

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.

**AMICUS CURIAE BRIEF
OF THE FLORIDA ASSOCIATION OF COUNTY ATTORNEYS**

CARL E. BRODY, JR.
Assistant County Attorney
315 Court Street
Clearwater, FL 33756
(727) 464-3354
FL Bar #0102229
Attorney for Amicus Curiae

CERTIFICATE OF TYPE AND STYLE

The size and style of type to be used in this Amicus Curiae Brief of The Florida Association of County Attorneys will be 12-point Courier New.

	<u>Page</u>
CERTIFICATE OF TYPE SIZE AND FONT.....	i
TABLE OF CITATIONS.....	iii,iv,v
SUMMARY OF ARGUMENT.....	1
INTRODUCTION.....	4
I. EFFECTS OF CREATING A FUNDAMENTAL RIGHT IN A DEAD BODY.....	6
A. Effects on all Entities Dealing With Dead Bodies.....	6
B. Financial Costs to Counties.....	7
C. Inconsistency With Legislative Intent.....	9
II. LEGAL STANDARDS.....	11
A. 42 U.S.C. Section 1983.....	11
B. Substantive Due Process Standard.....	12
III. THE SIXTH CIRCUIT RULINGS ARE ANOMALOUS.....	14
A. View of the State Courts.....	15
B. View of Federal Courts.....	19
CONCLUSION.....	23
CERTIFICATE OF SERVICE.....	25

<u>CASES</u>	<u>Page</u>
<u>Arnaud v. Odom,</u> 870 F.2d 304 (5th Cir. 1989).....	20,21
<u>Brotherton v. Cleveland,</u> 923 F.2d 477 (6th Cir. 1991).....	4,19,20
<u>Collins v. City of Harker Heights,</u> 503 U.S. 115 (1992).....	13
<u>Contreraz v. Michelotti-Sawyers,</u> 896 P.2d 1118 (Mont. 1995).....	17
<u>Crocker v. Pleasant,</u> 727 So.2d 1087 (Fla. 4th DCA 1999).....	4
<u>Culpepper v. Pearl Street Building, Inc.,</u> 877 P.2d 877 (Colo. 1994).....	17
<u>Dampier v. Grace Hospital Corporation,</u> ____ N.W.2d ____, 1999 WL 55150 (Mich. App. 1999).....	18
<u>Daniels v. Williams,</u> 474 U.S. 327 (1986).....	7,11
<u>Emory v. Peeler,</u> 756 F.2d 1547 (11th Cir. 1985).....	11
<u>Fuller v. Marx,</u> 724 F.2d 717 (8th Cir. 1984).....	21
<u>Halpin v. Kraeer Funeral Homes, Inc.,</u> 547 So.2d 973 (Fla. 4th DCA 1989).....	8
<u>In re Estate of Medlen,</u> 677 N.E.2d 33 (Ill. App. 2d 1997).....	16,17
<u>Kirker v. Orange County,</u> 519 So.2d 682 (Fla. 5th DCA 1988).....	8,18

<u>Lawyer v. Kernodle,</u> 721 F.2d 632 (8th Cir. 1983).....	21
<u>Leno v. St. Joseph Hospital,</u> 402 N.E.2d 58 (1973).....	17
<u>McKinney v. Pate,</u> 20 F.3d 1550 (11th Cir. 1994).....	12
<u>Palko v. Connecticut,</u> 302 U.S. 319 (1937).....	12
<u>Planned Parenthood v. Casey,</u> 505 U.S. 833 (1992).....	13
<u>Poe v. Ullman,</u> 367 U.S. 497 (1961).....	14
<u>Ravellette v. Smith,</u> 300 F.2d 854 (7th Cir. 1962).....	21
<u>Regents of the University of Michigan v. Ewing,</u> 474 U.S. 214 (1985).....	14
<u>Rochin v. California,</u> 342 U.S. 165 (1952).....	13
<u>Scarpaci v. Milwaukee County,</u> 292 N.W.2d 816 (Wisc. 1980).....	17
<u>State v. Powell,</u> 497 So.2d 1188 (Fla.1986).....	1,15,16,23,24
<u>Tafoya v. Bobraff,</u> 865 F.Supp. 742 (D.N.M.1994).....	21
<u>Tinsley v. Dudley,</u> 915 S.W.2d 806 (Tenn. App. 1995).....	18
<u>Walker v. Reed,</u> 104 F.3d 156 (8th Cir. 1997).....	11

Wall v. Rose Hill Cemetery Association,
914 P.2d 468 (Colo. App. 1995).....17

Whaley v. County of Tuscola,
58 F.3d 1111 (6th Cir. 1995).....4,19,20

Williams v. City of Minneola,
575 So.2d 683 (Fla. 5th DCA 1991).....8

Zinermon v. Burch,
494 U.S. 113 (1990).....12

STATUTES

Section 125.44, Fla. Stat. (1951).....10

Section 245, et seq., Fla. Stat.....1,2,4,6,7,9

Section 245, et seq., Fla. Stat. (1973), (1991).....10

Section 245.07, Fla. Stat. (1997).....2,7

OTHER AUTHORITY

Am. Jur. 2d, Section 3, page 10.....18

42 U.S.C. Section 1983.....3,11

United States Constitution, Amendment XIV, Section 1.....12

SUMMARY OF ARGUMENT

The Amicus in this brief will urge this Court to maintain its ruling in State v. Powell, 497 So.2d 1188 (Fla.1986), concerning the constitutional status of a dead body as it relates to next of kin.

Creation of a novel fundamental right based on the substantive due process clause of the Fourteenth Amendment is an extreme remedy. As such, any court considering such a request must undertake a careful and cautious review in order to assure that its ruling comports with the overall structural rights created by the Constitution. The Amicus is concerned that creation of a fundamental right in a dead body for next of kin is inconsistent with the general rule of law and that such a change in the law would have deleterious pecuniary effects on the several counties.

Initially, the Amicus expresses the concern that creation of a fundamental right in a dead body will have the undoubted effect of causing counties to take this increased potential for liability into account, thereby syphoning off funding which could be used for more socially dynamic programs. Specifically, a survey of counties and their subordinate agencies illustrates that social service and community minded agencies bear the brunt of responsibility for complying with Section 245, et seq., Florida Statutes, which

requires counties to dispose of unclaimed and indigent bodies. As such, it is easily conceivable that funding reallocation would negatively effect these agencies. Therefore, such unintended consequences should be considered when examining this issue in its totality.

Consistent with the above argument, finding a fundamental right in a dead body is inconsistent with the State Legislature's intent in creating Section 245, et seq., Florida Statutes. Nowhere in any of the legislative history is there a reference to the creation of a fundamental right and the reasonableness standard imbued within the statute favors an interpretation that the Legislature favored a lower standard be applied. Also, it must be acknowledged that the job of burying the deceased is a health issue which must be accomplished efficiently, or else decomposition of the corpse or the concomitant dangers included in that process will occur.

Finally, the Legislature clearly deemed alternative use for bodies subject to Section 245, et seq. acceptable as it allows for their use by medical schools for the benefit of society. Section 245.07 (1997). Therefore, there is no legislative support available to Petitioners in this matter.

As to the legal standards and rulings involved in the case at

bar, 42 U.S.C. Section 1983 sets a straightforward requirement that in order to state a claim the plaintiff must allege that a right secured by the Constitution has been violated. Therefore, unless Petitioners are able to show specifically that they do in fact retain a substantive due process property right in the body of the deceased for next of kin, their 1983 claim is without merit and the certified question may appropriately be answered in the affirmative. The Amicus provides abundant case law in support of its position that such a constitutional right is not present in the dead body itself; therefore, Petitioners' 1983 claim cannot stand.

For these reasons, Amicus suggests that this Court should answer the certified question in the affirmative.

INTRODUCTION

The certified question before the Court today asks: DOES POWELL PRECLUDE ALL SECTION 1983 CLAIMS GROUNDED ON INTERFERENCE WITH AN INTEREST IN A DEAD BODY? Crocker v. Pleasant, 727 So.2d 1087, 1089 (Fla. 4th DCA 1999). This question derives directly from the original trial complaint of Petitioners in which next of kin brought a 42 U.S.C. 1983 civil rights claim against Palm Beach County and others based on allegedly improper compliance with Section 245, et seq. of the Florida Statutes. In support of their position, Petitioners maintain that next of kin have a fundamental right pursuant to the due process clause of the Fourteenth Amendment in the body of their deceased relative. Specifically, Petitioners rely on two Sixth Circuit Court of Appeals cases to sustain their argument. See Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir. 1995); Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991).

Petitioners urge that the rulings in Whaley and Brotherton uphold the right of parties to bring Section 1983 actions based upon an interpretation that next of kin retain a constitutional substantive due process property right in the corpus of the body itself. Acknowledgment of this limiting theory is important because such a claim is separate and distinct from a claim of loss of the

right to bury. This latter claim to right is based upon a "liberty" interest whereas the former is absolute and based on a property interest. Indeed, even though traditional tort claims could provide potential damage award remedies to next of kin, the only genuine cure to those injured by the acts of the government would be to provide these individuals with the opportunity to have a ceremonial farewell to their loved one. As such any right to the body achieves nothing without the ceremonial release which is encompassed through the loved one's right to bury.

Accurately distinguishing between these two legal postures provides insight into the moral and common law foundation supporting the provision of any level of right retained by next of kin in the disposition of their deceased relative. An examination of these underpinnings also provides direction concerning the appropriateness of any rights which should be conferred to next of kin considering the availability of non-constitutional remedies. Any examination concerning the status of a dead body to next of kin should be made within this context. Therefore, this Amicus Brief will provide this Honorable Court with sufficient background and contemporary case law information to allow it to be fully aware of the state of the law concerning this most sober issue.

I. EFFECTS OF CREATING A FUNDAMENTAL RIGHT IN A DEAD BODY.

The Amicus, the FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, is responsible for representing and providing legal advice to the several boards of county commissioners in the State of Florida which concomitantly includes the representation of the subordinate departments which are given the responsibility of complying with Section 245, Florida Statutes, which requires the counties to dispose of unclaimed or indigent corpses.¹ The concern of Amicus is that any drastic changes in the duty owed the next of kin in disposing of dead bodies has potentially dangerous repercussions concerning funding issues for each of the Florida counties. The Amicus is convinced that the current protection provided by the State of Florida through applicable tort remedies are more than sufficient to provide Petitioners with adequate redress without taking the drastic step of creating a novel fundamental right and as such opening the counties up to Section 1983 civil rights liability.

A. Effects On All Entities Dealing With Dead Bodies

A review of the Florida Statutes illustrates the potential far reaching effects the creation of a fundamental property right in a

¹See attached Composite Exhibit "A".

dead body could have on entities besides the counties. Entities as disparate as coroners, funeral homes, medical schools, law enforcement departments, and hospitals, to name a few, would be negatively impacted by such a determination. Such a vast effect would occur because Petitioners' position would create an absolute right in the corpus of the corpses and as such any perceived violation of that property right would create an actionable Section 1983 claim. Daniels v. Williams, 474 U.S. 327, 331 (1986). Therefore, Petitioners' position would create liability issues for any of these entities which from time to time must deal with dead bodies and as such these entities would have to take whatever steps are necessary to protect their interests and increased liability. At this time the effects of such a cause and effect response cannot be calculated, but the effect would certainly not be a positive change for the citizens of Florida.

B. Financial Costs To Counties

The creation of a new fundamental property right in a dead body would have several deleterious effects on the counties.

Disposal of human remains which are unclaimed is a duty placed upon the counties by the State Legislature. See Section 245.07, Florida Statutes (1997). This duty must be complied with, otherwise besides failing to satisfy the provisions of Section 245,

the county will be subject to tort claims seeking damages. These ample remedial outlets remain available to Petitioners in this matter without resorting to federal civil rights protections. See Williams v. City of Minneola, 575 So.2d 683, 690 (Fla. 5th DCA 1991) (cause of action exists for reckless infliction of emotional distress in relation to a 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 dead body, exempt from impact rule); Kirker v. Orange County, 519 So.2d 682 (Fla. 5th DCA 1988) (this Court acknowledges the next of kin's right to bury a body).

As can be seen, there are more than ample remedial outlets available to Petitioners; these outlets are currently considered by counties in determining their budgets and the need to be aware of this protractive liability. Heaping the dead weight of Section 1983 liability will alter this analysis and require that counties evaluate their position with this liability source in mind.

Currently the counties are responsibly dealing with this issue as the low number of complaints registered with the counties observes.² Creation of this new liability though will have a

²In past two years only 11 complaints issued. See attached Composite Exhibit "A".

twofold effect. First, it would encourage next of kin to avail themselves of this potential windfall as their available remedy would be heightened significantly in comparison to a normal tort matter. Secondly, assuming the counties continue to serve these deceased individuals in the manner provided currently, though there would not be a great leap in cases filed against the counties, prudence would direct them to divert funding from other more deserving sources to the area of providing further oversight for the burial program. As such, other locally successful programs which benefit the local citizens could be lost. This means that in many counties socially protective programs might be lost in order to maintain the state mandated burial requirements.³ This is too high a price to pay in order to provide a superfluous remedy to Petitioners in this matter.

C. Inconsistency With Legislative Intent

Finally, a creation of a fundamental property right in the dead body of next of kin subverts the State Legislature's intent as to their reasoning for Section 245, et seq., and as to the appropriate remedy for failure to comply with state law.

The disposal of dead body provisions were originally enacted

³Per Composite Exhibit "A", 12 social service departments and 12 community agencies charged with oversight, together with various other agencies as indicated.

at Section 125.44, Florida Statutes (1951), and they required the various boards of county commissioners to send unclaimed bodies to the Florida medical school for their use after 10 days. At that time the Legislature's focus concerned supplying medical schools. Though this remains an important aspect of the law, the intent of the Legislature was expanded by: 1) requiring the counties to bury unclaimed and indigent bodies; and 2) requiring the counties to attempt to contact any next of kin. Section 125.44, Florida Statutes (1969) (required a search for next of kin). In 1973, the statute was moved to its current cite in the Florida Statutes, and in 1991 the search requirements for the counties was created. Section 245, et seq. (1973), (1991).

Through these provisions, the State Legislature clearly intended to place a duty on the counties to make a reasonable search for the next of kin for the deceased body, but there is no suggestion that they intended for any substantive right to be created. Furthermore, the Legislature also inferentially acknowledged the public health issue involved with allowing dead bodies to deteriorate by requiring the counties to dispose of those bodies that would not be disposed of by a private party.

As such, the State Legislature, in its wisdom, created an actionable duty which is available to next of kin alleging some

damage by a breach of the government's duty to make a reasonable search prior to burying an unclaimed body. This remedy should be sufficient as it recompenses the injured party for effecting their right to bury their next of kin at or near the time of death because of a breach of duty by the government.

II. LEGAL STANDARDS

A. 42 U.S.C. Section 1983

The standard applied in reviewing a 1983 claim is clear and unequivocal, "[t]o state a cognizable claim under Section 1983, a plaintiff's complaint must allege that the conduct of a defendant acting under color of state law deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." 42 U.S.C. Section 1983; Walker v. Reed, 104 F.3d 156, 157 (8th Cir. 1997), *cf.* Emory v. Peeler, 756 F.2d 1547, 1554 (11th Cir. 1985). As such, a plaintiff is required to show breach of a fundamental right in order to maintain a substantive due process challenge, otherwise only the adequacy of the procedural due process may be challenged, Daniels v. Williams, 474 U.S. 327, 373-39 (1986) (Stephens concurring). In the case at bar Petitioners fail to assert the necessary challenge to the validity of the state law under which the alleged deprivation of rights is based, therefore, no Section 1983 claim will lie if there is no

substantive due process property right in the dead body.

B. Substantive Due Process Standard

The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." United States Constitution Amendment XIV, Section 1. This canon provides for two distinct constitutional procedures: 1) procedural due process protections; and 2) substantive due process protections. See Zinermon v. Burch, 494 U.S. 113, 125 (1990) (providing an authoritative review of the distinct standards of review applicable in the due process analysis).

As to the substantive due process protection, courts have consistently and uniformly required that in order for a right to fall within the scope of this protection, that right must be fundamental - "implicit in the concept of ordered liberty." McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994), quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937). Examples of fundamental rights are: most of the enumerated rights encompassed within the Bill of Rights (i.e. right to free speech), and the penumbra of rights included within the enumerated life, liberty, and property protections (i.e. abortion rights). See McKinney, 20 F.3d at 1556, citing Planned Parenthood v. Casey, 505 U.S. 833

(1992). In the alternative, a substantive due process right can be created where governmental action "shocks the conscience" of the court. See Rochin v. California, 342 U.S. 165, 172 (1952).

The standard of review applied by the United States Supreme Court in determining the existence of a fundamental right has been extremely strict, providing that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). Furthermore, the Court explains that it is necessary to "focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake." Id. (emphasis added).⁴ Therefore the Court must review the matter before it specifically within the limits of Petitioners' claim when examining whether a fundamental property right in the body of the deceased for next of kin exists.

In applying the law to the question, this Court should also be careful to note that even if a property right exists in a thing, such right is not necessarily entitled to substantive due process protection. Regents of the University of Michigan v. Ewing, 474

⁴A review of Petitioners' Complaint illustrates that a claim for a constitutionally protected property right in the body of deceased formed the basis of the substantive due process claim in question. Petitioners' Complaint at paragraphs 30, 36.

U.S. 214, 229 (1985) (concurring Powell). Such rights can only be created after cautiously considering whether inclusion of this new protection comports with constitutional purposes and the historical development of these protections. Id., citing Poe v. Ullman, 367 U.S. 497, 544 (1961).

Overall, the courts have been reticent to create new substantive due process rights, limiting them to only the most fundamentally entitled situations. Therefore, unless this Court determines that the next of kin's right to the actual corpus of a dead body reaches this most heightened of standards, no Section 1983 action will lie in the Petitioners' Complaint and the certified question may be answered in the affirmative.

III. THE SIXTH CIRCUIT RULINGS ARE ANOMALOUS

The critical issue before this Court today, apart from responding to the certified question, involves your determination of the constitutional protection provided next of kin in the dead body of a loved one. As discussed previously, this decision will determine whether a Section 1983 claim may properly be brought where next of kin alleges some injury to the deceased body. Therefore, Amicus has undertaken an extensive review of federal and state law to determine the status of a dead body as it relates to next of kin.

A. View Of The State's Courts

Any review of the constitutional issue involved in the case at bar must begin with a review of this Court's ruling in State v. Powell, 497 So.2d 1188 (Fla.1986). As this Court is fully aware, Powell involved a challenge to the statutorily authorized procedure of removing corneal tissue from decedents during autopsies. Id. at 1190. Though the Court determined that next of kin had no right in a liberty or property interest in the remains of their decedent, a seemingly overlooked portion of the Court's analysis acknowledges the limited right to possess the remains of a decedent in order to exercise the ceremonial right of burial. Id. at 1192. This distinction is the crux of this issue before the Court today as the specific right claimed by the Petitioners is a property right in the body itself - no reference to the ceremonial right to bury is put forward. Furthermore, the cases cited by this Court in Powell in support of the above proposition remain good law. Id. (citation omitted).

Concerning Justice Shaw's dissent in Powell, nothing cited therein is either consistent with Petitioners' argument in the case at bar nor inconsistent with the majorities' specific holding. Indeed, Justice Shaw's opinion distinguishes between the trial Defendants in Powell and Petitioners in the case at bar. Id. at

1194.

Specifically, the Defendants in Powell received a direct pecuniary benefit by conducting the autopsy, whereas no such benefit is received in the case at bar. Also, unlike the Petitioners, Justice Shaw asserted that a privacy right in the decedent's body might exist, Id. at 1196, more importantly though this potential right was based upon the need for next of kin to celebrate the life of the deceased, "through appropriate commemoration," Id., and it was qualified by the "overriding police power of the state to regulate the care and disposition of dead bodies." Id. Therefore, it seems clear that the dissent in Powell in no way provides support for the claim that a fundamental property right is present in the deceased body for next of kin.

Every state court case reviewed by Amicus supports the Powell decision, finding no right in the corpus of the body but varying rights in the ceremonial right to bury; none of the latter though reaches the height of constituting a fundamental property, liberty, or privacy right under the United States Constitution.

For example, in Illinois, the seminal case on point explains that because of their duty to bury, the nearest relatives to a deceased retain a quasi-property right in the body. In re Estate of Medlen, 677 N.E.2d 33, 36 (Ill. App. 2d 1997). As the Court

further explains, "[while] there is no property right in a dead body, a right of possession of a decedent's remains devolves upon next of kin in order to make appropriate disposition "[...] by burial." Id., quoting Leno v. St. Joseph Hospital, 402 N.E.2d 58 (Ill. 1973). Similarly, the courts in Colorado have specifically noted that there is no property right in the body of a deceased itself. Wall v. Rose Hill Cemetery Association, 914 P.2d 468, 470 (Colo. App. 1995), citing Culpepper v. Pearl Street Building, Inc., 877 P.2d 877 (Colo. 1994).

A more clear understanding of this dichotomy of rights is provided by the Montana Supreme Court in Contreraz v. Michelotti-Sawyers, 896 P.2d 1118 (Mont. 1995), where the Court citing Wisconsin case law explained, "[t]he basis for recovery of damages is found not in a property right in a dead body but in the personal right of the family of the deceased to bury the body." Id. at 1122, quoting Scarpaci v. Milwaukee County, 292 N.W.2d 816, 820-21 (Wisc. 1980).

The Tennessee courts dealing in a factually similar case in which next of kin brought a simple tort action for failure to provide notice of their decedent's death, held that no fundamental right lay in the body of a deceased. Tinsley v. Dudley, 915 S.W.2d 806, 807 (Tenn. App. 1995), citing 22(a), Am. Jur. 2d Dead Bodies,

Section 2, page 9. The Court acknowledged only the quasi-property right arising out of a duty to bury. Id., citing 22(a), Am. Jur. 2d, Section 3, page 10(further citation omitted). Our own courts have come to this same understanding. See Kirker v. Orange County, 519 So.2d 682, 684 (Fla. 5th DCA 1988).

Overall, as there is no state case law in conflict with the standard asserting no property right in the body itself, but some quasi-property right in the right to bury, there can be no doubt that a finding that a fundamental right exists in a dead body would contradict the analysis of your brethren state courts. Indeed, even the Michigan courts which are within the Sixth Circuit Court of Appeals' jurisdiction hold that there is no property interest in the dead body, but because of the Federal Court determination, a fundamental right did in fact exist within that circuit based on a federal standard. Dampier v. Grace Hospital Corporation, ____ N.W.2d ____, 1999 WL 55150 (Mich. App. 1999). Therefore, as an issue of state law, there is no question as to the status of next of kin's right in the deceased's body. Federal law precedent is similar.

B. View Of Federal Courts

As discussed previously, fundamental rights are extremely limited and where these rights are based on federal law, the

protection claimed must be specific. The Federal Courts, reviewing the constitutional nature of a dead body, have been consistent, outside of the Sixth Circuit, with none finding a fundamental property right in a decedent's body. Most importantly, though, neither the Eleventh Circuit Court of Appeals, the United States Supreme Court, nor any Federal District Court in Florida, have found a constitutionally protected fundamental property right in the body of a deceased.

Initially, though, it is important to examine the Whaley and Brotherton decisions. The original Sixth Circuit opinion finding a constitutional property right in a dead body was Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991). Unlike the case at bar, Brotherton involved the removal of corneal tissue and therefore a "mutilation" of the deceased body. Brotherton, 923 F.2d at 478. The Court's review on the issue of the constitutional nature of the dead body acknowledged that the existence of a property interest is controlled by state law, Id. at 480, and it went on to find that Ohio law provided a sufficient right in the dead body to create an entitlement and thus subject to federal procedural due process rights. Id. at 981-82. The Court analyzed the Ohio Statutes providing for the post deprivation procedure and found it lacking. Id. For these reasons, the Sixth Circuit in Brotherton found the

removal of corneal tissue to be unconstitutional, not based on procedural due process grounds, not substantive rights. Therefore, Brotherton does not hold for the proposition advanced by the Petitioners in the case at bar.

The Whaley decision, on the other hand, does in fact support Petitioners' position, but it is alone in holding this position. Whaley also involved a corneal removal statute, but this Court actually did rule directly on the issue of whether there is a substantive due process right in a dead body.

Consistent with Brotherton, the Whaley Court acknowledged the quasi-property right found in the right to bury, but it went one step further and determined that interest was sufficient to constitute a federal substantive due process right in the body. This decision is the only one taking this leap in logic and the Amicus would suggest that it therefore holds no value in the face of overwhelming case law which is totally contradictory.

For example, in Arnaud v. Odom, 870 F.2d 304 (5th Cir. 1989), the Fifth Circuit addressed this question in the context of unauthorized medical experiments conducted by a parish employee. The Plaintiffs brought both procedural due process and substantive due process claims against Defendants, claiming the loss of property and liberty interests; for our purposes, the substantive

claim will be examined.

The Plaintiffs claimed the loss of a liberty or privacy interest, but in its review, the Arnaud Court, mindful of the heightened review that must be taken when importing fundamental rights, determined that a lack of precedential support, Id. at 310, and the heightened standard for finding new substantive due process rights, Id. at 311, doomed the Plaintiffs' request. See also, Tafoya v. Bobraff, 865 F.Supp. 742, 751 (D.N.M.1994) (Court held that next of kin have no constitutional liberty interest in decedent's corpse).

Similarly, the Eighth Circuit has consistently held that tort remedies and not constitutional remedies provide relief from injuries suffered for "mutilation" of a dead body, Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984), and loss of the right to bury, Lawyer v. Kernodle, 721 F.2d 632, 634 (8th Cir. 1983). A review of these cases illustrates that even where a quasi-property right in a dead body exists, state law tort remedies were sufficient to remedy the loss. Fuller, 724 F.2d at 719. See also, Ravellette v. Smith, 300 F.2d 854, 858 (7th Cir. 1962) (Court noted that next of kin have only a limited interest in a decedent's body).

As can be seen, the overall import of federal case law supports this Court's interpretation of the status of a dead body;

therefore, the certified question should appropriately be answered in the affirmative.

CONCLUSION

The Powell Court, in reviewing the effects of "mutilation" on a deceased body to the next of kin, properly delineated the specific request for relief based on the rights in a decedent's body and not the right to bury. Powell, 497 So.2d at 1192. This distinction is critical because it affects the nature of constitutional relief sought and it tacitly acknowledges the moral nature of the appropriate remedy. Indeed, in the case at bar, Petitioner may still be able to fully memorialize their deceased as the body was buried and may be in a sufficient state that nothing but time will have been lost. Though such a loss in time is disconcerting, Amicus feels that it does not rise to the level of a fundamental right; and particularly not based on any constitutionally protected right in the body itself. This position is overwhelmingly supported by the case law cited and through an examination of Section 245, et seq., Florida Statutes, which places a duty on counties to dispose of unclaimed and indigent dead bodies.

As suggested by the Amicus through United States Supreme Court law, the creation of a fundamental right is an extraordinary remedy which must be fashioned with an eye on the global view of the Constitution's intent to limit those rights which receive such

protection. Only one court in both the state and federal systems has determined that creation of this novel fundamental right is appropriate and in the face of overpowering evidence of the anomalous nature of this ruling, Amicus feels that this Court should properly maintain its position in Powell.

Respectfully submitted,

CARL E. BRODY, JR.
Assistant County Attorney
315 Court Street
Clearwater, FL 33756
(727) 464-3354
FL Bar #0102229
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to DON STEPHENS, ESQ., Olds & Stephens, 711 North Flagler Drive, West Palm Beach, FL 33401, MAYRA RIVERA-DELGADO, ESQ., City Attorney's Office, P. O. Box 3366, West Palm Beach, FL 33402, LEONARD BERGER, ESQ., County Attorney's Office, 301 North Olive Avenue, Suite 601, West Palm Beach, FL 33401, V. LYNN WHITFIELD, ESQ., Whitfield & Mosley, 224 Datura Street, Suite 918, P. O. Box 34, West Palm Beach, FL 33402, and DEA ABRAMSCHMITT, ESQ., Lakeshore Office Park, Suite 224, 2669 Forest Hill Blvd., West Palm Beach, FL 33406, this 17th day of June, 1999.

CARL E. BRODY, JR.
Assistant County Attorney

C:\Supreme Court\02-01-01\95148e1.wpd