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## **Alan H. Schreiber vs Robert R. Rowe**

THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS SCHREIBER VERSUS ROWE. 4 I NOTE THAT THERE ARE THREE COUNSEL THAT ARE INTENDING UPON MAKING COMMENTS TO THE COURT. WE, ALSO, REQUIRE THAT EVERYONE STAY WITHIN THEIR TIME PERIODS AND SO BE CONSIDERATE OF EACH OTHER'S TIME, SO THAT NO ONE IS SLIGHTED, BECAUSE WE ONLY CAN ALLOW THE MAXIMUM OF 20 MINUTES TO A SIDE. MR. ROSE.

MAY IT PLEASE THE COURT. NEAL ROSE, REPRESENTING THE PETITIONER ALAN SCHREIBER, THE PUBLIC DEFENDER FOR THE 17th JUDICIAL CIRCUIT. IN THIS MALPRACTICE CASE, THE TRIAL COURT DISMISSED THE CLAIMS AGAINST THE PUBLIC DEFENDERS, BASED ON STATUTE OF LIMITATIONS. THE FOURTH DISTRICT REVERSED HOLDING THAT THE MALPRACTICE CLAIM DID NOT BEGIN TO RUN. THE STATUTE DID NOT BEGIN TO RUN, UNTIL ROWE HAD OBTAINED HIS POSTCONVICTION RELIEF. THE STATUTE OF LIMITATIONS ISSUE APPEARS TO HAVE BEEN SETTLED, IN THIS COURT'S RECENT DECISION, IN STEELE VERSUS KEHOE, STEMMING FROM THE DECISION THAT THE STATUTE IS ACCORDING TO POSTCONVICTION RELIEF. WE WILL ARGUE, TODAY, ON THE ISSUES OF IMMUNITY AND SOVEREIGN IMMUNITY. WE SUBMIT, TODAY, THAT THE DOCTRINE OF JUDICIAL IMMUNITY PRESENTS LAWSUITS AGAINST THE PUBLIC DEFENDER. ALTHOUGH THE ENACTMENT OF 768.28 MAY HAVE WAIVED SOVEREIGN IMMUNITY, TO THE EXTENT OUTLINED IN THE STATUTE, THAT SECTION DID NOT ABROGATE THE COMMON LAW PRINCIPLE OF JUDICIAL IMMUNITY. IN HENDERSON VERSUS BOWDEN, THIS COURT EXPLAINED THAT, CONCEPTUALLY THE APPLICABILITY OF SOVEREIGN IMMUNITY DOESN'T EVEN ARE A RISE, UNTIL IT IS DETERMINED THAT THE DEFENDANT OTHERWISE OWES A DUTY OF CARE TO THE PLAINTIFF AND WOULD BE LIABLE, IN THE ABSENCE OF SUCH IMMUNITY. SHOULD THIS COURT ACCEPT THE DOCTRINE OF JUDICIAL IMMUNITY, THEN ALL THE CLAIMS IN THIS CASE WILL BE BARRED, AND THE COURT NEED THOUGHT NOT REACH THE ISSUE OF -- NEED NOT REACH THE ISSUE OF JUDICIAL IMMUNITY.

WAS JUDICIAL IMMUNITY RAISED IN THE TRIAL COURT?

JUDICIAL IMMUNITY WAS NOT RAISED IN THE TRIAL COURT.

WAS IT ADDRESSED?

JUDICIAL I AM UNIT WAS ADDRESSED -- JUDICIAL IMMUNITY WAS ADDRESSED IN THIS COURT BY PERMISSION AND WAS ADDRESSED BY ALL THE PARTIES.

IT WAS NOT ADDRESSED IN THE FOURTH DISTRICT?

THAT'S CORRECT. WE SUBMIT THERE ARE SOUND POLICY REASONS FOR THIS COURT TO INSTITUTE THE DOCTRINE OF JUDICIAL IMMUNITY. WHEN YOU COMPARE THE FUNCTIONS OF A PUBLIC DEFENDER, COMPARED TO THOSE OF A PROSECUTOR AND THOSE OF A PRIVATE ATTORNEY, ONE CAN SEE THAT THE FUNCTIONS OF A PUBLIC DEFENDER ARE, IN MEAN WAYS -- IN MANY WAYS, SIMILAR TO THAT OF A PROSECUTOR. THEREFORE THE SAME POLICY CONSIDERATIONS THAT WOULD GRANT JUDICIAL IMMUNITY TO THE PROSECUTOR WOULD SUPPORT PUBLIC DEFENDER IMMUNITY. THE PUBLIC DEFENDER SYSTEM IS AN UNIQUE SYSTEM, SET UP AS A RESPONSE TO A CONSTITUTIONAL MANDATE. WHILE, BOTH, THE PUBLIC DEFENDERANT TRIAL DEFENSE COUNSEL DECLARE THE SAME RIGHTS, THE SIMILARITY ENDS THERE.

WOULD YOU ADVOCATE THAT IT EXTEND TO COMPETENT COUNSEL THAT WAS APPOINTED,

BECAUSE THE PUBLIC DEFENDER WAS NOT AVAILABLE TO --

NOT NECESSARILY, BECAUSE ONE OF THE REASONS FOR ESTABLISHING IT, AS TO THE PUBLIC DEFENDER, IS BECAUSE OF THE UNIQUE SET UP OF THAT SITUATION.

DOESN'T THAT JUST RAISE SOME ISSUES OF JUST FUNDAMENTAL FAIRNESS, IF NOTHING ELSE? THAT IS YOU HAVE GOT ONE DEFENDANT WHO IS REPRESENTED BY A LAWYER, WHO HAPPENS TO BE EMPLOYED BY THE PUBLIC DEFENDERS OFFICE, THAT SCREWS UP, DOES EVERYTHING THAT IS INCOMPETENT, MALPRACTICE, WHATEVER, AND THEY ARE PRECLUDED, BUT SOMEBODY WHO HAPPENED, BECAUSE THERE WAS A CONFLICT, GETS CONFLICT COUNSEL, THEY HAVE A REMEDY?

THAT IS A VERY INTERESTING QUESTION. PART OF THE REASON FOR NEEDING THE IMMUNITY FOR THE PUBLIC DEFENDER IS BECAUSE THEY ARE DIFFERENT THAN A PRIVATE ATTORNEY.

DOESN'T SOVEREIGN IMMUNITY SOLVE THAT? IN OTHER WORDS THAT YOU ARE WITHIN THE STATE SYSTEM, AND THEREFORE THERE ARE CAPS ON --

THAT'S CORRECT. SOVEREIGN IMMUNITY WOULD PRECLUDE THE JUDGMENT DENIES THE CONFLICT -- AGAINST THE CONFLICT ATTORNEY WHO TOOK THAT CASE, JUST LIKE IT PRECLUDES A JUDGMENT AGAINST THE PUBLIC DEFENDER WHO HANDLES THE CASE.

PRECLUDES OR LIMITS THE AMOUNT?

IT ACTUALLY PRECLUDES THE JUDGMENT. SOVEREIGN IMMUNITY STATUTE PRECLUDES THE CLAIM AGAINST THE INDIVIDUAL ATTORNEY WHO HANDLES THE CASE, UNLESS THERE IS BAD FAITH INVOLVED. THE SOVEREIGN IMMUNITY STATUTE ONLY ALLOWS A JUDGMENT AGAINST THE OFFICE OF THE PUBLIC DEFENDER, SO THAT, REALLY, ISN'T AN ISSUE, BUT WHEN WE LOOK AT THE DIFFERENCES BETWEEN A PUBLIC DEFENDER AND A PRIVATE COUNSEL, WE CAN SEE THAT A PRIVATE ATTORNEY HAS AN ENTREPRENEURIAL ROLE, AND THE PUBLIC DEFENDER HAS A GOV. GOVERNMENTAL ROLE OF -- A GOVERNMENTAL ROLE OF REPRESENTING THE INN INDIGENTS -- OF REPRESENTING THE INDIGENT.

IS THIS AN UNIQUE SITUATION IN RESPECT TO THE PUBLIC DEFENDERS, OR DOES OUR GRANT OF IMMUNITY HAVE TO GO TO COUNSEL FOR FAMILY SERVICES?

I AM NOT SURE IN WHAT CONTEXT YOU ARE REFERRING.

DO THEY APPEAR IN DEPENDENCY CASES?

AGAIN, THOSE ATTORNEYS THAT ARE SPECIFICALLY --

IN OTHER WORDS ATTORNEYS THAT GO INTO DEPENDENCY COURT OR THAT THE STATE PROVIDES COUNSEL, IN DETERMINATION OF PARENTAL RIGHTS CASES, THAT TYPE OF CONSTRUCTION.

-- OF SITUATION.

THIS IS A DIFFERENT TYPE OF SITUATION, BECAUSE OF THE UNIQUE SITUATION OF THE PUBLIC DEFENDER. WHAT YOU HAVE IS AN UNIQUE SITUATION, WHERE HE DIFFERS FROM OTHER ATTORNEYS, BECAUSE THE PUBLIC DEFENDER HAS DUAL OBLIGATIONS. LIKE A PRIVATE ATTORNEY, HE DOES HAVE OBLIGATIONS TO HIS CLIENT, BUT HE HAS SIGNIFICANT OBLIGATIONS TO THE SYSTEM, ITSELF.

LET ME ASK YOU THIS. WHY WOULDN'T IT, RATHER THAN TRYING TO DEAL WITH THIS, AS A MATTER OF JUDICIAL IMMUNITY, QUOTE, THAT THIS BE A MATTER THAT IS WITHIN THE PROVINCE OF THE LEGISLATURE, BECAUSE THE LEGISLATURE HAS POWER TO PRESCRIBE THE GRANT OF

SOVEREIGN IMMUNITY OR THE LIMITS OF SOVEREIGN IMMUNITY.

THAT IS TRUE, AND THE SOVEREIGN IMMUNITY STATUTE ALLOWS CASES AGAINST THE JUDICIAL BRANCH, BUT THIS IS A COMPLETELY INDEPENDENT THEORY THAT HAS BEEN ESTABLISHED BY THE COURTS, FOR PUBLIC POLICY REASONS, SO, YES, THE LEGISLATURE COULD DO THAT, IF THEY WANT TO, BUT TYPICALLY, THIS IS ESTABLISHED BY THE COURTS, FOR PUBLIC POLICY REASONS.

AND SPEAKING OF PUBLIC POLICY, THE LAW IN THIS STATE, NOT FROM THIS COURT BUT FROM THE APPELLATE COURTS, AND I GUESS THAT IS, MAYBE, WHY YOU NEVER RAISED IT BELOW, HAS BEEN THAT THERE -- JUDICIAL IMMUNITY DOESN'T APPLY TO PUBLIC DEFENDERS. A THAT IS TRUE. THERE ARE TWO REPORTED DECISIONS OF DISTRICT COURTS.

HOW OFTEN, I MEAN, AS A PRACTICAL MATTER, I GUESS, HOW OFTEN DOES IT COME UP, I MEAN, HAVE THEIR BEEN JUDGMENTS AGAINST PUBLIC DEFENDERS FOR MALPRACTICE IN REPRESENTATION, OR WHAT IS THE PRACTICAL PROBLEMS THAT WE ARE FACED WITH?

THE PRACTICAL PROBLEMS THAT YOU ARE FACED WITH ARE -- GO WAY BEYOND JUST HAVING A JUDGMENT AGAINST THE OFFICE OF THE PUBLIC DEFENDER. WHAT HAPPENS IS THE PUBLIC DEFENDER NEEDS THE ABILITY TO MAKE DECISIONS AND USE HIS UNFETTERED DISCRETION SO HE CAN WORK WITHIN THE SYSTEM AND WORK AS A PART OF A GOVERNMENTAL OBLIGATION AND REPRESENTING HIS CLIENTS. SO WHEN YOU ALLOW THE SUITS TO BE BROUGHT AGAINST HIM, IN A CIVIL CONTEXT, IT GOES WAY BEYOND JUST A DAMAGE AWARD. YOU TAKE AWAY THE PUBLIC DEFENDER'S TIME, ENERGY, AND RESOURCES, IN DEALING WITH THE CLAIMS, AND THAT, FURTHER, EXACERBATES THE DIFFICULT SITUATION OF THE LIMITED RESOURCES, TO HANDLE THE INDIGENCY MATTERS.

YOU ARE IN YOUR REBUTTAL TIME.

ILL TOUCH ON THE ISSUES OF SOVEREIGN IMMUNITY. WHEN WE LOOK AT THE CLAIMS THAT ARE BROUGHT BY MR. ROWE, IN THE FIFTH AMENDED COMPLAINT, THE FIRST CLAIM AND MOST OF THE CLAIMS, EXCEPT FOR FLAT-OUT MALPRACTICE, THE CLAIM SAYS THAT MR. SCHREIBER WAS NEGLIGENT IN MANAGING THE RESOURCES OF THE OFFICE THE PUBLIC DEFENDER, TO INCLUDE THE MANAGE PRESIDENT OF HIS OWN PROFESSIONAL TIME. WE SUBMIT THAT THAT IS PRECISELY THE TYPE OF ACTIVITY THAT HAS TO BE PROTECTED BY SOVEREIGN IMMUNITY, AS A DISCRETIONARY AND PLANNING ACTIVITY, RATHER THAN AN OPERATIONAL ASPECT OF THE PUBLIC DEFENDERS OFFICE. THERE MUST BE SOVEREIGN IMMUNITY, FOR THOSE CLAIMS, ALL THE CLAIMS, EXCEPT FOR THE LAST CLAIM, WHICH IS MALPRACTICE BY THE ASSISTANT PUBLIC DEFENDER. FOR THAT MIGHT BE AN OPERATIONAL ASPECT.

THANK YOU. MR. BERRY.

MAY IT PLEASE THE COURT. THANK YOU, YOUR HONORS. MR. ROSE, STATED THAT THE ISSUE OF STATUTE OF LIMITATIONS HAS, APPARENTLY, BEEN RESOLVED BY THIS COURT, IN THE KEHOE CASE, AND I THINK HE IS CORRECT WHEN HE STATES THAT, IN REGARD TO HIS CLIENT, BUT I DO NOT FEEL THAT THAT RULING IS BINDING, AS FAR AS MY CLIENT, WHO IS RICHARD, VIS-A-VIS THE PUBLIC DEFENDER FOR THE FIFTEENTH JUDICIAL CIRCUIT, A COMPLETELY DIFFERENT ENTITY THAN MR. SCHREIBER, A PUBLIC DEFEND FORT SEVENTEENTH. -- FOR THE SEVENTEENTH.

WOULD YOU ADDRESS THE RESPONSIBILITY THAT IS SO REPUGNANT TO THAT OF THE INDIVIDUAL LAWYER, THAT JUDICIAL IMMUNITY MUST APPLY, AND I, CERTAINLY, UNDERSTAND THE ARGUMENTS, WITH REGARD TO PLANNING AND MANAGEMENT AND THOSE THINGS, BUT WHEN IT GETS DOWN TO THE FUNDAMENTAL OBLIGATION OF PROVIDING REPRESENTATION, PROPER REPRESENTATION TO AN INDIVIDUAL WITHIN OUR JUDICIAL SYSTEM, IT SEEMS TO ME THAT INDIVIDUAL ATTORNEYS, PRIVATE ATTORNEYS, ALL HAVE SYSTEM OBLIGATIONS, BUT THE FUNDAMENTAL OBLIGATION IS TO TRY TO PROTECT THAT INDIVIDUAL. WHAT DO YOU SEE AS THE

SYSTEM OBLIGATIONS THAT ARE SO INCONSISTENT WITH THE ROLE OF THE INDIVIDUAL LAWYER?

WELL, IF I UNDERSTAND THE COURT'S QUESTION CORRECTLY, THE DIFFERENCE WOULD BE THAT THE PUBLIC DEFENDER, IN MY VIEW, ANYWAY, IS AN INTEGRAL PART OF THE CRIMINAL JUSTICE SYSTEM, WHERE HE -- HE IS ONE OF THREE-PRONG LEGS HOLDING UP THE STOOL, IF YOU WILL. WITHOUT HIM, THE SYSTEM WON'T WORK. HE HAS NO CHOICE IN THE SELECTION OF HIS CLIENTS. HE HAS NO CONTROL OVER HIS CASE LOAD. THE INDIVIDUAL ASSISTANT PUBLIC DEFENDER, I AM TALKING ABOUT HERE, YOUR HONOR. HE TAKES THE JOB AS THE PUBLIC DEFENDER, AND FROM THERE ON OUT, HIS CONTROL OF THE CASE LOAD AND THOSE CLIENTS, THOSE CLIENTELE WHOM HE IS GOING TO REPRESENT, THE SELECTION OF CLIENTELE IS TAKEN COMPLETELY OUT OF HIS CONTROL. HE IS FORCED BY THE FACT THAT HE HAS TO REPRESENT INDIGENT CLIENTS, FACED WITH THE PROSPECT THAT HE IS GOING TO BE REPRESENTING THOSE CLIENTS WHO ARE LESSER EDUCATED, MORE LIKELY NOT TO BE ABLE TO AS IN THE DEFENSE OF THEIR CLAIM, THE CLAIM AGAINST THEM, AND MORE LIKELY THAN NOT TO BE REPEAT OFFENDERS AND MORE LIKELY THAN NOT TO BE THOSE WHO WOULD GET INTO THE SCENARIO WHERE THEY ARE GOING TO HAVE OTHERS WHO WILL OFFER THEIR KNOWLEDGE ABOUT WHERE THEIR LAWYERS MESSED UP, OR THEY WOULDN'T BE IN THE SYSTEM, IN THE FIRST PLACE. THEY ARE PUT IN THE SITUATION WHERE, MAYBE, THEY HAVE TO DEFEND OTHER ONES THAT PRIVATE ATTORNEYS WOULDN'T TAKE ON, UNLESS THE COURT WOULD APPOINT THEM. AND TO ADDRESS THAT SITUATION SLIGHTLY, IT SEEMS TO ME THAT THOSE COUNSEL WHO DO ACT IN CONFLICT SCENARIOS, TAKE THE RISK ON CONFIDENTLY, AND CAN INSURE THEMSELVES AGAINST ANY CONFLICT CLAIMS AGAINST THEM, DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, AND IT IS A RISK RISK-REWARD THING FOR THEM, AND THEY HAVE AN OPPORTUNITY TO DO THAT, WHEREAS PUBLIC DEFENDERS DO NOT.

WHAT ABOUT THE ARGUMENT THAT THE PUBLIC DEFENDERS OFFICE IS AN ADMINISTRATIVE, SORT OF HE CAN NOMINAL -- ECONOMICAL WAY OF PROVIDING LAWYERS TO INDIGENT DEFENDANTS, WHO CONFLICT COUNSEL WOULD BE AN ECONOMICAL, SOUND WAY TO DO IT, MORE THAN TO HAVE A CONFLICT COUNSEL, BUT THAT OTHERWISE THE ESSENCE OF IT IS THE SAME.

YES, YOUR HONORMENT THE SELECTION OF CLIENTS -- YOUR HONOR, THE SELECTION OF CLIENTS IS BASICALLY THE SAME. YOUR HONOR, IF I CAN GET BACK TO WHY YOU DO NOT BELIEVE THE STATUTE OF LIMITATION HAS RUN, TOO MY CLIENT, THE RULE THAT WAS HANDED DOWN IN ROWE, AND ADOPTED BY THIS COURT, THAT THE DEFENDANT MUST OBTAIN POSTCONVICTION RELIEF -- OBTAIN POSTCONVICTION RELIEF AND PRIOR TO THAT OBTAINING MALPRACTICE AGAINST HIS ATTORNEY, AND IN OBTAINING THAT POSTCONVICTION RELIEF, THAT THE STATUTE BEGINS TO RUN. AS FAR AS MY CLIENT IS CONCERNED, MY CLIENT IS AN APPELLANT COUNSEL, AND THE PROPER POSTCONVICTION RELIEF FOR APPELLANT COUNSEL WOULD BE TO FILE A PETITION FOR HABEAS CORPUS ON DIRECT APPEAL, ALLEGING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

MR. BARRY, I AM AFRAID YOUR TIME IS UP, SIR. WE HAVE YOUR BRIEFS. AND WE WILL, CERTAINLY, HAVE THOSE FOR OUR CONSIDERATION. THANK, SIR.

MR. MOONEY. MR. WARDEN.

MAY IT PLEASE THE COURT. THE STATE OF FLORIDA IS HERE TO URGE THAT THIS COURT EXTEND THE DOCTRINE OF JUDICIAL IMMUNITY TO PUBLIC DEFENDERS. I HAVE FOUR REASONS THAT I THINK SUPPORT THE POLICY WHY THAT -- WHY THIS COURT SHOULD DO. THAT I THINK WHICH WILL ADDRESS SOME OF THE QUESTIONS THAT THE COURT HAS, ALREADY, RAISED, BUT I THINK ONE POINT I WOULD LIKE TO MAKE, FIRST, IS THAT JUDICIAL IMMUNITY IS, REALLY, INTERTWINED CLOSELY WITH THE SEPARATION OF POWERS DOCTRINE. IT WAS INVENTED BY THE COURT, TO PROTECT ITSELF FROM THE LEGISLATURE DECIDING AS TO WHAT IT WOULD OR

WOULD NOT WAIVE AS SOVEREIGN IMMUNITY, AS TO THIS BRANCH OF GOVERNMENT, AND THE REAL QUESTION IN THIS CASE BECOMES IT IS CRIMINAL JUSTICE SYSTEM. WHAT IS ESSENTIAL TO THE FUNCTIONING OF THIS BRANCH OF GOVERNMENT, AND TO -- AND DO YOU WANT IT SUBJECT TO THE WHIMS OF SOVEREIGN IMMUNITY AND WHETHER THE LEGISLATURE INCREASES THE LIMITS TO \$1 MILLION, RATHER THAN \$100,000 OR WHATEVER.

DO WE PROTECT INDIVIDUAL LAWYERS, UNDER THAT SCHEME?

PROTECT WHICH LAWYERS, SIR?

INDIVIDUAL LAWYERS THAT OPERATE IN THE CRIMINAL JUSTICE SYSTEM.

YOU MEAN PRIVATE LAWYERS.

YES.

NO. THEY ARE DIFFERENT IN THIS CASE.

PRIVATE COUNSEL PAID FOR BY THE STATE?

I THINK THE SOVEREIGN IMMUNITY WILL APPLY TO CONFLICT COUNSEL NECESSARILY THIS STATE. IF THEY WERE TO APPLY THIS TO CONFLICT COUNSEL, IT WOULD BE APPLIED THE SAME.

DO THOSE POLICY ISSUES CHANGE, AS YOU GO TO CONFLICT COUNSEL?

I THINK THEY DO.

WOULD YOU EXPLAIN.

FIFERS ALL, I THINK SOVEREIGN IMMUNITY IS LOGICAL, BECAUSE OF THE SET UP OF ARTICLE V, AND BECAUSE OF ALL OF THE CRIMINAL ISSUES IN THIS STATE. WITHOUT THE PUBLIC DEFENDERS, THIS WHOLE SYSTEM WOULD CRASH, AND ALTHOUGH I DON'T HAVE ANYTHING SPECIFIC BEFORE THIS COURT, I THINK THAT ANECDOTALLY WHEN PUBLIC DEFENDERS ARE TRYING THE CASE, THE SITUATION WILL COME TO A HALT. SECOND OF ALL, IT -- TO A HALT. SECOND OF ALL, IT IS NOT A CLAIM WHERE THE PERSON CAN PROVE THAT THEY WERE THE TOTALLY WRONG PERSON, INNOCENTLY CONVICTED. IT IS NOT THAT CLAIM THAT MAY BE THE PROBLEM. IS THE LITIGATION THAT MAY ENSUE, IF, IN FACT, WE SAY THE PUBLIC DEFENDERS ARE OPEN TO THIS. THE BURDEN OF DISTRACTION AND RESOURCES THAT MUST BE ALLOCATED TO THE DEFENSE CLAIMS, AS OPPOSED TO THAT ONE CASE IN 1,000, OR WHATEVER, WHERE SOMEONE MAY ACTUALLY BE ABLE TO PROVE THEIR CLAIM.

JUDICIAL IMMUNITY HAS NOT BEEN IN EFFECT FOR PUBLIC DEFENDERS OVER THE LAST 20 YEARS, HAS IT?

CORRECT.

SO WHAT IS -- THIS IS BEING RAISED, HERE, FOR THE FIRST TIME, SO WE REALLY DON'T HAVE A RECORD.

RIGHT.

IN TERMS OF UNDERSTANDING THAT THE PUBLIC DEFENDERS ARE BEING DISTRACTED FROM THEIR DUTIES, BY LAWSUITS, DO WE HAVE --

THE CONTEXT IS THIS. GIDEON VERSUS WAINWRIGHT WAS 1963. THAT IS ONLY 37 YEARS AGO. THAT IS WHAT CREATED THE SYSTEM, AND TWENTY YEARS AGO, WE DIDN'T HAVE THE SYSTEM

THAT WE HAVE TODAY. IT HAS BEEN EVOLVING TO WHERE, NOW, TODAY, WE HAVE A SYSTEM REPRESENTING 93 PERCENT-PLUS OF ALL OF THE CRIMINAL DEFENDANTS IN THIS STATE. JUDICIAL IMMUNITY WASN'T EXTENDED TO PROSECUTORS, UNTIL 1993. THAT WAS ONLY SEVEN YEARS AGO. SO CLEARLY THIS HAS BEEN AN EVOLVING PROBLEM, THAT AS LAWYERS THINK ABOUT CASES AND PRISONERS THINK ABOUT LITIGATION, THEY COME UP WITH NEW IDEAS THAT ARE GOING TO EVOLVE THAT WE ARE NOW GOING TO HOLD THESE PEOPLE RESPONSIBLE AND SUE THEM FOR MALPRACTICE, AS WE HAVE IN THE PRIVATE TORT SECTOR, SO I DON'T THINK THAT, ALONE, IS A REASON NOT TO DO IT. I THINK IT IS A NEW CONCEPT THAT THIS COURT JUST CREATED FOR STATES ATTORNEYS, IN 1993.

WHAT --

I WAS GOING TO ASK ABOUT THE THIRD POINT. GO AHEAD.

MY THIRD POINT?

GO AHEAD.

MY THIRD POINT IS THAT THE PRIVATE TORT SYSTEM DOESN'T APPLY VERY WELL TO PUBLIC DEFENDERS. YOU CAN ENUMERATE A NUMBER OF FACTORS THAT JUSTIFY THE PRIVATE TORT SYSTEM, BUT I THINK YOU CAN BOIL THEM DOWN TO A FEW, ONE OF WHICH IS PERSONAL ACCOUNTABILITY AND RESPONSIBILITY, THAT THE WRONGDOER OUGHT TO PATE. WELL, UNDER OUR PRESENT SYSTEM, THE ASSISTANT PUBLIC DEFENDER THAT COMMITS THE MALPRACTICE DOESN'T PAY. THERE IS NO PERSONAL LIABILITY. THE PUBLIC DEFENDER, HIMSELF OR HERSELF, HAS NO PERSONAL LIABILITY. THE ONLY LIABILITY, HERE, IS ON BEHALF OF THE STATE AND THE STATE TAXPAYERS.

THAT IS FOR ALL CLAIMS AGAINST THE STATE. WE CAN MAKE THAT ARGUMENT ABOUT --

BUT AS FAR AS APPLYING THE TORT SYSTEM, THERE IS NO JUSTIFICATION, HERE, THAT SOMEHOW WE ARE MAKING A WRONG DOER PAY. IT IS, ALSO, NOTHING DO WITH BEHAVIOR MODIFICATION. WE HAVE AN EXTENSIVE SYSTEM OF BAR DISCIPLINE. YOU WERE DISCUSSING STANDARDS EARLIER THIS MORNING, ABOUT ATTORNEYS. WE REGULATE THE PROFESSION TREMENDOUSLY, SO WE DON'T NEED THE PRIVATE TORT SYSTEM TO REGULATOR MODIFY BEHAVIOR, EXCEPT IN THAT ONE RARE CASE THAT THEY MAY BE ABLE TO PROVE THEIR CLAIM, AS OPPOSED TO CITING A LOT OF LITIGATION OF PEOPLE WHO ARE A PART OF THIS INTEGRAL COURT -- AN INTEGRAL PART OF THIS COURT SYSTEM. SOVEREIGN IMMUNITY WOULD NOT BE THE BEST WAY TO SOLVE THIS PROBLEM. SECOND EVER ALL -- THE LEGISLATURE CAN CHANGE IT. SECOND OF ALL, IT DOES NOT BAR LITIGATION OR SUITS. IT IS THE PROBLEM FOR PUBLIC DEFENDERS HERE, AND IN THIS CASE, YOU ARE GOING TO GET INTO THE ISSUES OF, WELL, IS IT A DISCRETIONARY FUNCTION OR AN OPERATIONAL FUNCTION? WAS THERE A DUTY TO THE PUBLIC, UNDER THE CONSTITUTIONAL DUTIES OF THE PUBLIC DEFENDER, OR IS IT MERELY THE LEGAL MALPRACTICE, PER SE, OF THE ASSISTANT PUBLIC DEFENDER?

WHAT ABOUT THE ANALOGY TO OTHER PROFESSIONALS, JUST AS THE LAST QUESTION. THAT IS WHY, WHEN WE DON'T IMMUNIZE STATE DOCTORS, OTHER THAN IN -- OR ENGINEERS OR --

I THINK IT IS A VERY GOOD QUESTION, AND MY RESPONSE TO THAT IS WE DON'T HAVE TO PROVIDE STATE HOSPITALS. WE DON'T HAVE TO PROVIDE STATE DOCTORS. WE DO THAT AS A SERVICE AS A DECISION THAT WE HAVE MADE TO MAKE. UNDER WAYNE WRIGHT, THE PUBLIC DEFENDER HAS A CHOICE. HE CAN'T NEGOTIATE A FEE.

AN ORGANIZATIONAL OFFICE, I WOULD LIKE TO IMPOSE THAT THIS WAS JUST A CHOICE MADE IN THIS ORGANIZATION AND ADMINISTRATION AND ECONOMY, WASN'T IT?

IT MAY VERY WE MEAN BE THAT WAY, WITH YOU I THINK -- I WOULD -- BUT I THINK -- I WOULD GO BACK TO MY FIRST AND LAST POINT. I KNOW THIGH MY TIME IS UP. THAT IT IS A -- I KNOW THAT MY TIME IS UP. IT IS A PART OF THIS COURT'S JUDICIAL SYSTEM. IT IS A PART OF THE PROTECTION OF THIS COURT'S SYSTEM AND THE POTENTIAL LITIGATION. IF THE COURT SAYS THAT IT IS OKAY TO GO AHEAD AND OPEN UP LITIGATION TO THOSE KINDS OF THINGS, THEN THAT IS THIS COURT'S DECISION. BUT IT IS A POLICY DECISION THAT IS, REALLY, NOT WITHIN THE PURVIEW OF THIS COURT BUT THE LEGISLATURE. THANK YOU.

YOUR HONORS, I WOULD LIKE TO, EXCUSE ME, FIRST ADDRESS THE FAIRNESS AND THE CONSTITUTIONAL IMPLICATIONS OF WHAT COUNSEL ARE ASKING THIS COURT TO DO. THEY ARE ASKING YOUR HONORS TO TREAT INDIGENTS IN A DIFFERENT WAY THAN PEOPLE WHO CAN AFFORD TO PAY THEIR OWN PRIVATE COUNSEL. YOU HEARD, THIS MORNING, IN THE VERY FIRST ARGUMENT BEFORE YOUR HONORS, ABOUT THE RULE CHANGE, THAT THE PUBLIC DEFENDERS FROM THE STANDPOINT OF HOW THEY REPRESENT THEIR CLIENTS, THEY WANT TO BE TREATED JUST LIKE ANY OTHER LAWYERS. AND THEY SHOULD BE. THEIR PRIMARY DUTY IT IS TO REPRESENT THE INDIVIDUAL INDIGENT DEFENDANTS, AND AS YOUR HONOR, JUSTICE ANSTEAD SAID, IT JUST HAPPENS THAT, IN THE STATE OF FLORIDA, WE HAVE SET UP THIS PUBLIC DEFENDER SYSTEM AS AN ECONOMIC AWAY TO -- AS A HE CAN NOMINAL WAY TO -- AS AN ECONOMICAL WAY TO PROVIDE THAT SERVICE.

DON'T WE, NOW, HAVE CONSTITUTIONAL -- ELECTED OFFICERS, THAT IS THAT IT HAS, NOW, BECOME AN INHERENT PART OF THE CRIMINAL JUSTICE SYSTEM AND, REALLY, A PART OF GOVERNMENT, THAT IS THAT WE HAVE THESE ELECTED OFFICIALS, NOW, AS A MATTER OF FACT, ON THE GROUND, THAT DO HAVE ALL OF THESE POLICY CONSIDERATION TO SAY MAKE ABOUT HOW MANY LAWYERS ARE WE GOING TO PUT IN THE MISDEMEANOR DIVISION AND HOW MANY LAWYERS ARE WE GOING TO PUT IN THE FELONY DIVISION, AND NOW DO WE WANT JURIES, IN TORT CASES, MALPRACTICE CASES, IN EFFECT SETTING THOSE POLICIES.

THEY WON'T BE. EXCUSE ME.

AS OPPOSED TO THE ELECTED OFFICIALS AND THEN THE PEOPLE THAT WE HAVE ENTRUSTED WITH THOSE DECISIONS?

THEY WON'T BE, BECAUSE UNDER SOVEREIGN IMMUNITY, THERE IS NO LIABILITY FOR THOSE KINDS EVER PLANNING-LEVEL DECISIONS. THE ONLY KIND OF LIABILITY O'CLOCK HAVE, UNDER SOVEREIGN I AM -- OF LIABILITY SITUATIONS. THE ONLY LIABILITY THAT YOU CAN HAVE IS AS TO THEIR PARTICULAR PRACTICE IN THE CASE.

YOU AGREE THAT THIS GOES BEYOND THE SCOPE OF ILLEGAL ACTION, AS FRAMED IN THIS CONCEPT HERE, THEN, BECAUSE THERE ARE SOME CLAIMS GOING INTO ASSETS AND THOSE KINDS OF THINGS.

GOING INTO THE SOVEREIGN IMMUNITY ISSUE, WHICH IS WHAT YOU ARE DISCUSSING. I WILL GO BACK. SOME OF THE ALLEGATIONS ARE BORDERLINE. I CAN SEE. THAT BUT CERTAINLY THE ALLEGATION OF NEGLIGENT SUPERVISION AND ACTUAL LEGAL MALPRACTICE AT THE TRIAL AND TRIAL PREPARATION IS, CLEARLY, OPERATIONAL LEVEL, WHICH WOULD NOT BE BARRED BY SOVEREIGN IMMUNITY. GETTING BACK TO THE JUDICIAL IMMUNITY, I WANT TO MAKE CLEAR WHAT THE CASE LAW SAYS ABOUT JUDICIAL IMMUNITY. THIS COURT, IN PARITINO, DID NOT GIVE JUDICIAL IMMUNITY TO THE STATE PROSECUTORS, BECAUSE THEY WERE PART OF THE JUDICIAL BRANCH OF GOVERNMENT. THAT IS NOT THE RATIONALE. THIS COURT DID NOT GIVE PROSECUTORS JUDICIAL IMMUNITY BECAUSE THEY ARE AN ARTICLE V ENTITY. THIS COURT GAVE JUDICIAL IMMUNITY TO PROSECUTORS, BECAUSE THEY PERFORM A JUDICIAL OR QUASI-JUDICIAL FUNCTION. THAT IS THE REASON. THERE IS NO QUESTION THAT ALL CRIMINAL DEFENSE COUNSEL, INCLUDING PUBLIC DEFENDERS, PRIVATE LAWYERS, WHAT HAVE YOU, ARE PART OF THIS

CRIMINAL JUSTICE SYSTEM, BUT THAT IS NOT THE TEST.

WOULD YOU EXPLAIN THAT A LITTLE FURTHER, THAT PROSECUTORS PERFORM A JUDICIAL OR QUASI-JUDICIAL FUNCTION. THEY ARE AN ADVOCATE, AREN'T THEY, FOR THE STATE?

THEY ARE AN ADVOCATE FOR THE STATE, BUT I BELIEVE THAT PROSECUTORS PERFORM A QUASI-JUDICIAL FUNCTION, BECAUSE THEY MAKE DECISIONS AS TO WHO THEY ARE GOING TO CHARGE. AND I THINK THAT IS THE QUASI-JUDICIAL. I THINK THAT THE ONLY ENTITY WHO IS ENTITLED TO PURE JUDICIAL IMMUNITY IS THE JUDGES, BUT THE QUASI-JUDICIAL IMMUNITY, CORK TO THIS COURT, IN PARATINO, IS BECAUSE PROSECUTORS MAKE THE DECISIONS AS TO WHO THEY ARE GOING TO PROSECUTE.

WOULDN'T YOU SAY THE PUBLIC DEFENDERS PERFORM A DUTY FOR THE STATE, ALSO, THAT OFFICE OF THE PUBLIC DEFENDER?

THEY PERFORM SOME DUTY FOY THE STATE, THERE IS NO QUESTION, BUT THE PRIMARY DUTY IS TO THE CLIENT. YOU KNOW, SURE, THE PUBLIC DEFENDER, BECAUSE OF THE -- THAT IS THE WAY THAT THE STATE OF FLORIDA HAS SET UP FOR PROVIDING THIS CONSTITUTIONALLY-REQUIRED PROVISION OF COUNSEL. SO IN THAT SENSE, THEY ARE PERFORMING AN ASPECT OF GOVERNMENT, A REQUIREMENT OF GOVERNMENT, BUT THAT IS NOT THE PRIMARY FOCUS OF THE ROLE OF THAT BODY.

AREN'T THEY A LITTLE DIFFERENT FROM THE ORDINARY LAWYER, THOUGH, IN THAT THEY ARE NOT FREE TO SELECT THEIR CLIENTS? DOESN'T THAT PUT THEM IN A LITTLE DIFFERENT CATEGORY?

YOUR HONOR, THERE IS CERTAINLY SOME DIFFERENCES, AND I DON'T THINK ANYONE IN THIS ROOM COULD SAY THAT PUBLIC DEFENDERS ARE EXACTLY LIKE PRIVATE COUNSEL. THERE ARE SOME DIFFERENCES. BUT THE FUNDAMENTAL TASK OF THE PUBLIC DEFENDER IS TO PROVIDE THE INDIGENT WITH LEGAL SERVICES, AND IF YOU SAY THAT THE PUBLIC DEFENDER IS NOT RESPONSIBLE FOR LEGAL MALPRACTICE BUT A PRIVATE COUNSEL IS, THEN YOU ARE SAYING THAT THOSE PEOPLE WHO ARE INDIGENT AND ARE FORCED TO ACCEPT THE PUBLIC DEFENDER AS THEIR COUNSEL, DO NOT HAVE THE SAME RIGHTS AS THE INDIVIDUALS WHO CAN AFFORD COUNSEL. I THINK THAT IS UNFAIR. I THINK THAT IS A VIOLATION OF THE FEDERAL CONSTITUTION AND THIS STATE'S CONSTITUTION. I WOULD LIKE TO --

ISN'T THERE SOME EQUITY OR QUID PRO QUO, IN THAT THE PUBLIC DEFENDERS ARE PERFORM AGO DUTY FOY THE STATE, THE SAME WAY AS THE STATE ATTORNEYS AND THE PROSECUTORS ARE PERFORMING A DUTY FOR THE STATE? SO WHY SHOULDN'T THEY ENJOY THE SAME IMMUNITY?

BECAUSE THEY ARE PERFORMING THAT AS AN INCIDENT ALASPECT. THEIR PRIMARY DUTY -- AS AN INSIDE DENIAL ASPECT. THEIR -- AS AN INCIDENTAL ASPECT. I THINK THE PRIMARY CASE THAT DISCUSSES, THIS THE TWO CASES ARE WILCOX AND LORENZO CASE. THAT IS THE RATIONALE THAT THEY USE. THERE HAS BEEN SOME CASE LAW, NOT ON STATE LAW BUT IN FEDERAL PUBLIC DEFENDERS, THEY HAVE DECIDED THAT THERE IS NO IMMUNITY, IN THE FERRY VERSUS ACKERMAN CASE, NO IMMUNITY FOR THE PROSECUTOR, FEDERAL PUBLIC DEFENDERS, FOR THE SAME REASON THIGH HIM SAYING THERE IS A PRIMARY DUTY, ON THE PART OF THESE INDIVIDUALS, IS TO THE INDIVIDUAL CLIENTS AND NOT TO THE GOVERNMENT.

SPEAKING OF THAT, AND I AM NOT SURE HOW THIS, REALLY, WORKS OUT IN REALITY, BUT WE SEE, A LOT OF TIMES, IN INEFFECTIVE ASSISTANCE CASES, THAT THE LAWYER, THE VERY LAWYER THAT TRIED THE CASE GOES IN AND SAYS, YEAH, I SCREWED THIS UP. I SHOULD HAVE DONE THAT. I SHOULD HAVE DONE THIS. IF THERE WERE IMMUNITY GIVEN, WOULD THERE BE MORE OF AN INCENTIVE FOR LAWYERS TO GIVE THAT KIND OF TESTIMONY, SINCE, REALLY, THERE WOULD BE



NO EXPOSURE FOR, ESSENTIALLY, THROWING IN THE TOWEL?

THERE MIGHT OR THERE MIGHT NOT, BUT DON'T FORGET THAT THE EXPOSURE IS NOT TO THAT INDIVIDUAL LAWYER. NEITHER THE ASSISTANT PUBLIC DEFENDER NOR THE PUBLIC DEFENDER, HIMSELF OR HERSELF, IS GOING TO BE EXPOSED TO THESE DAMAGES. THESE ARE DAMAGES TO BE COLLECTED FROM THE STATE.

SPEAKING OF THAT AND THEN THE POLICY, SINCE, OF COURSE, YOU HAVE GOT A LAWYER THAT IS BEING GIVEN TO THE INDIGENT AT NO COST TO THE INDIGENT. THEY GET ASSESSED CERTAIN NOMINAL COSTS. WHAT IS THE -- WHAT SHOULD BE THE -- WHAT SHOULD ALLOW A SET-OFF? IN OTHER WORDS IF THEY ARE SELECT COLLECTING FOR THEIR DAMAGES, SHOULD -- IF THEY ARE COLLECTING FOR THEIR DAMAGES, SHOULD THERE BE SOME TYPE OF QUID PRO QUO IN THERE?

I THINK THE LEGISLATURE. I DON'T KNOW THAT THE COURT COULD IMPOSE THAT KIND OF PENALTY.

THE D.O.C. COULD COME IN AND GET RECOVERY?

CERTAINLY, IF THERE IS RECOVERY OF THAT NATURE.

LET ME EXPLORE THAT A LITTLE FURTHER, IN THAT THE WHOLE ESSENCE OF LEGAL MALPRACTICE, WHICH HAS GROWN, OVER THE LAST HALF THE LAST CENTURY, REALLY, STEMS STEMMED FROM -- STEMMED FROM A PRIVITY TYPE OF THEORY, IN THAT, ONCE YOU ENTER INTO A CONTRACT WITH SOMEONE, YOU HAVE A DUTY TO EXERCISE IT WITH REASONABLE CARE, AND THEN THERE WAS THE -- THE -- YOU GOT, FROM THERE, SORT OF THE SAME WAY YOU HAVE, WITH DOCTORS, THAT IT IS AN ERROR, OPENITION, BUT IT, REALLY, HAS ITS BASIC FUNDAMENTAL BASIS, IN A CONTRACT. THAT IS WHERE YOUR DUTY COMES FROM. WHEN THAT DOESN'T REALLY WORK, IF WHAT WE ARE SAYING IS THAT YOU ARE GOING TO HAVE THIS. YOU CAN'T GET TO ONE. YOU CAN'T GET TO THE LAWYER THAT IS PROVIDING IT, BUT THE LAWYER, REALLY, DOESN'T HAVE A CONTRACTOR AN UNDERLYING PRIVITY ARRANGEMENT WITH THE CLIENT, WHAT IS BEING PROVIDED IS A GOVERNMENTAL SERVICE.

WELL, BUT, IT IS A GOVERNMENTAL PROFESSIONAL SERVICE, AND IN THAT RESPECT, IF YOU LOOK AT THE SOVEREIGN IMMUNITY CASES, SPECIFICALLY THE TRIANON CASE, IT TALKS ABOUT MEDICAL MALPRACTICE, FOR EXAMPLE. INDIVIDUALS GOING TO A STATE-OPERATED HOSPITAL. THIS COURT SPECIFICALLY HELD IN THAT CASE, THAT THAT IS THE KIND OF PROFESSIONAL LEGAL DUTY THAT THE INDIVIDUALS ARE EXPECTING. THERE IS NO CONTRACT TO PAY FOR INDIGENTS, WITH HOSPITALS, JUST AS THERE IS NO CONTRACT TO PAY PUBLIC DEFENDERS FOR LEGAL SERVICES, BUT THIS COURT HELD THAT THAT IS A KIND OF DUTY THAT WILL ALLOW SOMEONE TO SUE FOR OPERATIONAL-LEVEL ACTIVITIES, SPECIFICALLY THE COURT SAID, NOW, YOU CAN'T SUE UNDER SOVEREIGN IMMUNITY ISSUE, YOU CAN'T SUE IN THE INDIGENT MEDICAL PROVISION SITUATION, YOU CAN'T SUE FOR HOW MANY DOCTORS ARE ON STAFF OR HOW THAT HOSPITAL IS OPERATED, BUT YOU CAN SUE FOR HOW THAT INDIVIDUAL DOCTOR TREATS THAT PATIENT, AND IF THAT INDIVIDUAL DOCTOR TREATS THAT PATIENT NEGLIGENTLY, THEN THERE IS A PROFESSIONAL DUTY THAT HAS BEEN BREACHED, AND A LAWSUIT CAN BE FILED, AND I THINK THAT THIS IS THE SAME THING, BUT FOR THIS DISCUSSION THAT WE ARE HAVING, ABOUT THE PARTICIPATION OF THE PUBLIC DEFENDERS OFFICE IN THE LEGAL SYSTEM.

WOULD YOU ADDRESS THE APPELLATE, WHILE YOU ARE IN THIS WHOLE THING.

THE WHAT?

THE APPELLATE LAWYER. IT SEEMS TO ME THAT WE HAVE A COLLATERAL PROCEEDING THAT YOU GO THROUGH, AND HERE THAT HAS BEEN ACCOMPLISHED, AS FAR AS THE TRIAL COUNSEL IS CONCERNED, BUT I SEE, FOR THE APPELLATE COUNSEL, GOES THROUGH THE HABEAS ROUTE, AND

WE HAVE NOT GONE THROUGH THAT PROCESS WITH THIS APPELLATE COUNSEL, CORRECT?

I AM NOT SURE THAT -- I MEAN, I AM NOT A CRIMINAL LAWYER, SO I APOLOGIZE, IF I SAY SOMETHING INCORRECT, BUT --

I THINK WE NEED TO FOCUS IN ON THIS WHOLE PROCESS, WHICH IS THAT WE HAVE TESTED WHAT THE TRIAL LAWYER HAS DONE, AND IT IT SEEMS TO ME THAT THAT IS A PROCEDURE CONSISTENT WITH THIS WHOLE ACTION, AND WE HAVE NOT GONE THROUGH THAT PROCESS WITH THE APPELLATE ACTION, HERE, IT SEEMS TO ME, AND DOES THAT MAKE A DIFFERENCE?

I DON'T THINK IT MAKES A DIFFERENCE. I DON'T THINK THAT, WHEN YOU GO IN ON AN INEFFECTIVE ASSISTANCE OF COUNSEL 3.850 PROCEEDING, THAT YOU ARE REQUIRED TO LAY OUT EVERYTHING THAT YOU HAVE. I THINK WHAT THE FOURTH DISTRICT, DID AND I THINK WHAT THIS COURT DID HAD, IN STEELE, IS TO SAY THAT THAT IS YOUR PREREQUISITE TO A LEGAL MALPRACTICE CASE. YOU HAVE TO HAVE HAD YOUR CONVICTION SET ASIDE, EITHER BY DIRECT --

IT WASN'T SET ASIDE BECAUSE OF THE APPELLATE COUNSEL'S CONDUCT. IT WAS BECAUSE OF TRIAL COUNSEL. THAT IS WHERE I AM HAVING SOME DIFFICULTY.

I DON'T THINK IT HAS TO BE. I THINK IT IS A PREREQUISITE TO ENABLE A LAWSUIT. IT WOULD BE A MOOT POINT POINT, FOR -- MOOT POINT FOR MR. ROWE, FOR EXAMPLE, TO GO IN, NOW, AND SAY I WANT 3.850 RELIEF AGAINST MY APPELLATE COUNSEL, SINCE HIS CONVICTION HAS ALREADY BEEN SET ASIDE. HE, NEVERTHELESS, DOES HAVE TO PROVE LEGAL MALPRACTICE OF THE APPELLATE LAWYER, IN HIS LEGAL MALPRACTICE CASE, AND THAT IS WHAT HAS TO BE EXPECTED OF HIM, NOT THAT HE WOULD HAVE TO DO TWO SEPARATE 3.850 MOTIONS. I WOULD LIKE SPEAK ABOUT SOVEREIGN IMMUNITY BRIEFLY. COUNSEL FOR MY OPPOSITION HAS INDICATED THAT THEY DON'T THINK THAT SOVEREIGN IMMUNITY SHOULD -- THEY DON'T THINK THE WAIVER OF SOVEREIGN IMMUNITY, UNDER 768.28 SHOULD APPLY, FOR A VARIETY OF REASONS. THE PRIMARY ARGUMENT THAT THEY SEEM TO HAVE MADE IS THAT MANY OF THE ALLEGATIONS OF THE COMPLAINT DO NOT RISE TO THE LEVEL OF OPERATIONAL NEGLIGENCE, IF YOU WILL. I WOULD LIKE TO ADDRESS THOSE FEW ALLEGATIONS THAT I BELIEVE CLEARLY ARE OPERATIONAL INNATE, AND THAT THIS COURT HAS HELD SIMILAR ALLEGATIONS TO BE OPERATIONAL INNATE. NUMBER ONE, WE ALLEGE NEGLIGENT SUPERVISION OF THE ASSISTANT PUBLIC DEFENDER. THIS COURT, IN LEE VERSUS H.R.S., INDICATED THAT NEGLIGENT SUPERVISION WOULD ALLOW A SUIT, THAT SOVEREIGN IMMUNITY WOULD NOT PRECLUDE SUCH A SUIT. WE, ALSO, ALLEGED THAT THERE WAS NEGLIGENT SELECTION OF BRAWLLY. I DON'T THINK THAT ANY OF THE CASES, REALLY, DISCUSS THE NEGLIGENT SELECTION OF A PARTICULAR PROVIDER, A PARTICULAR DOCTOR, A PARTICULAR LAWYER, WHAT HAVE YOU. WE BELIEVE THAT THAT WOULD BE AN OPERATIONAL DECISION. CERTAINLY WORKER-LEVEL NEGLIGENCE, THE NEGLIGENCE OF THE ACTUAL PERSON PROVIDING THE SERVICE, IS ACTIONABLE. THIS COURT HELD THAT, IN H.R.S. VERSUS WHALEY AND IN H.R.S. VERSUS IMMUNEY, SAYING THE DECISIONS OF HOW AN OFFICE MIGHT OPERATE ARE NOT ACTIONABLE. THE ACTUAL ACTION OF THE WORKER IS CLEARLY ACTIONABLE, AND THAT IS ONE OF THE ALLEGATIONS THAT WE HAVE MADE HERE. I BELIEVE THAT THE COURT OUGHT TO REJECT THE ARGUMENT THAT JUDICIAL IMMUNITY PRECLUDES ANY LAWSUIT AGAINST A PUBLIC DEFENDER. I THINK THE PARADE OF HORRIBLES THAT HAS BEEN SUGGESTED IN THE BRIEFS IN HERE, THIS MORNING, IS SOMETHING THAT THIS COURT SIMPLY CANNOT CONSIDER IN A VACUUM. WE HAVEN'T SEEN ANY PARADE OF HORRIBLES. SINCE 1982, WHEN WINDSOR VERSUS GIBSON WAS DECIDED, UNTIL TODAY, WE HAVE NOT SEEN A HUGE INFLUX OF MALPRACTICE LAWSUITS AGAINST PUBLIC DEFENDERS IN THIS STATE. MOREOVER, UNDER STEELE VERSUS KEHOE, THAT YOUR HONORS HAVE SDPIDED, INDIVIDUALS HAVE A -- HAVE DECIDED, INDIVIDUALS HAVE A VERY DIFFICULT BURDEN TO MEET, BEFORE THEY CAN EVEN FILE THAT MALPRACTICE ACTION. THEY HAVE TO HAVE THEIR CONVICTION SET ASIDE, SO THAT IS GOING TO, FURTHER, REDUCE THE AMOUNTS OF LAWSUITS THAT MIGHT BE FILED, EVEN IF THIS COURT SHOULD DECIDE THERE IS NO JUDICIAL IMMUNITY.

BECAUSE THIS PARADE OF HORRIBLES IS SOMETHING THAT WE HAVEN'T SEEN, AND THAT YOUR HONORS HAVE NOT, CANNOT LOOK IN THE CASE LAW AND SEE INSTANCES WHERE FACTS HAVE BEEN PROVED THAT THERE IS A LOT OF LITIGATION IN THIS AREA, I THINK THAT THIS IS AN ISSUE FOR THE LEGISLATURE. THE LEGISLATURE -- ON A.

HAVE THEIR BEEN A PARADE OF HORRIBLES, BEFORE THIS COURT GRANTED IT TO THE STATE ATTORNEY?

THAT IS A DIFFERENT ISSUE. YEAH. I AGREE THAT YOU CERTAINLY HAVE THAT RIGHT. HOWEVER, THAT WAS BECAUSE OF THE QUASI-JUDICIAL NATURE OF IT, AND THE IMPARTIALITY, AND THAT THAT PARTICULAR BODY ABSOLUTELY HAS TO HAVE. THE PUBLIC DEFENDERS IS NOT THAT CLEAR. THE MAIN -- ONE OF THE MAIN REASONS THAT COUNSEL HAS SUGGESTED JUDICIAL IMMUNITY IS BECAUSE OF THE PARADE OF HORRIBLES.

BUT HAVING THE OFFICE OF THE PUBLIC DEFENDER, NOW, -- HASN'T THE OFFICE OF THE PUBLIC DEFENDER, NOW, BEEN PLOWED INTO AND BECOME A SALIENT PART OF THE CRIMINAL JUSTICE SYSTEM IN THE STATE OF FLORIDA? AREN'T THEY JUST AS CRITICAL TO THE CRIMINAL JUSTICE SYSTEM, AS THE STATE ATTORNEYS?

I AGREE. I THINK THEY ARE CRITICAL. BUT I DON'T THINK THAT ANSWERS THE QUESTION, WITH ALL DUE RESPECT. I THINK THAT BEING A PART OF THAT SYSTEM IS NOT WHAT GIVES SOMEONE IMMUNITY. LAWYERS ARE -- PRIVATE LAWYERS ARE A PART OF THAT SYSTEM. BUT WE DON'T SHARE THAT IMMUNITY. WHAT GIVES JUDICIAL IMMUNITY IS JUDICIAL OR QUASI-JUDICIAL FUNCTION. AND AND THE PUBLIC --

I AM NOT TOO SURE. I HAVE PROBLEMS WITH THAT QUASI-, SUPPOSEDLY --

I AM GOING ON THE FARANTINO CASE, AND THAT IS THE CASE THAT THIS COURT --

I UNDERSTAND.

THAT WAS WHAT WAS DISCUSSED IN PARATINO, AND I BE -- BELIEVE THAT IS WAFERS REQUIRED IN PARATINO. IF THIS COURT HAS DETERMINED THAT THERE IS GOING TO AND HUGE AMOUNT OF LITIGATION AGAINST THE PUBLIC DEFENDERS, THEN THEY CAN GIVE PUBLIC DEFENDERS IMMUNITY. I DON'T BELIEVE THAT THIS COURT SHOULD GIVE A BLANKET JUDICIAL IMMUNITY TO PUBLIC DEFENDERS, BECAUSE YOU ARE NOT TREATING OUR CITIZENS FAIRLY, WHO CANNOT AFFORD THE -- TO HIRE THEIR OWN COUNSEL.

BUT FOR A QUASI-JUDICIAL NATURE OF THE STATE ATTORNEYS, SHOULD THEY BOTH BE TREATED, IF YOU EXCLUDE THAT, SHOULD THEY, BOTH, BE TREATED ALIKE?

THE STATE ATTORNEYS AND THE PUBLIC DEFENDERS. IS THAT BECAUSE ARE ASKING? I AM SORRY.

NO. IF YOU TAKE THE POSITION THAT SEEMS AS IF THE LINCHPIN OF YOUR ARGUMENT IS QUASI-JUDICIAL NATURE OF THE STATE ATTORNEYS, IF YOU TAKE THAT FACTOR OUT, IS THERE A SALIENT REASON WHY THEY SHOULD NOT BE TREATED ALIKE, THE STATE ATTORNEYS AND THE PUBLIC DEFENDERS?

NO. I DON'T THINK SO. I THINK THEN YOU GO TO SOVEREIGN IMMUNITY. SOVEREIGN IMMUNITY TAKES CARE OF THE DIFFERENT FUNCTIONS. SOVEREIGN IMMUNITY, YOU KNOW, WE ARE CONCERNED ABOUT THE PUBLIC DEFENDER NOT BEING BURDENED BY LAWSUITS TO TELL HIM HOW TO OPERATE HIS OR HER OFFICE. SOVEREIGN IMMUNITY TAKES CARE OF. THAT SOVEREIGN IMMUNITY WOULD, CERTAINLY, TAKE CARE OF THE STATE ATTORNEYS' ROLE, FOR THE MOST PART, BUT WHAT WE -- WHAT SOVEREIGN IMMUNITY DOESN'T DO AWAY WITH IS THE LEGAL

MALPRACTICE ASPECT OF IT, AND WE WOULD ASK YOUR HONORS TO REJECT A BLANKET DETERMINATION OF JUDICIAL IMMUNITY FOR PUBLIC DEFENDERS, HOLD THAT SOVEREIGN IMMUNITY DOES APPLY, AND THAT, UNDER THE MANY CASES THAT THIS COURT HAS DECIDED, ONLY OPERATIONAL-LEVEL CONDUCT OF THE PUBLIC DEFENDER OR HIS STAFF SHOULD BE ACTIONABLE. THANK YOU.

THANK YOU, COUNSEL. MR. ROSE, I BELIEVE -- I GIVE YOU ONE MINUTE. ALL THE TIME HAS BEEN USED.

THANK YOU. COUNSEL FOCUSES ON THE DISTINCTIONS BETWEEN THE PROSECUTOR AND THE PUBLIC DEFENDER. BUT IN REALITY, WE HAVE TO UNDERSTAND THAT THE PUBLIC DEFENDER PERFORMS A DUAL ROLE. THE PUBLIC DEFENDER HAS DUAL OBLIGATIONS. ALTHOUGH HE HAS AN OBLIGATION TO HIS CLIENTEST, HAS AN OBLIGATION TO PROMOTE THE EFFICIENT JUDICIAL PROCESS. IT IS THE PUBLIC DEFENDER'S DUAL ROLE THAT CREATES THE INHERENT CONFLICT OF INTEREST. HE IS EXPECTED TO RELIEF COURT DOCKETS BY SETTling MANY CASES, YET HE HAS TO ZEALOUSLY REPRESENT HIS CLIENT, AND IT IS THIS CONFLICT, WHICH REQUIRES THE EXERCISE OF DISCRETION AND WHICH SUPPORTS IMMUNITY.

THANK YOU VERY MUCH.

THANK YOU, ALL COUNSEL, FOR YOUR HELPING US WITH THIS VERY IMPORTANT ISSUE. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.