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THOMAS D. HALL

IN THE SUPREME COURT OF FLORIDA

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DALE EDWARD SJUTS,

Petitioner, :

vs. :

Case No, SC01-95

STATE OF FLORIDA, :

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On January 5, 1999, the State Attorney for the Tenth Judicial Circuit filed a Petition for **Commitment** pursuant to the **Jimmy Ryce Act**, sections 916.31-916.49, Fla. Stat. (Supp. 1998), against Dale Edward Sjuts. (V1/R1-19) On January 11, 1999, Circuit Court Judge Cecelia Moore appointed the Public Defender to represent Mr. Sjuts. (V1/R47) On behalf of its client, the Public Defender's Office for the Tenth Judicial Circuit filed an Answer to the Petition that included four counterclaims.

Counterclaim I was against the psychiatrist under contract with the State to evaluate Mr. Sjuts for purposes of determining whether Mr. Sjuts was a sexually violent predator who should be committed pursuant to the Jimmy Ryce Act. The counterclaim alleges problems in conducting the evaluation and requests damages, attorney's fees, and enjoinder of the evaluation and its fruits therefrom. The counterclaim alleges a violation of constitutional rights in violation of 42 U.S.C. §1983. Counterclaim **II** was against the State's contract psychiatrist and the State, and it alleges Mr. Sjuts is being deprived of his liberty interests due to information contained in the doctor's improperly obtained evaluation of Mr. Sjuts. The counterclaim requests damages, attorney's fees, and an enjoinder of using or benefiting from the evaluation due to a violation of 42 U.S.C. §1983. (V1/R68-75)

The **State** filed a motion to dismiss Counterclaims **I** and **II** arguing, among other things, that the Public Defender had no authority to pursue civil rights actions against the State.

(V1/R113-117) The doctor, via the Attorney General's Office, filed a similar motion. (V1/R155-161) On March 25, 1999, a hearing was held on the motions to dismiss (V3/R355-369); and on April 23, 1999, the trial court rendered an order granting the motions to dismiss Counterclaims I and II. (V2/R260-263) The order held that these Counterclaims were permissive and beyond the scope of the Public Defender's statutory authority under §27.51, Fla. Stat. (1997) . The trial court then dismissed the two Counterclaims without prejudice. The Public Defender's Office, on behalf of Mr. Sjuts, filed a timely notice of appeal on May 24, 1999. (V2/R347-351)

On December 15, 2000, the Second District issued an opinion finding, among other things, the Public Defender had no authority to pursue civil rights actions against the State and the State's agent. Petitioner timely filed a notice to invoke this Court's jurisdiction on the basis that the Second District's opinion expressly affects a class of constitutional or state officers.

### SUMMARY OF THE ARGUMENT

The counterclaims in this case are, in actuality, compulsory and must be raised now or they will be forever waived. The dismissed counterclaims arise from the same aggregate of operative facts because the facts serve as the basis for both the claim and the counterclaims or because the core of the facts for the original claim activates additional legal claims for Mr. Sjuts that would otherwise remain dormant. If this Court finds these counterclaims are compulsory, then this Court should dismiss this appeal and require the trial court to reconsider its order in light of its erroneous ruling that the counterclaims were permissive.

If this Court decides the counterclaims are permissive, then the trial court erred in holding these counterclaims were beyond the Public Defender's statutory authority to pursue. These counterclaims are an intricate part of the civil commitment action (Jimmy Ryce Act) to which the Public Defender's Office has been appointed in order to represent Mr. Sjuts' interests. If the Public Defender is to represent Mr. Sjuts in these Jimmy Ryce Act proceedings, it must represent Mr. Sjuts fully and without limitations. The Public Defender has an ethical duty to represent Mr. Sjuts without limitations being placed on its independent professional judgment by the State, and the State has a constitutional obligation to respect that professional independence. Thus, the trial court erred in dismissing Counterclaims I and II as being beyond the Public Defender's scope of representation.

## ARGUMENT

### ISSUE I

DID THE TRIAL COURT ERR IN DISMISSING PETITIONER'S COUNTERCLAIMS I AND II AS BEING BEYOND THE SCOPE OF THE PUBLIC DEFENDER'S AUTHORITY TO PURSUE?

Before the issue of the scope of the Public Defender's authority is addressed, there is a threshold issue that must be crossed first. Although the trial court held the Counterclaims at issue were permissive, the issue of whether they were permissive or compulsory was not discussed at Mr. Sjuts' March 25, 1999, hearing. The issue was discussed in a similar pending case on April 5, 1999, (prior to the rendition of the order) for a Jose Angel Ortega<sup>1</sup> (see Appendix B) with the Public Defender's Office taking the position that these are compulsory counterclaims. If these are compulsory counterclaims, then they must be raised now or they will be forever waived. Londono v. Turkey Creek, Inc., 609 So. 2d 14 at 19 (Fla. 1992) .

The test for measuring whether a claim is compulsory is the "logical relationship test." This test is further defined as:

[A] claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party

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<sup>1</sup> Mr. Ortega's petition on this same issue is pending before this Court in Case No. SC01-583.



defendant that would otherwise remain dormant.

Londono, 609 So. 2d at 20, quoting from a quote contained in Neil v. South Florida Auto Painters, Inc., 397 So. 2d 1160 at 1164 (Fla. 3d DCA 1981). But, as this Court noted, "stating this test is far easier than determining if a claim passes the logical relationship test." Londono, 609 So. 2d at 20.

Although the trial court found the Petitioner's Counterclaims to be separate and distinct from the State's civil commitment actions and not based on the same transaction and occurrence as the petitions for commitment, the Public Defender and Petitioner argue the contrary. A condition precedent to the State Attorney filing a petition seeking to have a person declared a sexually violent predator is the filing of a written assessment as to whether the person meets the definition of a sexually violent predator. "Sexually violent predator" is defined as any person who:

- (a) Has been convicted of a **sexually** violent offense;
- and**
- (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

§916.32(9), Fla. Stat. (Supp. 1998). Therefore, the civil commitment petition filed in the above-styled cause is not based solely on prior convictions for specified convictions. It is also based on an assessment that Mr. Sjuts currently suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined. Actions

occurring during this legally required assessment are the subject of Mr. Sjuts' counterclaims, making his counterclaims inextricably bound up with the State's claims. Thus, Mr. Sjuts' counterclaims are compulsory<sup>2</sup> contrary to the trial court's findings.

If these Counterclaims are compulsory, then it is essential they be raised now or they will be deemed waived. Unfortunately, the dismissal of a compulsory counterclaim is not appealable at this point in time. Dismissal of a compulsory counterclaim is not considered a final disposition and is not appealable until a final disposition of the original cause has been obtained on the merits. Campbell v. Gordon, 674 So. 2d 783 at 785 (Fla. 1st DCA 1996). If this Court agrees with Petitioner that his Counterclaims arise from the same aggregate of operative facts because the facts serve as the basis for both the claim and counterclaims or because the core of the facts for the original claim activates additional legal claims for Mr. Sjuts that would otherwise remain dormant, then this Court should dismiss this case and require the trial court to reconsider its order in light of its erroneous ruling that the counterclaims were permissive.

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<sup>2</sup>Rule 1.170(a), Florida Rules of Civil Procedure, provides:

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

If this Court decides the counterclaims are permissive, then the trial court's order dismissing the counterclaims is a final order and appealable now. See Campbell. The question then becomes whether these counterclaims are beyond the scope of the Public Defender's statutory authority under § 27.51, Fla. Stat. (1997).

Section 27.51, Florida Statutes (1997), sets forth the duties of the Public Defender:

(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:

(a) Under arrest for, or is charged with, a felony;

(b) Under arrest for, or is charged with, a misdemeanor, a violation of chapter 316 which is punishable by imprisonment, criminal contempt, or a violation of a municipal or county ordinance in the county court, unless the court, prior to trial, files in the cause an order of no imprisonment which states that the defendant will not be imprisoned if he or she is convicted;

(c) Alleged to be a delinquent child pursuant to a petition filed before a circuit court; or

(d) Sought by petition filed in such court to be involuntarily placed as a mentally ill person or involuntarily admitted to residential services as a person with developmental disabilities.

It is clear from this statute that § 27.51 does not authorize the Public Defender to represent persons who are being committed as sexually violent predators under the Jimmy Ryce Act;<sup>3</sup> however, the trial court entered an order on January 11, 1999, appointing the

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<sup>3</sup>Apparently § 27.51 has been amended to include in the Public Defender duties the duty to represent indigent persons sought by petition to be involuntarily placed as a sexually violent predator; but this amendment did not go into effect until May 26, 1999. See § 27.51(1) (d), Fla. Stat. (1999).

Public Defender's Office to represent Mr. Sjuts in this Jimmy Ryce Act proceeding (V1/R47) under § 916.36(3), Fla. Stat. (Supp. 1998), which states:

(3) At all adversarial proceedings under this act, the person subject to this act is entitled to the assistance of counsel, and, if the person is indigent, the court shall appoint the public defender or, if a conflict exists, other counsel to assist the person.

This type of proceeding is defined under § 916.31, Fla. Stat. (Supp. 1998), as being a civil commitment procedure for long term care and treatment of sexually violent predators that is very different from civil commitments under the Baker Act. Thus, the legislature has expanded the duties of the Public Defender beyond what is contained in §27.51 to represent indigents sought to be civilly committed pursuant to the Jimmy Ryce Act.<sup>4</sup>

In a civil lawsuit a permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fla. R. Crim. P. 1.170(b). "A partial final judgment adjudicating a permissive counterclaim is, therefore, ordinarily appealable." Campbell, 647 So. 2d at 785. The trial court's order in this case claims to dismiss counterclaims I and II without prejudice, but this ruling of being "without prejudice" makes no sense. If Mr. Sjuts' attorney in this case--the Public Defender's

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<sup>4</sup> See also Bentzel v. State, 585 So. 2d 1118 (Fla. 1st DCA 1991), in which it was held that the right to counsel language contained in extradition proceedings, §941.10(1), Fla. Stat. (1989), encompassed the appointment of the public defender to represent the indigent challenging extradition.

Office--cannot represent Mr. Sjuts on his counterclaims, then no one will represent the indigent, incarcerated Mr. Sjuts; thus, the holding that the Public Defender cannot represent Jimmy Ryce clients in their civil counterclaims has a highly prejudicial impact on Mr. Sjuts and other Jimmy Ryce Act clients represented by the Public Defender.

As for the scope of the Public Defender's Office's representation, the Public Defender has been ordered to represent Mr. Sjuts in his Jimmy Ryce Act commitment proceedings; and this representation should not be limited so as to interfere with an attorney's representation of his client.

Rule 4-1.7(b), Rules Regulating The Florida Bar (1999)I provides:

**(b) Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest,...

The comments to this rule state:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

The appropriate cause of action for Mr. Sjuts is to get the impermissibly obtained evidence enjoined from use in any fashion and to obtain damages in order to obtain retribution for Mr. Sjuts and, as a side affect, to keep the psychiatrist and State from

improperly conducting its Jimmy Ryce Act initial evaluations in the future. The State and the trial court's order are limiting the Public Defender's attorneys in fully representing Mr. Sjutts to the point where the limitation is affecting their independent professional judgment. This violates the Assistant Public Defender's ethical responsibilities to his client. In addition, this creates due process and equal protection violations where an indigent defendant is provided less representation than a solvent defendant in violation of Amendment 14, Sec. 1, of the U.S. Constitution and Art. I, Sections 2, 9 and 21 of the Florida Constitution.

In Polk County v. Dodson, 454 U.S. 312 at 325 (1981), the United States Supreme Court held that an Assistant Public Defender performing a lawyer's traditional functions could not be sued under 42 USCS § 1983 because that attorney was not acting "under color of state law." In order to reach that conclusion, the Court found two important factors: (1) The appointed attorney's right to act independently so as to advance the undivided interests of his client, and (2) the constitutional obligation of the State to respect that professional independence.

The fact that it is the State that pays the assistant public defender's salary is of no consequence. "Except for the source of payment, their [the attorney/client] relationship became identical to that existing between any other lawyer and client. 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender

program,' ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980) [ftnt. omitted]." Polk County, 454 U.S. at 318. The Court described the duties of a defense attorney as those of a personal counselor and advocate who opposes the designated representatives of the State. "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.' [Ftnt. omitted.] This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed. [Ftnt. omitted.]" Id. at 318, 319. The Court quotes from Ferri v. Ackerman, 444 U.S. 193 (1979), which describes the performance of appointed counsel as paralleling the performance of privately retained counsel; and even though appointed counsel serves pursuant to statutory authority, counsel's duty "'is to serve the undivided interests of his client.'" Polk County, 454 U.S. at 319, ftnt. 8. The quote goes on to note that an indispensable element of the appointed attorney's effective performance of his responsibilities is his ability to act independently of the government and to oppose it in adversary litigation. Id. The Court noted that although State decisions could determine the quality of a public defender's law library or size of his caseload, a defense attorney cannot be the servant of an administrative superior. The Court stated that a public defender is held to the same standards of competence and integrity as a private

attorney and "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of his client." Id. at 321. The Court then quotes DR5-107(B), ABA Code of Professional Responsibility (1976), that states a lawyer shall not permit a person who employs him to render legal services for another to direct or regulate his professional judgment in rendering such legal services. Id.

The concurring opinion by Chief Justice Burger emphasized the independence of appointed counsel from the government:

It is the independence from governmental control as to how the assigned task is to be performed that is crucial. The advocate, as an officer of the court which issued the commission to practice, owes an obligation to the court to repudiate any external effort to direct how the obligations to the client are to be carried out. The obligations owed by the attorney to the client are defined by the professional codes, not by the governmental entity from which the defense advocate's compensation is derived.

Id. at 327.

The second, and equally important, factor in Polk County "is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. [Footnote omitted.]" Id. at 321, 322. The Court stated that implicit in the concept of a "guiding hand" of appointed counsel is the assumption that appointed counsel will be free of State control. "There can be no fair trial unless the accused receives the services of an effective and independent advocate." Id. at 322.

Thus, the entire reasoning behind the holding in Polk County is based on the independence of the public defender to represent



his client's interest free from State interference and the State's constitutional obligation to respect that independence. In Mr. Sjuts' case the State is interfering with Public Defender's independence by putting limitations on its representation of Mr. Sjuts. The Public Defender has an ethical duty to represent Mr. Sjuts in all aspects of this proceeding, and this includes the counterclaims in question. The State's motion to dismiss these counterclaims interferes with these ethical duties, and the granting of that motion violates Mr. Sjuts' constitutional right to counsel--counsel that must be free of State control. See s o State v. Brummer, 426 So. 2d 532 (Fla. 1983).

In the more recent case of Legal Services Corp. v. Velazquez, 121 S.Ct. 1043 (2001), the U.S. Supreme Court held that conditions imposed by Congress on the use of Legal Services Corp. (LSC) funds violated the First Amendment rights of LSC grantees and their clients. Congress prohibited legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law. Such restrictions on LSC attorneys was held to be unconstitutional:

Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited. Just as government in those cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, see Arkansas Ed. Television Comm'n, supra, and Rosenberger, supra, it may not design a subsidy to effect

this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.

Id. at 1050. The Court found it unacceptable that an attorney could only represent a client on part of a case but could not advise the courts of serious questions of statutory validity. "The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case." Id. at 1051.

The argument that such a restriction was harmless because the attorney could withdraw was also rejected. Not only was Congress trying to eliminate arguments which it found unacceptable, but the client would be unlikely to find other counsel inasmuch as LSC attorneys were to only represent "persons financially unable to afford legal assistance." 42 U.S.C. §2996(a)(3). Velazquez, 121 S.Ct. at 1051.

Because LSC attorneys must withdraw whenever a question of a welfare statute's validity arises, an individual could not obtain joint representation so that the constitutional challenge would be presented by a non-LSC attorney, and other, permitted, arguments advanced by LSC counsel.

Id.

Finally, the Court noted that the Constitution does not permit the Government to confine litigants and their attorneys so as to insulate the Government's laws from judicial challenge:

We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought

inimical to the Government's own interest. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 548, 103 S.Ct. 1997, 76 L. Ed. 2d 129 (1983); Speiser v. Randall, 357 U.S. 513, 519, 78 S.Ct. 1332, 2 L. Ed. 2d 1460 (1958) .

Id. at 1052.

By prohibiting Public Defenders from representing their clients in counterclaims in Jimmy Ryce Act proceedings, the State is not only interfering with an attorney's ethical duties but is interfering with First Amendment rights to advance the attorney's client's rights. Arguing that the client is free to seek his own representation is meaningless in light of the client's indigent and confined status. As in Valazquez, the State's restrictions in this Act are unconstitutional.

The trial court relied on State v. Jorandby, 498 So. 2d 948 (Fla. 1986), for the proposition that public defenders cannot represent persons whose liberty interests **are not at stake in order** to come to the conclusion that the Public Defender's Office cannot represent Mr. Sjuts in these counterclaims. Jorandby is not applicable. Jorandby's assistant public defenders were representing a Florida death row inmate and filed a 1983 federal civil rights action on behalf of their client who had been injured while on death row. The civil rights action **was** used to try to stay the execution, but the execution took place. The personal representative of the inmate's estate was then substituted as the party in the 1983 action. It was only after the execution and the intent to keep the 1983 action going was made clear that the State petitioned the federal court to remove the assistant public defenders as

representatives of the inmates' successors. When the federal court denied the State's motion, the State went to the Florida Supreme Court via a writ of quo warranto to prohibit the assistant public defenders from representing the personal representative of the inmate's estate in this 1983 civil rights action seeking money damages from the State. At this point there was no part of the defense representation that concerned the inmate's liberty interest--only property interests, so it is not surprising that the Supreme Court found the proceeding had more in common with a tort claim than a suit for post-conviction relief. Id. at 950. Even the public defender conceded he should withdraw as counsel and let private counsel continue to represent the estate. Id.

In Mr. Sjuts' case the 1983 counterclaims are an intricate part of the civil commitment action to which the Public Defender's Office has been appointed in order to represent Mr. Sjuts' interests. The liberty interests are part and parcel of Mr. Sjuts' attack on the probable cause findings made as a result of the psychiatrist's impermissible evaluation. This impermissible evaluation, under the 1983 counterclaims, must be enjoined from use in any form; and the damages sought are for having obtained impermissible evidence that resulted in probable cause findings under the Jimmy Ryce Act that resulted in Mr. Sjuts being held in custody after he had completed his prison sentence. These counterclaims, therefore, are not solely a suit seeking property interests that puts it in a tort claim category.

In its opinion denying Mr. Sjuts' right to have his appointed counsel -- The Public Defender's Office -- pursue his counterclaims, the Second District also claims that the counterclaims against the State could be dismissed because the State is not a "person" under sec. 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). Perhaps defense counsel wrongly filed the counterclaims against the "State" but could add in individual State Officials pursuant to Hofer v. Melo, 502 U.S. 21 (1991). Petitioner also disagrees with the Second District's characterization of Dr. Waldman. The Public Defender's Office would need to have the authority to pursue these counterclaims.

Mr. Sjuts has not filed a third-party claim against Dr. Waldman under Fla. R. Civ. P. 1.180, but a counterclaim under Fla. R. Civ. P. 1.170. Dr. Waldman has been employed by the State to conduct an evaluation of Mr. Sjuts for the purpose of deciding whether or not Jimmy Ryce Act proceedings should be pursued against Mr. Sjuts. In addition, the Ryce Act statute provides that the Attorney General's office serves as legal counsel for the multidisciplinary team;<sup>5</sup> and Dr. Waldman was performing his evaluation in his capacity as a member of that team. It is clear the State has cloaked Dr. Waldman as an agent of the State, and as this agent Dr. Waldman conducted an interview with Mr. Sjuts in such a fashion that Mr. Sjuts' constitutional rights were violated. Just as individual officers and agents of a corporation are personally liable where these individuals have committed a tort even if such

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<sup>5</sup> §916.33(3), Fla. Stat. (Supp. 1998).

acts are performed within the scope of their employment or as corporate officers or agents in addition to the corporation being liable', so too is Dr. Waldman personally liable for his blatant disregard for Mr. Sjuts' rights. Dr. Waldman was added as party to Mr. Sjuts' Counterclaim under Fla. R. Civ. P. 1.170(h).

These counterclaims are intricately connected to the **Jimmy Ryce** Act proceedings; and if the Public Defender is to represent Mr. Sjuts in these Jimmy Ryce Act proceedings, it must represent Mr. Sjuts fully and without limitations. The Public Defender has an ethical duty to represent Mr. Sjuts without limitations being placed on its independent professional judgment by the State, and the State has a constitutional obligation to respect that professional independence.

At this point, the 1983 action is intertwined with the Jimmy Ryce Act proceeding and Mr. Sjuts' liberty interests; and the Public Defender has an obligation to represent Mr. Sjuts in these 1983 counterclaims.

The trial court erred in dismissing Counterclaims I and II as being beyond the Public Defender's scope of representation. The Second District's opinion upholding the trial court's decision directly impacts on the lawful duties of a constitutional officer.

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<sup>6</sup> See White-Wilson Medical Center v. Dayta Consultants, Inc., 486 So. 2d 659 (Fla. 1st DCA 1986).

CONCLUSION

Based on the above arguments and authorities, the trial court's order dismissing Counterclaims I and II must be set aside.

APPENDIX

PAGE NO.

1. Opinion from the Second District Court  
of Appeal dated 12-15-00. A
2. Counterclaims I and II re: Jose Angel Ortega  
case no. GCG-1999-00227 B