IN THE SUPREME COURT OF FLORIDA

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| ALAN H. SCHREIBER, Public Defender of the 17th Judicial Circuit of Florida, and RICHARD L. JORANDBY, Public Defender of the 15th Judicial Circuit of Florida, | ) | |
| Petitioners, | ) | |
| vs. | ) | **Case No. 95,000** |
| ROBERT R. ROWE, | ) | |
| Respondent. | ) | |

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SUPPLEMENTAL AMICUS BRIEF OF THE SOLICITOR GENERAL

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THOMAS E. WARNER
Solicitor General

T. KENT WETHERELL, II
Deputy Solicitor General

On behalf of
Robert A. Butterworth, Attorney General, and the State of Florida

OFFICE OF THE SOLICITOR GENERAL
The Capitol – Suite PL-01
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)

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* - Document included in the Appendix.

** - "Other Authorities" does not list staff analyses and other legislative history information included in the Appendix. Refer to Index to the Appendix for list of documents included therein.

## Certificate of Type Size and Style

The undersigned certifies that the type size and style used in this brief is 12-point Courier New.

## Introduction and Summary of the Argument

In the original amicus brief filed on behalf of the State, the Solicitor General asserted that public defenders (and their assistants) are entitled to judicial immunity from suit arising out of the performance of their official duties. This supplemental amicus brief reaffirms that position and further addresses the application of sovereign immunity to public defenders.

Specifically, the Solicitor General submits that the public defenders enjoy sovereign immunity from suit arising out of the management and supervision of their offices because any duty owed in the performance of those functions is to the public at large, not an individual criminal defendant. Alternatively, the management and supervision of the public defender's office is a "discretionary" function for which sovereign immunity has not been waived. Moreover, public defenders and their assistants are not subject to personal liability for malpractice committed in the course of representing a criminal defendant, and liability for such malpractice should be imposed on the State only in the most limited circumstances, if at all. Otherwise, every criminal defendant whose Rule 3.850 motion is granted based upon "ineffective assistance of counsel" might bring a legal malpractice claim against the State. Such a result is unsound public policy, would further drain the limited fiscal resources allocated to the public defenders, and should not be encouraged or sanctioned by the Court.

## Argument

**PUBLIC DEFENDERS ARE ENTITLED TO JUDICIAL IMMUNITY FROM SUITS ARISING OUT OF THE PERFORMANCE OF THEIR CONSTITUTIONALLY-DERIVED DUTIES AND ARE ALSO ENTITLED TO SOVEREIGN IMMUNITY FROM SUITS ARISING OUT OF THE PERFORMANCE OF DISCRETIONARY FUNCTIONS SUCH AS MANAGEMENT AND SUPERVISION OF THEIR OFFICES.**

### A. Judicial Immunity.

The State's original amicus brief in this case maintained that public defenders have judicial immunity from suit arising out of the performance of their official duties. The brief further asserted that the Legislature cannot (and did not) abrogate or undermine that immunity through the limited waiver of sovereign immunity in section 768.28, Florida Statutes. Indeed, that statute has been construed to preserve the common law judicial immunity of state attorneys and judges even though the "judicial branch" is specifically included in the definition of "state agencies and subdivisions" (§ 768.28(2)) for which sovereign immunity is partially waived. See Office of the State Attorney v. Parrotino, 628 So.2d 1097, 1099 (Fla. 1993) (state attorney); Berry v. State, 400 So.2d 80, 82-83 (Fla. 4th DCA), rev. denied 411 So.2d 380 (Fla. 1981) (judge). This case presents the Court its first opportunity to consider the judicial immunity of the third member of the "tri-partite entity" that is our criminal justice system, i.e., the

public defender.[1] For the legal and policy reasons set forth in the State's original amicus brief as well as those set forth in the Stetson Law Review article included in Appendix A to this brief,[2] the Solicitor General submits that this Court should hold that malpractice suits against public defenders are barred based upon their common law judicial immunity.

**B. Sovereign Immunity.**

Turning to the "issue of sovereign immunity" on which the Court has requested supplemental briefing,[3] the Solicitor General notes that the section 768.28 specifically references public defenders in both subsection (2) and subparagraph (9)(b)2. Subsection (2) includes "public defenders" within the definition of "state agencies and subdivisions" for which sovereign immunity is partially waived. Subparagraph (9)(b)2. includes "any public

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[1] On two previous occasions, a district court certified a question of great public importance on this issue to this Court. See Windsor v. Gibson, 424 So.2d 888, 889-90 (Fla. 1st DCA 1982); Wilcox v. Brummer, 739 So.2d 1282, 1283 (Fla. 3rd DCA 1999). However, the Court was never given the opportunity to answer those questions. No petition for review was filed in this Court in Windsor, and the petitioner in Wilcox (Case No. SC 96,745) voluntarily dismissed the petition for review prior to oral argument and disposition of the case on the merits.

[2] Aylward, Public Defenders: No Immunity from Suits by Dissatisfied Defendants – Odd Man Out of the "Tri-partite Entity", 13 Stetson L. Rev. 176 (1983).

[3] This brief will not belabor general principles of sovereign immunity beyond noting that section 768.28 is to be strictly construed in favor of the State. See, e.g., Carlile v. Game & Fresh Water Fish Comm'n, 354 So.2d 362, 363-64 (Fla. 1977) (§ 768.28 did not abrogate State's common law venue privilege).

defender"[4] in the definition of "officer, employee, or agent" as that phrase is used in paragraph (9)(a). Paragraph (9)(a) prescribes the limited circumstances under which a governmental employee can be held personally liable for torts committed in the course of employment.[5]

The specific references to public defenders in section 768.28 were added in 1984. See ch. 84-29, Laws of Fla.;[6] ch. 84-335, Laws of Fla.[7] The preamble to chapter 84-29 expresses the legislative

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[4] In addition to the public defender, the definition includes employees and agents of the public defender "including, among others, an assistant public defender and an investigator." § 768.28(9)(b)2., Fla. Stat. (emphasis supplied).

[5] Specifically, sovereign immunity is not waived for (and, hence, the employee is personally liable for) acts committed "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." § 768.28(9)(a), Fla. Stat. It does not appear from the record that the alleged malpractice in this case rises to that level, but that may be a fact question.

[6] The bill which became chapter 84-29 was HB 488 which originated as a proposed committee bill (PCB 11) in the House Judiciary Committee. The Senate companion bill was SB 158. A copy of chapter 84-29 is included in Appendix B.

[7] Chapter 84-335 (copy included in Appendix C) passed subsequent to and amended chapter 84-29. The primary focus of chapter 84-335 was to clarify that nothing in section 768.28 was intended to waive the State's immunity under the Eleventh Amendment to the United States Constitution. App. D (staff analysis for SB 911 which became chapter 84-335). The act also deleted the references to "special assistant public defenders, or private attorneys serving the state in a temporary capacity as court-appointed special public defenders" that were added to section 768.28 by chapter 84-29. The legislative history for SB 911, the bill which became chapter 84-335 does not express the legislative rationale for this change. However, a memorandum to Representative Upchurch, Chairman of the House Judiciary Committee, from a member

intent of that act as follows:

> WHEREAS, it is the intent of the Legislature to extend sovereign immunity to the public defenders and their employees and agents, except as provided in s. 768.28, Florida Statutes, and
>
> WHEREAS, it is the intent of the Legislature to include the office of the public defender within the provisions of s. 768.28, Florida Statutes, even where the attorney-client relationship exists[.]

Ch. 84-29, Laws of Fla. (reprinted in 1984 Laws of Florida, at 45). The legislative history of chapter 84-29 confirms the Legislature's intent to "specifically exempt public defenders and their employees from personal liability pursuant to s. 768.28(9)(a)." App. F (staff analysis for PCB 11 (HB 488) which became chapter 84-29, Laws of Florida). The legislative history also indicates that the act was adopted in direct response to First District's opinion in Windsor and was intended to clarify "whether or not [public defenders] are currently protected by 'sovereign immunity' as state employees, and, irrespectively, whether there should be a legislative policy statement declaring such protection."[8] App. G

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of the committee staff discussing PCB 11 (the bill which became chapter 84-29) suggests that the language may have been deleted because of concerns from the Public Defenders Coordination Office that "the counties will [] be liable if the court appointed attorneys are sued for malpractice, even though the public defender has no control over the appointed counsel's handling of the case." A copy of the memorandum is included in Appendix E.

[8] The Windsor court did not discuss whether the public defender was entitled to sovereign immunity as part of the "judicial branch." Apparently, that issue was not briefed by the parties. See App. A at 179 (note 32 and accompanying text). The 1984 amendments to chapter 768.28 clarified the issue in favor of

(memorandum to members of the Senate Committee on Judiciary-Civil) (emphasis original). See also App. H (staff analysis for SB 158, the companion bill to HB 488 which became chapter 84-29, Laws of Fla.).

In light of the plain language in section 768.28 and the legislative history discussed above, if the Legislature is authorized to waive the common law judicial immunity of the Office of Public Defender[9] through the limited waiver of sovereign immunity (and as set forth above and in the State's original amicus brief, it is not), then the Legislature clearly has done so.[10] That does not end the inquiry, however, because the limited waiver of sovereign immunity in section 768.28 does not extend to acts for which the duty is owed to the public at large, nor does it extend

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immunity.

[9] A tort suit based upon acts or omissions of the public defender or an assistant public defender should name the Office of the Public Defender, or the public defender in his official capacity. § 768.28(9)(a), Fla. Stat. It appears from the record that Rowe sued the Petitioners in their official capacity. [R. 82, 114-15].

[10] Of course, the limitations on liability in section 768.28(5) and the other prerequisites for suit against the State (e.g., pre-suit notice to the Department of Insurance) would apply. Moreover, the four-year statute of limitations in section 768.28(13) applies. See Beard v. Hambrick, 396 So.2d 708, 712 (Fla.1981) (applying four-year statute of limitations in § 768.28 in suit against sheriff, rather than the shorter two-year statute of limitations in § 95.11 for wrongful death claims). But see R. 125, 130-31 (arguing that the two-year statute of limitations in section 95.11(4) applies); Rowe v. Schreiber, 725 So.2d 1245, 1247 (Fla. 4th DCA 1999) (assuming without discussion that the two-year statute of limitations applies).

to torts committed in the performance of "discretionary" functions. See Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979).

The Fifth Amended Complaint alleges several grounds for imposing tort liability on Petitioners: (1) legal malpractice by an assistant public defender in Petitioner Schreiber's office [R. 118 (¶ 20)]; (2) Petitioner Schreiber's negligent management and supervision of his office [R. 117 (¶¶ 17-19)]; and (3) legal malpractice by an assistant public defender in Petitioner Jorandby's office [R. 119-120 (¶ 27)]. See also Rowe, 725 So.2d at 1246-47. The Solicitor General submits that the legal malpractice claims should be evaluated separately from the negligent management and supervision claim, and each claim must be evaluated based upon the tests set forth in Trianon and Commercial Carrier.

In Trianon, this Court explained that the first step in determining whether governmental liability might exist is to determine whether any common law or statutory duty of care is owed based upon the governmental function or activity at issue. 468 So.2d at 918. To aid in this determination, the Court identified four general categories of governmental functions and activities:

> (I) legislative, permitting, licensing, and executive officer functions;
>
> (II) enforcement of laws and the protection of the public safety;

(III) capital improvements and property control operations; and

(IV) providing professional, educational, and general services for the health and welfare of the citizens.

Id. at 919. The Court stated that no governmental liability arises out of the performance of functions described in categories I and II, but that there may be governmental liability arising out of functions described in categories III and IV "because there is a common law duty of care regarding how professional and general services are performed." Id. at 921.

The general principle underlying category I and category II functions is the absence of a common law duty to any particular individual, but rather a general duty owed to the public at large. Id. The Solicitor General submits that the management and supervision of the public defender's office involve duties owed to the general public at large, not any particular criminal defendant. As such, no tort liability can attach. Cf. Everton v. Willard, 468 So.2d 936, 938 (Fla. 1985) (law enforcement officer's duty to protect the citizens runs to the public as a whole, not an individual victim of a crime); Layton v. Dept. of Highway Safety & Motor Vehicles, 676 So.2d 1038, 1040-41 (Fla. 1st DCA), rev. denied, 686 So.2d 579 (Fla. 1996) (agency's duty to maintain accurate records runs to the general public, not an individual licensee).

By contrast, the actual representation of a criminal defendant would in the initial analysis appear to fall within category IV

because the public defender (or his/her assistant) is providing a legal service pursuant to the statutory mandate in section 27.51, Florida Statutes. As pointed out in the State's original amicus brief, however, at common law the English counterpart to the public defender enjoyed "a broad immunity for negligent misconduct." See Amicus Brief of the Solicitor General at 10 (quoting Tower v. Glover, 467 U.S. 914, 921 (1984)). Thus, the corollary to the judicial immunity argument is that if the "broad immunity" afforded to the public defender means that (s)he owed no common law duty to the criminal defendant, under Trianon there can be no governmental liability imposed on the public defender based upon acts or omissions in the course of the representation.

Assuming that notwithstanding the public defender's "broad immunity" at common law, the Court determines that all aspects of the operation of the public defender's office are category IV functions, the analysis then shifts to the factors discussed in Commercial Carrier. In that case, the Court held that the limited waiver of sovereign immunity in section 768.28 applies only to torts committed in the performance of an "operational" function, and not those committed in the performance of a "discretionary" function. See Commercial Carrier, 371 So.2d at 1020, 1022. The Court identified the following factors to consider when distinguishing "discretionary" functions from "operational" functions:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 1019 (quoting Evangelical United Brethern Church v. State, 407 P.2d 440 (Wash. 1965)). Accord Trianon, 468 So.2d at 921 (noting that the Commercial Carrier / Evangelical United test is most appropriately utilized in cases involving category III and IV functions). If each of these questions can be answered in the affirmative, then the function is "discretionary" in nature. See Commercial Carrier, 371 So.2d at 1019.

Applying the Commercial Carrier factors to this case, the alleged legal malpractice arising out of the acts and omissions of the assistant public defenders in the course of the legal representation of Rowe might be considered "operational" in nature. However, Petitioner Schreiber's alleged negligent management and supervision of his office should be considered "discretionary" in nature because public defender's decisions regarding the allocation of resources of the office and the assignment of cases (not to

mention his time in monitoring the functioning of the office) requires the exercise of basic policy evaluation, judgment, and expertise. See Lee v. Dept. of Health & Rehabilitative Svcs., 698 So.2d 1194, 1198-99 (Fla. 1997) (sovereign immunity bars claim against HRS for negligent assignment and supervision of employees).

Even though the application of the Commercial Carrier factors to the legal malpractice claims suggests that those claims are based upon operational functions, those factors are not necessarily dispositive. See Commercial Carrier, 371 So.2d at 1019 (noting that in the event of a negative answer to one of the four questions, "further inquiry may well become necessary, depending upon the facts and circumstances involved"). To the extent that a legal malpractice claim is based upon action or inaction resulting from strategic decisions (e.g., whether or not to call a witness with shaky credibility, whether or not to raise a suspect defense, how to allocate investigator or other discovery resources, etc.) made by the public defender or his/her assistant, those decisions are infused with independent professional judgment. Accordingly, such decisions are inherently discretionary and should be immune from suit. The Solicitor General submits that all reasonable doubts regarding the nature of the act should be resolved in favor of finding such act to be immune from suit. In this regard, additional factual development may be necessary to determine the nature of the specific acts giving rise to Rowe's malpractice

claims.

Finally, the Solicitor General submits that sound public policy supports a finding that most (if not all) legal malpractice allegedly committed by the public defender or his/her assistants is immune from suit. Otherwise, the State may be subject to civil liability any time a defendant is granted post-conviction relief based upon "ineffective assistance of counsel." It is unlikely that the Legislature intended the limited waiver of sovereign immunity in section 768.28 to provide a civil remedy for all legal malpractice committed in the course of a criminal proceeding. Indeed, there is nothing in the legislative history of the 1984 amendments to that statute to suggest that result was intended.

## Conclusion

For the legal and policy reasons set forth in this brief and the State's original amicus brief, the Solicitor General respectfully requests this Court to quash the decision below and remand the case with directions that the complaint be dismissed with prejudice based upon the Petitioners' judicial and/or sovereign immunity.


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THOMAS E. WARNER
Solicitor General
Fla. Bar No. 176725

T. KENT WETHERELL, II
Deputy Solicitor General
Fla. Bar No. 060208

On behalf of
Robert A. Butterworth, Attorney General, and the State of Florida

OFFICE OF THE SOLICITOR GENERAL
The Capitol – Suite PL-01
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this ___ day of October, 2000, a true and correct copy of the foregoing was provided by **U.S. Mail** to:

James C. Barry
Stephanie Brown
1555 Palm Beach Lakes Blvd.
Suite 1600
P.O. Box 2069
West Palm Beach, FL 33402-2069

E. Bruce Johnson
Christine M. Duignan
Johnson, Anselmo, et al.
790 East Broward Blvd.
Suite 400
Ft. Lauderdale, FL 33301

Niel Rose
Burnstein & Chackman, P.A.
P.O. Box 223340
Hollywood, FL 33022

Kenneth J. Kavanaugh
400 S.E. 8th Street
Ft. Lauderdale, FL 33316-5000

David E. Peterson
Befera & Peterson
866 South Dixie Highway
Coral Gables, FL 33146

Diane H. Tutt
Sharon C. Degnan
Dianne Tutt, P.A.
8211 W. Broward Blvd. – Suite 420
Plantation, FL 33324

_____
Attorney

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