

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 67,755

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SD J. WHITE

DEC 2 1985

STATE OF FLORIDA, ET AL.

CLERK, SUPREME COURT

By *[Signature]*
AL-Chief Deputy Clerk

Appellants,

vs.

WADE POWELL, ET UX., ET AL.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

ISSUE CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE
BY THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

BRIEF OF THE RABBINICAL ASSOCIATION OF GREATER MIAMI,
TEMPLE BETH OR, AND RABBI RAMI SHAPIRO, PH.D.,
AS AMICUS CURIAE

BENEDICT P. KUEHNE, ESQ.

BIERMAN, SONNETT, SHOHAT
& SALE, P.A.
200 S.E. First Street, #500
Miami, Florida 33131
Telephone: (305) 358-7477

COUNSEL FOR AMICUS CURIAE

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT	
THE CORNEA REMOVAL STATUTE UNCONSTITUTIONALLY INFRINGES ON FUNDAMENTAL PERSONAL AND RELIGIOUS FREEDOMS BY PERMITTING THE REMOVAL OF BODY PARTS WITHOUT CONSIDERATION OF INDIVIDUAL OR FAMILY CONSENT.....	3
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

Page

Cases

Kohn v. United States,
591 F.2d 586 (E.D.N.Y. 1984), aff'd,
760 F.2d 253 (1983).....8,9

Constitutional Provisions and Statutes

U.S. Constitution
Amendment I.....4
Amendment XIV.....4

Florida Constitution
Art. I, §3.....5
Art. I, §23.....5

Florida Anatomical Gift Act
§§732.191-732.921, Fla.Stat. (Supp. 1984).....3,4,8,9

Cornea Removal Statute
§732.9185, Fla.Stat. (1983).....3,9

Florida Statutes,
§406.11.....10

Other Authorities

28 Fla.Jur.2d, Gifts §1.....4

1977 Op. Att'y Gen. Fla. 077-14 (Nov. 2, 1977).....4

H. Adler, Anglo-Jewish Memories 137 (1909).....8

I. Jakobovits, Jewish Medical Ethics Ch. 12 (1959).....6,7,10

I. Klein, A Guide to Jewish Religious Practice 270 (1979)....6

S. Krauss, 2 Talmudische Archaeologie 55 and 473 n.411
(Leipzig 1910-1912).....6

S.J. Lewin, Le'or Hahalakhah 188 (1946).....7

I. M. Rabinowitch, Port-Mortem Examinations and the
Jewish Law 19 (Montreal 1945).....6

Rosner, Autopsy in Jewish Law and the Israeli Autopsy
Controversy, Jewish Bioethics 331-332 (1979).....7

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, Ph.D., respectfully adopt the factual statement contained within the Circuit Court's Order on the motions for summary judgment, which is a part of the appellate record.

SUMMARY OF THE ARGUMENT

The donation of body parts for the advancement of medical science or the preservation of human life is a matter which must be committed to the personal decision of the individual or the family. When tissue and organ donation is placed in the context of Jewish life, it also becomes a matter of religious law. Although it remains a personal matter, the decision to donate body parts is affected by the Jewish belief that the body and the soul are sacred because both are the handiwork of God and are entitled to reverence.

The Cornea Removal Statute has as its purpose the commendable objective of providing quality cornea tissue to people in need. The statute promotes the restoration of sight to countless people, thus improving the quality of life for those individuals and, by extension, for all society.

Notwithstanding this laudatory purpose, the statute permits medical examiners to remove cornea tissue without first obtaining permission from the person, while living, or from the

decedent's next of kin. To the extent that the statute authorizes the taking without reasonable notice and an opportunity for consent, the statute is unconstitutional. Since the statute on its face permits the taking of cornea tissue from the body of an observant, but now deceased, Jew absent individual or familial consent, the Cornea Removal Statute infringes upon the free exercise of religion and effectively promotes interests which are inimical to those of Judaism, without any countervailing government need. The statute has the inevitable effect of making second class citizens of Jews and members of all other religions which disfavor anatomical donation without consent.

The statute further elevates the needs of authorized eye banks above the interests of the individual and the family, which unconstitutionally infringes on the right of the family to direct disposition of the remains of its members. Absent a compelling state interest and given the availability of less intrusive alternatives, the taking of corneas without personal or family consent cannot be condoned. To the extent that the statute permits this illegitimate conduct, it must be ruled unconstitutional.

ARGUMENT

THE CORNEA REMOVAL STATUTE UNCONSTITUTIONALLY INFRINGES ON FUNDAMENTAL PERSONAL AND RELIGIOUS FREEDOMS BY PERMITTING THE REMOVAL OF BODY PARTS WITHOUT CONSIDERATION OF INDIVIDUAL OR FAMILY CONSENT.

The Cornea Removal Statute,^{1/} a portion of the Florida Anatomical Gift Act,^{2/} permits the medical examiner or the

^{1/} The Cornea Removal Statute, §732.9185, Fla.Stat. (1983), provides:

(1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:

(a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with s. 406.11.

(b) No objection by the next of kin of the decedent is known by the medical examiner.

(c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.

(2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

^{2/} The Florida Anatomical Gift Act, §§732.910-732.921, Fla. Stat. (Supp. 1984), is an adaptation of the Uniform Anatomical (fn.cont.)

associate medical examiner to provide a cornea upon request of an authorized eye bank whenever the decedent is under the jurisdiction of the medical examiner, there is no objection by the next of kin known by the medical examiner, and the removal of the cornea will not interfere with the subsequent course of an investigation or autopsy. 1977 Op. Att'y Gen. Fla. 077-14 (Nov. 2, 1977). The inclusion of a "no known objection" standard as a basis for permitting the removal of a cornea is singularly unique to the Cornea Removal Statute and is not found within other parts of the Anatomical Gift Act. Compare §732.912, Fla.Stat. (Supp. 1984) (provides for the **donation** of body parts for purposes consistent with the legislative intent to benefit medical science or human life).

The Cornea Removal Statute violates valid constitutional interests by permitting the removal of corneas without obtaining the inter vivos consent of the person whose cornea will be removed or the consent of the family of a deceased person whose cornea will be taken. The statute disregards any valid religious and family concerns with the sanctity of the human body and the reverence due the body at the time of death. The statute conflicts with the guarantees of the First and Fourteenth Amend-

Gift Act. The purpose of the Act, as found within the legislative declaration, is to encourage the pre- and post-mortem **donation** of tissue and organs as gifts for medicine and research. §732.910, Fla.Stat. (Supp. 1984). Florida law defines a gift as the voluntary transfer of property by one to another without any consideration or compensation. 28 Fla.Jur.2d Gifts §1. The taking of bodily tissue or organs by means other than the voluntary act of the person or the decedent's family cannot be considered a gift.

ments to the United States Constitution^{3/} as well as the liberty interests protected by Sections 3 and 23 of Florida's Declaration of Rights.^{4/} Because the statute permits and authorizes state

^{3/} U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

^{4/} Art. I, §3, Fla. Const. provides:

Religious freedom. -- There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Art. I, §23, Fla. Const. provides:

Right of privacy. -- Every natural person

(fn.cont.)

action which violates individual religious interests and inhibits the free exercise of religion, this Court must conclude that the statute is unconstitutional.

To Jews, the subject of the dead and their treatment is one of historical importance and concern.^{5/} A central component of Jewish law is that an aura of reverence for both the body and its spiritual counterpart must exist throughout life and death.^{6/} The same reverence for life is equally a part of matters involving the dead.^{7/}

Jewish law rigorously upholds the inviolability of the human body in death as well as life.^{8/} This includes a general disfavor of anatomical dissection and a complementary teaching

has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

^{5/} See I. Jakobovits, Jewish Medical Ethics Ch. 12 (1959) (hereinafter Jakobovits).

^{6/} Judaism believes in the principle that body and soul are sacred because both are the handiwork of God and are entitled to reverence. I. Klein, A Guide to Jewish Religious Practice 270 (1979).

^{7/} S. Krauss, 2 Talmudische Archaeologie 55 and 473 n. 411 (Leipzig 1910-1912).

^{8/} Jakobovits at 135. This consideration also accounts for the Jewish opposition to cremation. I. M. Rabinowitch, Post-Mortem Examinations and the Jewish Law 19 (Montreal 1945). Equally, Jewish law proscribes autopsies except in cases of need. Even then, the autopsy must be conducted with a sense of reverence for the body and is limited to those portions of the body needed for examination. Jakobovits at 278-283.

that the whole body must be buried upon death. If body parts have been removed, they must be returned and buried with the rest of the body.^{9/} Jewish principles hold that a man does not control the rights to his body,^{10/} for human life and its bodily vessel are "the possession of the Holy One...."^{11/}

The use of corneal grafts to restore sight to the blind is the equivalent of a life-saving act, according to Jewish law, if prior consent of the donor or the family has been obtained.^{12/} This exception to the rigidly defined Judaic law that the entire body must be buried is a very narrow one, but is in keeping with a central component of Jewish thought that life itself is sacred and Jews should assist in the saving of lives. Even when permission is granted for a cornea transplant for the purpose of restoring sight to a blind person, Jewish law requires that the disused portion of the eye after the cornea has been removed cannot be disposed of except by burial.^{13/} Absent these considerations, there can be no compliance with the Judaic mandate that the body be treated in all matters with a sense of reverence.

^{9/} Rosner, Autopsy in Jewish Law and the Israeli Autopsy Controversy, Jewish Bioethics 331, 332 (1979).

^{10/} Jakobovits at 98.

^{11/} S. J. Lewin, Le'or Hahalakhah 188 (1946).

^{12/} Jakobovits at 286 n.126.

^{13/} Id.

Thus, for the Jew observant of orthodox thought and religious tenets, matters involving anatomical separation call into question serious religious principles. In light of these strong religious concerns, it is not surprising that Jewish law mandates that the separation of tissue and organs from the body occur only in cases of medical need with the person's free will and consent in writing.^{14/} A decision to take organs or tissue without individual permission shows a demonstrated lack of reverence for the body. It violates, moreover, the religious beliefs of a considerable segment of the population. Considerations of expediency must not be permitted to overshadow religious interests.

A serious danger to religious freedom exists in any situation where the state, by action of its positive law, can separate the body from its tissues and organs without consent, as this statute permits. Even at the point of death, a human body does not belong to the state, but is a responsibility of the next of kin.^{15/} This was the holding of Kohn v. United States, 591 F.2d 568, 573 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (1985): "The law in the United States appears to be established that the next of kin have the right to possession of the dead body and that they may have damages for the injury to their feelings from any

^{14/} Jakobovits at 150. See also H. Adler, Anglo-Jewish Memories 137 (1909).

^{15/} The language of the Anatomical Gift Act supports this position by recognizing the family interest in the decedent's body and encouraging familial support of tissue and organ donations.

wrongful handling of the corpse." Even where the family yields permission to others to deal with the body, the law imposes on the state the obligation to treat the corpse with respect. This obligation, evolving out of the religious concern for the body, protects the very interests guaranteed by the First Amendment. Kohn v. United States, supra at 573.

The Cornea Removal Statute conflicts with the teachings of Judaism, and perhaps with other religions as well. The Statute disregards the religious beliefs discussed above, and can hinder observers from practicing their faith. Manifestly, unlike any other portion of the Anatomical Gift Act, the Statute promotes the active ignorance of the medical examiner in matters involving family approval for the taking of corneas. This is a particularly sinister government attitude, especially when it involves dealings with the Jewish cadaver. Recognizing the orthodox Jewish position that the entire body should be buried, would a medical examiner have any reason to seek family permission for the "donation" of a cornea in the case of a Jewish body? A negative answer from the family would deprive the medical examiner of the needed cornea, while the absence of any inquiry gives the medical examiner immunity for defiling the body in violation of religious tenets.

Organized Judaism is neither unconcerned with nor insensitive to the needs of the living and society for transplant tissue and organs, bodily parts which further medical research and ultimately advance life. Indeed, Jewish history reflects

examples of individuals who have donated their own bodies for the advancement of human life or medical science.^{16/} The unselfish act of giving of one's self to help others is worthy of praise. The crucial factor, from a Jewish law perspective, is that the person -- individually or through the family -- must make the intensely personal decision for anatomical dissection and donation. The Statute as it exists does not accommodate this religious requirement, and instead permits forced "donation" without consideration of religious scruples.

There can be little or no valid reason for the state to act in a manner which prevents a person's proper burial and eternal rest for the soul according to that person's religious tenets. There is even less reason for the state to act in a manner which deprives the individual or the family of the right to direct compliance with religious law. Organized Judaism recognizes the right of the state to perform autopsies under the limited circumstances directed by §406.11, Florida Statutes, even though the autopsy may conflict with religious preferences. But there is no right for the state to take apart one's body, remove tissue for purposes not associated with that body, and deny an opportunity for the person or the family to object on religious grounds. The Statute under consideration is far too broad in promoting the desired ends. The conflict between the need for quality cornea tissue and religious beliefs must be resolved on

^{16/} See Jakobovits at 147.

the side of religious freedom. Until the Statute incorporates that right, it cannot be constitutionally validated.

Respectfully submitted,

**BIERMAN, SONNETT, SHOHAT
& SALE, P.A.**

Counsel for Amicus Curiae
THE RABBINICAL ASSOCIATION OF
GREATER MIAMI,
TEMPLE BETH OR, and
RABBI RAMI SHAPIRO
200 S.E. First Street, #500
Miami, Florida 33131
Telephone: (305) 358-7477

By 
BENEDICT P. KUEHNE

CONCLUSION

For the reasons discussed, the amicus curiae, the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, Ph.D., maintain that the Cornea Removal Statute is unconstitutional on its face because it violates the religious principles of Judaism.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 25 day of November 1985, to LOUIS F. HUBNER, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32301 (Counsel for Appellant State of Florida); ALAN C. SUNDBERG, ESQ. and GEORGE N. MEROS, JR., ESQ., Carlton, Fields, Ward,

Emmanuel, Smith & Cutler, P.A., P.O. Drawer 190, 410 First Florida Bank, Tallahassee, Florida 32302 (Counsel for Eye Banks); DONALD W. WEIDNER, ESQ., Associate General Counsel, 760 Riverside Avenue, Jacksonville, Florida 32204; JACK SINGBUSH, P.A., P.O. Box 906, Ocala, Florida 32670; RICHARD B. COLLINS, ESQ. and CRAIG A. DENNIS, ESQ., Perkins & Collins, P.O. Drawer 5286, Tallahassee, Florida 32314; ROBERT L. BLAKE, ESQ., Assistant County Attorney, Public Health Trust Division, Jackson Memorial Hospital, Suite C-West Wing 108, Miami, Florida 33136; JANET W. ADAMS, ESQ., 333 North Ferncreek Avenue, Orlando, Florida 32803; JAMES T. REICH, ESQ., 606 S.W. 3d Avenue, Ocala, Florida 32670; JEROME J. BORNSTEIN, ESQ. and MARK P. LANG, ESQ., Staff Counsel, American Civil Liberties, 125 South Court Avenue, Orlando, Florida 32801; ANDREW G. PITTILO, JR., ESQ. and RUSSELL W. LAPEER, ESQ., P.O. Box 1450, Ocala, Florida 32678; FREDERICK H. VON UNWERTH, ESQ., Kilpatrick & Cody, Suite 500, 2501 M Street, N.W., Washington, D.C. 20037; and STEPHEN T. MAHER, ESQ., American Civil Liberties Union Foundation of Florida, Inc., University of Miami School of Law, P.O. Box 248087, Coral Gables, Florida 33124.

By 
BENEDICT P. KUEHNE