IN THE SUPREME COURT OF FLORIDA

RANDALL T. DEVINEY,
Appellant,

v.

CASE NO. SC17-2231
L.T. NO. 2008 CF 012641

STATE OF FLORIDA,
Appellee

_____/

APPELLANT'S MOTION FOR REHEARING

Appellant Randall T. Deviney, through undersigned counsel, moves this Court for an order granting rehearing of, and withdrawing, its opinion of May 6, 2021, affirming his death sentence. This Court previously granted an extension of time for filing Appellant's motion to and through June 21, 2021. The grounds for Appellant's motion are stated below and relate specifically to Issue I, the trial court's failure to grant two cause challenges during jury selection for Appellant's penalty phase trial.

Background

Mr. Deviney was convicted of the first-degree murder of Delores Futrell during an attack on August 5, 2008, when Mr. Deviney was 18 years old. After his conviction was reversed on direct appeal, *see Deviney v. State*, 112 So. 3d 57 (Fla. 2013), he was again convicted and sentenced to

death. This Court affirmed his conviction but remanded for a new penalty phase trial because the jury had not made unanimous findings necessary to impose a death sentence. *See Deviney v. State*, 213 So. 3d 794, 798-99 (Fla. 2017). Following a jury trial, Mr. Deviney was sentenced to death on December 11, 2017, and this direct appeal followed.

This Court issued its opinion affirming Mr. Deviney's death sentence on May 6, 2021. In the opinion the Court rejected the argument (Issue I) that the trial erred in denying cause challenges to two jurors, Sutherland and Henderson. As to that issue, a majority of the Court agreed Mr. Deviney's death sentence should be affirmed, but without agreeing on the rationale. Three members of the Court found no abuse of discretion in the denial of either cause challenge. *See* slip op. at 15, 16 (Polston, Muniz, Couriel, J.J., concurring). Three additional members agreed as to Juror Sutherland. As to Juror Henderson, those justices found denying the cause challenge was reversible error under *Trotter v. State*, 576 So. 2d 691 (Fla. 1990), but voted to affirm on the basis that *Trotter*'s "per se" rule was legally erroneous and should not be followed. *See* slip op. at 32-33 (Lawson, J., concurring in result, with Canady. C.J., and Grosshans, J.). Finally, the dissenting opinion agreed the denial as to Juror Henderson was

error, and in addition would continue to adhere to *Trotter*. *See* slip op. at 61 (Labarga, J., dissenting).

Issue I: The Error in Denying Cause Challenges.

Florida Rule of Appellate Procedure 9.330(a)(2)(A) requires Mr. Deviney to "state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision." Appellant believes the plurality and/or concurring opinions have overlooked or misapprehended the following points of law and fact: (1) that the "substantial right" at issue here, for purposes of applying section 924.33, Florida Statutes, is the right to a fair and impartial jury, not the right to peremptory challenges; (2) that, by requiring a defendant to demonstrate a basis for striking a juror for cause, the *Trotter* standard prevents reversal in cases where the defendant's right to a fair and impartial jury was protected, and that standard was relied on by counsel in conducting the penalty phase trial; (3) that Juror Henderson's responses created a basis for reasonable doubt as to his ability to apply the law with impartiality; and (4) that Juror Swanstrom's and Juror Parrott's responses similarly created a basis for reasonable doubt as to their ability to apply the law with impartiality.

1. The right to a fair and impartial jury is the "substantial right" at issue.

Section 924.33, Florida Statutes, states:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

The substantial right at issue here is a defendant's right to an impartial jury, which is constitutionally protected under the federal and state constitutions. Whether peremptory challenges, as one of many tools for protecting that right, are constitutional in nature is not at issue. When a defendant can point to a reasonable doubt as to the impartiality of the jury that sentenced him, his constitutional right to a fair trial is implicated.

2. The *Trotter* standard does not require reversal unless the defendant establishes reasonable doubt as to the impartiality of one or more jurors, and is not in conflict with section 924.33.

Section 924.33, the harmless error statute, "respects the constitutional right to a fair trial free of harmless error," without requiring that "trials be free of harmless errors." *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986). Although courts retain the ability to establish per se rules of reversal, doing so requires "a reasoned analysis…that, *for constitutional*

reasons, we must override the legislative decision." *Id.* (emphasis in original). The vast majority of errors, including constitutional errors, are subject to harmless error analysis. *See id.* Per se error rules "conserve judicial labor by obviating the need to apply harmless error analysis to errors which are always harmful." *Id.*

The *Trotter* standard, however, does not require reversal every time a defendant objects to a juror, nor does it compel the result that denials of cause challenges to biased jurors are always harmful. The *Trotter* standard requires reversal only if the defendant demonstrates reasonable doubt as to the juror's impartiality, in keeping with the well-established rule that "[a] juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." *Kearse v. State*, 770 So. 2d 1119, 1128 (Fla. 2000) (citing *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995)). Moreover, a defendant cannot obtain reversal of a conviction under *Trotter* merely by showing a biased juror was not excused for cause; the defendant must, in addition, exhaust all peremptory challenges and identify additional objectionable jurors who were seated. This prevents *Trotter* from functioning as a per se rule.

If the trial court denies a cause challenge, the defendant preserves his objection following the steps outlined in *Trotter*, *and* the defendant can point to grounds establishing a reasonable doubt about the juror's impartiality, the denial creates reversible error. This standard keeps the focus of the inquiry where it belongs, which is whether the effect of the error on the defendant's right to an impartial jury. *E.g.*, *Kearse*, 770 So. 2d at 1128-29 (declining to find error, even though properly preserved for appellate review, where two challenged jurors each unequivocally stated they would follow the law and set aside their personal views); *see also Busby v. State*, 894 So. 2d 88, 95-97 (Fla. 2004) (reversing for a new trial where a prospective juror who had worked as a corrections officer gave multiple answers during voir dire raising reasonable doubt about his ability to serve as a juror in a capital case, and should have been excluded for cause).

The real choice here is not between a per se rule of reversal and a rule that requires a showing of harm. It is a choice between a rule of reversal that focuses on the error — i.e., reasonable doubt as to the impartiality of one of the jurors who will decide between life in prison and a death sentence for the defendant — and a rule that assumes even the

most pro-death-penalty juror is an impartial arbiter. The latter choice would violate a defendant's constitutional right to an impartial jury. That right, in turn, is never more important than when deciding whether the State is going to end a life.

Finally, to the extent the affirmance of Appellant's sentence depends on receding from *Trotter*, as expressed in the concurring opinion, Appellant submits the concurrence overlooks his necessary reliance on *Trotter* in litigating this case and preserving his objection to the penalty phase jury. The concurrence deems it "untenable" that Juror Henderson could have been seated on the jury if Mr. Deviney had expended his peremptory challenges before reaching him, but it is equally untenable that three other objectionable jurors were ultimately seated — at least two of whom exhibited the same strong predisposition to imposing a death sentence. The concurrence also overlooks the nature of the harm caused when the trial court denied Appellant's well-founded cause challenge to Juror Henderson and forced Appellant to expend a peremptory challenge on a juror who should have been excused for cause. If anything, the differing views about whether Juror Henderson should have been excused expressed in the opinions in this case illustrate how essential peremptory

challenges are to protecting a defendant's right to an impartial jury, even if the challenges themselves are not constitutionally required.

The *Trotter* standard is a workable standard for preserving objections to a jury. The standard requires a defendant to point to reasonable doubt about a juror's impartiality before the denial of a cause challenge will lead to reversible error. Finally, because *Trotter* and its progeny do not presume that every denial of a cause challenge is harmful, the *Trotter* standard does not conflict with the statutory harmless error standard.

3. Denying the cause challenge to Juror Henderson created reversible error under either standard.

The plurality opinion finds no abuse of discretion in the denial of the cause challenge to Juror Henderson, even though that juror repeatedly indicated he held a firm belief that death should be imposed for a premeditated murder. Appellant respectfully submits that the plurality opinion places too much weight on the State's attempt to rehabilitate the juror after he had announced his predisposition to imposing the death penalty for a premeditated murder, particularly as the juror reiterated those views even after the State's questioning. The Court has previously acknowledged that a prospective juror's responses to rehabilitation are not

necessarily weighed as heavily as the juror's indication of bias or predisposition:

> Although a juror's assurances of impartiality may suggest to a court that the denial of a challenge for cause may be appropriate, *see Banks,* 46 So.3d at 995, such assurances are neither determinative nor definitive, *see Murphy v. Florida,* 421 U.S. 794, 800, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). *See also Overton v. State,* 801 So. 2d 877, 892 (Fla. 2001) (holding that a juror's assurances were insufficient to persuade this Court as to the juror's impartiality); *Singer,* 109 So. 2d at 24 ("a juror's statement that he [or she] can and will return a verdict according to the evidence submitted and the law announced at trial is *not* determinative of his [or her] competence...."). Assurances of impartiality after a proposed juror has announced prejudice is questionable at best.

Matarranz v. State, 133 So. 3d 473, 484–85 (Fla. 2013).

Juror Henderson may have responded affirmatively to questions designed to rehabilitate him, but even after that he persisted in the view that premeditation required imposing a death sentence. (R.2 467-68, 573.) He specifically stated that if "thought had been involved prior to actual act then I could not vote for a life sentence. It would be death." (R.2 573.) The plurality overlooks this by stating generally that "some of Henderson's answers to defense counsel's subsequent questioning again indicated a predisposition to imposing death if the murder was premeditated." Slip op. at 16. As indicated in *Matarranz* and cases cited therein, Juror Henderson's

agreement with rehabilitative questions could not outweigh his firm predisposition to impose the death penalty. Denying the cause challenge was thus an abuse of the court's discretion.

Even under a harmless error standard, however, the error in denying the cause challenge to Juror Henderson created reversible error. The harmless error test requires the state to prove "there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129 at 1135. The question is not whether the appellate court would reach the same result without the error in question; "[t]he question is whether there is a reasonable possibility that the error affected the verdict." *Id.* at 1139. If the focus is properly placed on the effect of the error on the trier of fact, then the error in denying the cause challenge to Juror Henderson was not harmless. The error, in fact, altered the composition of the trier of fact by forcing Appellant to accept jurors who were also objectionable, but who were unsuccessfully challenged for cause.

4. Harmful error occurred when Appellant was forced to accept Jurors Swanstrom and Parrott despite their predisposition to impose the death penalty.

The concurrence recognizes the error in denying the cause challenge to Juror Henderson but finds it harmless because the concurrence would

uphold the denial of cause challenges to the three jurors identified as "objectionable" after Appellant exhausted his peremptory challenges. What this overlooks, however, is that at least two of the three objectionable jurors exhibited a predisposition to imposing a death sentence as strong as that exhibited by Juror Henderson.

Juror Swanstrom ranked himself a "five," indicating the strongest possible belief in the death penalty, stating "I am firmly passionate as a five that it is something reasonable to consider and so I hold to that, but I also understand situationally the need to weigh the agitators [sic] versus the mitigators." (R.2 518.) Regarding the effect of mitigating evidence, he indicated that mercy was for "the higher up": "I believe the higher up gives us the ability to operate as a government and I can make my contribution." (R.2. 519.) When asked whether he would automatically vote for death if the state proved the heinous, atrocious, and cruel manner aggravating factor he stated, "I would not disregard the mitigating circumstances, but it does not mean that I would not arrive necessarily at a decision for death penalty." (R.2 520.) These answers were equivocal enough to create a reasonable doubt as to Juror Swanstrom's ability to be impartial.

Juror Parrott's predisposition was even stronger, he also ranked himself a "five" and indicated he would automatically impose a death penalty if the defendant was competent and the murder was premeditated. (R.2 474.) He repeated this under questioning, saying if a person was not insane or incompetent, he would automatically impose the death penalty. (R.2 474.) When questioned further by the State, he adhered to this view, saying "as far as mitigation I'm of the opinion that if somebody has diminished mental capabilities where they truly don't understand and I think if it's premeditated they had plenty of time to change their mind[…]" (R.2 595.) His answers, similarly, were sufficient to create a reasonable doubt as to whether he would consider a life sentence for a defendant whom he did not believe to be insane or incompetent, and his presence on the jury calls its impartiality into question.

CONCLUSION

A majority of the Court has agreed that it was error to deny Appellant's cause challenge to Juror Henderson, and there is no dispute that counsel properly preserved Appellant's objection to the jury using standards long established by this Court. Appellant respectfully requests that this Court grant rehearing, withdraw its opinion of May 6, 2021, vacate his death sentence, and remand his case for a new penalty phase trial.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished via the Florida Courts e-filing portal to Michael T. Kennett, Assistant Attorney General, on this date, June 18, 2021.

Respectfully submitted,
JESSICA J. YEARY
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
/s/ Barbara J. Busharis
BARBARA J. BUSHARIS
Assistant Public Defender
Fla Bar No. 71780
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, FL 32301
(850) 606-8500
barbara.busharis@flpd2.com
COUNSEL FOR APPELLANT