Federal Probation

DECEMBER 1992

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LVI DECEMBER 1992 NUMBER 4

This Issue in Brief

Euphoria on the Rocks: Understanding Crack Addiction.—A certain mystique surrounds crack cocaine and makes supervision of crack addicts a real challenge for even the most seasoned probation officer. Stressing the importance of knowing the facts about this drug, author Edward M. Read focuses on helping the officer understand the drug itself, the dynamics of addiction to it, and how to assess a person's dependence on it.

The Costs and Effects of Intensive Supervision for Drug Offenders.—Authors Joan Petersilia, Susan Turner, and Elizabeth Piper Deschenes report the results of a randomized field experiment testing the effects of an intensive supervision probation/parole project for drug-involved offenders. Among the findings were that intensive supervision apparently did not affect drug use, did not reduce recidivism, and cost more than routine supervision.

A Day in the Life of a Federal Probation Officer—Revisited.—Six United States probation officers update an article published in *Federal Probation* more than 20 years ago by describing what might come up in a typical workday. The authors—E. Jane Pierson, Thomas L. Densmore, John M. Shevlin, Omar Madruga, Jay F. Meyer, and Terry D. Childers—all of whom serve in specialist positions—offer commentaries about their work that range from philosophical to highly creative.

Personality Types of Probation Officers.—Are there personality characteristics common to probation officers? Authors Richard D. Sluder and Robert A. Shearer address the question, reporting findings from a study of 202 probation officers using the Myers-Briggs Type Indicator (MBTI). The authors discuss the patterns of MBTI personality characteristics among the officers studied, reviewing the strengths and potential weaknesses of the personality types.

When Do Probation and Parole Officers Enjoy the Same Immunity as Judges?—Authors Mark Jones and Rolando V. del Carmen examine the types of defenses a probation or parole officer enjoys in civil liability suits, focusing on the concepts of absolute, quasi-judicial, and qualified immunity. The authors

CONTENTS

When Do Probation and Parole Officers Enjoy the Same Immunity as Judges?

By Mark Jones and Rolando V. del Carmen*

Introduction

THE 1980'S and early 1990's have witnessed a dramatic increase in community-based offender populations. The number of adults on probation in the United States increased from a total of approximately 2 million in 1985 to 2,670,234 in 1990. Between 1989 and 1990 alone, the number of adults on probation increased by 6.1 percent. Parole populations also increased during the 1980's, despite several jurisdictions having abolished parole. At the end of 1990, 1 in every 43 adults in the United States was under some form of correctional supervision; 1 in every 24 males was under supervision.[1]

As these populations have increased and changed, so have line officer and administrator concerns about liability. A review of case law indicates that more courts are granting probation and parole officers quasi-judicial immunity, but court decisions have provided no clear guidelines for determining under what circumstances quasi-judicial immunity applies.

This article examines the types of defenses a probation or parole officer enjoys in civil liability suits. It focuses on the concepts of absolute, quasi-judicial, and qualified immunity. Prior court decisions indicate that probation and parole officers generally enjoy only qualified immunity, meaning they are immune only when the action was taken in good faith. This article suggests that rules regarding the types of defenses available to field officers may be changing in favor of more immunity for the line officer, but the limits are vague and undefined.

Several means of redress are available to offenders wishing to sue probation or parole officers, one of the most common being a claim for damages under state tort law. A tort is defined as a "private or civil wrong or injury other than breach of contract, for which the court will provide a remedy in the form of an action for damages."[2] Tort law, however, varies from state to state in specifics.

The main source of civil liability under Federal law is 42 U.S.C. Section 1983, often referred to as Section 1983 or Federal tort cases.[3] Two basic elements are required for a Section 1983 case to succeed, namely: The defendant must be acting under "color of law,"[4] and the violation must be of a constitutional or a federally protected right.

*The authors are both with the Criminal Justice Center, Sam Houston State University—Mr. Jones as a doctoral candidate and Dr. del Carmen as a professor.

Types of Immunity

The two most frequently invoked defenses in liability suits are official immunity and good faith. Official immunity generally means that certain public officers are immune from liability on the theory that they are acting for the state, which enjoys sovereign immunity. Good faith, on the other hand, means that there is no liability unless the officer violated a clearly established constitutional or statutory right of which a reasonable person would have known.[5]

Courts have traditionally recognized three types of official immunity: absolute, qualified, and quasi-judicial. Under absolute immunity, civil suits are dismissed without going into the merits of the claim, the assumption being that there is no reason to delve into the merit or demerit of the allegation since, regardless of fault, no liability ensues. Absolute immunity has been applied primarily to judges, legislators, and prosecutors.[6] In *Stump* v. *Sparkman*,[7] the Court held that judges are not liable for errors or acts done maliciously or in exercise of authority, but only for acts in the "clear absence of all jurisdiction." Legislative immunity has two meanings. The first is that except in cases of treason, felony, and a breach of the peace, legislators are "privileged from arrest during their attendance" at sessions and, second, that "for any speech or debate in either House, they shall not be questioned in any other place."[8] In *Imbler* v. *Pachtman*,[9] the Supreme Court ruled that prosecutors enjoy absolute immunity for decisions to prosecute or for activities "intimately associated with the judicial phase of the criminal process."[10]

Another type of official immunity is qualified immunity, meaning that the officer is immune only if he or she acted in good faith. With few exceptions and until recently, probation and parole officers enjoyed only qualified immunity because they are members of the executive department.[11] That, however, may be changing in the direction of more absolute immunity for probation and parole officers in some instances, as some cases discussed in this article suggest.

Qualified immunity has two formulations, depending upon jurisdiction. First, under state tort law, qualified immunity usually applies if an official performs a discretionary act, meaning an act that requires personal deliberation and judgment, as opposed to a ministerial act, meaning an act that amounts only to the performing of a duty. Second, qualified immunity is related to the good faith defense in Federal cases. In

Federal cases (Section 1983), an officer is exempt from liability if he or she does not violate a clearly established constitutional right of which a reasonable person should have known.

A recent case that involved this defense is *Hunter* v. *Bryant*,[12] in which two Secret Service agents were sued for arresting a man for threatening President Reagan. The Supreme Court held that the agents were entitled to qualified immunity because their decision was reasonable, even if mistaken. The Court held that the qualified immunity standard provides ample room for judgment errors and protects all but those who are plainly incompetent or those who knowingly violate the law.

Absolute immunity generally applies only to officials in the judicial and legislative branches of government, while qualified immunity applies to officials in the executive branch. Some officials, however, have both judicial and executive functions; such officials include court personnel, parole board members (when making a decision to release or not to release an inmate on parole), and some probation officers. Under this immunity, judicial-type functions that involve discretionary decision making or court functions are immune from liability, while other functions (such as the ministerial duties of a job) are not. The emphasis therefore is on the function performed rather than on the officer performing the function.[13]

While absolute immunity generally applies to judicial and legislative officials, and qualified immunity usually applies to members of the executive branch, quasi-judicial immunity, the third type of immunity, typically applies to persons performing both judicial and executive functions. Court personnel, parole officers, and probation officers performing judicial-type functions fall under this category.

The quasi-judicial immunity defense used to apply only to cases when probation officers prepared and wrote a presentence report. A number of presentence investigation (PSI) cases, both old and recent, illustrate the use of this type of immunity for probation officers. Some of the more notable cases are presented in table 1.

In each of these cases the court ruled that conducting a presentence investigation is an integral part of the judicial process and is carried out because of judicial order, hence quasi-judicial immunity applies.

Cases Rejecting the Quasi-Judicial Immunity Doctrine

Some recent cases, not involving a presentence report, have resulted in liability being imposed on line officers (see table 2). In these cases, the officers unsuccessfully tried to shield themselves from liability by claiming they were performing a judicial function. In *Crawford* v. *State*,[14] a prison inmate, Kenneth Maynard, while in a work furlough program, was instructed to attend an Alcoholics Anonymous (AA) session. Maynard absconded while being allowed to leave the furlough center to attend the session. Two months later, Maynard was arrested and charged with aggravated murder. He was convicted and sentenced to life in prison. The murder victim's widow filed a wrongful death suit against the state; the lower court granted summary judgment for the defendants, and the plaintiff appealed.

The Ohio Supreme Court held the state liable, saying that the employees were not acting upon a judicial directive and that the decision to send an inmate to a "non-educational" program such as AA is not a basic policy decision. Chances were that if attendance at AA had been court-ordered, or if AA had been directly recognized by state parole authorities as a viable educational or rehabilitative program, the state would not have been held liable. Since center authorities were acting on their own accord in sending Maynard to the program, rather than on judicial directive, liability was imposed.

Uncertainty remains as to the kinds of activities included in the phrase "intimately associated with the judicial process." The *Crawford* case, above, clarifies the ambiguity to some extent, but *Brunsvold* v. *State*,[15] decided in 1991, paints a less clear picture of what the phrase means. Brunsvold had been placed on probation for a bad check charge. He was subsequently arrested on a new bad check charge. While revocation was pending, the Montana Department of Institutions, acting on court orders, began crediting good time allowances on sentences where defendants were on probation while serving a suspended or deferred adjudication sentence. The probation officer calculated the discharge date, but Brunsvold was incarcerated beyond the date anyway. He filed suit against the prison warden and the probation officer.

Summary judgment was granted at the local level for all defendants, but the Montana Supreme Court reversed in part. The court ruled that the warden was acting as an agent of the judiciary but that the probation officer was acting as an agent of the executive branch and thus was not entitled to the same immunity as the warden. The court concluded that the officer was performing an administrative, rather than a judicial, task. Regarding the judicial immunity, or "intimately associated with the judicial phase" concept, the court stated that expanding the doctrine in accordance with this case would create a bright clear line and simplify application of the quasi-judicial doctrine. But the court also stated that the quasi-judicial doctrine is not intended to cover any government employee having any contact with a judicial act or proceeding.[16]

TABLE 1. PSI CASES WHERE PUBLIC OFFICERS SUCCESSFULLY INVOKED THE QUASI-JUDICIAL IMMUNITY DEFENSE

Case	Party Involved	Function Performed	Liability Imposed?	Reason for Decision
Friedman v. *Younger*, 282 F.Supp.710 (CD Cal. 1969)	Prosecutor & probation officer	PSI	No	Officers were performing a quasi-judicial function which is an integral part of the judicial process
Burkes v. *Callion*, 433 F.2d 318 (9th Cir. 1970)	Probation officer & medical examiner	PSI	No	Probation officer performing quasi-judicial functions is entitled to same immunity as judges
Spaulding v. *Nielsen*, 599 F.2d. 728 (5th Cir. 1979)	Federal probation officer	PSI	No	An integral part of the sentencing process
Hughes v. *Chesser*, 731 F.2d 1489 (11th Cir. 1984)	State probation officer	PSI	No	Immunity granted Federal probation officers is applicable to state probation officers
Crosby-Bey v. *Jansson*, 586 F.Supp. 96 (DDC 1984)	Probation officer	PSI	No	A probation officer is entitled to share a judge's absolute immunity from the charge that false and erroneous information in presentence report persuaded the judge to impose an unduly harsh sentence
Demoran v. *Witt*, 781 F.2d 155 (9th Cir. 1986)	State probation officer	PSI	No	Absolute immunity applies even amid allegations of bad faith and malice
Dorman v. *Higgins*, 821 F.2d 133 (2nd Cir. 1987)	Federal probation officer	PSI	No	Immunity is needed to avoid intimidation while exercising a high degree of discretion

In *Mee* v. *Ortega*,[17] the court held that initiation of revocation proceedings is not blanket protection from liability. In *Mee*, a parole officer held a parolee in jail for 1 month awaiting a revocation hearing. The Parole Board decided against having a hearing and ordered Mee to be released. Mee filed suit against the parole officer; the officer maintained that he was performing a function analogous to that of a prosecutor and therefore enjoyed absolute immunity. Mee also alleged that the officer perjured himself at a habeas corpus hearing.

The court ruled that the officer was entitled to absolute immunity regarding the perjury allegation. But the court also held that the officer was only entitled to qualified immunity in reference to Mee's incarceration. The court said that, in this instance, the officer's function was more closely related to that of a police officer than of a prosecutor.

Cases Broadening the Quasi-Judicial Immunity Doctrine

A number of recent cases, such as those listed in table 3, appear to broaden the concept of judicial immunity, extending it to other phases of probation and parole work. An example is *Triparti* v. *United States Immigration and Naturalization Service*.[18] Triparti faced deportation based on Federal criminal charges. He sued the Immigration and Naturalization Service, the U.S. attorney who prosecuted him, an immigration officer who participated in the deportation proceedings, and two Federal probation officers. The probation officers were sued for allegedly making false statements in a presentence report and a pretrial bond report.

The district court dismissed the suit against all defendants. In the case of the probation officers, the district court stated that the probation officers were covered by qualified immunity because they were performing a narrowly defined judicial function. The Tenth Circuit Court of Appeals agreed that the probation officers were entitled to immunity, but based on different grounds. The court stated that the officers were entitled to absolute immunity if they were performing "quasi-judicial" functions. Stating that probation officers who conduct presentence and pretrial release reports perform "critical roles," the court held that when the challenged activities of a Federal probation officer are "intimately associated with the judicial phase of the criminal process,"[19] that officer is absolutely immune from liability.

In *Farrish* v. *Mississippi State Parole Board*,[20] a convicted drug offender was imprisoned, paroled, and rearrested for parole violations because of subsequent

TABLE 2. CASES REJECTING THE QUASI-JUDICIAL IMMUNITY DOCTRINE

Case	Party Involved	Liability Imposed?	Function Performed	Reason for Decision
Crawford v. State, 566 N.E.2d 1233 (Ohio Sup. Feb 1991)	State of Ohio	Yes	Sending an inmate to non-court-ordered treatment	Not a basic policy decision
Zavalas v. Department of Corrections, 809 P.2d 1329 (Or.App. April 1991)	State probation officer	Yes	Supervision	Probation officer who failed to report known drug violations to court is not entitled to absolute immunity (claiming to act as an agent of the court) when probationer killed people while operating a vehicle under the influence, as this was not a judicial function
Brunsvold v. State, 820 P.2d 732 (Mont.Sup. Oct. 1991)	State probation officer	Yes	Calculation of prison discharge date	Is not so intimately associated with judicial act as to be an agent of the judiciary
Mee v. Ortega, 967 F.2d 423 (10th Cir. 1992)	State probation officer	A)Yes B)No	A)Holding parolee in jail for one month pending a hearing (which was never held) B)Testimony at a Habeas Corpus hearing	A)Closer to a police function than a prosecutorial one B)Witnesses in judicial proceeding enjoy absolute immunity

drug charges. Throughout the revocation proceedings, Farrish insisted on the appearance of an individual who he alleged could provide favorable testimony. Parole officials concluded they had no subpoena power, hence his request was denied. The witness never appeared, and Farrish's parole was revoked. He filed a Section 1983 lawsuit, alleging that his constitutional rights to due process were violated. The district court agreed; it also ruled, however, that the governor, members of the Mississippi Parole Board, and the members of the Board of Corrections were immune since they did not personally engage in conduct violative of Farrish's due process rights. The court held the corrections commissioner liable for failure to establish rules or policies for conducting preliminary parole proceedings. The district court also held the two parole officers involved liable. The commissioner and the two officers appealed.

Even though Farrish's due process rights were violated, the Fifth Circuit Court of Appeals held that the parole officer enjoyed absolute immunity from liability. It concluded that the parole revocation process was even more adjudicatory in nature than the initial process of paroling an inmate from prison. Inasmuch as the individual officers were conducting activities associated with this adjudicatory process, i.e., the role of a prosecutor, they enjoyed absolute immunity.

Absolute immunity for parole officers also prevailed in *Brown* v. *Nester*.[21] In this case, Brown's parole was revoked based on an armed robbery charge, a weapons possession charge, failure to report, and failure to abide by curfew. Brown sued his parole officer, alleging that he was subjected to onerous reporting conditions and that nonproven allegations were submitted to the parole board for consideration. Brown also alleged that he should not have been revoked based on the armed robbery charge because he had not been indicted, but was merely a suspect. Citing *Farrish*, the court ruled that the parole officer was entitled to absolute immunity because he was performing a role analogous to that of a prosecutor.

In *Kipp* v. *Saetre*,[22] the Court of Appeals of Minnesota addressed the question of whether a probation officer is entitled to absolute or qualified immunity from a civil suit under 42 U.S.C. Section 1983. Kipp, a West German national, entered a guilty plea to a charge of selling cocaine. As a condition of his sentence, Kipp was ordered to return to West Germany and remain on unsupervised probation for 5 years. The supervising probation officer subsequently heard rumors that Kipp had returned to the United States. He reported these rumors to the sentencing judge, who ordered that an arrest warrant be issued. Kipp, however, had been arrested and charged with several new offenses. The original sentencing judge signed a revocation order without granting Kipp a revocation hearing. An appellate court ruled that Kipp's due process rights were violated because he did not receive a formal hearing. The court also ruled that Kipp's return to the United States did not constitute a probation violation.

Kipp subsequently filed a Section 1983 suit against the sentencing judge, the prosecutor, and the probation officer. The Minnesota Court of Appeals held that

TABLE 3. CASES BROADENING THE QUASI-JUDICIAL IMMUNITY DOCTRINE

Case	Party Involved	Function Performed	Liability Imposed?	Reason for Decision
Triparti v. *U.S. INS*, 784 F.2d 345 (10th Cir. 1986)	Federal probation officer	Pretrial release	No	Intimately associated with the judicial phase of the criminal process
Chitty v. *Walton*, 680 F.Supp. 683 (D.Vt. 1987)	Prison caseworker & parole officer	Preparole report	No	Closely associated with parole board's quasi-judicial function
Farrish v. *Mississippi State Parole Board*, 836 F.2d 969 (5th Cir. 1988)	State parole officer & preliminary hearing officer	Preparation for revocation hearing	No	Revocation process is adjudicatory in nature
Cooney v. *Park County*, 792 P.2d 1287 (Wyo. 1990)	State probation officer	Testifying in revocation hearing	No	Revocation is intimately associated with judicial phase of criminal proceeding
Kipp v. *Saetre*, 454 N.W.2d 639 (Minn. App. 1990)	State probation officer	Revocation process	No	Acted on judge's directive
Brown v. *Nester*, 753 F.Supp. 630 (S.D.Miss. 1990)	State probation officer	Supervision, submission of parole violations to parole board	No	Function analogous to that of prosecutor

the judge and prosecutor were entitled to absolute immunity. It also held that the probation officer was entitled to absolute immunity because he was acting upon the directive of a judge, adding that the decision not to hold a hearing was the judge's, not the probation officer's. The court ruled that "absolute immunity attaches to those activities of a county prosecutor and a county probation officer which are associated with the judicial phase of the criminal process."[23] The court stated that to deny absolute immunity under such circumstances "would set a precedent inimical to the functioning of our system."[24]

Even when a probation/parole officer may have committed a criminal act in the course of a revocation proceeding, civil liability is not necessarily imposed because of quasi-judicial immunity. In *Cooney* v. *Park County*,[25] the Supreme Court of Wyoming held that a probation officer enjoyed absolute immunity even though he knowingly gave false testimony during a revocation hearing. Since the officer in this case was conducting activities intimately associated with the judicial process, he enjoyed absolute immunity from liability, though not from criminal prosecution.

Conclusion

Two related themes are identifiable in cases where quasi-judicial immunity applies. First, the court focuses on the *function* performed by the officer rather than on who the officer may be. It is unlikely that probation or parole officers will ever be entitled to absolute immunity by virtue of their position alone. Second, in order for quasi-judicial immunity to apply, the function performed must be intimately associated with the judicial phase of the criminal process. What this means is far from certain and appears to change and evolve over time. Earlier cases limited its meaning to the preparation and writing of PSI reports; the cases in table 3, however, include such functions as pretrial release, preparole reports, preparation for a revocation hearing, revocations, and submissions of parole violations. These deviate from previously decided cases that extended quasi-judicial immunity primarily to instances when probation officers performed PSI functions. The limits appear to be expanding, but the rationale remains the same.

Case law indicates that probation and parole officers have better chances of successfully invoking the quasi-judicial immunity defense if they are performing functions that are intimately associated with the judicial process. An officer should examine whether the function being performed is more analogous to that of a judicial official, such as a prosecutor or judge, as opposed to that of a law enforcement officer. As is evident in *Crawford*, officers will be subject to the less protective qualified immunity doctrine when acting in a nonjudicial or supervisory capacity. That may not make sense to officers who say that they are judicial or parole board employees and that just about everything they do is upon orders of the judge or parole board. The quasi-judicial immunity defense, however, has not gone that far. Despite current trends towards expansion, the chances of the courts extending absolute immunity to all acts performed by probation or parole officers appears unlikely. The limits may be expanding, but the rationale for granting quasi-judicial immunity—only when the function performed is intimately associated with the judicial process—remains the same.

NOTES

[1]Bureau of Justice Statistics (1991). *Probation and Parole 1990.* Washington DC: U.S. Department of Justice.

[2]*Black's Law Dictionary*, 5th Edition, 1979, at 1335.

[3]Section 1983 states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4]A person acting under of color of law does so when he/she is clothed with authority of state law.

[5]*Harlow v. Fitzgerald* (457 U.S. 800, 1982).

[6]See *Stump v. Sparkman*, 435 U.S. 349 and *Pierson v. Ray*, 386 U.S. 547 (1967).

[7]435 U.S. 349 (1978).

[8]*Black's Law Dictionary*, 5th Edition (West Publishing Company) 1979, at 810.

[9]424 U.S. 409 (1976).

[10]However, this standard may be changing as well. The Supreme Court, in *Burns* v. *Reed*, 59 U.S.L.W. 4536, ruled that prosecutors may be held liable for the legal advice they provide law enforcement officers.

[11]*Thompson* v. *Burke*, 556 F.2d 231 (3rd Cir. 1977).

[12]112 S.Ct. 534 (1991).

[13]R.V. del Carmen, *Potential Liabilities of Probation and Parole Officers*, Anderson Publishing Company, 1985, at 35.

[14]566 N.E.2d 1233 (Ohio Sup. Feb 1991).

[15]820 P.2d 732 (Mont.Sup. Oct. 1991).

[16]Id.

[17]967 F.2d 423 (10th Cir. 1992).

[18]784 F.2d 345 (10th Cir. 1986).

[19]*Triparti* v. *U.S. INS*, 784 F.2d 345, 348 (10th Cir. 1986).

[20]836 F.2d 969 (5th Cir. 1988).

[21]753 F.Supp. 630 (S.D. Miss. 1990).

[22]454 N.W.2d 639 (Minn.App. 1990).

[23]Id., at 640.

[24]Id., at 645.

[25]792 P.2d 1287 (Wyo.Sup. April 1990).