IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,414

MICHAEL RENARDO CLEMENTS,
DECEASED,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

The late respondent was the defendant in the trial court and the appellant in the lower tribunal, until his death. Attached hereto as an appendix is the corrected opinion of the lower tribunal. Petitioner's brief will be referred to as "PB."

The Office of the Public Defender wishes to again register its objection to being required to represent a deceased client, as stated in the motion to withdraw as counsel dated June 15, 1995.

II STATEMENT OF THE CASE AND FACTS

The late respondent accepts petitioner's recitation at PB 2-3, and wishes to add that any client this Office is appointed to represent is, by definition, indigent.

III SUMMARY OF THE ARGUMENT

The late respondent will argue in this brief that petitioner's request for relief should be denied. Petitioner seeks to have this Court change the law of Florida by way of a "policy choice" so that victims may recover from a defendant's estate when the defendant suffers an untimely death pending appeal. Petitioner's request should go unanswered, because there is no victim in the instant case, and because this Court does not make a "policy choice" unless there is a real case or controversy to decide.

The late respondent was convicted of possession of cocaine, a victimless crime. There is no "policy choice" to be made here.

This Court has said it will not entertain cases in which there are no adverse parties and no actual controversies to be adjudicated. There is no respondent in this Court. This Office has no interest in litigating the certified question. This is truly a non-adversary proceeding.

Petitioner admits this case is moot as to the late respondent. Petitioner is in effect asking this Court to change the law and issue a policy decision through an advisory opinion. The same is true with regard to the companion case of State v. Thomas, case no. 85,786, where the defendant died pending an appeal from an order of restitution which she did not have the ability to pay.

Since this Court has no authority to render advisory opinions, since there is no real party to this action, and

since this Court's jurisdiction over certified questions is wholly discretionary, this Court must decline to accept review of this case and of State v. Thomas.

IV ARGUMENT

THIS COURT SHOULD DECLINE TO ANSWER THE CERTIFIED QUESTION. (Issue restated by the late respondent)

Petitioner seeks to have this Court change the law of Florida by way of a "policy choice" (PB 4,6) so that victims may recover from a defendant's estate when the defendant suffers an untimely death pending appeal. Petitioner's request should go unanswered, because there is no victim in the instant case. The late respondent was convicted of possession of cocaine, a victimless crime.

Petitioner admits this case is moot as to respondent. Petitioner is in effect asking this Court to change the law and issue a policy decision through an advisory opinion. The same is equally true with regard to the companion case of State v. Thomas, case no. 85,786, where the defendant died pending an appeal from an order of restitution, which she did not have the ability to pay.

Admittedly, this Court has jurisdiction to answer certified questions under art. III, §3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(v), and usually does so. However, it must be remembered that this jurisdiction is discretionary, and not automatic.

This Court has often declined to grant review to answer certified questions, where there was no reason for the Court to accept jurisdiction. For example, in State v. Burgess, 326 So. 2d 441 (Fla. 1976), the defendant was charged with resisting arrest with violence and entered a guilty plea to the lesser

offense of resisting arrest without violence. The district court of appeal certified a question to this Court regarding the right to resist an unlawful arrest with violence. This court declined to grant review:

> Since the guilty plea was accepted by the court to a lesser offense, we deem it inappropriate to issue our opinion in response to the certified question relating to resisting arrest with violence.
>
> Accordingly, we respectfully decline to answer the question propounded by the District Court.

Id. *See also* Bullard v. Wainwright, 313 So. 2d 653 (Fla. 1975).

Likewise, this Court has encouraged appellees and respondents to "carefully examine these jurisdictional issues" and to challenge the jurisdiction of the Court. Coffin v. State, 374 So. 2d 504, 508 (Fla. 1979).

This Court has recognized that its role in answering a certified question is totally discretionary, and this Court has no duty to accept review even though a lower appellate court feels the question is of great public importance:

> Considering all the language used it is plain that the certificate is necessary to invest this court with the power to adjudicate a question a district court considers of such moment but **it does not follow that this court is unalterably bound to decide the question for the pivotal auxiliary verb "may"** which the court took the pains to italicize, **denotes sanction or authority; it should not be construed as "shall" compelling this court to decide the merits of the question.** Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596.

Stein v. Darby, 134 So. 2d 232, 237 (Fla. 1961); emphasis

added.

In Sarasota-Fruitville Drainage District v. Certain Lands, etc., 80 So. 2d 335 (Fla. 1955), a drainage district asked a circuit court to issue a notice against property owners who had not paid their drainage assessments. The circuit court declined to issue the notice, and the drainage district sought review in this Court. This Court treated the appeal as a petition for certiorari and dismissed the action because the drainage district improperly sought an advisory opinion, and because there was no adverse party:

> At the outset we note that this record must be regarded as a petition for certiorari under Section 59.45, F.S.1951, F.S.A., because the order sought to be reviewed is not a final decree. However, **the principles set out hereafter are equally appropriate whether the proceeding be for review by certiorari or for review by appeal.**
>
> **There is no appellee in this suit. If we entertained jurisdiction of this proceeding and determined the question sought to be presented, our decision would not be binding upon anyone except possibly the Drainage District. It is a fundamental principle of appellate procedure that only actual controversies are reviewed by direct appeal.** 4 C.J.S., Appeal and Error, s 1354(a), page 1945. We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution. We have said that there can be no appeal without an appellant. Forcum v. Symmes, 101 Fla. 1266, 133 So. 88. **We amplify that statement by saying that there can be no appeal without an appellant and an appellee.** In Ervin v. Taylor, Fla.1953, 66 So.2d 816, 817, we said, "The complaint was a mere petition to the court to pass upon the validity of an act of the legislature. There were no adversaries,

> and being none, there was no actual controversy. In that situation there was no justification for adjudicating the constitutionality of the enactment. Ervin v. City of North Miami Beach, Fla., 66 So.2d 235." In the case of Ervin v. City of North Miami Beach, Fla.1953, 66 So.2d 235, 236, we emphasized, that "Judicial adherence to the doctrine of separation of powers preserves the courts for the decision of issues between litigants capable of effective determination." In that case we quoted with approval from the late Mr. Justice Brown in the case of Ready v. Safeway Rock Co., 157 Fla. 27, 24 So.2d 808, 811, to the effect that the Constitution of this State gives this Court the right to issue advisory opinions only to the Governor of the State of Florida and then only concerning questions arising as to his powers and duties under the Constitution.
>
> **The effect of a decision in this case would be nothing more than our opinion in a non-adversary proceeding** where only the plaintiff is present concerning the constitutionality of a solemn act of the Legislature. Under these circumstances the proceeding is dismissed sua sponte.

80 So. 2d at 336-37; emphasis added. There is no "actual controversy," and no respondent in this Court. This dispute is between the state and no one. The state has not shown that the late respondent had any property and has not shown that the state has any interest in his property, if any exists. This is truly a "non-adversary proceeding."

Only the Governor may request advisory opinions from this Court under art. IV, §1(c), Fla. Const. A citizen may not. State ex rel. Ayres v. Gray, 69 So. 2d 187 (Fla. 1953). Another state agency may not. Jones v. Kind, 61 So. 2d 188 (Fla. 1952). The Attorney General may request advisory

opinions only on the validity of citizen petitions to amend the Constitution under art. IV, §10, Fla. Const., not on the policy question of what to do when a criminal defendant dies pending appeal.

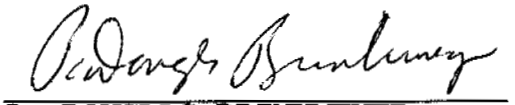
Since this Court has no authority to render advisory opinions on policy matters, and since there are no real parties to this action, this Court must follow Sarasota-Fruitville Drainage District and decline to accept review of this case and of State v. Thomas.

V CONCLUSION

Based upon the foregoing, this Court should decline to answer the certified question.

Respectfully Submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers and Daniel A. David, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, this 13 day of July, 1995.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

PD

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHAEL RENARDO CLEMENTS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 93-4126

Opinion filed April 24, 1995.

An appeal from the Circuit Court for Duval County.
John Southwood, Judge.

Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Daniel David, Assistant Attorney General, Tallahassee, for Appellee.

CORRECTED OPINION
ON MOTION FOR CERTIFICATION OF QUESTION
TO THE FLORIDA SUPREME COURT

PER CURIAM.

Appellant's conviction for possession of cocaine was affirmed per curiam by this court in an opinion filed January 30, 1995. On February 10, 1995, before expiration of the time for filing a motion for rehearing, counsel for appellant filed a motion for abatement of this appeal ab initio on the ground that

appellant had died. See, Williams v. State, 648 So. 2d 313 (Fla. 1st DCA 1995); Bagley v. State, 122 So. 2d 789 (Fla. 1st DCA 1960). A subsequently filed death certificate indicates that appellant was found dead on February 1, 1995. In response, the state acknowledges the line of cases from this court entitling appellant to the relief requested, but represents that the Florida Supreme Court, in a recent case under similar circumstances, denied a motion to abate appeal ab initio and instead dismissed the appeal, Rodriguez v. State, 645 So. 2d 454 (Fla. 1994), and moves this court to certify the question presented here and in Williams to the Supreme Court of Florida.

Accordingly, pursuant to Williams, we abate ab initio this appeal and the underlying prosecution against appellant and certify the following question to the Florida Supreme Court as a question of great public importance:

> DOES THE DEATH OF A CRIMINAL DEFENDANT AFTER JUDGMENT 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?

BOOTH, MICKLE AND VAN NORTWICK, JJ., CONCUR.