IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE ex rel. JIM SMITH,
Attorney General,

Petitioner,

vs.

RICHARD JORANDBY, Public Defender of the 15th Judicial Circuit; CRAIG S. BARNARD, Assistant Public defender; RICHARD H. BURR III, Assistant Public Defender,

Respondents.

_____/

CASE NO. 68141

PUD
Fed civil action

PETITION FOR A WRIT OF QUO WARRANTO

The State of Florida petitions this court for a writ of quo warranto to prohibit the public defender of the 15th Judicial Circuit, through two of his assistants, from representing the personal representative of the estate of a deceased inmate-plaintiff in a civil action for damages under 42 U.S.C. s. 1983 in the U.S. District Court for the Northern District of Florida. The State submits that the public defender has no statutory authority to represent plaintiffs in federal civil rights damages actions.

I.

Jurisdiction

This court has jurisdiction to hear petitions for writs of quo warranto against state officers such as the public defender under Art. V, s. 3(b)(8), Fla. Const.

In State v. Brummer, 443 So.2d 957 (Fla. 1984), this court determined that it had jurisdiction to decide a petition for a writ of quo warranto by the State seeking to prohibit actions by a public defender which were outside his authority.

II.

Parties

The State of Florida is the petitioner, through Attorney General Jim Smith.

The respondents are:

1. Richard L. Jorandby, the public defender for the 15th Judicial Circuit.

2. Craig S. Barnard, Mr. Jorandby's chief assistant public defender.

3. Richard H. Burr III, one of Mr. Jorandby's assistant public defenders.

III.

Facts

On March 13, 1984, Mr. Barnard and Mr. Burr, along with Tallahassee attorney Mary Charlotte McCall, filed a federal civil rights action in the U.S. District Court for the Northern District of Florida representing James Adams, then an inmate on death row at Florida State Prison.

The case was styled Adams v. Bailes, et al., Case No. TCA 84-7099-WS. The complaint alleged that in May 1979 Mr. Adams was poisoned by another inmate named George Young, at the time a runner on death row. The complaint put forward essentially two theories why the defendants were liable. The first was that Mr. Young conspired with one of the defendants, Lt. Rex Bailes, an officer at FSP, to commit the poisoning at the officer's urging. The second was that Mr. Young was a violent inmate and posed a threat to Mr. Adams from which he should have been protected. Brought under 42 U.S.C. s. 1983, the complaint alleged that these acts violated Mr. Adams' federal constitutional right to be free from cruel and unusual punishment. Mr. Adams' complaint asked for $250,000 in compensatory damages and $500,000 in punitive damages. (A copy of the complaint is attached as exhibit 1.)

While Mr. Barnard and Mr. Burr did not actually sign the complaint, their names appear on it, and they have signed other documents in the course of proceedings. On March 7, 1984, Mr. Burr filed a motion to appear in the case pro hac vice. (A copy of the motion is attached as exhibit 2.) Mr. Barnard signed the plaintiff's memorandum of law in reply to the defendants' motion to dismiss. (A copy is attached as exhibit 3.) Both counsel signed the Plaintiff's Motion for a Preliminary Injunction and Stay of Execution in which Mr. Adams attempted to stay his execution on the ground that he had the civil rights action pending in Adams v. Bailes. (A copy is attached as exhibit 4.) At a subsequent hearing on the motion before U.S. District Judge William Stafford, Mr. Burr appeared for Mr. Adams. The court denied the motion, and declined to stay Mr. Adams' execution.

Mr. Adams was executed on May 10, 1984. The defendants moved the federal court to request the assistant public defenders to remove themselves from representing Mr. Adams' interests on March 19, 1985, providing Mr. Barnard and Mr. Burr with notice that there were questions about the propriety of their representation. Mr. Barnard and Mr. Burr responded to that motion on March 28, 1985, taking the position that as state-appointed attorneys there was ample precedent from this court to justify their continued representation of a client in a federal civil damages proceeding.

On Aug. 22, 1985, the district court denied the defendants motion to discharge the assistant public defenders as the plaintiff's counsel. The district court, though expressing reservations about the respondents' representations, declined to order their withdrawal

> in the absence of a definitive state court interpretation of Fla. Stat. Section 27.51(1) (1983). . . . The issue, however, unquestionably is one of state policy and state statutory construction. It is inappropriate for this court to definitively interpret such policy in the first instance.

The court then substituted Mrs. Daisy Carswell Adams, the personnel representative of Mr. Adams' estate, as the plaintiff in the action. (A copy of the court's order is attached as exhibit 5.)

Throughout this litigation Mr. Barnard and Mr. Burr have acted as assistant public defenders, working on Mr. Adams' case during regular business hours without taking leave, and have used the resources of the public defender's office. See, e.g. exhibit 6, a letter to counsel from Mr. Burr on official public defender's stationery, and note that the envelope bears the state's mail frank.

ARGUMENT

The State's position is that the Office of the Public Defender for the 15th Judicial Circuit does not have statutory or constitutional authority to represent the plaintiff in this case. First, the State submits that the public defender did not have authority to represent Mr. Adams at the start of the federal law suit since at that time Mr. Adams was not charged with a crime and the federal suit was not in any way connected with post conviction relief. Second, the public defender has no authority to represent the personal representative of Mr. Adams' estate in a federal civil rights action for damages.

The Florida Constitution provides for the creation of offices of public defenders (Art. V, s. 18), and states in part:

> Section 18. Public Defenders. -- In each judicial circuit a public defender shall be elected for a term of four years. He shall perform duties prescribed by general law. . . .

Section 27.51, Fla. Stat. sets out those duties. Briefly, the public defender shall represent persons found to be indigent who are:

> (a) under arrest for, or charged with a felony;
> (b) under arrest for, or charged with a misdemeanor;

(c) children alleged to be delinquent;
(d) facing the prospect of involuntary hospitalization as a mentally ill or mentally retarded person.

The section further empowers public defenders to represent these people during felony appeals to the state or federal courts, s. 27.51(4), Fla. Stat. At one time, the public defender routinely represented indigent convicted persons facing the death penalty in collateral post conviction matters. However, today the public defender must refer such matters to the capital collateral representative. Section 27.51(5), Fla. Stat. Finally, the public defender is authorized to appoint assistants, s. 27.53, Fla. Stat., who have no greater authority than he does.

Thus, as state officers, a public defender and his assistants have only those powers expressly conferred on them by the constitution or by statute, or those powers necessarily implied to carry out their authorized duties. See the discussion of this question in AGO 83-61, attached as exhibit 7.

The courts have discussed in a number of cases the powers of state-appointed counsel to represent clients in the federal courts.

In Graham v. State, 372 So.2d 1363 (Fla. 1979), this court considered a petition for the appointment of counsel by 11 private, volunteer attorneys representing men on death row. The attorneys sought state appointment to represent the men on death row "for the purpose of providing legal advice and representation for subsequent collateral relief applications in both state and federal courts and to pay the necessary expenses thereof." Graham v. State, at 1364. This court held that the men on death row had no statutory or constitutional right to state-appointed counsel, and that the state had no obligation to provide counsel or costs in federal proceedings.

> This state only has an obligation to provide counsel for indigent defendants in its state courts. Neither this court nor an individual judge in the state system could appoint counsel to represent an indigent in the federal court system.

Id., at 1365.

Thus, the court settled the only issue in the case. However, the court went on to observe in dicta:

> This does not mean, however, that state-appointed counsel could not continue their representation and seek federal relief. Their professional responsibility may dictate this action. . . .
> Id., at 1365.

In State v. Brummer, 426 So.2d 532 (Fla. 1982) -- Brummer I -- this court faced a challenge by the State to a public defender's authority to bring a class action suit in the federal courts. In that case, two assistant public defenders had been appointed to represent a child facing involuntary commitment for mental health reasons. After a hearing the child was committed. The two assistant public defenders, along with voluntary private counsel, then filed a federal civil rights action seeking declaratory relief and an injunction. Later they amended the complaint to seek damages. The plaintiff's attorneys attempted to have the case certified as a class action, and at that point the State, through the Attorney General, petitioned this court for a writ of quo warranto on the grounds that the public defender had no authority to bring a class action suit in federal court. Citing Graham v. State, this court concluded that the public defender in fact did not have any such authority. In order to take any step in representing their client, the court said, even if a decision is only viewed as a tactical one, "the respondents must still have the authority to act and here they simply do not." Brummer I, Id. at 533

The issue of whether a public defender could have brought suit for damages in the first place was not raised by the parties. But the court expressed some thoughts in dicta on the propriety of whether the public defender could represent clients in federal court:

> This does not mean, however that state-appointed counsel could not continue their representation and seek federal relief on an "individual" basis. A lawyer's professional responsibility may dictate this action. . . .
>
> The state is constitutionally obliged to respect the professional independence of the

> public defenders whom it engages. The decision in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.799 (1963), established the right of state criminal defendants to the "[g]uiding hand of counsel at every step of the proceedings against [them]."

Brummer I, at 533. Emphasis added.

It is important to note in Brummer I and Graham v. State that the court did not express an opinion on how far a state-appointed attorney's conscience would be allowed to stretch and in what kinds of cases he would be statutorily authorized to continue representation. But the court recognized that the statutes imposed some limits on the public defender. The court was only observing that in some situations the conscience and independence of a public defender might justify the pursuit of federal relief on an individual basis. However, it appears that the public defender's authority would only reach to actions related to the original criminal charge.

In Graham v. Vann, 394 So.2d 176 (Fla. 1st DCA 1981), the First District Court of Appeal confronted the issue of whether a public defender had the statutory authority to represent convicted felons already serving time in Florida prisons in a state habeas corpus action challenging the conditions of their confinement. The petitioners alleged that inmate violence, inadequate staff training, crowded conditions and deficiencies in accommodations violated their constitutional rights. The public defender represented the petitioners. The court held that his representation was authorized by Rule 3.111(b)(2), Fla.R.Crim.P., which permits the trial court to appoint counsel for indigent criminal defendants, and people facing mental competency hearings and other proceedings which are adversary in nature regardless of whether the case is civil or criminal. The court also noted that the inmates faced conditions that daily threatened their lives and safety, that the public defender had represented some of the petitioners in the past and that there were five criminal actions

then pending against the petitioners. Under these circumstances, the court could not believe that the trial court was allowed to appoint counsel but not free to consider the public defender. Thus, the court held that the public defender's representation in this habeas action was appropriate. Graham v. Vann, at 178.

It appears, however, that the holding in Graham v. Vann has been drastically underminded by this court's decision in the recent case of State v. Brummer, 443 So.2d 957 (Fla. 1984) -- Brummer II. In Brummer II, two men were convicted of felonies, one for armed robbery and the other for marijuana trafficking, who had been represented in the trial court and on appeal by the public defender. After each man's conviction was affirmed, the public defender took no further action. Both defendants filed pro se petitions for writs of habeas corpus in the U.S. District Court for the Southern District of Florida. The federal judge appointed the public defender to represent the men in these actions. The State, through the attorney general, contested the appointment on the grounds that the public defender had no authority to represent either man.

This court recognized that the office of the public defender is a creature of statute and the state constitution, and that the public defender's powers are specifically enumerated, limited to the four classes of clients set out at the start of this argument. The court also took into account Rule 3.111, Fla.R.Crim.P., providing for the appointment of counsel.

Then the court said, "[W]e find that respondents have exceeded their statutory authority in accepting the appointment . . . ." Brummer II, at 959. The court declined, however, to require the respondents to withdraw from the federal action because, having accepted the appointment, it might place them in an untenable position before the federal court. But the court tendered its conclusion to the federal court with confidence that the appointment would be vacated.

Thus, while a court may have authority to make an appointment, the public defender may not be able to accept it -- or to pursue representation in an official capacity beyond the limits imposed by s. 27.51.

Reading s. 27.51 and these cases two simple conclusions emerge:

1. The public defender may only represent a limited class of clients -- indigents charged with felonies or misdemeanors, minors alleged to be delinquent and people facing involuntary commitment.

2. The public defender may represent these classes of clients in federal court only to protect them from incarceration or to attack the legal basis for incarceration.

Thus, the public defender, in a criminal case for example, may seek appellate review in state or federal courts, see 27.51(4), or, under this court's reading of that statute, he may seek federal collateral review that attacks the state's reason to hold the defendant. In either case, the public defender's representation must arise directly from an underlying criminal prosecution or from the other enumerated circumstances of s. 27.51(1).

The federal civil rights action for damages in Adams v. Bailes is not a case arising directly from Mr. Adams' criminal prosecution. A claim for damages for the alleged violation of a prisoner's constitutional rights has more in common with a tort claim than one for post conviction relief. See e.g. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Thus here we have the odd situation in which the public defender has become a plaintiff's attorney in a tort action -- one of constitutional dimensions, perhaps, but still a tort. Even though the respondents' consciences and sense of professional responsibility may dictate to them that they should have pursued this cause, it is beyond the limits clearly recognized by this

court for public defenders. They must pursue the case as individuals, not as public defenders, and not use public resources such as: telephone, travel, stationery, state time, and secretaries.

The respondents may wish to argue that Mr. Adams' claim falls into the exception found in Graham v. Vann. But there are three reasons why this is not so. First, Mr. Adams sued not to enjoin conditions that daily subjected him to cruel and unusual punishment; rather, he sued for damages for a single injury that could not, and in view of his death never will be, repeated. Second, Mr. Adams was not, and is not today, facing any pending criminal charges. Third, Graham v. Wainwright is wrongly decided under the analysis we have proposed. Conditions of confinement and actions under the U.S. Constitution to enjoin them are not related to the state's right to hold a plaintiff -- the only type of case in which a public defender may lawfully become involved.

Last, the public defender may not lawfully continue representing Mrs. Daisy Carswell Adams because she is not a member of the class whom he may accept as a client under s. 27.51(1). She is the personal representative of Mr. Adams' estate -- and it was Mr. Adams, not Mrs. Adams, who was originally charged with a felony. Nor does she fall into any of the other classes.

Therefore, the petitioner respectfully submits that the respondents do not have constitutional or statutory authority to represent clients in federal civil rights actions for damages. Moreover, Mrs. Adams is not a client whom he may represent.

IV.

Wherefore, the petitioner submits that he has shown good cause why this court should issue a writ of quo warranto, and the petitioner respectfully requests that the court require the respondents to withdraw as counsel for Mrs. Adams in the case

Adams v. Bailes, U.S. District Court for the Northern District of Florida, case no. 84-7099-WS. The petitioner submits that Mrs. Adams will not be prejudiced by such an order, since she is also represented by private counsel.

Respectfully submitted,

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Attorney General

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Assistant Attorney General

JASON VAIL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR QUO WARRANTO has been furnished by U.S. mail to: RICHARD JORANDBY, Public Defender, CRAIG S. BARNARD, Assistant Public Defender, and, RICHARD H. BURR, III, Assistant Public Defender, Office of the Public Defender, 13th Floor, Harvey Building, 224 Datura Avenue, West Palm Beach, Florida 33401; on this 13th day of January, 1986.

JASON VAIL