31,906

IN THE SUPREME COURT OF FLORIDA

DEWEY McLAUGHLIN and
CONNIE HOFFMAN a/k/a
CONNIE GONZALES,

Appellants,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY TO PETITION FOR REHEARING

RICHARD W. ERVIN
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Counsel For
Appellee

FILED

[redacted] 11 1962

GUYTE P. McCORD
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REPLY TO PETITION FOR REHEARING

Comes now the appellee, the State of Florida, and files the following in reply to the petition for rehearing submitted to this court by the appellants.

I.

The petition for rehearing urges that the court correct its former opinion as to pass upon the allowance of the defense of marriage between the parties.

II.

It is submitted that there are adequate state grounds on which to rule that the trial court did not commit reversible error in instructing the jury that the defendants could not legally marry in the state of Florida. The United States Supreme Court pointed out

in the case of Durley v. Mayo, 100 L.Ed 1178, that such court did not review the federal constitutional questions which may have been present in that particular case where there were adequate state grounds to support the holding to which such federal constitutional questions were applicable.

In the instant case, as pointed out on pages 8 and 9 of appellee's brief, there was no evidence which would tend to support the existence of a marriage in this state between the defendants. In fact, as pointed out on pages 8 and 9 of appellee's brief, there was ample evidence from which the jury could conclude that the defendants were not married to each other.

III.

Furthermore, the defendants failed to assign as error the judge's instructing the jury that a marriage between the defendants in the state of Florida would be illegal and void. As is stated in the case of Mortellaro v. State, 72 So.2d 815, a court will generally not consider an error unless it is the basis of an assignment of error. The assignment of error that the court erred in overruling and denying defendants' motion for new trial is insufficient to support a reversal on the ground that the instruction to the jury was

erroneous. Green v. State, 163 So.712, 121 Fla. 307.

IT IS THEREFORE SUBMITTED that the existing state grounds are such as to make the instant case an improper vehicle on which to test the federal constitutionality of the Florida miscegenation provisions of the Florida constitution. This court, in order to clarify such proposition, is therefore urged to set forth the state grounds for not reversing on the trial judge's instruction relating to the marriage of the defendants, if the court determined such state grounds to be adequate.

Respectfully submitted,

Richard W. Ervin

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Counsel for Appellee.

I HEREBY CERTIFY that a copy of the above and foregoing Reply to Petition for Rehearing has been furnished to Messrs. G. E. Graves, Jr. and H. L. Braynon, Attorneys at Law, 802 N. W. Second Avenue, Miami, Florida, Attorneys for Appellants, by mail, this 10th day of May, 1963.

James G. Mahorner

Of Counsel for Appellee.