

The Burger Court Opinion Writing Database

Ferri v. Ackerman

444 U.S. 193 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 3, 1979

Re: 78-5981 - Ferri v. Ackerman

Dear John:

I join.

Regards,



Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 9, 1979

MEMORANDUM TO: Mr. Justice Marshall
Mr. Justice Blackmun

RE: No. 78-5981 Ferri v. Ackerman

While this case is a unanimous reversal, we
three predicated our view on federal rather than
state law. I'll be happy to undertake a concurrence
to that effect.

W.J.B.
W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

November 2, 1979

RE: No. 78-5981 Ferri v. Ackerman

Dear John:

I agree.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 31, 1979

Re: No. 78-5981, Ferri v. Ackerman

Dear John,

On page 4 of your opinion, you state: "The narrow issue presented to this Court is whether federal law provides respondent with absolute immunity."

That would certainly be the issue if federal law is applicable. I think, however, and my recollection is that a majority of us agreed, that federal law is not applicable.

Accordingly, I would state the issue differently: whether the question of immunity in this case is governed by federal common law, as the Pennsylvania Supreme Court held, or by state law, as the petitioner asserts.

Resolution of this issue would require discussion of the same basic considerations as are discussed in the last 7 pages of your opinion, but that discussion would be cast in a somewhat different form.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 1, 1979

Re: No. 78-5981 - Ferri v. Ackerman

Dear John,

Thanks for your note of November 1. While our difference of view is perhaps a subtle one, it is nevertheless substantial. In short, your proposed rephrasing of the sentence on page 4 would not be sufficient to satisfy my concerns.

I see two issues here: (1) whether federal law governs this case, and (2) if so, what the content of that law is. As I read your proposed opinion, you appear to address only the second question. It is your conclusion that nothing in the Criminal Justice Act or the respondent's role as an officer of a federal court warrants a federal grant of immunity in a common-law negligence action.

It is my view that, for basically the same reasons you cite in support of your conclusion, this case is simply not governed by federal law. This is not a case where we are called upon to fill in the gaps in a federal statute, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, or to resolve a question involving an otherwise important federal interest, e.g., Howard v. Lyons, 360 U.S. 593.

To conclude that the case is not governed by federal law is not to imply that Congress could not act to change the situation. My position is simply that, basically for the reasons you state, each of the 50 States is presently free to decide the question of a defendant's immunity in this situation as a matter of its own tort law.

Sincerely yours,

P.S.
1

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 6, 1979

Re: 78-5981 - Ferri v. Ackerman

Dear John:

Now that the first sentence of the last paragraph on page four has been recast, I am glad to join your opinion for the Court as recirculated today.

Sincerely yours,

P. S.

Mr. Justice Stevens
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 1, 1979

Re: 78-5981 - Ferri v. Ackerman

Dear John,

Please join me.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 8, 1979

Re: No. 78-5981 - Ferri v. Ackerman

Dear John:

I may join your opinion, but I would like
another week to consider it.

Sincerely,

T.M.

T.M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 29, 1979

Re: No. 78-5981 - Ferri v. Ackerman

Dear John:

Please join me.

Sincerely,

J.M.

T.M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 2, 1979

Re: No. 78-5981 - Ferri v. Ackerman

Dear John:

If you could see your way clear to omit footnote 13 on page 5, you have my joinder.

Sincerely,



Mr. Justice Stevens

cc: The Conference

HA

November 6, 1979

Re: No. 78-5981 - Ferri v. Ackerman

Dear John:

I am satisfied with your replacement and revision of footnote 13.

I take it that the last sentence of footnote 16 is new. It, however, was not marked on my copy.

Sincerely,

HAB

Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 8, 1979

Re: No. 78-5981 - Ferri v. Ackerman

Dear John:

This is a formal joinder of your recirculation of November 7.

Sincerely,



Mr. Justice Stevens
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 6, 1979

78-5981-Ferri v. Ackerman

Dear John:

In view of my uncertainty at the Conference, and the exchange of letters between you and Potter, I will await any writing that he may have in mind.

In any event, you have your Court.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 7, 1979

78-5981-Ferri v. Ackerman

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20542

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 6, 1979

Re: No. 78-5981 - Ferri v. Ackerman

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copy to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens
Oct 31 '79

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5981

Francis Rick Ferri, Petitioner, } On Writ of Certiorari to the
 v. } Supreme Court of Pennsyl-
 Daniel Ackerman. } vania for the Western
 District.

[November —, 1979]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question is whether an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client.

On August 28, 1974, a federal grand jury for the Western District of Pennsylvania named petitioner as a defendant in five counts of a nine-count federal indictment alleging that he had participated in a 1971 conspiracy to construct and use a bomb in violation of various federal statutes.¹ In due course, the District Court appointed respondent to serve as petitioner's counsel pursuant to the Criminal Justice Act.² Respondent represented petitioner during pretrial proceedings and a 12-day trial. The jury found petitioner guilty on all counts; the judge imposed a sentence of 20 years on the conspiracy and bombing counts and an additional 10 years on

¹ The relevant sections, codified in the Criminal Code and the Internal Revenue Code are: 18 U. S. C. §§ 844 (1), 2, 371; 26 U. S. C. §§ 5821, 5822, 5861, 5871.

² 18 U. S. C. § 3006A. The record indicates that petitioner had previously been represented by two other lawyers. An action against the first for malpractice is still pending; the second was permitted to withdraw when respondent was appointed to represent petitioner.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 1, 1979

Re: 78-5981 - Ferri v. Ackerman

Dear Potter:

Thank you for your letter. I agree that the majority of us concluded that federal law is not applicable, but it seems to me that we can only come to that conclusion after examining the potential sources of a federal rule of immunity and then determining whether they provide respondent with the immunity he claims. I wonder if it would help you if I were to rephrase the sentence on page 4 to read as follows: "The narrow issue presented to this Court is whether there is a federal rule of law that provides respondent with absolute immunity."

I would prefer not to state the question the way you suggest because that phrasing omits the possibility that immunity was implicitly authorized by Congress.

Respectfully,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 2, 1979

Re: 78-5981 - Ferri v. Ackerman

Dear Potter:

At least we agree that our difference is a subtle one. I must confess, however, that I am unable to perceive its substance.

Unless we first determine that there is no federal rule of law that applies to this case--a determination that cannot be made without considering the content of the arguably applicable federal law--I do not understand how we could decide whether or not federal law governs this case. In other words, it is the answer to what you describe as the second issue that leads us to the conclusion that federal law does not govern this case. Unlike your reading of my opinion, I had thought that I only addressed the second of the two issues that you described and my answer to that issue led inexorably to the conclusion that federal law does not govern this case which, in turn, means that each of the fifty states is free to resolve the immunity question for itself.

You have been successful in the past in educating me on points that I did not originally grasp, and perhaps further reflection will help me see the light in this case. But as of now I frankly do not understand your problem.

Respectfully,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 6, 1979

Re: 78-5981 - Ferri v. Ackerman

Dear Potter and Harry:

In response to your respective suggestions, I have revised the text somewhat on page 4 and recast footnote 13 and moved it to a different location, in hopes that I will solve your respective concerns. The changes are at the Printer. I just thought I would let you know that I am trying to meet your objections.

Respectfully,



Mr. Justice Stewart

Mr. Justice Blackmun

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: Nov 6 79

Changes
 Pp 3, 5-6

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5981

Francis Rick Ferri, Petitioner, | On Writ of Certiorari to the
 v. | Supreme Court of Pennsylvania for the Western
 Daniel Ackerman. | District.

[November —, 1979]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question is whether an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client.

On August 28, 1974, a federal grand jury for the Western District of Pennsylvania named petitioner as a defendant in five counts of a nine-count federal indictment alleging that he had participated in a 1971 conspiracy to construct and use a bomb in violation of various federal statutes.¹ In due course, the District Court appointed respondent to serve as petitioner's counsel pursuant to the Criminal Justice Act.² Respondent represented petitioner during pretrial proceedings and a 12-day trial. The jury found petitioner guilty on all counts; the judge imposed a sentence of 20 years on the conspiracy and bombing counts and an additional 10 years on

¹ The relevant sections, codified in the Criminal Code and the Internal Revenue Code, are: 18 U. S. C. §§ 844 (1), 2, 371; 26 U. S. C. §§ 5821, 5822, 5861, 5871.

² 18 U. S. C. § 3006A. The record indicates that petitioner had previously been represented by two other lawyers. An action against the first for malpractice is still pending; the second was permitted to withdraw when respondent was appointed to represent petitioner.

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 6, 1979

MEMORANDUM TO THE CONFERENCE

Re: 78-5981 - Ferri v. Ackerman

Due to an inadvertence we failed to mark the changes in our latest circulation. The most significant are a change suggested by Potter on page 4, a revision of footnote 13, and the addition of a new sentence at the end of footnote 16. We are having a new printing made with some other technical changes, and when it is re-circulated all changes will be identified.

Respectfully,

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated:

Recirculated: NOV 7 79

PP. 3-7, 10-12

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5981

Francis Rick Ferri, Petitioner, v. Daniel Ackerman. } On Writ of Certiorari to the Supreme Court of Pennsylvania for the Western District.

[November —, 1979]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question is whether an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client.

On August 28, 1974, a federal grand jury for the Western District of Pennsylvania named petitioner as a defendant in five counts of a nine-count federal indictment alleging that he had participated in a 1971 conspiracy to construct and use a bomb in violation of various federal statutes.¹ In due course, the District Court appointed respondent to serve as petitioner's counsel pursuant to the Criminal Justice Act.² Respondent represented petitioner during pretrial proceedings and a 12-day trial. The jury found petitioner guilty on all counts; the judge imposed a sentence of 20 years on the conspiracy and bombing counts and an additional 10 years on

¹ The relevant sections, codified in the Criminal Code and the Internal Revenue Code, are: 18 U. S. C. §§ 844 (i), 2, 371; 26 U. S. C. §§ 5821, 5822, 5861, 5871.

² 18 U. S. C. § 3006A. The record indicates that petitioner had previously been represented by two other lawyers. An action against the first for malpractice is still pending; the second was permitted to withdraw when respondent was appointed to represent petitioner.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 4, 1979

MEMORANDUM TO THE CONFERENCE

Re: Case Held for 78-5981 - Ferri v. Ackerman

No. 78-6153, Ferri v. Rosetti, has been held for Ferri v. Ackerman. In this case, the same petitioner as in Ferri v. Ackerman seeks review of a determination of the Supreme Court of Pennsylvania that his lawyer, appointed pursuant to the Criminal Justice Act, enjoys absolute immunity as a matter of federal law in a state malpractice action alleging negligent loss of a client's papers. The Court relied on its earlier opinion in Ferri v. Ackerman. Since we held in Ferri v. Ackerman that CJA appointed counsel does not enjoy absolute immunity as a matter of federal law in a state malpractice action, I would grant this petition for certiorari, vacate the judgment of the Supreme Court of Pennsylvania and remand for further proceedings in light of Ferri v. Ackerman.

Respectfully,

