

IN THE SUPREME COURT OF FLORIDA

JOHN CROCKER, et al.,

CASE NO. 95,148

4th DCA # 98-00633

Petitioners,

vs.

RICHARD PLEASANT, etc., et al.,

Respondents.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Petitioners hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

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4th DCA
(Appellate Judge)

Honorable Moses Baker, Jr.
Circuit Court Judge
Fifteenth Judicial Circuit
(Trial Judge)

Board of County Commissioners
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(Defendant/Respondent)

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(Plaintiffs/Petitioners)

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Honorable Robert M. Gross
District Court Judge
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(Appellate Judge)

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PRELIMINARY STATEMENT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Petitioners hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

The Petitioners' appendix will be designated by "PA," and the record below will be designated by "R".

STATEMENT OF THE CASE AND FACTS

The tragic facts of this case, as set forth in Petitioners' complaint, are as follows:

On December 5, 1995, West Palm Beach police officer Pleasant (a defendant below) was assigned to investigate an unidentified burning death. (R. 41; PA. 7) Within three days, December 8, 1995, Pleasant identified the decedent as Jay Crocker and was given Crocker's high school transcripts from which Pleasant acquired the name, address and telephone number of Crocker's parents, John and Betty Crocker (Petitioners). (R. 41; PA. 7) Pleasant thereupon sent a teletype to the Miami Shores Police Department requesting that they contact the Petitioners and have them call him. Pleasant did not apprise Miami Shores that this was a death notification. (R. 41; PA. 7)

Miami Shores Police Department immediately tried to contact the Petitioners, but there was no one home. (R. 41; PA. 7) Upon Miami Shores advising Pleasant of this, he then sent Miami Shores a second teletype stating that no extra effort to contact the Petitioners in person was necessary and that a note to Petitioners, asking them to contact Pleasant, would suffice. (R. 41-2; PA. 7-8) Deplorably, Pleasant still did not inform Miami Shores that this related to a death. (R. 41, 42; PA. 7, 8) After this perfunctory effort to notify the Petitioners on

December 8, 1995, Pleasant made no further effort, whatsoever, to notify Petitioners of their son's death. (R. 42; PA. 8)

Sometime between December 8, 1995 and March 30, 1996, Crocker's body was turned over to a Palm Beach County (County/Respondent) facility for burial as an unclaimed body. (R. 42; PA. 8) Although section 245.07, Florida Statutes (1995) requires the County/Respondent to make a reasonable effort to identify the body and notify the next of kin, it made no such effort to contact Petitioners. (R. 42, PA. 8) Consequently, Jay Crocker was buried in an unmarked, pauper's grave, unknown to his parents.

Petitioners had been continuously searching for their son, distributing flyers with his picture on them all over the area. (R. 42; PA. 8) Around February 25, 1996 (and prior to Jay Crocker's burial), Petitioners filed a missing person's report, which was entered into the national system. (R. 42; PA. 8) Although the City of West Palm Beach's Police Department (City/Respondent) had access to this national system, the missing person's report brought no results. (R. 42-43; PA. 8-9) At last, on June 1, 1996, Petitioners learned that their son had worked in West Palm Beach. After contacting their son's previous employer, Petitioners finally learned the horrible news that their son had been dead for six months. (R. 43; PA. 9)

Petitioners thereupon filed suit against Pleasant, the City of West Palm Beach, and Palm Beach County. (R. 40-49; PA. 7-15) The complaint alleged, against Pleasant, tortious interference with their right to their son's body and outrageous conduct. Counts III and IV alleged section 1983 claims for interference with a protected property interest in Jay Crocker's body, without due process, in violation of the fourteenth amendment. (R. 44-49; PA. 10-15)

Both the City and County Respondents filed motions for a judgment on the pleadings, claiming that Petitioners complaint failed to state a cause of action under section 1983 because Petitioners had no property interest in their son's body. (R. 74-7, 87-9) The trial court, agreeing that Petitioners' had no constitutionally protected property right in their son's body, granted both Respondents' motion for a judgment on the pleadings and issued a final judgment in favor of the Respondents. (R. 93-4, 95-100; PA. 4-5) Petitioners appealed to the Fourth District Court of Appeal. (R. 101)

The Fourth District reviewed the federal cases which hold that there is, in fact, a constitutionally protected property interest in the decedent's remains, but reluctantly decided that Petitioners could not bring a section 1983 claim in Florida because these federal cases conflicted with Powell. Crocker v.

Pleasant, 24 Fla. L. Weekly D585 (Fla. 4th DCA March 3, 1999)
(PA. 2) The Fourth observed, however, that the misconduct alleged in the instant case was much more egregious than the claim in Powell. (PA. 2) But, because of the "broad holding of our supreme court in Powell that the claimants in that case had 'no protectable liberty or property interest' in the decedent's body", the Fourth felt it was obliged to affirm the judgment on the pleadings. (PA. 2)

Nevertheless, upon making that decision, the Fourth then wrote that, "[w]e conclude, however, that our supreme court should determine whether Powell is limited to corneal removal or precludes section 1983 actions where the interference with burial is more egregious", and certified the following question as being one of great public importance:

DOES POWELL PRECLUDE ALL SECTION 1983 CLAIMS GROUNDED
ON INTERFERENCE WITH AN INTEREST IN A DEAD BODY?

(PA. 2-3) Petitioners immediately filed Notice to Invoke Discretionary Jurisdiction with this Court and this appeal follows.

SUMMARY OF THE ARGUMENT

Powell, decided in 1986, should not be read to preclude all section 1983 claims grounded on interference with a dead body because Powell's language was overbroad considering the narrow issue it was deciding, and because federal courts have subsequently held that the next of kin do have a property interest in a decedent's body sufficient to bring a section 1983 claim. Powell did not include a section 1983 claim, but involved the question of whether Florida's Anatomical Gift Act was constitutional. It was not necessary for the supreme court to make the sweeping statement that there was not a property or liberty interest in a dead body in order to find the statute constitutional.

Furthermore, the interference with the dead body alleged in Powell was the relatively minor one of removing the body's corneas without the consent of the next of kin, an act which was sanctioned by the Anatomical Gift Act. Here, the interference was the reprehensible actions of the Respondents in failing to notify the Petitioners that their son had died (even though they had Petitioners names, address, and phone number), resulting in months of anguish for Petitioners as they searched for him in vain, only to finally learn (through their own sources) that

their son had been long dead and buried. This goes well beyond the mere removal of a body's corneas.

Interpreting Powell to ban all section 1983 claims based upon interference with a dead body would leave many aggrieved parties, such as Petitioners, without a remedy. Section 1983 was enacted just for situations such as this, where the interference was done under color of state law and consisted of a protected right of liberty or property. Florida's case law, as well as statutory law, provides numerous examples of the rights and interests the next of kin has in the remains of their loved ones. Certainly, Florida's laws mirror those of Ohio and Michigan, where the Sixth Circuit determined that the respective state laws did provide a property interest sufficient to bring a claim under section 1983. Whether or not the rules, understandings, and laws of a state comprise a constitutionally protected property right is a question of federal law. Thus, a Florida state case should not be the final authority on the issue of whether the next of kin can bring a section 1983 claim grounded on interference with their property interest in the body of a decedent. Petitioners urge that this Court answer the Fourth District's certified question in the negative.

ARGUMENT

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED BY HOLDING THAT POWELL PRECLUDED A SECTION 1983 CLAIM AND AFFIRMING THE TRIAL COURT'S RULING WHEN POWELL WAS DECIDED PRIOR TO FEDERAL DECISIONS AND WHEN THE ISSUE IN POWELL WAS DISTINCT FROM THE ISSUE AT BAR.

As Justice Shaw indicated in his dissenting opinion, Powell's [majority] language was much too broad considering the narrow issue that was before it. State v. Powell, 497 So. 2d 1188, 1195 (Fla. 1986) Although the language in Powell seems to imply that section 1983 claims are barred when grounded on a claim of property interest in a dead body, Powell did not even include a 1983 claim. In deciding Powell, the supreme court's primary concern appeared to be the policy implications and the consequences of finding Florida's Anatomical Gift Statute unconstitutional. However, this court could have readily upheld the statute without also stating that there was no property interest in a dead body. Reading Powell to bar all 1983 claims is too broad an interpretation. Given the decisions of the more recent federal circuit courts, Petitioners ask that this Court recede from its decision in Powell insofar as its language concerning the nonexistence of the next of kin's property interest in their loved one's remains.

A. POWELL'S ANALYSIS OF WHETHER THE NEXT OF KIN HAD A PROPERTY INTEREST IN THE DEAD BODY DID NOT HAVE THE BENEFIT OF THE MORE RECENT FEDERAL DECISIONS ON THAT QUESTION.

Although the Fourth District Court of Appeal found that the facts of the instant case were much more egregious than those of Powell, it held that it must affirm the trial court's granting of the judgment on the pleadings because of "the broad holding of our supreme court in Powell that the claimants in that case had 'no protectable liberty or property interest' in the decedent's body." Crocker v. Pleasant, 24 Fla. L. Weekly D585 (Fla. 4th DCA March 3, 1999) (PA. 2) It then stated that the supreme court should determine whether Powell was limited to corneal removal or whether it precluded all section 1983 claims where the defendant's interference with a dead body was much more egregious. Id. (PA. 2-3) The Fourth concluded with certifying the following question as one of great public importance:

DOES POWELL PRECLUDE ALL SECTION 1983 CLAIMS GROUNDED ON INTERFERENCE WITH AN INTEREST IN A DEAD BODY?

Id. (PA. 3)

Petitioners allege that the district court erred in holding that Powell mandated it affirm the trial court's decision because the issue of whether there is a protected property interest in a dead body sufficient to support a section 1983 claim has been

definitively answered by the Sixth Circuit. Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir. 1995); Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991). Furthermore, the Sixth Circuit expressly stated that such a question was a matter of federal law, not state. Brotherton, 923 F.2d at 481-82. The Fourth District should not have read Powell's language as precluding all 1983 claims, especially since there was not a section 1983 claim brought in Powell. Additionally, the Fourth should have looked to federal precedent, rather than state, in deciding whether a section 1983 claim could be sustained in Florida because such an issue is one of federal interpretation.

A thorough scrutiny of Powell's reasoning is instructive. A close reading of Powell's analysis leading up to its finding that there was "no protectable liberty or property interest in the remains [of a dead body]" reveals that it based its finding on its belief that "[a]ll authorities generally agree that the next of kin have no property right in the remains of a decedent." Powell, 497 So. 2d at 1191, 1193. This Court also stated that "[t]he view that the next of kin has no property right . . . is universally accepted by courts and commentators." Id. at 1192. While this may have been the case in 1986, it certainly is not true today. (And, in fact, it was not even true when Powell was decided, as Fuller was decided in 1984. Fuller v. Marx, 724 F.2d

717, 719 (8th Cir. 1984)) Not only have the Fifth, Sixth, and Eighth Circuits specifically found that constitutionally protected property rights in the remains of a dead body exist in Louisiana, Ohio, Michigan, and Arkansas, numerous states, themselves, have found that some type of property interests exist. Whaley, 58 F.3d 1111; Brotherton, 923 F.2d 477; Arnaud v. Odom, 870 F.2d 304 (5th Cir. 1989); Fuller, 724 F.2d 717. Many states label this interest as a "quasi-property right". Brotherton, 923 F.2d at 480; Arnaud, 870 F.2d at 308 (Louisiana has established a "quasi-property" right of survivors in remains of their deceased relatives); Fuller, 724 F.2d at 719 ("Under Arkansas law, the next of kin does have a quasi-property right in a dead body.")

Florida, itself, recognizes a right of possession of a body for the purpose of burial, a right to bring a tort claim for mishandling a corpse, and the right of the next of kin to donate or refuse to donate the deceased's body's organs. Williams v. City Minneola, 575 So. 2d 683, 690 (Fla. 5th DCA 1991) (cause of action exists for reckless infliction of emotional distress resulting from outrageous conduct involving photos of dead body); Halpin v. Kraeer Funeral Homes, Inc., 547 So. 2d 973 (Fla. 4th DCA 1989) (claim of intentional infliction of emotional distress because of interference with a dead body exempt from impact

rule); Kirker v. Orange County, 519 So. 2d 682 (Fla. 1988) (right of action for mutilation of dead body is based on right of next of kin to bury body in the condition found when life became extinct); Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950) (invasion of right of next of kin to have possession of the body of deceased person is an actionable wrong). Section 732.917, Florida Statutes (1995), provides that, if an anatomical gift is made, the rest of the body vests in the next of kin. Section 245.08, Florida Statutes (1995), requires a body to be surrendered for burial to any relative, by blood or marriage, who claims it.

Justice Shaw's dissent in Powell enumerated the various rights to a loved one's body the Florida legislature had accorded to the next of kin and concluded that it was "simply not legally possible nor permissible to donate or control the donation of an article which does not belong to the donor." Powell, 497 So. 2d at 1198. J. Shaw ended his dissent with the warning that decisions about the rights, duties and privileges of the next of kin were likely to become "even more intense as medical science advances and organ transplants increase in number." Id. Time has proven the accuracy of J. Shaw's prediction. Thus, the majority's reasoning upon which Powell concluded that the next of kin had no property interest in the body of their deceased, even

if appropriate at that time, is no longer valid today.

The federal cases of Whaley and Brotherton combine elements of both the instant case and Powell. Consequently, the Fourth District should have accorded them the weight they deserved and based their decision on this federal law. Like Powell, Brotherton involved a claim brought because of unauthorized cornea removal from the body of the claimant's husband. Brotherton, 923 F.2d 477, 478 (6th Cir. 1991). Upon her husband's death, the wife was asked if she wanted to make an anatomical gift of her husband's body, but she refused. Because the husband's death was considered a possible suicide, his body was autopsied. Id. After the autopsy was done, the coroner permitted the corneas to be removed and used as anatomical gifts. The wife learned of their removal upon reading the autopsy report. Id. Ohio's Anatomical Gift Statute, like Florida's, allows the removal of a corpse's corneas if the removing agent knows of no objection of the deceased's next of kin. Id. The wife filed suit alleging that her husband's corneas were removed in violation of due process of law (a section 1983 claim, like the one at bar.) Id. at 478-79. The federal district court dismissed her claim, finding that she had no property interest in her husband's body. Id. at 479.

The Sixth Circuit correctly began by describing the three

prerequisites of the due process claim as being: (1) deprivation; (2) of property; and (3) under color of state law. Id. It stated that due process only protected those interests where one has a legitimate claim of entitlement. Id. at 480. The Sixth went on explain that it must look to Ohio's state laws to determine whether the wife's interest in her husband's body rose to the level of a legitimate claim of entitlement, since property interests are created, and their dimensions defined, by "existing rules or understandings" stemming from state law. Id. After remarking that a majority of courts have found that quasi-property rights exist, it noted that there was no question that Ohio granted a possessory right of a spouse or other next of kin to a deceased body for the purpose of preparation, mourning, and burial. Id. at 481.

Brotherton found that the concept of property was extremely broad and abstract, where "property" most often referred not to just a physical object, but to a legal "bundle of rights" recognized in an object. This bundle of rights included such things as the right to possess, use, exclude, profit and dispose. Id. Reviewing both English and American legal history, the court held that the prevailing view of both legal systems were that the next of kin have a quasi-property right in the body of the deceased for purposes of burial or other lawful disposition. Id.

Echoing J. Shaw, the Sixth Circuit declared that the human body was a valuable resource and stated that, "The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements." Id.

Finally, and most importantly for our discussion, the Sixth Circuit pronounced:

Thankfully, we do not need to determine whether the Supreme Court of Ohio would categorize the interest in the dead body granted to the spouse as property, quasi-property or not property. Although the existence of an interest may be a matter of state law, whether that interest rises to the level of a "legitimate claim of entitlement" protected by the due process clause is determined by federal law. This determination does not rest on the label attached to a right granted by the state but rather on the substance of that right.

Id. at 481-82 (emphasis added). Finding that Ohio's Anatomical Gift Act expressly granted the right of the wife to control the disposal of her husband's body, and that Ohio also granted her a possessory right to his body, the circuit court held that:

Although extremely regulated, in sum, these rights form a substantial interest in the dead body, regardless of Ohio's classification of that interest. We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a "legitimate claim of entitlement" in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment.

Id. at 482.

Like Brotherton, Whaley also involved a section 1983 claim arising from the unauthorized removal of corneas or eyeballs from

the deceased. Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir. 1995). The issue before the Sixth was whether Michigan law provided the next of kin with a constitutionally protected property interest in the relative's body. The district court had ruled that the plaintiffs did not have such an interest, but the Sixth Circuit reversed. Id. at 1112. Stating, as it did in Brotherton, that the Constitution did not create property interests, the circuit court examined Michigan's state laws. Id. at 1113-114. Whaley echoed Brotherton's language when it declared that:

whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law. In making this determination, courts must look beyond the law's nomenclature and to its substance.

Id. at 1114. Whaley's court reviewed its decision in Brotherton, stating that, although Ohio's state appellate courts had stressed that they did not have a general "quasi-property" right in a dead body, the circuit court did not give this fact much relevance because it was not the state's label which was determinative, but the substance of the right. Id. Whaley reasoned that if Michigan recognized the same basic rights in a dead body as did Ohio, then Brotherton would control. Id. After reviewing Michigan's law, the Sixth Circuit found that their laws were

essentially the same, with Michigan's actually being a little more explicit in acknowledging those rights. Id. The circuit court held that such statutory and case law granting the next of kin the right to dispose of the body, make anatomical gifts of the body's organs, and prevent others from damaging the body were essentially rights that were the "heart and soul of the common law understanding of "property." Id. at 1115. It also found that Michigan's supreme court had repeatedly held that the next of kin were entitled to possession of the body as it was when death came, with it being an actionable wrong for another to interfere with that right or to mutilate the body in any way.

Id. Ultimately, the Sixth Circuit held:

Regardless of the legal label the State places on the rights in a dead body it chooses to create, these rights nevertheless exist. Moreover, they closely correspond with the "bundle of rights" by which property has been traditionally defined. For this reason alone, we conclude that Michigan, like Ohio, provides the next of kin with a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes. Accordingly, the next of kin may bring a constitutional claim under the Due Process Clause.

Id. at 1117.

Florida's "existing rules and understandings"; its statutes, and case law, are virtually identical to those found in Ohio and Michigan. And, clearly, these federal cases were right on point to the instant case. Powell was decided *prior* to these cases and

was not determining property interest relative to a section 1983 claim. The federal cases have expressly stated that such a question was one of federal law, not state. Powell did not have the benefit of these federal decisions when it was decided. Therefore, the Fourth District should have found that Powell did not apply to a section 1983 claim, and followed the federal cases instead.

B. BECAUSE POWELL'S ISSUE WAS THE CONSTITUTIONALITY OF A FLORIDA STATUTE (732.9185) UNDER WHICH THE DEFENDANTS HAD BEEN ACTING, AND THE INTERFERENCE WITH THE DEAD BODY WAS MINOR, POWELL SHOULD NOT PRECLUDE THIS SECTION 1983 CLAIM WHERE THE ISSUE IS NOT ONE OF CONSTITUTIONALITY OF A STATUTE, AND THE INTERFERENCE WAS MUCH MORE EGREGIOUS.

The instant case brings a section 1983 claim, as in Whaley and Brotherton, but does not involve the issue of cornea or eyeball removal, as did those federal cases as well as Powell. As stated previously, Powell did not involve a section 1983 claim at all. The Fourth District acknowledged that the facts in the instant case were distinguishable from those in Powell and expressed concern (to the point of certifying the question) with whether Powell's language should be read so broadly as to encompass all section 1983 claims, even where the interference with burial was so much more egregious. Petitioners urge this Court to answer that certified question in the negative because the instant case and Powell involve distinctly different issues

and policies behind those issues.

This Court in Powell was faced with a challenge to the constitutionality of section 732.9185, Florida Statutes (1983), which authorized medical examiners to remove corneal tissue from corpses during required autopsies when those tissues were needed for transplantation. Powell, 497 So. 2d 1188, 1189 (Fla. 1986). Although the statute prohibited the removal of the corneal tissue when the next of kin objected, it did not require that the next of kin be notified. Id. Therefore, the medical examiners were not obliged to inquire whether the next of kin had any objection to the corneal removal. The plaintiffs were the parents of two accident victims whose corneas had been removed during required autopsies. Id. In both cases, the medical examiner did not give notice or obtain consent of the parents before removing the corneal tissue. The plaintiffs subsequently brought suit for wrongful removal of their sons' corneas and sought a judgment declaring section 732.9185 unconstitutional. Id. at 1190.

The trial court, by summary judgment, declared the statute unconstitutional, finding that it deprived survivors of their "fundamental personal and property right to dispose of their deceased next of kin in the same condition as lawful autopsies left them, without procedural or substantive due process of law . . ." Id. It concluded with the holding that the state had no

compelling interest in non-consensual removal of decedents' corneas that outweighed the next of kin's right to dispose of their sons' bodies in the condition death left them. Id.

This Court began by emphasizing that a legislative act carried a presumption of validity and that the challenging party had the substantial burden of proving that the statute bore no reasonable relationship to a legitimate state purpose. Id. at 1190. This Court went into detail about the critical need for corneal tissue to provide the blind with the "basic necessities of life", explaining that the increasing number of elderly created a great demand for corneas. Id. It then went on to reveal that corneal transplants were particularly important in newborns because if the cornea is not clear within the first few months of the baby's life, its brain would never "learn to see". Id. The supreme court determined that the key to successful corneal transplantation was the availability of high-quality corneal tissue, which meant that the corneas could not be over ten hours old. Id. The evidence revealed that the implementation of section 732.9185 brought about an increase in the quality and quantity of available corneal tissue because it did not require the medical examiners to seek approval from the next of kin (which might be a lengthy process) prior to removing the corneas. Id. at 1191. Finally, this Court declared that

cornea removal represented an "infinitesimally small intrusion which does not affect the decedent's appearance" and concluded that the statute reasonably achieved the permissible legislative objective of providing sight to the blind. Id.

Powell then proceeded to address the trial court's finding that section 732.9185 deprived the next of kin of a fundamental property right. This is where Powell claimed that there was universal agreement among all authorities that there was no property rights in the remains of a decedent. Id. at 1191-192. Powell concluded by finding "no taking of private property by state action for a non-public purpose in violation of article X, section 6, of the Florida Constitution." Id. at 1192.

Plaintiffs had also asserted that their right to control the disposition of the body was a fundamental right of personal liberty protected by the due process clause. Id. at 1193. However, this Court found that the right of the next of kin to a tort claim for interference with burial was not a fundamental right traditionally protected under either the Florida or United States Constitution. Id.

Justice Shaw, however, wrote a strong dissent where he pointed out that the only question which was legitimately before the Court was whether the trial court correctly held, by granting summary judgment, that section 732.9185 was unconstitutional.

Id. at 1195. J. Shaw criticized the majority for addressing a "wide range of issues which are only tenuously related to the narrow issue before us", an action he felt was "completely premature." Id. The dissent summed up the majority's opinion as stating that, "the state and its agents have an unqualified right to the body of a decedent provided at some point the remains of the remains are turned over to the next of kin." Id. J. Shaw unequivocally expressed his disagreement with the majority:

I do not believe this is the law. I am persuaded, as was the trial judge below, that since time immemorial it has been the duty and the right of the next of kin to take control, possession, and custody of the body and remains of a deceased family member. . . . These rights are not only reserved to the people under article I, section 1 of the Florida Constitution, but are affirmatively protected as religious, liberty, and privacy rights under article I, sections 3, 9, and 23 and by various statutes of the state. The scope of the common law and the rights retained by the people should not, in my view, be narrowly construed.

Id. at 1195.

The federal circuit courts' decisions patently agree with J. Shaw's analysis. In deciding both Brotherton and Whaley, the Sixth Circuit examined the state laws and declared that it was a mistake to focus on whatever label the respective states attached to the rights it afforded in dead bodies, because the focus should be on the substance of those rights instead. Whaley, 58 F.3d at 1116; Brotherton, 923 F.2d at 481-82.

It is plain from the language of Powell that this Court's primary concern was for the inevitable negative consequences of finding section 732.9185 unconstitutional. There were vital policy considerations at stake, as a decision which would have required prior consent from the next of kin could have greatly reduced the quantity and quality of corneal tissue available for transplantation. However, as J. Shaw pointed out, it was unnecessary for the Powell court to make sweeping declarations about the rights and interests of the next of kin in their decedent's bodies in order to decide this case. Even if the court found it necessary to decide whether or not section 732.9185 was constitutional (instead of merely ruling whether or not the trial court erred in granting summary judgment), the Powell court could have declared that any interference with the next of kin's property interest was justified by the important state interest of providing for an adequate supply of corneal tissue.

In any event, the instant case involves a much more egregious interference with a dead body than mere cornea removal. Here, the Petitioners suffered months of anguish as they sought to learn of the whereabouts of their son, when all the while the Respondents knew that he was dead, yet failed to inform Petitioners. The Petitioners distributed flyers with their son's

picture on them in their attempt to find out what happened to him, as well as filing a missing person's report. Although the West Palm Beach Police Department had access to the national system which contained the missing person's report, still no one informed the Petitioners of their son's death. It was not until six months after Jay Crocker had died that his parents learned, through a source completely independent from any of the Respondents, that their son had died and had been buried in a pauper's grave months before. As a result, Petitioners were unable to take part in the investigation of their son's death, which occurred under questionable circumstances. Additionally, they suffered the emotional and financial impact of having to move their son's body from its pauper's grave to its present resting site.

The most outrageous aspect of this whole tragic scenario was the fact that the original investigating officer, Pleasant, *knew* who the deceased's parents were and where they lived! Pleasant had this information only a few days after Jay Crocker's death. After making one feeble attempt to reach the Petitioners, through the Miami Shores Police Department, he never followed up on the notification again. The body was then released to the county for burial as an unclaimed body. In spite of the fact that section 245.07 required the county to make a reasonable effort to notify

the next of kin before burying the body, no such effort was made.

These facts comprise a very different situation than that found in Powell. Additionally, the claims brought as a result of the different type of interference with the dead bodies were distinct. Powell's plaintiffs challenged the validity of the statute which authorized the state actors to remove the corneas without getting prior consent. Here, although the Respondents were acting under color of state law, they actually failed to follow the law as well as their own rules and regulations concerning the procedures to be taken in notifying the next of kin of a death. Thus, the Petitioners' claim did not rest upon challenging the law itself, but the fact that these government officers failed to follow required procedures.

Surely, this Court, in answering the question of section 732.9185's constitutionality, did not intend to preclude recovery of injured persons, such as the instant Petitioners, when their complaints consist of a section 1983 claim grounded on interference with an interest in a dead body. The very purpose of 42 U.S.C. 1983 (1998) is to ensure that such injured persons have a remedy when state actors deprive or interfere with their fundamental rights guaranteed by the fourteenth amendment. If this Court denies them redress under section 1983, then given the immunity most state actors enjoy, Petitioners are left with no

remedy at all no matter how egregious the level of interference with their loved one's remains. This result seems both unjust and improper.

Even if this Court finds that the Fourth District did not technically err in holding that it was bound to follow supreme court precedent, (as, after all, it is arguably not the district court's province to make policy or pick and chose which precedent to follow when it has a seemingly clear mandate from the supreme court) this Court should revisit Powell in order to answer the certified question. Petitioners urge that this Court, in light of the federal courts' decisions concerning section 1983 claims grounded on an interference with a dead body, recede from its broad language stating there is no protected property interest in a decedent's body.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Petitioners respectfully request this Honorable Court answer the Fourth District's certified question in the negative, reverse the Fourth's decision affirming the trial court's dismissal of Petitioners' claim, and remand with instructions to the trial court to reinstate Petitioners' section 1983 claim of interference with the body of their deceased son.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Don Stephens, Esq., Olds & Stephens, 711 N. Flagler Drive, West Palm Beach, FL 33401; Mayra Rivera-Delgado, Esq., City Attorney's Office, P.O. Box 3366, West Palm Beach, FL 33402; and Leonard Berger, Esq., County Attorney's Office, 301 North Olive Ave., Suite 601, West Palm Beach, FL 33401, this _____ day of May, 1999.

Respectfully submitted,

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