OPINION NO. 73-029

Syllabus:

The Office of the Attorney General may defend a State Highway Patrolman who is accused of a criminal offense committed in the scope of his official duties, even though the prosecution is conducted by the county prosecutor. Opinion No. 72-076, Opinions of the Attorney General for 1972, clarified and amplified; Opinion No. 2532, Opinions of the Attorney General for 1950, overruled, as to Branch 5 of the Syllabus.

To: Robert M. Chiaramonte, Supt., State Highway Patrol, Columbus, Ohio
By: William J. Brown, Attorney General, April 2, 1973

I have before me your request for a clarification of Opinion No. 72-076, Opinions of the Attorney General for 1972. That Opinion reached the following conclusion:

> When a State Highway Patrolman is sued for false arrest, the Attorney General may defend him if, after careful examination of the facts and circumstances upon which the suit is based, he concludes that the patrolman attempted in good faith to perform his

official duties. Opinion No. 71-080, Opinions of the Attorney General for 1971, approved and followed.

You state that a question of possible conflict of interest has been raised as to instances in which a criminal charge is filed against a highway patrolman based on his acts in the performance of official duties. May a member of the Attorney General's staff defend the patrolman when he is being prosecuted by the county prosecutor?

It is, of course, not uncommon to find the Attorney General and a county prosecutor on opposite sides of the same case. See, e.g., Carney v. Board of Tax Appeals, 169 Ohio St. 445 (1959), in which the Cuyahoga County Auditor challenged the validity of real property valuation rules promulgated by the Board of Tax Appeals. The county prosecutor represented the Auditor, while the Attorney General represented the Board. Mandamus actions against state officials frequently give rise to the same confrontation. State, ex rel. Downing v. Powers, 125 Ohio St. 108 (1932); and see State, ex rel. Doerfler v. Price, 101 Ohio St. 50 (1920). A similar situation occurs in federal practice, where the Solicitor General and the General Counsel of the Interstate Commerce Commission occasionally find themselves in opposition. And it will be recalled that, when three federal officials were prosecuted for criminal violations of ordinances of the city of Columbus a few years ago, they were defended by attorneys from the Department of Justice. See Skolnick v. Hanrahan, 398 F.2d 27 (CA7, 1968); and People v. Graber, 394 Ill. 362, 68 N.E. 2d 750 (1946).

In Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio, 1971), the court held that a conflict of interest arising by operation of law is unavoidable, and that such a conflict will not prevent the Attorney General from representing state officers and employees. That case arose out of the unfortunate events of May 1 to May 4, 1970, on the campus at Kent State University. The Attorney General, by direction of the Governor, conducted a grand jury investigation into the actions of all involved, including members of the National Guard. At the same time, he represented the Governor and the members of the Guard against whom civil actions for wrongful death had been brought. In answer to the contention that this placed the Attorney General in a position of conflicting interests, the court said (323 F. Supp. at 353):

> Possible conflict of interest locked in by operation of law differs from conflict of interest as a matter of fact. * * * Possible conflict of interest by operation of law was unavoidable, once the Governor requested the Attorney General to convene a special grand jury in Portage County. The Governor acted after it was determined that the State could not legally supply Portage County with the $100,000 that its county prosecutor estimated would be the cost of a county grand jury investigation.

In my opinion, when a highway patrolman has been accused of a criminal offense arising out of his good faith performance of official duties, the conduct of his defense by the Attorney General presents a conflict of interest locked in by operation of law. The State Highway Patrol is a division of the Department of

Highway Safety. Under R.C. 109.02 the Attorney General is the attorney for all departments of the state. That Section provides in part:

> The attorney general is the chief law officer for the state and all its departments * * *. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law.
> * * *

Whenever an agent of any department of the state is accused of inflicting a wrong upon a citizen by acts performed within the scope of his official authority, the state has a direct interest in the outcome. It has often been said that such actions of a state agent are always _ultra vires_ and impose no liability on the state. But this argument has been specifically rejected by the Supreme Court of the United States. _Larson_ v. _Domestic and Foreign Commerce Corp._, 337 U.S. 682, 693, 694, 695, and see in general 693-704 (1949); _Hatahley_ v. _United States_, 351 U.S. 173, 180-181 (1956). In _Larson_ the court said (337 U.S. at 695):

> * * * We therefore reject the contention here. We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then _they are the actions of the sovereign, whether or not they are tortious_ under general law, if they would be regarded as the actions of a private principal under the normal rules of agency.
> * * * (Emphasis added.)

It is true that, under the doctrine of sovereign immunity, the state itself _cannot be sued_ without its permission. But this does not mean that the state refuses to acknowledge any liability for the acts of its agents. The federal government recognizes such liability and has provided remedies under the Tucker Act or the Federal Tort Claims Act, by a proceeding in the Court of Claims, or by petition to Congress. The State of Ohio affords similar relief through a petition filed with the Sundry Claims Board. R.C. 127.11.

The outcome of a criminal charge, brought against a highway patrolman because of acts within the scope of his authority, may well be dispositive of a later claim for civil relief from the Sundry Claims Board. The state has, therefore, a direct interest in the criminal case, and the Department of Highway Safety has a duty to determine whether the patrolman was attempting in good faith to perform his official duties, and to request that the Attorney General conduct the defense if it so finds. The Attorney General, as the attorney for the Department, also has a duty to examine the facts and to undertake the defense of the patrolman if he concurs in the Department's determination. _State, ex rel. Walton_ v. _Crabbe_, 109 Ohio St. 623, 626 (1924). The fact that the prosecution is conducted by the county prosecutor gives rise to a conflict of interest by operation of law and does not disqualify the Attorney General from taking part in the case. The opinion of my predecessor in Opinion No. 2532, Opinions of the Attorney General for 1950, which did not consider any of the foregoing arguments, is overruled, as to Branch 5 of the Syllabus.

In specific answer to your question it is my opinion, and you are so advised, that the Office of the Attorney General may defend a State Highway Patrolman who is accused of a criminal offense committed in the scope of his official duties, even though the prosecution is conducted by the county prosecutor. Opinion No. 72-076, Opinions of the Attorney General for 1972, clarified and amplified; Opinion No. 2532, Opinions of the Attorney General for 1950, overruled, as to Branch 5 of the Syllabus.