IN THE SUPREME COURT OF FLORIDA

OTTIS ELWOOD TOOLE,

CROSS-APPELLEE/APPELLANT,

-VS-

CASE NO. 65,378

STATE OF FLORIDA,

CROSS-APPELLANT/APPELLEE.

CROSS-APPELLANT'S/APPELLEE'S REPLY BRIEF

JIM SMITH
ATTORNEY GENERAL

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0600

COUNSEL FOR CROSS-APPELLANT/APPELLEE

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THE TRIAL JUDGE ERRED IN REFUSING TO GRANT THE STATE'S SEVERAL CHALLENGES OF PROSPECTIVE JURORS WHO UNEQUIVOCALLY STATED AND WERE FOUND BY THE TRIAL JUDGE TO BE UNABLE TO CONSIDER DEATH AS A POSSIBLE PUNISHMENT REGARDLESS OF THE FACTS AND CIRCUMSTANCES.

ARGUMENT

Cross-Appellee urges that the State of Florida has not demonstrated reversible error because the State did not exhaust its peremptory challenges and a ruling in this case would not alter the validity of appellant's conviction. The cross-appellee further argues that under Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), aff'd, ___ F.2d ___ (8th Cir.1985), Opinion filed January 30, 1985, Witherspoon and its progeny requires a jury selection process like that employed by the trial judge.

Initially, cross-appellant would observe that all appeals by the State pursuant to Rule 9.140(c) involve issues that do not affect the outcome of the appeal by virtue of the fact that the defendant has been convicted and the State is never asking that the judgment and sentence be reversed for a new trial in such a circumstance. Appellant/cross-appellee is apparently suggesting that when the State wins in the trial court review is unavailable because there can be no reversible error. The conclusion, of course, is that the State cannot obtain review of legal errors in such circumstances--a conclusion which is

contrary to the rule of this Court which allows the State to appeal a "ruling on a question of law when a convicted defendant appeals his judgment of conviction. . ." Rule 9.140(c), Fla. R.App.P. Note that the rule does not require the State to demonstrate prejudicial error simply because it is the prevailing party.

Appellant's claim that this Court need not or should not reach the issue is legally untenable and would deny the State its right to review the judicial error. More importantly, a refusal to rule on this issue on the theories advanced by appellant would present a situation where the legal error is capable of repetition and always avoiding review because this Court in this very case declined to grant extraordinary relief. State ex rel. Edward Austin v. James L. Harrison, Case No. 65,218. Because the legal issue is capable of repetition but likely to avoid review if not disposed of, this Court should resolve the matter for the benefit of the bench and the bar. Cf. Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975), n. 11.

Appellant also states that the competency of a challenged juror is a mixed question of law and fact and thus the trial judge will not be reversed unless abuse of discretion is demonstrated. This argument is untenable. The State is not arguing the trial judge erred in determining whether the prospective jurors' attitudes concerning the imposition of the death penalty meet the criteria of Witherspoon or Wainwright v. Witt, ___ U.S. ___ (1985), 36 Cr.L. 3116, for that matter. See: Cross-appellant's

Initial Brief at pp. 34-35. Appellant's attempt to cast the issue as one of historical fact, Patton v. Yount, 467 U.S. ___, 81 L.Ed.2d 847 (1984) was correctly anticipated. As heretofore noted Judge Harrison found the prospective jurors in question met the Witherspoon test! Indeed, appellant has not attempted to demonstrate the persons were qualified under Witherspoon. Instead, appellant has attempted to argue Witherspoon doesn't control this case: that Section 913.13, correctly interpreted justifies the action of the trial judge.

It is appellant who is incorrect as to the interpretation of Section 913.13, formerly Section 932.20. The latter was interpreted in Campbell v. State, 227 So.2d 873 (Fla.1969) to authorize excusal of prospective jurors from service upon a jury in a capital case if he could not impartially consider a sentence of death. The fact that we no longer employ a unitary trial in a capital case does not alter the applicablity of 913.13 as interpreted in Campbell. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978 and Downs v. State, 386 So.2d 788 (Fla.1980).

Appellant's reliance upon Grigsby v. Mabry, supra, which is understandable must also be rejected. That case was predicated upon the illogical assumption that excusing prospective jurors under Witherspoon created a "prosecution-prone" jury and deprived the defendant of his Sixth Amendment right to a jury composed of a cross-section of the community. As was noted in the original brief at page 35, that view was rejected by the Fifth Circuit

Court of Appeals in Spinkellink and this Court in Downs, supra. More importantly, this Court on February 7, in Caruthers v. State, 10 F.L.W. 114 (Fla. Feb. 7, 1985), rejected this argument again and on January 29, 1985, the Eleventh Circuit Court of Appeals in the case of McCleskey v. Kemp, ___ F.2d ___ (11th Cir.1985), Case No. 84-8176, en banc unanimously rejected Grigsby v. Mabry on the basis of Spinkellink v. Wainwright, supra, and Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981). See also: Garrison v. Keeten, 742 F.2d 129 (4th Cir.1984) rejecting Grigsby.

Interestingly, Justice Brennan was persuaded by Grisby for he cited to it in his dissenting opinion in Witt, 36 Cr.L at 3129, note 11, however, the majority clearly rejected the concept. See note 5 at p. 3119. This is not unexpected for in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, the Supreme Court rejected the exact claim. See Opinion Part II, B, 57 L.Ed.2d at 984. In fact, this claim was raised in the United States Supreme Court in three death cases and stays of executions were denied or vacated, with Justice Brennan dissenting on the basis of Grigsby. Maggio v. Williams, ___ U.S. ___, 78 L.Ed.2d 43 (1983); Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed.2d 210 (1983) and Woodard v. Hutchins, ___ U.S. ___, 78 L.Ed.2d 541 (1984). In Sullivan, the Court found the claim "meritless" and in Maggio the Court vacated a stay saying it merited little discussion.

The Grisby decision, which is not final, is not binding on this Court. Since it is contrary to decisions of this Court and other courts have refused to follow it, this Court should reject Grigsby and should reject it as a basis for the lower court's actions in this case.

The State urges this Court to hold that Judge Harrison erred in refusing to excuse the prospective jurors who stated unequivocally that they could not consider death as a possible penalty and that he erred in resorting to the "novel" procedure of allowing them to serve in the guilt stage of the proceedings. Riley v. State, 366 So.2d 19 (Fla.1978).

Respectfully submitted,

JIM SMITH
Attorney General

Raymond L. Marky

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR CROSS-APPELLANT/APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been forwarded to Ms. Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 25th day of February 1985.

Raymond L. Marky
Assistant Attorney General