NR-2599

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,000

DISTRICT COURT OF APPEAL, 4TH DISTRICT NO. 97-1997

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-

ROBERT R. ROWE,

_____/

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF PETITIONER, ALAN H. SCHREIBER, ON SOVEREIGN IMMUNITY

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INTRODUCTION

The Petitioners, 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, were defendants in the trial court. Respondent, Robert R. Rowe, was the plaintiff in the trial court. In his brief, the parties will be referred to by name.

SUMMARY OF ARGUMENT

The majority of the claims against Alan H. Schreiber, public defender, are based on discretionary, policy-making, or planning activities of the office of the public defender, for which the public defender has sovereign immunity. The theories of liability asserted against the public defender include a claim that he was negligent in managing the resources of the office of the public defender; a claim that he was negligent in the selection of the assistant public defender who represented Rowe; a claim that Schreiber was negligent in the supervision of the assistant public defender assigned to the case; and a claim that Schreiber failed to ensure that the assistant public defender assigned to the case did not have an excessive case load. All these activities, and possibly the fifth claim for legal malpractice, fall within the second category established in *Trianon*, that is, enforcement of laws and the protection of public safety. Under the doctrine of sovereign immunity, the public defender will have no tort liability for such discretionary governmental functions performed by the office.

Alternatively, if this Court determines that the functions of the public are more closely aligned with category III (capital improvements and property control operations) or category IV (providing professional, educational, and general services for the health and welfare of the citizens) set forth *Trianon*, then the *Evangelical Brethren* test questions must be considered. Because the answers to these questions are all affirmative at least for the first four

claims asserted by Rowe, there is sovereign immunity for those claims. The remaining claim based on legal malpractice may be considered to be an operational activity for which there would not be immunity.

The question of sovereign immunity, however, may not even arise in this case should this Court accept the doctrine of judicial immunity for the office of the public defender. As this Court has recognized, the enactment of the statute waiving sovereign immunity applies only when the governmental entity has a duty of care. If judicial immunity applies to the public defender, then the claims in this case are barred, and the waiver of immunity would not create a right against the public defender which did not otherwise exist.

Although two Florida district courts have rejected the application of judicial immunity to claims against a public defender, this case provides an opportunity for this Court to finally resolve the issue. There are sound policy reasons for this Court to extend the doctrine of judicial immunity to include the public defender. Such immunity is independent and has not been waived by the legislative enactment of Florida Statute Section768.28.

There are significant differences between public defenders and private counsel. Unlike private counsel, a public defender may not reject a client, but is obligated to represent every person assigned, regardless how high the current case load or how difficult the case. Next, public defenders have limited resources and are typically under-funded. When combined with an increasing crime rate, increased claims of indigency and reduced budgets, the

difficulties for the public defender are exacerbated. The burden and cost of defending civil claims only hurts indigent defendants. Immunity should exist to free the public defender from the burdensome consequences of litigation and to preserve the limited resources of the office for the defense of the accused.

The function of the public defender, like that of the judge and district attorney, is essential to the working of the court system. The public defender is not an adversary to the system, but is an integral part of it. Extension of judicial immunity to the public defender will ensure that the limited resources available are used to defend the accused, rather than defend the public defender of civil lawsuits.

ARGUMENT I

WHERE THE MAJORITY OF THE CLAIMS AGAINST Alan H. SCHREIBER, PUBLIC DEFENDER, ARE BASED ON DISCRETIONARY, POLICY-MAKING, OR PLANNING ACTIVITIES OF THE OFFICE OF THE PUBLIC DEFENDER, THE PUBLIC DEFENDER MAINTAINS SOVEREIGN IMMUNITY FROM TORT LIABILITY ARISING FROM THESE ACTIVITIES.

Section 768.28, Florida Statutes, waives governmental immunity from tort liability "under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state." Sec. 768.28(1), Florida Statutes. Subsection (2) of the Act provides that "state agencies or subdivisions" include the judicial branch, including public defenders. Section 768.28(5) provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. This section provides that neither the state nor its agencies or subdivisions shall be liable to pay a claim or judgment by any one person which exceeds the sum of $100,000.00.[1]

[1]To be sure, sovereign immunity was raised below by Alan Schreiber in paragraph 20 of the motion to dismiss the fifth amended complaint. [R 129-133]. Therefore, sovereign immunity may be used to support the dismissal of Rowe's action. Moreover, "sovereign immunity relates to the jurisdiction of the court and may be raised at any time." *Charity v. Board of Regents of the Div. of Universities of the Florida Dept. of Educ.*, 698 So. 2d 907, at f.n.1 (Fla. 1st DCA 1997). Sovereign immunity relates to subject matter jurisdiction. *State, Dept. of Highway Safety and Motor Vehicles, Div. of Highway Patrol v. Kropff*, 491 So. 2d 1252, f.n.1 (Fla. 3d DCA 1986).

Section 768.28(9)(a) provides that no officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. "The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee . . ." *Id*. Thus, any judgment against the public defender, Alan Schreiber, could only be against the office of the public defender, and not against Mr. Schreiber in his personal capacity.

As this court has stated time and again, there can be no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual under similar circumstances. *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999). In other words, conceptionally, the question of the applicability of immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. *Id*. at 535. As this

court noted in *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985), "it is important to recognize that the enactment of the statute waiving sovereign immunity did not establish any new duty of care for governmental entities. The statute's sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care."

This court may very well determine that the question of the applicability of sovereign immunity does not even arise in this case because the public defender is protected by judicial immunity. Should this court, as suggested by the Amicus Brief submitted by the State of Florida, adopt the doctrine of judicial immunity for the office of the public defender, then the issue of sovereign immunity need not be reached. To facilitate the resolution of this issue, Alan H. Schreiber adopts the positions set forth in the Amicus Brief, and because of the interplay of the judicial immunity issue with the sovereign immunity issue, the doctrine of judicial immunity will be examined further in the next section.

However, in the event that this court decides not to adopt the doctrine of judicial immunity, the applicability of sovereign immunity must be considered and does have a significant impact upon this case. In *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979), this court "attempted to flesh out the effect of the statutory waiver of immunity and, in doing so, carved out an exception to the waiver of immunity for 'policy-

making, planning or judgmental government functions." *Department of Health and Rehabilitative Services v. B.J.M.*, 656 So. 2d 906 (Fla. 1995). Despite the broad scope of the waiver of sovereign immunity in §768.28, this court held that certain "discretionary" governmental functions remain immune from tort liability. *Commercial Carrier Corp.*, 371 So. 2d at 1022. The identification of these functions is done primarily by distinguishing, through a case-by-case analysis, the "planning" and "operational" levels of decision-making by governmental agencies. *Id*.

Initially, in *Commercial Carrier* it was held that this distinction should be made according to the preliminary test set forth in *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407P. 2d 404 (1965). This approach was later modified in *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985). In *Trianon*, this court explained that before applying the *Evangelical Brethren* test, the government function or activity at issue should be placed in one of four basic categories of government action. The four categories are: (I) legislative, permitting, licensing and executive office or function; (II) enforcement of laws and the protection of public safety; (III) capitol improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens. *Id*. at 919-21.

In *Trianon*, this court stated that there is no governmental tort liability in regard to the discretionary governmental functions described in categories I

and II because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care. On the other hand, the court recognized that there may be substantial government liability under categories III and IV. This is because there is a common law duty of care regarding how property is maintained and operated and how professional and general services are performed. The *Evangelical Brethren* test is therefore most appropriately utilized in these latter two categories to determine what conduct constitutes a discretionary planning or judgmental function and what conduct is operational for which the governmental entity may be liable. Since *Trianon*, this court has emphasized that these four categories are rough guides rather than inflexible rules. *Department of Health and Rehabilitative Services v. B.J.M.*, 656 So. 2d 906 (Fla. 1995).

If the government activity or function is not protected under category I or II, the court must determine what conduct within categories III and IV "constitutes a discretionary planning or judgmental function and what conduct is operational" under the *Evangelical Brethren* test. *Trianon*, 468 So. 2d at 921. If the *Evangelical* questions can be clearly and unequivocally answered affirmatively, then the chAlanged act is probably policy-making, planning, or judgmental activity which is immune from tort liability. However, if the answer to any of these questions is negative, then a court must inquire further to determine whether the conduct should be immune. *B.J.M.*, 656 So. 2d at 912.

This further analysis distinguishes those policy-making, planning or judgmental government functions entitled to immunity from the routine operational level actions that are not subject to tort liability. *Id*.

Given this analytical frame work, the particular claim made by Robert Rowe against Alan H. Schreiber as public defender of the 17th Judicial Circuit of Florida, will be examined. In Count I of the Fifth Amended Complaint filed by Rowe, Rowe asserted his claim against Alan Schreiber. Rowe alleged that Schreiber and Douglas N. Brawley, an assistant public defender, undertook the defense of Rowe's case. In paragraphs 17 through 20 of the Fifth Amended Complaint, Rowe essentially asserted five theories against Schreiber: (1) "Schreiber was negligent in managing the resources of the office of public defender, to include the management of his own professional time and the professional time of Brawley and other assistant public defenders; as a result, Rowe's defense was not adequately prepared; (2) Schreiber was negligent in the selection of Brawley, who is inexperienced, to represent Rowe in the defense of these very serious charges; (3) Schreiber was negligent in the supervision of Brawley in failing to ensure that Brawley adequately prepared the defense of Rowe; (4) and [was negligent] in failing to ensure that Brawley did not have an excessive case load which would prevent Brawley's adequate preparation of Rowe's defense; (5) Schreiber and Brawley breached the standards applying to lawyers practicing in the community and were negligent by failing to carefully prepare Rowe's defense,

including but not limited to failing to preserve appellate issues concerning the denial of a motion to continue, failing to consult medical experts, failing to utilize a psychologist, failing to obtain medical records, failing to obtain witness testimony, failing to object to the reading of an out of court statement, failing to object to the prosecutor's questions to witnesses, and opening the door to the admission of unfairly prejudicial evidence."

As will be shown, the first four of these five theories asserted by Rowe against Alan Schreiber certainly constitute the type of policy-making, planning or judgmental government functions entitled to sovereign immunity. The final legal theory asserted - the negligent performance of legal duties - may also be entitled to sovereign immunity if it is considered to fall within the *Trianon* II category. If it does not fall within that category, then that legal malpractice claim may constitute a routine operational level action that may be subject to tort liability.

Initially, it is suggested that all of the claims asserted by Rowe against Alan Schreiber, or at least the first four claims asserted, would fit best in the second category established in *Trianon*, that is, enforcement of laws and the protection of public safety. In *Trianon*, this court explained the underlying rationale of category II by stating:

> How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there has never been a common law duty of care. This discretionary power to enforce compliance

> with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials. . . .

468 So. 2d at 919.

The discretionary power provided to the public defender to enforce compliance with the law is most closely aligned with that given to judges, prosecutors, arresting officers, and other law enforcement officials. In this respect, most - if not all - of Rowe's assertions against Schreiber belong most appropriately within category II. Specifically, the public defender has the power to enforce compliance with the law, in that the public defender provides implementation of the accused's constitutional right to be represented by counsel. Moreover, by providing representation to the accused, the public defender actually enforces compliance with the law, by protecting the legal rights of the accused and by counteracting or guarding against abuse by judges, prosecutors, arresting officers, and other law enforcement officials. In this regard, the public defender exercises its discretionary power to enforce compliance with the laws duty enacted by a governmental body. This role of the public defender squarely places the activities of office within category II.

If the governmental functions or activities of the public defender's office asserted in this case are placed in category II, then the public defender will have no tort liability regarding the discretionary governmental functions performed by the office. Sovereign immunity must therefore apply to preclude

the assertions by Rowe against Alan Schreiber in his official capacity as public defender.

Alternatively, if this Court determines that the functions of the public defender are aligned more closely with category III (capital improvements and property control operations) or category IV (providing professional, educational, and general services for the health and welfare of the citizens), then this court must determine what conduct of the public defender asserted by Rowe constitutes discretionary planning or judgmental functions and what conduct is operational. The *Evangelical Brethren* test must therefore be considered. The test from *Evangelical* poses four questions: (1) Does the chAlanged 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 government agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the chAlanged act, omission, or decision? *B.J.M.*, 656 So. 2d at 913. Affirmative answers to these questions should usually give rise to immunity for the questioned activity. *Id*.

Applying the four *Evangelical* questions to the five asserted theories of liability against Alan Schreiber, these four questions can all be answered in the affirmative as to the first four of the five claims asserted. The first four theories asserted against Schreiber include a claim that he was negligent in managing the resources of the office of the public defender; a claim that he was negligent in the selection of Brawley to represent Rowe; a claim that Schreiber was negligent in the supervision of Brawley; and a claim that he failed to ensure that Brawley did not have an excessive case load.

In considering question one of the *Evangelical* test in regard to the first four assertions of negligence against Schreiber, it is apparent that the chAlanged acts, omissions, or decisions of Schreiber did necessarily involve a basic governmental policy, program, or objective. Such issues as the management of the resources of the office of the public defender, the assignment of particular assistant public defenders to a client; the supervision of the assistant public defender; and controlling the excessive case load of the public defender's office all involve a basic governmental policy, program, or objective of the public defender's office, which is to provide legal representation for indigents charged with crimes.

When the second question of the *Evangelical* test is considered in regard to these four assertions against Schreiber, one must determine that the questioned acts, omissions, or decisions of Schreiber are indeed essential to the realization or accomplishment of the policy, program or objective of the

office of the public defender. In fact, it would be difficult to think of anything more essential to the mandate of the office of the public defender than such activities as the management of its resources, the selection, assignment and supervision of assistant public defenders, and dealing with the realities of an excessive case load.

The third questions from the *Evangelical* test also requires an affirmative answer. The acts, omissions, or decisions of Schreiber regarding the four assertions of negligence most definitely require the exercise of basic policy evaluation, judgment, and expertise on the part of the office of the public defender. Again, such issues as managing the resources of the office and dealing with the excessive case load of the public defender constitute fundamental basic policy evaluations.

Finally, when considering the fourth question from the *Evangelical* test, there is no question that the public defender possessed the requisite constitutional, statutory, or lawful authority and duty to do or make the chAlanged acts, omissions, or decisions. Because the answers to these four questions are all in the affirmative, this court should grant immunity as to the first four claims of negligence asserted by Rowe against Alan Schreiber as the public defender.

The fifth, and remaining claim against Schreiber, is based upon a claim of legal malpractice in the representation of Rowe. As explained, if the governmental functions or activities of the public defender are placed in

category II of *Trianon*, then there will be no tort liability for these discretionary governmental functions. However, if these particular activities of the public defender are not placed in category II of *Trianon*, then the *Evangelical Brethren* test questions must be posed. When posing the four *Evangelical* inquiries as to the claims of legal malpractice in the representation of Rowe, it is not likely that these four questions would be answered in the affirmative. Consequently, there may not be sovereign immunity as to the fifth claim of negligence asserted against Alan Schreiber for legal malpractice, unless it is placed within one of the first two *Trianon* categories.

ARGUMENT II

THE DOCTRINE OF JUDICIAL IMMUNITY PRECLUDES LAWSUITS AGAINST THE PUBLIC DEFENDER.

The doctrine of judicial immunity precludes lawsuits against the office of the public defender. The principal of judicial immunity stems from the earliest days of the common law and emerged in American jurisprudence with the landmark case of *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1872). See *Berry v. State*, 400 So. 2d 80 (Fla. 4th DCA 1981). In *Bradley*, the court recognized that it was "a general principal of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to him." *Id*. at 347. The court therefore held that judges are not liable in civil actions for their judicial acts. *Id*. at 351.

Although this result has been the uniform holding of Florida courts, *Berry v. State*, 400 So. 2d 80, 83, two district court decisions have refused to extend the doctrine of judicial immunity to protect a public defender in a malpractice claim. First, the First District in *Windsor v. Gibson*, 424 So. 2d 888 (Fla. 1st DCA 1982) held that the doctrine of judicial immunity does not preclude the bringing of a malpractice suit against the public defender's office. The court reasoned that the considerations which require that a judge and prosecutor be immune from liability for the exercise of duties essential to the

administration of justice, do not require that the same immunity be extended to the public defender. *Id*. The court explained that while the prosecutor is an officer of the state whose duty it is to see that impartial justice is done, the public defender is an advocate, whose only duty is owed to the indigent defendant. The role of the public defender, according to this reasoning, does not differ from that of privately retained counsel. *Id*.

More recently, the Third District, in *Wilcox v. Brummer*, 739 So. 2d 1282 (Fla. 3d DCA 1999), followed the holding in *Windsor*, rejecting the claim for judicial immunity on behalf of the public defender. Both the *Windsor* court and the *Wilcox* court certified the question whether the doctrine of judicial immunity precludes the bringing of a suit against the public defender for the actions of the public defender or an assistant. This Supreme Court has yet to resolve this issue.

Petitioner, Alan Schreiber, submits that this case now provides an opportunity for this Court to provide a definitive resolution of this issue. This Court has already accepted the Amicus Brief filed by the Solicitor General for the State of Florida, which outlines the reasons for public defender immunity. Those reasons, along with the authorities contained herein, provide a compelling basis for such immunity.

Although the enactment of Florida Statute §768.28 may have waived sovereign immunity to the extent outlined in the statute, that section did not

abrogate the common law principal of judicial immunity. *Berry v. State*, 400 So. 2d 80 (Fla. 4th DCA 1981).

As this Court has explained,

> It may be true that in its earliest manifestation judicial immunity imitated from the English sovereign's absolute immunity, because early English judges sat the pleasure and as legal appendages of the Crown. However, in time even England began recognizing that judges held an office that was to an increasing degree distinct from and beyond the Crown's reach. Continuing this same trend, judicial immunity and sovereign immunity completely ceased to be co-extensive as conceived in most American states, and in Florida in particular. Article V of the Florida Constitution creates the judicial branch of this State, deliberately separating it from and making it co-equal to the other branches of government. Article V also creates the office of State Attorney, implying what is obvious - - the State Attorney's are quasi-judicial officers.

Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino, 628 So. 2d 1097 (Fla. 1993).

This Court elaborated that "[w]hile the legislature has authority to waive immunity for those organs of government within its purview, the legislature cannot take actions that would undermine the independence of Florida's judicial and quasi-judicial offices. This would violate the doctrine of separation of powers. Art. II Sec. 3, *Fla. Const*." *Id*. at 1099. As succinctly stated by this court, "judicial and prosecutorial immunity in Florida long have existed apart from sovereign immunity, have an independent basis in law and policy, and have not been waived." *Id*. at 1099. Accordingly, if this court concludes that judicial immunity should be extended not only to prosecutors, but also to

public defenders, as Article V quasi-judicial officers, such immunity is independent and has not been waived by the legislative enactment of Florida Statute §768.28.

To be sure, the United States Supreme Court left the question of immunity to the states to decide when it declined to hold that federal law provides immunity for counsel in state malpractice suits. *Ferri v. Ackerman*, 444 U.S. 193, 100 S. Ct. 402, 62 L. Ed. 2d 355 (1979). The court noted that valid public policy reasons may justify such a grant of immunity. *Id*. at 204 - 05, 100 S. Ct. at 409.

There are a number of decisions reported in other states, which call into question the reasoning of the Florida District Courts of Appeal which rejected quasi-judicial immunity for the public defender in the cases of *Windsor v. Gibson*, 424 So. 2d 888 (Fla. 1st DCA 1982) and *Wilcox v. Brummer*, 739 So. 2d 1282 (Fla. 3d DCA 1999). These decisions reason that the public defender was an advocate whose role does not differ from that of privately retained counsel. Therefore, these courts concluded that a public defender was not entitled to the same immunity to which a judge and prosecutor were entitled for the exercise of duties essential to the administration of justice.

One of the most articulate out-of-state decision supporting judicial immunity for the public defender is found in *Dziubak v. Martt*, 503 N.W. 2d 771 (Minn. 1993), a decision of the Supreme Court of Minnesota. In that decision, the court was asked to decide whether the state public defenders were

immune from suits for malpractice. The court found sound public policy reasons favoring immunity and held that public defenders are immune from suit for legal malpractice.

The *Dziubak* court recognized the decision of the United States Supreme Court in *Tower v. Glover*, 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984), which noted that English Barristers are a close "cousin" to public defenders, and since at least 1435 A.D. have enjoyed broad immunity from liability for negligent, but not intentional misconduct. *Id*. at 921, 104 S. Ct. at 2825. The Minnesota court explained that tort immunity is generally based on the idea that although a defendant might be negligent, important social values require that the defendant remain free of liability. See W. Page Keaton, et al., *Prosser & Keaton on the Law of Torts*, section 131 at 1032 (5th Ed. 1984). The *Dziubak* court reasoned that the public defender is appointed to protect the best interests of his or her client and must be free to exercise independent, discretionary judgment when representing the client, without weighing every decision in terms of potential civil liability. Although the court recognized that privately retained defense counsel must also exercise independent discretion in the defense of his or her clients, and are not immune from legal malpractice claims, the court noted significant differences between private counsel and public defenders which require the extension of immunity to public defenders.

First, a public defender may not reject a client, but is obligated to represent whomever is assigned to him or her, regardless of the current case load or the degree of difficulty the case presents. In Florida, where the public defender represents nearly ninety three percent of those individuals charged with a felony, an excessive case load is a chronic reality. On the other hand, privately retained counsel may evaluate numerous factors regarding the client and the case, and, taking into account counsel's work load at the time, can decide to accept or decline representation.

Second, public defenders have limited resources available to their office and are typically under-funded. In contrast, private defense counsel are limited only by the resources of the individual client. As explained in *Dziubak*, the public defender lacks sufficient funds to represent each client in a way that each client might demand to be served. An increasing crime rate, combined with increased claims of indigency and lower state budgets to fund government positions, have caused public defender case loads to grow dramatically.

The Minnesota Supreme Court believed that if the public defender is not immune from liability, the cost and burden of defending civil claims will only exacerbate this situation which will further hurt indigent defendants. The court noted "it would be an unfair burden to subject the public defender to possible malpractice for acts or omissions due to impossible case loads and an under-funded office: something completely out of the defender's control." *Id*. at 776.

The court also noted that the cost in money and resources to defend against malpractice suits is at least as important, if not more important than the cost of any possible damage awards. Simply put, immunity exists to free government officials from the burdensome consequences of litigation. In addition to money damages, these consequences include distraction of officials from their governmental duties, and a waste of substantial time, energy, and money consumed in the discovery process. "Immunity from suit for public defenders best serves the indigent population in preserving the resources of the defender's office for the defense of the criminally accused." *Id*. at 777.

Quoting from Stephen L. Millich, *Public Defender Malpractice Liability in California*, 11 Whittier L. Rev 535, 537 - 38 (1989), the Minnesota high court stated: "The judge, district attorney, and public defender are parts of a courtroom triumvirate. Each has a function which is essential to the working of the triumvirate. Each has a function which is essential to the working of the system. The public defender's role is that of an adversary to the prosecutor - not an adversary of the system but an integral part of it. . . . [S]ociety reaps the benefit from a smoother functioning criminal justice system."

The Minnesota court therefore concluded that the extension of immunity to public defenders will ensure that the resources available to the public defender will be used for the defense of the accused, rather than diminished through the defense of public defenders against civil suits for malpractice.

Immunity will conserve these resources to provide an effective defense to the greatest number of indigent defendants. *Dziubak*, 503 N.W. 2d at 777. The petitioner, Alan Schreiber, suggests that these public policy reasons mandate extension of judicial immunity to the office of the public defender.

Other decisions support the conclusion reached by the Supreme Court of Minnesota. For example, in *Scott v. City of Niagra Falls*, 407 N.Y.S. 2d 103, 95 Misc. 2d 353 (Supp. 1978), the court determined that the role of the public defender, like that of the judge and district attorney, is to ensure justice within the adversary system. The *Scott* court stated that although the orientation of the public defender is toward a particular assigned client, by fulfilling that role he permits the judicial system to function in a manner which increases the probability that justice will prevail. To this extent, the public defender serves the public as much as he serves his particular assigned client. Therefore, the court ruled that public defenders are immune from civil liability for judgmental or discretionary acts or decisions taken or made in pursuance of the responsibilities as public defenders.

The *Scott* decision relied in part on the reasoning and conclusion of the Federal Third Circuit Court of Appeals in the case of *Brown v. Joseph*, 463 F. 2d 1046 (3d Cir. 1972). That court perceived no valid reason to extend judicial immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized public defenders. To deny immunity to the public defender and expose him to potential liability, would in

the view of the Third Circuit Court, not only discourage recruitment, but could conceivably encourage many experienced public defenders to reconsider present positions. See *Coyazo v. State*, 897 P. 2d 234, 120 N.M. 47 (App. 1995) (discussion of compelling reasons for public defender immunity). See also *Browne v. Robb*, 583 A. 2d 949 (Del. Supr. 1990) (Supreme Court of Delaware finds qualified immunity for public defenders under state statute). Consistent with the public policy reasons espoused in these cases, this Court should likewise extend the doctrine of judicial immunity to the office of the public defender.

CONCLUSION

Based on the foregoing, Petitioner Alan H. Schreiber requests that this court enter its order affirming the trial court's dismissal of the motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this 2nd day of October, 2000, to Diane H. Tutt, Esq., 8211 West Broward Blvd., Suite 420, Plantation Florida 33324 (954) 475-9933, counsel for Respondent Robert R. Rowe; Kenneth J. Kavanaugh, Esq., 400 SE 8th Street, Fort Lauderdale Florida 33316-5000, counsel for Respondent Robert R. Rowe; James C. Barry, Esq., Adams, Coogler, Watson & Merkel, P.A., Post Office Box 2069, 1555 Palm Beach Lakes Blvd., Suite 1600, West Palm Beach, Florida 33402-2069, counsel for Petitioner, Richard L. Jorandby; Thomas E. Warner, Solicitor General and Louis F. Hubener, Assistant Attorney General, Office of the Solicitor General, The Capital, Tallahassee, Florida 32399-1050.

I HEREBY CERTIFY that this brief is produced in 14 point Arial font type, which is proportionately spaced.

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