQ.	
on behalf of the Petitioners	3
JOHN D. HUDSON, ESQ.	
on behalf of the Respondent	22
EDWIN S. KNEEDLER, ESQ.,	
amicus curiae supporting Respondent	40
NORMAN G. JESSE, ESQ.,	
on behalf of the Petitioners -- rebuttal	49

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Polk County et al. against Russell Richard Dodson.

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

ORAL ARGUMENT OF NORMAN G. JESSE, ESQ.

ON BEHALF OF PETITIONERS

MR. JESSE: Mr. Chief Justice, and may it please the Court, this proceeding arose out of a pro se complaint filed by the Respondent under 42 USC 1983 in the United States District Court for the Southern District of Iowa, November 5th, 1979. That complaint alleged various claims against the Petitioner Martha Shepard in the Polk County Offender Advocate's office against the Polk County Board of Supervisors and against the entity of Polk County.

Respondent alleged that Petitioner Shepard had failed to properly represent him on appeal of his conviction for first degree robbery in the District Court of Iowa in and for Polk County to the Iowa Supreme Court. He claimed that her actions in failing to -- in failing to represent him properly in that -- in that appeal had deprived him of his right to counsel under the Sixth Amendment, and imposed upon him cruel and unusual punishment, and had arbitrarily denied him his state-created right to appeal to the Iowa Supreme Court from its conviction.

He also asserted claims for -- for legal

1 malpractice and for breach of an oral contract to prosecute
2 the appeal to the Supreme Court.

3 The Polk County Offender Advocate was also named.
4 The Board of Supervisors of Polk County and Polk County
5 itself were named, alleging that they were responsible for
6 Ms. Shepard's action because they had adopted established
7 rules and procedures for handling such appeals.

8 His complaint sought injunctive relief. It is of
9 monetary damages and release from confinement. The District
10 Court dismissed the complaint, ruling that Petitioner
11 Shepard and the Offender Advocate did not act under color of
12 state law, that the complaint did not allege the requisite
13 personal involvement of the Polk County -- members of the
14 Polk County Board of Supervisors, or of the Polk County
15 Offender Advocate.

16 It construed his request for -- for release to be
17 a petition for habeas corpus, and found that he had not
18 exhausted his state remedies, and therefore dismissed that
19 as well.

20 On appeal, the Court of Appeals reversed and
21 remanded the decision of the District Court, finding that
22 the county employed the public defender, and that a county
23 -- county employed public defender does act under color of
24 state law, because the public defender in that situation is
25 selected, paid, hired and fired by the county, that the

1 public defenders have their power because of the fact that
2 they are employed to represent indigent defendants, and not
3 because they have been selected by the defendants for whom
4 they are providing representation.

5 Having decided that the county employed public
6 defender is -- is involved in state action, then the Court
7 of Appeals ruled that the county employed public defender
8 enjoys only a qualified immunity, and further, that as a
9 matter of pleading, that the Respondent had stated a 1983
10 claim against the Board of Supervisors and the Offender
11 Advocate.

12 QUESTION: Did the Eighth Circuit intimate any
13 view as to whether a non-indigent defendant suing his
14 privately licensed counsel whom he had chosen would be
15 liable under 1983 because the state had licensed him as a
16 member of the Bar?

17 MR. JESSE: No, I don't believe the Court
18 indicated that they would intend any such result. I don't
19 believe that question was discussed.

20 QUESTION: Do you think that would follow fairly
21 naturally from this whole thing?

22 MR. JESSE: That is not the law, as I understand
23 it. It seems to me that it would --

24 QUESTION: Well, I never understood it to be the
25 law, either, but I have never understood the Eighth

1 Circuit's holding to be the law.

2 MR. JESSE: Well, I agree with Your Honor that
3 that would seem to be a logical extension from the finding
4 that because they are county employed and have not been
5 selected, that they are involved in state action. By the
6 same rationale you could say that the license provided to
7 practice law was state action sufficient to make a privately
8 employed counsel amenable to suit.

9 QUESTION: Subject to suit for his actions.

10 MR. JESSE: I do not agree that that is the law,
11 and we are contending otherwise.

12 Petitioner petitioned this Court for a writ of
13 certiorari, presenting two questions, and that is whether
14 the Court of Appeals erred in holding the county employed
15 public defender acts under color of state law in
16 representing indigent defendants, and is thus amenable to
17 suit under 42 USC 1983, and two, whether the Court of
18 Appeals erred in holding that in suits brought under 42 USC
19 1983 a county employed public defender enjoys only a
20 qualified immunity from suit for his actions taken while
21 representing indigent clients. This Court granted cert
22 March 2, 1981.

23 The Court is favored here with amicus briefs by
24 the United States, by the National Legal Aid and Defenders
25 Association, by the National Association of Criminal Defense

1 Lawyers, and by the Minnesota State Public Defender.

2 QUESTION: I thought the Court of Appeals
3 indicated that a private attorney appointed by the state
4 wouldn't act under color of state law, and certainly if that
5 were true, a private -- an attorney employed privately
6 wouldn't, either, would he?

7 MR. JESSE: I would think that a private attorney
8 employed by a defendant would not be amenable to suit under
9 1983.

10 QUESTION: And didn't the Court of Appeals say
11 so? At least -- don't they have authority in the Eighth
12 Circuit to the effect that an appointed attorney, a private
13 attorney appointed by the Court to represent an indigent
14 defendant does not act under color of state law?

15 MR. JESSE: There is such authority in the Eighth
16 District and --

17 QUESTION: In the Eighth Circuit.

18 MR. JESSE: Or in the Eighth Circuit, and --

19 QUESTION: I would suppose -- wouldn't it be a
20 fortiori that a private attorney wouldn't be subject to a
21 1983?

22 MR. JESSE: Certainly it would be difficult to
23 have those inconsistent results of a private attorney
24 amenable to suit and a court-appointed attorney not.

25 QUESTION: What about the prosecutor? Is he

1 subject?

2 MR. JESSE: No, the prosecutor has absolute
3 immunity.

4 QUESTION: He has got absolute liability. How
5 about the judge?

6 MR. JESSE: The judge has absolute immunity.

7 QUESTION: In what respect does a public defender
8 serving in this capacity as part of one of the three legs of
9 the stool, the judge, the prosecutor, the defense counsel,
10 in what respect is he different from the others in
11 performing the broad social function and constitutional
12 function of providing counsel?

13 MR. JESSE: Well, it is our contention that he is
14 not functioning in that capacity, that he is not essentially
15 different than the -- in terms of the public policy
16 ramifications, than is the prosecutor or the judge.
17 However, in a very limited context, this Court has, in Ferri
18 versus Ackerman, decided that he is not a part of a
19 tri-partite equal person for purposes of applying --

20 QUESTION: That was in a malpractice suit, was it
21 not?

22 MR. JESSE: That's correct. In a state
23 malpractice suit, that the Court would not apply a Federal
24 absolute immunity to that situation.

25 QUESTION: Isn't the real difference that he

1 represents the defendant, period, and nobody else?

2 MR. JESSE: That's correct, and that is our
3 position, that the --

4 QUESTION: And that is the difference.

5 MR. JESSE: -- that the public defender is really
6 analogous to court-appointed counsel, court-appointed
7 private counsel, and --

8 QUESTION: But is he required to be?

9 MR. JESSE: I think that he is required to be by
10 both the canons of ethics by his responsibilities as a
11 lawyer, to be -- to owe his sole obligation and his sole --
12 his sole work for the benefit of the defendant. The fact
13 that he is employed as a public defender and is paid by the
14 county is --

15 QUESTION: He is not really employed. He is paid
16 by the state. He is not employed by the state. Isn't there
17 a difference there? I mean, when somebody is employed by
18 somebody, he is under the control of that person, but is the
19 defender here under the control of the state at all, once he
20 is appointed?

21 MR. JESSE: I believe not. He is not under the
22 control of the Board of Supervisors of Polk County in any
23 respect as it relates to his handling of his client's case,
24 and the responsibilities and obligations that he owes to his
25 client.

1 QUESTION: Is he in any different posture
2 professionally -- I emphasize professionally -- from a
3 psychiatrist at the state mental hospital for indigents, or
4 a surgeon at a hospital provided -- which provides services
5 for indigents? In each case, he is to function as a
6 professional carrying out his professional duty. Is that
7 not right?

8 MR. JESSE: There is a sense in which that is
9 true, yes, and the Respondents --

10 QUESTION: In what sense is it not true?

11 MR. JESSE: -- and the United States have cited
12 cases which would analogize the situation of the
13 professional relationship between the attorney and his
14 indigent client, and a medical director of a state mental
15 health institute or some similiar facility.

16 QUESTION: Well, we have held in O'Conner, have we
17 not, that the medical director of a mental hospital does --
18 the state action requirement under 1983 is satisfied,
19 haven't we?

20 MR. JESSE: Well --

21 QUESTION: I know you haven't cited O'Conner in
22 your briefs, or in your reply brief, but Respondent relies
23 on it rather heavily.

24 MR. JESSE: Right, Respondent --

25 QUESTION: But didn't we hold that in O'Conner and

1 Donaldson?

2 MR. JESSE: The state action question was not --
3 was not precisely addressed in O'Conner, but that mainly
4 turned on the cruel and inhuman punishment feature. It
5 assumed, however, state action, and the difference --

6 QUESTION: Well, we did, we certainly did, and we
7 allowed liability, didn't we?

8 MR. JESSE: You allowed liability, and so --

9 QUESTION: Under 1983.

10 MR. JESSE: -- so state action is assumed.

11 QUESTION: Under 1983.

12 MR. JESSE: Yes, sir.

13 QUESTION: Well, what is the difference between a
14 doctor-patient relationship and the attorney-client
15 relationship? Is there any?

16 MR. JESSE: There is no difference, but you need
17 to look further than just whether or not that professional
18 relationship existed between the patient and the medical
19 director, and whether or not that is different than the
20 position of an attorney, a public defender and his indigent
21 defendant, and there is a difference.

22 The difference is that the medical director of a
23 state mental health institute is performing both a medical
24 function for which he has a relationship and providing for
25 another state interest which is providing for the housing

1 and confinement of persons and treatment of persons with
2 mental illness. So there is another --

3 QUESTION: Well, can't you say the same thing
4 here, that a public defender is satisfying the state's
5 obligation to protect indigents?

6 MR. JESSE: The public defender is satisfying the
7 public interest that is imposed upon them by Gideon versus
8 Wainright and the cases construing the right to counsel, and
9 the requirement that the state provide effective assistance
10 of counsel. However, when you look at the activity of the
11 lawyer involved, it is clear that he represents an interest
12 that is contrary to the state's real interest, and that is
13 the prosecution and confinement of persons who are convicted
14 of crime. That is the state's interest.

15 QUESTION: But when a psychiatrist in a state
16 hospital examines a defendant who is charged with a crime,
17 he may be performing functions which in the end result are
18 directly contrary to the prosecutor's, the state's right as
19 asserted by the prosecutor to convict him, because the
20 psychiatrist may come out with the conclusion that he is
21 incapable of forming the necessary intent, and therefore in
22 effect not guilty by reason of insanity.

23 Is there any difference between that conflict and
24 the attorney's conflict with the prosecutor in the adversary
25 system?

1 MR. JESSE: Well, that is true in the adversary
2 context, except that the -- except that the -- it would be
3 very difficult when you have a state institution that
4 without question deprives a person of his liberty and a
5 person functioning within that institution who has the
6 medical relationship between the client, it would be very
7 difficult to say that that person who is directing that
8 institution that confines the person was not engaged in
9 state conduct, and that is not related to the function, the
10 medical function that is being performed by that
11 individual. It has to do with the unquestioned state action
12 of depriving the person of liberty, and the maintenance of
13 that institution, state institution for that purpose.

14 QUESTION: Well, one of the key figures in that
15 process that you have described, denying him his liberty, is
16 the prosecutor, and we extend to the prosecutor an absolute
17 immunity. This goes back to my earlier question to you. In
18 broad social and constitutional terms, how is the defense
19 counsel performing any different function from the
20 prosecutor?

21 MR. JESSE: Well, we would argue that the
22 prosecutor, or that the defense attorney really performs in
23 the broad social sense the same kind of functions --

24 QUESTION: And constitutional sense.

25 MR. JESSE: -- and ought to be accorded the same

1 kind of --

2 QUESTION: Also a constitutional sense, under
3 Gideon and Argensinger. Is that not so?

4 MR. JESSE: Yes. Yes, because he is providing the
5 necessary ingredient of providing the effective assistance
6 of counsel.

7 QUESTION: Each is engaged in administering
8 justice, each with a different role. Is that not so?

9 MR. JESSE: That is correct. The prosecution and
10 the -- the prosecutor is involved in the prosecution of
11 persons who are accused of crime, and that is part of the
12 state function that is his responsibility, and the public
13 defender is involved in providing that other essential
14 ingredient for a valid conviction, which is in the state's
15 interest, and that is the effective assistance of counsel.

16 QUESTION: Well, in that respect, the appointed
17 counsel or the retained one doesn't differ, does he, from
18 the public defender?

19 MR. JESSE: No, we would argue that they are not
20 essentially different, and that if, as the Eighth Circuit
21 has ruled in this case, if a public defender whose only real
22 relationship to the state is that he receives his paycheck
23 from the state is amenable to 1983 suits, that a
24 court-appointed attorney would -- who performs essentially
25 the same services and is paid from the very same pot of

1 money is paid from the very same levy as the public defender.

2 And as it happens in Polk County, the Board of
3 Supervisors of Polk County have in operation a dual system
4 of providing for counsel. They have the defender advocates
5 program, which is a county program, paid for out of the
6 court fund, and they have a parallel system of
7 court-appointed private attorneys.

8 QUESTION: And they treat them separately,
9 apparently, for purposes of 1983.

10 MR. JESSE: Well, we maintain that you should not
11 treat them separately, but the --

12 QUESTION: I know, but the Court of Appeals would
13 treat them separately.

14 MR. JESSE: -- the Court of Appeals would treat
15 them separately. We maintain that there is no essential
16 difference between a court-appointed private attorney who is
17 paid out of the court fund and a public defender who is paid
18 for out of the court fund. The state is involved in the
19 determination of indigency in both cases, and it is the same
20 -- the same determination of what indigency is as it applies
21 to a particular defendant. The court makes the appointment
22 in the one case or in the other, and all the -- all the
23 county has done as a practical matter, all the county has
24 done is to organize a group of attorneys into one office,
25 where theoretically they can be provided with better library

1 facilities and better secretarial services, and can be
2 provided an investigator, and the capacity to provide
3 effective assistance of counsel, and rather than paying a
4 higher per hour or higher per unit cost to a private
5 attorney who must provide his own library and his own
6 secretary and his own investigative services.

7 QUESTION: Mr. Jesse, this Court hasn't really
8 decided, though, has it, whether Court-appointed private
9 counsel are said to be acting under color of state law for
10 purposes of Section 1983. The Ferri case really didn't
11 decide that, did it?

12 MR. JESSE: No, it did not, and this Court has not
13 addressed directly that question.

14 QUESTION: Also, how do you get around such cases
15 as Burton versus Wilmington Parking Authority in deciding
16 when the state, and in this case the county, or a county
17 official, or a public defender is acting under color of
18 state law, where a private restaurant was held to be acting
19 under color of state law simply because it had leased the
20 space from the state? That was sufficient. Now, how do you
21 get around cases like that?

22 MR. JESSE: Well, but the state, it was leasing
23 the facility from the state, and the state was involved in a
24 parallel operation with the restaurant owner, and presumably
25 they -- both parties benefitted from that relationship. The

1 restaurant operator benefitted from the parking facilities
2 that were available, and the presence of the parking
3 facilities benefitted the restaurant owner by the presence
4 of customers.

5 That is quite a different relationship than the --
6 than the Board of Supervisors has with the offender advocate
7 program in Polk County, and we believe that what you need to
8 look at is the -- is the action that is complained about,
9 the action that is complained about, and not --

10 QUESTION: Apply a function test, in other words.

11 MR. JESSE: Well, I believe that the Court has
12 already in a sense applied a kind of function test in Branti
13 versus Finkel, where state action was found with respect to
14 the public defenders program, but it was found in the
15 context of the public defender terminating the employment of
16 certain persons who worked for him.

17 Now, that is clearly and unmistakably the exercise
18 of a power that is conferred by the statute. On the other
19 hand, the public defender, the individual public defender,
20 who might be amenable to suit under the Eighth Circuit's
21 theory of this case, does not exercise that power. That
22 person exercises the power that any attorney has, and that
23 power only, and the fact of the creation of the public
24 defender's office does not enhance the powers that are
25 exercised, or enhance the activities that the public --

1 assistant public defender is involved in.

2 QUESTION: Mr. Jesse, is the prosecutor of Polk
3 County elected?

4 MR. JESSE: Yes, Your Honor, he is.

5 QUESTION: Now, the lawyer is appointed by the
6 court or the supervisors?

7 MR. JESSE: The Board of Supervisors appoints the
8 offender advocate in this case.

9 QUESTION: To each case?

10 MR. JESSE: No, to -- no, they appoint the
11 offender advocate, and the offender advocate has several
12 assistants that he appoints. The Board of Supervisors
13 approves their appointments and sets their salary.

14 QUESTION: Well, I come before the judge, and the
15 judge says, I'm going to appoint you a lawyer. Who does he
16 appoint?

17 MR. JESSE: He appoints the offender advocate's
18 office.

19 QUESTION: Office.

20 MR. JESSE: Or, a person from the assigned counsel
21 list.

22 QUESTION: Committee. It is sort of a committee?

23 MR. JESSE: Well, they maintain a list of persons
24 who have agreed to accept appointments.

25 QUESTION: And the supervisors pay him.

1 MR. JESSE: The supervisors pay both.

2 QUESTION: The supervisors pay each lawyer, or the
3 office?

4 MR. JESSE: The supervisors create a budget for
5 the Office of Offender Advocate.

6 QUESTION: And they get paid by the year?

7 MR. JESSE: And they are on annual salaries. They
8 are prohibited from engaging in private -- in other private
9 practice.

10 QUESTION: You see, you are now giving me trouble
11 about his individual responsibility to the individual client
12 when he is being paid by the year. That gives me a little
13 problem.

14 MR. JESSE: Well, but if he --

15 QUESTION: Doesn't it give you a little problem?

16 MR. JESSE: I believe that there is no essential
17 difference. The structure of the offender advocate program
18 is merely a way of collecting together the persons who are
19 providing those services to indigent defendants, hopefully
20 provide them with better facilities, and --

21 QUESTION: Don't you see a difference between the
22 judge saying, I will appoint Lawyer Jones to defend you, and
23 the judge saying, I will give you an office to defend you?

24 MR. JESSE: But the effect is exactly the same,
25 because Lawyer Jones has to have an office, and the judge

1 is, when he approves that fee, is paying part of his rent
2 and part of his telephone and part of his secretary and part
3 of his library.

4 QUESTION: Well, who does the defendant look to
5 for service, the office or an individual?

6 MR. JESSE: To the individual. Every case is
7 assigned by the offender advocate to an individual lawyer.

8 QUESTION: But not the Court. But the Court does
9 not give him a lawyer.

10 MR. JESSE: The Court does not select from among
11 the lawyers in the Offender Advocate's Office. There are
12 nine lawyers, and the Court does not select. He appoints
13 the offender advocate to be the person, and the offender
14 advocate delegates the responsibility to the --

15 QUESTION: I still have a problem.

16 MR. JESSE: Well, this presents a public policy
17 argument that -- that is involved in the Eighth Circuit's
18 decision, and that is that rather than enhancing the
19 capability of the county to provide indigent services,
20 provide representation of indigents through the creation of
21 offender advocates programs or public defenders, they will
22 abandon those and go to a total system of assigned counsel
23 on an appointment basis of private attorneys in order to
24 avoid the exposure to 1983 actions.

25 QUESTION: Well, we haven't even decided that,

1 have we?

2 MR. JESSE: You have not yet decided that.

3 QUESTION: Mr. Jesse, may I ask --

4 QUESTION: Well, if you decided you were in
5 trouble now, you might be in trouble then, under the other
6 system, too. And isn't it true that if we decide, if we
7 agree with you on the color of law question, that we need
8 not reach the amenity issue at all?

9 MR. JESSE: That's correct, yes.

10 QUESTION: Mr. Jesse, when the District Judge
11 dismissed this complaint, as I understand the papers, he
12 forwarded the papers to the Iowa Supreme Court, to give them
13 an opportunity to hear the appeal on the merits, which
14 counsel thought was without merit. Do you know if the Iowa
15 Supreme Court ever did decide the appeal on the merits?

16 MR. JESSE: I think that the Iowa Supreme Court
17 did not decide the case on the merits. The case was
18 disposed of under Rule 104, which provides for the dismissal
19 of frivolous appeals, and the Court did, pursuant to the
20 motion of Mrs. Shepard, dismiss that case.

21 QUESTION: Then in this case the District Judge
22 says, after everything was done, he forwarded everything to
23 the Chief Justice of the Iowa Supreme Court, and nothing
24 further happened as far as we know, then.

25 MR. JESSE: Not to my knowledge.

1 CHIEF JUSTICE BURGER: Mr. Hudson?

2 ORAL ARGUMENT OF JOHN D. HUDSON, ESQ.,

3 ON BEHALF OF THE RESPONDENT

4 MR. HUDSON: Mr. Chief Justice, and may it please
5 the Court, I agree with Justice Marshal that the place to
6 begin the analysis of this case is with an examination of
7 the relevant statute under which the Public Defender's
8 Office was created. In Iowa, we have an Iowa Public
9 Defender Act which is found at Chapter 336(A) of the Iowa
10 Code. Under this particular statute, the county supervisors
11 of a particular county or group of counties if they so
12 choose can decide by resolution to form a Public Defender's
13 Office.

14 The office is created by the supervisors. They
15 determine a budget for the supervisors. They ask the
16 district judges of the county to nominate certain
17 individuals who would be well qualified to serve as a public
18 defender, and the county supervisors select the individual
19 from that particular list.

20 The county supervisors are given the
21 responsibility of defining the term "indigency", which thus
22 gives them the power to decide which individuals will be
23 eligible for representation by the public defender. In
24 addition to this -- these responsibilities, it is the
25 responsibility of the public defender to submit an annual

1 report to the Attorney General of the State of Iowa, to the
2 chief judge of the judicial district in which he practices,
3 and also to the county supervisors.

4 The supervisors are given the opportunity of
5 terminating the office at any time that they deem
6 appropriate. It seems clear, and it was acknowledged by the
7 Eighth Circuit that this, the extensive involvement of the
8 local county supervisors in the Public Defender Office means
9 that the public defender himself and his or her assistances
10 become inextricably linked to the political process.

11 QUESTION: Mr. Hudson, is this the ground on which
12 you distinguish, or do you distinguish from the appointed
13 counsel?

14 MR. HUDSON: I do distinguish on this ground.

15 QUESTION: On this ground?

16 MR. HUDSON: Yes, Your Honor.

17 QUESTION: I see, but your submission also is that
18 the appointed counsel, there would be no state action
19 involved?

20 MR. HUDSON: I agree with Mr. Jesse. I believe
21 the case in the Eighth Circuit is Barnes versus Dorsey.

22 QUESTION: Yes.

23 MR. HUDSON: And that particular case presently
24 holds that appointed private counsel does not act under
25 color of law.

1 QUESTION: My question really is, do you agree
2 with that decision?

3 MR. HUDSON: Your Honor, the Court in its last
4 term, in the case of Cuyler versus Sullivan, has placed the
5 holdings of those cases in jeopardy, it seems to me. In
6 that particular case, they state criminal trial was found to
7 be an action by the state, and a privately retained counsel
8 who offered ineffective service to his client in that case
9 was found to be denial of due process.

10 QUESTION: So that issue is still open, you
11 suggest.

12 QUESTION: Well, wasn't the reasoning of the Court
13 there that the prisoner was held by a judgment of the state
14 mandated by the court?

15 MR. HUDSON: In Cuyler, Your Honor?

16 QUESTION: In Cuyler, yes. Not that his
17 particular attorney had performed incompetently.

18 QUESTION: Or that his attorney acted under color
19 of law. Those are different concepts, aren't they?

20 MR. HUDSON: The color of law question was
21 certainly not raised in Cuyler versus Sullivan. The
22 question there was whether or not a privately retained
23 attorney could offer ineffective assistance of counsel to
24 the extent that the trial became a meaningful charade --
25 meaningless charade, and --

1 QUESTION: Yes, and it was held there was
2 sufficient state action to set aside the conviction? Right?
3 MR. HUDSON: So this Court held, Your Honor.
4 QUESTION: Yes.
5 QUESTION: Well, in any event, Mr. Hudson, you
6 don't have to concede, and you don't, I gather --
7 MR. HUDSON: I do not, Your Honor.
8 QUESTION: -- the answer to whether or not the
9 privately appointed counsel involves state action.
10 MR. HUDSON: I would concede that to my knowledge
11 every circuit court has so held, that the --
12 QUESTION: That it does not involve state action.
13 MR. HUDSON: -- that it does not involve state
14 action.
15 QUESTION: Well, the holding is that the private
16 attorney doesn't act under color of law, under color of
17 state law. That is the way --
18 MR. HUDSON: The Eighth Circuit has so held, Your
19 Honor.
20 QUESTION: Yes. It isn't a question of state
21 action.
22 MR. HUDSON: Very well, Your Honor.
23 QUESTION: Well, you have referred to the
24 extensive regulation of the Polk County public defender.
25 Certainly the Iowa bar extensively regulates the members of

1 the Iowa bar, does it not? Even though they might be
2 privately retained to defend a criminal in an action?

3 MR. HUDSON: Well, of course, we are all subject
4 to the same ethical considerations, Your Honor, and we are
5 all subject to the same rules and regulations governing the
6 profession of the practice of law. The regulation that I am
7 talking about that Polk County imposes upon the public
8 defender is, in particular, money. They have the
9 opportunity to define indigency. It is conceivable, at
10 least under the Iowa statute, that they could go so far as
11 to say that indigency shall include anyone who makes less
12 than \$30,000 a year, so --

13 QUESTION: Well, doesn't the Iowa bar have the
14 right to define champerty, and maintenance, and all sorts of
15 other things that bar associations traditionally define as
16 violations of canons of ethics?

17 MR. HUDSON: They do, Your Honor, and each of
18 those regulations would be applicable to a public defender
19 as well. Where I would make the distinction between the
20 hypothetical that you have posed would be the extent that
21 the public domain does exercise control over the public
22 defender. In other words, it becomes involved in the
23 political process through the funding, through the
24 appointment, through the decision on whether or not to keep
25 the office, through the reports that must be made to the

1 supervisors on an annual basis, and et cetera.

2 QUESTION: If we hold that the defense counsel
3 here is subject to the same rules as anybody else, and that
4 he is liable for acting under color of state law, wouldn't
5 we thereafter be obliged to give him the same immunity we
6 give the prosecutor?

7 MR. HUDSON: No, Your Honor.

8 QUESTION: Why not?

9 MR. HUDSON: Why not? That matter has been the
10 subject of great debate in this Court and in many courts of
11 appeal. I would suggest to the Court that the policy
12 considerations were carefully reviewed by this Court in 1979
13 in the case of Ferri versus Ackerman. As this Court has
14 questioned Mr. Jesse this morning, it was in fact a state
15 malpractice action. However, the Court's inquiry was
16 directed to whether or not Federal law required the
17 imposition of an absolute immunity for a private attorney
18 who was appointed under the Criminal Justice Act.

19 This Court in reviewing the relevant policy
20 considerations determined that the -- a defense attorney's
21 function is considerably different from that of a prosecutor
22 or of a judge. I would agree with the Chief Justice's
23 comment that they are part of the three legs of a particular
24 stool upon which justice rests, but the distinction must be
25 that the defense attorney, unlike the judge or the

1 prosecutor, owes his primary allegiance to his particular
2 client.

3 In fact, it is the defense lawyer's obligation to
4 vigorously oppose the actions of the --

5 QUESTION: So that everybody's pocketbook is
6 secure except defense counsel.

7 MR. HUDSON: Well, that is the point that is made
8 in the dissent in the Eighth Circuit, Your Honor, that an
9 aggrieved defendant will look to the public defender. I
10 don't agree with that particular philosophy.

11 QUESTION: He is not usually the wealthiest man in
12 the county.

13 MR. HUDSON: That is true, Your Honor.

14 QUESTION: Now, if a private attorney representing
15 a criminal defendant on appeal concludes that the case is
16 utterly frivolous, what is his duty? A private attorney now.

17 MR. HUDSON: A private attorney?

18 QUESTION: Yes.

19 MR. HUDSON: We have in Iowa, Your Honor, a rule
20 that is modeled after this Court's decision in Anders versus
21 California. That is Rule 104, which is included in one on
22 of the briefs as an appendix, I believe. That rule, as I
23 read it, is not applicable to the private attorney. My
24 response, I am afraid, would be that the private attorney
25 should not have accepted the case in the beginning, and

1 should have perhaps reviewed the case. The appointed
2 counsel finds himself in a different position, in that he
3 has no choice.

4 QUESTION: Before we come back to the appointed
5 counsel, the private attorney, as you suggested, if he
6 considered it was frivolous, would have the duty, I suppose,
7 first of all to tell the client.

8 MR. HUDSON: Yes, Your Honor.

9 QUESTION: He also has a duty to the court, and
10 what does that duty to the court embrace?

11 MR. HUDSON: The duty to the court, it would be my
12 judgment, would include not pursuing frivolous appeals. If
13 the consent of the client could not be obtained, I would
14 think that an application to withdraw from the case would be
15 the appropriate response to that situation.

16 QUESTION: And why do you think there is a
17 difference?

18 MR. HUDSON: Between the privately retained
19 attorney --

20 QUESTION: Between the privately retained counsel
21 and the public defender, who reaches the same conclusion,
22 that the appeal is utterly frivolous.

23 MR. HUDSON: I believe this Court in Anders, Your
24 Honor, recognized that there was a similar obligation, and
25 you cannot unilaterally simply dismiss an appeal, or you

1 cannot unilaterally withdraw from the case, but you must
2 follow a procedure that was carefully delineated in Anders.
3 You have to notify the client. You have to brief to the
4 appellate court any issues that are at least arguable on
5 their merits. And --

6 QUESTION: My assumption is that you find no
7 legitimate arguable position. You have a duty to the Court,
8 I would think. You are still a lawyer.

9 MR. HUDSON: I think you would still have the same
10 duty. Yes, Your Honor. It seems to me the procedures must
11 be somewhat different --

12 QUESTION: Perhaps.

13 MR. HUDSON: -- because Rule 104 does not include
14 the hypothetical that you have posed, but still the
15 obligation to the Court not to waste their time would
16 include, it should seem to me, a procedure somewhat like
17 that.

18 QUESTION: If the private attorney, knowing the
19 appeal was frivolous, did nothing, prosecuted it, and then
20 sent the client a bill --

21 MR. HUDSON: The prosecutor, Your Honor?

22 QUESTION: I am sorry. Pursued the appeal. A
23 private attorney --

24 MR. HUDSON: Yes.

25 QUESTION: -- concluded the appeal was frivolous,

1 did not advise his client, went ahead and argued the case,
2 lost it, of course, sent the client a bill. Would that be
3 malpractice?

4 MR. HUDSON: It is shabby lawyering, Your Honor. I
5 don't know if it would be --

6 QUESTION: It sure would.

7 MR. HUDSON: -- malpractice.

8 QUESTION: Well, do very many lawyers today,
9 private or otherwise, want to take the risk of not pressing
10 every claim that the defendant wants him to press, and every
11 appeal that the defendant wants pressed?

12 MR. HUDSON: No, Your Honor, they don't. Most
13 lawyers practice somewhat defensively in the criminal law
14 area.

15 QUESTION: They now have to protect their flanks
16 from their own client.

17 MR. HUDSON: That is true, Your Honor.

18 QUESTION: Now, is the prosecutor totally without
19 obligations to the defendant, the accused person?

20 MR. HUDSON: Well, of course, this Court in Brady
21 versus Maryland and other such similar decisions has --

22 QUESTION: Well, apart from that, in the first
23 instance the prosecutor certainly has a professional
24 obligation not to present evidence to a grand jury or to a
25 petit jury later on trial which he does not regard as

1 reliable. That is one of the canons. He has an obligation
2 not to seek indictments against people unless there is a
3 solid basis for it. There are a whole range of obligations,
4 limited, to be sure, compared with the defense counsel, but
5 he is obliged to do certain things which are for the
6 protection of the accused, or the putative accused.

7 MR. HUDSON: That is true, Your Honor. The same
8 is also true of the defense counsel. There are limited
9 circumstances where the defense counsel has -- or at least
10 should perform some act that may well be directly contrary
11 to the best interests of his client. Examples would include
12 when a defense lawyer knows that his client is about to lie
13 on the witness stand. It is his obligation to bring that to
14 the attention of the court. If the defense lawyer knows
15 that a serious crime is about to be committed, it also is
16 imperative upon the lawyer.

17 QUESTION: Well, the defense lawyer who knows or
18 believes his client is about to lie is directed by the
19 standards not to do anything to help him other than letting
20 him take the stand and tell the story in his own words.
21 Isn't that right?

22 MR. HUDSON: Yes, Your Honor, but not to
23 participate in the deception --

24 QUESTION: In any fraud on the part --

25 MR. HUDSON: -- not to attempt to elicit testimony

1 from the witness.

2 QUESTION: Mr. Hudson, in this case, does the
3 complaint allege that the lawyer, Ms. Shepard, did anything
4 other than what a competent lawyer would do?

5 MR. HUDSON: Yes, Your Honor.

6 QUESTION: Other inconclusory language? She
7 apparently filed an Anders brief pursuant to Rule 104, and
8 had the -- moved to dismiss the appeal.

9 MR. HUDSON: That is --

10 QUESTION: Is there any allegation in the
11 complaint that the appeal would have had any merit had it
12 not been dismissed?

13 MR. HUDSON: I believe there is such an allegation.

14 QUESTION: I don't think there is.

15 MR. HUDSON: Well, to say the very minimum, the
16 complaint is inarticulate, Justice Stevens, and it is my --

17 QUESTION: It refers to the Eighth Amendment, but
18 I don't think you would contend there is a violation of the
19 Eighth Amendment alleged.

20 MR. HUDSON: He uses conclusory language to assert
21 such a violation, but the underlying facts at least that are
22 set forth in this --

23 QUESTION: Isn't it like hundreds I have seen,
24 that the main reason is, he was convicted? And so, the only
25 way he can be convicted was ineffective assistance of

1 counsel. Isn't that what it adds up to?

2 MR. HUDSON: Well, I am not going to concede that,
3 Your Honor.

4 QUESTION: I have seen hundreds of them.

5 MR. HUDSON: I would state to the Court that
6 because of the procedural posture of this particular case,
7 we know very little about the underlying merits.

8 QUESTION: I see.

9 QUESTION: But if there is merit to the claim that
10 there was a constitutional violation, is not the plaintiff
11 entitled to his release from prison?

12 MR. HUDSON: That would be true as a habeas
13 petition.

14 QUESTION: Isn't it sort of strange to be suing
15 for damages while you don't even challenge in the
16 appropriate forum the conviction that keeps you there?

17 MR. HUDSON: He --

18 QUESTION: I take it there is no challenge, at
19 least not before us.

20 MR. HUDSON: Not before this Court today. No,
21 Your Honor, there is not. He did include in the pro se
22 complaint that was filed with Judge Vieter a request to be
23 released from prison --

24 QUESTION: To be released, and to have the lawyer
25 disbarred, and the judge said he wouldn't do either of those

1 things.

2 MR. HUDSON: And the request to be released was
3 treated as an application for habeas, and was denied on the
4 ground that state remedies had not been exhausted, but in
5 direct answer to your question --

6 QUESTION: It seems to me the whole litigation
7 over the quality of his representation is premature before
8 we know whether he is entitled to his release, because if he
9 is not entitled to his release, he has suffered no damages.

10 MR. HUDSON: Your Honor, the way that the case was
11 procedurally handled, we don't know the merits of the
12 underlying complaint. No hearing was granted in the
13 District Court. You inquired of Mr. Jesse as to the Rule
14 104 procedure. I don't find a clear answer to that in the
15 record before this Court this morning -- this afternoon, and
16 you know, perhaps it is a matter of --

17 QUESTION: Do you think it would be appropriate to
18 have a trial on this complaint without first having a trial
19 on the question, first exhausting remedies and finding out
20 whether the conviction is valid?

21 MR. HUDSON: It has never been the requirement of
22 this Court since Monroe versus Pape that state remedies be
23 exhausted prior to the prosecution of a Section 1983
24 complaint, Your Honor.

25 QUESTION: But how could, in a trial like this --

1 Maybe that is true, but there has also never been a trial to
2 my knowledge of a 1983 case against a defense lawyer while
3 the defendant is still sitting in jail. It just seems to me
4 a rather --

5 MR. HUDSON: I believe that is true, Your Honor.

6 QUESTION: It is a strange order in which to do
7 business.

8 MR. HUDSON: Well, it --

9 QUESTION: Because how would you compute damages
10 if you figure he is still going to be there?

11 MR. HUDSON: Well, the elements of this particular
12 offense also have not been defined by any lower court, and I
13 don't believe that the elements of this particular segment
14 of Section 1983 are before the Court this afternoon, and so
15 the computation of damages, I would suggest that we rely
16 merely upon tort principles, as this Court has suggested.

17 QUESTION: But it is rather clear that the
18 plaintiff could not recover damages if he is lawfully
19 incarcerated, isn't it?

20 MR. HUDSON: I don't know if that is clear, Your
21 Honor. It would turn again upon relevant principles of tort
22 law. That would go, however, not to the -- that would go to
23 the question of damages, and not to the question --

24 QUESTION: But in order for him to prevail on the
25 merits of his complaint, he must prove a constitutional

1 violation, under 1983.

2 MR. HUDSON: Yes, Your Honor.

3 QUESTION: And if he can prove a constitutional
4 violation, a fortiori, his conviction is invalid.

5 MR. HUDSON: Yes, Your Honor, that would be true.
6 What about the situation, however, where he could prove a
7 constitutional violation that was deemed to be harmless
8 error. Under Section --

9 QUESTION: There are no damages for harmless
10 error. That is perfectly clear.

11 MR. HUDSON: Under Section 1983, that may well be
12 a compensable injury. We must understand that the questions
13 that you are raising with me right now go to the question of
14 damages.

15 QUESTION: And whether the complaint has alleged a
16 cause of action. I am just wondering whether it is
17 necessary to get into all this state action business when
18 there is a lawsuit that is way, way ahead of schedule.

19 MR. HUDSON: Well, the question before the Court
20 is whether it does state a cause of action, and you make
21 some very valid points, Your Honor, regarding damages, but --

22 QUESTION: But 1983 provides for damages.

23 MR. HUDSON: It does, and that is the basic
24 purpose, Justice Marhsal, of --

25 QUESTION: Well, the district judge perhaps on a

1 proper motion could have dismissed this case on the -- for
2 lack of an allegation of the cause of action, because of the
3 lack of a showing that he is improperly incarcerated.

4 MR. HUDSON: The district judge did dismiss it for
5 failure to state a claim, finding that --

6 QUESTION: Well, is there any reason why the
7 district judge could not act on that? That is the thrust of
8 my question.

9 MR. HUDSON: For failure to state a --

10 QUESTION: Yes, on the very grounds that have just
11 been under discussion. That he can't make out a case, he
12 can't make out a case until some court has determined that
13 the accused is unconstitutionally confined in a prison.

14 MR. HUDSON: Well, I would again reiterate my
15 position, Your Honor, that it has never been the rule or the
16 law under Section 1983 that prior state remedies must first
17 be exhausted. The Court is making reference, I believe, to
18 a habeas action in the state courts of Iowa. It has always
19 been the rule since Monroe versus Pape that you can proceed
20 directly to Federal court, and the purpose, in fact, of 1983
21 is to provide a Federal forum for compensation of injuries.

22 QUESTION: Not if you are attacking -- not if you
23 are attacking your custody.

24 MR. HUDSON: We are not attacking the custody. We
25 want compensation for the constitutional violation.

1 QUESTION: What was he sentenced for?
2 MR. HUDSON: Robbery.
3 QUESTION: For how long?
4 MR. HUDSON: Twenty-five years, I believe, Your
5 Honor.
6 QUESTION: So he is still in prison?
7 MR. HUDSON: Yes, sir.
8 QUESTION: And was there an appeal that was never
9 disposed of?
10 MR. HUDSON: There was an appeal which became the
11 subject of this particular lawsuit, and I don't believe the
12 record clearly reflects the disposition of that particular
13 appeal.
14 QUESTION: Well, in the appeal, was the question
15 of adequacy of counsel raised at all?
16 MR. HUDSON: I don't believe that it was, Your
17 Honor, because Mrs. Shepard represented him in that appeal,
18 and she unlikely would raise that.
19 QUESTION: Well, this lawsuit doesn't challenge
20 the adequacy of representation by trial counsel, as I read
21 the complaint. It just challenges adequacy of
22 representation by appellate counsel for filing and Anders
23 brief.
24 MR. HUDSON: That is correct.
25 QUESTION: That is the gist of the lawsuit.

1 MR. HUDSON: And not pursuing the appeal, Justice
2 Stevens, for what Mr. Dodson believed --

3 QUESTION: That's right. He was asking for
4 dismissal under Rule 104

5 MR. HUDSON: -- to be meritorious grounds.

6 CHIEF JUSTICE BURGER: Very well.

7 Mr. Kneedler?

8 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

9 AMICUS CURIAE SUPPORTING RESPONDENT

10 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
11 may it please the Court, I will address the question whether
12 a public defender employed by a county acts under color of
13 state law within the meaning of 42 United States Code
14 Section 1983, in the course -- when he performs his official
15 duties under state law of representing indigent defendants.

16 QUESTION: And what is the United States' interest
17 in this, in arguing that particular question?

18 MR. KNEEDLER: This issue is of interest to the
19 United States because the language in Section 1983 referring
20 to color of law, color of statute is the precise language,
21 is parallel to the language in Section 242 of Title 18,
22 which provides criminal sanctions for anyone who wilfully
23 subjects a person to the deprivation of constitutional
24 rights while acting under color of law, and this Court has
25 construed the color of law language in Section 242 to be --

1 given it essentially the same scope as the color of law
2 language in Title -- in Section 1983.

3 In this case, the principal conduct complained of
4 by Respondent was the alleged failure of Petitioner Shepard
5 to adequately represent him on appeal of his state
6 conviction. Respondent further alleges that this inadequacy
7 was due to or pursuant to policies adopted by the offender
8 advocate and by -- apparently by the Board of Supervisors of
9 Polk County.

10 As described by Mr. Hudson, the county -- the Polk
11 County Offender Advocate's office is established pursuant to
12 a state statute that calls for the establishment of county
13 public defenders's offices. In this case, the offender
14 advocate was appointed by the Board of Supervisors, is
15 entirely funded by the Board of Supervisors.

16 It seems clear, then, that the Polk County
17 Offender Advocate's office is an agency of Polk County.
18 Indeed, the chapter of the Iowa Code that authorizes
19 counties to establish offender advocates' offices is
20 entitled county and township government. So, acting
21 pursuant to the state statute, the county has established an
22 office of county government for the purpose of providing
23 function -- defense to indigent defendants.

24 Moreover, in this case, the conduct complained of
25 was the inadequacy of Petitioner Shepard's representation of

1 Respondent on appeal. The relevant provisions of the Iowa
2 statute expressly require the public defender, once he is
3 appointed, to represent -- to defend and counsel the
4 defendant, and to represent him at all stages of his
5 subsequent post-conviction remedies, including appeal or
6 other remedies.

7 So, in this case the county employee involved, the
8 assistant public defender, was discharging her duties under
9 county ordinance and state law when she filed the Anders
10 brief or the alleged Anders brief that Respondent complains
11 of.

12 It would seem indisputable that a state employee,
13 or the actions of a state employee undertaken in the course
14 of the discharge of her official duties under state law is
15 properly attributable to the state, and therefore would be
16 state action for purposes of the Fourteenth Amendment.

17 Given this, it would seem equally indisputable
18 that those same actions would be taken under color of state
19 law for purposes of Section 1983, which was passed to
20 enforce the restraints on state action imposed by the
21 Fourteenth Amendment.

22 Indeed, this Court in *United States versus Price*
23 said that in cases under Section 1983, the element of color
24 of law has been treated as the same thing as the state
25 action requirement for purposes of the Fourteenth Amendment.

1 QUESTION: What about Section 242 and a private
2 attorney, privately employed attorney, where it is held that
3 there is state action involved if he misrepresents the -- if
4 the state continues to hold a person even though he has been
5 misrepresented by -- or badly represented?

6 MR. KNEEDLER: My understanding of the rationale
7 of the Court's decision in Cuyler versus Sullivan was that
8 the state action there involved was the fact that the state
9 had deprived the defendant of his liberty pursuant to a
10 judgment which was the culmination of a prosecution
11 initiated by the state, and indeed the Court refers to the
12 act, the state action as being the state's obtaining the
13 conviction, which is tainted by the conduct of counsel.

14 QUESTION: Do you think you have to, to win in
15 this case, you have to show that the conduct of the public
16 defender was pursuant to some rule of the county?

17 MR. KNEEDLER: No. No, I do not.

18 QUESTION: You just have to prove that he was an
19 employee of the county? Is that all?

20 MR. KNEEDLER: Yes.

21 QUESTION: And just given the general duties of
22 representing indigents?

23 MR. KNEEDLER: Yes, and I would like to follow up
24 on that for a moment. The notion, the argument that
25 Petitioners seek to advance is that an exception should be

1 carved out of the state action, or the color of law
2 principle, because of the attorney-client relationship that
3 is entered into between the public defender and the indigent
4 defendant, the notion being that it is somehow antagonistic
5 to the state when the public defender represents the
6 indigent defendant.

7 I think that analysis is incorrect, and of
8 course --

9 QUESTION: Well, would it be incorrect with
10 respect to the privately retained counsel?

11 MR. KNEEDLER: Well, I think that presents quite a
12 different question. I think the reason why that is so --

13 QUESTION: Well, can you just say yes or no?

14 MR. KNEEDLER: Well, we have not taken a position
15 on whether there would be color of state law for anyone in
16 this case, for anyone other than the state employed public
17 defender.

18 QUESTION: You haven't taken a position as to
19 whether Section 242 would be applicable to a privately
20 retained counsel. Is that it?

21 MR. KNEEDLER: We have not to date. That issue
22 has not arisen. But I would point out one distinction, I
23 think, that is important in Cuyler, that might suggest --
24 that at least would distinguish it from this case. There
25 are many actions or at least some actions by persons who

1 everyone would concede are acting wholly in a private
2 capacity which could nevertheless render a conviction
3 invalid and unconstitutional, for instance, someone who
4 might attempt to bribe a juror, or prejudicial publicity in
5 a newspaper might render a trial -- a conviction invalid
6 under the Constitution because it deprived the defendant of
7 his right to a fair trial, but that would not necessarily
8 render the private person acting under color of state law
9 for these purposes.

10 But this case can be decided on a much narrower
11 principle, that the defense counsel here was concededly an
12 employee of the government. What I was referring to earlier
13 is that in a criminal trial, the government has two
14 obligations, or two duties. One is the duty of the
15 prosecution to conduct a fair trial. The second duty that
16 evolves from the Court's decisions in Gideon and with
17 respect to appeals from Anders, is to provide a defense,
18 provide for the Defendant to have a defense made on his
19 behalf.

20 QUESTION: Of course, if you rely on that
21 argument, it would apply to appointed counsel as well as the
22 public --

23 MR. KNEEDLER: Not necessarily, because in --

24 QUESTION: Isn't it true that in your criminal
25 prosecutions that raise a similar issue of lawyers, they

1 have been public defenders who have used their office to get
2 money out of indigent clients?

3 MR. KNEEDLER: That's right.

4 QUESTION: So there is a clear acting under color
5 of state law in a way that is quite different from merely
6 performing the office of lawyer in an incompetent manner.

7 MR. KNEEDLER: Well, but in both events, the
8 lawyer is --

9 QUESTION: What I am suggesting is, those
10 decisions are not necessarily implicated by what we do with
11 this case.

12 MR. KNEEDLER: Well, to an extent, I think they --
13 to an extent, I think they are, because the fact, what is
14 being -- what is being discussed in this case, for example,
15 is conduct that is at the very core of the person's duties
16 under state law, and the state has imposed those duties, the
17 relevant provisions of Iowa law expressly require as would
18 seem implicit in the creation of the public defender's
19 office, for the public defender to represent the defendant.

20 So, at the same time that he is performing his
21 duty to his client, he is at the same time performing a duty
22 -- fulfilling his duty to the state in the creation of the
23 public defender's office, so there is nothing inconsistent
24 in saying that --

25 QUESTION: I assume that if defense counsel gets a

1 man acquitted, that helps the state.

2 MR. KNEEDLER: Yes, the interests of justice are
3 served if --

4 QUESTION: That is not what I said. I said, it
5 helps the state.

6 MR. KNEEDLER: Well --

7 QUESTION: That is the presumption, at least,
8 isn't it?

9 MR. KNEEDLER: Yes, sir, it helps the state in the
10 broadest sense, I would suppose, in seeing that justice is
11 done, but here referring to the state as the government, the
12 state would have been fulfilling its obligation of providing
13 defense counsel.

14 QUESTION: What about on the underlying question
15 here, at least as I see one of the underlying questions?
16 What if a privately retained lawyer for an affluent client
17 did precisely what Ms. Shepard did in this case? Would
18 there be any problems or liabilities or whatever?

19 MR. KNEEDLER: Well, I suppose that -- of course,
20 this goes to the question of whether there was a
21 constitutional violation rather than whether the counsel had
22 acted under color of state law, but that, I think, would go
23 back to the theory of Anders, whether -- the obligation of
24 counsel to file an Anders brief, and that has been -- that
25 could either be a due process right, in which case it would

1 apply to private counsel, or an equal protection right
2 ensuring indigent clients the same rights, and in that case
3 it may not.

4 So I think it would depend on one's view of the
5 theory of Anders itself.

6 QUESTION: Well, let's assume, not the -- not the
7 precise conduct here, but the defense counsel privately
8 retained by an affluent client, said to his client, you have
9 no case, you can't get anywhere on appeal, and I won't put
10 my name on any appeal except to protect you by filing the
11 notice of appeal, and then I am out, you get yourself
12 another lawyer.

13 Any problem on the underlying question there?

14 MR. KNEEDLER: On whether there has been a
15 constitutional violation?

16 QUESTION: On whether there is any liability as
17 between them, laying aside the constitutional question.

18 MR. KNEEDLER: Well, I would think that there
19 would be a liability exposure under state malpractice law,
20 depending on --

21 QUESTION: You mean a lawyer can't withdraw from a
22 case?

23 MR. KNEEDLER: Oh, he could withdraw, yes.

24 QUESTION: That is what I meant.

25 MR. KNEEDLER: I am sorry. Yes. No, if he

1 withdrew, I would -- whether or not the Constitution
2 requires it, it would certainly be proper to follow the same
3 type of procedure as in Anders.

4 CHIEF JUSTICE BURGER: Thank you.

5 You have one minute remaining.

6 ORAL ARGUMENT OF NORMAN G. JESSE, ESQ.,

7 ON BEHALF OF THE PETITIONERS - REBUTTAL

8 MR. JESSE: Mr. Chief Justice, and may it please
9 the Court, the Respondent and the United States, and the
10 United States in particular with concern -- with respect to
11 their ability to file Section 242 criminal prosecutions,
12 would have the Court look no further than the kind of
13 instrumentality argument about whether or not the county has
14 established a public defender program, irrespective of what
15 the real actions are, and they point out that -- that the
16 Petitioners have not referred to the case of United States
17 versus Classic, but United States versus Classic does tell
18 us that the activity that is aimed at in 1983 actions is the
19 misuse of power possessed by virtue of state law and made
20 possible only because the wrongdoer is cloaked with the
21 authority of state law --

22 QUESTION: Well, Classic involved the whole state
23 of Louisiana, didn't it?

24 MR. JESSE: Yes, but in this particular, what I am
25 suggesting is that we ought to look at the activity, and not

1 merely that it is an instrumentality, because it is the
2 activity that is important, and that activity is not. It's
3 the representation, and that does not depend upon the
4 creation of the public defender, but is the result of being
5 licensed to practice law, as is true of every lawyer.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
7 case is submitted.

8 (Whereupon, at 3:21 o'clock p.m., the case in the
9 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

POLK COUNTY, ET AL., vs. RUSSELL RICHARD DODSON

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