IN THE SUPREME COURT OF FLORIDA

DALE EDWARD SJUTS,

Petitioner,

v.

STATE OF FLORIDA and DR. ALAN J. WALDMAN,

Respondents.

Case No. SC 01-95

ANSWER BRIEF OF RESPONDENTS

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ABBREVIATIONS USED IN BRIEF

Parties. Petitioner Dale Edward Sjuts will be referred to as "Petitioner" or "Sjuts" in this brief. Respondents State of Florida and Dr. Alan J. Waldman will be collectively referred to as "State" in this brief except where the context indicates otherwise.

Record. The three-volume record on appeal will be cited as "R" followed by the volume number and page number(s), e.g., R1-69.

Petitioner's Brief. References to Petitioner's initial brief shall be 'Init. Br." followed by the page number(s). References to the documents in the appendix to Petitioner's brief shall be "Init. Br. App." followed by the tab letter, e.g., Init. Br. App. B.

Appendix to State's Brief. The appendix to this brief includes the decision below (Tab A) as well as the trial court's order which was affirmed by the Second District (Tab B). References to those documents shall be "App." followed by the tab letter, e.g., App. A.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts in Petitioner's brief is incomplete. The State offers the following Statement of the Case and Facts in lieu of that provided by Petitioner:

This case was initiated on January 5, 1999, when the State filed a Petition for Commitment against Sjuts pursuant to the Jimmy Ryce Act, sections 916.31-.49, Florida Statutes (1998 Supp.). R1-1, -30. The petition alleged that Sjuts is a sexually violent predator based upon his two previous convictions for attempted sexual battery on a child under the age of 12 and based upon mental abnormalities (namely Pedophilia, marijuana abuse, alcohol abuse, and cocaine abuse) which makes Sjuts "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment." R1-1 to -2. The allegations in the petition were based upon a report detailing Sjuts' psyco-sexual history prepared by Dr. Alan J. Waldman, a foresnic psychiatrist who examined Sjuts as part of a multidisciplinary team established under the Jimmy Ryce Act. Rl-1, -22, -14 to -18. And see R3-343 (Sjuts' consent to the evaluation).

After the trial court entered an ex parte order finding probable cause to declare Sjuts a sexually violent predator, R1-24, the Public Defender for the Tenth Judicial Circuit was appointed to represent Sjuts who is indigent. R1-47. On February 1, 1999, the Public Defender filed an answer which set forth four

"Counterclaims." Rl-69. The first "counterclaim" purported to allege a cause of action under 42 U.S.C. § 1983 for an "unlawful search violating privacy rights" and the second "counterclaim" purported to allege a cause of action under § 1983 for "false imprisonment violating liberty interests."[1] Rl-69 to -72. Both § 1983 "counterclaims" were directed at the State of Florida and Dr. Waldman in his individual capacity. Rl-69 (¶¶ 15-16), R1-71, R1-72. Both § 1983 'counterclaims" were based upon the legal premise that the Jimmy Ryce Act does not authorize a mental health evaluation before a probable cause determination is made under the Act by the trial court. Rl-70, -71 (¶¶ 24, 30). More specifically, the § 1983 'counterclaims" were based upon allegations that Dr. Waldman coerced Petitioner into undergoing the psychiatric evaluation by misinforming him that the evaluation was permitted by and was within the context of the Jimmy Ryce Act and that Petitioner would not be released at the end of his sentence if he did not consent to the evaluation. Rl-70, -71 (¶¶ 20-22, 30). The § 1983 'counterclaims" sought the following relief:

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[1] The third counterclaim alleged that the Jimmy Ryce Act is unconstitutional on various grounds. Rl-72 to -74. The forth counterclaim sought to prohibit the State from procuring or utilizing the mental evaluation of Petitioner (and presumably other potential Ryce Act defendants) without a court order and further sought to require the State to establish formal rules to supervise the assessment and evaluation process. Rl-74 to -75. The viability of the third and fourth counterclaims are not at issue in this appeal. See slip op. at 3 n.2; R2-261.

[1] Find that the State and Dr. Waldman violated [Petitioner's] constitutional rights in violation of 42 U.S.C. § 1983.

[2] Award compensatory damages against Dr. Waldman;

[3] Award punitive damages against Dr. Waldman;

[4] Award attorney fees pursuant to 42 U.S.C. § 1988; and

[5] Enjoin the State and Dr. Waldman from using [Petitioner's] evaluation or gaining any benefit therefrom.

Rl-71, -72.

The Office of the Attorney General appeared to defend the State and Dr. Waldman against the two § 1983 "counterclaims" and subsequently moved to dismiss those claims. R1-111, -113 to -117 (as to the State); R1-153, -155 to -161 (as to Dr. Waldman).[2] The trial court, relying on State ex rel. Smith v. Jorandbv, 498 So.2d 948 (Fla. 1986), dismissed the § 1983 "counterclaims" without prejudice because such claims for "monetary damages against the State and its agents is beyond the scope of the public defender's statutory authority" in section 27.51, Fla. Stat. (1997) .[3] R2-260 to -263 (copy in App. B). Petitioner filed a notice of appeal

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[2] The Office of the Attorney General serves as legal counsel to the multidisciplinary team of which Dr. Waldman was a member. See § 916.33(3), Fla. Stat. (1998 Supp.).

[3] A hearing on the State's motions to dismiss the § 1983 'counterclaims" was held on March 25, 1999. See R3-355 to -369 (transcript of hearing). It should be noted that the transcript attached to Petitioner's brief (Init. Br. App. B) is of a hearing in a different case before a different iudse involving a different defendant.

which characterized the trial court's order as "a final judgment dismissing permisssive counterclaims." R2-347 (emphasis supplied).

The Second District affirmed the trial court's dismissal of the § 1983 'counterclaims." Slip op. at 2 (copy in App. A; reported at 774 So.2d 783). The court determined that the "trial court correctly concluded that the public defender exceeded his statutory authority when filing the counterclaims." Id. at 3 (citing § 27.51 and Jorandby) . The court further held that the § 1983 'counterclaims" were subject to dismissal because "the State is not a proper defendant in a § 1983 suit." Id. at 4. Finally, the court held that the § 1983 claims were not proper counterclaims or third-party actions against Dr. Waldman because Dr. Waldman is not an opposing party in the underlying litigation and the claims are not based upon the same transaction or occurrence that is the subject-matter of the Jimmy Ryce Act proceeding. Id.

Sjuts subsequently filed a notice to invoke this Court's discretionary jurisdiction. The sole basis for review set forth in the notice and the jurisdictional brief filed by Petitioner was that the district court's decision affects a class of constitutional officers, namely the Public Defenders. On April 17, 2001, the Court accepted jurisdiction and set the case for oral argument.

STANDARD OF REVIEW

The standard of review is *de novo*. See Execu-Tech Business Systems, Inc. v. New Oii Paper Co. Ltd., 752 So.2d 582, 584 (Fla. 2000) (a ruling on a motion to dismiss based upon a question of law is reviewed *de novo*).

STJMMARY OF THE ARGUMENT

The trial court properly dismissed Sjuts' § 1983 "counterclaims" against the State and Dr. Waldman. The Public Defender is without authority to pursue such claims on behalf of Sjuts and, in any event, such claims are not proper counterclaims or third-party claims in a Jimmy Ryce Act proceeding. Accordingly, the Court should approve the Second District's decision which affirms the trial court's dismissal of the § 1983 'counterclaims" without prejudice.

This Court expressly held in State ex rel. Smith v. Jorandby, 498 So.2d 948 (Fla. 1986), that the Public Defender has no authority to bring a § 1983 action seeking monetary damages against the State on behalf of an indigent defendant. There have been no material changes to the constitutional and statutory provisions governing the Public Defenders which would undermine the Court's holding in Jorandby. Indeed, the 1999 amendments to section 27.51 reaffirm the limited scope of the Public Defender's authority in civil actions.

Moreover, Sjuts' § 1983 claims are not proper counterclaims or third-party claims in this Jimmy Ryce Act proceeding. The § 1983 claims may not be brought against the State which is the only "opposing party" in the commitment proceeding. To the extent that the § 1983 claims are directed at Dr. Waldman in his individual capacity, they are not counterclaims because Dr. Waldman is not an "opposing party" in the commitment proceeding. In any event, the § 1983 claims are not proper counterclaims because they do not arise out of the same transaction or occurrence as the underlying Jimmy Ryce Act proceeding and involve completely different issues. Accordingly, the § 1983 claims against Dr. Waldman should be raised in a separate action if at all.

ARGUMENT

THE TRIAL COURT CORRECTLY DISMISSED SJUTS' PURPORTED § 1983 "COUNTERCLAIMS" BECAUSE THE PUBLIC DEFENDER HAS NO AUTHORITY TO BRING SUCH CLAIMS AND, IN ANY EVENT, THEY ARE NOT PROPER COUNTERCLAIMS OR THIRD-PARTY CLAIMS IN A JIMMY RYCE ACT COMMITMENT PROCEEDING.

Although not entirely clear from Petitioner's brief, this case presents two issues for review. The first is whether the Public Defender has authority to bring a § 1983 action seeking monetary damages on behalf of an indigent defendant. The second is whether a § 1983 action may be interjected **as** a counterclaim or third-party claim in a Jimmy Ryce Act commitment proceeding by anyone on the defendant's behalf. The Second District properly decided each issue and its decision should be approved.

A. The Public Defender has no authority to bring § 1983 claims seeking money damages on behalf of an indigent defendant.

The Public Defenders are not vested with inherent discretionary authority to represent indigent persons nor to determine the nature of the cases in which representation is provided. In State ex rel. Smith v. Brummer, 443 So.2d 957 (Fla. 1984), the Court held that the Public Defender exceeded his authority in accepting an appointment by a federal district court to represent indigent defendants in federal habeas proceedings. In reaching this decision, the Court explained the parameters of the Public Defenders' authority:

> The Office of the Public Defender is a creature of the state constitution and of statute, not of the common law . . . . The functioning of that office is regulated by statute, sections 27.50-.59, Florida Statutes (1981), and by court rule. Florida Rule of Criminal Procedure 3.111. Section 27.51 sets forth the duties of the public defender: To represent any indigents who face possible loss of liberty, or any indigent minor alleged to be a delinquent child, and to handle felony appeals in the state or federal courts.

Id. at 959.

Moreover, the Public Defenders do not have "blanket authority" to determine the scope of representation in any case in which their office is appointed:

> The office of public defender is totally a creature of the state constitution and of statute, not of common law. State ex rel. Smith v. Brummer, 443 So.2d 957 (Fla. 1984). The applicable statute, (section 27.51, Florida Statutes (1985)), does not provide blanket authority for the public defender to represent all indigent persons in all types of criminal actions. Behr v. Gardner, 442 So.2d 980 (Fla. 1st DCA 1983).

Moorman v. Bentley, 490 So. 2d 186, 187 (Fla. 2d DCA 1986). If the Public Defenders have no authority to undertake representation of indigent persons in "all types of criminal actions," then they surely do not have such authority in all types of civil cases.

This case is controlled by State ex rel. Smith v. Jorandby, 498 So.2d 948 (Fla. 1986), which also involved a § 1983 action filed by a Public Defender seeking monetary damages against state

officials. In Jorandby, the Court expressly (and unanimously) held:

> . . . under Florida's constitution and statutory law, public defenders are authorized only to represent defendants whose liberty interests are threatened by the State of Florida, and, consequently have no authority to seek money damages against the state on behalf of their clients.

Id. at 949.[4] There have been no material changes to the Florida Constitution or the controlling statutes since Jorandbv **was** decided which would undermine the holding in that case. Indeed, as discussed below, a 1999 amendment to section 27.51, Florida Statutes, effectively codifies the holding of Jorandby. Accordingly, the Court should reaffirm Jorandbv and approve the Second District's decision which affirmed the dismissal of the § 1983 'counterclaim" filed by the Public Defender against the state-appointed psychiatrist in the Jimmy Ryce Act commitment proceeding underlying this case.

Petitioner does not even mention Jorandbv until page 15 of his brief and then attempts to distinguish that case on the basis that the § 1983 claim filed in this case seeks to enjoin the State from using the psychiatrist's evaluation in addition to seeking money damages against the psychiatrist. That distinction fails. First,

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[4] Accord State ex rel. Butterworth v. Kenney, 714 So.2d 404, 410-11 (Fla. 1998) (Office of the Capital Collateral Regional Counsel may not represent criminal defendants in § 1983 actions because the statutes establishing the CCRC does not provide such authority).

the injunctive relief sought against the State is not available because the State is not a proper defendant in a § 1983 action. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989).[5] Second, injunctive relief against Dr. Waldman in his individual capacity could not preclude the State from using the psychiatrist's evaluation at trial; a motion in limine is the proper procedural mechanism to preclude the use of evidence at trial.[6] Without the improper claim for injunctive relief against the State, the § 1983 'counterclaims" in this case are functionally identical to the § 1983 claim in Jorandby; they involve property interests (e.g., money damages) rather than liberty interests. Accordingly, the Court should hold, as it did in Jorandby, that the Public Defender in this case has "no authority to participate as counsel in this civil rights case." Jorandbv, 498 So.2d at 949.

As set forth above, the Florida Constitution does not provide the Public Defenders any inherent authority; instead, it provides

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[5] Petitioner now concedes that the § 1983 "counterclaims" may have been "wrongfully filed . . . against the 'State'". Init. Br. at 17.

[6] See, e.g., Dailev v. Multicon Development, Inc., 417 So.2d 1106 (Fla. 4th DCA 1982) ("The purpose of a motion in limine is generally to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial."); Devoe v. Western Auto Supply Co., 537 So.2d 188 (Fla. 2nd DCA 1989) ('The purpose of a motion in limine is to exclude irrelevant and immaterial matters, or to exclude evidence when its probative value is outweighed by the danger of unfair prejudice.") (citations omitted). But cf. Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 118 S.Ct. 2014 (1998) (exclusionary rule does not apply in civil cases).

that the Public Defender "shall perform duties prescribed by general law." Art. V, § 18, Fla. Const. (emphasis supplied). The Legislature has prescribed the Public Defenders' duties in section 27.51 and, as the Court recognized in Jorandby, each circumstance listed in that statute 'is directed toward an event that could result in incarceration" or which involves a "prosecution by the state threatening an indigent's liberty interest." Jorandby, 498 So.2d at 950. The Public Defender is without authority to perform duties other than those specified in section 27.51 or another general law.[7] See id. And cf. Attn'y Gen. Op. 95-45 (concluding that public defender has no authority to represent indigent person in proceeding to expunge or seal indigent's criminal history because such authority is not specifically enumerated in section 27.51); Kenney, 714 So.2d at 710-11 (authority of the Office of the Capital Collateral Regional Counsel is limited to that specified in its enabling statutes).

Petitioner has not, and cannot identify any general law which authorizes the Public Defender to pursue a civil cause of action (under § 1983 or otherwise) on his behalf. The absence of such statutory authority is reaffirmed by the 1999 amendments to section

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[7] The Public Defender's representation of Petitioner in the underlying Jimmy Ryce Act commitment proceeding was specifically authorized by section 916.36(3), Fla. Stat. (1998 Supp.). And cf. Init. Br. at 7-8. Section 27.51 was amended in 1999 to further clarify the public defender has such authority. See ch. 99-222, § 2, Laws of Fla. (effective May 26, 1999).

27.51 through which the Legislature clarified the limited nature of the Public Defenders' duties in civil actions. Specifically, section 27.51(1)(d) was amended to read:

> (1) The public defender shall represent, without additional compensation, any person who is determined by the court to be indigent as provided in s. 27.52 and who is:
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> * * *
>
> (d) Sought by petition filed in such court to be involuntarily placed as a mentally ill person or sexually violent predator or involuntarily admitted to residential services as a person with developmental disabilities. However, a public defender does not have the authority to represent any person who is a plaintiff in a civil action brought under the Florida Rules of Civil Procedure, the Federal Rules of Civil Procedure, or the Federal Statutes, or who is a petitioner in an administrative proceeding challenging a rule under chapter 120, unless specifically authorized by statute.

Ch. 99-222, § 2, Laws of Fla. (effective May 26, 1999) (underscored language added). The 1999 amendments effectively codify the holding in Jorandby as well as the broader principle underlying that decision. Specifically, the amendments clarify that the Public Defenders' authority in civil cases is limited to cases where an indigent defendant's liberty interests are at stake and that the Public Defenders have no authority to represent such persons as plaintiffs in any type of civil case.

The title to the 1999 legislation confirms that the amendments to section 27.51 were intended to clarify the existing state of the

law. Specifically, the title explained the amendments to section 27.51 as follows:

> . . . ; clarifying duty of the public defender to represent sexually violent predators who are indigent; prohibiting a public defender from representing such persons in civil actions and administrative proceedings; . . . .

(emphasis supplied). The legislative history of the amendments to section 27.51 further confirms that the amendments were clarifying that the Public Defenders' only authority in civil cases was to represent indigent defendants in Baker Act and Jimmy Ryce Act cases.[8]

Petitioner argues that notwithstanding Jorandby and the limited authority provided to the Public Defender by statute, the Public Defender has authority to prosecute his § 1983 claims in this case because they are "compulsory" counterclaims. Init. Br. at 4-7, 8, 16-18. This argument is without merit.[9] The nature of

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[8] See Staff Analysis for CS/CS/SB 2192 (Sen. Judic. Comm. Apr. 8, 2001) ('[The bill] clarif[ies] the duties of a public defender to include representation of sexually violent predators who are indigent in civil commitment proceedings and prohibit[s] representation of such persons in other civil or administrative matters[.]"). The staff analysis is available through the Legislature's website at http://www.leg.state.fl.us/data/session/1999/Senate/bills/ analysis/pdf/SB2192.ju.pdf. And see Tape recording of Senate Judiciary Committee meeting (Apr. 7, 1999) (comments of Sen. Grant) (explaining that Amendment 2 to CS/SB 2192, the amendment which added the underscored language to § 27.51(1)(d), is a "semi-technical amendment") (tape available from committee, Room 515 Knott Building).

[9] It is also an argument not presented to the trial court. See Init. Br. at 4 (conceding that the nature of the § 1983 claims

the counterclaim has no effect on the authority delegated to the Public Defender by the Florida Constitution and by statute.

As a corollary to that argument, Petitioner contends that the Public Defender's ability to represent him in the Jimmy Ryce Act proceeding would be unconstitutionally limited if the Public Defender is precluded from bringing the § 1983 'counterclaims" on his behalf. Init. Br. at 10-15. In support of this contention, Petitioner relies on Polk Countyv. Dodson, 454 U.S. 312, 102 S.Ct. 445 (1981), and Legal Services Corp. v. Velazquez, 121 S.Ct. 1043 (2001). Those cases are inapposite.

Polk County involved a suit against a public defender under § 1983. The Court held that the public defender was not a proper defendant under § 1983 because his actions were not "under color of state law." 454 U.S. at 321-325, 102 S.Ct. at 451-453. In reaching that conclusion, the Court discussed the nature of the public defender's function and, generally, his "independence" from state control. Id. Contrary to Petitioner's argument, however, Polk Countv does not stand for the broad proposition that the State is without authority to limit the duties and authority of the

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"was not discussed" at the March 29, 1999, hearing on the State's motion to dismiss those claims). Moreover, the argument is inconsistent with Petitioner's characterization of the § 1983 claims in his notice of appeal where he stated that the order 'is a final judgment dismissing permissive counterclaims." R2-347 (emphasis supplied). The court should not entertain the inconsistent position now being advocated by Petitioner. See generally New Hampshire v. Maine, 2001 WL 567710 (U.S. May 29, 2001) (discussing "judicial estoppel").

Public Defender. Indeed, the State's constitutional duty to provide counsel to indigent defendants extends only to proceedings in which the defendant's liberty interests are threatened. See generally Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). In this regard, the broad language in Polk County discussing the 'independence" of the public defender must be construed to extend no further than those circumstances. where, as here, the § 1983 claim involves property interests (e.g., money damages) rather than liberty interests, the State is not obligated to provide counsel and Polk County is not implicated.

Moreover, the general principle espoused in Polk County that the Public Defender must be allowed to fully defend 'his client" is not undermined if the Public Defender is precluded from representing Sjuts in the § 1983 claims. The inability of the Public Defender to pursue monetary damages against Dr. Waldman in his individual capacity does not impede the Public Defender's defense of Sjuts in the Jimmy Ryce Act commitment proceeding. The issues involved in the commitment proceeding are completely different than the issues involved in a § 1983 action for money damages. The commitment proceeding focuses on Sjuts' prior convictions and his present mental state, see § 916.32(9), Fla. Stat. (1998 Supp.); by contrast, the § 1983 claims focus on the actions of Dr. Waldman and the resulting monetary damages to Sjuts, if any.

Velazquez is also inapposite. In that case, the Court invalidated a federal statute which prohibited funds appropriated to legal services' attorneys from being used to challenge the constitutionality of welfare statutes. 121 S.Ct at 1047. Here, the Public Defender is not precluded from arguing on behalf of Sjuts that the Jimmy Ryce Act is unconstitutional." Moreover, the restriction on the legal services' attorneys in Velazquez prejudiced their indigent clients because they would be unlikely to find other counsel. 121 S.Ct. at 1051. That is not the case here even though Petitioner argues that if the Public Defender cannot represent him, then "no one will." Init. Br. at 8-9.

This speculative argument is without merit; Petitioner will not be prejudiced if this Court determines that the Public Defender is without authority to represent him in the § 1983 action. As the Second District noted, Petitioner may represent himself or obtain other counsel for purposes of his section 1983 action. Slip op. at 3. Petitioner's indigent and incarcerated status does not affect the viability of these alternatives in light of 42 U.S.C. § 1988 which provides for an award of attorneys' fees to a prevailing party in a § 1983 action. Indeed, a primary purpose of § 1988 is to ensure that indigents and others with civil rights claims will

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[10] Indeed, the Public Defender has challenged the constitutionality of the Jimmy Ryce Act on behalf of Sjuts in counterclaims III and IV. Rl-72 to -75. The viability of those counterclaims are not at issue in this appeal. See slip op. at 3 n.2; R2-261.

be able to retain counsel to pursue their claims. See, e.g., Dowdell v. City of Apopka, 698 F.2d 1181, 1189 (11th Cir. 1983) (citing Congressional record); Lucas v. Guyton, 901 F.Supp. 1047, 1055 (D.S.C. 1995) (awarding attorneys' fees under § 1988 to inmate who prevailed in his § 1983 claim and noting that the purpose of § 1988 is to is "provide an incentive for competent and skilled attorneys to take on unpopular cases and indigent clients"). Moreover, the § 1983 claims are still in the pleading stage and they must be re-pled and filed as independent actions rather than a part of the Jimmy Ryce Act proceeding; therefore, substitution of new counsel for the Public Defender at this stage would not prejudice Sjuts' § 1983 claim.

Finally, Petitioner's position is unsound public policy. Specifically, delineation of the duties of the Public Defender is a matter best addressed by the Legislature because: a) the Public Defenders' limited resources should not be diverted from the defense of indigent criminal defendants to pursuing civil damage claims on their behalf;[11] b) doctors and other professionals involved in the evaluation process under the Jimmy Ryce Act may be discouraged from participating in the process if counterclaims

[11] Ironically, the same Public Defender who here is advocating expansion of his office's authority has been the subject of extensive judicial review addressing "hundreds of delinquent cases involving indigent defendants who are not receiving timely appellate review." See In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload, 709 So. 2d 101, 102 (Fla. 1998).

(whether well-founded or not) seeking to impose personal liability for monetary damages become common; c) malpractice on the part of the Public Defender in a civil action could result in civil, monetary liability on the part of the State;[12] d) the pursuit of unfounded claims by the Public Defender could subject the Public Defender to claims by the party who the claim is directed at (here, Dr. Waldman), whether for abuse of process or some related theory; e) as the proceedings herein are civil, the Public Defender could be the subject of an award of attorneys fees under section 57.105, which might ultimately have to be paid by the State.

In light of these considerations, it is apparent that Jorandbv and the 1999 amendments to section 27.51 which effectively codify that decision and its underlying policy reflect sound public policy. Accordingly, the Court should reaffirm Jorandbv by approving the Second District's decision in this case and holding that the Public Defender's role is to defend indigents whose liberty interests are being threatened and not to prosecute civil actions on behalf of the defendant.

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[12] The issue of the State's liability for malpractice by the public defender in the course of representing a criminal defendant is pending before the Court in Schreiber v. Rowe, Case no. SC95,000.

B. Section 1983 claims are not a proper counterclaims or third-party claims in a commitment proceeding under the Jimmy Ryce Act.

Because Sjuts' § 1983 claims were dismissed "without prejudice", he may re-file those claims pro se or through other counsel. As a result, it was necessary for the Second District to address whether the § 1983 claims against Dr. Waldman in his individual capacity could be interjected as counterclaims or third-party claims in the commitment proceeding at all, or whether the claims must be filed as separate actions. The Second District correctly determined that such claims were not proper counterclaims or third-party claims are were properly dismissed from the commitment proceeding. Slip op. at 3-4. The Court should approve that portion of the Second District's decision along with its holding that the Public Defender is without authority to bring the § 1983 claims.

Petitioner apparently concedes that his § 1983 claims are not proper third-party claims. See Init. Br. at 17 ("Mr. Sjuts has not filed a third-party claim against Dr. Waldman under Fla. R. Civ. P. 1.180 . . . ."). As the Second District determined, the § 1983 claims cannot be third-party claims because "Dr. Waldman [does not] owe[] any part of Sjuts's 'liability' to the State." Slip op. at 4. Accord Padavono Civil Practice, at § 7.17 (1999 ed.) (discussing the scope of Fla.R.Civ.P. 1.180). Petitioner contends, however, that the § 1983 claims can (and must) be raised in the

commitment proceeding because they are compulsory counterclaims. This argument is without merit; the § 1983 claims are not proper counterclaims at all and certainly are not compulsory in nature.

The § 1983 claims were filed in response to a petition for commitment under the Jimmy Ryce Act. The only parties to that proceeding were the State of Florida and Sjuts. Dr. Waldman was not a party to the Jimmy Ryce Act proceeding. A counterclaim, whether compulsory or permissive, is properly directed only at 'an opposing party." See Fla. R. Civ. P. 1.170(a)-(b); see also Unichem Mfg. Co. v. Witco Chemical Corp., 522 So.2d 98 (Fla. 3rd DCA 1988) (quoting Durham Tropical Land Corp. v. Sun Garden Sales Co., 106 Fla. 429, 151 So. 327 (1932)).

Petitioner argues that his § 1983 claims against Dr. Waldman are in fact claims against an opposing party (i.e., the State) for purposes of Fla. R. Civ. P. 1.170 because Dr. Waldman is an 'agent of the State." Init. Br. at 17-18. At the same time, however, Petitioner argues that Dr. Waldman is "personally liable" for damages under § 1983. Id. at 18; and see Rl-69, ¶ 16 (suing Dr. Waldman in his individual capacity). Petitioner cannot have it both ways; either Dr. Waldman is being sued in his individual capacity, for which the State would have no "respondeat superior" liability, see Hafer v. Malo, 501 U.S. 21, 25-26 112 S.Ct. 358, 361-62 (1991) (distinguishing official capacity and individual (personal) capacity suits under § 1983); Hodgson v. Mississippi

Dept. of Corrections, 963 F.Supp. 776, 789 (E.D. Wisc. 1997) ("personal capacity suits do not extend any form of liability to the State"),[13] or he is being sued in his official capacity for which he would have no personal liability and the State could still have no monetary liability. See Hafer, 502 U.S. at 26, 112 S.Ct. at 362 (public officials sued for money damages are not "persons" for purposes of § 1983 when sued in their official capacity because such suits are "no different than a suit against the state itself") (quoting Will, susra). Accordingly, in no event can the § 1983 "counterclaims" against Dr. Waldman be considered a suit against the State for purposes of Fla. R. Civ. P. 1.170. See, e.g., Hall v. McDonough, 216 So.2d 84, 85 (Fla. 2nd DCA 1968) (rejecting the argument that joinder of a non-party under Fla. R. Civ. P. 1.170 in her individual capacity is appropriate where that party has appeared only in a representative capacity, or vice versa.).

Sjuts suggests that even though Dr. Waldman was not a party to the commitment proceeding, his "counterclaims" against Dr. Waldman are proper pursuant to Fla. R. Civ. P. 1.170(h). Init. Br. at 18. That rule is inapplicable as it is premised on a viable

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[13] And cf. § 768.28(9)(a), Fla. Stat. (2000) (sovereign immunity not waived where state employee acted in bad faith or in a manner exhibiting willful disregard of human rights, etc.). Petitioner alleges that Dr. Waldman's acted with a "blatant disregard for [Petitioner's] rights." Init. Br. at 18. And see R1-70, ¶ 26 (alleging that Dr. Waldman's actions 'evince a reckless or careless disregard for, or a deliberate indifference to [Petitioner'] rights"); Rl-71, ¶ 34 (alleging that Dr. Waldman's actions were 'done in bad faith").

counterclaim against an original opposing party. Here, there is no viable § 1983 counterclaim against the State for which Dr. Waldman's presence is necessary to grant complete relief. See Will, supra (State is not a proper defendant under § 1983).

Even if the § 1983 claims could be considered to be counterclaims, they certainly are not compulsory. As noted above, the § 1983 claims arise out of and are based upon different aggregate facts. See Londono v. Turkey Creek, Inc., 609 So.2d 14, 20 (Fla. 1992). The commitment proceeding focuses on Sjuts' prior convictions and his present mental state (§ 916.32(9), Fla. Stat. (1998 Supp.)) while the § 1983 claims focus on the actions of Dr. Waldman and the resulting monetary damages to Sjuts, if any. Even though there might be some overlap in the claims because they both involve Dr. Waldman's report on the mental state of Sjuts, the claims involve different core facts and legal issues.[14]

Finally, permitting § 1983 claims to be litigated within the context of the commitment proceeding is unsound policy and is inconsistent with the legislative direction that such proceedings

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[14] See, e.g, McKay v. State Farm Fire and Casualty Company, 731 So.2d 852, 854-55 (Fla. 4th DCA 1999)(even though claims involved the same insurance policy, they were not compulsory where one claim involved the scope of the policy and the other claim involved alleged negligence of the agent in not providing the proper type of the coverage); Whigum v. Heilig-Meyers Furniture, Inc., 682 So.2d 643, 646 (Fla. 1st DCA 1996) (an claim for violation of Florida Consumer Collection Practices Act does not arise out of the same aggregate set of operative facts as a creditor's action to collect the debt even though both claims involve the same debtors, creditors and debt obligations).

be handled expeditiously. See § 916.36(1), Fla. Stat. (1998 Supp.) (directing that a trial be held within 30 days after the determination of probable cause), If § 1983 claims (or other ancillary matters) were required or allowed to be litigated as part of the commitment proceeding, it would be difficult if not impossible to hold a trial within the specified statutory period because of discovery related to the ancillary claims. The policy underlying the expedited trial in Jimmy Ryce Act proceedings is the potential restraint on the defendant's liberty resulting from the proceeding. There is no similar policy which would mandate expeditious consideration of a § 1983 counterclaim and, indeed, it would be inequitable to force a § 1983 defendant to defend such a claim on the expedited time-frame established for commitment proceedings.[15]

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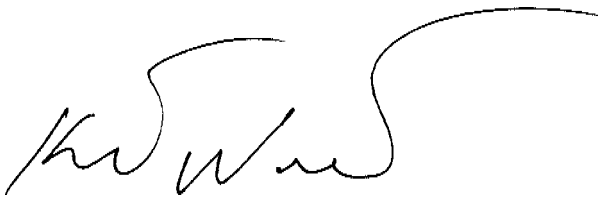
[15] This inequity would be compounded if the Court holds (as advocated by Sjuts' Public Defender and others) that the failure to hold a trial within 30 days mandates dismissal of the commitment proceeding. See State v. Goode, 26 Fla. L. Weekly D131 (Fla. 2nd DCA Jan. 5, 2001), rev, sranted Case no. SC01-28; Kinder v. State, 25 Fla. L. Weekly D2821 (Fla. 2nd DCA Dec. 8, 2000), rev. granted Case No. SC01-37.

CONCLUSION

For the foregoing reasons of law and policy, the Court should approve the Second District's decision and remand the case for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2001, a true and correct copy of the foregoing has been furnished by **U.S. Mail** to:

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Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-size and type-style requirements of Fla. R. App. P. 9.210(a)(2). The brief was prepared with 12-point Courier New font.

Attorney

APPENDIX

TAB

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DALE EDWARD SJUTS,

Appellant,

v.

STATE OF FLORIDA and DR. ALAN J. WALDMAN,

Appellees.

Case No. 2D99-2092

Opinion filed December 15, 2000.

Appeal from the Circuit Court for Polk County; Cecelia M. Moore, Judge.

James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Richard L. Poplin, Assistant Attorney General, Miami, for Appellees.

NORTHCUTT, Judge.

The circuit court dismissed without prejudice two counterclaims fiied by Dale Edward.Sjuts in response to the State's petition to involuntarily commit him pursuant to the Jimmy Ryce Act.[1] We affirm the dismissals, but not for the reason advanced by the circuit court.

Sjuts was imprisoned for sexually violent offenses. As he neared the end of his prison term, the State Attorney for the Tenth Judicial Circuit filed a Ryce Act petition alleging that Sjuts was a sexually violent predator who must be committed for long-term control, care and treatment. Pursuant to section 394.915 of the Act, the circuit court determined there was probable cause to believe Sjuts was a sexually violent predator. It ordered that upon the completion of his prison sentence he was to be detained in a secure facility pending trial in the Ryce Act proceeding.

Sjuts's public defender filed an answer to the petition, along with an affirmative defense and four counterclaim. Sjuts denied that he was a sexually violent predator, and he claimed that Dr. Alan J. Waldman, a psychiatrist under state contract, had coerced him into submitting to a mental health examination which later supplied some of the allegations in the State's petition. Counterclaim I characterized the examination as an unlawful search, and asserted a civil rights claim under 42 U.S.C. § 1983 against Dr. Waldman and the State. It demanded compensatory and punitive damages from Dr. Waldman, attorney's fees, and an injunction against the State's use of the examination. Sjuts's second counterclaim, also a § 1983 action against Dr. Waldman and the State, complained of his detention after he completed his prison

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[1] §§ 916.37-.49, Fla. Stat. (Supp. 1998), amended and transferred by Ch. 99-222, Laws of Fla. (1999), to §§ 394.910-.931, Fla. Stat. (1999).

sentence. He charged that he had been unlawfully deprived of his liberty as a result of information obtained in the coerced examination. This counterclaim sought the same relief 'demanded in the first one.[2]

On motions by the State and by the Attorney General on Dr. Waldman's behalf, the circuit court dismissed the two counterclaims, It reasoned that Sjuts's public defender had no authority to file these civil actions on his behalf. This appeal ensued.

The circuit court correctly concluded that the public defender exceeded his statutory authority when filing the counterclaims, which did not entail a defense against State action that threatened Sjuts's liberty interest, Rather, these claims sought monetary damages for the alleged deprivation of Sjuts's rights to be free of unlawful searches and detentions, and injunctive vindications of those rights.[3] See § 27.51 (1), Fla. Stat. (1997); State v. Jorandby, 498 So. 2d 948 (Fla. 1986). However, we find no basis for dismissing a party's claims on the ground that his counsel is disqualified from pursuing them. Certainly, the parry may represent himself or obtain other counsel for purposes of the counterclaims. See, e.g., Jorandby, 498 So. 2d 948. If need be, the circuit court may sever the counterclaims to ensure that the litigation proceeds in an orderly fashion. See Fla. R. Civ. P. 1.270(b).

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[2] Counterclaims III and IV, brought solely against the State, seek declaratory and injunctive relief and allege the unconstitutionality of the Sexually Violent Predators Act. They are not at issue in this appeal.

[3] Notably, the second counterclaim, which was premised on Sjuts's claim that he had been unlawfully deprived of his liberty as a result of the coerced examination, sought to enjoin its use by the State. It did not venture to enjoin the State's continued detention of him, akin to a petition for writ of habeas corpus. The public defender is authorized to represent petitioners for writs of habeas corpus. See Bentzel v. State, 585 So. 2d 1118 (Fla. 1st DCA 1991).

Still, Sjuts's counterclaims were subject to dismissal for other reasons. First, the State was not a proper defendant in a $1983 suit. That statute provides a cause of action against every "person" who under color of state law subjects the plaintiff to a deprivation of his or her civil rights. It is long-settled that a state is not a "person" for purposes of the statute. See Will v. Michigan Department of State Police, 491 U.S. 58, 64 (1989).

Further, the claims against Dr. Waldman were not proper counterclaims because he was not an opposing party in the underlying litigation. See Fla. R. Civ. P. 1.170. Nor could these counterclaims be characterized as third party actions, Sjuts did not contend that Dr. Waldman owed any part of Sjuts's "liability" to the State. Nor did Dr. Waldman's alleged impropriety "arise out of the transaction or occurrence that [was] the subject matter" of the State's petition, i.e., Sjuts's alleged criminal history and his supposed mental or personality afflictions that together would qualify him as a sexually violent predator under section 394.912(10) of the Act. See Fla. R. Civ. P. 1.180; Rupp v. Philpot, 619 So. 2d 1047, 1048 (Fla. 5th DCA 1993); VTN Consol., Inc. v. Coastal Engineering Associates, Inc., 341 So. 2d 226 (Fla. 2d DCA 1976).

Affirmed.

CAMPBELL, A.C.J., and THREADGILL, J., Concur.

Appendix B

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT IN AND
FOR POLK COUNTY, FLORIDA
Case No. GCG 99-114

STATE OF FLORIDA,.
Petitioner,

v.

DALE EDWARD SJUTS,
Respondent.
_____/

ORDER GRANTING PETITIONER'S MOTION TO DISMISS COUNTS I AND II OF COUNTERCLAIM

This Matter came before the Court on Petitioner's motion to dismiss counts I and II of Respondent's counterclaims. Having heard argument from the parties, the Court finds the following:

On January 5, 1999, the state filed a petition pursuant to Section 916.34, Florida Statutes (Supp. 1998) to involuntarily commit Respondent, Dale Edward Sjuts, as a sexually violent predator. Respondent is represented by the public defender's office.

On February 1, 1999, Respondent responded to the state's petition with a motion to dismiss and a four count counterclaim.

Counts I and II are claims against the state and Dr. Waldman (the counterdefendants) pursuant to 42 U.S.C. § 1983. Respondent seeks compensatory damages, punitive damages, attorney's fees, and an injunction prohibiting the use of Dr. Waldman's evaluation.

Count III is a state law claim for declaratory and injunctive relief against the state of Florida. In Count III, Respondent claims that the governing statute violates various state and federal constitutional rights including equal protection, double jeopardy, and the protections against ex post facto laws and excessive punishment. Respondent also claims that the statute is overbroad, vague, and violates the Americans with Disabilities Act. Respondent seeks an order finding the statute unconstitutional and enjoining the state from proceeding with commitment proceedings pursuant to the statute.

Count IV is a state law claim for declaratory and injunctive relief against the state of Florida. Respondent claims the state must promulgate rules pursuant to Florida's Administrative Procedure Act governing the actions of the multidisciplinary team Respondent further argues that the multidisciplinary team cannot conduct mental evaluations without a court order. Respondent seeks a Court order requiring the initiation of formal rule making procedures and finding that multidisciplinary teams under the act cannot obtain

mental evaluations before a determination of probable cause has occurred or a court order has been issued. Respondent further seeks to enjoin the state from using unlawfully obtained mental evaluations,

Since only counts I and II are addressed in these motions, no tidings will be made on counts III and IV. In Count I, Respondent claims that, while under contract with the state, Dr. Waldman performed an illegal search and violated Mr. Sjuts right to privacy under the state and federal constitution. According to Respondent, Dr. Waldman misrepresented the nature, purpose, and scope of the examination, Respondent contends that mental health evaluations are not permitted until an initial determination of probable cause has been made or a court orders such examination

In Count II, Respondent accuses the counterdefendants of false imprisonment. According to Respondent, Dr. Waldman obtained an unauthorized mental health evaluation and submitted that evaluation to the state of Florida knowing that it would be used to detain Mr. Sjuts after the expiration of his criminal sentence.

The counterdefendants now seek to dismiss counts I and II of the counterclaim. They argue (i) that the public defender's office has no statutory authority to bring civil suits for damages against the state of Florida, (ii) that Dr. Waldman and the state are immune from civil liability pursuant to Section 916.43, Florida Statutes (Supp. 1998), (iii) that Dr. Waldman is entitled to qualified immunity under federal civil rights jurisprudence, and (iv) that sovereign immunity protects the state from civil liability in this case, For reasons discussed below, the Court finds that the public defender's office has exceeded its statutory authority by filing a civil suit for damages on behalf of Respondent. Consequenty, the Court declines to address' the counterdefendant's other arguments.

Pursuant to Section *27.5* 1, Florida Statutes, the Public Defender may represent persons in four specific instances. Each one of these instances involves a possible loss of liberty. *Section 27.51(1), Fla. Stat. (1997).* The Florida Supreme Court interpreted this section as preventing public defenders from representing persons whose liberty interests are not at stake. *State v. Jorandby, 498* So.2d 948 (Fla. 1986).

In *Jorandby,* two assistant public defenders filed a federal civil rights action on behalf of a death row inmate (the plaintiff) alleging that a state prison officer failed to protect the inmate fi-om other inmates. Following the plaintiff's execution, the state petitioned the federal court to remove the public defenders from the case. The federal court denied relief and substituted the plaintiff's estate as the party plaintiff. The state then filed a petition with the Florida Supreme Court for a writ quo warranto removing the assistant public defenders from the case. Based on Section 27.5 1, Florida Statutes, the Florida Supreme Court found that the civil suit went beyond the statutory authority granted to the public defender's office.

> This statutory authority permits representation by a public defender only in circumstances entailing prosecution by the state threatening an indigent's liberty interest. In the instant case, the federal civil rights action seeks compensatory and punitive damages — a property interest, not a liberty interest . . . We conclude that the public defender had no authority to participate as counsel in this civil rights action. *Id* at 950.

In *Jorandby,* the state filed a petition for a writ quo warranto removing the public defender, Respondent argues that this case is distinguishable from *Jorandby.* Admittedly, this case is in a somewhat different posture, but the *Court* finds that the principles enunciated *in Jorandby* are equally applicable to this *case. In Jorandby,* the Supreme Court was faced with a situation where the public defenders no longer had any **official** matters on which they were or could have been representing the plaintiff. In the present case, the public defender's office is clearly authorized to defend Mr. Sjuts in this civil commitment action. Consequently, the public defender's authority to represent Mr. Sjuts in these commitment proceedings is not at issue. The **only** issue is whether the scope of that representation properly extends to a Section 1983 action against the state or its agents.

An action for civil commitment as a sexually violent offender is based on the respondent's alleged history of sexually violent offenses, and, if successful, such an action results in the indefinite commitment of respondent to an appropriate mental health facility as set forth in the governing statute. Since Respondent's liberty interests are clearly at *stake,* he is entitled to the services of the public defender's office. However, Respondent's claim for monetary damages pursuant to 42 U.S.C. § 1983 is essentially a civil tort claim based on the actions of a state agent in the assessment of Respondent's mental condition in preparation for these proceedings. Therefore, property interests and not liberty interests are at stake in counts I and XI of Respondent's counterclaim In *Jorandby,* the court held that:

> [U]nder Florida's constitution and statutory law, public defenders are authorized only to represent defendants whose liberty interests are threatened by the State of Florida, and, consequently, public defenders have no authority to seek money damages against the state on behalf of their clients. *Id.*

Although Respondent's Section 1983 claims have been filed as counterclaims, they are wholly separate and distinct from the state's civil commitment action The counterclaims are not based on the same transaction and occurrence *as* the petition for commitment. *See Londono v. Turkey Creek, Inc., 609* So.2d 14 (Fla. 1992); *see also Neil v. South Florida Auto Painters, Inc., 397* So.2d 1160, 1165-66 (Fla. 3rd DCA 1981). The state's petition is based on Respondent's prior convictions for offenses that allegedly fall within the scope of the governing statute, On the other hand, Respondent's counterclaims arise out of the preliminary investigation

leading up to the present commitment proceedings. Since Respondent's counterclaims do not arise out of the same transaction or occurrence as these commitment proceedings, they are essentially a separate civil lawsuit for monetary damages against the state, and Respondent is not prohibited from bringing those claims at a later date either pro se or through private counsel. Florida Rule of Civil Procedure 1.170. However, such civil lawsuits go beyond the scope of the public defender's statutory authority pursuant to Section 27.5 1, Florida Statutes (1997). *See Jorandby* supra at 950.

Having found that a Section 1983 action for monetary damages against the state and its agents is beyond the scope of the public defender's statutory authority, the Court has no choice but to grant the counterdefendants' motions to dismiss.

It is therefore ORDERED and ADJUDGED that the counterdefendants' motions to dismiss counts I and II of Respondent's counterclaim are hereby GRANTED. Counts I and II of Respondent's counterclaim are hereby DISMISSED without prejudice.

ORDERED in chambers this 21 day of April, 1999 at Bartow, Florida.

Cecelia M. Moore
Circuit Court Judge

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