

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE

FEB 17 1988

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

CASE NO. 68,141

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.)

RESPONSE TO PETITION FOR WRIT OF QUO WARRANTO

Respondents, Richard L. Jorandby, Public Defender of the Fifteenth Judicial Circuit of Florida, and Assistant Public Defenders, Craig S. Barnard and Richard H. Burr III, hereby respond to the Petition for a Writ of Quo Warranto filed by the State of Florida through its Attorney General, and state as follows:

I.

Jurisdiction

Respondents accept the statement of jurisdiction by the Relator.

II.

Parties

Respondents agree with Relator's description of the parties to this action, except to note that Craig S. Barnard and Richard H. Burr III, as assistant public defenders, possess no authority independent of the Public Defender and "serve at the pleasure of the Public Defender," § 27.53(1), Fla. Stat., and are thus not separate parties to this action. In this response therefore, all respondents will be referred to collectively as "Respondent" or as the "Public Defender." The petitioner/relator in this cause will be referred to as the "State" or "Attorney General."

III.

Facts

Respondent concurs with the Attorney General's recitation of the relevant procedural history and substantive facts with the following additions.

Mr. Adams was executed on May 10, 1984. The defendants in the federal civil rights action filed the required "Notice of Suggestion of Death" of the plaintiff in the federal court on March 4, 1985. The Public Defender filed the required Motion for Substitution of Plaintiff on June 28, 1985. While that motion was pending, the defendants sought to depose the plaintiff's primary witness. The Public Defender responded to that effort by a motion for a protective order, filed July 26, 1985. Then, on August 22, 1985, the motion for substitution of plaintiff was granted. No further substantive activities occurred in the case. A status conference was scheduled in the federal District Court for January 23, 1986 which was cancelled because of the pendency of this action.

IV.

Discussion

The Attorney General has filed this quo warranto petition in an effort to have the Public Defender removed as counsel in a federal civil rights action brought individually on behalf of James Adams, an indigent death row client of the Public Defender. The civil rights action was brought during the time when the Public Defender was representing James Adams in active post-conviction litigation in the state and federal courts. The civil rights action in essence alleges that the State of Florida, through its agents, attempted to do violence to Mr. Adams and/or murder Mr. Adams while he was confined at Florida State Prison -- and while he was actively pursuing his right to post-conviction redress. However, during the pendency of that federal civil rights action, the State of Florida sought and

obtained the execution of Mr. Adams, only after it had successfully argued to the federal court that its execution of Mr. Adams would not materially affect the civil rights litigation.

The Attorney General's action in the present proceeding is, however, premature and based on an apparent misunderstanding of the Public Defender's position as counsel in the federal civil rights action. The Public Defender agrees with the Attorney General that the Public Defender should be withdrawn as counsel in the federal action as soon as an orderly transition can be made to counsel for Mr. Adams' successors. However, to the extent that the Attorney General infers that the Public Defender had no authority to initiate the action on behalf of his client, the Public Defender disagrees. The Public Defender disagrees with the Attorney General also to the extent that his argument implies that the Public Defender is not authorized to withdraw from representation after the death of his client in a manner that accords with the requirements of establish federal civil practice and with his professional obligations. However, the Public Defender and the Attorney General do agree on the ultimate point: that the Public Defender should be withdrawn as counsel after the death of his client.

There are two questions presented by the issue before the court. The first question is whether the Public Defender could properly bring the civil rights action under 42 U.S.C. § 1983 on behalf of his indigent client. The second question is, if the Public Defender could bring that action, whether the Public Defender's authority and duty to protect and enforce his client's civil rights terminates summarily and immediately when the State executes his client.

The Attorney General does not seriously challenge the Public Defender's authority to institute the federal civil rights action individually, on behalf of his indigent client who the Public Defender had been appointed by the state courts to represent. This Court implicitly recognized such authority in State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1983) (hereinafter, Brummer I). In that case the Court found no authority for a public

defender to maintain a federal civil rights suit on behalf of a class, where that class includes persons not shown to be indigent and includes persons for whom no appointment of the public defender had been entered. The Court emphasized a point relevant to the present inquiry: that the public defender's responsibility is "'to represent individual citizens in controversy with the State.'" 426 So.2d at 533 (quoting Branti v. Finkel, 445 U.S. 507, 519 (1980)) (emphasis supplied). The gravamen of the Court's holding was as follows:

The Florida Statutes remind us that the public defender does not owe any responsibility to persons other than those whom he is appointed to represent and he is not authorized by statute to undertake representation of any such additional persons. He therefore cannot undertake representation of a class.

426 So.2d at 533.

However, the Court's ruling with regard to representation of an individual client in an individual action was in favor of the authority of the public defender. Distinguishing its holding on representation of a class, the Court stated:

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. It is, however, our view that a state court could not mandate this action.

Id. at 533. The Court thus explicitly affirmed the authority of the public defender to act on behalf of an individual client in such a forum. The reasoning in support of that holding comes from the essence of the attorney-client relationship: "The state is constitutionally obliged to respect the professional independence of the public defenders whom it engages." Id. Any other holding would place a public defender and his assistants in an untenable position, forced to choose between their office or employment by the State and complying with the Code of Professional Responsibility which dictates that

A lawyer shall not permit a person who ... pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

D.R. 5-107(b). This Court reasoned further in accord with that essential principle that the public defender's

"principal responsibility is to serve his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."

Brummer I, 426 So.2d at 533 (quoting Polk County v. Dodson, 454 U.S. 312 (1981)) (emphasis by the Court).

In this case the Public Defender was representing James Adams. He had been found indigent and the Public Defender had been appointed by the state courts to represent Mr. Adams on direct appeal and in post-conviction litigation.¹ While the Public Defender was representing Mr. Adams in active litigation, agents of the State of Florida, acting under color of state law, tried by various means to do violence and even to murder James Adams while he was confined in their custody at Florida State Prison. He was confined under the judgment and sentence that was then currently under attack in post-conviction proceedings. On one occasion Mr. Adams was hospitalized from injuries suffered by an attempt to poison him when state agents caused "Draino" to be put in his food. Thus, while the Public Defender was representing his duly-appointed client in challenges to the sentence imposed by the state, the state was attempting to harm and kill him while in exclusive state custody.

It is under those extreme, life-threatening circumstances, that the Public Defender felt compelled to take measures to protect his client and to prevent further and future harm. It is then that the Public Defender filed the federal civil rights action on behalf of his client. It was filed as an individual action on behalf of an individual client for redress of a specific threat that was quite plainly related to his confinement² that was then under active challenge.

¹ See Adams v. State, 380 So.2d 421 (Fla. 1980) (appointment of counsel for post-conviction).

² See Graham v. Vann, 394 So.2d 176, 177-78 (Fla. 1st DCA 1981) (Public Defender authorized to challenge conditions of confinement on behalf of his individual clients).

The civil rights action was thus necessary and appropriate. The Public Defender's professional responsibility dictated his action.

The remaining question concerns the obligation of the Public Defender after the death of his client. In general the professional obligation of the Public Defender, as for any attorney, would be to close out his representation of the deceased party in an orderly manner that would preserve and not prejudice the surviving civil action for the deceased's representatives. In short, the attorney for the deceased party must take the actions necessary to preserve the action and can take no steps to the detriment of the deceased's representatives. It is this professional duty that has governed the Public Defender's action to this point.

Upon the death of a party to a claim that survives his death, Rule 25 of the Federal Rules of Civil Procedure requires a strict procedure be followed. First, a Notice of Suggestion of Death must be filed. This notice cannot be filed by the deceased party's attorney, for the courts view such an action to be contrary to the interests of the deceased's successors.³ In this case, since Mr. Adams' estate had not been probated, the defendants filed a suggestion of death of the plaintiff on March 4, 1985. The federal rule provides further that 90 days after the filing of the suggestion of death, a motion for substitution of party must be filed and if it is not timely filed "the action shall be dismissed as to the deceased party." Fed.R.Civ.P. 25 (a)(1). To avoid such dismissal, the Public Defender filed the motion for substitution of plaintiff on June 28, 1985.⁴ The

³ See, e.g., Al-Jundi v. Rockefeller, 88 F.R.D. 244, 246 (W.D.N.Y. 1980) (a suggestion of death may be made by any party, "but not by the deceased party herself or himself (acting through counsel)") (original emphasis); In re Klein, 36 B.R. 390, 393 (E.D.N.Y. 1984) ("[T]he attorney for a decedent has no authority ... to suggest the death of his deceased client upon the record. Such action could clearly prejudice the rights of a successor party...").

⁴ The ninety day period of Fed.R.Civ.P. 25(a)(1) had been extended by the court to await the finalizing of Mr. Adams' estate and appointment of a representative. The attorney representing Mr. Adams successors and who handled the probate of the estate did not represent them in the federal civil rights action.

failure to take such action to preserve the rights of the successors has been found to be "blatantly irresponsible." Ten v. Svenska Orient Linen, 87 F.R.D. 551, 553 (S.D.N.Y. 1980).

However, while the motion for substitution of plaintiff was pending, the defendants undertook substantive action on the case by moving to depose the plaintiff's primary witness. Again to preserve the rights of the successors, the Public Defender opposed that motion by asking for a protective order by motion filed on July 26, 1985. The motion for substitution of plaintiff was granted on August 22, 1985. No rulings have been made on the other pending motions. A status conference was scheduled for January 23, 1986 which was cancelled due to the pendency of this petition. Accordingly, though time has passed, little of substance has occurred in the civil rights action and what has occurred has been an effort to preserve and not prejudice the rights of the successors in the surviving claim. Those actions were thus dictated by the Public Defender's professional obligations.

Nevertheless, the Public Defender agrees that the federal civil rights action is now at a stage where the Public Defender should be withdrawn and counsel for Mr. Adams' successors should be substituted.

In summary the Public Defender's position is (1) that he appropriately brought the federal civil rights action individually, on behalf of his client who was then under threat of violence while he was actively pursuing post-conviction litigation; (2) that after the execution of his client, the Public Defender was required by federal rule and professional responsibility to maintain and not prejudice the claim for his client's successors; and (3) that once such obligation is complete the Public Defender should withdraw in favor of the substitution of counsel for those successors.

Accordingly, the writ of quo warranto need not be issued, cf. State ex rel. Smith v. Brummer, 443 So.2d 957, 959 (Fla. 1984) (declining to issue the writ though it was found that the public defender exceeded his statutory authority so as not to place him in "an untenable position before the federal court"), and should not issue because the Public Defender has acted in accord with professional responsibility and within his statutory authority.

CONCLUSION

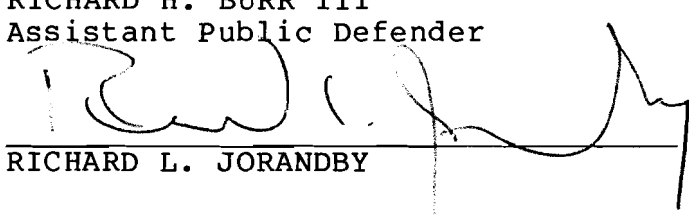
The writ of quo warranto should not issue.

Respectfully submitted,

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CRAIG S. BARNARD
Chief Assistant Public Defender

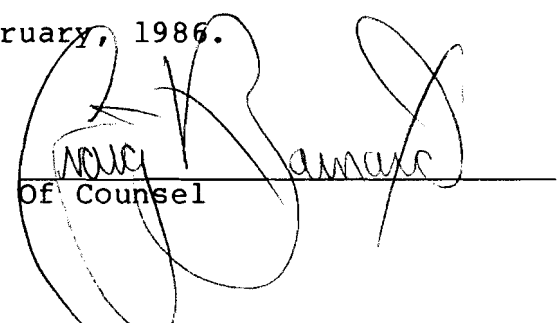
RICHARD H. BURR III
Assistant Public Defender



RICHARD L. JORANDBY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Shirley A. Walker, Assistant Attorney General, Department of Legal Affairs, The Capitol -- Suite 1501, Tallahassee, Florida 32301, this 14th day of February, 1986.



Nancy Samuels
Of Counsel