IN THE SUPREME COURT OF FLORIDA

RANDALL T. DEVINEY,

Appellant,

v. CASE NO.: SC17-2231
L.T. NO. 162008CF012641AXXXMA

STATE OF FLORIDA,

Appellee.
_____/

STATE'S RESPONSE
TO MOTION FOR REHEARING

I. SUMMARY

Appellant raises a backdoor attack on the trial's decision to deny the for-cause challenges as to actual jurors Swanstrom and Parrott. Instead of attacking the denial of those challenges directly in his Initial Brief, Appellant relies upon a motion for rehearing to argue that the purported harm from the presence of those actual jurors establishes how the trial court abused its discretion when it denied the for-cause challenge as to a prospective juror who never served. In making this argument, Appellant substitutes the putative harm from the presence of Swanstrom and Parrott for the lack of any harm from the absence of Henderson. To the extent *Trotter v. State*, 576 So. 2d 691 (Fla. 1990) supports Appellant's claim of substituted harm, this Court should recede from that clearly erroneous decision.

II. REHEARING

Under Florida Rule of Appellate Procedure 9.330, a motion for rehearing "shall 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." Fla. R. App. P. 9.330(a)(2)(A).

A motion for rehearing "shall not reargue the merits of the Court's order." *Jacobs v. Wainwright*, 450 So. 2d 200, 201 (Fla. 1984). Additionally, a motion for rehearing should be clear and concise. *See Dep't of Revenue v. Leadership Hous., Inc.*, 322 So. 2d 7, 9 (Fla. 1975) (quoting *Tex. Co. v. Davidson*, 80 So. 558, 559 (Fla. 1918)).

Put simply, an appellant or petitioner cannot use a motion for rehearing as a means to continue his or her attempts at advocacy. *See Goter v. Brown*, 682 So. 2d 155, 158 (Fla. 4th DCA 1996).

Given these constraints, the length of the motion for rehearing is often inversely proportional to its merit; for if the Court truly overlooked an important point of law or fact, then an appellant should not need pages upon pages to highlight that point with particularity. *Cf. Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So. 3d 1063 (Fla. 5th DCA. 2017); *cf. also State ex rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817, 818–19

(Fla. 1st DCA 1958); *Ayala v. Gonzalez*, 984 So. 2d 523, 526 (Fla. 5th DCA 2008).

Finally, a motion for rehearing cannot raise new issues or new arguments. *See* Fla. R. App. P. 9.330(a)(2)(A) ("The motion shall not present issues not previously raised in the proceeding."); *see also Rolling v. State*, 215 So. 3d 70 (Fla. 3d DCA 2016); *Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004).

III. ISSUE CHALLENGED

In his Initial Brief, Appellant raised five issues. *See Deviney v. State*, Case No. SC17-2231, 2021 WL 1800101, *5 (Fla. May 6, 2021). In the motion for rehearing, Appellant only challenges this Court's decision as to the first issue: whether the trial court erroneously denied the for-cause challenge as to prospective juror Henderson – someone who did not serve on the actual jury that resentenced Appellant.[1]

IV. ANALYSIS

Appellant asks this Court to substitute the putative harm from the presence of actual jurors Swanstrom and Parrott for the lack of any harm from the absence of prospective juror Henderson. However, Appellant never raised, let alone preserved, any attack on the denial of the for-cause

[1] The denial of the for-cause challenge as to prospective juror Sutherland is not at issue.

challenges as to Swanstrom and Parrott; therefore, the denial of those challenges cannot form any basis for rehearing. *See* Fla. R. App. P. 9.330(a)(2)(A). To the extent *Trotter v. State*, 576 So. 2d 691 (Fla. 1990) suggests otherwise, Justice Lawson's concurring opinion in this case correctly articulates why this Court should recede from that "clearly erroneous" decision. *See Deviney v. State*, Case No. SC17-2231, 2021 WL 1800101, *19 (Fla. May 6, 2021) (Lawson, J., concurring in part and concurring in result), quoting *State v. Poole*, 297 So. 3d 487, 506-07 (Fla. 2020); *see also Trotter*, 576 So. 2d at 693 (holding that the erroneous denial of a cause challenge is per se reversible error even under circumstances where the juror is stricken using a peremptory challenge and no biased juror is seated).

At trial, Appellant lodged unsuccessful for-cause challenges against prospective juror Henderson as well as actual jurors Swanstrom and Parrott; however, Appellant only used a peremptory challenge to remove prospective juror Henderson. *See Deviney*, 2021 WL 1800101 at *16 (Lawson, J., concurring in part and concurring in result):

> Turning to the record here, after the trial court denied the cause challenge to Henderson, Deviney exercised a peremptory challenge and struck Henderson from the jury. After exhausting his remaining peremptories on other potential jurors, Deviney asserted cause challenges to three prospective jurors—Swanstrom, Parrott, and Pompey. The trial court denied those

> cause challenges and also denied Deviney additional peremptory challenges to strike them. Swanstrom, Parrott, and Pompey each sat on the jury.

In his Initial Brief, Appellant mentions jurors Swanstrom and Parrott – but only to document compliance with the steps required by *Trotter* to preserve an appeal of the denial of the for-cause challenge as to prospective juror Henderson. *See* IB-27-28:

> ***Deviney's exhaustion of, and request for additional, peremptories***. Shortly thereafter, Deviney used peremptory challenges to strike Henderson and Sutherland. [R2 610-11] And he exhausted his remaining peremptory challenges. [R2 610-15]
>
> The court immediately began to announce the jury. [R2 615] Deviney interrupted: "Your Honor, before you do that if I can just preserve this issue for appellate purposes?" [R2 615] The court responded "Sure." [R2 615]
>
> At that point, Deviney moved the court to grant him additional peremptory challenges with which to challenge jurors Swanstrom, Parrott, and Pompey. [R2 615] The court denied that motion. [R2 615] Immediately afterwards, the court announced the jury. [R2 615-16] Swanstrom, Parrott, and Pompey served on the jury that sentenced Deviney to death. [R2 616, 3172-73] (emphasis in original)

See also Deviney, 2021 WL 1800101 at *16 (Lawson, J., concurring in part and concurring in result):

> Thus, it is undisputed that after Deviney's cause challenge to Henderson was denied, (1) Deviney exhausted his peremptories, (2) Deviney was denied additional peremptories to strike three prospective jurors he had already attempted to strike for cause, and (3) the three "objectionable" prospective

> jurors actually sat on the jury. Under *Trotter*, Deviney has demonstrated reversible error and would be entitled to a new penalty-phase trial.

As the Initial Brief and this Court's decision illustrate, Appellant did not argue that reversible error occurred when the trial court denied the for-cause challenges as to actual jurors Swanstrom and Parrott. Rather, it appears that Appellant only argued that the trial court abused its discretion when it denied the for-cause challenge as to prospective juror Henderson. *See, e.g.,* IB-38 ("[R]easonable doubt existed as to whether Henderson's views would substantially impair his ability to impose any punishment other than death for first degree murder regardless of the balance of aggravating factors and mitigating circumstances.").

Nevertheless, Appellant argues in the motion for rehearing that this Court failed to recognize the harmful error that occurred when the trial court denied Appellant's for-cause challenge as to prospective juror Henderson because two biased jurors – Swanstrom and Parrott – actually served on the jury. *See* Motion, p.4 ("Harmful error occurred when Appellant was forced to accept Jurors Swanstrom and Parrott despite their predisposition to impose the death penalty."). Thus, Appellant argues that the purported bias of two actual jurors (Swanstrom and Parrott) demonstrates the trial

court's error in failing to recognize the bias of a prospective juror who never served (Henderson).[2]

In making this argument, Appellant clearly identifies the "substantial right at issue… as a defendant's right to an impartial jury." Motion, p.4. Additionally, Appellant concedes that "[w]hether peremptory challenges, as one of [the] many tools for protecting [the] right [to an impartial jury], are constitutional in nature is not at issue." *Id*. Nonetheless, Appellant argues that "[w]hen 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." *Id*. Thus, Appellant claims that the actual jury was biased against him (by being biased in favor of the death penalty).

By choosing in his Initial Brief not to attack the denial of the for-cause challenges as to actual jurors Swanstrom and Parrot, Appellant appears to concede that the harm from the presence of Swanstrom and Parrott remains insufficient to independently support reversal. In other words, Appellant concedes that he cannot show the trial court committed

[2] Under this line of reasoning, the trial court's failure to recognize the bias of prospective juror Henderson resulted in the denial of Appellant's for-cause challenge as to Henderson – which led to the use of a peremptory challenge against Henderson – which ultimately led to the seating of jurors Swanstrom and Parrott.

reversible error when it denied the for-cause challenges as to Swanstrom and Parrot.

Similarly, Appellant appears to concede that the harm from the absence of Henderson likewise remains insufficient to independently support reversal. In other words, Appellant concedes that he cannot establish – based upon the harm, *vel non*, from Henderson alone – that the trial court abused its discretion when it denied the for-cause challenge as to Henderson.[3]

Hence, Appellant does not claim that prospective juror Henderson – who Appellant removed with a peremptory challenge after lodging an unsuccessful challenge for cause – created reasonable doubt as to the impartiality of the jury. Instead, Appellant points to jurors Swanstrom and Parrott – for whom Appellant lodged unsuccessful challenges for cause but did not remove with peremptory challenges – as the source of reasonable doubt as to impartiality. *See* Motion, pp. 10-12.

In making this argument, however, Appellant does not simply claim that jurors Swanstrom and Parrott were "objectionable" under *Trotter*. *See generally Deviney*, 2021 WL 1800101, at *18 (Lawson, J., concurring in part and concurring in result) ("Under *Trotter*, however, "objectionable"

[3] Indeed, how can the absence of a juror who is biased against a defendant result in any direct harm to that defendant?

does not mean legally objectionable—a juror who is biased or partial. Instead, "objectionable" under *Trotter* simply means a juror against whom the party asserted an unsuccessful cause challenge and who ended up on the jury because the party had exhausted his or her peremptories.").

Rather, Appellant goes further and repeatedly argues that actual jurors Swanstrom and Parrott were just as biased as prospective juror Henderson. *See* Motion, p.7; *see also id*. at 11-12. Hence, Appellant claims that the denial of the for-cause challenge as to prospective jury Henderson was not harmless because two biased jurors – Swanstrom and Parrott – actually served on the jury. *See* Motion, p.10:

> Even under a harmless error standard, however, the error in denying the cause challenge to Juror Henderson created reversible error… 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 [prospective] 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.

Thus, rather than directly attacking the denial of the for-cause challenges as to Swanstrom and Parrott, Appellant makes an analytical mishmash – arguing that the harm from the presence of actual jurors Swanstrom and Parrott shows how the trial court abused its discretion when it denied the for-cause challenge as to prospective juror Henderson. In other words, the harm from the presence of Swanstrom and Parrott

replaces the lack of any harm from the absence of Henderson. Thus, Appellant relies upon a claim of substituted harm in order to argue that the trial court abused its discretion when it denied the for-cause challenge as to Henderson – a juror who never actually served.

For at least three reasons, Appellant's attack clearly shows the flawed logic behind the Court's "clearly erroneous" decision in *Trotter*. *Deviney*, 2021 WL 1800101, *19 (Lawson, J., concurring in part and concurring in result), quoting *Poole*, 297 So. 3d at 506-07. First, if a defendant unsuccessfully challenges a prospective juror for cause, then the removal of that juror through a peremptory challenge cannot cause any direct prejudice to the defendant's right to a fair and impartial jury. *See generally Kopsho v. State*, 959 So. 2d 168, 174 (Fla. 2007) (Bell, J., concurring in result only) ("The majority's continued adherence to the *Trotter* per se prejudice rule in criminal cases vitiates the curative purpose of peremptory challenges."). Unfortunately, however, *Trotter* encourages the substitution of the purported harm caused by the presence of an actual juror for the lack of any harm flowing from the absence of a prospective one.

Second, if the harm caused by the presence of an actual juror was so prejudicial, then a defendant should appeal the denial of the for-cause

challenge as to that juror. Presumably, labeling an actual juror as "objectionable" in order to satisfy the *Trotter* preservation requirement as to the prospective juror would also satisfy the renewal requirement for denial of the for-cause challenge as to the actual juror. *See Cannon v. State*, 310 So. 3d 1259, 1269 (Fla. 2020) citing *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007) ("[T]he preservation requirement contemplates a party renewing its objection after the trial court issues an adverse ruling."); *see, e.g., Kopsho*, 959 So. 2d at 173:

> [D]efense counsel challenged juror Mullinax for cause. The trial judge denied this challenge. Later, defense counsel used a peremptory challenge to strike Mullinax. After exhausting all remaining peremptory challenges, defense counsel requested an additional peremptory, noting that the additional peremptory would be used to strike potential juror Bellet. The trial judge denied the defense's request for an additional peremptory. Defense counsel objected to this denial and reiterated that *the additional peremptory would have been used to strike juror Bellet because of his answers about premeditation*. (emphasis added)

Once again, however, *Trotter* encourages the substitution of harm.

And third, the appeal from the denial of a for-cause challenge as to a prospective juror who never served should not provide an opportunity for a defendant to argue the harm caused by two jurors who actually did. Instead of providing the substituted harm for the denial of the for-cause challenge as to a prospective juror, any bias associated with an actual juror

should form the basis for its own, stand-alone claim. *But see Busby v. State*, 894 So. 2d 88, 114 (Fla. 2004) (Bell, J., concurring in part and dissenting in part):

> [T]he defendant must meet the *Trotter* standards and must show that the juror identified as being "objectionable" was indeed a legally objectionable juror, i.e., a biased or partial juror. If the defendant makes such a showing, then harm has been proven and a violation of the defendant's constitutional right to a fair trial has been established.

Once again, however, *Trotter* encourages the substitution of harm.

Whether intentional or not, Appellant's claim of substituted harm constitutes an impermissible, backdoor attack on the trial court's decision to deny the for-cause challenges as to jurors Swanstrom and Parrott. That attack – however cloaked – cannot be raised for the first time in a motion for rehearing. *See* Fla. R. App. P. 9.330(a)(2)(A). Any claim that Swanstrom's and Parrott's bias toward the death penalty resulted in an unfair trial should have been raised previously as an independent claim of error. *Id*. To the extent *Trotter* suggests otherwise, this Court should recede from that "clearly erroneous" decision. *Poole*, 297 So. 3d at 507.

CONCLUSION

The State respectfully requests that this Court deny Appellant's motion for rehearing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Substitution of Counsel has been furnished via the Florida E-Filing portal and/or electronic mail to counsel of record, this 29th day of June, 2021.

/s/ *Michael T. Kennett*
MICHAEL T. KENNETT

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that that this document complies with the requirements of Florida Rule of Appellate Procedure 9.045. This document is filed in Arial 14-point font.

/s/ *Michael T. Kennett*
MICHAEL T. KENNETT