# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

**THE SUPREME COURT OF THE UNITED STATES**

**DKT/CASE NO.** 82-1988

**TITLE** BRUCE TOWER, ETC., ET AL., Petitioners v. BILLY IRL GLOVER

**PLACE** **Washington, D. C.**

**DATE** February 22, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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BRUCE TOWER, ETC., ET AL., :

Petitioners, :

v. : No. 82-1988

BILLY IRL GLOVER, :

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Washington, D.C.

Wednesday, February 22, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 o'clock a.m.

APPEARANCES:

DAVID B. FROHNMAYER, Attorney General, State of Oregon, Salem, Oregon; on behalf of petitioners

CRAIG K. EDWARDS, Portland, Oregon; on behalf of respondent

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Tower against Glover.

Mr. Frohnmayer, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID B. FROHNMAYER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. FROHNMAYER: Thank you, Mr. Chief Justice, and may it please the Court, the narrow subject presented by this case is whether public defenders are immune from their clients' Section 1983 claims when they are cast as conspiracies.

But the broader question directly implicated is whether the Civil Rights Act of 1871 in this Court must countenance conspiracy claims which act to undermine effectively the independence and functioning of the state in judicial processes.

This Court has previously recognized the integrity of the judicial system by granting absolute immunity to three of its four vital participants: judges, witnesses, and prosecutors.

This case presents an opportunity to close the fourth side of an iron rectangle of protection for the judicial process by acknowledging the immunity of the public defender.

Extension of this protection obviously goes beyond the mere desire for geometric symmetry, because it enhances, rather than endangers, the capacity of states to provide indigent defense counsel in accordance with the command of this Court in the Sixth and Fourteenth Amendments in Gideon v. Wainwright.

In urging reversal of the Ninth Circuit, below we submit four propositions this morning.

First is that public defender immunity from Section 1983 conspiracy claims is, in fact, necessary to protect against destructive suits which themselves threaten the integrity and finality of the judicial process itself.

Second, that public defender immunity is necessary to protect the institution of public defender as one of the most effective methods of meeting Sixth Amendment mandates.

Our third contention and proposition is that public defender immunity, in fact, best serves the interests of indigent clients.

And, finally, we submit to the Court that there exist alternative remedies for those few abuses which might exist which amply justify the grant of absolute immunity.

The facts giving rise to this case are simple

and have been exhaustively reviewed in the briefs of counsel. We note simply that respondent Glover, a convicted burgler, brought a prc se 1983 claim against his state and county public defenders.

QUESTION: You limit your argument to public defenders, not to privately-retained defenders.

MR. FROHNMAYER: Mr. Chief Justice, the facts of this case, of course, just present the issue of public defender. Scme cf the policies which we urge and favcr, obviously, would extend to the whole gamit cf counsel, although we dc not argue their case precisely because we believe that the most forceful case for immunity, if immunity is to be granted, does in fact lie with the public defender institution.

QUESTION: Well, what of the private lawyer who is just appointed tc represent an accused or a particular case? He's in between the privately-retained counsel and public defender.

MR. FROHNMAYER: Yes. And the difference, Justice Brennan, is this -- and whether the difference would cause any difference in result, of course, is cpen to question. The difference is that the appointed counsel does have the cption as to whether cr nct tc accept a particular appointment, whereas those cases which come to the public defender office are ones which

the public defender has no capacity to refuse.

The intake of that office is fixed; the risks may be high; and the public defender has no way of minimizing the risks of a highly litigious group of people.

QUESTION: But, neverthless, do not some of the suggestions you made in your initial summation apply as much to the appointed counsel as they do to the public defender?

MR. FROHNMAYER: Yes, they could.

We are simply suggesting to the Court that absolute immunity did apply to all counsel at common law with respect to defammation proceedings, and that if one looks at the contemporary policy and the contemporary structure of indigent defense, there is a continuum on which the strongest case, then, can be made for the public defender; a slightly less strong case made for the appointed counsel; and perhaps the weakest, but perhaps still an acceptable case, made be made for privately-retained defense counsel.

That's our position.

QUESTION: On the one point you made, I'm not sure it's consistent with history. The public defender is not drafted for the assignment. He volunteers, or she volunteers to become a member of the staff of a

public defender; whereas, certainly, the tradition was that when a court called a private practitioner and asked that private practitioner to appear and defend a person charged, certainly the tradition was that the lawyer should not refuse but should accept.

MR. FROHNMAYER: I think that that is the tradition, Chief Justice Burger, but I think that the common practice in some jurisdictions, obviously, gives counsel who wish to be appointed some flexibility in determining whether they wish to be on the list for a particular court or for a particular time.

And with reference to history, there is an interesting point which is raised by the Kaus citation on page 28 of the respondent's briefs, the UCLA study of the English practice at common law for at least 200 years.

And the import of that common law immunity from malpractice actions in criminal defense proceedings for English barristers was, in part, grounded on the fact that the English barrister at common law has no discretion to refuse a client and does not have the contractual relationship with the client, but must instead take whatever accused criminal walks in the door as his client on behalf of the solicitor who offers the brief to the barrister.

So, in that respect, there is a strong comparison between the policy reasons underlying the English common law immunity from malpractice actions or barristers, and that which obtains most strongly, we believe, in the case of the public defender with respect to immunity that we're arguing in this case.

QUESTION: What about private legal aid societies?

MR. FROHNMAYER: With respect to --

QUESTION: Your point. Like, for example, in New York.

MR. FROHNMAYER: Well, in the State of Oregon, the private legal aid society does not provide for criminal defense.

QUESTION: I'm not talking about -- I'm saying what about states other than Oregon that have private public assistance programs for lawyers defending indigent clients?

QUESTION: Would they be immune?

MR. FROHNMAYER: We would submit that many of the common law arguments for immunity and many of the policy arguments for immunity would apply equally to the private legal aid organization, at least to the extent that it could not control its intake.

QUESTION: Well, what makes you think they can

control their intake?

MR. FROHNMAYER: It may well be that they cannot, and if they cannot --

QUESTION: Well, if they can, but they take 99 percent of the cases, would they be immune?

MR. FROHNMAYER: Yes. Under the reasoning that we advance, they would be immune.

QUESTION: Why?

MR. FROHNMAYER: Because of the nature of the risk which they accept. If 99 percent of the client population that they have is a client population that they are not, in effect, practically free to refuse, then the same degree of risk affects the operation of their criminal defense activities.

QUESTION: Then I get back to the Chief Justice.

What about a private lawyer who gets a $50,000 fee? Is he immune?

MR. FROHNMAYER: Under some of the policies that we urge, yes. Under the most --

QUESTION: You mean he collects a $50,000 fee, and he doesn't have to account for what he does?

QUESTION: Well, Mr. Frohnmayer; It might help an awful lot if you got to your very last point now.

You weren't arguing that they're immune from

malpractice suits, are you?

MR. FROHNMAYER: Your Honor, this is a very interesting point because --

QUESTION: Well, are you or not?

MR. FROHNMAYER: We find --

QUESTION: This is the 1983 action. Are your remarks limited to 1983 suits, or are you saying that these people are immune from malpractice suits?

MR. FROHNMAYER: Justice White, we have found in the authority cited by respondent on page 28 of its brief, that there are only eight reported criminal defense malpractice cases in the history of the United States up until the year 1984.

And it may very well be that there is --

QUESTION: Criminal? What about just a -- how about just a malpractice suit?

MR. FROHNMAYER: Well, a malpractice suit which arises from the conduct of a criminal defense. There are eight. And that is all. None of them prior to 1871.

QUESTION: That may be, but would -- you wouldn't say that a private lawyer who earned the fee that Justice Marshall mentioned is immune from a malpractice suit, would you?

MR. FROHNMAYER: Not from a malpractice suit,

but --

QUESTION: Well, is he different from the legal aid society or from the public defender?

MR. FROHNMAYER: He's different in two respects, Justice White, and those two respects are, first of all, that the client does have an independent contract remedy against the attorney; and, secondly, the client has an economic incentive not to urge the pressing of frivolous claims on behalf of his case.

QUESTION: Well, we haven't held that the appointed counsel is not immune from malpractice suits?

MR. FROHNMAYER: I don't believe that you have. If you're referring to the Ferri v. Ackerman case, all this Court held was that the Criminal Justice Act did not, by itself, import an immunity which would apply in a state malpractice proceeding.

It is not, in our judgment, a holding to any degree that the federal common law under 1983 justifies a malpractice action against lawyers, and, in fact, quite the contrary.

QUESTION: Well, I wasn't asking that. I'm asking whether, in your view, the legal aid clinic or the public defender is immune from a state law malpractice suit, in your view.

MR. FROHNMAYER: That depends on the state.

QUESTION: Well, how about the great State of Oregon?

MR. FROHNMAYER: That issue has never been litigated by the Oregon Supreme Court. It has recognized, in the case of Watt v. Gurkey, which this Court cited in Imbler v. Pachtman, the prosecutorial immunity exists as in absolute manner, and it may well be that the Oregon Supreme Court would follow that case in --

QUESTION: Well, do you think the public defender is wielding state authority in the State of Oregon?

MR. FROHNMAYER: We must look at the Oregon statutes cast against the rationale of this Court's analysis in Polk County v. Dodson.

QUESTION: Right. Right.

What if he isn't? What if he is not?

MR. FROHNMAYER: What if he is not exerting state authority?

QUESTION: There isn't any basis for immunity then, is there?

MR. FROHNMAYER: Well, unless there is conspiratorial -- unless there is the allegation of conspiratorial liability, which is the issue that we have before us.

QUESTION: Mr. Frohnmayer, none of our immunity cases, whether judicial immunity, prosecutorial immunity, suggest that there is immunity as a matter of federal law from state actions, do they?

MR. FROHNMAYER: From state actions at common law or statutorily based?

QUESTION: Whichever.

MR. FROHNMAYER: No, there's not, and we're not contending that's the case.

QUESTION: So, whether or not the petitioner here would be liable under an Oregon malpractice statute, is something we certainly don't have to decide.

MR. FROHNMAYER: That's correct, and we have not suggested to the Court that it need decide that.

QUESTION: Well, I thought you were kind of weaving together kind of malpractice arguments, together with 1983 arguments.

MR. FROHNMAYER: No, no. I was simply suggesting a continuum of different forms of legal representation.

QUESTION: I attempted to get him to weave them together, but he refused.

QUESTION: General Frohnmayer, isn't the fact that there are so few malpractice actions against public defenders an argument against your position that finding

1983 liability would open floodgates of suits?

MR. FROHNMAYER: I think not. I think not, for several reasons: First of all, it was not until this Court's decisions in Ferri v. Ackerman and Polk County v. Dodson, that any of the lower circuit or district courts in this country believed that there was any question but that the public defender was immune.

Secondly, one has to recognize that with all of the other actors in the criminal justice process which convicts a particular defendant possessing immunity, the last and perhaps only target for the person who feels unjustifably dissapointed at his or her conviction will look to the public defender as a way of reopening the validity of the entire criminal justice process that convicted that person.

And so in that -- and beyond that point, I think there's quite a difference, and I believe that the Turner study that we cited in our brief would at least partially bear this out.

There is a difference in the mind of many persons who are incarcerated, between the availability of a federal remedy and the availability of a state remedy.

QUESTION: May I get back to the -- we're talking about a different guy.

What about a private lawyer who volunteers his services for free? Would he be subject to a suit, or would he have immunity?

MR. FROHNMAYER: In the situation in which he is alleged to have conspired, as the facts would have indicated here, yes. We --

QUESTION: Would have immunity?

MR. FROHNMAYER: yes. We believe that a case can be made for immunity there.

QUESTION: Why? How in the world does he get immunity?

MR. FROHNMAYER: Because that leads, really, to one --

QUESTION: What has the government done to bring this about? Except to let him be born.

MR. FROHNMAYER: Well, the allegation is that there exists state action under the Dennis v. Sparks theory, because --

QUESTION: Well, how is it state action?

MR. FROHNMAYER: Well, for the same reason that --

QUESTION: The man volunteered to defend him, and they came to complete agreement as to that. And he spent his money out of his own pocket. But still, he's subject to liability, isn't he?

MR. FROHNMAYER: Under Section 1983, under a conspiracy claim of this kind, yes.

QUESTION: I don't see how you get 1983 on him.

MR. FROHNMAYER: Well, for the same reason that 1983 is alleged to be present in this case. And that is that the public defender --

QUESTION: Is operating pursuant to an Oregon statute.

MR. FROHNMAYER: That is correct.

QUESTION: Now, what statute is my man operating under?

MR. FROHNMAYER: If I may submit this, Justice Marshall, under this Court's holding in Polk County v. Dodson, the fact that a statute authorizes the operation of the public defender was not sufficient, in this Court's judgment in that case, to add the color of law requirement for 1983 jurisdiction.

It was -- and the only reason that this case is different than this Court's holding in Polk County v. Dodson is the additional allegation of a conspiracy between state court judges and state administrative officials with which the public defender --

QUESTION: Well, what did the state court judge do in my case?

MR. FROHNMAYER: I'm sorry?

QUESTION: Where the man volunteered his services, what did the state court judge do to bring that about?

MR. FROHNMAYER: Well, I thought that you were saying, Justice Marshall, that you were simply changing the facts in the hypothetical you gave me so that it would be a volunteer attorney instead of a public defender.

In the facts that you get me, there is no color of state law at all. There's no 1983 jursidiction. That's a different issue.

QUESTION: So you don't need to --

MR. FROHNMAYER: You don't need to reach the immunity issue because there's no 19 --

QUESTION: Well, couldn't he bring a malpractice suit?

MR. FROHNMAYER: It may be that he could. Our suggestion is that, based upon --

QUESTION: Will he have immunity?

MR. FROHNMAYER: No, because there's no federal cause of action under which he can claim the immunity.

QUESTION: Oh, yours is limited to 1983 actions..

MR. FROHNMAYER: That is correct. We are

arguing a Section 1983 case.

QUESTION: And you get immunity on a 1983 action, but under no other action?

MR. FROHNMAYER: That is correct. And if --

QUESTION: What statute or constitutional vision says that?

MR. FROHNMAYER: That's correct. If there's any --

QUESTION: What constitutional or statutory provision says that you are immune under 1983, but under nothing else?

MR. FROHNMAYER: That's right. We are not asking this Court to extend the reason --

QUESTION: Well, give me the case that says that.

MR. FROHNMAYER: I think this is the case in which the Court has the opportunity to say it.

QUESTION: I see. I see.

MR. FROHNMAYER: And that is the issue that we believe this Court reserved in Footnote 4 of its decision in Polk County v. Dodson.

If there is anything that I have said in response to the Court's questioning to this time that indicates that we wish to have an immunity to extend to other actions not arising under color of state law under

1983, that was a mistaken apprehension, and that is not our contention before this Court. It is not part of the case that we have before us.

QUESTION: General Frohnmayer, I take it, then, that you are perfectly willing to accept the Dennis view that the conspiracy allegation clothes everybody with the undercolor of state law.

MR. FROHNMAYER: Yes. We believe --

QUESTION: And you don't -- you don't disagree with that.

MR. FROHNMAYER: We find it very difficult to give a principle distinction from the Dennis conclusion in this case. We believe that that's one of the inescapable problems with the Dennis analysis, but it follows so soundly on this Court's earlier decisions, that we do not urge you today to reconsider the Dennis case.

The only possible distinction between the Dennis case and this one is that in the Dennis case, it was the immune state official himself who took the action; that is, the judge took the action to take the bribe or be subject to undue influence and change his decision; whereas in this case, it might be argued that the public defender who is not acting under color of state law under your Polk County decisions was the

ultimate actor who is alleged to have the fault.

But that is a method of distinguishing the Dennis case. But if that method is not accepted as an appropriate distinction, then this Court, we believe, must squarely face the question.

QUESTION: Well, what is the conspiracy allegation here?

MR. FROHNMAYER: The conspiracy allegation, as the Ninth Circuit acknowledged, Justice Brennan, is somewhat vague. The allegation is that the state court judges and administrative officials conspired or colluded with the trial and appellate public defenders to cause or persuade the public defenders not to perform their duties in urging certain arguments at trial and in excising certain key arguments from the brief that the defendant wished to pursue.

QUESTION: And, of course, we accept that allegation as the premise for your argument, do we?

MR. FROHNMAYER: That is correct. All we have is the face of the pleadings This comes on a Motion to Dismiss. There has been no discovery. In fact, there's been no clarification of the complaint.

QUESTION: General, at the time the district court acted in this case, had Polk County come down?

MR. FROHNMAYER: I believe that it had not.

QUESTION: I think it had not. It had, of course, when the court of pppeals acted. But I wonder whether the district court wouldn't have dismissed the complaint in view of the vague allegations of conspiracy if Polk County had come down, no state action on the part of the defender?

MR. FROHNMAYER: Well, Justice Powell, we don't kncw, of course, and the Ninth Circuit decisicn was rendered after this Court's decision, both in Ferri v. Ackerman and Polk Ccunty. And the Ninth Circuit did note, in Footnote 1 concluding its opinion, that although vaguely put, the allegations cf conspiracy were probably adequate on their face, however much we might differ with that view.

QUESTION: They did allege that Judge Wocdrich and the judge of the ccurt cf appeals had jcined ir the conspiracy. I suppose, as long as Dennis v. Sparks is on the bcoks, that's sufficient to bring in the state action.

MR. FROHNMAYER: That's our problem, Justice Rehnquist and, in fact, that's the anomaly that this case creates after this Polk County v. Dodson. There is only one species of Section 1983 liability to which a public defender is subject, and that is the species of 1983 claim that says there is a conspiracy.

And that, we find not only anomalous, but we find, indeed, deeply harmful to the criminal justice process. We find it harmful to the judicial process itself.

The first of our arguments was that, in fact, immunity is accepted for those participants in the judicial process.

QUESTION: Suppose, Mr. Attorney General, though, that this public defender under Oregon law was subject to suit for conspiring with the prosecution.

MR. FROHNMAYER: Well, if the public --

QUESTION: Let's just assume that he could be sued under Oregon law, and Oregon states for having conspired with the public officials in derogation of his duty.

MR. FROHNMAYER: We would hope that he would. And under Oregon --

QUESTION: Suppose he is subject to that kind of a suit. Wouldn't that have the same impact on the judicial system?

MR. FROHNMAYER: Absolutely not, for a very important reason, and it's the same reason that applies to the distinction that this court has drawn between the use of 18 United States Code 242, the criminal color of law provisions, and the civil rights provisions under

1983; that is, that you have a prosecutor who has the responsibility, under a set of professional ethics, to screen complaints, to make sure that they are not the vindictive or frivolous complaint that comes.

And so the prosecutor and the Grand Jury act as essential guards to the floodgate of litigation, because they are able to screen the frivolous from the well-taken claim.

And in that respect, we think that there is a very significant difference.

QUESTION: But I'm talking about the public defender, if he subject to suit for conspiring with the prosecution in derogation of his duty, the public defender's duty, under Oregon law.

Now, isn't he then -- he is subject to a serious risk, then, of being sued in the state courts.

MR. FROHNMAYER: Yes, but he's not subject to a serious risk of being sued frivolously. And the point that we make is this: We do not believe that the problem with Section 1983 lawsuits is that they will succeed; our contention is that the cost of vindication of the public defender in these suits is too high in the process.

QUESTION: Well, what makes you think that -- what makes you think that there wouldn't be frivolous

litigation in the state courts?

MR. FROHNMAYER: Because there exist the prosecutorial control and the Grand Jury control.

QUESTION: I know. But that's just the allegation. The allegation is that there has been a conspiracy in derogation of -- I suppose if there's a conspiracy, it's in derogation of the prosecutor's duty, as well as the public defender's.

MR. FROHNMAYER: Well, but the point, Justice White, is that there clearly are screening devices which do not cause such a massive diversion of the public defender's time from the duty for which the public defender is hired, and that is to fulfill the Sixth Amendment mandate and represent defenseless indigents.

QUESTION: And that's the rationale for the exemption the prosecutor, isn't it?

MR. FROHNMAYER: Absolutely, it is. It's the diversion of time from the duties.

QUESTION: Couldn't he file a malpractice case in the state court?

MR. FROHNMAYER: I'm sorry, Justice --

QUESTION: Couldn't he file a malpractice lawsuit in the state court?

MR. FROHNMAYER: It is possible that he could.

QUESTION: Well, you just said he couldn't do

anything in the state court.

So he could flood the state court with malpractice suits, couldn't they?

MR. FROHNMAYER: Well, we don't know from the Oregon, Justice --

QUESTION: Well, you don't know what they are going to do in the federal court either.

MR. FROHNMAYER: No, sir. But we certainly don't believe that a duplication of spurious litigation is any --

QUESTION: Well, don't you think that cuts down on your flood argument?

MR. FROHNMAYER: We're not certain, but what we believe is that any diversion of the public defender's time to answer frivolous litigation is a diversion which deprives the public defender and the states of the responsibility to meet a Sixth Amendment mandate. And that is a stronger reason for immunity than this Court recognized in the Briscoe case, where the police officer's time was diverted by virtue of being a witness and then having to testify in 1983 proceedings.

But the police officer did not have a constitutional mandate to fulfill in the time that was taken away by defending frivolous court actions, and

that is the case in this instance.

And it's beyond that point It goes to the question of the vulnerability of the public defender or perhaps, indeed, of any defense counsel in a judicial proceeding where all of the other participants in that proceeding are immune from suit. It makes the public defender uniquely vulnerable to the vindictive litigant, because that is the last and only place that the integrity of the judicial fact finding process, in fact, can be undermined. And that is --

QUESTION: Do you have malpractice insurance in Washington?

MR. FROHNMAYER: Malpractice insurance exists in Cregcn, Justice Marshall, for --

QUESTION: I mean Cregon.

MR. FROHNMAYER: It exists fcr members of the private bar. For the public defender and for public employees, the state has a tcrque liability fund which is established under Chapter 30.

QUESTION: Couldn't they -- they could get insurance if they wanted to, if they wanted to pay fcr it.

MR. FROHNMAYER: The state public defender is insured by the state for his defense, as long as it does not involve willful cr wantcn misconduct.

We advance to the Court one other proposition in connection with the protection of the judicial process, and it's one that we think is extremely important. These claims, sounding in conspiracy as they do, will be extraordinarily difficult to defeat in some proceedings, even when they are frivolous.

That point has been examined in great detail in this Court's past decisions, and it's an extremely telling one as it applies to the public defender here; because, in fact, it is very difficult to imagine, for example, as Justice Stevens' opinion pointed out earlier this last term, a good faith defense conspiracy.

In virtually every case, we believe a defense will be required on the merits, because what's alleged is conspiracy, what's alleged is the allegation that a state of mind was a certain way, an the controversion of those points simply would not, we believe, be significant enough to allow the summary judgment procedure to be utilized to dispose of these kinds of claims in summary proceedings.

So, for that reason, we think it's extremely important that the Court recognize that the large burden on the public defender office, the diversion from attending to clients when there is a fixed pool of resources to deal with them, is, we think, extremely

important.

We also submit to the Court this proposition: The public defender's office, the public defender concept, by every study we have come across, is the most widely-utilized, the most cost-effective, and the most efficient in delivering indigent legal services as part of the Sixth Amendment mandate.

If states such as Oregon or others who sponsor public indigent defense programs are subject to liability for the defense of an increasing burden of suits, then that kind of experimentation, which is the most effective way of realizing the Gideon v. Wainwright mandate, we believe, will not be effectively fulfilled.

Mr. Chief Justice, I wish to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Edwards.

ORAL ARGUMENT OF CRAIG K. EDWARDS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. EDWARDS: Mr. Chief Justice and may it please the Court, Glover's allegations in this matter, if true, present a classic situation that the 42nd Congress intended to remedy by the enactment of the 1871 Civil Rights Act, where it's alleged that state trial judges, state appellate judges, and state officials

engaged in a conspiracy to deprive a citizen of constitutional rights, a federal avenue of redress must remain open to ensure the protection of those constitutional rights and to ensure that a citizen has an adequate avenue to obtain redress for that derivation.

QUESTION: How about the jury? Did they join the jury her?

MR. EDWARDS: Members of the jury may not have been joined under the legislation, but members of the jury would perform a greater public interest.

We maintain that a public defender does not perform in the interest of the public. The public defender's duty is to represent the clients, the indient accused's interests, and to oppose the government in adversary litigation.

That's the

QUESTION: When this Court decided the Agersinger case and the earlier case, certainly there was some thought that there was a public concern about having a person who was charged with crime by the government be provided with counsel.

MR. EDWARDS: Your Honor, where counsel is appointed or is a public defender to represent the accused's best interest, that counselor, whether retained, appointed, or a public defender, has not other

duty but to represent and to advance the interests of the accused.

In this case --

QUESTION: You say no other duty?

MR. EDWARDS: There may be --

QUESTION: What about his duties as an officer of the court?

MR. EDWARDS: Well, certainly, there are obligations to the court and --

QUESTION: You suggest he could advance perjured testimony?

MR. EDWARDS: No. In fact, we don't, Your Honor, and that's one of the arguments that we believe goes in our favor; that a public defender, even though a public defender may not be able to refuse a case, the public defender certainly has an obligation not to advance frivolous claims, the floodgates of frivolous claims and such, that Mr. Frohnmayer suggested may be advanced. The public defender has that obligation not to do that.

There is also the general public interest in the effective assistance of counsel for all accused, whether they have money or whether they don't. But the primary emphasis or the primary reason for that, and one of the things that the Court has always looked at, is

the interest in making sure that the adversarial prccess is a strong one. And at any time where we have the interests of the gcvernment which say that a public defender should be immune because the government has to spend its resources more economically and such, we're subverting that adversarial process.

We're not maintaining a strong separation between the person who is suppcsed to represent the accused's best interest.

QUESTION: There is a practical observation that I think the Court is bcund to have in mind when it considers claims like this. And we see thousands cf petitions for certiorari year-in, year-out, in which some disgruntled citizen complains that the judges and all the lawyers and all the administratcrs who've ever been involved in his case or her case have all joined in a massive conspiracy against him.

Here, the charge is that the circuit judge and the prosecutor and the defense lawyer and judges of the Oregon Court of Appeals, one of whom was a fcrmer attorney general -- now, we all know that you have tc believe what's taken on the pleadings at the dismissal stage and so forth, but we're also concerned, I think, with, you know, how much resources ought to be allocated to defend against this sort of thing tc bring it tc

trial.

And, you kno my idea, frankly, is that the chances of your ever p ving what you allege are about one in a thousand.

Now, I reali that doesn't affect it legally, but I think that's bou to be in people's minds as they decide whether there i immunity or not.

MR. EDWARDS: Your Honor, certainly there is no way to stop a frivo us complaint from being filed under Section 1983. A we don't maintain that there will not be frivolous mplaints filed.

It's our poi that that one case in a thousand which has mer to it, and the attorney general has suggested that the are cases that do have some merit to them, that on case in a thousand, to deprive a citizen of constitutio l rights without any federal avenue of redress is t great, considering that the only public interest i in the efficient expenditure of resources.

QUESTION: F t justitia ruat coelum. Let there be justice, thou the heavens fall. That's your position.

MR. EDWARDS: Your Honor, the constitutional rights are precious.

QUESTION: W l, that's not a bad position.

That's engraved in stone in the civil court's building in St. Louis, Missouri.

(Laughter.)

MR. EDWARDS: Your Honor, my point is that those rights are precious, and that at any time that government acts to deprive a citizen of those rights, the purpose behind the 1871 Civil Rights Act should be available to a citizen to utilize that independent avenue of redress.

QUESTION: Well, do you have a malpractice suit in state courts against the, I guess, the public defender?

MR. EDWARDS: It's my position that there certainly could be a malpractice in state courts against the public defender. Where the only allegations are that a public defender was negligent in the representation of a case, a malpractice case should vie against the public defender.

QUESTION: Would it differ substantially from what you're suing for in the federal court, or not?

MR. EDWARDS: It certainly would, because if we were suing in the federal court for just a malpractice claim, we couldn't get to the color of law requirement under 1983.

QUESTION: And you -- but you can't get to --

the only person you can get to in the federal court is the public defender.

MR. EDWARDS: Is the public defender, because the defense attorney who is --

QUESTION: And you have to prove a conspiracy.

MR. EDWARDS: That's right.

QUESTION: Which is in agreement with the judge. Why isn't your -- why isn't your remedy, your malpractice remedy, a much more useful remedy to bring justice to bear on this situation?

MR. EDWARDS: In many cases, Your Honor, where a malpractice remedy is available, it's very difficult for an indigent accused to be able to retain an attorney. Now, that's not to say that there are not members of the bar who --

QUESTION: And why is it so -- it isn't hard to retain an attorney for a 1983 suit because in 1988?

MR. EDWARDS: No. Most of these claims, as Mr. Frohnmayer has suggested, are brought pro se, where the indigent accused has an avenue of redress.

QUESTION: Well, why can't he -- why doesn't he just sue for malpractice pro se?

MR. EDWARDS: Well, the pleading requirements ae difficult to meet in the state court. There may also be the burden that the defendant has to show --

QUESTION: Well, could he have brought this 1983 suit in the state court in Oregon?

MR. EDWARDS: Not -- he could have brought, alleging conspiracy.

QUESTION: Well, this very suit. Could he not have brought this very 1983 action in the state court?

MR. EDWARDS: Yes, he could have. But the court has made clear, since Monroe v. Pape, that there is no requirement that the state remedies the address, or that you have to go to the state court.

We have the Congress, which in this situation where it's alleged that state officials have engaged in conspiracy --

QUESTION: No, but if he had brought this 1983 suit in state court, would not the very issue we are dealing with today have been raised?

MR. EDWARDS: Yes, it would, Your Honor, but this fellow doesn't have much confidence in the state courts.

QUESTION: He was convicted?

MR. EDWARDS: He was convicted, and he says as a result of the conspiracy.

(Laughter.)

QUESTION: Yes. But, Mr. Edwards, isn't it also true that in a malpractice case, the plaintiff must

allege that he was innocent?

MR. EDWARDS: That's what I was driving at befcre. That's right. But for the --

QUESTION: And so that's pretty -- sometimes a pretty heavy burden.

MR. EDWARDS: That certainly is a heavy burden.

QUESTION: What wculd be wrong with a federal rule in the 1983 area that said that in this kind cf case, you have to allege innccence?

MR. EDWARDS: That may be a way to address the floodgates problem, Your Honor.

QUESTION: It would be pretty hard for him to prove damages if he would have been convicted, ycu know, if he's really guilty and would have been convicted anyway.

MR. EDWARDS: Well, frankly, I think he would have a difficult time in prcving the amount of damages that he's alleged, and that even though there is the state malpractice "but for" proposition, that he may have a difficult time obtaining damages if he cculd not prove that this conviction was a result of conspiracy.

QUESTION: In this case, did this man allege he was innocent?

MR. EDWARDS: He believe that he was deprived of his constitutional right to --

QUESTION: I know, but that's not my question. My question is did he allege that he was innccent of the crime for which he was convicted?

MR. EDWARDS: Yes. He believed that he was innccent. He was obtaining to obtain psychiatric records. He had been hospitalized, and he alleged that part of the conspiracy was that his -- that state officials persuaded his public defender to fail to obtain those defense records. And, as part of that conspiracy, he was not able, then, to raise the defense that he wanted to raise, and that's the problem.

QUESTION: So you're saying he was illegally convicted.

MR. EDWARDS: He was convicted without due process of law. He was --

QUESTION: Well, I take it he's the -- it would sound like that if you win, if you prove up your case, what you've really done is you're really collaterally attacking his conviction. I would suppose you're supposed to do that in habeas corpus.

MR. EDWARDS: Well, Your Honor, at this time this fellow is out of prison, and a petition of habeas corpus does him no good. Also, for the general purposes of these cases where --

QUESTION: Is he on parole, or --

MR. EDWARDS: He may be. He's -- he served 36 months, 35 to 38 months out a ten-year sentence.

QUESTION: Do you think he's still technically in custody or not?

MR. EDWARDS: I do not know. He probably is on some sort of probation.

QUESTION: Counsel, is there anything in the legislative history of 1983 which, by any stretch of the imagination, thought about this case?

MR. EDWARDS: Your Honor, I would suggest that the legislative history of 1983, just in the enactment itself, where this Court has interpreted 1983 and Polk County v. Dodson, that a public defender is immune --

QUESTION: I didn't say one word about Polk County. I talked about the legislative history of 1983, which was a little before Polk County case.

MR. EDWARDS: There is nothing, other than the Act itself, the language of the Act itself.

QUESTION: Well, that's all I wanted to know.

MR. EDWARDS: I would suggest that that language holds that -- or would dictate that public defenders, during the course of traditional defense functions, would be immune, would be effectively immune from a lawsuit brought by a dissatisfied client.

It's important to note that the defense

attorney does not perform a quasi-judicial function, regardless of the funding that is afforded to the defense attorney, regardless of the fact that the state is the source of the funds. The defense attorney doesn't perform the quasi-judicial function.

As I've said before, the defense attorney performs the private function. The defense attorney does not consider the public interest in this case, and in every other case that the Court's looked at, it's been -- it's determined whether or not a quasi-judicial function has been performed.

QUESTION: How about Briscoe v. the witnesses?. Would you say that's a public --

MR. EDWARDS: That's the only case where a private party has been afforded immunity without performing a quasi-judicial function. But in that case, what the Court was very impressed with was that the witness performs, in essence, a public interest and it aids the judicial system in that it helps us get to the truth. The more that a witness is able to speak without the threat of subsequent intimidation, subsequent lawsuits, we get to the truth of the matter.

In this case, where we're saying that a defense attorney should be allowed to conspire with no liability under 1983, that policy that underlies the

witness immunity is not advanced by a holding of immunity in this case.

We injure the judicial process to the extent that we don't preserve the adversarial process, which in itself --

QUESTION: Well, you could say the same thing, apply that same analysis to Briscoe, I think, that you're allowing witnesses to perjure themselves.

Obviously, witness perjury doesn't help the judicial process any more than conspiracy between public defenders and judges help the judicial process.

The question is, you know, under what circumstances, if ever, shall people who participate in the judicial process be called to account under a separate 1983 action for the role they played in the judicial process.

MR. EDWARDS: Your Honor, I would believe that a witness who testifies and perjures him or herself should be liable.

Now, under Briscoe, where the police officer, where it was alleged that the police officer perjured himself, that was held to be within the functions that a witness performs, and at least there's a trier of fact to sort out the truth from a lie.

Where you have a defense attorney as the last

hope for an indigent accused who is granted immunity, then there is no way at all to find the truth in a matter. There's no way at all where the defense attorney, the prosecutor, the judge, witnesses, all would conspire or all would act outside traditional defense functions; there's no last -- there's no other hope.

QUESTION: How often would you estimate this sort of a conspiracy takes place in Oregon?

MR. EDWARDS: I would submit that it probably does not occur very often, Your Honor, and I would hope that it does not occur very often.

I would also suggest that, to the extent that there have only been eight malpractice claims against criminal defense attorneys over the reported history, that Justice O'Connor's point, that there are not a whole lot -- there just aren't a whole lot of these claims that have merit to them. To the extent that there are some, they should be addressed.

QUESTION: But we don't know at this stage whether any claims have merit to them, I guess.

QUESTION: And the system that you're advocating requires the application of public resources to even the most frivolous claims. That's the whole point made by the Attorney General.

MR. EDWARDS: I understand that, Your Honor, but to the extent that a public defender performs in the interest of the public in providing efficient and economic assistance to indigent accused, we should not take that liability away.

I think that it would be the, perhaps, the Congress which should, or the state legislatures which should provide additional funding for the provision of indigent defense services; that it's up to the legislature to fund those principles which this Court believes are very important, and obviously this Court believes that effective assistance to indigent accused is important.

Amicus professional criminal lawyers' defense associations, both state and national, who have joined us in saying there should be no immunity for the public defender, both understand and both have advanced the argument that a finding of immunity does nothing at all to advance the effective representation of accused.

It's also clear that the common law immunity, which under -- common law immunity from defamation -- was also advanced to see that attorneys did not fear subsequent litigation in the defense attorney's role in judicial proceedings.

Again, this was to make sure that all the

facts were out onto the table, and so that the courts could get to the truth of the matter.

To the extent that we're asked at this point to advance a policy from 1983 liability to -- to the extent that we're asked to see that immunity from 1983 claims should lie, we're not asked to accept that because that policy advances the truth. The only thing we're asked to do that is based upon the fact that there is a more efficient expenditure of state resources. And that's why, I think, that the legislature would be the proper authority to see that there are sufficient funds to protect constitutional rights and to provide effective assistance to the accused.

I would also point out that, although there is a speculative burden that the courts may be -- there is a speculative overburden argument. It is speculative. In addition to that, police officers, who are the most likely target of 1983 litigation, members of the Executive Branch, are only afforded a qualified immunity, not an absolute immunity.

We're asked to provide an absolute immunity for the -- this Court's been asked to provide absolute immunity, based on the fact that there will be an overburdening of the courts and an overburdening of the public defender's office itself.

QUESTION: Well, you make a tangential argument for qualified immunity for public defenders.

MR. EDWARDS: Well, to the extent that --

QUESTION: The policeman has it, and the prosecutor has it, and the judge has it, and the witnesses have it.

MR. EDWARDS: Okay. I don't think that a qualified immunity would be very helpful in this case for two reasons: one, the public defender is not a public official. Qualified immunity is designed to aid public officials in seeing that their duties are performed. There's a public interest in seeing that they perform their duties without subsequent fear of litigation.

Also, in regard to the qualified immunity, there's a good faith test, and at any time a defense attorney conspires with a state appellate or a state trial judge or the prosecutor, that there can't be good faith.

And so the qualified immunity wouldn't work in this situation. Glover would still win under a qualified immunity, but I don't think that it's the best rule that this Court could come up with.

QUESTION: Mr. Edwards, your position, then, is that the public defender is not a public official,

but he nonetheless acts under color of state law.

MR. EDWARDS: He's acting under color of state law here, only because he has conspired with state officials.

QUESTION: And that's the Dennis holding.

MR. EDWARDS: That's right. For those traditional defense functions, obviously, he or she does not act under color of law. But when there's a conspiracy with state officials, yes, the color of law holds.

QUESTION: Why, logically, should that be?

MR. EDWARDS: Well --

QUESTION: I mean why, logically, should someone who is not ordinarily acting under color of state in law in performing the functions allotted to him, when he conspires with a state official, why should that person's action be transformed into --

MR. EDWARDS: Well, it's clear that private parties who conspire with state officials obtain color of law, act under color of law.

QUESTION: Well, why is it clear? I mean, logically?

MR. EDWARDS: Well, if you act in concurrence with the state official to further the state's purpose, you are acting under color of law.

QUESTION: Even if the purpose is an illegal purpose?

MR. EDWARDS: Even if the purpose is illegal, especially if the purpose is illegal. You're acting under color of law. You're conspiring, you're working with the state.

QUESTION: Well, I suppose you could say that state action is certainly involved in a conviction, and that this person is accused of subverting the proper conduct of public officials.

MR. EDWARDS: I think that I would argue that the public officials --

QUESTION: You're really accusing of conspiracy, aren't you?

MR. EDWARDS: I think that the public officials have subverted his defense attorney. I would argue that.

QUESTION: Aren't you saying you're action is really -- has to be a claim of conspiracy?

MR. EDWARDS: Yes, it does. It has to be a claim of conspiracy to get under color of law.

Now, for other, I would --

QUESTION: Well, if you prove an agreement, why you've subverted -- there's a subversion of the prosecutor's function, too.

MR. EDWARDS: That's right, but there is a public interest --

QUESTION: So his liability could be for doing that, not acting for the state, but acting against the state by subverting its proper conduct.

MR. EDWARDS: Well, to the extent, though, under 1983 that he has acted under color of law, and that the state is involved here or the government is involved with the private citizen to deprive another of constitutional rights, he should have an avenue of redress, a federal avenue of redress under 1983.

I would submit that the Court --

QUESTION: Mr. Edwards, how is it that you distinguish the Briscoe v. Lahue approach, which indicated that all people, governmental or otherwise, who are integral parts of the judicial process, are covered by immunity?

Why isn't the public defender part of the judicial process?

MR. EDWARDS: Because the public defender performs such a unique role, the public defender is the representative of the accused and, necessarily, to maintain the adversarial tradition that is paramount in ascertaining truth, the public defender should not be -- the public defender may perform a critical role in the

judicial process, but that alone is not enough to make it the quasi-judicial role, or to --

QUESTION: Well, I don't think that Briscoe turned on making witnesses quasi-judicial. It simply brought them in under the umbrella of the judicial process. And the judicial process in our country requires counsel for the defendant as well as the prosecutor and the judge and the witnesses.

MR. EDWARDS: Your Honor, I understand that, but I think, again, that the mere location as part of the judicial function is not enough to avoid immunity. We have to look at the role that each person plays in the judicial proceeding and, to the extent that a public defender performs only in the accused's behalf and that that adversarial process is designed to seek the truth, to get the truth out, which --

QUESTION: Of course. But the public has an interest in the production of truth by virtue of the adversarial process. The public has an interest in all aspects of this judicial proceeding, and maybe that interest is so great that it requires immunity for all participants.

That's the question, I suppose.

MR. EDWARDS: I think that the greater public interest is in maintaining a strong adversarial process.

QUESTION: Do you have anything further, Mr. Attorney General? You have five minutes remaining.

MR. FROHNMAYER: Thank you, Mr. Chief Justice.

ORAL ARGUMENT OF DAVID B. FROHMAYER, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. FROHNMAYER: Chief Justice, members of the Court, we take strong issue with the contentions just advanced by respondent. The public defender does play a critical role in the judicial process. That's the basis of the common law immunity in defammation, which extends to all participants in the adversary process.

This Court has recognized that vital role in its decision in the Butz case, where, without question, those participants who were advocates, irrespective of the side they occupied, even in an administrative agency proceeding were accorded absolute immunity by this Court.

It's the same statement that is made by this Court in Imbler v. Pachtman.

There is a public purpose that is served that is not merely of policy importance. It has constitutional dimension, and that is because the public defender or any advocate for the defense is serving a Sixth Amendment purpose. We suggest that that is one of the reasons why fearless advocacy ought to be furthered by the grant of absolute immunity, and we suggest one of

the other policy bases that has also always underlain this Court's decisions, and that is the undesirability of having further federal court reexamination of the entire trial process at the state level through this knd of subversion.

QUESTION: May I ask a question right there? It kind of relates to the burden problem.

Just reflecting on this case -- of course, this man, I understand, is cut of jail now, but wouldn't it be true that in most cases of this kind, that the allegations would be made by way of a habeas corpus petition asking -- seeking release while the man's -- you're going to have the burden. If the man wants tc make these charges, you're going to have to try him cut once.

MR. FROHNMAYER: That's true, and there is a state proceeding, a post-conviction proceeding in Oregon, which would allow --

QUESTION: And if you've gone through all that machiner and, say, the state prevailed and said there was no merit to these charges, wouldn't you be able to get rid of it on a summary judgment, in most cases?

MR. FROHNMAYER: It may well be, if that were an exhaustion requirement or a preclusion requirement that either the state cr the --

QUESTION: But I just think, realistically, most of these allegations would produce that kind of litigation, wouldn't it?

MR. FROHNMAYER: Yes, although the issues that one brings up in habeas corpus proceeding would be directed to the underlying constitutional violation --

QUESTION: Yeah. But, clearly, if these facts are true, the conviction's no good.

MR. FROHNMAYER: That's correct. That's correct. But at least --

QUESTION: I just have trouble -- I'm just trying to wrestle with the notion of whether there really is a mountain of litigation of this kind out there, or just a few isolated cases.

MR. FROHNMAYER: Well, we believe that there is likely to be an increasing caseload, simply because it was not until recent years that there was even thought to be any question about the public defender's immunity or the immunity of defense counsel.

So we believe that simply looking to a preclusive or some other method of achieving collateral estoppel through a state or federal habeas remedy, while one way of dealing with this problem, is not as symmetrical as we think is desirable to deal with the protection of the judicial process itself, for the

independent reasons that we have just suggested, Justice Stevens.

QUESTION: To what extent do you think the availability of attorneys' fees to a successful plaintiff under 1983 is an incentive to use that as a cause of action?

MR. FROHNMAYER: To use Section 198 -- I think that still hangs in the balance, Justice O'Connor. It's not clear even now how much success a plaintiff has to enjoy in a Section 1988 -- 83 action before attorneys'fees are awarded, even in light of last court's decisions.

It certainly is some incentive, but bear in mind that counsel can be appointed in habeas corpus proceedings, and counsel can be appointed in state post-conviction proceedings, whereby these issues can be dealt with in a logical manner without involving, ab initio, the state -- the federal court jurisdiction under Section 1983.

We submit also that when learned counsel for the respondent says that the public defender has no obligation to urge the frivolous, that the obvious retort is, yes, but he doesn't have any obligation not to be sued either.

And here, the public defenders are asked for

$10 million and the State of Oregon must provide their defense, probably beyond a summary judgment proceeding, and the cost can be catastrophic; catastrophic, not merely for the system because it diverts from a fixed class of indigent defendants whose defense will no longer be adequately prepared because of the loss of that person from an office, but it will cause advocates to make a paper trail, a stream of consciousness paper trail about every trial tactical decision; it will force them to explain why every piece of the brief ended up on the cutting room floor instead of before the court.

That's not the kind of advocacy which this Court's decisions have encouraged, and that's not what is in the interest of the public.

Thank you.

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

We'll hear arguments next in Palmore against Sidoti.

(Whereupon, at 11:10 p.m., the case in the above-entitled matter was submitted.)

# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that th 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:
#82-1988 - BRUCE TOWER, ETC., ET AL., Petitioners v. BILLY IRL GLOVER

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BY _____
(REPORTER)