In the Supreme Court of Florida

CASE NO. SC22-984

JAMES SEADLER,
Petitioner,

-vs-

MARINA BAY RESORT CONDOMINIUM ASSOCIATION d/b/a MARINA BAY RESORT,
Respondent.

On Petition for Discretionary Review

Brief of Amicus Curiae

in support of James Seadler

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Statement of Identity and Interest

The Florida Public Defender Association, Inc. (FPDA) consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants in hundreds of trials every year, FPDA members are deeply interested in the fairness and integrity of the jury selection procedures at issue in this case.

SUMMARY OF THE ARGUMENT

The issue in this case is not whether harmless error applies to wrongful denials of cause challenges. It does, and has, for almost 40 years. The procedure, summarized in *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990), is not a preservation rule; it is an issue-specific method to demonstrate that the error was harmful by affecting the composition of the jury that rendered the verdict.

The State of Florida's amicus curiae brief will seek to have this Court insert language in its opinion that will undermine the precedent on this issue in criminal cases. This Court should decline that invitation, especially because there is a substantive right to peremptory challenges in criminal cases and a procedural due process prohibition on their arbitrary removal.

The FPDA does not ask this Court to decide those issues in this civil case. They must await an appeal in a criminal case. Instead, the FPDA requests that this Court's opinion not include anything that could affect the established law in criminal cases, including (mis)characterizing the issue as whether harmless error applies.

ARGUMENT

I.
The issue is not harmless error.

The State of Florida's motion for leave to file an amicus curiae brief and Mr. Seadler's initial brief both frame the issue as whether the harmless error standard applies to wrongful denials of cause challenges. That understanding is inaccurate. A *per se* reversal rule would look only to whether the cause challenge was improperly denied. If so (and it certainly appears so in this case), then that would be the end of the analysis.

Instead, Florida law requires an entire procedure of naming a person who would have been stricken but/for the error, and that person actually serving on the jury. *See, e.g.*, *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990).[1] The reason for the procedure

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[1] The procedure in *Trotter* is not a preservation rule, which ensures that an issue is not raised for the first time on appeal. *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."). Here, the issue was first presented when Mr. Seadler moved for a cause challenge and the trial court denied it. The issue was preserved when the motion was renewed before the jury was sworn. *Wallace v. Holiday Isle Resort and Marina, Inc.*,

outlined in *Trotter* is to demonstrate how the results of a jury trial cannot be shown to be unaffected by the erroneous denial of a cause challenge.

The First District Court of Appeal's opinion below engages in a game-theory-based alternative reality to conclude that one way or the other, a juror objectionable to Mr. Seadler would have sat on the jury. The obvious error in the District Court's analysis is its assumption that all objectionable jurors are equally objectionable. On the facts of this case, it assumes that Mr. Seadler would be indifferent between Juror 22 or Juror 12. For anyone who has ever picked a jury, that assumption is ridiculous. *See generally* *Peterson v. state*, 154 So. 3d 275, 281-82 (Fla. 2014) (discussing the strategy involved with picking a jury, often in consultation with the client).

The District Court's game-theory proves only that, if the trial judge had not wrongly denied the cause challenge, Mr. Seadler would have had to choose between exercising a peremptory

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706 So. 2d 346, 347 (Fla. 1998). All that is required for preservation is "to inform the trial judge of the alleged error." *Williams v. State*, 414 So. 2d 509, 512 (Fla. 1982).

challenge on Juror 22, thereby allowing Juror 12 onto the jury, or not exercising that challenge, thereby keeping Juror 22 instead of Juror 12. That is precisely what a peremptory challenge is: a litigant's choice to affect the composition of the jury. *Busby v. State*, 894 So. 2d 88, 99 (Fla. 2004) ("While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.") (quoting *Swain v. Alabama*, 380 U.S. 202, 220 (1965)).

Another way of stating the harm is that Mr. Seadler did not have that choice of excusing either Juror 22 or Juror 12. He could excuse neither of them because the trial court illegally deprived him of one of his peremptory challenges. An error that affects the composition of the jury can never be shown to not have "contribute[d] to the verdict." *Special v. West Boca Medical Center*, 160 So. 3d 1251, 1256 (Fla. 2014). Instead of a *per se* reversal rule, this rule is an issue-specific formulation of the harmless error rule.

The early case law was clear on this point. "The next question we must resolve is whether it was harmless error for the trial court to refuse to dismiss Johnson for cause. We find that such error cannot be harmless because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available [to] him." *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985). The same harmfulness analysis can be seen in *Bryant v. State*, 656 So. 2d 426 (Fla. 1995), where the trial court denied the cause challenge but granted the defendant one additional peremptory. "Thus, Bryant was not harmed by the court's error in denying this challenge for cause and reversal is not required on this basis." *Id.* at 428.

After *Hill*, this Court then used the term "reversible error," which is a shorthand way of saying error that is both preserved and harmful. *See Pentecost v. State*, 545 So. 2d 861, 863 (Fla. 1989) ("To show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.") (quoted in *Trotter*, 576 So. 2d at 693); *see also Van Poyck v. Singletary*, 715 So. 2d 930, 931 (Fla. 1998) ("[I]t is

reversible error when a challenge for cause is improperly denied, and the defendant then exhausts his peremptory challenges on venirepersons who should have been dismissed for cause and a request for additional peremptory challenges is denied.").

In *Busby*, however, Justice Bell's concurring in part and dissenting in part opinion referred to the "*Trotter* per se error rule." 894 So. 2d at 106. Justice Bell's point was different than that now before this Court. He was unconcerned about a litigant being disadvantaged; he was only concerned about a biased juror, one excusable for-cause, sitting. *Id.* at 113-14.

The problems with Justice Bell's analysis will be discussed in section II below. The important point for this section is that Justice Bell's use of the term "per se error" was picked up by the Second District in *Thomas v. State*, 958 So. 2d 1047 (Fla. 2d DCA 2007) (discussing Justice Bell's dissent). The Second District has continued to use the "per se" language. *Kochalka v. Bourgeois*, 162 So. 3d 1122, 1126 (Fla. 2d DCA 2015) ("Errors in jury selection are 'per se errors.'"). None of the other District Courts do, instead using the correct language from this Court that meeting the *Trotter*

test is "reversible error." *Seadler v. Marina Bay Resort Condo. Ass'n, Inc.*, 341 So. 3d 1146, 1156 (Fla. 1st DCA 2021) (quoting other districts in conflict, all using the "reversible error" formulation).

Therefore, the issue before this Court is not whether harmless error analysis applies to improper denials of cause challenges. It does, and this Court has applied it for almost four decades now, since *Hill*.

II.
There is a substantive and procedural constitutional right to peremptory challenges, at the least in criminal cases.

Judge Tanenbaum's concurring opinion below can be seen as a response to Justice Bell's position. *Seadler v. Marina Bay Resort Condominium Association, Inc.*, 341 So. 3d 1146, 1157-63 (Fla. 1st DCA 2021) (Tanenbaum, J., concurring). Judge Tanenbaum points out that there are the significant historical and statutory distinctions between the use of peremptory challenges in civil and criminal cases that warrant a separate analysis. And it is precisely that opinion that the state seeks to counter in its *amicus curiae* brief.

While "[t]he right to peremptory challenges in civil actions was unknown to the common law,"[2] *Utilities Serv., Inc. v. Replogle*, 110 So. 2d 438, 440 (Fla. 1st DCA 1959), peremptory strikes in criminal cases date back to our nation's founding. *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) ("The peremptory challenge is

[2] *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 639 (1991) (O'Connor, J., dissenting) (noting that there were no peremptory strikes in civil cases at common law).

part of our common-law heritage."); *Swain v. Alabama*, 380 U.S. 202, 212-18 (1965) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW 353 (15th ed. 1809) and COKE ON LITTLETON 156 (14th ed. 1791) (recounting the history of peremptory strikes in criminal cases)).

Although not a constitutionally protected right, both the United States Supreme Court and this Court have described the peremptory challenge as "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894); *see McCray v. State*, 220 So. 3d 1119, 1123 (Fla. 2017). Peremptory challenges carry such importance because their "very purpose . . . is 'the effectuation of the constitutional guarantee [in criminal cases] of trial by an impartial jury.'" *Smith v. State*, 59 So. 3d 1107, 1111 (Fla. 2011) (quoting *Busby v. State*, 894 So. 2d 88, 98 (Fla. 2004)). "By this means [the accused in a criminal case] may escape the judgment by those whom he [or she] may consider prejudiced against him [or her] but whom he may not be able to show disqualified for cause defined by statute." *Carroll v. State*, 190 So. 437, 438 (Fla. 1939).

In Florida, criminal defendants' right to exercise peremptory challenges derives not only from the common law, but is also codified within section 913.08, Florida Statutes. By virtue of this statutory codification, criminal defendants maintain a *substantive* right to use peremptory challenges during trials. *See Chavez v. State*, 698 So. 2d 284, 286 (Fla. 3d DCA 1997) ("The process of exercising peremptories is essential to the fairness of the trial and one of a defendant's most important substantive rights."). In turn, this Court's "'reversible error' analysis" for jury selection errors in criminal cases has been "firmly rooted in the existence of a defendant's *right* to a peremptory challenge in a criminal trial." *Seadler v. Marina Bay Resort Condo. Ass'n, Inc.*, 341 So. 3d 1146, 1160 (Fla. 1st DCA 2021) (Tanenbaum, J., concurring).

On the other hand, the Florida Legislature repealed civil parties' statutory right to peremptory challenges in 1973.[3] *See* Ch. 73-333, § 24, at 840, Laws of Fla. As a result, civil litigants are only conferred the right to peremptory strikes through a rule of civil procedure. *See* Fla. R. Civ. P. 1.431(g).

[3] *See* § 53.011, Fla. Stat. (1971).

Judge Tanenbaum viewed these historical and statutory distinctions as warranting differing analyses for evaluating peremptory strike errors in civil and criminal cases. 341 So. 3d at 1160. Alternatively, under a procedural due process analysis, it would not matter if peremptory challenges are constitutionally required, statutorily-based, or created by a rule of procedure. The only important thing is that they exist and may not be arbitrarily removed.

To see why, assume hypothetically that the trial court decided to give one side more peremptory challenges than the other—the due process violation would have been manifest. "[T]he term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals." *Scull v. State*, 569 So. 2d 1251 (Fla. 1990). All individuals are equal before the law, and therefore must be treated equally. Art. I, § 1, Fla. Const. ("All natural persons, female and male alike, are equal before the law. . . ."). The trial court below did the same thing—giving litigants an uneven number of challenges—by denying a valid cause challenge, thereby causing Mr. Seadler to have to expend a

peremptory to correct the trial court's error.

Even if there were no constitutional, statutory or procedural right to peremptory challenges, "[e]ven where a state is not required to extend a certain benefit to its people, after having chosen to extend it, the state may not withdraw that right" without satisfying due process. *Lankheim v. Florida Atl. Univ., Bd. of Trustees*, 992 So. 2d 828, 834 (Fla. 4th DCA 2008). "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

The only issue is that, however established, the peremptory challenge was arbitrarily taken away. "It is the Due Process Clause that protects the individual against the arbitrary and unreasonable exercise of governmental power." *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004). When the trial judge effectively took away one of Mr. Seadler's peremptory challenges, that was an arbitrary and

unreasonable exercise of government power.

This Court's decision in *Matarranz v. State*, 133 So. 3d 473 (Fla. 2013), acknowledges the due process basis for the *Trotter* procedure for establishing harmful error. "Given that the requirements of preservation were satisfied [the objection/re-objection procedure], Matarranz would suffer a violation of his due process rights if the Juror should have been, but was not, removed for cause." *Id.* at 483.

III.
This Court should not unnecessarily address the constitutional issues.

The issue of the substantive or procedural due process right to peremptory challenges in criminal cases is not before this Court in this civil case. The purpose of the State of Florida appearing as *amicus curiae* is to procure an opinion from this Court undermining the stable precedent in this area. The FPDA does not ask that this Court decide the criminal issue. Rather, the FPDA respectfully requests that, whatever this Court decides, its opinion clearly state that it is not questioning or calling into doubt its established precedent in the criminal cases.

As Justice Alito has noted, the Court has "often stressed that it is important to avoid the premature adjudication of constitutional questions, and that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable." *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) (cleaned up). "[W]hen a case may be resolved on grounds other than constitutional, th[is] Court will ordinarily refrain from proceeding to decide the constitutional question." *Sullivan v. Sapp*, 866 So. 2d 28, 34 (Fla. 2004); *see also*

State v. Efthimiadis, 690 So. 2d 1320, 1322 (Fla. 4th DCA 1997).

Although this Court can address other issues once it accepts jurisdiction, those issues must be dispositive. *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) ("[O]nce this Court has jurisdiction of a cause, it has jurisdiction to consider ... other issues [that] have been properly briefed and argued and are dispositive of the case.") (emphasis supplied); *Hall v. State*, 752 So. 2d 575, 578 n.2 (Fla. 2000) ("Once we have conflict jurisdiction, we have jurisdiction to decide all issues necessary to a full and final resolution.") (emphasis supplied).

Because this case does not involve a criminal jury, the issue of the right to peremptory challenges in criminal cases is neither dispositive nor necessary. Instead, the State of Florida seeks an advisory opinion, which this Court cannot give absent specific authorization. Art. V, §3(b)(10), Fla. Const. (this Court "[s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law."); *Long v. State*, 271 So. 3d 938, 949 (Fla. 2019) (Luck, J. concurring in part) ("We don't

give advisory opinions on anticipated claims.").

Here, criminal juries were not before the First District and will not be implicated by resolving the conflict between the Districts with respect to civil juries. "It is a long-standing rule of appellate jurisprudence that the appellate court should not undertake to resolve issues which, though of interest to the bench and bar, are not dispositive of the particular case before the court." *Pagan v. Sarasota County Public Hosp. Bd.*, 884 So. 2d 257, 264 (Fla. 2d DCA 2004).

CONCLUSION

The FPDA urges this Court exercise restraint when writing its opinion in this case. This Court should not frame the issue so that it applies to criminal cases, including by (mis)characterizing the issue as "*per se* reversal versus harmless error." *Trotter* establishes a procedure to prove the harmfulness of error, and this Court should reaffirm that precedent.

Respectfully submitted,

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CERTIFICATES

I hereby certify that a copy of the above brief was delivered by email to counsel for Mr. Seadler, Charles F. Beall, Jr., Esq., and Jessica L. Scholl, Esq., Moore, Hill & Westmoreland, P.A., P.O. Box 13290, Pensacola, Florida 13290, at cbeall@mhw-law.com, jscholl@mhw-law.com, tstokes@mhw-law.com; and to counsel for Marina Bay, Scott Cole, Esq., Lissette M. Gonzalez, Esq., Mark D. Tinker, Esq., Cole, Scott & Kissane, 9150 South Dadeland Boulevard, Suite 1400, Miami, FL 33156-7855, at Scott.Cole@csklegal.com, Lissette.Gonzalez@csklegal.com, and Mark.Tinker@csklegal.com, this first day of February 2023.

I hereby certify that this petition is printed in 14-point Bookman Old Style and that it is about 2,887 words, well below the 5,000-word limit.

/s/ John Eddy Morrison
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