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Idaho Supreme Court
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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

NATALIE SHUBERT,

Plaintiff, Respondent,

vs.

ADA COUNTY, a Political Subdivision of the State of Idaho; ALLEN TRIMMING, an employee of Ada County in his personal and individual and official capacities as the Ada County Public Defender, and MICHAEL WARREN LOJEK an employee of Ada County in his personal and individual and official capacities as Deputy Ada County Public Defender.

Defendants, Appellants.

**Supreme Court No. 46403-2018**

# RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada

**Hon. Samuel A. Hoagland, District Judge, Presiding**

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# I. STATEMENT OF THE CASE

To avoid redundancy, Plaintiff/Respondent (Ms. Shubert) will confine her Statement of the Case to additional facts not contained in the Brief of the Defendants/Appellants Ada County Public Defender Alan Trimming and Deputy Ada County Public Defender Michael Lojek, hereafter referred to collectively as the "Ada County Public Defenders," and "Deputy PD Lojek" in compliance with I.A.R. 35(d).

## A. NATURE OF THE CASE

The nature of this case is as presented by the Ada County Public Defenders, other than the fact that Ms. Shubert disputes that the Ada County Clerks are immune from suit for the errors made in the underlying criminal cases as represented by Ada County Public Defenders . However, that is not an issue before this Court on appeal.

## B. PROCEDURAL HISTORY

The procedural history relevant to the Ada County Public Defenders' appeal is generally as stated in their brief. However, contrary to the Ada County Public Defenders' representation, the finding that the plea agreement and Court order certifications signed by Ms. Shubert did not evidence her knowledge of the contents of the relevant documents was not made by the District Court *sua sponte*. This issue was presented to the District Court by the Ada County Public Defenders who briefed it extensively (*CR* 265, 369-370, 390-91, 626-627, 639, 679, 680 687-688, 695, 707-709) as did Ms. Shubert (*CR* 667-669). The District Court considered the signed "guilty plea advisory forms" (*CR* 765-766) noting that "[d]efendants rely on "certifications" Shubert signed as evidence that Shubert was on notice that her probation was erroneously extended." *CR* 785. The Ada County Public Defenders having placed the issue before the District Court, the District Court considered it, but rejected their contention, finding that the facts in the record were insufficient to conclude that Ms. Shubert understood what she was signing:

These "certifications" do not show that Shubett was aware of facts that should have made her inquire further. The Guilty Plea Advisory Form only shows that she was aware that the maximum penalty for issuing a check without funds was three years imprisonment and that under the plea agreement she would receive six years of probation 0n the GT-601 case and three years of probation on the NSF—2880 case' There is no indication that she understood that her probation could be tolled and extended if she was charged with probation violations.

*Memorandum Decision & Order Re: Various Motions*, *CR* 786.

The District Court did not address the Ada County Public Defenders' contract analysis regarding the documents that Ms. Shubert signed because it was not raised below. Nevertheless, it is addressed below by Ms. Shubert in case this Court considers that on appeal.

## C. STATEMENT OF FACTS

### C[1] Summary of the Record

The facts contained in the record may be complex, but the issues to be decided by this Court on appeal can be boiled down to their essence. At all relevant times with respect to the illegal sentences, Ms. Shubert was represented by Deputy PD Lojek, then an active member of the Idaho State Bar. Like all public defenders, Deputy PD Lojek represented private clients, and after the adoption of Idaho Bar Commission Rule 306(a)5 was required that to carry professional malpractice insurance. Ms. Schubert was sentenced to probation in two cases. Her probation expired in the first case on February 27, 2012, and in the second case, her probation expired on April 2, 2014, when Judge Owen commuted her sentence. She was subsequently charged with and convicted of probation violations in both cases because Deputy PD Lojek repeatedly failed to recognize that illegal sentences were being imposed extending the period of Ms. Shubert's probation beyond that which could be imposed by law. As explained by Judge Owen in the underlying criminal cases, due to illegal orders, Ms. Shubert was unlawfully confined in the Ada County Jail during 2014-2015 and again in 2016. *Hearing Transcript of March 23, 2016, Aug. p.* 4-12.

**C[2] Ms. Shubert's Background**

Ms. Shubert has no legal training, dropped out of high school when she was 15-16 years old, but did acquire a GED while incarcerated in the Ada County Juvenile Facility. *Shubert Decl.* ¶ 4, *CR* 171. During all times that Michael Lojek ("Deputy PD Lojek") represented Ms. Shubert, Ms. Shubert relied upon him to explain the significance of court orders. Ms. Shubert continues to rely upon the assistance of her attorneys in this civil lawsuit. *Id.*

**C[3] February 27, 2009 – the Original Sentencing**

Ms. Shubert was represented Deputy PD Lojek on February 27, 2009, when Judge Owen sentenced her to three years' probation in the *Insufficient Funds Case* and six years' probation in the *Grand Theft Case*. *Shubert Decl.* ¶ 8, *CR* 171. Deputy PD Lojek represented Ms. Shubert throughout both cases, other than concerning the motion to correct an illegal sentence filed in the *Insufficient Funds Case* in 2016, *Shubert Decl.* ¶ 6, *CR* 171, after Deputy PD Lojek had left the Ada County Public Defender's Office. With the exception of the Rule 35 Motion to correct an illegal sentence, Ms. Shubert communicated exclusively with Deputy PD Lojek during the pendency of both cases, and she did not communicate with any other member of the Ada County Public Defender's Office regarding her cases. *Shubert Decl.* ¶ 7, *CR* 171.

Ms. Shubert was present in the courtroom on February 27, 2009 when Judge Owen sentenced her to three years' probation in the *Insufficient Funds Case*, and six years' probation in the *Grand Theft Case*. *Shubert Decl.* ¶ 9, *CR* 171, *Judgment of Conviction, Suspended Sentence, Order of Probation and Commitment* entered in the *Insufficient Funds Case* on March 3, 2009*, CR 184-189; Judgment of Conviction, Suspended Sentence, Order of Probation and Commitment* entered in the *Grand Theft Case* on March 3, 2009, *CR* 190-196. At sentencing on February 27, 2009 Ms. Shubert understood her probation was set to expire at midnight on February 26, 2012 in the *Insufficient Funds Case* and on February 26, 2015 in the *Grand Theft Case*. *Shubert Decl.*

¶ 10-12, *CR* 171-172, Exhibits 2 and 3, *CR* 184-196. She did not, however, understand what occurred following her initial sentencing on February 27, 2009. *Shubert Decl.* ¶ 14-28, *CR* 172-175.

### C[4] February 1, 2011 – Probation Violation Charges Resulting in Orders Illegally Sentencing Ms. Shubert to Probation Ending on May 19, 2017

On or about February 1, 2011 Ms. Shubert was charged with a probation violation. As a result of those charges, orders were entered in both cases which mistakenly and illegally extended her probation in both the *Insufficient Funds Case* and the *Grand Theft Case* to May 19, 2017. See, *Order Reinstating and Amending Probation* (*Insufficient Funds Case*) entered on May 25, 2011, CR 197-201; *Order Reinstating and Amending Probation* (*Grand Theft Case*) entered on May 25, 2011, *CR* 202-204; and amended *Order Reinstating and Amending Probation* (*Grand Theft Case*) entered on September 15, 2011. See also the transcript of Judge Owen's remarks recognizing those mistakes made in open court on March 23, 2016 in Ada County Case Number CR-FE-2008-2880. *Hearing Transcript, Aug. p.* 4-12.

To the best of Ms. Shubert's recollection, she does not recall Judge Owen stating that her probation had been extended or that it would expire at midnight on May 19, 2017 in either case, nor does she recall Deputy PD Lojek advising her that her probation would expire on May 19, 2017 at that sentencing hearing, or at any subsequent time. *Shubert Decl.* ¶ 14; *CR* 172. If Ms. Shubert had been aware that Judge Owen had mistakenly imposed an illegal sentence, she would have requested that Deputy PD Lojek move for appropriate relief in both cases at that time. *Id.*

Ms. Shubert does not recall ever seeing copies of the two orders identified as *Order(s) Reinstating and Amending Probation* entered May 25, 2011 in the *Insufficient Funds Case* (*CR* 197-199) and the *Grand Theft Case* (*CR* 202-204), or the *Amended Order Reinstating Probation* entered on September 15, 2011 (*CR* 2005-2007) prior to dismissal of the *Insufficient Funds Case*.

Even if Ms. Shubert was shown those orders, her public defender, Deputy PD Lojek, (1) did not point out that her probation was set to expire on midnight of May 19, 2017, (2) did not advise her that her probation had been extended, and (3) did not explain to her how this could have happened. At the time, Ms. Shubert did not understand how the reinstatement of probation affected her in terms of whether or not the reinstatement had the effect of extending the length of her probation. Deputy PD Lojek never explained this either. *Shubert Decl.* ¶ 15; *CR* 172-173. Had Ms. Shubert been aware that exhibits 4, 5 and 6 to her declaration had imposed illegal sentences, she would have requested that Deputy PD Lojek move for appropriate relief following the issuance of those orders. *Shubert Decl.* ¶ 16; *CR* 173, Ex. 4,5,6; *CR* 197-207.

As a matter of fact, based on the record, when the Ada County Public Defender's Office and Deputy PD Lojek were appointed to represent Ms. Shubert, they had a duty to provide Ms. Shubert effective assistance of counsel during the sentencing phase of her cases, and to make sure that all sentences imposed in her cases complied with the law. *Trimming Depo. p.* 43, *l.* 5 – 24, *Aug. p.* 252. This duty included the obligation to bring to the attention of the sentencing court any such errors, and to make a timely motion for relief with respect to any error in sentencing.

Q. At the time of this April 2, 2014 hearing can you tell me whether in terms of the standards that you attempted to enforce in your office it was Mr. Lojek's duty to know whether or not Ms. Shubert was on probation in the *Insufficient Funds Case*?

A. Yes. We have already discussed ad nauseam about these sequence of orders, and the errors in the orders that occurred one after another, and it would appear that somebody should have at least been – the handling attorney, in this instance Mr. Lojek, should have been aware that something was untoward about those orders. But even an invalid court order is subject to some force and effect until such time as it is set aside.

Q. So what does that have to do with whether or not your deputies need to know whether somebody is on probation or not?

A. No, I have already conceded to you that it should have been caught at some point in time that those orders by the court were erroneously entered.

*Trimming Depo. p.* 80 *l.* l7 – *p.* 81 *l.* 11; Aug. *p.* 261.

Any delegation of the foregoing duties to Ms. Shubert would have breached these standards. *Dennis Benjamin Decl.* ¶ 5-7; *Aug. p.* 16-17. Jonathan Loschi, the Deputy Ada County Public Defender who took over for Deputy PD Lojek when he left that office, quickly discovered Lojek's mistake when he reviewed Ms. Shubert's file. He testified that he would not rely on a client to be able to even understand a written order without assistance of their public defender and would not even ask the client to review the order for accuracy if it appeared accurate to the attorney. *Loschi Depo. p.* 71 *l.* 15-22.

**C[5] April 23, 2013 – Judge Owen Revokes Ms. Shubert's Probation in Both Cases**

According to the *Judgment of Conviction, Suspended Sentence, Order of Probation and Commitment* entered on March 3, 2009 in the *Insufficient Funds Case*, Ms. Shubert's probation in the *Insufficient Funds Case* ended on February 26, 2012. *CR* 292-297; *Shubert Decl.* ¶ 17; *CR* 173. On or about January 4, 2013 motions for a bench warrant and probation violation were filed in the *Insufficient Funds Case* and *Grand Theft Case*. Deputy PD Lojek represented Ms. Shubert on both violations. *Shubert Decl.* ¶ 21; *CR* 174. Deputy PD Lojek apparently failed to recognize and as demonstrated by the record failed to advise Ms. Shubert or Judge Owen that she could not be charged with a probation violation in the *Insufficient Funds Case* since her probation in that case ended on February 26, 2012. *Shubert Decl.* ¶ 18; *CR* 173. Had Deputy PD Lojek had informed Ms. Shubert that her probation in the *Insufficient Funds Case* was expired she would have requested that Deputy PD Lojek take appropriate measures to have the probation violation and the underlying case dismissed. *Shubert Decl.* ¶ 22; *CR* 174.

Nevertheless, on April 23, 2013 the orders *Revoking Probation, Imposing Sentence and Order Retaining Jurisdiction* were entered in both the *Insufficient Funds Case* and the *Grand*

*Theft Case* pursuant to a probation violation. Judge Owen revoked her probation in both cases and imposed sentences with credit for time served of 145 days for prejudgment incarceration and credit for 53 days served in jail prior to sentencing on the first probation violation, and credit for 91 days served prior to sentencing on the second probation violation. Judge Owen then retained jurisdiction in both cases for an indeterminate period of time not to exceed 365 days. *Shubert Decl*. Ex. 7, 8, *CR* 208-215. Again, Deputy PD Lojek apparently failed to recognize that Ms. Shubert was no longer on probation in the *Insufficient Funds Case*. Deputy PD Lojek explained to Ms. Shubert that the provision for "retained jurisdiction" meant that she would be serving a "rider." *Shubert Decl*. ¶ 20; *CR* 173.

**C[6] September 11, 2013 – Judge Owen Illegally Reinstates Probation and Retains Jurisdiction in the Insufficient Funds Case**

After completion of the "rider," Ms. Shubert was released. At hearing on September 11, 2013 Ms. Shubert again appeared before Judge Owen. At that time Ms. Shubert's Sentence in the *Insufficient Funds Case* was suspended and probation was reinstated for a period of three years under the exact same terms and conditions entered on February 27, 2009. Deputy PD Lojek apparently failed to recognize the fact that Ms. Shubert could no longer be legally on probation in the *Insufficient Funds Case.* Deputy PD Lojek again failed to explain to Ms. Shubert that the probation ordered by Judge Owen in the *Insufficient Funds Case* expired on February 26, 2012 and that Ms. Shubert was no longer on probation as of that date. Had Deputy PD Lojek so informed Ms. Shubert, she would have requested that he move to dismiss the *Insufficient Funds Case*. *Shubert Decl*. ¶ 23; *CR* 174.

There were two orders entered the *Insufficient Funds Case* with respect to the probation violations of which Ms. Shubert was found guilty. The first was the *Order Reinstating Probation After Retained Jurisdiction* entered September 17, 2013 *Shubert Decl*. ¶ 24; *CR* 174

Ex. 10; *CR* 221-223. That order incorrectly states that Ms. Shubert's probation would expire on September 10, 2016 unless otherwise ordered by the Court. *Id.* To the best of Ms. Shubert's recollection Deputy PD Lojek did not discuss Exhibit 10 with her and Ms. Shubert is confident that he did not advise her that her probation in the *Insufficient Funds Case* had been extended for over four years following its expiration on February 26, 2012. *Shubert Decl.* ¶ 24; *CR* 174.

The second *Order Reinstating Probation After Retained Jurisdiction* entered in the *Insufficient Funds Case* on October 7, 2013 states that Ms. Shubert's probation would expire at midnight on February 25, 2015.[1] *Shubert Decl.* ¶ 23 *Shubert Decl.* ¶ 24; *CR* 174, Ex. 11; *CR* 224-226. To the best of her recollection, Deputy PD Lojek did not discuss Exhibit 11 with her, and she is confident that he did not advise her that her probation in the *Insufficient Funds Case* had been extended for over three years following its expiration on February 26, 2012. *Shubert Decl.* ¶ 24; *CR* 174.

Ms. Shubert does not recall being provided with copies of Exhibits 10, 11 and 12 (the three *Order(s) Reinstating Probation After Retained Jurisdiction* entered on September 17, 2013, October 7, 2013 and December 5, 2013, respectively) to review. In any case, even after reviewing these orders now, the various expiration dates in them, as compared with her original sentence, are so confusing that without the assistance of an attorney she could not really understand them. *Shubert Decl.* ¶ 27; *CR* 175.

Deputy PD Lojek did not advise Ms. Shubert that there was any discrepancy between the probation expiration dates of September 10, 2016, February 25, 2015, and February 26, 2015, contained in Exhibits 10, 11 and 12. *Shubert Decl.* ¶ 28; *CR* 175, Ex. 10-12. Ms. Shubert was

[1] An *Order Reinstating Probation After Retained Jurisdiction* was also entered in the *Grand Theft Case* on December 5, 2013, Exhibit 12; *CR* 227-229. That order stated that Ms. Shubert's probation in the *Grand Theft Case* would expire on February 26, 2015. *Shubert Decl.* ¶ 26; *CR* 175.

not aware of these discrepancies, or that the expiration dates contained in Exhibit 10 and 11 mistakenly stated that her probation in the *Insufficient Funds Case* expired after the end of the probation that had been ordered in that case. Had Ms. Shubert been aware that Exhibits 10 and 11 entered in the *Insufficient Funds Case* ordered an illegal sentence, she would have requested that Deputy PD Lojek move for appropriate relief at that time. *Id.*

**C[7] April 4, 2014 – Judge Owen Revokes Probation, Imposes Sentence And Commutes Sentence To Ada County Jail With Credit For Time Served In The *Grand Theft Case.***

On April 2, 2014, Ms. Shubert appeared before Judge Owen in the *Grand Theft Case* with Deputy PD Lojek and was sentenced with respect to a motion for probation violation filed on February 24, 2014.

Prior to the April 2, 2014 Court appearance, Ms. Shubert advised Deputy PD Lojek that she wanted to leave Idaho and go to Texas. Ms. Shubert advised Deputy PD Lojek that her grandmother had written a letter to Judge Owen requesting that she be permitted to go to Texas to live with her and to help care for her niece who also lived there. Deputy PD Lojek advised Ms. Shubert that Judge Owen would not allow her to go to Texas and that he would likely impose sentence. Nevertheless, Deputy PD Lojek argued that Ms. Shubert should not be returned to jail, but rather be permitted to join her grandmother and her brother in Corpus Christi Texas. *Transcript*, *Aug. p.* 221-237 at 228.

Deputy PD Lojek's argument prevailed. At the hearing in that case Judge Owen made it clear that he was not reinstating probation in the *Grand Theft Case* and that he was terminating her probation and ordering Ms. Shubert released as of that date, declaring "This case is at an end." *Aug. p.* at 235. Judge Owen also observed at that time "In all, you have spent almost a year in jail on this case. And the only reason you are not here on this other case is you only have three years' probation in that other case, again, another case involving checks." *Aug. p.* 234. On

April 4, 2014, Judge Owen entered his *Order Revoking Probation, Imposing Sentence and Commuting Sentenced to Ada County Jail with Credit for Time Served* in the *Grand Theft Case*. *Shubert Decl*. Ex. 19, *CR* 258. Obviously, Ms. Shubert was no longer on probation after April 2, 2014.

Given Judge Owen's ruling, and his statements at the time of the hearing, Ms. Shubert planned to go to Texas. Whether or not Judge Owen called both cases at the time that he commuted Ms. Shubert's sentence in the *Grand Theft Case*, and simply failed to enter an order identical to Exhibit 18 in the *Insufficient Funds Case*, *Shubert Decl*. Ex. 18, *CR* 253-257, he certainly made it clear that he believed that Ms. Shubert was no longer on probation in the *Insufficient Funds Case.* Given Ms. Shubert's understanding that she was no longer on probation in either case, on or about April 4, 2014 she left to live her grandmother in Texas. *Shubert Decl*. ¶ 32, *CR* 176.

**C[8] June 2014 – Ms. Shubert's Alleged Probation Violation**

Ms. Shubert's understanding, acquired in early June 2014, was that sometime around the beginning of June 2014 Ms. Shubert learned from her mother that her probation officer, Christine Martindale, had contacted her and advised her that Ms. Shubert was in violation of her probation. Having been advised of this by her grandmother, Ms. Shubert called Christine Martindale who asked what her residence was. Ms. Shubert told her that she was living in Texas. Christine Martindale told Ms. Shubert that she had absconded, because she was still on probation. Christine Martindale did not advise Ms. Shubert which case she had allegedly violated her probation in. Ms. Shubert told Christine Martindale that this was not what Judge Owen had told her when she appeared in Court, but Christine Martindale said that Ms. Shubert was still on probation according to her paperwork, and that she needed to take this up with her attorney. *Shubert Decl*. ¶ 34, *CR* 176-177.

Relying upon what Ms. Martindale told Ms. Shubert, she returned to Idaho. A *Motion for Probation Violation* was filed on or about June 29, 2014. *Shubert Decl*. Ex. 16, *CR* 244-247. The report of probation violation was prepared by Christine Martindale *Shubert Decl.* ¶ 34, , *CR* 176-177; Ex. 17, *CR* 248-252. Ms. Shubert contacted Deputy PD Lojek and explained to him that there was some confusion and asked him to do whatever was necessary to correct it. Ms. Shubert explained to him that she did not believe she was on probation. *Shubert Decl*. ¶ 35, *CR* 177. Deputy PD Lojek advised Ms. Shubert that this was just a result of a clerical mistake and that he would take care of it. *Shubert Decl*. ¶ 36, *CR* 177.

Apparently completely forgetting Judge Owen's ruling at the hearing on April 2, 2014, Deputy PD Lojek advised Ms. Shubert that the probation violation was only on one case number. Deputy PD Lojek advised Ms. Shubert that he was going to file a motion to have the probation violation dismissed. *Shubert Decl*. ¶ 38.

**C[9] July 23, 2014 – Ms. Shubert Is Illegally Incarcerated**

Ms. Shubert was arrested and incarcerated on July 23, 2014 in connection with the alleged probation violation in the *Insufficient Funds Case* and remained incarcerated until December 10, 2014. *Shubert Decl*. ¶ 40 Ex. 18. Deputy PD Lojek never came to see her, though he represented her in connection with that probation violation and appeared before Judge Owen. *Shubert Decl*. ¶ 41. Ms. Shubert requested that Deputy PD Lojek take action on her behalf to correct the mistakes that had occurred in her case. *Shubert Decl*. Ex.1, *CR* 181-183. Ms. Shubert continued to languish in jail.

**C[10] January 19, 2015 - Ms. Schubert Contacts Deputy PD Lojek Requesting His Assistance Regarding Her Illegal Sentence**

Ms. Shubert emailed Deputy PD Lojek on January 19, 2015 and explained to him that she had spoken with her probation officer, Christine Martindale, on January 16, 2015 at which

time Christine Martindale showed Ms. Shubert documentation concerning her probation violation for which she was sentenced in April 2014. Ms. Shubert explained to Deputy PD Lojek that it was her understanding that her sentences were to run concurrently in the *Insufficient Funds Case* and *Grand Theft Case* and that Christine Martindale advised there was a "mix up." *Shubert Decl.* ¶ 43, *CR* 177-178; Ex. 1, *CR* 181-183. Deputy PD Lojek responded to Ms. Shubert's January 19, 2015 email stating "Awesome. Thanks for following up with her on your end; it ought to really help!" *Shubert Decl.* ¶ 44, *CR* 178; Ex. 1, *CR* 181-183.

### C[11] January 29, 2015 - Ms. Schubert Again Contacts Deputy PD Lojek Again Requesting His Assistance Regarding Her Illegal Sentence

Ms. Shubert again emailed Deputy PD Lojek on January 29, 2015 and explained that she had spoken with Christine Martindale on the morning of January 29, 2015 concerning the letter that Ms. Shubert had received from Deputy PD Lojek. Ms. Shubert explained to Deputy PD Lojek that Ms. Martindale had told her that she understood that both of her cases were to run concurrently and that someone should be able to just contact Judge Owen or central records, indicating that he should do so. *Shubert Decl.* ¶ 45, *CR* 178.

### C[12] February 9, 2015 – Ms. Schubert Again Contacts Deputy PD Lojek Again Requesting His Assistance Regarding Her Illegal Sentence

Ms. Shubert again emailed Deputy PD Lojek on February 9, 2015 and advised him that she was confused. ("I havent (*sic.*) done anything to get violated for ?? Im (*sic.*) so confused ??") By this point in time Ms. Shubert was completely confused, because her understanding was that both cases had been commuted in April of 2014, so it made no sense to her that she would still have been on probation. *Shubert Decl.* ¶ 46, *CR* 178.

### C[13] April 8, 2015 – Ms. Schubert Once Again Contacts Deputy PD Lojek Again Requesting His Assistance Regarding Her Illegal Sentence

On April 8, 2015 Ms. Shubert emailed Deputy PD Lojek asking him to please put in a

request to Judge Owen to discharge her felony probation. ("Mike can we please put (*sic.*) in a request to owed (*sic.*) to discharge my felony probation yet ??") *Shubert Decl*. Ex. 1, *CR* 181-183.

**C[14] Defendant Respondent Lojek Takes No Action To Correct Ms. Schubert's Illegal Sentence**

There is no indication that Deputy PD Lojek made any attempt to review the paperwork relating to Ms. Shubert's cases or make any attempt to correct what Ms. Martindale had referred to as a "mix up." *Shubert Decl*. ¶ 47, *CR* 178. Ms. Shubert relied on Deputy PD Lojek to investigate whether or not she should have been on probation when she was charged with a probation violation in June 2014. To the best of her knowledge, Deputy PD Lojek never filed a motion to discharge her probations in either case and did not put in a motion to correct the "mix up" of which she had advised him. *Shubert Decl*. ¶ 49, *CR* 178.

**C[15] March 11, 2016 – Ms. Shubert Is Arrested Again For An Alleged Probation Violation**

On March 11, 2016, Ms. Shubert was again arrested on an alleged probation violation in the *Insufficient Funds Case* and incarcerated in the Ada County Jail from March 11, 2016 to March 21, 2016. *Shubert Decl*. Ex. 19, *CR* 258. See, *Ada County Sheriff's Office Jail Booking Sheet*. *Shubert Decl*. ¶ 29; *CR* 175, Ex. 18; *CR* 253-257.

**C[16] The County Public Defenders' Omissions Become Apparent**

At that time, Ms. Shubert still did not understand what was going on with the *Insufficient Funds Case* and the *Grand Theft Case,* but fortunately, Ms. Shubert was assigned a new public defender, Jonathan Loschi, ("Deputy PD Loschi") who thoroughly reviewed her files. Based on that review, it was obvious that Ms. Shubert should have been released from probation a number of years earlier. Deputy PD Loschi stated that he figured out there was an issue with Ms. Shubert's case "when I first picked the case up." *Loschi Depo p.* 14 *l.* 18-20 - *p.* 15 *l.* 1-8, *Aug. p.*

323. The issue was evident to Deputy PD Loschi from the file, and he didn't even need to speak with Ms. Shubert. *Id.* Deputy PD Loschi quickly determined an illegal sentence had been imposed by understanding and applying simple legal concepts like the applicable maximum sentence for a specific crime to determine the maximum period of probation, and using that simple information to spot a clear clerical error, that Ms. Shubert had been reinstated on probation in 2011, but that probation was set to expire in 2011. *Loschi Depo p.* 17 *l.* 11-25 - *p.* 18 *l.* 1-6, *Aug. p.* 323-324. Deputy PD Loschi also testified that an illegal sentence was imposed against Ms. Shubert and that an attorney familiar with the orders in the case should have caught the mistake. *Loschi Depo p.* 37 *l.* 19-25 - *p.* 38 *l.* 1-18, *Aug. p.* 324-325. Deputy PD Loschi immediately filed a motion to correct an illegal sentence which was granted by Judge Owen on March 24, 2016, Exhibit 20, and the *Insufficient Funds Case* and *Grand Theft Case* were dismissed on that date. *Shubert Decl.* ¶ 43, *CR* 177-178; Ex.1, *CR* 181-183. Ex. 21, *CR* 261; Ex. 22, *CR* 262.

Indeed, Deputy PD Lojek's negligence throughout his representation of Ms. Shubert is demonstrated by circumstantial evidence as well as direct evidence. Deputy PD Loschi, the Public Defender who picked up Ms. Shubert's file after Deputy PD Lojek resigned his position, determined immediately that she had been illegally sentenced and filed an Idaho Criminal Rule 35 motion for relief. *Loschi Depo. p.* 14 *l.* 18-25 - *p.* 15 *l.* 1-8, *Aug. p.* 323. There was no reason for a lawyer with familiarity with the file not to see that the sentence Ms. Shubert received in the *Insufficient Funds Case* was illegal. *Loschi Depo. p.* 37 *l.* 19-25 - *p.* 38 *l.* 1-18, *Aug. p.* 328-329.

The Ada County Public Defenders' negligence and recklessness are clear in the record.

Q. Do you think Mr. Lojek exercised due diligence when he, when and if he reviewed the order of May 25th, 2011 and failed to notice it misstated the expiration date of Ms. Shubert's probation in the insufficient funds check case as being May 19, 2017?

THE WITNESS: I believe that it should have been caught, yes.

*Trimming Depo p.* 43 *l.* 25, 44 *l.* 1-4 - *p.* 45 *l.* 18-19, *Aug. p.* 252.

Deputy PD Loschi testified that it is important as a public defender to check and review orders when they come in, *Loschi Depo p.* 59 *l.* 7-18 - *p.* 60 *l.* 1-25, *Aug. p.* 334, but that there was no established policy for reviewing orders in the Ada County Public Defender's Office. *Loschi Depo p.* 30 *l.* 23-25 - *p.* 31 *l.* 1-9, *Aug. p.* 327. The Ada County Public Defenders' failings were virtually inevitable since they also had no formal procedure at the Ada County Public Defender's Office for reviewing orders for accuracy as they came in, *Loschi Depo*. *p.* 70 *l.* 9 - *p.* 71 *l.* 1, *Aug. p.* 337, and there was no supervision to make sure that deputy attorneys were checking orders for accuracy, *Loschi Depo*. *p.* 71 *l.* 3-7, *Aug. p.* 337.

Deputy PD Loschi testified that the first thing a public defender should do when assigned a probation violation is review the file and go back through the history of the judgments to figure out the relevant time periods, determine whether the court has jurisdiction over a public defender's client, whether the client can be charged or pursued. Deputy PD Loschi testified that this is important because if there is an allegation of a parole violation while the client is alleged to be on probation, it is important to know for how long the accused was placed on probation, and it also helps to figure out the worst-case scenario that the client is facing, what sentence is hanging over the client's head, and how much credit the client has. *Loschi Depo p.* 66 *l.* 21-25 - *p.* 67 *l.* 1-25 - *p.* 68 *l.* 1-3, 23-25 - *p.* 69 *l.* 1-4, *Aug. p.* 336.

## II. IRCP 56 STANDARD OF REVIEW

When reviewing an order for summary judgment, the standard of review on appeal is the same standard used by the district court in ruling on the motion. *Davison v. Debest Plumbing, Inc.*, 163 Idaho 571, 574, 416 P.3d 943, 946 (2018) (quoting *Mendenhall v. Aldous,* 146 Idaho 434, 436, 196 P.3d 352, 354 (2008)). Summary judgment is only appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the

nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). If the evidence reveals no genuine issue as to any material fact, then all that remains is a question of law over which this Court exercises free review. *Id.* at 685-86, 183 P.3d at 773-74. *Dickinson Frozen Foods, Inc. v. J.R. Simplot Co.*, No. 45580, 2019 Ida. LEXIS 81, at *9 (May 3, 2019).

On appeal to the Idaho Supreme Court it "liberally construes the facts and existing record in favor of the non-moving party" in making such determination." *Hall v. Forsloff*, 124 Idaho 771, 773, 864 P.2d 609, 611 (1993). "If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). To meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1038 (1994). If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the non-moving party is not required to respond with supporting evidence. *Id. Smith v. Meridian Joint School Dist. No. 2*, 918 P.2d 583, 588, (Idaho 1996).

The Court construes the record in a light most favorable to the non-moving party and draws all reasonable inferences and conclusions in that party's favor. *Avila v. Wahlquist*, 126 Idaho 745, 747, 890 P.2d 331, 333 (1995).

## III. ISSUES ADDRESSED

Though the Ada County Public Defenders' brief does not contain a division under the heading "Issues Presented On Appeal," as required by I.A.R. 35, the following issues (as stated by the Ada County Public Defenders in the Procedural History section of their brief on appeal) are presented in this brief in the order in which they are discussed below:

1. Are public defenders entitled to immunity pursuant to Idaho Code section 6-904?
2. Does the unambiguous language in Idaho Code section 6-904A exempt public defenders and Ada County from liability?
3. Are public defenders entitled to immunity under the common law?
4. Is a criminal defendant presumed to have knowledge of the contents of a court document when she signs and certifies [sic.] a court document?

## IV. ARGUMENT

### A. QUESTION PRESENTED: DOES IDAHO CODE § 6-904(1) IMMUNIZE IDAHO PUBLIC DEFENDERS? ANSWER: NO.

#### A[1] Idaho Code § 6-904(1) Is Not Applicable To The Facts Of This Case

The Idaho Tort Claim Act provides:

> LIABILITY OF GOVERNMENTAL ENTITIES — DEFENSE OF EMPLOYEES. (1) Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho, provided that the governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.

Idaho Code § 9-603. Emphasis supplied.[2]

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[2] Under Idaho Code § 9-603 a governmental entity, but for any express exception granting immunity, is liable because a private attorney will be liable for legal malpractice. To establish a claim for attorney

> The purpose of the ITCA is to provide "much needed relief to those suffering injury from the negligence of government employees." *Sterling v. Bloom*, 111 Idaho 211, 214, 723 P.2d 755, 758 (1986) (quoting *United States v. Muniz*, 374 U.S. 150, 165, 83 S. Ct. 1850, 10 L.Ed. 2d 805 (1963)) (superseded on other grounds by statute, I.C. § 6-904A, as noted by *Harris v. State*, 123 Idaho 295, 301, 847 P.2d 1156, 1162 (1992)). The ITCA is to be construed liberally, consistent with its purpose, and with a view to "attaining substantial justice." *Id.* at 214-15, 723 P.2d at 758-59. Therefore, under the ITCA liability is the rule and immunity is the exception. *Id.*

*Rees v. State*, 143 Idaho 10, 19, 137 P.3d 397, 406 (2006). Emphasis supplied.

The Ada County Public Defenders argue that they are immune from liability under Idaho Code § 6-904(1), which provides:

> EXCEPTIONS TO GOVERNMENTAL LIABILITY. A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> 1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

Emphasis supplied.

Application of this exception to governmental liability for negligence requires a four-part factual inquiry to determine: (1) whether the Ada County Public Defenders were "governmental employees" within the meaning of the Idaho Tort Claims Act, (2) whether the Ada County Public Defenders were acting without malice or criminal intent, (3) whether the Ada County Public Defenders were acting in reliance upon the execution or performance of a statutory

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malpractice arising out of a civil action, the Plaintiff must show: (1) the creation of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or the standard of care by the lawyer; and (4) that the failure to perform the duty was a proximate cause of the damages suffered by the client. *Marias v. Marano*, 120 Idaho 11, 13, 813 *p.*2d 350, 352 (1991); *Johnson v. Jones*, 103 Idaho 702, 652 *p.*2d 650 (1982). At least for purposes of this appeal, there can be no real question that the Ada County Public Defenders committed legal malpractice damaging Ms. Schubert. There also can be no question that a private attorney is liable for legal malpractice for the omissions upon the basis of which Ms. Shubert seeks relief.

regulatory function, and (4) whether the Ada County Public Defenders were engaged in the performance of the discretionary function or duty at the time of the negligent acts and omissions that caused Ms. Shubert's damages.

### A[2] Public Defenders Should Not Be Considered "Governmental Employees" for Purposes of the Idaho Tort Claims Act

The Ada County Public Defenders cite *Sterling v. Bloom* for the proposition that since judges are immune from liability in exercising a discretionary function, Deputy PD Lojek should be equally immune. Again, the Ada County Public Defenders provide no Idaho authority for this proposition. This argument fails like the Ada County Public Defenders' argument for general immunity, based on a lack of authority in Idaho.

It is by no means conceded that public defenders are "governmental employees" within the meaning of the Idaho Tort Claims Act. First, the record does not establish that all public defenders in Idaho are employed by a governmental entity, as opposed to contracting with the governmental entity to provide legal services. Indeed, the powers and duties of the Idaho Public Defense Commission include the promulgation of rules establishing "model contracts and core requirements for contracts between counties and private attorneys for the provision of indigent defense services" and the review of defense attorneys for compliance with "contractual provisions." Idaho Code § 19-850 -- "Powers and duties of the state public defense commission." See, generally, *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017).

Second, the Ada County Public Defenders moved to dismiss Ms. Shubert's civil rights claim because public defenders are not "state actors" under 42 U.S.C. § 1983. *CR* 714. It is passing strange that the Ada County Public Defenders take the contradictory position that they are agents of the state for purposes of the Idaho Tort Claims Act, but not for purposes federal civil rights laws. The purpose of the Idaho Tort Claims Act is to protect those acting on behalf

of the state.

In deciding this issue, the District Court relied upon the logic of the United States Supreme Court in *Polk County v. Dodson*, 454 U.S. 312, 314 (1981), a case in which the Plaintiff filed a 42 U.S.C. § 1983 action against his former public defender alleging that she failed to adequately represent him in his appeal. In *Polk*, the United States Supreme Court stated:

> This assignment [of defense of an accused to a public defender] entailed functions and obligations in no way dependent on state authority. From the moment of her appointment, Shepard became Dodson's lawyer, and Dodson became Shepard's client. Except for the source of payment, their relationship became identical to that existing between any other lawyer and client. "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980).
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> * * *
>
> [I]t is the function of the public defender to enter "not guilty" pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities.
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> * * *
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> [A] public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States,* 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B), ABA Code of Professional Responsibility (1976).
>
> Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), established the right of state criminal defendants to the "'guiding hand of counsel at every step in the proceedings against [them].'" *Id.*, at 345, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, e. g., *Gideon v. Wainwright*, supra; *Holloway v. Arkansas*,

> 435 U.S. 475 (1978). At least in the absence of pleading and proof to the contrary, we therefore cannot assume that Polk County, having employed public defenders to satisfy the State's obligations under *Gideon v. Wainwright*, has attempted to control their action in a manner inconsistent with the principles on which Gideon rests.

*Polk Cty. v. Dodson*, 454 U.S. 312, 318, 102 S. Ct. 445, 449-52 (1981). Emphasis supplied.

Given the observations of the United States Supreme Court, it is difficult to see how public defenders are "an employee of the governmental entity" within the meaning of Idaho Code § 6-904(1). For practical purposes, public defenders are only paid by a governmental entity, and they are not entitled to immunity under Idaho Code § 6-904(1).

### A[3] The Exception Contained Within Idaho Code § 6-904(1) Is Limited To Public Employees Executing Or Performing A Statutory Or Regulatory Function Or Exercising Discretionary Functions

As observed by this Court, Idaho Code § 6-904(1) is sometimes referred to as the "discretionary function" exception to liability. *Brooks v. Logan*, 127 Idaho 484, 488, 903 P.2d 73, 77 (1995). It applies to governmental decisions entailing planning or policy formation:

> There is a two-step process for determining the applicability of this exception. *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987); *City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596, 600 (Ct. App. 1993). The first step is to examine the nature and quality of the challenged actions. *Id.* "Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be 'operational.'" *Ransom*, 113 Idaho at 205, 743 P.2d at 73. Decisions involving a consideration of the financial, political, economic and social effects of a policy or plan will generally be planning and "discretionary." *Id.* "While greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions; ... those with the least authority may, on occasion, make planning decisions which fall within the ambit of the discretionary function exception." *Id.*at 204, 743 P.2d at 72. The second step is to examine the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government. *Id.* at 205, 743 P.2d at 73.

*Dorea Enters. v. City of Blackfoot*, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007). Emphasis supplied.

Applying this test, the omissions of the Ada County Public Defenders constituting

negligence in the representation of Ms. Schubert were clearly "operational" and not within the scope of the exception to liability contained within Idaho Code § 6-904(1). Consequently, whether the Ada County Public Defenders were exercising "ordinary care" is moot, because Idaho Code § 6-904(1) does not apply in this case.

To the extent that Idaho Code § 6-904(1) requires construction by this Court, construction urged by the Ada County Public Defenders does not give effect to the obvious intent of the legislature to protect governmental entities from liability for the acts and omissions of their employees and entities, as opposed to simply protecting government coffers from having to indemnify those, as here, paid by the government but not acting on their behalf.

> When the Court must engage in statutory construction, it has the duty to ascertain the legislative intent, and give effect to that intent. *Messenger v. Burns*, 86 Idaho 26, 29, 382 P.2d 913, 915 (1963). To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. *Id.* at 29-30, 382 P.2d at 915-16.

*State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

### A[4] Even if I.C. § 6-904(1) Does Apply In This Case, Deputy PD Lojek Failed To Exercise Ordinary Care In Handling Ms. Shubert's Case

Deputy PD Lojek's reckless lack of ordinary care is demonstrated clearly in the record. The representation of Ms. Shubert by the Ada County Public Defenders unquestionably fell far below the standard of care for public defenders, as demonstrated by the testimony of the Ada County Chief Public Defenders themselves. See, *Statement of Facts*, *supra*, generally, and particularly the section entitled "The County Public Defenders' Omissions Become Apparent." See, also, *Benjamin Decl.* ¶ 10.

If I.C. 6-904(1) is applicable, the record before this Court is sufficient to preclude summary judgment because there is no evidence that Deputy PD Lojek exercised ordinary care in handling Mr. Shubert's cases, and there is at least a genuine issue of material fact as to

whether he acted recklessly. Currently, there is no basis upon which this Court can hold the Ada County Public Defenders immune under I.C. § 6-904(1) as a matter of law.

### B. QUESTION PRESENTED: DOES THE UNAMBIGUOUS LANGUAGE IN IDAHO CODE SECTION 6-904A(2) EXEMPT PUBLIC DEFENDERS AND ADA COUNTY FROM LIABILITY? ANSWER: NO.

The Ada County Public Defenders also rely on Idaho Code § 6-904A(2) as the basis for the claim of their immunity. In pertinent part, this section provides:

> Idaho Code § 6-904A. EXCEPTIONS TO GOVERNMENTAL LIABILITY. A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and <u>without reckless</u>, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
>
> *  *  *
>
> 2. Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity or by or <u>to a person who is on probation</u>, or parole, or who is being supervised as part of a court imposed drug court program, or any work-release program, or by or to a person receiving services from a mental health center, hospital or similar facility.

Emphasis supplied.

#### B[1] As Noted by the District Court, Idaho Code § 6-904A Was Not Enacted to Prevent Governmental Entities from Liability to a Person on Probation

In ruling on Ada County Public Defenders' Motion For Summary Judgment on the issue of immunity, the District Court observed:

> All the Idaho cases interpreting Idaho Code § 6-904A(2) deal with third party injury claims where the person that injured them was "under supervision, custody or care of a governmental entity" or was on probation. Those cases note that "[u]nder I.C. § 6-904A(2) the State generally enjoys immunity from suits in which a person is injured by another under the supervision of the State." *Smith v. Bd. of Corr.*, 133 Idaho 519, 522, 988 P.2d 1193, 1196 (1999). "Section 6-904A(2) was intended to provide immunity to the State from the 'unpredictable acts of third persons' who are under the 'state's custody, supervision and care.'" *Id.* at 523, 988 P.2d at 1197 (1999) (citing *Harris v. State Dep't of Health & Welfare*, 123 Idaho 295, 299, 847 P.2d 1156, 1160 (1992). "This limitation of liability is based upon the status of the person causing the injury, not the status of the person injured." *Mareci v. Coeur D'Alene Sch. Dist.* No. 271, 150 Idaho 740, 743, 250 P.3d 791, 794 (2011); *Coonse ex rel. Coonse v. Boise Sch. Dist.*, 132 Idaho 803, 806, 979 P.2d 1161, 1164 (1999) ("It is clear

that the immunity arises from the status of the person(s) causing the injury, not the status of the person injured.").

* * *

In passing the 2004 revisions to Idaho Code § 6-904A, the legislature indicated that the bill is meant to provide liability protection to probation and parole officers, not to immunize an attorney for malpractice claims. *See* 2004 Idaho Laws Ch. 227 (S.B. 1416).

*Memorandum Decision & Order Re: Various Motions*, *CR* 735. Emphasis supplied. The District Court's analysis of the application of Idaho Code § 6-904A was undeniably correct, and the Ada County Public Defenders are not provided immunity under that statute.

### B[2] Even If Idaho Code § 6-904A Covered Injuries to a Person on Probation, At Most There Are Issues of Fact As to Whether Ms. Schubert Was on Probation at the Time of the Negligence that Caused Her Damages

It is likely that the tortious omissions of the Ada County Public Defenders that damaged Ms. Schubert occurred both while she was lawfully on probation, (see, *p.* 4 *supra* "February 1, 2011 – Probation Violation Charges Resulting in Orders Illegally Sentencing Ms. Shubert to Probation Ending on May 19, 2017") and continued after the period during which she was lawfully on probation. Assuming that the omissions of the Ada County Public Defenders in repeatedly failing to recognize and failing to move to correct mistakes in orders, unwarranted charges of probation violation, and the entry of illegal orders or continuing tort, the tortious conduct occurred both while Ms. Schubert was on probation and thereafter.

As we have indicated previously, the definition of intentional infliction of emotional distress requires that there must be a causal connection between the wrongful conduct and the emotional distress, and the emotional distress must be severe. *Evans,* 118 Idaho at 220, 796 P.2d at 97. <u>By its very nature this tort will often involve a series of acts over a period of time, rather than one single act</u> causing severe emotional distress. For that reason we recognize the concept of continuing tort, as it was originally applied in *Farber*, should be extended to apply in other limited contexts, including particularly intentional infliction of emotional distress. We note, however, that embracing this concept in the area of intentional or negligent infliction of emotional distress does not throw open the doors to permit filing these actions at any time. The courts which have adopted this continuing tort theory have generally stated that the statute of limitations is only held in abeyance until the tortious acts cease. See, *e.g., Page*, 729 F.2d at 818, and *Twyman v. Twyman,* 790 S.W.2d 819 (Tex.App.1990). At that point the statute begins to run. If at some point after the statute has

run the tortious acts begin again, a new cause of action may arise, but only as to those damages which have accrued since the new tortious conduct began.

*Curtis v. Firth*, 123 Idaho 598, 604, 850 P.2d 749, 755 (1993). The underlying principles of the continuing tort theory logically apply here with respect to the application of Idaho Code § 6-904A to the continuing failure of the Ada County Public Defenders recognize and move to correct in the orders entered in 2011 and thereafter the illegal extension of Ms. Schubert's terms of probation beyond that allowed by law contained. This reckless conduct commenced in 2011 and continued into 2016.

Ms. Schubert was not legally on probation in the *Insufficient Funds Case* after February 26, 2012 (see, *p.* 3 *supra*) on February 26, 2012, and her maximum period of probation ended on February 26, 2015 in the *Grand Theft Case*. *Shubert Decl.* ¶ 10-12, *CR* 171-172, Exhibits 2 and 3, *CR* 184-196. Based on Judge Owen's rulings in the underlying criminal cases, Ms. Schubert was not on probation after April 2, 2014. See, *p.* 9, *supra*. As demonstrated, even if Idaho Code § 6-904A were interpreted contrary to the plain language of the statute to provide immunity with respect to injuries to probationers, Ms. Schubert was not legally on probation in the *Insufficient Funds Case* at the time of the Ada County Public Defenders' omissions resulting in her subsequent illegal incarcerations. Nevertheless, in addition to failing to detect the errors in the orders entered while she was on probation, Deputy PD Lojek failed to recognize the error in charging Ms. Schubert with a probation violation in the *Insufficient Funds Case* after probation ended in that case.

As noted by Deputy PD Loschi, who discovered Deputy PD Lojek's mistakes and corrected them, there were really two mistakes with respect to the September 17 , 2013 *Order Reinstating Probation after Retaining Jurisdiction* entered in the *Insufficient Funds Case* (*CR* 221-223) because (1) it never should have been entered, because Ms. Schubert was not on

probation, and (2) because, even if she was on probation, her probation could not have been extended to September 10, 2016, because that would have exceeded the maximum permissible sentence for the violation of the statute under which she was convicted. *Loschi Depo. p.* 40 *l.* 24 – *p.* 42 *l.* 9. It is clear from the record that the same mistake was made with respect to the *Order Revoking Probation, Imposing Sentence an Order Retaining Jurisdiction* entered in the *Insufficient Funds Case* on April 23, 2013, *CR* 208-211; and the *Order Reinstating Probation after Retaining Jurisdiction* entered in the *Insufficient Funds Case* on October 7, 2013, *CR* 224-226. As stated by Judge Owen at the hearing on Deputy PD Loschi's *Motion to Correct Illegal Sentence* which took place on March 23, 2016:

> … on April 4, 2014, I revoked your probation in that case and commuted your sentence out, and so at that point, both of these cases should have been at an end, but I have learned in reviewing both of these files that your probation was continued in the case that it should never have been continued in. And at some point in – at some point this month you were arrested on a probation violation.

*Transcript of Hearing of March 23, 3016, Aug. p.* 10-11.

Thus, with respect to his representations of Ms. Schubert regarding any alleged probation violations occurring after February 26, 2012 in the *Insufficient Funds Case* and April 4, 2014 in the *Grand Theft Case,* Deputy PD Lojek cannot assert protection under Idaho Code § 6-904A, because she was not legally on probation. Clearly, at all times following April 4, 2014, Ms. Schubert was not on probation in either the *Insufficient Funds Case* or the *Grand Theft Case*. As such, Idaho Code § 6-904A does not immunize the Ada County Public Defenders for negligence occurring after those relevant dates, even if it arguably provides for immunity for injuries committed by a probationer upon third parties. For this reason, summary judgment based on Idaho Code § 6-904A is improper, and this issue is frivolous.

### B[3] Assuming Only For Purposes Of This Issue That Ms. Schubert Was A Person On Probation For Purposes Of Idaho Code § 6-904A, The Ada County Public Defenders Remain Liable For Their Reckless Conduct

Even if Idaho Code § 6-904A does apply for any time relevant to this case, it does not immunize reckless behavior resulting in injury to a person on probation. Idaho Code § 6-904A provides:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

2. Arises out of injury to a person…or by or to a person who is on probation, or parole. (Emphasis supplied.)

Idaho Code § 6-904C provides:

1. "Gross negligence" is the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.
2. Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result. (Emphasis supplied.)

As demonstrated above, and as recognized by Judge Owen, Ms. Schubert was not a person legally on probation in either case after April 4, 2014, *Transcript of Hearing of March 23*, 2016, *CR* 132-138 at 136, and was not on probation in the *Insufficient Funds Case* after February 26, 2012. Therefore, Idaho Code § 6-904A, on which the Ada County Public Defenders rely, does not apply. Even assuming that Ms. Schubert was a person on probation at the time of his omissions, whether Deputy PD Lojek's actions were reckless is a question of fact for a jury.

The record at least presents an issue of fact regarding recklessness on the part of Deputy PD Lojek, since it is clear that he failed to take any action to correct the illegal sentence leading to the illegal incarceration of Ms. Schubert when asked by her to do so, and because there is at

least circumstantial evidence that he intentionally and knowingly failed to review for court orders. Nothing in the record supports the proposition that Deputy PD Lojek review the orders, recognize that the sentences imposed were illegal, but that it simply slipped his mind to take any action to remedy this problem.

There is at least circumstantial evidence that Deputy PD Lojek did not even bother to review the written orders issued illegally extending Ms. Shubert's probation to May 19, 2017. Deputy PD Lojek testified that he did not have a general practice of checking court orders for accuracy. *Lojek Depo. p.* 50 *l.* 12 - *p.* 51 *l.* 21, *Aug. p.* 292. Though Deputy PD Lojek supervised attorneys in the Ada County Public Defender's Office ( *Lojek Depo. p.* 15 *l.* 13 - *p.* 16 *l.* 10, *Aug. p.* 341-342), he testified that there was no protocol in the office to do a file review. *Lojek Depo. p.* 40 *l.* 1 – 7, *Aug. p.* 290. Deputy PD Lojek testified that he received no specific training regarding the importance of reviewing orders after judges issued a decision. *Lojek Depo. p.* 84 *l.* 5-17. *Aug. p.* 301. See, also, testimony of Ada County Public Defender Alan Trimming. *Trimming Depo. p.* 16 *l.* 9 – 14, *Aug.* 245. Deputy PD Lojek could not recall any protocol or any supervisor that helped with the review of orders or trained lawyers to review the orders. *Lojek Depo. p.* 84 *l.* 5 - *p.* 85 *l.* 8, *Aug. p.* 301. The only standard of care that Deputy PD Lojek was able to articulate at the time of his deposition was, "my standard was to get my clients out of custody and make the case go away." *Lojek Depo. p.* 81 *l.* 15 - *p.* 82 *l.* 24, *Aug. p.* 300. It is doubtful that any court would admit an expert witness's opinion that legal malpractice was committed because an attorney violated applicable standards by failing to "get [his] clients out of custody and make the case go away," much less find it sufficient evidence to withstand a motion for summary judgment.

Deputy PD Lojek disagreed that one might have to be a lawyer to really fully understand

court orders sent to clients involving statutes, codes, and legal words. Lojek testified that he relies on his clients to be a second set of eyes to help him catch any errors or mistakes in such court orders. *Lojek Depo. p.* 48 *l.* 15 - *p.* 50 *l.* 3, *Aug. p.* 292. Based upon his testimony, Deputy PD Lojek intentionally and knowingly relied on his client to understand court orders and advise him of errors and mistakes. To the extent that he did this without reviewing those orders himself, as here, he knowingly created an unreasonable risk of harm to Ms. Schubert constituting recklessness as defined by Idaho Code § 6-904C. Indeed, his prolonged pattern of inattention to the details of Ms. Schubert's case was reckless given the obvious need of individuals not trained in the law to rely on their attorneys to understand and advise them concerning court proceedings.

Deputy PD Lojek testified that he relied heavily on his clients to be up to date on their case to "collaborate" with him. Yet, it does not appear that this "collaboration" amounted to much. After Ms. Shubert returned from Texas in 2014 and advised Deputy PD Lojek that she believed she should not be on probation, *Shubert Decl.* ¶ 35, *CR* 177, Lojek advised Shubert that this was a "clerical mistake," and that he would "take care of it" *Shubert Decl.* ¶ 36, *CR* 177. He did not do that. Deputy PD Lojek was repeatedly contacted by Ms. Schubert regarding the concerns that she was wrongfully incarcerated, leading her to believe that he would follow up on this information, but he never took any action to do so. See, *p.* 11 - *p.* 13, *supra*.

Apparently, as a matter of routine, Deputy PD Lojek did not ask his clients whether they could read, write and understand the English-language, what their reading level was, or if they had gone to high school. *Lojek Depo. p.* 42 *l.* 22 - *p.* 43 *l.* 12, *Aug. p.* 290. Relying on the client to understand and detect errors in court orders without such knowledge is reckless.

Deputy PD Lojek's failures to review the relevant orders and to follow up on Ms. Schubert's requests that he take action to determine what mistakes had been made and to correct

them carried with them a high degree of probability that Ms. Shubert would be injured. Ms. Schubert was injured by being forced to endure months in jail under an illegal sentence when she was wrongfully accused of probation violations that went uncontested by Deputy PD Lojek. Given Deputy PD Lojek's description of his procedures, there is at least circumstantial evidence raising issues of fact as to whether he (1) intentionally and knowingly failed to review orders that imposed illegal sentences on Ms. Shubert, and (2) intentionally and knowingly failed to take the actions required and requested by Ms. Schubert to remedy her legal incarceration and have the illegal sentences corrected.

Ms. Shubert contacted Deputy PD Lojek and explained to him that she did not believe she was on probation. *Shubert Decl.* ¶ 35, *CR* 177. Deputy PD Lojek advised Ms. Shubert that this was just a result of a clerical mistake and that he would take care of it. *Shubert Decl.* ¶ 36, *CR* 177. In April 2014, Ms. Shubert requested via email that Deputy PD Lojek do something to address the issue and discharge her felony probation. *Shubert Decl.* Ex.1, *CR* 181-183. Deputy PD Lojek failed to act, as he told Ms. Shubert he would, and nothing happened until Deputy PD Loschi took over Ms. Shubert's case, detected an obvious error amounting to illegal sentence, and essentially immediately filed the Rule 35 motion for release. *Loschi Depo* 14 *l.* 18-20, 15 *l.* 1-8, *Aug. p.* 323. Whether Deputy PD Lojek knowingly and intentionally refused to act, or simply recklessly failed to review the court's order knowing that an error in an order can deprive an individual of freedom, or simply failed to timely take the necessary steps to correct Ms. Schubert's illegal sentence is a question of fact for a jury to determine, and summary judgment on this basis is improper.

The foregoing leads to the conclusion that the Ada County Public Defenders are not entitled to immunity under Idaho Code § 6-904A because Ms. Schubert was not a person on

probation whose claim is subject to Idaho Code § 6-904A, and because the Ada County Public Defenders behaved recklessly as defined by Idaho Code § 6-904C.

### C. QUESTION PRESENTED: ARE PUBLIC DEFENDERS ENTITLED TO IMMUNITY UNDER THE COMMON LAW? ANSWER: NO.

#### C[1] Idaho Should Not Adopt Absolute Immunity For Public Defenders Is A Part Of Its Common Law

In Idaho there no legislation, statutory authority or *stare decises* entitling Public Defenders to absolute or qualified immunity from suit.

As the District Court noted:

> Here, the asserted theory of liability on the part of the Public Defenders is novel and is an issue of first impression in Idaho. The Ada County Defendants have failed to bring cases to the Court's attention or articulate compelling reasons as to why the Court should extend judicial immunity to the Public Defenders in this case.

*CR* 62.

Nevertheless, the Ada County Public Defenders invite this Court to extend governmental immunity to public defenders as a matter of judicial policy.

#### C[2] Scenarios Relevant To This Court's Consideration Of Judicial Policy

Although the facts in the record evidence a complete miscarriage of justice and the consequences flowing from it, the Ada County Public Defenders' would have this Court as a matter of judicial policy simply tell Ms. Schubert "tough luck." The long and detailed discussion of the complex set of facts contained in the Clerk's Record and the Augmented Record are certainly illustrative of the reasons that public defenders should not be held immune from suits for legal malpractice. Likely of equal importance to this Court are the myriad foreseeable scenarios in which the immunities advocated by the Ada County Public Defenders would lead to injustice that, as a matter of judicial policy, militate against immunity for public defenders.

As a simple example, should this Court answer yes to the questions posed to it by the Ada

County Public Defenders (1) a public defender defending an innocent accused (2) executed based on a wrongful conviction of murder (3) resulting from the public defender's negligent failure to introduce testimony from numerous alibi witnesses of undisputed facts exonerating the accused (4) would not be liable for professional negligence resulting in wrongful death of the accused to the accused's minor heirs. Such a hypothetical factual scenarios should be taken into consideration in determining the judicial policy of the state of Idaho.

### C[3] The Argument That The Judicial Policy Of The State Requires The Recognition Of Immunity For Public Defenders Is Belied By This Court's Adopted Rules

This Court's adopted rules appear to manifest a contrary judicial policy. The Idaho Bar Commission Rule 306(a)5, as adopted by order of this Court, carries with it the implication that it is the judicial policy of the state of Idaho that public defenders are liable for professional malpractice. Idaho Bar Commission Rule 302(a)(5) requires active members of the Idaho State Bar to "certify to the Bar (A) whether the attorney represents private clients; [3] and (B) if the attorney represents private clients, submit proof of current professional liability insurance coverage … ." The term "private clients" is not defined by the Idaho Bar Commission Rules, Idaho cases, or Idaho statutes. Nevertheless, it is self-evident that it is the status of the client that determines whether or not malpractice insurance is required and not the status of the individual or entity who pays the attorney. Public defenders representing private clients clearly fall within the requirements of IBCR 302(a)(5), and consistent with this Court having adopted that rule requiring them to carry malpractice insurance, it may be presumed that they are legally liable for committing professional malpractice. Were this not the case, there would be no reason for the

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[3] "Public defenders represent individual clients rather than the government itself; *State v. Severson*, 147 Idaho 694, 706-07, 215 *p.*3d 414, 426-27 (2009)." *Eby v. State*, No. 39301, 2013 Ida. App. Unpub. LEXIS 118, at *10-11 (Ct. App. Mar. 28, 2013). Emphasis supplied.

requirement that they carry malpractice insurance. Whether or not the Ada County Public Defenders, or any other public defenders in Idaho, have complied with IBCR 302(a)(5) is not at issue. Unlike judges and prosecutors, public defenders represent private clients. Idaho attorneys in active practice representing private clients are required to carry insurance for legal malpractice. It follows that this Court, has by implication declared as a matter of policy that public defenders are liable for the professional malpractice.

**C[4] Announcing Immunity For Public Defenders As A Part Of Idaho's Common-Law Should Not Be Adopted As A Matter Of Public Policy**

Even if this Court did not intend to include public defenders as those liable for professional malpractice in adopting Idaho Bar Commission Rule 302, absolute immunity for public defenders should not be adopted as a matter of judicial policy. The scope of governmental immunity adopted by statute has been addressed by Idaho's legislature as discussed below. That being the case, this Court's prior opinions suggest that there is no need for this Court to declare a common-law immunity based on public policy:

"We must recognize, however, that the doctrine of governmental immunity from tort liability underlies a very broad field and that the legislative process and procedures can be more effectively applied to a comprehensive solution, while the court's processes and procedures are more effectively directed to a solution more narrowly limited to specific facts framed in litigated cases." .

Citation omitted. *Smith v. State*, 93 Idaho 795, 805-06, 473 P.2d 937, 947-48 (1970).

The Ada County Public Defenders argue that Idaho's Public Defenders should be immune from liability for professional malpractice because "prosecuting attorneys are immune from liability for activities intimately associated with the judicial phase of the criminal process." *Nation v. State, Dept. of Correction*, 144 Idaho 177, 187, 158 P.3d 953, 963 (2006).

It is apparent that a prosecutor has no attorney-client relationship but rather an arm's length relationship with the accused, whereas a public defender is bound by an attorney-client

relationship. Defendants-respondents analogizing the role of a public defender to the role of a public prosecutor is inapt. A public prosecutor owes no duty of confidentiality to the defendant; a defendant's public defender does owe that duty. A public prosecutor owes no general duty to keep a defendant advised; a defendant's public defender does owe that duty. A public prosecutor as special responsibilities imposed upon her by Idaho Rules of Professional Conduct 3.8; this rule does not impose those duties on a defendant's public defender. The commentary to this rule states:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

In contrast, a public defender's duty to an accused is strictly to act as an advocate. Any other duty would create a conflict of interest. Certainly, if it were otherwise, a public defender could decide to abandon a viable defense "for the public good" just as a prosecutor can decide to dismiss a viable case in the interest of justice.

The Supreme Court of the United States has cautioned that absolute immunity should be granted sparingly. Absolute immunity is only sparingly recognized for state actors. *Forrester v. White*, 484 U.S. 219, 224, 108 S. Ct. 538, 98 L.Ed. 2d 555 (1988). It should not be extended "further than its justification would warrant." *Harlow v. Fitzgerald*, 457 U.S. 800, 811, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (1982). The United States Supreme Court in *Imbler* discusses the circumstances which justify absolute immunity for prosecutors:

> "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case.... The apprehension of such consequences

> would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." *Pearson* v *Reed* 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935).

*Imbler v. Pachtman*, 424 U.S. 409, 423-24, 96 S. Ct. 984, 991-92 (1976).

### C[5] Prosecutorial Immunity Was Granted In Idaho For Reasons Not Applicable To Public Defenders

While prosecutors have a duty to the public, a public defender has a duty limited to his or her client. This Court has stated the reasons for its grant of prosecutorial immunity:

> Idaho has never recognized absolute prosecutorial immunity, but absolute prosecutorial immunity was recognized at common law. *See Imbler*, 424 U.S. at 423-24. This absolute immunity is based on public policy. Fear of harassment by "unfounded litigation" could cause a "deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. Therefore, in order to have unimpeded prosecutors who administer their duties with "courage and independence" we afford them absolute immunity for their quasi-judicial functions. *Id.*

*Nation v. State*, 144 Idaho 177, 187-88, 158 P.3d 953, 963-64 (2007). In contrast, a public defender's duty cannot be meaningfully distinguished from the duty of any active attorney as to any private client. As discussed herein, that duty is solely to the client, and is not a "public trust." In short, an argument in favor of granting absolute immunity for public defenders based upon analogizing their roles in the system to public prosecutors is not supported by the facts.

### C[6] The Limited Number Of States Granting Of Immunity To Their Public Defenders Of Done So For Reasons That Should Be Unpersuasive To This Court

The Ada County Public Defenders next argue that since other states like New York and New Mexico have granted immunity to public defenders that Idaho should do so. First, this Court has made it clear that "changes in public policy should come from the legislature. *Anstine v. Hawkins*, 92 Idaho 561, 563, 447 P.2d 677, 679 (1968)." *In re Chaney*, 126 Idaho 554, 559, 887 P.2d 1061, 1066 (1995). Consistent with this rule of law, this Court, as a matter of judicial

policy, yields to legislative policies expressed in Idaho statutes. See, *e.g., Idaho State AFL-CIO v. Leroy,* 110 Idaho 691, 725, 718 P.2d 1129, 1163 (1986). Policy in the area of governmental immunity has been expressed clearly by Idaho's legislature. As noted above, the Idaho legislature has considered "the injustice created by the doctrine of sovereign immunity" (*Smith v. State*, 93 Idaho 795, 808, 473 P.2d 937, 950 (1970)), has abolished it, and "therefore, under the ITCA liability is the rule and immunity is the exception." *Rees v. State*, 143 Idaho 10, 19, 137 P.3d 397, 406 (2006). Nevertheless, the Ada County Public Defenders argue that despite the legislature already having acted in this field, if public defenders are not included within the exemptions to the abrogation of sovereign immunity contained in the Idaho Tort Claims Act, this Court should declare them to be so as a matter of common law. To do so would be contrary to this Court's well-established judicial policy of deferring to the legislature and, for this reason alone, this Court should decline the invitation to be guided by what appears to be a minority of jurisdictions which have granted public defenders immunity on their common law.

Those states granting immunity as a matter of common law the public defenders appear to do so for reasons significantly different from those intended to protect discretionary charging decisions made by public prosecutors. It would appear that the primary reason for granting immunity to public defenders and not private attorneys is to protect the assets of governmental entities. This spurious justification for judicial overreaching in the name of policy has been laid bare previously in Idaho:

> [W]e have no authority to override the constitutional and statutory provisions authorizing access to the courts for bringing tort suits against the state. To paraphrase Justice Frankfurter in *Indian Towing Co. v. United States*, 350 U.S. 61, 67, 76 S.Ct. 122, 125, 100 L.Ed. 48 (1955), we are not the self-constituted guardians of the public purse empowered to import sovereign immunity into a statute designed to waive it. The legislature is the primary guardian of the public purse and we have no authority to override its determination that the government will be liable for its torts. *Everton, supra*, 468 So.2d at 946.

*Ransom v. Garden City*, (Bistline concurring) 113 Idaho 202, 217-18, 743 P.2d 70, 85-86 (1987).

Significantly other states have denied immunity to public defenders for persuasive reasons. In a unanimous decision, the California Supreme Court refused to extend immunity to public defenders when a former public defender client was convicted of and incarcerated for bank robbery and brought a legal malpractice action against the deputy public defender after obtaining a judicial determination of factual innocence. The California Supreme Court held (1) a public defender's actual representation of a client generally does not involve discretionary acts within meaning of discretionary act immunity statute, and (2) a public defender's decision not to file motion for disclosure of identity of a confidential informant was not a discretionary act protected by discretionary act immunity. *Barner v. Leeds* 24 Cal. 4th 676, 13 P.3d 704 (2000). The *Barner* court also ruled in the absence of bad faith, a public employee—including a deputy public defender—who is sued personally, based on the performance of his or her duties, may obtain both defense and indemnity from the employer, which is vicariously liable for the torts of its employees. See §§ 815.2, subd. (a), 825 *et seq*.; *Caldwell, supra,* 10 Cal.4th at pp. 980–981, 42 Cal.Rptr.2d 842, *Decl.* ¶.) "Hence, fears that personal exposure to damage suits and judgments would deter the vigorous performance of public responsibilities are no longer a policy basis for immunity. [Citation.]" (*Caldwell, supra,* 10 Cal.4th at *p.* 981, 42 Cal.Rptr.2d 842, 897 P.2d 1320.) Finally, a deputy public defender's exposure to liability for legal malpractice is circumscribed by the requirement that a defendant in a criminal action must prove his or her actual innocence by a preponderance of the evidence before prevailing on a claim against his or her attorney for negligent representation in the criminal proceeding. (*Wiley v. County of San Diego,* 19 Cal.4th at *p.* 545, 79 Cal.Rptr.2d 672, 966 P.2d 983 (1998)) *Barner* 24 Cal. 4th 676, 691 (2000).

Pennsylvania has followed California in denying immunity to public defenders. The Supreme Court of Pennsylvania held:

> We are called upon here by the appellees to read into a statute implementing a constitutionally prescribed duty to furnish indigents with court-appointed counsel, an unexpressed public interest in limiting liability for professional malpractice visited upon indigents thus represented. We are asked to rule that this potential liability outweighs the interest of the indigent client in the provision of legal services under the same standards as those applicable in other attorney-client situations. Appellee's contention is tantamount to a suggestion that we distinguish between groups of Plaintiffs based on economic status, thus, denying an indigent the tort relief which would be available to the paying client in a similar fact situation. Such a distinction would raise troublesome equal protection questions were we to adopt it.

*Reese v. Danforth* 48 PA 479, 486,406 Pa. 735 (1979). Emphasis supplied.

The Supreme Court of Pennsylvania refused to extend immunity to public defenders since doing so would deny an indigent client the same set of rights as someone who had the money to hire private counsel, the right to sue their attorney for malpractice when committed.

Michigan courts have also denied immunity to public defenders for similar reasoning. A trial court rejected a court appointed public defender's argument that public defenders enjoy qualified immunity from suits for malpractice in their conduct of the defense. The Michigan Court of Appeals upheld the trial court decision, ruling:

> Further, when we reflect on the equal protection clause of the 14th Amendment to the United States Constitution, we are reminded of the words of the late Justice Black who, in *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956), stated: "(t)here can be no equal justice where the kind of trial a man gets depends on the amount of money he has". In light of the foregoing well-established principles of law, we decline to draw a distinction between appointed and retained counsel in criminal cases when it comes to questions of malpractice. The United States Constitution and our own principles of fairness lead us to affirm the trial court.

*Donigan v. Finn,* 95 Mich. App. 28, 30, 290 N.W. 2d 80 (1980). Emphasis supplied.

Multiple other courts have held that public defenders are not entitled to immunity. See, *e.g.*, *Briggs v. Lawrence*, 281 Cal. Rptr. 578, 581 (Ct. App. 1991) ("Defendants do not and cannot assert that as public defenders they would be individually immune from liability for malpractice."); *Reese v. Danforth*, 406 A.2d 735, 740 (Pa. 1979) (public defenders "do not serve as public administrators with policy-making functions" and therefore under state law

do not receive immunity); *see also*, *Spring v. Constantino*, 362 A.2d 871, 873 (Conn. 1975) ("While it need not decide if and to what extent a public defender enjoys immunity as an "employee" of the state, this court must conclude that the immunity conferred and the liability assumed by the state under chapter 53 was not intended to extend to the acts and omissions of a public defender which arise during the course of the attorney-client relationship and over which the state has no right of control."); *see also*, *Donigan v. Finn*, 290 N.W.2d 80, 81 (Mich. Ct. App. 1980) (finding that court-appointed counsel are not immune from malpractice liability when defending an indigent client); *See Windsor v. Gibson*, 424 So. 2d 888, 889 (Fla. Dist. Ct. App. 1982) (holding that the doctrine of judicial immunity does not preclude an action against the office of the public defender by a former client);

Additionally, many states permit legal malpractice actions against attorneys appointed to represent criminal defendants. *See Mylar v. Wilkinson*, 435 So.2d 1237 (Ala. 1983); *Shaw v. Public Defender Agency*, 816 P.2d 1358 (Alaska 1991); *Rose v. Hudson*, 153 Cal. App. 4th 641, 63 Cal.Rptr.3d 248 (Cal. App. 2007); *Pearson v. Sublette*, 730 P.2d 909 (Colo. App. 1986); *Johnson v. Gibson*, 837 So.2d 481 (Fla. App. 2002); *Herron v. Mixon*, 157 Ga. App. 224, 276 S.E.2d 893 (Ga. App. 1981); *Trobaugh v. Sondag*, 668 N.W.2d 577 (Iowa 2003); *Canaan v. Bartee*, 276 Kan. 116, 72 P.3d 911 (Kan. 2003); *Law v. Mayeux*, 527 So.2d 37 (La. App. 1988); *Fleming v. Gardner*, 658 A.2d 1074 (Me. 1995); *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994); *Johnson v. Raban*, 702 S.W.2d 134 (Mo. App. 1985); *Delbridge v. Office of Public Defender*, 238 N.J. Super. 288, 569 A.2d 854 (N.J. Super. 1989) (non-criminal case in which the court held that appointed counsel had immunity from suit except for legal malpractice, conspiracy, or other intentional misconduct.); *Snyder v. Baumecker*, 708 F.Supp. 1451 (D. N.J. 1989) (applying New Jersey law); *Britt v. Legal Aid Soc., Inc.*, 95 N.Y.2d 443, 741 N.E.2d 109, 718 N.Y.S.2d 264

(N.Y. 2000); *Stevens v. Bispham*, 316 Ore. 221, 851 P.2d 556 (Or. 1993); *Moore v. McComsey*, 313 Pa. Super. 264, 459 A.2d 841 (Pa. Super. 1983); *Peterson v. White*, 877 S.W.2d 62 (Tex. App. 1994); *Taylor v. Davis*, 265 Va. 187, 576 S.E.2d 445 (Va. 2003); *Powell v. Associated Counsel for Accused*, 125 Wn. App. 773, 106 P.3d 271 (Wash. App. 2005).

Though some states afford immunity to public defenders, Idaho should not become one of them, both because to do so would violate this Court's judicial policy of deferring to the legislature in fields in which it has acted, and because doing so would make judicial policy, undermining the reasons for this court adopting rules requiring attorneys representing private clients to carry professional malpractice insurance and, potentially, creating equal protection problems.

**C[7] The Holding In *McKay v. Owens* Granting Quasi-Immunity To Guardians *Ad Litem* Should Not Extend To Public Defenders**

In Idaho, there has been no legislation, statutory authority or *stare decises* entitling public defenders to immunity from suit. Recognizing that, the Ada County Public Defenders offer this Court an analogy to the role of a guardian *ad litem*. The Ada County Public Defender' argue that guardians *ad litem* acting as an "arm of the court" are entitled quasi-immunity under the logic of *McKay v. Owens* 130 Idaho 148, 156, 937 P.2d 1222 (1997). However, *McKay* contains language refuting the over-broad application of that case as precedent for this case: "[A]t least in custody matters, [where] the guardian *ad litem* has traditionally been viewed as <u>functioning as an agent or arm of the court, to which it owes its principal duty of allegiance, and not strictly as legal counsel to a child client</u>." citing *State ex rel. Bird v. Weinstock,* 864 S.W.2d 376, 384 (Mo.App.1993). Emphasis supplied.

The Ada County Public Defenders' analogy is fallacious because a guardian *ad litem* performs a totally different function than a public defender. Attorneys representing the

criminally accused do not owe the court a principal duty of allegiance, but rather are "strictly" legal counsel for the criminally accused. Obviously, all attorneys are "officers of the court." Yet, while there is no authority in Idaho for a cause of action against a guardian *ad litem* acting as an "arm of the court," Idaho has long recognized the cause of action against attorneys for legal malpractice. See, for example, *Johnson v. Jones*, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982). If this Court were to extend quasi-immunity to public defenders based upon the rationale contained *in McKay*, it would be logical to extend it to all attorneys on the same basis. Such an extension of quasi-immunity would almost certainly violate judicial policy and would not be in the public interest. Therefore, public defenders should not be immune from civil liability, as a matter of public policy, under the common law.

### D. QUESTION: IS A CRIMINAL DEFENDANT PRESUMED TO HAVE KNOWLEDGE OF THE CONTENTS OF A COURT DOCUMENT WHEN SHE SIGNS AND CERTIFIES A COURT DOCUMENT? ANSWER: NO – NOT UNDER THE CIRCUMSTANCES IN THIS CASE

As noted by the District Court:

> It is a traditional lawyer function to review judgments and orders signed by the Court to determine their accuracy. The three incorrect Judgments that Defendants contend imposed notice on the Plaintiff, were not effective to impose claim-precluding notice upon Plaintiff, because (1) a reasonably prudent person would believe that their attorney would review and ensure that the signed Judgments/Orders conformed to the Court's oral ruling, and (2) since the Judgements/Orders were all illegal, Shubert's attorney was in the best position to know that fact and would have an affirmative duty to take proper curative action. Shubert has the right to rely on the premise that her lawyer is the legal expert, charged with an affirmative duty to protect her interests, and as long as nothing adverse has resulted, to trust that the job was done properly.

*Memorandum Decision and Order*, *CR* 165. Notwithstanding this fact, the Ada County Public Defenders argue that a criminal defendant who signs the statement put in front of them that they have read and understood in order is conclusively presumed to have done so.

The Ada County Public Defenders rest this argument on this Court's prior opinions analogizing a probation agreement to traditional contract terms and governmental contracts.

This argument assumes that the court orders provided to Ms. Schubert were the equivalent of probation agreements. They were not. First, even if a contractual analogy were to be applied to Ms. Schubert circumstances, various aspects of contract law undermine the application of that analogy to court documents. Assuming that a document stating that someone has read and understood a court order is analogous to a probation contract, numerous defenses should, in fairness, be available to a criminal defendant who is the victim of her attorney's negligence. As but one example focusing on the contractual analogy, any "probation contract" signed by Ms. Schubert incorporating an illegal sentence would be based on a mutual mistake, therefore not enforceable under contract law. See, *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).[4]

Second, to fully comprehend the injustice of the Ada County Public Defenders position, it may be useful for it to consider the implication of their argument. If it is true that an individual is irrevocably bound by the terms of a court document if she signs a statement "certifying" that she has read and understood that document, then an illiterate criminal defendant wrongfully sentenced to a life sentence for a crime that carried a maximum of one year in jail could not bring a malpractice action against her public defender for failing to recognize and move to correct an error leading to years of unlawful incarceration and misery imposed under an illegal sentence. It is doubtful that this absurd result is compelled by judicial policy.

The Ada County Public Defenders argue at page 35 of their appellate brief that Ms. Shubert is "presumed to have knowledge of the contents of court orders, and, more specifically, that all of Ms. Shubert's certification's including the four detailed [by the Ada County Public

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[4] [M]utual mistake permits a party to rescind or modify a contract as long as the mistake is so substantial and fundamental as to defeat the object of that party." *Primary Health Network, Inc.*, 137 Idaho at 668, 52 *p*.3d at 312 (citing *United States v. Fowler*, 913 F.2d 1382 (9th Cir. 1990)).

Defenders], indicate her knowledge of the contents of the records she signed." Even assuming that Ms. Schubert's certification that she has knowledge of the records that she signed is binding upon her on that issue, there is no reason in law or logic for her to be conclusively presumed to have understood what she signed. Such a legal presumption, the Ada County Public Defenders should be aware, is not compelled by this Court's holding in the Idaho case that they cite in support of their argument. In *State v. Gawron*, 112 Idaho 841, 736 p.2d 1295 (1987) while this Court did recognize, for purposes of the facts of that decision only, the analogy of a waiver of the requirement of a warrant to search a house to an agreement to a contract provision, it expressly noted:

> In *State v. Blevins*, 108 Idaho 239, 697 P.2d 1253 (Ct.App.1985), it was held that the issue of voluntary knowing and intelligent waivers is essentially a factual issue turning on the accused's state of mind, and lending itself to resolution by the trial court. Here, Gawron has made no allegation that his signature and acceptance of the order and conditions of probation were involuntary or done unintelligently.

*State v. Gawron*, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987).

Furthermore, while this Court did cite 17 Am. Jur. 2nd, Contracts, Section 347 (2004) for the proposition that "the law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest," *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006), it did not announce that such a presumption was irrebuttable. If it were, a contract could never be set aside on the grounds of a mutual mistake, and a waiver could not be set aside because it was done "unintelligently" or on other applicable grounds.

In this case, it is Ms. Shubert's position that all of the relevant documents which she signed alluded to by the Ada County Public Defenders were signed unintelligently, precisely because of the negligence of the Ada County Public Defender's Office and Deputy PD Lojek.

While this Court may continue to analyze probation contracts by analogy to contract law,

it should not extend this analogy to every document signed in a criminal court proceeding by a criminal defendant. The documents in question are not contracts, but rather are, at most, prior inconsistent statements that could may be used to impeach Ms. Shubert at trial if admitted by the District Court.

## V. CONCLUSION

The Ada County Public Defenders' issues on appeal are without merit for the reasons stated above. The decisions of the District Court should be affirmed denying the Ada County Public Defenders relief based on their arguments urged in this appeal. This case should be remanded to the District Court for further proceedings consistent with its decision.

Dated May 26, 2019.

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