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Civil Rights: Attorney Malpractice: Public Defenders Not Liable Under 42 U.S.C. Sec. 1983. Polk County v. Dodson, 102 S. Ct. 445 (1981).

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does not adequately address the above problems, the court decided to abandon that standard and start from the beginning.

V. CONCLUSION

Dean represents a new stage in Wisconsin polygraph law. *Stanislawski* proved unsatisfactory in dealing with the competing values of reliable probative evidence and the integrity of the trial process. Other states' procedures do not provide an adequate replacement. Therefore, Wisconsin must formulate a new standard that is equipped to deal with the problems inherent in polygraph testing. As the Seventh Circuit Court of Appeals explained in *McMorris,* for better or worse, "[s]cientific evidence . . . has become more a part of the ordinary trial . . . ."[86]

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CIVIL RIGHTS — Attorney Malpractice — Public Defenders Not Liable Under 42 U.S.C. Section 1983. *Polk County v. Dodson*, 102 S. Ct. 445 (1981).

The Civil Rights Act of 1871, 42 U.S.C. section 1983, provides a civil cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," deprives another person of constitutional rights.[1] In the last two decades, the number of actions against public officials to enforce civil rights under section 1983 has increased dramatically.[2] Over the same period, the number of state-funded public defender offices has also increased, primarily in response to United States Supreme Court decisions holding that indigents have a constitu-

86. McMorris v. Israel, 643 F.2d 458, 462 (7th Cir. 1981).

1. 42 U.S.C. § 1983 (1976). The statute confers original federal jurisdiction over the claim.

2. *See* 90 HARV. L. REV. 1133, 1135-36, 1172 (1977). The increase followed the Supreme Court decision in Monroe v. Pape, 365 U.S. 167 (1961), which held that actions not authorized by a state may nevertheless be under color of state law for purposes of § 1983, *id.* at 172, and that plaintiffs suing under § 1983 need not prove that defendants acted with the intent to deprive a person of a federal right, *id.* at 187. *See* 90 HARV. L. REV., *supra*, at 1167-75.

tional right to counsel during trial and first appeal.[3] Not surprisingly, then, courts have been faced with the question of whether public defenders act under color of state law, rendering them amenable to suit under section 1983. Resolving a division in the federal courts of appeals,[4] the United States Supreme Court, in *Polk County v. Dodson*,[5] answered this question in the negative. In arriving at its decision, the Court made several significant observations concerning the role of the state-employed public defenders vis-a-vis the clients and the state.

I. THE COURT'S DECISION

The respondent, Russell Richard Dodson, was convicted of robbery in an Iowa state court. Martha Shepard, a public defender employed full-time in the Polk County, Iowa, Offender Advocate's office, was appointed to represent him on appeal. Subsequently, she moved for permission to withdraw as counsel and have the appeal dismissed as frivolous. The Iowa Supreme Court granted the motion and the appeal was dismissed.

Dodson then brought an action in federal court under 42 U.S.C. section 1983, naming as defendants Ms. Shepard, Polk County, the Polk County Offender Advocate and the Polk County Board of Supervisors.[6] His complaint alleged that Ms. Shepard inadequately represented him and that her actions, especially her motion to withdraw, had, *inter alia*, deprived him of his sixth amendment right to counsel.[7] Dodson relied

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3. *See* Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976). The decisions were Gideon v. Wainwright, 372 U.S. 335 (1963) (at trial), and Douglas v. California, 372 U.S. 353 (1963) (first appeal).

4. The Seventh and Eighth Circuits have held that state-employed public defenders do act under color of state law. *See* Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980). The Fifth and Tenth Circuits have held that they do not so act. *See* Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). The Third and Ninth Circuits have supported the latter position in dicta by holding that public defenders are absolutely immune from suit under § 1983. *See* Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977).

5. 102 S. Ct. 445 (1981).

6. Dodson v. Polk County, 483 F. Supp. 347 (S.D. Iowa 1979).

7. In Whitmore v. State, 56 Wis. 2d 706, 203 N.W.2d 56 (1973), the Wisconsin Supreme Court, per Justice Heffernan, stated:

[I]t is apparent that the duties of trial counsel should not cease until the deci-

upon Shepard's employment by the county to establish that she acted under color of state law, a jurisdictional requisite for a section 1983 action. Dodson also alleged that the Offender Advocate and Board of Supervisors had established rules and procedures that Shepard was bound to follow in handling criminal appeals.

The district court dismissed Dodson's claims against Shepard, reasoning that she did not act under color of state law since a public defender owes a duty of undivided loyalty to her client, and therefore cannot be sued as an agent of the state.[8] The Court of Appeals for the Eighth Circuit reversed,[9] holding that Shepard acted under color of state law because she was an employee of the county, which is "merely a creature of the State."[10] In *Polk County v. Dodson,* the United States Supreme Court reversed the court of appeals and held that a public defender does not act under color of state law when performing a lawyer's traditional function as counsel to an indigent defendant in a state criminal proceeding.[11]

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sion is made by the defendant and his counsel whether to appeal immediately or undertake any postconviction motions that may be desirable. It is the obligation of trial counsel to continue his representation of the defendant during this stage of the proceedings and assist the defendant in making a reasonable decision. He has the duty to explain in detail to the defendant the relative advantages or disadvantages of any projected appeal or postconviction motions. The decision, of course, must be the defendant's own.

Id. at 719, 203 N.W.2d at 63.

Earlier, however, in Cleghorn v. State, 55 Wis. 2d 466, 198 N.W.2d 577 (1972), the Wisconsin Supreme Court, per Chief Justice Hallows, also stated:

> While an indigent defendant has a constitutional right to assistance of counsel, he has no right to require an advocate to violate his professional and personal integrity and oath of office by advancing arguments which he does not honestly believe have any merit. Counsel does not need to stultify himself by arguing hopeless and nonmeritorious appeals.

Id. at 476, 198 N.W.2d at 582.

8. 483 F. Supp. at 349-50. The claims against the other defendants were also dismissed.

9. Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980).

10. *Id.* at 1106. The court also reinstated the claims against the Offender Advocate and Board of Supervisors, and allowed Dodson an opportunity, on remand, to state his claim against the county with greater specificity. *Id.* at 1109.

11. Polk County v. Dodson, 102 S. Ct. at 453. The Supreme Court also dismissed the claims against the Offender Advocate, Polk County and the Polk County Board of Supervisors, primarily on the basis that § 1983 will not support a claim based on a *respondeat superior* theory of liability. *Id.* at 454. *See also* Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978); Schappen, *Civil Rights Litigation After* Monell, 79 COLO. L. REV. 213 (1979).

II. THE COURT'S ANALYSIS

The test for determining whether a person is acting under color of state law was succinctly stated by the United States Supreme Court in *United States v. Classic*:[12] "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[13] Several factors support a finding that public defenders' actions satisfy the test posed in *Classic*. Public defender offices are generally established by state statute.[14] They fulfill a duty which the United States Constitution imposes upon the states.[15] Public defenders, as state employees, are paid with state funds and are subject to state administrative directives that determine their clients, their caseloads and their facilities.

Justice Powell, however, speaking for the majority in *Polk County*, recognized that while a public defender's employment relationship with the state is "certainly a relevant factor, we find it insufficient to establish that a public defender acts under color of state law within the meaning of section 1983."[16] Justice Powell drew a sharp distinction between the role of the public defender and the role of any other public employee. As a defense attorney, the public defender owes a duty to serve "the undivided interests of his client,"[17] not the interests of the state. The activities of the public defender include entering pleas, moving to suppress state's evidence, objecting to evidence at trial, cross-examining state's witnesses and making closing arguments on behalf of defendants. The Court found it difficult to detect any color of state law in such activities, which in fact place the public defender in an independent, adversarial role *against* the State.[18] Indeed, the

12. 313 U.S. 299 (1941).

13. *Id.* at 326.

14. *See* Espinoza v. Rogers, 470 F.2d 1174, 1174 (10th Cir. 1972); Brown v. Joseph, 463 F.2d 1046, 1048 (3d Cir. 1972). The public defender's office in the Polk County case provides an exception, since it did not exist under the authority of an Iowa state statute, and was the independent creation of the Polk County Board of Supervisors. Dodson v. Polk County, 483 F. Supp. 347, 349 n.2 (S.D. Iowa 1979). This was apparently not a factor in the Supreme Court's decision, however.

15. *See* cases cited *supra* note 3.

16. Polk County v. Dodson, 102 S. Ct. 445, 451 (1981).

17. *Id.* at 450 (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)).

18. 102 S. Ct. at 451.

American Bar Association's *Code of Professional Responsibility* mandates that public defenders exercise independent judgment on behalf of their clients, apart from the influences of the public defenders' employers.[19] More importantly, the Court found a constitutional obligation upon the state to respect the professional independence of the public defenders it employs. In *Gideon v. Wainwright*,[20] the Court established the right of state criminal defendants to the "guiding hand of counsel at every step in the proceedings against [them]."[21] The *Polk County* Court noted that implicit in the concept of the "guiding hand" is the assumption that counsel will be free of state control,[22] a factor which militates against a finding that public defenders act under color of state law.

The Court also refused to differentiate between the role of public defender and that of privately retained defense counsel. The majority argued that although legislative and administrative decisions influence the way public defenders work, neither they nor privately retained counsel, by the nature of their functions, can be the servants of an administrative superior.[23]

In a lone but thorough dissent, Justice Blackmun argued that the public defenders' status as county employees per se determines that they act under color of state law, notwithstanding the precise nature of their employment relationship with the state. Citing *Monroe v. Pape*,[24] Justice Blackmun noted that the Court has long held that a state official acts

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19. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1977). Ethical Consideration 5-1 explains this Canon:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1977) (footnote omitted).

20. 372 U.S. 335 (1963).

21. *Id.* at 345 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

22. Polk County v. Dodson, 102 S. Ct. at 452.

23. *Id.* at 451. Note also the American Bar Association's STANDARDS FOR CRIMINAL JUSTICE 4-3.9 (2d ed. 1980): "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program."

24. 365 U.S. 167 (1961).

under color of state law even when the state does not authorize or even know of the official's conduct.[25] Thus, the lack of direct state control over the public defenders' activities is irrelevant to the issue of whether they act under color of state law.

Assuming, however, that the degree of state control is relevant to the "color of state law" issue, the dissent additionally argued that the majority underestimated the control that the government actually has over the public defenders. Justice Blackmun noted that the county controls the size of and funding for the public defender's office, which dictates the size of the public defenders' caseloads.[26] This in turn has a great influence on the amount of time the public defenders can spend with their clients. The public defenders' discretion — and their ability to provide effective representation — is therefore influenced by state action to a degree not experienced by privately retained counsel. It is also likely that public defenders must conform to administrative rules aimed directly at ensuring effective representation. The dissent noted that while the county may not have directed Dodson's counsel to withdraw from the case, it doubtless could have prescribed general guidelines to follow in determining whether an appeal should be pursued or the case dropped.[27]

The dissent further noted that the state not only determines the public defender's overall caseload, but assigns the public defenders to particular clients as well.[28] A public defender therefore possesses authority to represent a client by virtue of the state's selection of the attorney. This is in contrast to the privately-retained attorney, whose authority to represent clients is derived from the *client's* selection of the attorney. Indeed, it was the state's assignment of counsel to Dodson that enabled Shepard to represent him and thereby allegedly violate his constitutional rights.

Finally, the dissent refused to subscribe to the majority's theory that public defenders cannot act under color of state law because of their ethical obligations to their client.[29] Jus-

25. Polk County v. Dodson, 102 S. Ct. at 456 (Blackmun, J., dissenting).
26. *Id.* at 457.
27. *Id.*
28. *Id.* at 455.
29. *See supra* text accompanying notes 16-18.

tice Blackmun argued that state-employed physicians have ethical obligations to their patients just as the attorneys have ethical obligations to their clients, and in both cases these obligations may conflict with state practices and policies.[30] Yet, in *Estelle v. Gamble*,[31] the Court held that a prison doctor's substandard care does present a cognizable section 1983 claim.[32] In Justice Blackmun's words, "[t]he *Gamble* Court did not find that color of state law evaporated in the face of a professional's independent ethical obligations. I cannot see why [the present] case is different."[33]

III. CRITIQUE AND IMPLICATIONS

Justice Blackmun's criticism that the majority opinion "unduly minimizes the influence that the government actually has over the public defender"[34] fails to perceive the true basis for the Court's decision. The majority argues not so much that the state does not, but rather that it *should not,* influence public defenders' representation of their clients, given the public defenders' ethical obligations. The majority opinion is more normatively than empirically based. The Court appears to fear that respect for the public defenders' professional independence might be eroded were they deemed to act "under color of state law." In his brief concurring opinion, Justice Burger supports this view by noting that:

> [I]t is important to emphasize that in providing counsel for an accused the governmental participation is very limited. Under *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Argersinger v. Hamlin,* 407 U.S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. *It is the independence from governmental control as to how the assigned task is to be performed that is crucial.*[35]

While other state-employed professionals doubtless have ethical obligations to their clients, these will conflict with state policies and interests only occasionally. In the case of

30. Polk County v. Dodson, 102 S. Ct. at 456.
31. 429 U.S. 97 (1976).
32. *Id.* at 107.
33. Polk County v. Dodson, 102 S. Ct. at 456.
34. Polk County v. Dodson, 102 S. Ct. at 456-57.
35. *Id.* at 454 (emphasis added).

defense attorneys, their very role places them in an adversarial relation to the state, and compels them to act with total independence. It is difficult to reconcile this role with the view that the public defenders act under color of state law. To respond by arguing that the public defenders' status as state employees per se determines that they act under state law oversimplifies the issue by ignoring the uniqueness of the public defenders' adversarial function.

Stating an argument similar to one posed by the dissent, one commentator has claimed that "[a]n indigent who has much at stake and who likely has no voice in selecting the attorney who will represent his interests is justified in viewing the public defender's power as *state* power."[36] There are two responses to this argument. First, it is not necessarily true that defendants will have no voice in the selection of the public defenders to represent them.[37] Second, the defendants' perception of the source of public defenders' power to represent them does not determine whether their counsel act under color of state law. It is the *actual* source of counsel's power that influences this issue, and while it is true, as the dissent states, that "a public defender's power . . . is possessed by virtue of the State's selection of the [indigent defendant's] attorney,"[38] this is only a partial explanation. The public defenders' power to represent the defendants also stems from their status and role as defense attorneys, a role which precludes them from acting under color of state law due to the duty of undivided loyalty they owe their clients.[39]

The *Polk County* Court did not decide that public defenders never act under color of state law. The Court decided only that a public defender does not so act when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding.[40] A public defender may act under color of state law when performing certain administrative functions.

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36. Note, *Liability of Public Defenders Under Section 1983*, 92 HARV. L. REV. 943, 946-47 (1979) (footnote omitted) (emphasis in original).

37. *See, e.g.*, Harris v. Superior Court, 19 Cal. 3d 786, 567 P.2d 759, 140 Cal. Rptr. 318 (1977) (it is an abuse of sound judicial discretion to deny defendant's choice of counsel where choice is supported by objective considerations).

38. Polk County v. Dodson, 102 S. Ct. at 455 (Blackmun, J., dissenting).

39. *See* the discussion of the majority opinion, *supra* Section II.

40. Polk County v. Dodson, 102 S. Ct. at 453.

For example, in *Branti v. Finkel*,[41] the United States Supreme Court assumed that a public defender so acted when making hiring and firing decisions on behalf of the state.[42] This result seems proper insofar as the rationale for concluding that a public defender does not act under color of state law relates only to the public defender's role as a lawyer.

It is also important to distinguish the "color of state law" issue from the "scope of employment" issue related to a *respondeat superior* claim.[43] The *Polk County* Court's conclusion that public defenders do not act "under color of state law" is not tantamount to a conclusion that they act outside the scope of their employment, insulating the state from claims of vicarious liability.[44] The Court decided only that, as a purely jurisdictional matter, public defenders are not amenable to suit under section 1983 because they do not act under color of state law.

Finally, it should be noted that *Polk County* could be raised by public defenders in defense of their rejection of state-imposed case loads and administrative directives. The *Polk County* Court evinced an unequivocal desire to preserve the professional independence of public defenders. Caseload and administrative directives may constrain this independence and adversely affect the quality of services provided to clients, such as to deny them their sixth amendment right to effective assistance of counsel.

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41. 445 U.S. 507 (1980).

42. The *Polk County* Court gave the *Branti* case this interpretation, Polk County v. Dodson, 102 S. Ct. at 453, apparently because the *Branti* Court never paused to consider the "color of state law" issue. *Id.* at 458.

43. Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *See* Monell v. Department of Social Servs., 436 U.S. 658, 694 n.58 (1978).

44. In Cameron v. City of Milwaukee, 102 Wis. 2d 448, 307 N.W.2d 164 (1981), the Wisconsin Supreme Court faced the related issue of whether acts "under color of state law" are limited to acts within the state employee's scope of employment. Chief Justice Beilfuss responded as follows:

> We do not perceive a substantial equation between conduct which is within the scope of a municipal or state employee's employment and conduct which may be termed "under color of law." Conduct within the scope of employment is limited to those acts which by law are attributable to the master or employer. However, for purposes of § 1983, acts under color of law are not limited to conduct attributable to the state by virtue of the employer-employee relationship.

Id. at 457, 307 N.W.2d at 169.

IV. CONCLUSION

In holding that public defenders do not act under color of state law when performing the traditional duties of defense attorneys, the United States Supreme Court, in *Polk County v. Dodson,* reaffirmed the professional independence of state-appointed defense counsel. The Court also effectively insulated public defenders from suit under 42 U.S.C. section 1983.[45]

The *Polk County* Court was wisely cautious about opening up new avenues through which public defenders can be sued by disgruntled clients. The public defenders' fear of a section 1983 suit by every dissatisfied client could constrain their good faith exercise of professional judgment in deciding whether to pursue frivolous claims or utilize various tactics and strategies. That fear could also make it difficult to recruit and hold competent attorneys to represent indigent defendants. Of course, innocent prisoners wrongly incarcerated as the result of ineffective counsel retain the right to initiate state or federal habeas corpus proceedings to secure their release. They may also be able to assert tort claims under state law, seeking damages for attorney malpractice.

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45. The petitioner, Polk County, asked the Court to decide whether public defenders are immune from suit under § 1983. Since the Court held, on the jurisdictional issue, that public defenders do not act under color of state law, the immunity issue was never reached. Nonetheless, the effect is the same: public defenders, when acting as defense counsel, cannot be sued under § 1983.

Judges are absolutely immune from suit under § 1983, *see* Bradley v. Fisher, 13 Wall. 335 (1872), as are prosecutors, *see* Imbler v. Pachtman, 424 U.S. 409 (1976). The United States Court of Appeals for the Seventh Circuit previously held that public defenders are also absolutely immune from suit under § 1983. *See* Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). *See also* Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972).