IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,414

MICHAEL RENARDO CLEMENTS,

Respondent.

_____/

ON PETITION FOR REVIEW OF
A QUESTION OF GREAT PUBLIC
IMPORTANCE CERTIFIED BY THE
FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

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Appellee.

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ANSWER BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner, State of Florida, Appellee below, will be referred to herein as Petitioner or "the State." Respondent, Michael Renardo Clements, Appellant below, will be referred to as Respondent or by his proper name. References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

This case is before this Court on a question certified by the First District Court of Appeal.

On August 11, 1993 Respondent was charged by Information with Possession of Cocaine in violation of F.S. 893.13(1)(f). (R 5). Defendant elected trial by jury, and was convicted upon a one-day trial held on November 29, 1993 (T 1-268, see T 262). Pursuant to this conviction, he was sentenced on December 14, 1993 to one year in the Duval County Jail, with 20 days time served credit and $353 costs were imposed (T 281).

Appellant filed his Notice of Appeal on December 14, 1993 (R 22). After briefs of the parties were submitted, the First District Court of Appeal affirmed Respondent's conviction by PCA dated January 30, 1995 (App. A). On February 10, 1995, Respondent filed a Motion for Abatement of Appeal in the 1st DCA, representing that Respondent was deceased as of February 1, 1995 (App. B). On February 15, 1995, Respondent filed in the 1st DCA a copy of the death certificate (App. C). The death certificate, under Section 3, Date of Death, specifies Respondent was "Found on February 1, 1995." (App. C).

On February 20, 1995, Petitioner filed in the 1st DCA a Motion for Certification of A Question to this Court pursuant to Florida Constitution Art. 5 § 3(b)(5), (App. D). On March 17, 1995, the First District granted the state's Motion and certified the following question to this Court as having a great effect on the proper administration of justice throughout the state:

> DOES THE DEATH OF AN APPELLANT AFTER JUDGEMENT AND SENTENCE ARE IMPOSED, BUT DURING THE PENDENCY OF HIS APPEAL THEREFROM, MANDATE THAT THE JUDGEMENT AND SENTENCE IMPOSED BY THE TRIAL COURT BE VOIDED, OR ONLY THAT THE APPEAL ITSELF BE MOOTED?

Subsequently, the First District on April 24, 1995 sua sponte issued a corrected opinion, certifying the exact same question, but now certifying it as a question of great public importance.

SUMMARY OF ARGUMENT

The question certified to this Court by the First District represents purely a policy choice to be made by this Court. This Court, in Rodriguez, has already made that policy choice clear. The policy of this court is that an appellant's post-conviction death during the pendency of an appeal results solely in the appeal being dismissed, and the underlying judgement and sentence remain intact.

Inasmuch as this Court's decision in Rodriguez recognizes the presumption of validity in the proceedings below and gives full measure to the legislatively expressed policy of recognizing victims' rights, it is the better approach. The First District's approach, by contrast, ignores well settled presumptions of correctness and regularity in proceedings below, pays no heed to constitutional and legislative policy emphasizing victims' rights, and is thus clearly to be disfavored.

This Court should answer the question certified by the First District by upholding the principle of Rodriguez, with the result that a deceased convicted appellant's appeal --and only the appeal itself-- is dismissed, and the underlying judgement and sentence remain intact.

ARGUMENT

ISSUE

DOES THE DEATH OF A CRIMINAL DEFENDANT AFTER JUDGEMENT AND SENTENCE, BUT DURING THE PENDENCY OF THE APPEAL THEREFROM, REQUIRE THE PROSECUTION TO BE PERMANENTLY ABATED AB INITIO IN THE TRIAL AND APPELLATE COURTS?

It must be noted initially that the death of a convicted person after conviction but during the appeal process is becoming a more and more common occurrence. And, the State submits, even more common as the percentage of incarcerated criminals with AIDS increases. Currently, besides the instant case, currently before the First District is a case in the exact same posture as this one. Majorie Elizabeth Thomas v. State, 1st DCA Case. No. 94-2022. The First District in Thomas has certified the exact same question as in this case. Also in the same posture currently before this Court is Edwin Bernard Kaprat III v. State, Case Nos. 85-376, 85-377.[1]

The facts of the instant case are in no dispute. Michael Clements was tried by jury and convicted. He appealed that conviction to the 1st DCA. After that court had already affirmed his conviction by PCA, but during the time in which rehearing could be sought, he died. His public defender, in accord with

[1] Kaprat was appealing to this court two death sentences from two seperate trials and convictions in Hernardo County. He was killed on death row by fellow inmates while his appeals to this court were pending.

precedent of the 1st DCA, to be discussed more fully infra, then filed a Motion to Abate Ab Initio.

The practice and procedure of the First District, when a convict dies post conviction but during the pendency of the appeal has been to dismiss the prosecution ab initio. Prior to this case and Thomas, supra, this was commonly and routinely done. See Williams v. State, 648 So. 2d 313 (Fla. 1st DCA 1995) wherein the First District adopted the "suggestion" of defense counsel, ordered abatement ab initio of the prosecution in the trial and appellate courts, and denied the State's motion to dismiss the appeal.

This practice is directly contrary to the result ordered by this Court in Rodriguez v. State, No. 83,152, reported at 645 So. 2d 454 (Fla. 1994). The choice between the result of the First DCA most recently seen in Williams and this Court in Rodriguez is clear. Rodriguez is the better approach of the two.

As an initial matter, it must be noted that there is no federal constitutional right or question involved in resolution of this issue. United States v. Pauline, 625 So. 2d 684, 685, n. 5 (5th Cir. 1980): ". . . This issue is, of course, not constitutional, so that the views of the United States Supreme Court do not control the state courts." Pauline is binding precedent in this federal circuit. Former Fifth Circuit decisions rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc).

Abatement ab initio in the federal system is clearly grounded on policy choices, Pauline, supra at 684-685:

> Abatement of the entire course of the proceedings has several significant effects: if the sentence included a fine, abatement *ab initio* prevents recovery against the estate and, ultimately, the heirs; the abated conviction cannot be used in any related civil litigation against the estate; and arguably the family is comforted by restoration of the decedent's "good name."

The same result from the same rationale obtains in the Florida District Courts of Appeal on the issue: it results from a policy choice. The seminal Florida case in this area is Bagley v. State, 122 So. 2d 789, 791 (Fla. 1st DCA 1960), where the policy choice is made quite clear:

> The obliterative effect of abatement ab initio necessarily leaves undetermined the question of the appellant's guilt. For whatever comfort or benefit derivable therefrom, the legal presumption of innocence of the crime with which she was charged abides now in no less degree than before the criminal proceedings were instituted. Jurisdiction to determine the issue of guilt or innocence is now assumed by the ultimate arbiter of human affairs.

As will be developed below, the Bagley principle is contrary to well-settled appellate presumptions established by this and other courts. Vaccaro v. State, 152 Fla. 123, 11 So. 2d 186 (Fla. 1942). The operative force behind the policy reasons stated in Bagley and Pauline is absent from this case. Even if respondent's prosecution is abated in this case ab initio, he

will still not meet his maker with a clean criminal record. See T. 280 where it was noted at sentencing[2]:

> THE COURT: This Defendant, of course, has been convicted of possession of cocaine, he was charged with that in July of '91 and placed on probation for that offense. This is not his first bite at the apple on that particular charge.
>
> He was subsequently violated on that probation due to a charge of carrying a concealed firearm.

Respondent has not left this earth with his good name intact. He died a multiple convicted felon. While the approach of the First District would "clear" him on this charge, he still would have at least two other felony convictions at the time of his death. Thus, one of the prime policy reasons fueling the result in Pauline and Bagley is utterly void in this case.

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[2] Besides these offenses, his Florida rapsheet reveals arrests for: 1. Carrying a Concealed Firearm in 1991, 2. The above referenced July 1991 cocaine possession case, 3. The above referenced charge of carrying a concealed firearm, 4. another arrest in 1992 for cocaine possession, 5. His arrest in August of 1993 for cocaine possession, which was the progenitor of the appeal in this case before the First District, and 6. Another 1993 arrest, this one for fraudulently obtaining property by use of a bad check. The first arrest for carrying a concealed weapon charge resulted in a decline to misdemeanor, and a withhold of guilt in January 7, 1991 (Duval Circuit Court Case No. 90-15048CFA and Duval County Court Case No. 90-78760). Arrest number 2 resulted originally in a withheld adjudication of guilt on July 16, 1991, but after he was arrested for violating his probation, the ultimate result was an adjudication of guilt on this charge on January 15, 1992 (Duval Circuit Court Case No. 91-7472CFA). On arrest number 3, he was adjudicated guilty on January 1, 1992 (Duval Circuit Court Case No. 91-13649). Arrest number 4 was dropped on May 4, 1992 (Duval Circuit Court Case No. 92-4539CF). Arrest number 5 was the conviction resulting in the substantive appeal below (Duval Circuit Court Case No. 93-8134CF). Arrest number 6 was nol prossed October 1, 1993 (Duval Circuit Court Case No. 93-8242CF).

The First District's decision in Bagley is an example of a bad principle of law created to effect a "just" or "good" or "fair" result in that particular case. This is evident in the first sentence of Bagley:

> The appellant, who was convicted of a felony, died subsequent to the filing of our opinion reversing the judgement and remanding the case for a new trial, 119 So. 2d 400, but prior to the expiration of the time allowed for filing a petition for rehearing.
>
> 122 So. 2d at 790

Thus, since the decision of the First District on the substantive appeal had erased Bagley's second degree murder conviction, and ordered a new trial, it was deemed unfair or unseemly or improper that Bagley go to her grave with her "good name" unrestored. Of course, Bagley's intervening death made the retrial ordered in the substantive appeal an impossibility. Thus, this language from Bagley: "For whatever comfort or benefit derivable therefrom, the legal presumption of innocence of the crime with which she was charged abides now in no less degree than before the criminal proceedings were instituted." 122 So. 2d at 791. Because she could take no comfort on this earth in the reversal of her second degree murder conviction, and because no retrial was possible, it was only "fair" that she go to her grave with her name unblemished.

That Bagley was an equity fueled result is without question. The "why" of this result as reached by the First District is made clear by review of the facts in the original substantive appeal,

Bagley v. State, 119 So. 2d 400 (Fla. 1st DCA 1960). As recited by the First District, these facts show that Bagley was undeniably the victim of horrendous domestic abuse, and because the trial court did not give a statutorily provided for instruction (which evidently would have been a complete defense to any degree of homicide in those circumstances), reversal was mandated. Briefly, the facts of Bagley's underlying second degree murder conviction show that her roommate/boyfriend Johnnie Ashley came home drunk, was a butcher with easy access to many knives in his car, a violent argument erupted, and Bagley tried to call the apartment manager for help. While she was on the phone trying to summon aid, Ashley came after her with a bottle. Bagley's fourteen year old son tried to come to the aid of his mother. Ashley proceeded to turn his attention to the boy, and began to severely beat him, punching and pummeling the boy, and then choked the boy into unconsciousness, all the while threatening that he was going to kill him and his mother (Bagley), and threatening to get his butcher's knives out of his car to finish the job. Ashley then went for a shotgun in the home, and after a struggle, Bagley got the gun, and Ashley then went to his car to get his butcher's knives. On the way out, he encountered Bagley's now revived son on the porch, and began choking him again. Bagley yelled a warning, Ashley continued to choke her son, and she fired into the floor. Bagley then went out to protect her son, the gun discharged, fatally wounding Ashley, who was apparently on the way to get his butcher's knives out of the car. 119 So. 2d at 401-402.

The above is a brief recitation of the facts as outlined by the First District. The First District held in the substantive appeal that because the trial court had only given a justifiable homicide instruction as to self and not of others (the son), this constituted fundamental reversible error.

Given the equities underlying the Bagley case, it is easy to see why the court, over thirty years ago, in a situation where a mother was trying to defend her son and self, in their home against a vicious, life threatening drunken attack, came to the result it did. It is why the First District, in the second opinion, after noting Bagley's conviction was reversed before her death, stated, "It is the general rule that death of the defendant pending appeal from a conviction in a prosecution for crime abates the appeal and we adhere to it." (122 So. 2d at 790). (emphasis added). But, driven by the equities surrounding Bagley's conviction, which had been set aside in the original substantive appeal, the First District proceeded to grapple with the following problem, so as to reach a "fair" or "just" result in that particular case: "A more difficult problem arises as to whether this court should extend the abatement to include the proceedings in the trial court." 122 So. 2d at 790-791.

Fueled by the equities of the underlying case, of which the second panel was undoubtedly aware (two out of the three judges on the first Bagley panel sat on the second) the second Bagley opinion stretched the general rule to cover this particular situation, and ordered abatement ab initio to abate all

proceedings in the trial and appellate courts. Subsequent appellate application of Bagley has ignored its specific observation that "It is the general rule that death of the defendant pending appeal from a conviction in a prosecution for crime abates the appeal and we adhere to it[,]" and has focused instead on the Bagley filigree of extending "the general rule" to "all proceeding" in the trial and appellate courts on the facts of that case.

A few observations regarding Bagley and its effects are in order. First, since Bagley was already dead, no retrial could be had in any court under any circumstances, and thus to the extent that the second Bagley opinion abates all proceedings in the circuit court, it must be considered dicta and advisory. Because the defendant was already dead, nothing could be done in terms of a retrial, thus there was no retrial to abate in the circuit court. Indeed, the First District in the second Bagley opinion recognizes as much: "Jurisdiction to determine the issue of guilt or innocence is now assumed by the ultimate arbiter of human affairs." 122 So. 2d 789, 791. Inasmuch as the substantive Bagley appeal had already reversed her conviction, and since her death precluded any retrial, she was able to go to her grave unconvicted. Her "good name" would no longer come under attack by criminal prosecution and conviction. Thus, it is clear that the second Bagley opinion proscribing "all proceedings" in the circuit court must be considered dicta and surplusage, since no retrial could be had no matter what the First District ordered, since Bagley was already dead by that time.

Second, the particular equities driving the Bagley case have been examined, supra. In that regard, it is important to note that in the second Bagley case, it was the Attorney General who moved to abate all proceedings in all courts ab initio, apparently in an effort to protect the state from financial liability. This sprung from the apparent concern that Bagley's estate, now that she had her conviction reversed on the original appeal, and, because of her death could not be retried, would seek recovery of costs under statute when a defendant is acquitted or discharged. 122 So. 2d at 790. Again, it is seen that the perceived equities drove the court to extend the general rule of abatement beyond the appeal itself to the trial court. This left open the possibility of cost recovery by the estate: "Out conclusions . . . are not determinative of any rights of appellant's estate under [cost recovery statute] or otherwise." Id.

Third, the subsequent Bagley opinion expressly recognizes "the general rule that death of the defendant pending appeal from a conviction in a prosecution for crime abates the appeal and we adhere to it." 122 So. 2d 790. As a matter of policy, the court then extended the rule to apply not only to the appeal, but to all proceedings, not only at the district level, but in the circuit court as well. Indeed, though not explicit, Bagley can be read as limiting itself solely to that specific case: "Motion to abate all proceedings on this appeal and in the court below is granted." 122 So. 2d at 791 (emphasis added). The point being, this Court, as a matter of policy, is just as free to come to the

conclusion and rule that abatement is limited solely to the appeal, and not to the judgement and sentence upon which the appeal is predicted.

Fourth, since this is purely a policy issue, it is especially appropriate that this Court set the policy for this State. There are no constraints on the ruling of this court, whether decisional from the various DCA's, statutorily, or from federal constitutional constrictions.

Since what is at issue here is purely a matter of policy, the State submits that as a matter of policy, the better outcome is as done by this Court in Rodriguez. Employment of the First District's approach literally turns the well established legal presumptions surrounding an appeal on their heads.

A judgement and conviction arrives in any appellate court in this state clothed with a presumption of correctness. This primary appellate principle was well stated in Abbott v. State, 334 So. 2d 643, 647 (Fla. 3d DCA 1976), cert. denied, 431 US 968, 97 S. Ct. 2926, 53 L. Ed. 2d 1064 (1977):

> The burden of establishing error is always on the appellant. The verdict or judgment of guilt having arrived in this court clothed with a presumption of correctness, all inferences to be drawn from the evidence are to be in favor of the verdict or judgment of guilt. Crum v. State, Fla. App. 1965, 172 So. 2d 24, 25. As a general proposition, it is the burden of the appellant to make error appear in the record. Bryant v. State, Fla. App. 1967, 204 So. 2d 9.

Further amplification of this fundamental principle is found in Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979), which states that it is an appellant's responsibility to bring forth an adequate record that demonstrates reversible error, and Ford v. Wainwright, 451 So. 2d 471 (Fla. 1984) which provides that reversible error cannot be based on conjecture.

This fundamental appellate premise is expressed not only uniformly in the case law, but statutorily as well:

> **924.33 When judgment not to be reversed or modified.** -- No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

If for no other reason than the approach of the First District turns well recognized appellate principles on their collective head the result reached by this court in Rodriguez should be adopted. The First District's approach is also contrary to the well settled presumption of regularity in the proceedings below. This is well established black letter law in Florida, and has been so for decades. For example, in Vaccaro v. State, 152 Fla. 123, 126, 11 So. 2d 186, 187-188 (Fla. 1942) this Court stated, en banc:

> The defendant in every criminal case is presumed to be innocent, however that presumption ceases upon the adjudication

> of guilt and the entry of sentence. When the judgement comes to us for review it comes with a presumption in favor of its regularity.

The approach of the First District presumes irregularity and presupposes there is merit to the appeal. While certainly a convicted defendant has a right avail himself of the appellate process, this does not mean that the appeal he launches of his conviction has any inherent or intrinsic merit.

Even if an appellant's pending appeal is wholly without legal or factual merit, his conviction is reversed and the entire matter abated ab initio in all courts under the First District's rationale. Thus, even an Anders brief results in total vindication on all counts in every court for a convicted defendant, should he die during the pendency of the Anders appeal. As is evident, a wholly meritless appeal, even a frivolous appeal, results in reversal under the First District's formulation. All that is required is the filing of a notice of appeal, and a defendant's subsequent death, and the automatic result is obliteration of the defendant's conviction and sentence, no matter how justified or well deserved, no matter how error free the trial, no matter how meritless the appeal itself, no matter how overwhelming the evidence of guilt that resulted in the conviction. Even if no error is demonstrated, the conviction is eliminated under the approach of the First District.

Generally, the citizens and courts of this State have a substantial interest in finality at the District Court of Appeal

level. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Ansin v. Thornton, 101 So. 2d 808 (Fla. 1958); Whipple v. State, 431 So. 2d 1011 (Fla. 2d DCA 1983). That finality is destroyed by the procedure here. The conviction and sentence here have already been affirmed, but now, due to the defendant's post-PCA death, the slate is now wiped clean. The finality of the judgement at the circuit court level, also as a matter of important judicial concern, is wiped out as well. This concern with judicial finality survives when an appellant does not. A deceased appellant truly is beyond the jurisdiction of any court and has no further concern with his or her earthly rights. The feelings of family and friends and the consequences of collateral proceedings no longer concern a deceased appellant and are merely red herrings. Such things would not have been considered at trial or on appeal. They should not, therefore, be elevated to prominence merely because an appellant dies.

Florida has expressed concern, both in its constitution and by statute, for the rights of victims of crimes. Art. I, § 16, Fla. Const.; ch. 960, Fla. Stat. (1993); see also §§ 39.504, 775.089, 960.001(h), Fla. Stat. (1993). The abatement ab initio principle, with its emphasis on the decedent's survivors, developed long before the modern concern with victim's rights. In a contest between survivors - the decedent's family or the victims and their survivors - it is unreasonable to blithely assume that the feelings of the decedent's family should prevail over the rights of the victims and their survivors. Because he is dead, Clements has no personal interest in any rights he may

have had while alive, and his family has no standing to assert Clements' rights. Victims and their survivors, on the other hand, have both constitutional and statutory rights. Granting abatement ab initio would, improperly and unwarrantedly, ignore those rights. The better course would be to adopt the position that the appeal, and only the appeal, should be dismissed as moot when an appellant dies before an appeal is final.

That is an especially prudent course of action where a conviction is accompanied by probation with a special condition of restitution. Obviously, if the conviction is erased ab initio as if it had never occurred, the requirement of restitution is eliminated as well. A victim should not be required to forego a perfected right of recovery by action against a decedent's estate, and be forced to opt instead for the risks of a subsequent civil action against the estate.[3] This is the situation that would obtain in Thomas. Likewise, a victim -- or his or her survivors -- of a violent personal crime, should not be foreclosed the satisfaction of the perpetrator having been convicted of the offense. This is the situation that would obtain in Kaprat.

The First District cases, expressing a policy choice of favoring the feelings and sentiments of a defendant's survivors (if any) over those of a defendant's surviving victims cannot

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[3] This policy decision of the legislature is evident in F.S. 775.089(8), providing that a convicted defendant is stopped from denying the essential allegations of the offense in a subsequent civil action. see also F.S. 772.14.

stand in light of the subsequent policy determinations of the legislature firmly establishing the rights of victims. The defendant, being dead, has no interest whatsoever in whether his appeal is successful or not. He was alive at the time he was convicted. His subsequent death in and of itself, should not alter the presumed validity of that conviction, and the regularity of the proceedings that led to it.

The First District's policy choice simply elevates the tangential interest of a convicted defendant's heirs and survivors in having his good name possibly "restored" on appeal over the interests of his victims in having the just satisfaction of seeing him go to his grave with his presumptively correct conviction unimpungned. And, the First District's approach places the interests of a deceased defendant's heirs, if any, first in distribution of assets from the estate, if any. The rights of victims mandate that the assets of the estate, if any, should be utilized to recompense the victims --insofar as is possible-- for the wrongs inflicted upon them by the defendant during his crime(s).

The firm and legitimate interests of victims in seeing the conviction upheld of the person that victimized them should be ascendant over the hypothetical and abstract interest of the defendant's survivors in seeing his conviction possibly reversed on appeal. Clearly, the approach of this Court in Rodriguez recognizes the rights of victims. The approach of the First District does not. Given the policy choices enunciated by the

legislature in the field of victims' rights, it would be both prudent and fair for this Court to affirm the policy choice of Rodriguez.

CONCLUSION

This Court should answer the question certified by the First District by ruling that only the appeal is mooted by any appellant's post-conviction death, and that the judgement and sentence upon which the appeal is predicated remain in full force and effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to GLEN GIFFORD, Assistant Public Defender, Leon County Courthouse Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 30 day of May, 1995.

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