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IN THE SUPREME COURT OF FLORIDA

DALE EDWARD SJUTS,

Petitioner,

vs.

STATE OF FLORIDA and DR. ALAN J. WALDMAN,

Respondent.

Case No. SC01-95

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner will rely on his initial brief.

ARGUMENT

ISSUE I

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

Petitioner failed to set forth the standard of review in his initial brief, but he agrees with Respondent that it is de novo.

As for the Office of the Public Defender lacking statutory authority to pursue civil rights actions under 42 U.S.C. §1983, this issue has been addressed in Appellant's initial brief; and undersigned counsel relies on that argument. Undersigned counsel does note the State's use of State ex rel. Butterworth v. Kenny, **714** So. 2d 404 (Fla. 1998), to support its position; but that case is factually distinguishable. Kenny dealt with CCRC pursuing a civil rights lawsuit under 42 U.S.C. §1983 in order to attack the constitutionality of the electric chair. The Florida Supreme Court held CCRC had no authority to do so, because there was no constitutional right to an attorney in postconviction cases--even in death cases. Since there was no constitutional right to an attorney, the legislature could limit CCRC's authority by statute. In this case--a Jimmy Ryce Act proceeding--the Public Defender is representing Mr. Sjuts in a precommitment proceeding, not a postcommit-

ment proceeding; and Mr. Sjuts' right to counsel is constitutional.

As for the State's claim that this effort to preclude the use of the evaluation is a remedy that cannot be granted under the exclusionary rule, Mr. Sjuts disagrees. The state relies on Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. ___, 118 S.Ct. 2014, 141 L. Ed. 2d 344 (1998); but that case only holds the exclusionary rule does not apply to administrative proceedings concerning a violation of parole. In so holding the Court noted the exclusionary rule is applicable where its deterrence benefits outweigh its substantial social costs. In parole situations where the defendant has already been convicted and sentenced, the informal, administrative parole revocation procedures designed to accommodate a large number of parole proceedings would be greatly hindered by application of the exclusionary rule. In addition, there is an overwhelming interest in ensuring that a parolee complies with the conditions of his parole and is returned to prison if those conditions are violated. The costs of allowing a parolee to avoid the consequences of his violation are compounded by the fact that parolees are more likely to commit future crimes. Scott, 141 L. Ed. 2d at 353. The court then described the

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[1] There is another interesting aspect to Kenny in that despite the Florida Supreme Court's rejection of an attack on the method of execution of death row inmates in Kenny and Provenzano v. Moore, 744 ***So.*** 2d **413** (Fla. 1999), the United States Supreme Court was prepared to address this issue until the Florida legislature changed the method of execution to include lethal injection. See Bryan v. Moore, 145 L. Ed. 2d 306 (1999), and Bryan v. Moore, 99-6723, 66 CrL 2145 (Jan. 24, 2000).

deterrence factor as "marginal." Thus, the court came to the conclusion that in parole cases deterrence benefits of the exclusionary rule would not outweigh the costs. Id. at 354.

The situation in Mr. Sjuts' case is very different. Despite the State's attempt to depict a Jimmy Ryce proceeding as a quick, expedited, 30-day process, the reality is the opposite. Mr. Sjuts has been in custody for purposes of the Jimmy Ryce Act since January 5, 1999; and he has not yet gone to trial. The Public Defender's Office is representing Mr. Sjuts in a serious proceeding carrying a potential life commitment at the most or at the least "long term" commitment. Motion practice is being vigorously pursued in this case and other Jimmy Ryce Act cases throughout the State. When there is a trial, it will be with a jury and a circuit court judge--not a parole board consisting of non-lawyers. Traditional rules of evidence will apply, unlike in the informal parole hearings. The deterrence benefit will not be "marginal" in this case or in other Jimmy Ryce Act cases. An evaluation that starts the Jimmy Ryce Act procedures and keeps a person in custody should be free from improper, coercive tactics. The State argues doctors and other professionals may be discouraged from participating in the process if counterclaims -- whether well-founded or not -- are allowed. The State's use of these doctors have great significance in this process inasmuch as the initial psychiatric interviews help to determine whether or not commitment proceedings will be recommended. Surely it would be better for society to have a psychiatric interview that was not coercive and not conducted in

violation of constitutional rights, then to allow psychiatric interviews to be conducted in a coercive and unconstitutional manner. Clearly, an interview conducted without regard to constitutional rights and exclusionary consequences will be far less reliable; and if a psychiatric interview is conducted properly, then society benefits as a whole and there are minimal social costs in light of the increased reliability in the interview.

The State has called the Jimmy Ryce Act a civil procedure and relies on Kansas v. Hendricks, 521 U.S. 346 (1997), for support.[2] Whether or not the Florida statutory procedures can meet constitutional muster as apparently Kansas has done at the moment is not presently before this Court, but even Hendricks notes that a civil label is not always dispositive, Providing strict procedural safeguards is one of the considerations in making a determination of what type of proceeding it really is. Id. In One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), the Court held that forfeiture proceedings--although technically a civil proceedings--are in effect criminal or quasi-criminal in nature. Id. at 697, 700. The Court then held that the exclusionary rule applied to forfeiture proceedings. Id. at 702.[3] If the exclusionary rule can

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[2] It is interesting to note that when Public Defender's have tried to utilize other civil forms of procedure -- such as discovery, the State is most emphatic in arguing against this claiming these rules don't apply. See Siuts v. State, 754 So. 2d 781 (Fla. 2d DCA 2000).

[3] Plymouth Sedan is still viable. See One 1995 Corvette Vin No. 1G1YY22P585103433 v. Mayor and City Council of Baltimore, 724 A.2d 680, 692 (MD 1999); U.S. v. $404,905.00 in U.S. Currency, 182

apply in a civil/quasi-criminal proceeding of forfeiture where only property rights are at stake, then it must be applicable in a Jimmy Ryce Act proceeding which, although technically a civil proceeding, is really quasi-criminal in nature with liberty interests at stake.

The question of whether the exclusionary rules applies in a particular civil case requires weighing the deterrent benefits of applying the rule against the societal cost of excluding relevant evidence. See United States v. Janis, 428 U.S. 433 at 453, 454 (1976); Ahart v. Colorado Dept. of Corrections, 964 P. 2d 517 at 520 (Colo. 1998). As has been argued above, this proceeding requires the application of the exclusionary rule. The deterrent benefits far outweigh the social costs.

As for monetary damages, this type of remedy will also have a deterrent effect. It will prevent other doctors from using coercive, unconstitutional tactics in obtaining their interviews; and it will discourage the State from hiring such doctors. If this is considered a "chilling effect," then it will be a desirable one. Doctors that cannot conduct interviews without violating constitutional rights should be discouraged from participating.

As for the State's claim that "sound public policy considerations" require the prohibition of Public Defenders from pursuing money damages because Public Defenders do not have the resources, those resources are limited by the State. If the State does not fully fund the Public Defender's Office to fully represent its

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F.3d 643 (8th Cir. 1999); Golon v. Jenne, 739 So. 2d 659 (Fla. 4th DCA 1999).

clients -- including Jimmy Ryce Act clients -- then the Public Defender's Office will be ineffective in its representation as an attorney for its clients and will have to move to withdraw. See In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload, 709 So. 2d 101 (Fla. **1998).** The State cannot require the Public Defender to represent a class of people then tie its hands behind its back by not fully funding that representation.

In regards to the State's claims of the Public Defender committing malpractice, pursuing unfounded claims, and being subject to awards of attorney's fees, all of these claims assume pursuing wholly frivolous legal claims. Under the rules regulating The Florida Bar, "All members of The Florida Bar shall comply with the terms and the intent of the Rules of Professional Conduct...." R.Regulating Fla. Bar 1-10.1 (emphasis added). This includes all assistant Public Defenders. R.Regulating Fla. Bar **4-3.1** states:

> A lawyer shall not bring **or** defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The comment to this rule points out the balance between the duty to **use** legal procedure for the fullest benefit of the client's cause and the duty not to abuse legal procedure, Contrary to the State's belief that assistant public defenders are free to file frivolous

lawsuits with careless abandon, assistant public defenders are held to the same standard as the rest of the legal profession and are not allowed to pursue frivolous cases. Hence, the United States Supreme Court created Anders v. California, 386 **U.S.** 738 (1967), for the assistant public defender who has no choice and must represent all indigent criminal defendants on a direct appeal--even when the appeal is frivolous.

There is a balance that must always be maintained in representing a client; but as the rule points out, extreme vigilance is required in representing someone in a proceeding that could result in incarceration. That clearly applies to assistant public defenders representing their clients in Jimmy Ryce Act proceedings wherein indefinite, and most likely long-term, incarceration is the only result if it is determined that the client must **be** committed.

The State does raise an interesting ethical problem, but it is one that involves the Attorney General's office. The Attorney General is presently representing Dr. Waldman; but if Dr. Waldman sues undersigned's office, it is the Attorney General's Office that is supposed to represent the Public Defender's office. This would clearly be a conflict of interest. Perhaps the State's "sound public policy considerations" are really "Attorney General policy considerations" stemming from a desire to avoid such a conundrum.

Mr. Sjuts relies on his initial brief for additional argument.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Thomas E. Warner, Solicitor General, The Capitol, Suite PL-01, Tallahassee, FL 32399, on this 25th day of June, 2001.

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Respectfully submitted,

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