01/25/02 "See News Release 007 for any concurrences and/or dissents."

SUPREME COURT OF LOUISIANA

No. 2000-KA-2277

STATE OF LOUISIANA

VERSUS

ELZIE BALL

CALOGERO, Chief Justice, dissents and assigns reasons.

I respectfully dissent from the majority opinion with regard to the reverse-*Witherspoon* challenges, because the risk that the trial judge's denials of the defendant's challenges for cause might have "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." *Morgan v. Illinois*, 504 U.S. 719, 736, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (internal quotations omitted). With its decision today, the court continues down the slippery slope of granting trial judges unbridled discretion in ruling on challenges for cause in capital cases. *See State v. Miller*, 99-0192 (La. 9/6/00), 776 So.2d 396, 415, Calogero, C.J., dissenting.

The standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L. Ed. 2d 841 (1985). Thus, if a prospective juror's inclination toward the death penalty would substantially impair the performance of the juror's duties, a challenge for cause is warranted. *State v. Ross*, 623 So. 2d 643, 644 (La. 1993). Although the trial judge's ruling should be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion, *State v. Cross*, 93-1189 (La.

6/30/95), 658 So.2d 683, "a challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to the law may be reasonably implied." *State v. Hallal*, 557 So.2d 1388, 1389-90 (La. 1990).

Initially, I must disagree with the majority's apparent rationale that the merits of defendant's challenges for cause should be viewed in light of any perceived transgression by defense counsel of the general prohibition on asking jurors to "commit" themselves during voir dire to a particular result. *See Ante*, p. 24. Regardless of whether counsel's examination might have exceeded the scope of voir dire, and the trial court made no finding that counsel did so, the fact remains that counsel's rendition of the anticipated evidence was entirely accurate, and counsel asked from jurors no more than what this court has held the State itself may secure from prospective jurors, that is, an indication of whether their views for or against capital punishment may substantially impair their performance as a juror in this case. *See State v. Williams*, 96-1023 (La. 1/21/98), 708 So.2d 703 (prospective jurors properly dismissed for cause because the age of the defendant would have impaired their ability to return a death verdict); *State v. Frost*, 97-1771 (La. 12/1/98), 727 So.2d 417 (same); *State v. Comeaux*, 514 So.2d 84 (La. 1987) (prospective jurors properly dismissed for cause because they could not impose death penalty on borderline retardate); *see also State v. Deal*, 00-0434 (La. 11/28/01), ___ So.2d ___, 2001 WL 1511864 (unpub'd appx. at p. 9) (prospective juror properly dismissed for cause because he could not consider death penalty under the facts of the case, outlined by the prosecutor as one where the defendant was alleged to have killed his infant son with specific intent).

This court has held that a potential juror who indicates that he will not consider a life sentence, but will instead automatically vote for the death penalty under the particular factual circumstances of the case before him, is subject to a challenge for cause. *State v. Maxie*, 93-2158 (La. 4/10/95), 653 So.2d 526; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278. I would find that the trial judge abused his discretion in failing to excuse for cause prospective jurors Sintes, Tortorich, and Jordan, who expressed their unswerving inclination to return a death sentence in a case such as the defendant's.

Although Sintes, Tortorich, and Jordan did initially indicate, before any circumstances of the crime alleged were known to them, to have open minds as to the sentence to be imposed, when these prospective jurors learned that the case actually involved the aggravating circumstance of an intentional killing during an armed robbery, their responses quite clearly shifted to foreclose the possibility of returning a life sentence. Besides saying that she would "automatically" vote for death if the defendant intentionally murdered someone during an armed robbery, Ms. Sintes also responded in the negative when asked if any mitigating circumstances could persuade her to consider a life sentence: "If I feel like he did it intentionally, . . . I feel like he would get the death penalty." Mr. Tortorich also responded in the negative when asked if he could consider a life sentence if the defendant intentionally killed the victim during an armed robbery: "I don't think I'd consider life imprisonment." Finally, Mr. Jordan was the most emphatic of the three. When asked if he would vote for death if he found the defendant intended to kill the victim, Mr. Jordan stated, "Yes, I will." Then, when asked if anything would persuade him otherwise, he responded, "It's hard to say, but it would have to be pretty strong." The State exerted no effort to rehabilitate these jurors even after defense counsel had elicited such pro-death

statements from them. Consequently, these jurors never abandoned their opinion that the only appropriate sentence for a person convicted of an intentional killing during an armed robbery was the death sentence.

Despite such emphatic and implacable stances expressed by the jurors, the majority now simply accepts without more that the State "seemed confident" and the trial court "appeared satisfied" with the jurors' initial responses that they would have an open mind. *Ante*, p. 20. In my view, for the death sentence to be valid under the constitution, the chosen jurors must be open-minded about whether to impose the death penalty, even though the facts permit imposition of such a penalty, because jurors can impose a sentence of life with or without the existence of mitigating circumstances. *See State v. Wessinger*, 98-1234 (La. 5/28/99), 736 So.2d 162; *State v. Martin*, 550 So.2d 568 (La. 1989).

Though the majority characterizes the instant case as similar to *State v. Chester*, 97-2790 (La. 12/1/98), 724 So.2d 1276, and *State v. Taylor*, 99-1311 (La. 1/17/01), 781 So.2d 1205, the jurors in those cases, displayed voir dire responses that, in the totality, reflected their ability to consider the whole picture before deciding what sentence to impose. For example, in *Chester*, the prospective juror, we reasoned, was more likely confused as to the relationship between specific intent and mitigating circumstances, but it was clearly evident that she would listen to both mitigating and aggravating circumstances and that she would make a judgment as to the sentence to impose based on the evidence presented in the penalty phase. We found no abuse of the trial court's discretion in denying the challenge for cause because the juror had not expressed an unconditional unwillingness to impose the death penalty under any and all circumstances. There is nothing in the voir dire record on which to base a similar confidence in the ability of the three prospective jurors in the instant case to follow the

court's instructions impartially and evaluate all of the evidence presented to them. Viewed as a whole, the responses of Sintes, Tortorich, and Jordan neither evince the balance we found in *Chester* nor suggest a mere personal preference for the death penalty like we observed in *Taylor*. Instead, the only fair reading of the entire voir dire responses of these prospective jurors is that they were irretrievably committed to returning a verdict of death in this defendant's case. As such, these prospective jurors should have been excused for cause.