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IN THE SUPREME COURT OF FLORIDA

DALE EDWARD SJUTS,

Petitioner, :

vs. :

STATE OF FLORIDA,

Respondent.

Case No. SC01-95

**FILED**  
THOMAS D. HALL

JAN 22 2001

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On 1-5-99, 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. On 1-11-99, Circuit Court Judge Cecelia Moore appointed the Public Defender to represent Mr. Sjuts. On behalf of its client, the Public Defender's Office for the Tenth Judicial Circuit filed an Answer to the Petition that included four counter-claims.

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.

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. The doctor, via the Attorney General's Office, filed a similar motion.

On 3-25-99, a hearing was held on the motions to dismiss; and on 4-23-99, the trial court rendered an order granting the motions to dismiss Counterclaims I and II. 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 5-24-99.

On 12-15-00, 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 Second District 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. 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.

ARGUMENT

ISSUE

BY HOLDING THAT PUBLIC DEFENDERS HAVE NO AUTHORITY TO PURSUE CIVIL RIGHTS ACTIONS AGAINST THE STATE AND THE STATE'S AGENT, THE SECOND DISTRICT'S OPINION EXPRESSLY AFFECT THE DUTIES AND POWERS OF THE CONSTITUTIONAL OFFICER, THE PUBLIC DEFENDER.

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>1</sup> however, the trial court entered an order on 1-11-99, appointing the Public Defender's Office to represent Mr. Sjuts in this Jimmy Ryce Act proceeding under §916.36(3), Fla. Stat. (Supp. 1998):

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<sup>1</sup> §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 5-26-99. See § 27.51(1) (d), Fla. Stat. (1999) ,

(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>2</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 v. Gordon, 647 So. 2d 783 at 785 (Fla. 1st DCA 1996). The Second District's opinion states that even though the Public Defender's Office cannot represent Mr. Sjuts on his counterclaims, the counterclaims could not be dismissed on this basis; and Mr. Sjuts was free to pursue these legal claims on his own. However, if Mr. Sjuts' attorney in this case -- the Public Defender's 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

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<sup>2</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.

Jimmy Ryce Act 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), 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. Sjuts 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 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 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 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. 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 also State v. Brummer, 426 So. 2d 532 (Fla. 1983).

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.<sup>3</sup>

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.

#### CONCLUSION

The Second District's opinion directly impacts on the lawful duties of a constitutional officer. This Court should accept jurisdiction in this case.

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<sup>3</sup> The Second District Court 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). Appellant also disagrees with the Second's characterization of Dr. Waldman. The Public Defender's Office would need to have the authority to pursue these counterclaims.

APPENDIX

PAGE NO.

1. Opinion from Second District Court  
of Appeal dated 12-15-00.

A



**NORTHCUTT**, Judge.

The circuit court dismissed without prejudice two counterclaims filed by Dale **Edward Sjuts** in response to the State's petition to involuntarily commit him pursuant to the Jimmy **Ryce** Act.<sup>1</sup> 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 counterclaims. 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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<sup>1</sup> **§§** 916.31 - .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**.<sup>2</sup>

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.' **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 party 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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<sup>2</sup> 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.

<sup>3</sup> 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 Enaineerina Associates. Inc., 341 So. 2d 226 (Fla. 2d DCA 1976).

Affirmed.

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

CERTIFICATE OF SERVICE

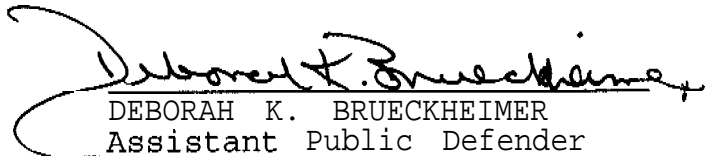
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Respectfully submitted,

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