IN THE SUPREME COURT OF FLORIDA

CASE NO. SC95000

ALAN H. SCHREIBER, etc.
et al.,

Petitioners,

vs.

ROBERT R. ROWE,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF
IN RESPONSE TO AMICUS BRIEF

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INTRODUCTION

In accordance with this Court's Order dated March 10, 2000, this brief is filed on behalf of the Respondent/Cross Petitioner, ROBERT R. ROWE, in response to the Amicus Curiae Brief filed by the State of Florida in support of the Petitioners.

Throughout this brief, Respondent/Cross Petitioner will be referred to as "Rowe." Petitioners/Cross Respondents, ALAN H. SCHREIBER and RICHARD L. JORANDBY, will be referred to as "Schreiber" and "Jorandby" respectively. THE STATE OF FLORIDA, which has filed the Amicus Curiae Brief, will be referred to as "The State."

RESPONSE TO THE STATE OF FLORIDA'S STATEMENT OF THE QUESTION PRESENTED, INTEREST AS AMICUS CURIAE, STATEMENT OF THE CASE AND FACTS, AND STATEMENT AS TO SUBJECT MATTER JURISDICTION

On the first page and again on page 3 of its brief, the State inaccurately characterizes Rowe's legal malpractice claims. Contrary to the State's assertion, Rowe has not challenged the administrative or operational functioning of the Public Defender's office insofar as it implicates any alleged inadequate allocation of resources or lack of funding, but rather Rowe has sought to hold Schreiber and Jorandby liable for the negligent legal representation that their offices provided him, which Rowe has alleged breached the standards applying to lawyers practicing in the community, thereby causing his imprisonment for a period of almost ten years.

Furthermore, while acknowledging that the issue raised in the amicus curiae brief has never been raised prior to this point and thus has never been considered by either the trial court or the Fourth District, the State nonetheless suggests that it is proper for it to raise the issue of immunity for the Office of the Public Defender at this point in the case. Because of the obvious prejudice that the injection of a completely new issue into the case creates, Rowe continues to object to this issue being considered for the first time at this stage of the litigation.

Moreover, for the reasons argued in more detail below, even while recognizing

that it is, in fact, true that because sovereign immunity goes to the issue of the court's subject matter jurisdiction, it can be raised at any time, this proposition does not affect the outcome of this case since neither Schreiber nor Jorandby are entitled to judicial immunity.

RESPONSE TO SUMMARY OF THE ARGUMENT

On page 6 of its amicus curiae brief, the State makes the overbroad statement that: "Offices created by Article V [of the Florida Constitution] are judicial or quasi-judicial in nature." While admittedly most of the offices that are created within Article V are in fact judicial or quasi-judicial in nature, it cannot be said that simply because an office is mentioned within Article V of the Florida Constitution that necessarily means that the office is operating in a judicial or quasi-judicial capacity so as to be entitled to judicial or quasi-judicial immunity. Otherwise, were the State's argument taken to its logical conclusion, then it would necessarily follow that all attorneys who are admitted to practice law in this State pursuant to Article V, § 15 would also be deemed quasi-judicial actors who should therefore be entitled to judicial immunity.

The flaw in the State's argument is that simply because the Public Defender's position is constitutionally-derived does not automatically lead to the conclusion that the position is quasi-judicial. As this Court had recognized in the past, quasi-judicial power is defined as "the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action,

and to exercise discretion of a judicial nature." ***Commission on Ethics v. Sullivan***, 489 So. 2d 10 (Fla. 1986)(quoting Black's Law Dictionary). Based on this definition, it is apparent that while the role of the state attorney clearly falls within the quasi-judicial realm, that of the public defender does not. Therefore, the State's attempt to correlate the two positions is misplaced.

Contrary to the argument made by the State in its amicus curiae brief, the district courts of appeal of this State have properly concluded that public defenders are not entitled to quasi-judicial immunity since their role is fundamentally different from that of either a judge or a prosecutor and, in reality, is no different from privately retained counsel. As such, a public defender owes the same duty to his client that any other privately retained attorney does and to the extent that duty is breached, the public defender can and should be held liable for damages, just as a privately retained attorney would be.

RESPONSE TO THE ARGUMENT

Point I

PUBLIC DEFENDERS ARE NOT ENTITLED TO JUDICIAL IMMUNITY FROM SUIT DESPITE THE FACT THAT THEY ARE PUBLICLY ELECTED CONSTITUTIONAL OFFICERS WHO PERFORM AN INDISPENSABLE ROLE IN FLORIDA'S CRIMINAL JUSTICE SYSTEM UNDER ARTICLE V OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES.

Beginning on page 8 of its brief, the State suggests that the reason that public defenders should be entitled to quasi-judicial immunity is because "they are on equal constitutional footing and every bit as essential to the criminal justice system as State Attorneys." While it is certainly true that both the Office of the State Attorney and the Office of the Public Defender are mentioned in Article V of the Florida Constitution and that both offices are important components of the criminal justice system, that, in and of itself, does not and cannot justify entitlement to either judicial or quasi-judicial immunity. Otherwise, as mentioned above, if the mere fact that the position is mentioned in Article V of the Constitution and that it is essential to the criminal defense system is enough to create immunity, then all criminal defense lawyers, regardless of whether they are appointed or privately retained, should be entitled to quasi-judicial immunity.

The State's attempt to analogize the role of the public defender in the criminal justice system with that of the prosecutor is misplaced since the function of each is fundamentally different. As recognized by this Court in ***Office of State Attorney v. Parrotino***, 628 So. 2d 1097 (Fla. 1993), the immunity that has long been granted to judges and prosecutors rests on a public policy belief that a strict guarantee of immunity is necessary to preserve the effectiveness and impartiality of judicial and quasi-judicial offices. The First District elaborated on this notion when it explained that, unlike a public defender who serves within the criminal justice system as an advocate of his or her client, the prosecutor is an officer of the state whose duty it is to see that impartial justice is done. ***Windsor v. Gibson***, 424 So. 2d 888, 889 (Fla. 1st DCA 1982). Thus, contrary to the State's argument throughout its amicus brief, despite the fact that the Office of the Public Defender is mentioned in Article V of the Florida Constitution, its role in the criminal justice system is simply not quasi-judicial.

Likewise, the State's reliance on ***Times Publishing Co. v. Ake***, 660 So. 2d 255 (Fla. 1995) is flawed since that case does not speak to the question of judicial or quasi-judicial immunity. Instead, ***Ake*** addresses the issue of whether the clerk of courts is governed by the Public Records Act. In concluding that it is not, this Court

affirmed the opinion of the Second District that the clerk of the circuit court, when carrying out the administrative operations of the judiciary in regard to judicial records, is acting as an arm of the court and thus is immune from the supervisory authority of the legislature as articulated in Chapter 119.

Beginning on page 11, the State asserts that another justification for public defenders being afforded immunity is because "Public Defenders of this state are responsible for hundreds of thousands of cases" and moreover that "Public defenders . . . generally cannot reject a client and must contend with exceedingly high caseloads and limited funding." While these contentions may very well be true, they simply cannot serve as a reason to grant immunity to public defenders. As this Court recognized in ***Hatten v. State***, 561 So. 2d 562 (Fla. 1990), despite inadequate staffing and funding of the Office of the Public Defender, "lack of support by the legislature does not relieve the public defender of his legal and professional duty to safeguard each of his client's interests and to act with reasonable diligence in the representation of his clients." Moreover, the mere fact that state funds are used to compensate a public defender does not provide a sufficient basis for concluding that appointed counsel should be afforded immunity from malpractice suits.

To allow a malpractice remedy to those criminal defendants who can afford

to retain private counsel, yet deny it to those who cannot, but have nonetheless been provided with inferior and ineffective representation, is essentially to create a system that not only authorizes, but in fact guarantees, a lower standard of care and inferior representation for indigent clients. In every sense, this notion is inconsistent with the very purposes and protections of the Sixth Amendment. All defense counsel, regardless of whether they are privately retained or appointed, should be required to satisfy the same standards of professional integrity and responsibility and should be subject to the same controls and consequences if they do not.

The State's assertion on page 12 of the amicus brief that liability of an attorney for malpractice arises from a contractual relationship with a client and from the consideration that is paid for the attorney's services is simply wrong. To the contrary, the liability of an attorney for malpractice arises from a breach of the attorney's legal and professional duty to his client to provide competent representation consistent with the standards applying to lawyers in the community.

The ability of a criminal defendant, such as Rowe, who has had his conviction

set aside based on a finding of ineffective assistance of counsel,[1] to sue his appointed counsel for malpractice does not conflict with the ability of the public defender to perform his function. If anything, it provides the same incentive for appointed and private counsel to perform their function competently. *See* ***Ferri v. Ackerman***, 444 U.S. 193, 204 (1979)(concluding that federal public defenders are not entitled to the same immunity as are federal prosecutors and judges since their role is not the same, but rather is more akin to private counsel). For the State to advocate that Florida public defenders should be relieved of their duty to provide, at the very least, this minimal level of representation is unjustified.

At page 15 of the amicus brief, the State improperly argues that: "The [public defender's] office should not be subject to suit for malpractice by every defendant who thinks his attorney was negligent or did not expend all the money, time and other resources that the client believes should be expended." In making this argument, the State completely disregards the holding below in this case as well as this Court's recent holding in ***Steele v. Kehoe***, 747 So. 2d 931 (Fla. 1999) wherein it was

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[1] As argued in detail in the main briefs herein, by virtue of the fact that Rowe has succeeded in his post-conviction relief claim of ineffective assistance of counsel, he has already made a showing that there is a reasonable probability that but for his counsel's errors, the result of his criminal trial would have been different. ***Overton v. State***, 531 So. 2d 1382 (Fla. 1st DCA 1988).

resolved that prior to pursuing a legal malpractice claim against a criminal defense attorney, a convicted criminal must first obtain appellate or post-conviction relief. Insofar as this precondition exists, the State's suggestion that it will be made to answer to every defendant that is unhappy with his representation is unfounded.

While acknowledging that there are a number of other jurisdictions that have, in fact, conferred public defenders with absolute immunity from suit, Rowe respectfully suggests that these courts have wrongly decided the issue. In both ***Scott v. Niagra Falls***[2] and ***Dzuibak v. Mott***,[3] the cases cited by the State in the amicus brief, the courts concentrated and based the finding of immunity upon the "essential role" that the public defender plays in ensuring that the criminal justice systems works. In other words, public defenders should be entitled to immunity because of the fact that "while they are an adversary to the prosecutor, they are not an adversary to the system." (Amicus brief, 13). While this may be true, it is too broad of a theory to justify a finding of immunity for a public defender.

As argued in several different places throughout this brief, to the extent that the logic in this argument is persuasive, there is no basis to find that a privately

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[2] 407 N.Y.S.2d 103 (N.Y. Sup. Ct. 1978).

[3] 503 N.W.2d 771 (Minn. 1993).

retained criminal defense lawyer is not entitled to the same immunity. After all, regardless of whether defense counsel is publicly or privately retained, their function as part of this so-called "courtroom triumvirate" is the same. That being said, the mere fact that defense counsel is essential to the criminal justice system does not justify a finding of quasi-judicial immunity as argued by the State herein.

Point II

THE DECISIONS IN ***WILCOX V. BRUMMER***, 739 So. 2d 1282 (Fla. 3d DCA 1999) AND ***WINDSOR V. GIBSON***, 424 So. 2d 888 (Fla. 1st DCA 1982) PROPERLY RECOGNIZED THAT THE ROLE OF THE PUBLIC DEFENDER IS FUNDAMENTALLY DIFFERENT FROM THAT OF THE COURT AND THE PROSECUTOR.

The State argues that the decisions of the First District in ***Windsor v. Gibson***, 424 So. 2d 888 (Fla. 1st DCA 1982) and the Third District in ***Wilcox v. Brummer***, 739 So. 2d 1282 (Fla. 3d DCA 1999), which held that public defenders are not entitled to judicial immunity for claims of legal malpractice, were wrongly decided. In support of this contention, the State relies almost exclusively on the case of ***Office of State Attorney v.***

Parrotino, 628 So. 2d 1097 (Fla. 1993) and suggests that this Court's holding in ***Parrotino*** compels a finding that public defenders are entitled to the same immunity as judges and prosecutors. This claim is completely without merit.

A review of the ***Parrotino*** opinion reveals that it does not even address the availability of immunity to public defenders, but rather speaks only to the issue of the doctrine's applicability to prosecutors. Moreover, in recognizing why prosecutors and judges have been conferred with absolute immunity, this Court acknowledged that it is based on the judicial and quasi-judicial **function**[4] for which these positions were created and the need for the judge and prosecutor to see that impartial justice is rendered remain free and unfettered. ***Id.*** at 1098-1099.

The fallacy in the State's position is that it is based on the misconception that the public defender's employment relationship with the state, rather than its function within the judicial system, should determine whether the public defender

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[4] In ***Amos v. State, Dept. of Legal Affairs***, 666 So. 2d 933 (Fla. 2d DCA 1995), the Second District acknowledged the notion that it is the **function** of the position that determines whether absolute immunity applies. In ***Amos***, after noting that absolute prosecutorial immunity has been extended to attorneys performing functions analogous to a prosecutor, the appellate court reversed a finding of immunity in favor of the General Counsel and an Assistant General Counsel for the Department of Insurance on grounds that they were not performing a quasi-prosecutorial function.

is entitled to immunity. Both the judge and prosecutor are officers of the state whose primary functions in the criminal justice system are to administer justice for the benefit of the public as a whole. Toward that end, their duties runs to no one in particular, but rather to society in general.

The public defender, on the other hand, does not operate in an analogous capacity. To the contrary, as properly recognized in both ***Windsor***, *supra* and ***Wilcox***, *supra,* the function and sole responsibility of the public defender in the criminal justice system is to competently represent his client and in so doing, to act completely independent of the state. As aptly stated by the United States Supreme Court in ***Ferri v. Ackerman***, 444 U.S. 193 (1979), the primary rationale for grating immunity to judges, prosecutors, and other public officers does not apply to defense counsel being sued for malpractice by his own client. ***Id.*** at 204. Insofar as public defenders do not engage in either a judicial or quasi-judicial capacity, they are not entitled to judicial immunity.

Point III

THE LEGISLATURE HAS EXPRESSLY WAIVED SOVEREIGN IMMUNITY FOR PUBLIC DEFENDERS IN F.S. § 768.28.

The State argues, beginning on page 17 of the amicus brief, that in accordance with this Court's decision in ***Parrotino***, *supra*, the legislature is without the authority to abrogate judicial immunity for public defenders. While ***Parrotino*** did recognize that the legislature is without the authority to take actions that would undermine the independence of Florida's judicial and quasi-judicial offices and furthermore that notions of judicial and prosecutorial immunity have a basis in law and policy independent from sovereign immunity, there is nothing in that opinion that mandates

a conclusion that public defenders are entitled to judicial immunity. Therefore, and as argued in great detail throughout this brief, because public defenders are not entitled to judicial immunity in the first place, the legislature can and did waive sovereign immunity for purposes of allowing a legal malpractice claim, like that asserted by Rowe herein, against Schreiber and Jorandby. *See* F.S. § 768.28(2).

Point IV

THE FACT THAT THERE IS A LEGISLATIVE CLAIMS PROCESS IN EFFECT FOR PERSONS ADVERSELY AFFECTED BY OFFICIAL ACTS OF PUBLIC OFFICERS DOES NOT AND CANNOT JUSTIFY AN AWARD OF JUDICIAL IMMUNITY FOR PUBLIC DEFENDERS.

As a final point in its amicus brief, the State argues that because of the claims bill process, through which citizens who are injured by actions of government officials that are protected by sovereign immunity can seek compensation for their damages, Rowe and others in a position similar to him are not without a remedy.

This argument is fatally flawed in that it completely overlooks the fact that, for the reasons that are outlined in great detail throughout this brief, public defenders are not, in fact, entitled to either sovereign or judicial immunity. Therefore, the fact that there may be a remedy in place when sovereign immunity is applicable is completely irrelevant to this case where it is not. To the extent that the State is suggesting that the existence of a claims bill process somehow creates immunity for the public defender, this assertion is misplaced and has no support in law or fact.

CONCLUSION

Because the function of the public defender within the criminal justice system is fundamentally different from that of either a judge or a prosecutor, the judicial and/or quasi-judicial immunity that has been provided to these offices cannot justify providing a public defender with analogous immunity. Accordingly, there is no reason to infuse this issue into the present case.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was furnished by mail this 4th day of April, 2000 to, NEIL ROSE, ESQUIRE, P.O. Box 223340, Hollywood, Florida 33022, JAMES C. BARRY, ESQUIRE, 1555 Palm Beach Lakes Boulevard, Suite 1600, West Palm Beach, Florida 33401, KENNETH J. KAVANAUGH, ESQUIRE, 400 S.E. 8th Street, Fort Lauderdale, Florida 33316-5000, DAVID E. PETERSON, ESQUIRE, Befera & Peterson, 866 South Dixie Highway, Coral Gables, Florida 33146, E. BRUCE JOHNSON, ESQUIRE and CHRISTINE M. DUIGNAN, ESQUIRE, Johnson, Anselmo, et al., 790 East Broward Boulevard, Suite 400, Fort Lauderdale, Florida 33301 and LOUIS F. HUBENER, ESQUIRE, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050.

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