

**BRIEF  
DUPLICATE**

IN THE **21 K 1788**

**SUPREME COURT**

**STATE OF LOUISIANA**

**#2021-K-1788**

**State of Louisiana, Relator**

**v.**

**Kenneth James Gleason, Respondent**

**On Writ of Review to the Court of Appeal  
First Circuit Case # 2021-KA-1286  
Nineteenth Judicial District Court  
Parish of East Baton Rouge, State of Louisiana  
Docket # 11-17-0715, Section VII  
Honorable Beau Higginbotham, Judge, Presiding**

**Original Brief on Behalf of Kenneth Gleason, Respondent**

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## **JURISDICTIONAL STATEMENT**

Jurisdiction vested in this Court when the State timely filed a writ application challenging the ruling by the Court of Appeal, First Circuit dismissing Kenneth Gleason's prosecution *ab initio*. This brief is being filed by direction of this Court.

## **STATEMENT OF THE CASE**

Counsel has no issues with the Statement of the Case presented by the State. Counsel notes specifically that there has been no definitive finding that Mr. Gleason, who had been incarcerated in local facilities for a number of years awaiting trial, and was found dead in his cell four days after being transferred to Angola, committed suicide. See State's brief, p. 4, fn 1.

## **STATEMENT OF FACTS**

Initially, as conceded by the State on p. 5, fn. 3, there are no facts available in the appellate record. In an effort to avoid the cost of transcribing a two week trial as well as the various motions, the record was a designated one. The law was clear at the time that the prosecution should be abated *ab initio*. See *State v. Morris*, 328 So. 2d 65 (La. 1976)

The designated record was lodged in the Court of Appeal on October 22, 2021. The Motion to Abate the Prosecution and to Suspend the Briefing Deadlines was not filed until November 5 and the dismissal of the prosecution did not occur until November 10, 2021. During the interim, the State did not challenge the record or seek supplementation. The State also did not file any opposition to the motion or notify the Clerk's Office of any intent to do so. As a result, the State should be bound by the

record submitted to this Court. Undersigned counsel was not the trial counsel and therefore cannot challenge the facts which the State avers were those presented at trial.

Moreover, the facts of this case are not relevant to the issue on appeal, and the facts appear only to be introduced in brief for their emotional impact and to affect the decision. The question presented is solely a legal one. The decision should be rendered without regard to the facts of any individual case. Counsel asks that the facts not be considered.

#### **STATE'S ASSIGNMENT OF ERROR**

The First Circuit did not err insofar as it applied this Court's precedent. The State is seeking a departure from existing precedent.

#### **STATE'S ISSUE PRESENTED FOR REVIEW**

Whether the doctrine of abatement *ab initio* should be abandoned or otherwise modified?

#### **STATE'S SUMMARY OF THE ARGUMENTS**

The State summarizes its arguments as follows:

This Court adopted the doctrine of abatement in *State v. Morris*. It is now time to abandon the procedure, as it serves no truly functional purpose and, among other things, undermines victim's [sic] rights. Louisiana should completely abandon its abatement procedure and adopt the "Alabama Rule" announced in the factually identical case of *Commonwealth v. Hernandez*, 481 Mass 582, 118 NE 3d 107 (2019).

In response, the defense counters that the Court in *Morris* ruled correctly in light of the available constitutional and statutory authority, that the case has now become law by custom and should be enforced as such, that if change is to occur, the change should be made by the Legislature, and that the present procedure does not impair the rights of victims.

## ARGUMENT

### 1. Finality of an appeal

When this Court first considered the issue of what transpires when a criminal defendant dies during the pendency of appeal, it noted that the issue was a *res nova* one. *State v. Morris*, *supra*.

The Court noted in *Morris* that there was a dearth of statutory authority governing the situation in criminal cases. The Court considered that this jurisdiction gave constitutional protection for an appeal of right in cases triable by a jury, but there was no procedure in place for allowing a representative to continue the appeal as in civil cases. In fairness, the dismissal of the prosecution *ab initio* was the result since the appeal could not be finalized.

Both the State's cited cases, *Commonwealth v. Hernandez*, 481 Mass. 582, 118 N.E.3d 107 (2019) and *State v. Wheat*, 907 So. 2d 461 (Ala. 2005) arise from a statutory right to an appeal. Moreover, in his concurring opinion in *Wheat*, *supra*, Justice Hanwood noted that there was a Rule of Appellate Procedure regarding the disposition of an appeal when the defendant died during the pendency of an appeal. The Rule places the discretion to determine the disposition with the appellate court to decide on a case by case basis. He wrote that,

... Rule 43(a), Ala. R. App. P., cited but not quoted in the main opinion, states: “**Death of a Party**. When the death of a party has been suggested, the proceeding shall not abate, but shall continue or be disposed of as the appellate court may direct.” (Emphasis added.) Rule 43(a) was not applicable to the appeal from the municipal court to the circuit court for a trial de novo, the procedural posture of the case in *Ex parte Estate of Cook*, 848 So. 2d 916 (Ala. 2002). See Rule 1, Ala. R. App. P. As the Committee Comments to Rule 43 point out, that rule “is flexible in its application to permit [the] action to proceed in accordance with the court’s direction on a case by case basis.” I agree with the disposition directed for this appeal in the main opinion.

As pointed out in the Writ Opposition, the dismissal of a defendant’s appeal is inconsistent with the constitutional guaranty of an appeal of right, without regard to merit. *C.Cr.P. art. 912* provides that a defendant may appeal a judgment that imposes a sentence. *C.Cr.P. art. 222<sup>1</sup>* provides for when a judgment becomes a final one. A judgment that is timely appealed precludes it from being a final one until the last appellate delay has expired.

The purposes of an appeal are multifold. The stated constitutional purpose is to insure that “No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. . . .” The appeal should consist of a dispassionate review not only as to the sufficiency of the evidence, the rulings of the trial court, and the fairness of the sentence imposed considering the nature of the

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A. Within fourteen days of rendition of the judgment of the supreme court or any appellate court, in term time or out, a party may apply to the appropriate court for a rehearing. The court may act upon the application at any time.

B. A judgment rendered by the supreme court or other appellate court becomes final when the delay for applying for a rehearing has expired and no application therefor has been made.

C. If an application for a rehearing has been made timely, a judgment of the appellate court becomes final when the application is denied.

D. If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ.

crime and the character of the defendant. See e.g. *State v. Michelli*, 301 So.2d 577 (La. 1974); *State v. Foley*, 448 So.2d 731 (La. App. 5 Cir. 1984) An appeal is based totally on the record. No additional evidence can be offered and no personal arguments are allowed. The right to an appeal inures to the defendant. The State is statutorily limited as to what issues can be appealed. See *C.Cr.P. art. 912*. The dismissal of the prosecution in this case without any review shortchanged Mr. Gleason of the review he was constitutionally entitled to. Accordingly, to allow the dismissal to work to Mr. Gleason's detriment, even though dead, would be fundamentally unfair. The solution set out in *Morris*, in the absence of any statutory authority allowing the appeal to proceed, sets out the correct procedural path since at the time of Mr. Gleason's death, the judgment of the trial court was not a final one.

## **# 2. The Doctrine of Jurisprudence Constante**

The doctrine of *jurisprudence constante* requires that the procedure set out in *Morris* be followed. The ruling of the First Circuit was not error and the State in brief does not allege error.

The doctrine of *jurisprudence constante* was recently explained in *Bergeron v. Richardson*, 2020-01409 (La. 06/30/21); 320 So. 3d 1109, 1114-15

The Civil Code establishes only two sources of law in Louisiana: legislation and custom. See La. Civ.Code art. 1. Within these two categories, legislation is superior to custom and will supercede it in every instance. See La. Civ.Code art. 3. Judicial decisions, on the other hand, are not intended to be an authoritative source of law in Louisiana. See A.N. Yiannopoulos, *Louisiana Civil Law System* § 35, p. 53 (1977). Consequently, Louisiana courts have frequently noted that our civilian tradition does not recognize the doctrine of stare decisis in our state. See *Ardoin v. Hartford Acc't & Indem. Co.*, 360 So.2d 1331, 1334 (La. 1978); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576, 591 (La. 1975); *Carter v. Moore*, 258 La. 921, 959, 248 So.2d 813, 829 (1971); *Johnson v. St. Paul Mercury Ins. Co.*, 256 La. 289, 296, 236 So.2d 216, 218 (1970), overruled on other grounds, *Jagers v. Royal Indem. Co.*, 276 So.2d 309, 312 (La. 1973); *City of New Orleans v. Treen*, 421 So.2d 282, 285 (La.App. 4th Cir. 1982); *State v. Placid Oil Co.*, 274 So.2d 402, 414 (La.App. 1st Cir. 1972).



Instead, a long line of cases following the same reasoning within this state forms jurisprudence constante. See *Heinick v. Jefferson Par. Sch. Bd.*, 97-579, p. 4 (La.App. 5 Cir. 10/28/97), 701 So.2d 1047, 1050; *City of New Orleans*, 421 So.2d at 285. As summarized by this court in *Johnson*:

Fundamental and elementary principles recognize that certainty and constancy of the law are indispensable to orderly social intercourse, a sound economic climate and a stable government. Certainty is a supreme value in the civil law system to which we are heirs. In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of jurisprudence constante. Unlike *stare decisis*, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past.

*Johnson*, 256 La. at 296, 236 So.2d at 218. Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a "constant stream of uniform and homogenous rulings having the same reasoning," jurisprudence constante applies and operates with "considerable persuasive authority." James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L.Rev. 1, 15 (1993). Because of the fact that "one of the fundamental rules of [the civil law tradition] is that a tribunal is never bound by the decisions which it formerly rendered: it can always change its mind," 1 Marcel Planiol, *Treatise on the Civil Law* § 123, (La. State Law Inst. trans.1959) (12th ed.1939), prior holdings by this court are persuasive, not authoritative, expressions of the law. See *Yiannopoulos*, supra, at § 35, p. 5 **Thus, it is only when courts consistently become part of Louisiana's custom under Civil Code article 3 and be enforced as the law of the state. See La. Civ.Code art. 3.** [footnote omitted;emphasis added]

In sum, the chief distinction between jurisprudence constante and *stare decisis* is this: "A single case affords sufficient foundation for the latter, while a series of adjudicated cases, all in accord, form the basis for the former." *Yiannopoulos*, supra, at § 35, p. 55. [emphasis added; footnote omitted].

*Morris*, supra, was decided in 1976. In the intervening forty-six years, the case has been cited forty one times as a basis for dismissing a prosecution *ab initio* when a defendant dies during the pendency of appeal. The case has become "custom" at this point in time and should be enforced as law.

A trend in other jurisdictions, some where the right to an appeal is statutory, should not form the basis for the change in the absence of any action by the Legislature.

### 3. The Absence of Legislation

The powers of the state's government are divided into three separate branches: legislative, executive, and judicial. La. Const. art. II, § 1. Unless authorized by the constitution, no one of the branches, or anyone holding office in one of them, shall exercise power belonging to either of the others. La. Const. art. II, § 2.

See *Mallard Bay Drilling, Inc. v. Kennedy*, 2004-1089 (La. 06/29/05); 914 So. 2d 533, 542-43.

As Justice Knoll, after determining that the issue presented by the case rested on policy considerations succinctly stated in *Thomas v. Bridges*, 2013-1855 (La. 05/07/14), 144 So. 3d 1001, “[W]e find this issue involves policy considerations that should be addressed by the Louisiana Legislature rather than resolved by this Court. Our function is to merely interpret the laws passed by the legislature, not to make laws.”

As this Court noted in *Morris*, there was no legislative authority offering a solution to what occurs when a defendant dies during the pendency of an appeal, finding it to be *res nova*. This Court crafted a remedy that was consistent with both the constitutional and statutory provisions available. There is still a lack of statutory authority to continue the appeal so as to give the conviction finality. To alter the remedy at this juncture because of a growing trend in other jurisdictions would have the effect of changing a remedy that has become law by custom. Any change at this juncture should be made by the Legislature. The case cited by the State in its brief, *State v. Mutory*, 581 S.W.3d 741 (Tenn. 2019), demonstrates that there are many options available, many of which would require companion legislation.

### 4. Consideration of the Victims

The State contends that the current procedure of dismissing a prosecution *ab initio* does not take into account that the victims of crime or the families of the victims should have the right to compensation for any losses citing to **The Crime**

**Victims Reparation Act, The Crime Victims Bill of Rights, and Art. I, Sec. 25 of the Louisiana Constitution.**

The **Crime Victims Reparation Act** is set out in *La. R.S. 46:1801-46:1822*.

A reading of the articles reveals that a conviction is not necessary to obtain an award from the Crime Victims Reparation Board. *La. R.S. 46:1806* setting out the time limitations of applying for reparation specifically provides for the death of a defendant following commission of a homicide.

The statute pertinently reads as follows:

A.

(1) An application for reparations shall be filed in writing with the board within one year after the date of the personal injury, death, or catastrophic property loss or within such longer period as the board determines is justified by the circumstances. The application shall be valid only if the act resulting in the personal injury, death, or catastrophic property loss was reported to the appropriate law enforcement officers within seventy-two hours after the date of the personal injury, death, or catastrophic property loss, or within such longer period as the board determines is justified by the circumstances.

(2)

(a) Notwithstanding the provisions of Paragraph (1) of this Subsection and except as provided in Subparagraph (b) of this Paragraph, an application filed by a dependent or legal representative of a deceased victim of a homicide offense, or filed by a claimant as defined in R.S. 46:1802(4), shall be filed within five years after the date on which the judgment of conviction becomes final or within five years after the date on which the supreme court denies the defendant's first application for appeal.

**(b) Notwithstanding the provisions of Paragraph (1) of this Subsection, when the death of the offender occurs prior to a conviction for a homicide offense, an application filed by a dependent or legal representative of a deceased victim of a homicide offense, or filed by a claimant as defined in R.S. 46:1802(4), shall be filed within five years after the date of the death of the offender.**  
[emphasis added]

While a conviction operates as conclusive proof that a crime was in fact committed pursuant to *La.R.S. 46:1809*, the statute also states pertinently that "An order for reparations may be made whether or not any person is arrested, prosecuted, or convicted of the crime giving rise to the application for reparations. The board may

suspend proceedings in the interest of justice if a civil or criminal action arising from such act or omission constituting the crime is pending or imminent.”

**Crime Victims Bill of Rights - *La.R.S. 46:1844***

This statute states specifically that the trial judge, at the time of sentencing, “shall” order restitution and therefore does require a conviction for that order. The pertinent portion of the statute reads as follows:

(1) If the defendant is found guilty, the court or the committee on parole shall require the defendant to pay restitution to the appropriate party in an amount and manner determined by the court. In addition, the court or the committee on parole may require the defendant to perform community service work in an amount and according to a schedule determined by the court.

(2) One of the conditions of work release shall be a requirement that an inmate pay from his earnings all restitution ordered by the court or the committee on parole. Even if no restitution has been ordered, the sheriff or director of the program shall have the right to require payment of restitution as a condition of work release.

(3) A victim shall not be required to pay recording fees for the filing of a restitution order with the clerk of court. The defendant shall be responsible for all costs associated with this action.

The trial court in the instant case did not issue an order of restitution. *C.Cr.P. art. 883.2* permits the trial court to consider a defendant’s indigency as a factor in determining the amount of restitution. Mr. Gleason was represented by pro bono counsel and his estate is likely not to have assets. To date there has been no indication that any member of the victims’ family has filed a lawsuit requesting reparations. The abatement of the prosecution has had no financial impact.

***La. Const. Art. I, Sec. 25***

The Constitutional Amendment reads as follows:

Section 25. Any person who is a victim of crime shall be treated with fairness, dignity, and respect, and shall be informed of the rights accorded under this Section. As defined by law, a victim of crime shall have the right to reasonable notice and to be present and heard during all critical stages of preconviction and postconviction proceedings; the right to be informed upon the release from custody or the escape of the accused or the offender; the right to confer with the prosecution prior to final disposition of the case; the right to refuse to be interviewed by the

accused or a representative of the accused; the right to review and comment upon the presentence report prior to imposition of sentence; the right to seek restitution; and the right to a reasonably prompt conclusion of the case. **The legislature shall enact laws to implement this Section. The evidentiary and procedural laws of this state shall be interpreted in a manner consistent with this Section.**

Nothing in this Section shall be construed to inure to the benefit of an accused or to confer upon any person the right to appeal or seek supervisory review of any judicial decision made in a criminal proceeding. Nothing in this Section shall be the basis for an award of costs or attorney fees, for the appointment of counsel for a victim, or for any cause of action for compensation or damages against the state of Louisiana, a political subdivision, a public agency, or a court, or any officer, employee, or agent thereof. Remedies to enforce the rights enumerated in this Section shall be provided by law. [emphasis added]

The Amendment adds credence to the argument that it should be the Legislature that should determine the appropriate procedure for how to proceed with a case when the defendant dies during the course of appellate proceedings since other companion legislation may be necessary.

Counsel is compelled to concede that the victim's right to seek compensation has been elevated to a constitutional right as is the defendant's right to an appeal. However, nothing in the authorities cited by the State takes the right to sue away from the victim or the family. They still have access to the courts, also guaranteed by the Constitution. See *La. Const, Art. I, Sec. 22*. A conviction is not required to prevail, and the burden of proof is the lesser burden of preponderance of the evidence.

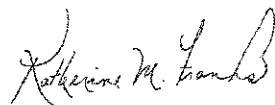
In addition, the solution proposed by the State does not necessarily protect the victims' right to reparations since the conviction would be placed in limbo as would any order of restitution set by the court at the time of sentencing.

## CONCLUSION

The vacating of a conviction *ab initio* when a defendant dies during the pendency of an appeal is still a law by custom. If it is to be changed, it should be

changed by the Legislature so that companion legislation recognizing the competing constitutional rights of both the defendants and the victims can be enacted. This case is not the appropriate procedural vehicle to change the law.

Respectfully Submitted,

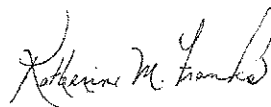


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**CERTIFICATE**



I hereby certify that the foregoing original brief of appellant, Kenneth Gleason has been served upon the State of Louisiana through Dylan Alge and Lori Olinde, Assistant District Attorneys, Parish of East Baton Rouge via electronic mail and on the Court of Appeal by filing this pleading in the appellate record on the 29th day of March 2022.



Katherine M. Franks



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