IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,414

MICHAEL RENARDO CLEMENTS,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NO. 0325791

DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

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? 2

CONCLUSION 6

CERTIFICATE OF SERVICE 7

TABLE OF CITATIONS

CASES **PAGE(S)**

Bohannan v. McGowan,
222 So. 2d 60 (Fla. 2d DCA 1969),
cert. denied, 226 So. 2d 818 (Fla. 1969)..... 4,5

Holly v. Auld,
450 So. 2d 217 (Fla. 1984)..... 3,4

In Re T.W.,
551 So. 2d 1186 (Fla. 1989)..... 3

Rodriguez v. State,
645 So. 2d 454 (Fla. 1994)..... 6

Sarasota-Fruitville Drainage District v.
Certain Lands, Etc.,
80 So. 2d 335 (Fla. 1955)..... 4

CONSTITUTIONS AND STATUTES

Florida Constitution

Article V, section 3(b)(4)..... 3

Article V, section 4..... 5

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,414

MICHAEL RENARDO CLEMENTS,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Respondent, defendant below, will be referred to herein by name or as "respondent." Petitioner, the State of Florida, will be referred to herein as "the State." 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).

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?

In making the argument that Clements' death renders this case moot, counsel for respondent has repeatedly argued for what can only be characterized as a "dim line rule." In his submissions to this Court, respondent has continuously insisted that the death of Mr. Clements was a watershed, after which public defender representation in this case is foreclosed. See e.g. Motion to Dismiss, Request to Decline Discretionary Review and Motion To Withdraw of March 27, 1995, at p. 4 of that document: "With the death of Mr. Clements, the Public Defender lost its client, and with him any liberty interest to be vindicated by continued representation." The public defender's post-death actions here in behalf of Mr. Clements, are, in the view of that office, perfectly acceptable because the PD didn't do all that much: "It is a relatively minor task, and one which conserves judicial resources, for the Public Defender to move for abatement and provide a death certificate."[1] If it is the view of counsel that there is no client and no interest to defend, a simple dismissal of the appeal is an efficacious remedy.

---

[1] Motion to Dismiss, Request to Decline Discretionary Review and Motion to Withdraw, March 27, 1995, p. 5.

What is before this court to be answered is a question certified by the First District Court of Appeal to be of great public importance. It is of necessity, and by definition, an issue that can only arise post-death. It will occur again when an appellant dies postconviction but after the appellate process is instituted. Under the respondent's formulation it is perpetually evasive of review.

This Court has long accepted jurisdiction over, and then resolved controversies of great public importance that are evasive of review, even though the issue is, as to the parties involved, moot. See In Re T.W., 551 So. 2d 1186, 1189 (Fla. 1989): "Because the questions raised are of great public importance and are likely to recur, we accept jurisdiction despite T.W.'s abortion."

Indeed, this Court, in finding jurisdiction and subsequently reaching the merits of an issue under the very same provision of the constitution that brings this case here, and under the exact same posture (Art. V., § 3(b)(4), certified question of great public importance from a DCA) specifically rejected the mootness argument as defeating jurisdiction in Holly v. Auld, 450 So. 2d 217 (Fla. 1984). In Holly v. Auld, this Court noted at 450 So. 2d 217, 218, n.1:

> Auld has settled with the petitioners, and his attorney has filed a suggestion of mootness with this Court. It is well settled that mootness does not destroy an appellate court's jurisdiction, however, when the questions raised are great public importance or are likely to recur. *Pace v. King*, 38 So. 2d 823 (Fla. 1949); *Tau Alpha Holding Corp. v. Board of Adjustments*, 126 Fla. 858, 171 So. 819 (1937). This case meets these requirements.

> The district court properly certified its question as being one of great public importance, and this situation will occur again. Moreover, the district court's incorrect resolution of the question will only cause more problems in the future.

Unlike Sarasota-Fruitville Drainage District v. Certain Lands, Etc., 80 So. 2d 335 (Fla. 1955), upon which Respondent primarily relies, there is no ambiguity in the instant case as to who the parties in controversy are. Mr. Clements brought the initial appeal against the State, and the State now seeks review of the action of the First District Court of Appeal in abating his appeal as well as abating his per curiam affirmed conviction based on the motion filed by his counsel after he was already dead. The actual controversy at issue here could only have arisen after the death of a party as it is based on the post-death disposition of legal proceedings. Thus, respondent's claim that you must have two live opposing parties in interest before an appeal can be accepted would render all post-death orders unappealable.

This illogical limitation was recognized in Bohannan v. McGowan, 222 So. 2d 60 (Fla. 2d DCA 1969), cert. denied, 226 So. 2d 818 (Fla. 1969), in which the Second District Court held that the cases that say there must be both an appellant and an appellee in order to have an appeal "import nothing more than that there must be a justiciable controversy."[2] Id. at 61. In Bohannan, a child and mother were killed and the father brought action against the defendant. Id. at 60. However, after filing suit the father died.

---

[2] The Second District Court specifically cited to Sarasota-Fruitville. Id. at 60 n.1.

Id. The administrator of the father's estate filed a motion to substitute parties but the trial court denied the motion holding the action was abated by the father's death. Id. The Second District held that it was not necessary for both the appellant and appellee to be alive for the court of appeals to have jurisdiction to decide the controversy. Id. at 61. The Second district went on to say that to require that both parties be alive to have appellate jurisdiction would render orders of abatement due to a parties death "immune from appeal, a result certainly not in keeping with Section 5, Article v. of our constitution, F.S.A., which provides that 'appeals . . . may be taken . . . as a matter of right . . .'" Id.[3]

Similarly, respondent's argument, in the instant case, that this Court should deny review because there are "no real parties" seeks to limit the jurisdiction of this Court to review only those decisions of the lower courts of this state which were rendered when both parties were alive, thereby holding immune from review by this Court all orders of abatement based upon the death of a party. As in Bohannan, this added restriction does not seem to be in keeping with our Constitution. Section 4(b)(4), Article V, states that the Florida Supreme Court "[m]ay review any decision of a district court of appeal that passes upon a question of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal." (emphasis added). There is no limitation that this Court may only

---

[3] This language is now part of Section 4 of Article V. of our Constitution.

accept jurisdiction when all parties are alive or were even alive at the time the district court decision to be reviewed was made. What is important is whether there still exists a controversy which needs to be decided as is present in the instant case.

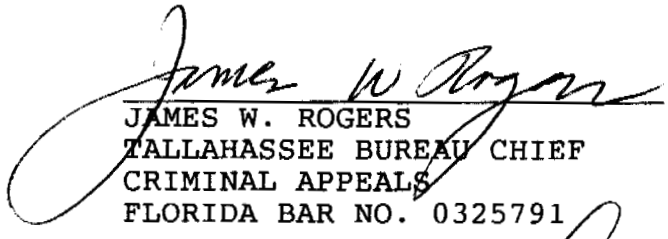
Petitioner would also note that in a case of this type, involving a question of judicial policy, the most appropriate court to set the judicial policy for this type of issue in the State of Florida is the Florida Supreme Court. This Court should accept this case, and resolve it on the merits, to establish the rule in Rodriguez as being the rule for courts in this state, rather than allowing the anomaly to stand of this court and the district court ordering diametrically different results on the same issue in identical circumstances.

CONCLUSION

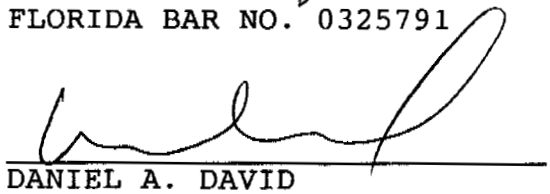
There is an actual ongoing controversy before this Court. This Court should accept jurisdiction to settle the issue. This Court should, by its holding, make clear that the rule of this Court in Rodriguez is the result to be followed when a convicted criminal dies during appeal, rather than the contrary result of the First District as seen in Clements.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NO. 0325791



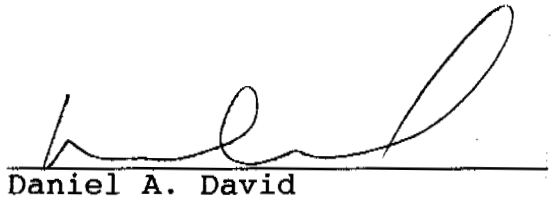
DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER
TCR 95-110497

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MR. P. DOUGLAS BRINKMEYER** and **MR. GLENN GIFFORD**, Assistant Public Defenders, Leon County Courthouse Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 3 day of August, 1995.



Daniel A. David
Assistant Attorney General