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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOSHUA DAVIS, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D17-517

Opinion filed June 3, 2020.

Appeal from the Circuit Court for Polk County; Jalal A. Harb, Judge.

Howard L. Dimmig, II, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee; Helene S. Parnes, Senior Assistant Attorney General and Laurie Benoit-Knox, Assistant Attorney General, Tampa, for Appellee.

SALARIO, Judge.

This is Joshua Davis's appeal from his convictions for two counts of second-degree murder, one count of attempted first-degree murder, and one count of child abuse. It presents the question whether we should review the erroneous denial of a legally sufficient motion to disqualify a trial judge based on alleged bias or prejudice

under section 38.10, Florida Statutes (2015), and Florida Rule of Judicial Administration 2.330(d)(1) for harmless error when the defendant in a criminal case raises the issue by way of a direct appeal from a judgment and sentence, as distinguished from a petition for a writ of prohibition. We hold that the erroneous denial of a disqualification motion on direct appeal should be reviewed for harmless error, with the question being whether there is a reasonable possibility that the error denied the defendant a fair trial before a neutral judge. Applying that standard to the incorrect denial of Mr. Davis's recusal motion in this case, we find the error harmless and affirm. Because the question is vitally important and our answer fairly debatable, we certify a question of great public importance to the Florida Supreme Court.

I.

The underlying facts of this case are tragic, but a detailed telling is not necessary to understand the issues. On April 24, 2012, three male coworkers of Mr. Davis went to visit with him at his home. Mr. Davis was there with his young daughter. Mr. Davis and two of the men went outside and smoked marijuana. When they returned, the men all gathered in the living room with Mr. Davis's daughter. Everything seemed fine until Mr. Davis suddenly got up and left the room. He returned with a nine-millimeter pistol and shot all three men. Two died. There was no motive for the shootings; the men were all friends. In subsequent statements to law enforcement, Mr. Davis explained that after they came back into the house, his friends started behaving strangely and that it made him fearful for himself and his daughter. He also stated that he was "paranoid" from having smoked marijuana.

On May 10, 2012, Mr. Davis was indicted by a grand jury on two counts of first-degree murder, one count of attempted first-degree murder, and one count of child

abuse. The State filed a notice declaring its intention to seek the death penalty. Mr. Davis filed a notice stating his intention to rely on an insanity defense. The case was scheduled for a trial before Judge Donald Jacobsen in May 2015. The trial was continued on the State's motion due to the sudden illness of its lead prosecutor.

At the time the continuance was granted, Judge Jacobsen anticipated leaving the capital felony division to become chief judge. Judge Jalal Harb was expected to take over the division when Judge Jacobsen left. When Judge Jacobsen granted the continuance, he told the parties about his expected departure and that he might continue to handle some cases in the capital felony division as needed.

That announcement triggered the series of events at issue in this appeal. Mr. Davis filed a motion requesting that Judge Jacobsen remain on the case because of his knowledge of the facts and because he had ruled on key motions relevant to a death-eligible case. The motion also asserted that Mr. Davis would move to disqualify Judge Harb were he to take the case because Judge Harb had been a prosecutor in the homicide division of the State Attorney's Office in the Tenth Circuit from August 2012 to March 2013—after Mr. Davis was indicted but while his case was pending.

Although one might expect that the State would not have an opinion about how the case should be assigned, it opposed Mr. Davis's motion and argued for Judge Harb taking the case over. It filed a motion to strike Mr. Davis's motion for Judge Jacobsen to keep the case in which it argued, as relevant here, that "Judge Harb had no involvement in the prosecution of this case whatsoever" and that "being in the same division where a case is pending does not rise to the level of prejudice." It concluded that "the defense is essentially judge shopping."

There was a hearing on these two motions on June 18, 2015. Judge Jacobsen presided. Judge Harb was there as an observer. Mr. Davis was present as well. The State argued that Judge Harb could readily come up to speed on the case and that he should be the one to hear it. With respect to Judge Harb's work at the State Attorney's Office, the prosecutor explained:

> Judge, I would like to put on the record that I did, when I received the defense motion, pull this file, as well as any homicide committee notes that took place while Judge Harb was in our division. I pulled this file and every attorney note that's in this case. Judge Harb's not touched this file. He never attended a homicide committee meeting regarding this case. Other than the fact that this case was pending in the division when he was an attorney in that division, he's had no contact with this file.

Judge Jacobsen denied the motion that he remain on the case without prejudice to the making of a motion to disqualify Judge Harb and held the State's motion to strike in abeyance. In explaining his ruling, Judge Jacobsen stated:

> I don't know if Judge Harb has had an opportunity—he's physically here just observing, and he was not made aware of all this. Obviously, if he had some contact with it, it would be, I would assume, a matter of recusal. If he did not have contact with it and there's a concern, then it would be a possible motion for disqualification.

Judge Harb took over the capital felony division as planned in July 2015. Mr. Davis promptly filed a motion to disqualify him under section 38.10 and rule 2.330(d)(1), together with a supporting affidavit. Mr. Davis alleged that he feared he would not receive a fair trial because (1) Judge Harb was an assistant state attorney in the homicide division while this case was pending and worked alongside the prosecutor in that division, (2) the homicide division functioned as a single unit with decisions being made not by individual prosecutors but rather by committee as a unified division, (3) the

State's argument in opposition to his motion for Judge Jacobsen to remain on the case was both strenuous and based on factual research about Judge Harb that the judge could not consider in ruling on a motion to disqualify, and (4) Judge Harb was present at the hearing on the motion for Judge Jacobsen to remain on the case. Judge Harb rendered an order deeming the motion legally insufficient and denying it.

Mr. Davis did not file a petition for a writ of prohibition in this court seeking relief from Judge Harb's denial of his motion to disqualify. Pretrial litigation proceeded before Judge Harb for another year and three months. One month before trial, the State announced that it would not seek the death penalty.

The case was tried over three weeks in October 2016. The State's theory was that Mr. Davis intentionally shot the three men while under the influence of marijuana and, according to one of the State's experts, in a state of psychosis from having used the drug. Mr. Davis argued that the shootings were justified in light of the circumstances under which Mr. Davis's friends came to his home, the behavior of his friends after the men came back into his home, and the speed with which the relevant events occurred. He also presented an alternative defense of insanity based on expert testimony that he suffered from a mental infirmity resulting from traumatic events during his childhood that manifested in paranoid beliefs and behavior, which the State countered with expert testimony related to drug-induced paranoia.

The jury returned verdicts of guilty of the lesser included offenses of second-degree murder as to the two victims who were killed, guilty as charged with respect to the attempted first-degree murder of the victim who survived, and guilty as charged with respect to child abuse. Mr. Davis filed a motion for a new trial in which he argued, in relevant part, that Judge Harb was actually biased toward the State during

the course of the trial, citing a series of trial rulings and exchanges with counsel. Judge Harb denied that motion, and the case proceeded to sentencing. Mr. Davis was sentenced to three concurrent life sentences for the murder counts—each with a twenty-five-year minimum mandatory based on the use of a firearm—and a concurrent five-year sentence for child abuse. This is his timely appeal.

II.

Mr. Davis's principal argument is that his judgment and sentences should be reversed and the case remanded for a new trial because Judge Harb wrongly denied his motion for disqualification. It is important to understand what this argument says and what it does not. Mr. Davis does not argue that Judge Harb's conduct during his trial showed actual bias, and he has abandoned any appellate issue concerning the denial of the motion for new trial in which the allegation of actual bias was made. See I.R.C. v. State, 968 So. 2d 583, 588 (Fla. 2d DCA 2007) (explaining that issues not raised in the briefs are abandoned). Mr. Davis argues solely that the allegations of the disqualification motion Judge Harb denied were legally sufficient to show a reasonable fear that he would not receive a fair trial and thus to require that Judge Harb step off the case. Our review is de novo. See State v. Ballard, 956 So. 2d 470, 472 (Fla. 2d DCA 2007) (citing Frengel v. Frengel, 880 So. 2d 763, 764 (Fla. 2d DCA 2004)).

A motion to disqualify a trial judge for alleged bias or prejudice is regulated substantively by section 38.10 and procedurally by rule 2.330.[1] See Peterson v. State,

[1]The statutes and procedural rules for addressing motions to disqualify trial judges, and the associated mechanism for appellate review of denials of such motions through writ or direct appeal, have changed significantly in both form and substance over the course of time. As a result, we recognize that the body of judicial opinions examining these issues must be considered within the context of those changes when applying them to current cases. For instance, Livingston v. State, 441

221 So. 3d 571, 581 (Fla. 2017) (quoting Gore v. State, 964 So. 2d 1257, 1268 (Fla. 2007)). Section 38.10 provides in relevant part that:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial . . . on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further . . . .

Rule 2.330(c)-(d), in turn, provides that a motion to disqualify shall be sworn to by affidavit, shall "allege specifically the facts and reasons" supporting disqualification, and shall show "that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." And rule 2.330(f) provides that the judge against whom a disqualification motion is directed "shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged." "If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." Id.

Taken together, the statute and rule require that a trial judge disqualify himself when the sworn motion contains allegations that are sufficient to establish an objectively reasonable fear that the movant will not receive a fair trial because of some bias or prejudice of the judge. See Pena v. State, 259 So. 3d 223, 227 (Fla. 2d DCA 2018) (quoting Gregory v. State, 118 So. 3d 770, 778 (Fla. 2013)). Whether the

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So. 2d 1083, 1086-87 (Fla. 1983), upon which Mr. Davis relies and which we discuss later in this opinion, involved a prior version of the disqualification statute that required two affidavits from people with no connection to the parties or their counsel supporting the substance of the movant's allegations. § 39.10, Fla. Stat. (1979). That requirement does not exist in the current statute or rule, but if it did, it would certainly factor into the analysis of whether the trial judge should have granted the motion to disqualify in this case as well as the analysis of whether and how an erroneous denial should be reviewed for harmless error.

allegations are true or false or somewhere in between is beside the point. See Fla. R. Jud. Admin. 2.330(f) (stating that the trial judge "shall not pass on the truth of the facts alleged"); Shumpert v. State, 703 So. 2d 1128, 1129 (Fla. 2d DCA 1997). So too is whether the trial judge is in fact biased or prejudiced against the movant or in favor of his or her opponent. See Cave v. State, 660 So. 2d 705, 708 (Fla. 1995) (quoting Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978)); Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983). The question is solely whether the allegations of the sworn motion, if true, establish that the movant has an objectively well-grounded fear that he or she will not receive a fair trial. If the answer is yes, the trial judge must disqualify himself.

Mr. Davis's motion was legally sufficient and should have been granted. Although the parties have not directed us to any opinion that is totally on-point with the facts alleged here, the supreme court's recent decision in Reed v. State, 259 So. 3d 718 (Fla. 2018), is close in important respects. After being convicted for first-degree murder and sentenced to death in 1987, the defendant in Reed engaged in extensive postconviction litigation. Id. at 719-20. In 2017, he filed a successive postconviction motion seeking relief from his death sentence under Hurst v. Florida, 136 S. Ct. 616 (2016). 259 So. 3d at 719. The postconviction court summarily denied relief, and the defendant thereafter filed a motion to disqualify the postconviction judge. Id. at 719. He alleged that the judge had worked at the State Attorney's Office that prosecuted him as part of its team of capital crime attorneys from 1986 (the year he was convicted) to 1994 (while postconviction litigation was pending). Id. at 719-20. As Mr. Davis does here, the defendant alleged both that the postconviction judge worked alongside the prosecutors who handled his case and that the prosecutors on that team had input in the decision-making in each other's cases. Id. at 720. The postconviction court denied

the motion as legally insufficient, explaining that the allegations were cursory, speculative, failed to demonstrate actual bias, and failed to demonstrate an objectively reasonable fear that the defendant did not receive a fair hearing on his postconviction motion. Id.

The supreme court reversed the order denying disqualification and remanded for reevaluation of the postconviction claims before a different judge. Id. at 721. After deciding that the defendant's motion was timely, the court held that it was also sufficient to give rise to a reasonable fear that the defendant would not receive a fair hearing. Id. It explained as follows:

> While [the postconviction judge] was not the assigned prosecutor on Reed's case, she was actively prosecuting capital cases during the time period when Reed's prosecution was ongoing. It was alleged that she was a part of the team of capital prosecutors and that, "as part of the capital team during her tenure with the State Attorney's Office, each capital prosecutor . . . had input in the decision making in each other's cases." Considering the unique aspects of death penalty cases, including the very decision to seek the death penalty, we conclude that, in these narrow circumstances, Reed's motion was legally sufficient . . . .

Id. (emphasis added). In sum, the court held that, at least in a case in which the death penalty is sought, allegations that the judge worked in the capital crimes division of the responsible State Attorney's Office while the defendant's case was pending and had input into decision-making in other prosecutors' cases are sufficient to demonstrate a reasonable fear that the defendant will not get a fair hearing from that judge.

These are, of course, precisely the kinds of allegations that Mr. Davis made in his motion to disqualify Judge Harb. And at least at the time Mr. Davis sought disqualification, the State was also seeking the death penalty in this case. To the extent, however, that Mr. Davis may have framed his allegations differently from those

in Reed, that the State's decision prior to trial to take the death penalty off the table makes a difference, or that there are material distinctions between the procedural posture of this case and Reed that are relevant, three other aspects of Mr. Davis's allegations render the motion legally sufficient.

First, Mr. Davis's motion alleges that the State strongly argued against Judge Jacobsen's staying on the case and in favor of Judge Harb's taking it. Second, Judge Harb was present at the hearing during which these arguments were made. And third, the State, in the presence of Judge Harb, disclosed the results of its factual investigation into whether Judge Harb had contact with the case while at the State Attorney's Office. The State's conduct thus (1) implied that it believed Judge Harb was inclined to make rulings that were favorable to the State and (2) resulted in Judge Harb having learned factual information that the law unambiguously forbade him from considering in deciding the question of disqualification, when the State knew full well that a disqualification motion would be coming if the case was assigned to him. See Bundy, 366 So. 2d at 442 ("When a judge has looked beyond . . . mere legal sufficiency . . . and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification."); J & J Indus., Inc. v. Carpet Showcase of Tampa Bay, Inc., 723 So. 2d 281, 283 (Fla. 2d DCA 1998) (same).

We do not hold that Judge Harb was in fact biased. In fact, most of the conduct posing a problem here is attributable to the State's over-the-top advocacy. However, these allegations, taken together with the allegations about Judge Harb's employment at the State Attorney's Office, are sufficient to have given Mr. Davis—who was present while all of this unfolded—a reasonable fear that he would not receive a fair

trial. Cf. Rogers v. State, 630 So. 2d 513, 514, 516 (Fla. 1993) (holding that disqualification was required where the trial judge responded to testimony from a witness about an alleged ex parte conversation and stating that "[a] judge may well be drawn into the fray inadvertently" creating circumstances requiring disqualification); Edwards v. State, 689 So. 2d 1251, 1253 (Fla. 4th DCA 1997) (holding that a trial court's comment on the merits of a disqualification motion required disqualification even where "defense counsel was attempting to bait him into a comment on the truth of the allegations"). Mr. Davis's motion to disqualify was legally sufficient and should have been granted.

III.

Having determined that Judge Harb should have granted Mr. Davis's motion for disqualification, the next question is whether his failure to do so requires that we reverse Mr. Davis's judgment and sentences. We hold that it does not because, as we shall explain, the error was harmless in that, on this record, there is no reasonable possibility that the denial of the motion denied Mr. Davis a fair trial before a neutral judge.

A.

The parties have not cited, and we have not located, any controlling opinion that has explicitly analyzed whether, in an appeal from a final judgment in a criminal case, the denial of a legally sufficient motion for disqualification based on alleged bias or prejudice may be reviewed for harmless error and held that it either is or is not so reviewable.[2] We address that question first.

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[2]There are many decisions in civil and criminal cases that have reversed a final judgment or order based on the erroneous denial of a disqualification motion

It is helpful initially to place the question in context. An erroneous denial of a disqualification motion may be reviewed in the courts of appeal in one or both of two ways—by a petition for a writ of prohibition, which can be filed immediately after the order denying the motion, or by way of a direct appeal from a final judgment. See Leveritt & Assocs., P.A. v. Williamson, 698 So. 2d 1316, 1318 (Fla. 2d DCA 1997) ("A challenge to an order denying a motion to disqualify may be raised in a petition for writ of prohibition . . . or it may be raised on direct appeal from the final judgment or order."). The advantages of using prohibition when possible are obvious. In reviewing a petition for a writ of prohibition directed to the denial of a disqualification motion, the court of appeal engages in the same de novo review that it would on direct appeal and can provide an immediate remedy by removing the judge from the case, thus ensuring that the party seeking disqualification does not have to endure a trial with a judge the party feels is biased or prejudiced. See Sutton v. State, 975 So. 2d 1073, 1077 (Fla. 2008) (explaining the availability of prohibition to immediately address disqualification issues and that such prohibition petitions are evaluated in the same manner as direct appeals); see, e.g., Paylan v. State, 263 So. 3d 23, 23 (Fla. 2d DCA 2019) (granting prohibition and directing appointment of a successor judge). That also spares the parties and the court the time, effort, and resources of conducting further proceedings—up to and including a trial—before a judge who, in the parlance of section 38.10 and rule 2.330(d), was supposed to "proceed no further" in the first place. See Sutton, 975 So. 2d at 1077 (noting that disqualification denials "should be immediately reviewable because [they

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without explaining why or otherwise holding that the error is not reviewable for harmlessness. See, e.g., Cave, 660 So. 2d at 708; CH2M Hill Se., Inc. v. Pinellas County, 598 So. 2d 85, 88 (Fla. 2d DCA 1992).

can] be erroneously denied in numerous situations in which a trial by [a] biased judge should have been avoided altogether").

This case highlights the desirability of using prohibition to address the denial of a motion to disqualify. After Judge Harb denied Mr. Davis's disqualification motion, the litigation continued for a year and three months and culminated in a three-week trial. Mr. Davis went to a trial before a judge that he alleged he did not believe could try him fairly. The surviving victim of Mr. Davis's attack, multiple witnesses, jurors, and court personnel all devoted time and resources to Mr. Davis's three-week trial. If the error here is reversible, it will all have to get done again. Had Mr. Davis sought prohibition, he would have had a trial before a judge he did not think biased and the substantial burdens and costs of a potential new trial would be unnecessary.[3]

Had Mr. Davis presented the disqualification issue by way of prohibition, we would not have asked whether Judge Harb's mistaken denial of disqualification

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[3]It is true that a court may deny a prohibition petition on discretionary or other grounds notwithstanding the facial sufficiency of a disqualification motion. See Sutton, 975 So. 2d at 1077-78; Topps v. State, 865 So. 2d 1253, 1257-58 (Fla. 2004) (explaining that extraordinary writ petitions may be denied for reasons unrelated to the merits and, therefore, that a denial of such a petition does not preclude litigating the issue on direct appeal unless the denial is explicitly with prejudice). Experience teaches, however, that it will be the infrequent case in which an appellate court denies a prohibition petition directed to a legally sufficient disqualification motion for reasons wholly unrelated to the merits, even though we rarely expressly deny such a petition "on the merits." See, e.g., Rotschrek v. State, 241 So. 3d 795, 795 (Fla. 2d DCA 2018) (denying prohibition without prejudice to raising disqualification issue in a then-pending direct appeal); Parmley v. Dep't of Children & Families, 236 So. 3d 375, 375 (Fla. 2d DCA 2017) (denying prohibition petition without prejudice to raising the issue on direct appeal where a hearing officer rendered a final order while the prohibition petition was still pending). As we show in the text, the harmless error statute requires that we review for harmlessness when the denial of a legally sufficient disqualification motion is raised on direct appeal. In those circumstances where the matter is raised on appeal after prohibition has been denied other than on the merits, the unavailability of relief by way of prohibition would be a fact a court may consider in determining whether the erroneous denial is harmless under the test we identify.

required a reversal of Judge Harb's prior orders. We would simply have directed that Judge Harb get off the case and that a successor judge be appointed. That successor judge would have tried the case and would have had the ability—upon motion—to reconsider any ruling Judge Harb made prior to his disqualification should the successor judge have deemed it necessary. See Fla. R. Jud. Admin. 2.330(h) (explaining that prior rulings of a disqualified judge "may" be reconsidered by the successor judge upon motion); Ognenovic v. David J. Giannone, Inc., 184 So. 3d 1135, 1137 (Fla. 4th DCA 2015) (describing considerations for reconsideration).

That landscape changes, however, when the denial of a disqualification motion is raised as a legal error requiring the reversal of a judgment of conviction. In that circumstance, the criminal harmless error statute, section 924.33, Florida Statutes (2015), must be considered. That statute provides as follows:

> 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 supreme court has recognized that "[t]he authority of the legislature to enact" this statute is "unquestioned" and that the statute by its terms "provides that harmless error analysis is applicable to all judgments regardless of the type of error involved." State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986) (emphasis added). Given those premises, any error reviewable in an appeal from a criminal judgment—which includes an error in denying a disqualification motion—is subject to analysis for harmless error.

Although the legislature has the authority to require a harmless error analysis, the courts have historically defined what kind of analysis is used to determine

whether an error is harmless. See Goodwin v. State, 751 So. 2d 537, 542 (Fla. 1999) ("[T]his Court retains the authority to determine the analysis to be applied in deciding whether an error requires reversal."); DiGuilio, 491 So. 2d at 1134 (describing the courts' determination of harmlessness). Harmless error analysis is grounded in the need to protect a defendant's right to a fair trial: the supreme court has recognized that "[a]lthough a defendant is not entitled to a completely error-free trial, he or she has a constitutional right to a fair trial free of harmful error." Johnson v. State, 53 So. 3d 1003, 1007 (Fla. 2010) (emphasis added) (citing Goodwin, 751 So. 2d at 538-39, 541). The Florida courts protect that right by applying the harmless error test of Chapman v. California, 386 U.S. 18 (1967), and DiGuilio, 491 So. 2d at 1135, to most errors. See Goodwin, 751 So. 2d at 542-43 (holding that the test of Chapman and DiGuilio apply to both constitutional and nonconstitutional errors). That well-worn test requires the State to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict" or, stated differently, that "there is no reasonable possibility that the error contributed to the conviction." DiGuilio, 491 So. 2d at 1135. Its application involves a case-specific inquiry into how the error may have influenced the jury's verdict. See Bullington v. State, No. 2D18-2197, 2020 WL 2090199, at *7 (Fla. 2d DCA May 1, 2020) (quoting DiGuilio, 491 So. 2d at 1135).

Within the rubric of the harmless error test, the supreme court has identified certain categories of errors that are always reversible—i.e., per se reversible errors. See DiGuilio, 491 So. 2d at 1135 ("The test of whether a given *type* of error can be properly categorized as per se reversible is the harmless error test itself."). These kinds of errors generally fall into two categories. First, there are errors where the application of the test stated in Chapman and DiGuilio always results in a finding that

the error is harmful—i.e., where the error always entails a reasonable possibility that the error affected the jury's determinations with respect to the verdict. See Johnson, 53 So. 3d at 1007 (quoting DiGuilio, 491 So. 2d at 1135); State v. Schopp, 653 So. 2d 1016, 1019 (Fla. 1995). Second, there are errors where it is not possible to apply the test stated in Chapman and DiGuilio because it would require an appellate court "to engage in pure speculation in order to attempt to determine the potential effect of the error on the jury." Johnson, 53 So. 3d at 1007.

There are, however, situations where the nature of the error makes it unproductive to use the Chapman and DiGuilio test to determine whether it is per se reversible or reviewable for harmlessness because the error is not related to the jury's factfinding function. A trial court's failure to properly conduct a Richardson hearing to address a discovery violation by the State is an example. In considering whether such errors are harmless, the supreme court has not focused on the effect of the error on the jury; instead, the court has focused on whether the error prejudiced the defense by hindering its trial preparation because that is the risk inherent in a discovery violation. See Scipio v. State, 928 So. 2d 1138, 1146, 1149 (Fla. 2006) (discussing the history of harmless error analysis for Richardson violations and stating that in the Richardson context, the "harmless error standard does not focus on whether the discovery violation would have made a difference in the verdict"). At first, the court held that a failure to conduct a proper Richardson hearing was per se reversible, reasoning that there is no way to tell whether a discovery violation prejudiced the defendant's trial preparation without having a Richardson hearing to make that determination. See Smith v. State, 500 So. 2d 125, 126 (Fla. 1986), receded from by Schopp, 653 So. 2d 1016. In short, the court concluded that "[n]o appellate court can be certain that errors of this type [the

failure to conduct a Richardson hearing] are harmless." Cumbie v. State, 345 So. 2d 1061, 1062 (Fla. 1977), receded from by Schopp, 653 So. 2d 1016. The court later receded from that approach recognizing that there are cases where one "can say beyond a reasonable doubt that the defense was not prejudiced by the underlying violation and thus the failure to make adequate inquiry was harmless error." Schopp, 653 So. 2d at 1020; see also Scipio, 928 So. 2d at 1148. Although it acknowledged that Richardson errors are likely to be harmful, the court explained "the mere fact that there is a high probability that a given error will be found harmful does not justify categorizing the error as per se reversible." Schopp, 653 So. 2d at 1021. Thus, it modified the Chapman and DiGuilio harmless error test to the nature of the error and held that the harmless error test for Richardson violations is "whether there is a reasonable possibility that the discovery violation 'materially hindered the defendant's trial preparation or strategy.' " Scipio, 928 So. 2d at 1150 (quoting Schopp, 653 So. 2d at 1020).

A trial court's error in denying a legally sufficient disqualification motion stands on a similar footing. The requirement that a judge disqualify himself or herself when a litigant files a legally sufficient motion is tied to the litigant's interest in having a fair trial before a neutral judge. See, e.g., State v. Dixon, 217 So. 3d 1115, 1117 (Fla. 3d DCA 2017) (tying ruling on a legally sufficient motion to disqualify to the proposition that "every litigant is entitled to nothing less than the cold neutrality of an impartial judge" (quoting State ex rel. Davis v. Parks, 194 So. 613, 615 (1939))); Frengel, 880 So. 2d at 764 (same). That aspect of the disqualification issue makes coupling the question whether the denial of a disqualification motion is per se reversible or reviewable for harmless error to the Chapman and DiGuilio harmless error test an awkward fit. As with the supreme court's approach to a Richardson error, we should consider whether and

how an error can be assessed for harmlessness by reference to the issue to which the question is directed. See also State v. Merricks, 831 So. 2d 156, 159 (Fla. 2002) (holding that bailiff's substantive, ex parte communications with jury were per se reversible error by reference to the potential for prejudice and the lack of an adequate record of the communications). That means analyzing for harm to the movant's right to a fair trial before a neutral judge.[4]

Viewing the matter that way, we conclude that the denial of a legally sufficient disqualification motion is not per se reversible error. Initially, the denial of such a motion does not always entail a reasonable possibility that the movant will be denied a right to a fair trial before a neutral, detached judge. Cf. Schopp, 653 So. 2d at 1020 ("[A] per se rule is appropriate only for those errors that always vitiate the right to a

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[4]Because an error in denying a disqualification motion does not fit the traditional Chapman/DiGuilio harmless error test, Mr. Davis argues that the denial of his motion constitutes a "structural error" that is not susceptible of harmless error review. The concept of a structural error is used to describe an error that " 'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.' " McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). The concept is sometimes used to describe errors that are insusceptible of harmless error analysis and are thus per se reversible. See generally Johnson, 53 So. 3d at 1011-12 (Canady, C.J., concurring in part and dissenting in part) (describing the relationship between per se reversible errors and the concept of structural error). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017). Structural errors thus constitute "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.' " Neder v. United States, 527 U.S. 1, 7-8 (1999) (quoting Fulminante, 499 U.S. at 309). We do not agree that the error here is structural. Mr. Davis is right that a trial before a judge who was actually biased or prejudiced would qualify as a structural error, see Pinardi v. State, 718 So. 2d 242, 244 (Fla. 5th DCA 1998), but the mere erroneous denial of a motion to disqualify does not make a judge actually biased; nor is the mere erroneous denial of such a motion of constitutional magnitude. For the reasons we explain in the text, the denial of a disqualification motion does not always harm a defendant's right to a fair trial. We also find persuasive the federal cases discussed in the text that analyze the erroneous denial of a disqualification motion not involving actual bias for harmlessness.

fair trial and therefore are always harmful."). This conclusion flows from the highly limited inquiry section 38.10 and rule 2.330 permit a trial judge to make in passing on a disqualification motion. The statute and rule do not ask whether the trial judge is biased or prejudiced in fact. They do not consider whether the trial judge can rule fairly and impartially notwithstanding the matter alleged to constitute a source of bias or prejudice. They do not allow the judge or opposing party to press for details concerning the movant's allegations of facts or to bring out other facts that bear on the movant's assertions. Indeed, they do not even consider whether the movant's allegations of facts are actually true. Instead, they assume that the movant's allegations are true and ask only whether someone in the movant's position would reasonably fear that they will not receive a fair trial. Because the evaluation of a disqualification motion is untethered from fact and considers only whether unproved allegations raise a reasonable fear, there will obviously be instances in which there is no reasonable possibility that the movant's right to a fair trial before a neutral judge was in any way affected by the denial of a disqualification motion (e.g., the allegations were untrue, there were other facts that made them irrelevant, or the judge was able to set aside the alleged prejudice) even though the allegations of bias or prejudice were legally sufficient.

In addition, when we review the erroneous denial of a motion for disqualification at the end of the case—as distinguished from on a petition for a writ of prohibition—we can actually see how things played out after the denial and make determinations about whether the defendant's right to a fair trial before an impartial judge was affected. Imagine, for example, that a defendant made a legally sufficient disqualification motion based on a trial judge's relationship with the prosecutor that the trial judge denied. Imagine also that the prosecutor resigned a few months later and a

new prosecutor was assigned to try the case. We would be hard pressed in such circumstances to say there was a reasonable probability that the defendant was denied a fair trial before a neutral judge because the appellate record would clearly reflect that the alleged disqualifying relationship did not infect the trial itself. Similarly, suppose a disqualification motion made legally sufficient allegations that the trial judge had prejudged a disputed legal issue in the case and, after the motion was denied but before the trial, the supreme court conclusively resolved the issue, and the trial judge ruled consistently with that binding decision. Again, it would be hard to say that the error was harmful because the supreme court decision eliminated the alleged bias.

The point here is not to identify every situation in which an appellate court might determine that an error in denying a legally sufficient disqualification motion is harmless. It is simply to observe that because end-of-case review permits an appellate court to consider a full record, cases where the error is harmless can be expected to exist and, as a result, the error is not harmful in every case in which it occurs.

Furthermore, the erroneous denial of a legally sufficient motion for disqualification is not the kind of error that prohibits us from assessing harm based on the facts as distinguished from "pure speculation." See Johnson, 53 So. 3d at 1007. The denial of a legally sufficient motion for disqualification is unlike, for example, a trial court's preemptive instruction that trial testimony will not be read back to a jury or a trial judge's substantive, ex parte conversations with a jury—both situations in which there is uniformly no way to tell how the error would have affected the proceedings or the defendant's rights. See id. at 1009 (holding that a reviewing court cannot tell whether a preemptive instruction against readbacks is harmless because "[a] court attempting to conduct a harmless error analysis cannot know what testimony a jury would have

requested to have read back or even whether a jury would have asked for a read-back at all"); Ivory v. State, 351 So. 2d 26, 28 (Fla. 1977) (holding that ex parte contact with the jury is "so fraught with potential prejudice [to the parties' rights of participation] that it cannot be considered harmless"). Here, as the above hypotheticals show, it is not difficult to imagine cases in which an appellate court can determine whether the denial of a disqualification motion had a reasonable possibility of denying the defendant a fair trial before a neutral judge. And although there will certainly be individual cases in which this is not possible—possibly many such cases—the proper conclusion in those cases will be that the error cannot be called harmless beyond a reasonable doubt on the facts of those cases, not that the error is harmful in every case. See DiGuilio, 491 So. 2d at 1137 ("High risk that an error will be harmful is not enough, however, to justify categorizing the error as always harmful (per se).").

Our conclusion that it is not impossible to tell whether the denial of a legally sufficient disqualification motion is harmful is confirmed by the fact that when a judge is disqualified, we do not automatically set his or her prior orders aside. See Buckner v. Cowling, 135 So. 3d 383, 383 (Fla. 5th DCA 2014) ("[A] party is not entitled to have [an order by a judge who is later disqualified] vacated as a matter of right."); Rath v. Network Mktg., L.C., 944 So. 2d 485, 486-87 (Fla. 4th DCA 2006) (denying a petition for a writ of mandamus seeking to compel a successor judge to reconsider a disqualified judge's orders because "petitioners were not entitled as a matter of right" to reconsideration). Rather, a successor judge "may"—but is not required to—reconsider a disqualified judge's prior rulings upon motion by a party. Fla. R. Jud. Admin. 2.330(h); see also Pilkington v. Pilkington, 182 So. 3d 776, 778 (Fla. 5th DCA 2015) (holding that a prohibition petition directed to the denial of a disqualification motion was not mooted

by the trial judge's retirement because, if the petitioner prevailed, he could seek reconsideration of prior rulings); Barber v. Mackenzie, 562 So. 2d 755, 756-57 (Fla. 4th DCA 1990) (same; discussing the role of reconsideration). In making the decision whether to reconsider such a ruling, courts have considered whether the disqualified judge's prior ruling was legally wrong, whether the rulings work an injustice on the party seeking reconsideration, and whether reconsideration of a multitude of rulings affects the administration of justice. See Ognenovic, 184 So. 3d at 1137 (first citing Russ v. City of Jacksonville, 734 So. 2d 508, 511 (Fla. 1st DCA 1999); and then citing Rath, 944 So. 2d at 487). If it was the case that it was impossible to tell whether rulings by a judge subject to disqualification injured the substantial rights of a party, however, we would not undertake this kind of analysis. We would simply vacate the prior rulings.

Our conclusion is further confirmed by the fact that courts outside Florida routinely review the denial of similar kinds of disqualification motions for harmless error. In the federal system, 28 U.S.C. § 455(a) (2020), requires that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." That disqualification standard is similar to our statute and rule in that it focuses on whether there is a reasonable question about whether the judge is impartial but less favorable to the movant in that it requires actual proof of disqualifying circumstances as distinguished from legally sufficient allegations of such circumstances. See United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986) ("[T]he standard for determining whether a judge should disqualify himself under § 455 is an objective one, whether a reasonable person knowing all the facts would conclude that the judge's impartiality might reasonably be questioned. Section 455 does not require the judge to accept all allegations by the moving party as true.") (citation omitted). The federal

courts evaluate the erroneous denial of a motion to disqualify under § 455(a) under a three-part test first announced in Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988), which considers (1) the risk of injustice to the parties in the particular case, (2) the risk of injustice in other cases, and (3) the risk of undermining public confidence in the judicial process. See United States v. Williams, 949 F.3d 1056, 1063 (7th Cir. 2020) (applying Liljeberg harmless error test where erroneous denial of a disqualification motion was raised on direct appeal from a criminal judgment and sentence); United States v. Kelly, 888 F.2d 732, 747 (11th Cir. 1989) (same).

A number of state courts have applied the federal harmless error test or their own form of harmless error review to errors in denying disqualification motions in cases not involving actual bias. See, e.g., State v. Cleary, 882 N.W.2d 899, 908 (Minn. Ct. App. 2016) (applying Liljeberg); Thompson v. Millard Pub. Sch. Dist. No. 17, 921 N.W.2d 589, 596 (Neb. 2019) (applying Liljeberg); Sargent Cty. Bank v. Wentworth, 547 N.W.2d 753, 760 (N.D. 1996) ("Prior orders of a disqualified judge generally are not void where the judge was not personally biased or prejudiced against a party, the disqualification was based on only a possible appearance of impropriety, and the challenged rulings were correct."); State v. Gardner, 789 P.2d 273, 278 (Utah 1989) (reviewing disqualification error for harmlessness); Velardo v. Ovitt, 933 A.2d 227, 236-37 (Vt. 2007) (applying Liljeberg); Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 387-88 (W. Va. 1995) (reviewing disqualification error under harmless error statutes and stating that "a claim of an appearance of impropriety does not rise to the level of a fundamental defect in due process requiring a new trial"). The fact that the federal courts and many states review the erroneous denial of disqualification motions not involving actual bias for harmless error is strong evidence that the error is in fact

susceptible of review for harmlessness and, accordingly, is not one that we should regard as harmful per se.

We decline to adopt the federal harmless error test because the test we do adopt—whether there is a reasonable probability that the defendant was denied a fair trial before a neutral judge—is more closely aligned with our supreme court's decisions on how a case should be evaluated for harmless error. Further, the application of that test necessarily also avoids the risk of injustice in other cases and protects public confidence in the judicial process—the other concerns of the federal harmless error standard—because if we require a new trial whenever there is a reasonable possibility the movant was denied his or her right to a fair trial before a neutral judge, we assure parties in subsequent cases and the public as a whole that the defendant received the fair trial free of harmful error to which he is entitled. And on facts like those in this case—where a defendant has elected not to pursue pretrial a prohibition remedy that was then available—it prevents injustice in other cases and protects the public perception of the judicial process for us to refrain from requiring the parties, witnesses, and court system to endure a new trial in circumstances where we are confident that there was nothing wrong with the trial the defendant received.

Mr. Davis argues that existing supreme court precedent precludes harmless error review of the denial of a legally sufficient motion to disqualify, relying primarily on Livingston, 441 So. 2d 1083. Livingston was a first-degree murder and sexual battery prosecution involving a defense lawyer and a trial judge whose relations were acrimonious. Id. at 1084-85. The defendant filed a motion to disqualify, which the judge denied. Id. at 1085. On direct appeal from a judgment and sentence, the supreme court held that disqualification was required and stated, without elaboration,

that "[w]e must vacate the judgment and sentence and remand with directions to proceed with a new trial." Id. at 1087. Two dissenting justices argued that when an appellate court reviews a disqualification denial on direct appeal (as distinguished from prohibition), it should not reverse unless "an atmosphere of partiality did in fact develop at the trial." Id. at 1089 (Boyd, J., dissenting) (emphasis added). Mr. Davis contends that, because the dissenters' position did not prevail, Livingston implicitly rejects that idea that the denial of a legally sufficient disqualification motion should be reviewed on direct appeal for harmlessness.

We respectfully disagree. The dissenters in Livingston did not argue that a disqualification denial should be reviewed for harmlessness, which puts the burden on the State to show that there is no reasonable possibility that the defendant was denied a fair trial before a neutral judge. They argued for a different rule—that the defendant should be required to show that the trial judge was biased or partial in fact. Id. at 1089-90. To the extent Livingston impliedly rejects anything, it rejects that position and not the possibility that the improper denial could be reviewed for harmlessness. Furthermore, the Livingston majority did not provide any reasons for its determination that a new trial was required. The supreme court's saying that a new trial was required in that case, with nothing more, does not expressly or by necessary implication mean that a new trial is required in every case in which a legally sufficient disqualification motion is denied. Thus, we do not think that Livingston holds that the error here is per se reversible.

Mr. Davis also points to more categorial language in Fuster-Escalona v. Wisotsky, 781 So. 2d 1063, 1065 (Fla. 2000), and Thompson v. State, 990 So. 2d 482, 489 (Fla. 2008), to the effect that an appellate court will "vacate" a trial court judgment

that flows from an erroneously denied motion to disqualify. But in each case, the language was dicta. In Fuster-Escalona, the question was whether a motion to disqualify counts as "record activity" within the meaning of the rule of civil procedure governing dismissal of a civil case for failure to prosecute. 781 So. 2d at 1064. The court's comment about what appellate courts do with judgments after a motion to disqualify is erroneously denied had no bearing on its analysis that such a motion does constitute record activity. Id. at 1066. And in Thompson, the question was whether trial counsel's failure to file a motion to disqualify satisfied the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), in the context of a collateral challenge to a criminal conviction, and the court's statement there likewise did not have a connection to its holding that the failure did not satisfy the Strickland prejudice standard with respect to the trial but did with respect to the sentencing. 990 So. 2d at 485, 491. Neither case holds that a new trial is required every time a winning disqualification argument is presented on direct appeal, neither case contains an analysis showing that such a result is required, and neither case cites any authority that contains such holding or analysis.

Having said that, we are mindful that our duty is to follow the law as the supreme court has declared it, that Mr. Davis's reading of Livingston, Fuster-Escalona, and Thompson is entirely reasonable, as is his argument that errors in the denial of disqualification motions are not reviewable for harmlessness, and that the question we decide is highly important to the State, defendants in criminal cases, and the perception of the criminal justice system. Although we disagree with Mr. Davis's argument and hold that such errors are reviewable for harmlessness under the standard we have described, we will certify a question to the Florida Supreme Court.

B.

We now consider whether Judge Harb's denial of Mr. Davis's disqualification motion was harmless by asking whether there is a reasonable possibility he was denied his right to a fair trial by a neutral judge. Three facets of this case taken together convince us that there is no such reasonable possibility. See Bullington, No. 2D18-2197, 2020 WL 2090199, at *7 ("[T]he answer to the question the harmless error test asks—whether there is a reasonable possibility the error contributed to the verdict—is ultimately dependent on the individual facts of each case." (first citing State v. Davis, 720 So. 2d 220, 229-30 (Fla. 1998); and then citing Salas v. State, 972 So. 2d 941, 944 (Fla. 5th DCA 2007))).

First, the circumstances of this case strongly suggest that Mr. Davis does not himself think that he at any point failed to receive a fair trial. Had Mr. Davis been concerned that he could not get a fair trial before Judge Harb, he could have sought a writ of prohibition at any time during the fifteen months between the denial of his disqualification motion and his trial. See Lewis v. State, 251 So. 3d 310, 311 (Fla. 2d DCA 2018) ("[T]here is no jurisdictional timeframe for the filing of a petition for writ of prohibition."). He did not.[5] Moreover, after he denied Mr. Davis's disqualification

[5]Mr. Davis argues that a defendant in a case in which the death penalty is sought—as it was here at the time the disqualification motion was denied—would be precluded from seeking supreme court review of the denial of a disqualification motion after a final judgment if a district court of appeal denied an earlier prohibition petition with an express statement that the denial is "on the merits" and, thus, that our consideration of the failure to seek prohibition would "penalize" defendants in that position. See art. V, § 3(b)(1), Fla. Const. (providing mandatory jurisdiction in the supreme court in "appeals from final judgments of trial courts imposing the death penalty"); Topps, 865 So. 2d at 1257 (distinguishing, in terms of preclusive effect, the unelaborated denial of an extraordinary writ petition from a denial that is expressly "on the merits"). There does not appear to be anything, however, that would foreclose a defendant in that position from filing a prohibition petition directly in the supreme court if

motion, Judge Harb made several pretrial rulings related to the death penalty aspect of the case, to evidentiary matters raised in motions in limine, and on a motion to reconsider multiple rulings previously made by Judge Jacobsen. Had Mr. Davis thought that Judge Harb's conduct with respect to any of those pretrial matters corroborated his alleged fear of bias or prejudice, he could have filed a new disqualification motion subject to the timing requirements of rule 2.330(e) or filed a prohibition petition based on the original disqualification motion then. He did not do that either. Instead, he chose to proceed to a three-week jury trial with Judge Harb presiding, while renewing his original motion to disqualify for preservation purposes.

Furthermore, Mr. Davis has not raised as an issue on appeal any matter with respect to Judge Harb's conduct during the trial that suggests to us that he thought he received anything other than a fair trial before a neutral judge. He did not, for example, raise as an appellate issue the denial of his motion for a new trial alleging actual bias or prejudice, which—if it had merit—would unquestionably entitle him to a

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the question of "who decides" is important to him. See art. V, § 3(b)(7), Fla. Const. (providing that the supreme court has jurisdiction to "issue writs of prohibition to courts"); Bundy, 366 So. 2d at 441 (holding, under earlier version of the constitution that limited prohibition jurisdiction to cases that would fall within the supreme court's jurisdiction on an appeal from a final judgment, that the supreme court had jurisdiction to consider a prohibition petition directed to the denial of a motion to disqualify, stating that "[b]ecause the case is one in which a sentence of death might ultimately be imposed, we have jurisdiction"); see, e.g., Evans v. State, No. SC16-1745, 2016 WL 5807827, at *1 (Fla. Oct. 4, 2016) (reviewing pretrial petition for a writ of prohibition based on the denial of a motion to disqualify and denying it without prejudice). Furthermore, even if there was, a defendant's strategic decision to forego an immediate remedy and to proceed to trial before a judge he has said is disqualified necessarily communicates something about the defendant's view as to whether the judge is actually capable of affording him a fair trial. On the facts of this case, when the declination to seek immediate relief is taken together with his other conduct throughout the litigation and the declination to raise any meritorious appellate issue apart from disqualification, it communicates that Mr. Davis did not see a real risk to his right to a fair trial.

new trial. Nor has he challenged the legal correctness of any of the scores of pretrial and trial rulings Judge Harb made on legal and evidentiary matters during the fifteen-plus months he presided over the case or the sentences that Judge Harb imposed. In fact, the only appellate issue apart from disqualification Mr. Davis has raised is Judge Harb's decision to overrule a defense objection to comments in the State's closing argument that voluntary intoxication was not a defense to the crimes with which Mr. Davis was charged.[6] And, in light of the dispute between the State and defense over why Mr. Davis shot three men without warning, we can find no error there. See, e.g., Kaczmar v. State, 104 So. 3d 990, 1006 (Fla. 2012) ("It is appropriate for an attorney who does not misstate the law to relate it to the facts of the case in closing argument."); Seckington v. State, 424 So. 2d 194, 195 (Fla. 5th DCA 1983) (holding that the trial court erred in prohibiting argument that an accidental touching was not battery even though the trial court did not so instruct the jury); cf. Gray v. State, 731 So. 2d 816, 818 (Fla. 5th DCA 1999) ("The state's argument properly pointed out that the cause of Gray's not knowing what he was doing or the consequence of what he was doing or not knowing that what he was doing was wrong was not because of a mental infirmity, disease or defect; it was because he voluntarily got drunk, a condition which did not constitute insanity."). The absence of any effort to get Judge Harb off the case after his

[6]Mr. Davis's brief mentions Judge Harb's granting of a State motion to quash a deposition subpoena to the lead prosecutor on Mr. Davis's case during which the State argued and the defense conceded that Mr. Davis was seeking discovery into the factual accuracy of the prosecutor's earlier assertions in opposition to Mr. Davis's motion to keep the case assigned to Judge Jacobsen. Although Mr. Davis questions the propriety of Judge Harb deciding that motion, he did not then file a second motion to disqualify, he did not seek relief of the first denial by way of prohibition, he has not made the deposition issue on appeal, and he has not argued that Judge Harb's decision to grant the State's motion was legally wrong.

denial of the disqualification motion combined with the absence of any strong argument for reversal apart from the denial of the disqualification motion is a good indicator that Mr. Davis in fact received a fair trial before a neutral judge.

Second, our own consideration of this case does not suggest a reasonable possibility that Mr. Davis was denied a fair trial. Judge Harb made scores of pretrial and trial rulings which, as Mr. Davis concedes, went both ways—some favorable to the State and some favorable to the defense. There do not appear to be instances of conduct or a pattern of rulings by Judge Harb that would indicate any bias or prejudice against Mr. Davis. In his supplemental briefs on the issue of harmlessness, Mr. Davis has not identified any rulings or conduct by the trial judge that indicate to us that he received anything other than a fair trial before a neutral judge. And the record of the sentencing proceedings reflects fair consideration of the defense arguments and the imposition of a sentence that comported with law.

Third, although the circumstances alleged in the motion to disqualify are sufficient to give Mr. Davis a reasonable fear about Judge Harb's ability to try the case, they do not in reality pose a substantial risk that Mr. Davis would be denied a fair trial. With regard to Judge Harb's prior employment with the State Attorney's Office, we know from the dates alleged in the motion that he was not there when Mr. Davis was indicted for the murders or when the State made the decision to seek the death penalty, and so he could not have participated in those decisions. The motion does not identify any other decision in a prosecution like this that Judge Harb might have been present for. Although the allegation leaves the possibility that Judge Harb might have heard something about the case, this does not seem likely to have affected Mr. Davis's right to a fair trial because Judge Harb ultimately got to hear all of the evidence, not just

whatever he may have heard during his prior employment, and a jury, not Judge Harb, made the ultimate determination of guilt or innocence. See, e.g., Williams, 949 F.3d at 1064 (considering the fact that the judge "was not the trier of fact making the ultimate determination of whether the government had proved Williams guilty" in evaluating the risk of injustice to the defendant under the federal harmless error test).

The prosecutor's argument to keep Judge Harb on the case and efforts to prove that Judge Harb had no contact with it do not say much, if anything at all, about whether there is a reasonable possibility that Mr. Davis was denied a fair trial before a neutral judge because they do not say much, if anything at all, about whether Judge Harb himself was biased or prejudiced. They communicated that the State wanted Judge Harb on the case and placed in front of Judge Harb information he could not consider when evaluating a disqualification motion—things that would give a reasonable defendant sitting there watching cause for concern, to be sure—but that was on the State, not Judge Harb. Put differently, these allegations do not suggest that Judge Harb himself said or did anything that would cast doubt on his ability to try Mr. Davis's case fairly. Thus, these allegations too do not raise a material risk that Judge Harb's presiding over the case would deny Mr. Davis a fair trial before a neutral judge.

In the circumstances of this case, where the error in denying the disqualification motion was relatively low risk, where Mr. Davis's conduct and appellate arguments strongly indicate that he received a fair trial, and where our own assessment of the case confirms that indication, we see no reasonable possibility that Mr. Davis received anything other than a fair trial before a neutral judge. Accordingly, the error in denying his disqualification motion is harmless beyond a reasonable doubt.

IV.

We hold that where a defendant in a criminal trial asserts the denial of a legally sufficient motion for disqualification based on alleged bias or prejudice as an error on direct appeal from a judgment and sentence, the error is reviewable for harmlessness. The harmless error test in those circumstances is whether the State has established that there is no reasonable possibility that the error denied the defendant a fair trial before an impartial judge. For the reasons we have explained, that test is satisfied here, and we affirm Mr. Davis's judgment and sentences. We certify the following question to the Florida Supreme Court as one of great public importance:

> WHEN A DEFENDANT IN A CRIMINAL CASE ASSERTS IN AN APPEAL FROM A JUDGMENT AND SENTENCE THAT THE TRIAL COURT ERRONEOUSLY DENIED A LEGALLY SUFFICIENT MOTION TO DISQUALIFY THE TRIAL JUDGE FOR ALLEGED BIAS OR PREJUDICE UNDER SECTION 38.10, FLORIDA STATUTES (2015), AND FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.330(D)(1), SHOULD AN APPELLATE COURT REVIEW THE ERRONEOUS DENIAL FOR HARMLESS ERROR AND, IF SO, WHAT HARMLESS ERROR TEST SHOULD THE APPELLATE COURT APPLY?
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> Affirmed; question certified.

BLACK and ROTHSTEIN-YOUAKIM, JJ., Concur.