IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALFREDIE STEELE,

Respondent/Defendant.
_____/

CASE NO. SC04-802
Second DCA No. 2D04-1049
Lower Court No. 03-02280CFAES
Pasco County Circuit Court

ON PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

AMENDED ANSWER BRIEF OF RESPONDENT ON THE MERITS

BOB DILLINGER
PUBLIC DEFENDER
SIXTH JUDICIAL CIRCUIT

By: Joy K. Goodyear
Assistant Public Defender
Florida Bar Number: 0159972

ATTORNEY FOR RESPONDENT

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The two certified questions should be answered in the negative. The trial court did not depart from the essential requirements of the law and the state will not suffer irreparable harm by the court's ruling that the state should provide notice of the aggravating factors and that the jury should use a special verdict form. The order also does not result in a miscarriage of justice. Therefore, the Second District Court of Appeal erred in granting certiorari as to the portion of the order requiring notice of aggravators and correctly denied certiorari as to the portion of the order requiring the special verdict form. In Ring v. Arizona, 536 U.S. 584, 609 (2002), the United States Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment because it allocated to the judge rather than the jury the responsibility of making the findings of fact necessary to impose a death sentence. The only requirements the trial court has imposed in the present case are for the state to provide notice to the defense as to what aggravating factors the State intends to argue to the jury and for the jury to use a special interrogatory

verdict form, to record which aggravating factors the jury found were established beyond a reasonable doubt and the vote of the jury on each one. At the hearing on the defense's Motion to Bar Imposition of Death Sentence on Grounds that Florida's Capital Sentencing Procedure is unconstitutional under Ring, the court specifically asked defense counsel if these curative steps would resolve the constitutional issues and defense counsel indicated that they would, at a minimum, alleviate some of the constitutional problems. Therefore, the state's argument that the court granted relief not requested by the defense, is unfounded.

The Second District Court of Appeal was correct in stating that Florida law does not specifically prohibit a trial judge from using a special verdict form. State v. Steele, 872 So.2d 364, 365 (Fla. 2nd DCA 2004). The new requirement of a special verdict form does not improperly invade the province of the jury because the only requirement placed upon the jury is that it record what it has decided. This requirement does not invade the province of the jury, but instead will help appellate review of the proceedings if there is a change in the law.

The state further argues that the court's order will create chaos, but this argument is without merit. While this trial will have some safeguards to protect it from reversal if there is a change in the law, it does not affect the way the trial is conducted or how the parties proceed. This would not result in the imposition of

the death sentence being arbitrary or capricious. In fact, the only error in the trial court's ruling is that it does not go far enough to solve the constitutional infirmities of Florida's capital sentencing statutes. The respondent requests this court to answer the certified questions in the negative and affirm the Second District Court of Appeals order denying certiorari as to the portion of the order requiring the special verdict form and reverse the granting of certiorari as to the portion of the order requiring notice of aggravators.

Argument

ISSUE I - DOES A TRIAL COURT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW, IN A DEATH PENALTY CASE, BY REQUIRING THE STATE TO PROVIDE PRE-GUILT OR PRE-PENALTY PHASE NOTICE OF AGGRAVATING FACTORS?

The defense filed a Motion to Bar Imposition of Death Sentence on Grounds that Florida's Capital Sentencing Procedure is Unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). In the motion, the defense argued that the statute was unconstitutional for three reasons. Those reasons were that in Florida the judge makes the factual findings necessary to impose a death sentence, instead of a jury; that the jury's advisory sentencing recommendation does not have to be unanimous; and that the state does not have to list the aggravating circumstances it is seeking to establish in the indictment. After a hearing, the trial judge ordered that

the statute was constitutional, but the state would have to give notice to the defense as to what aggravating factors it would be seeking to prove and the jury would record their findings on a special verdict form. The state filed a Petition for Writ of Certiorari and the Second District Court of Appeal denied certiorari as to the portion of the order requiring the special verdict form and granted certiorari as to the portion of the order requiring notice of aggravators. State v. Steele, 872 So.2d 364, 365. The trial court's order does not depart from the essential requirements of law or result in a miscarriage of justice and therefore the Second District Court of Appeal erred in granting certiorari as to the portion of the order requiring notice of aggravators and correctly denied certiorari as to the portion of the order requiring a special verdict form.

The standard of review for certiorari is whether the "lower court did not afford procedural due process or departed from the essential requirements of law." Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885, 889 (Fla. 2003). The trial court's order requiring the state to give notice as to what aggravators it would be seeking to establish does not depart from the essential requirement of law or result in a miscarriage of justice. Further, the state is not irreparably harmed by the trial judge's order that the state must provide notice of the aggravating factors because the order does not affect the way the state prosecutes the case, but only requires

that the state give the defense notice as to what aggravating factors it will be seeking to establish.

While Florida law does not require the state to give notice of aggravating circumstances and this Court has ruled that notice is not required, there is also not a prohibition against a trial judge requiring the state to give notice. The Second District Court of Appeal cited to Vining v. State, 637 So.2d 921 (Fla. 1994) to supports its finding that the trial judge departed from the essential requirements of law in ordering the state to give notice to the defense as to what aggravating factors it would be trying to prove. Steele, 872 So.2d at 365. While Vining does hold that the state is not required to give notice, it does not state that an order requiring notice would depart from the essential requirements of law or result in a miscarriage of justice. Vining, 637 So.2d at 927. The trial judge should be able to order the state to provide notice of the aggravating circumstances if the trial judge believes the circumstances so require. Since there is not a law prohibiting the state from giving notice of the aggravating circumstances, the trial judge did not depart from the essential requirements of law in ordering the state to do so. In addition, by requiring the state to give notice of the aggravating factors that the state will be seeking to prove, the case will not be subject to reversal if the law changes to require notice.

The trial court's order requiring the state to give notice of the aggravating factors complies with Florida law. Florida courts have consistently treated aggravating factors that cause an offense to be reclassified to a more serious level or that trigger the application of a minimum mandatory sentence as elements of an offense that must be charged in the indictment and specifically found by the jury, unanimously and beyond a reasonable doubt. Bottoson v. Moore, 833 So.2d 693, 701 (Fla. 2002). The current procedures for imposing a death sentence in Florida do not require notice of aggravating circumstances; do not require that the jury unanimously agree on the existence of any aggravating circumstance or on the ultimate question whether there are sufficient aggravating circumstances to warrant imposition of the death penalty; do not require that a finding of sufficient aggravating circumstances be made beyond a reasonable doubt; and are not subject to the rules of evidence. This violates Florida law, independent of federal constitutional law, and impermissibly affords capital defendants fewer rights than defendants facing a three-year minimum mandatory sentence for possessing a firearm during commission of a crime. Bottoson, 833 So.2d at 709-710 (Anstead, C.J., concurring). In addition to federal due process and notice requirements, state law independently requires that,

> "A charging document must provide adequate notice of the alleged essential fact the defendant must defend against. Art. I, Sections 9, 16, Fla. Const. In recognition of this concern, Florida Rule of Criminal Procedure 3.140(b) provides that an 'indictment or information upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.'"
> State v. Rodriguez, 575 So.2d 1262, 1264 (Fla. 1991); State v. Dye, 346 So.2d 538, 541 (Fla. 1977) ("An information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference."); see also Drain v. State, 601 So.2d 256, 261-62 (Fla. 5th DCA Ct. App. 1992) (citing art. I, Section 16, Fla. Const. and Fla. R. Crim. P. 3.140(d)(l) and (o); Fla. R. Crim. P. 3.140(d)(1) ("Each count of an indictment of information upon which the defendant is to be tried shall allege the essential facts constituting the offense charged.") (emphasis added).

"Where an indictment or information wholly omits to allege one of more of the essential elements of the crime, it fails to charge a crime under the laws of the state." State v. Gray, 435 So.2d 816, 818 (Fla. 1983).

Taking from the jury its obligation to determine any element of an offense is a denial of due process and an "invasion of the jury's historical function." State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984); Henderson v. State, 20 So.2d 649 (Fla. 1945) ("It is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence.") Thus, in order to prevent "a miscarriage of justice," a jury and not a judge must make the finding

"that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087..." Overfelt, 457 So.2d at 1387. A jury can only find elements alleged in the information, because conviction of an offense not charged violates due process. Gray, 435 So.2d at 816.

The Second District Court of Appeal stated that "Ring does not require the State to provide notice of aggravators." Steele, 872 So.3d at 365. However, in Ring, the court did state "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, 536 U.S. at 585 (quoting Apprendi, 530 U.S. at 494 n. 19); see also Bottoson, 833 So.2d at 703 (Anstead, C.J., concurring); Id. at 710 (Shaw, J., concurring); Id. at 719 (Pariente, J., concurring). Ring is premised in part on the principle that "[c]apital defendants, no less than non-capital defendants," are entitled to the due process and jury trial rights that apply to "the determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 589. "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." Id. at 609. This reasoning applies with equal force to the state law protections, both constitutional

and common law, that apply to the determination of essential elements of an offense. See Bottoson, 833 So.2d at 703 (Anstead, C.J., concurring) (noting that Florida state law requires unanimous verdicts); Id. at 710-11 (Shaw, J., concurring) (finding that if Ring's rationale is applied to Florida's capital sentencing statute, "the statute violates settled principles of state law.")

Indeed, Florida law has long recognized that aggravating circumstances "actually define those crimes...to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); see also Hootman v. State, 709 So.2d 1357, 1360 (Fla. 1998) (addition of new aggravating circumstance "alter[s] the definition of the criminal conduct that may subject [the defendant] to the death penalty and increas[es] the punishment of a crime..."), abrogated on jurisdictional grounds, State v. Matute-Chirinos 713 So.2d 1006 (Fla. 1998).

The state argues that "it is incontestable that this Court has repeatedly held that Florida's death sentencing statute, Sec. 921.141, remains constitutional in the wake of challenges raised pursuant to Ring..." (Brief of Petitioner on the Merits, p. 6.) However, this Court has not decided if Ring applies to Florida or under what circumstances it might apply. Windom v. State, 29 Fla. L. Weekly S191 (Fla. May 6, 2004). In fact, no majority view has emerged. Id. In Justice Pariente's specially

concurring opinion there are several statements that establish that this Court has not decided the applicability of Ring. Some of these statements are as follows:

> "deciding retroactivity is premature because we have not determined whether Ring has any applicability to Florida's capital sentencing scheme...because a majority of this Court has been able to dispose of post-conviction Ring claims on other grounds, there is no need to decide retroactivity now...we cannot determine whether Ring constitutes a 'development of fundamental significance,' Witt 387 So.2d at 931, until we have ascertained its effect, if any, on Florida's capital sentencing scheme...In contrast, because we cannot yet ascertain the effect of Ring in Florida, we cannot yet reliably determine retroactivity. Id. If and when either this Court or the United States Supreme Court determines in a specific case that Ring has invalidated a Florida death sentence in some respect..."
> Id.

The opinion is then concluded by the following statement, "In conclusion, I believe that because of the uncertainties in the law created by Ring and yet to be resolved in this State, we would be acting unnecessarily, prematurely, and with no significant conservation of judicial resources in determining at this point whether Ring is retroactive." Windom, 29 Fla. L. Weekly at S191. These statements clearly prove that this Court has not determined if Ring applies to Florida.

The state argues that the trial court's order intrudes into the prosecutorial function, but the trial court is not preventing the state from seeking the death

penalty or limiting the cases where the death penalty can be sought, instead the trial court is simply requiring that the state give notice to the defense of what aggravating factors it is planning to prove. The state also argues that it is not necessary to give notice because the aggravating factors are enumerated in Florida Statutes Section 921.141(15). There are 14 different aggravators listed in this section. Requiring the defense to guess which of the 14 factors will be used is not sufficient to put the defense on adequate notice and violates due process. The state further argues that the discovery process allows the defense to discover what aggravating factors the state is seeking to establish. However, if the defense is able to determine what the aggravating factors are than the state should not be opposed to having to clearly state what they are. The state argues that the trial court's ruling imposes an unwarranted additional discovery burden upon the State that cannot be reciprocated. However, simply stating what factors the state is seeking to establish is not an additional burden, especially considering the state's argument that the defense can determine what the factors are through discovery. Stating what aggravating factors the defendant will need to defend against falls into the same category of notifying the defendant as to what charge he is defending against. Therefore, there is no need for a reciprocal burden.

The trial court's order requiring the state to give adequate notice of those aggravating factors which it intends to submit and argue to the jury as a basis for the imposition of the death penalty does not depart from the essential requirements of law or result in a miscarriage of justice. Therefore, the Second District Court of Appeal erred in granting certiorari in regard to this part of the trial judge's order. The respondent respectfully requests that this Court answer the certified question in the negative and reverse the Second District Court of Appeal's granting of certiorari.

ISSUE II - DOES A TRIAL COURT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW, IN A DEATH PENALTY CASE, BY USING A PENALTY PHASE SPECIAL VERDICT FORM THAT DETAILS THE JURORS' DETERMINATION CONCERNING AGGRAVATING FACTORS FOUND BY THE JURY?

The Second District Court of Appeal correctly denied certiorari in regard to the portion of the court order requiring the jury to record their findings on a special verdict form. By doing so, the Second District Court of Appeal held that the trial court's order does not violate the essential requirements of the law and is not a miscarriage of justice. The respondent respectfully requests this court to affirm the Second District Court of Appeal's holding and answer the certified question in the negative.

Florida law does not prohibit a trial judge from using a special verdict form. Steele, 872 So.2d at 365. The trial court's ruling does not create new law or change the deliberative process of the jury. The requirement of a special verdict form does not invade the province of the jury because it does not affect the way the jury determines their recommendation, but only requires the jury to record its findings. Contrary to the state's position, the special verdict form does not contradict the standard jury instruction because it does not require that the jury be unanimous, only that it record is findings. It also would not cause any confusion to

the jury because it does not alter the jurors' deliberations, but simply requires that the jurors specify how many jurors found each aggravating factor.

In Ring, the United States Supreme Court held that a jury must make the findings of fact necessary to impose the death penalty. Ring, 536 U.S. at 609. In Florida the jury only gives an advisory sentence to the judge, while the judge determines what aggravating and mitigating factors are present and what sentence to impose. While the Florida Supreme Court in King v. Moore, 831 So.143 (Fla. 2002) and Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) upheld the constitutionality of the Florida statute by a plurality opinion since Ring, it has not determined if Ring applies in Florida. In Windom, this Court upheld the sentence of death, but also stated that the jury's recommendation was unanimous and one of the aggravating factors was a prior violent felony. Windom, 29 Fla. L. Weekly at S191. In Justice Cantero's specially concurring opinion it states,

> "I believe we should finally decide the question of whether, even if Ring did apply in Florida (members of this Court disagree on whether it does, and under what circumstances), it would apply retroactively...All states where, in capital cases, a judge was partially or totally responsible for the sentencing decision had to determine whether and under what circumstances Ring applied and whether it required anywhere from a slight change to a total revamping of the sentencing process. In this Court, no majority view has emerged...Neither Bottoson nor

> King, therefore, finally settled the question of whether Ring applies in Florida."
> Windom, 29 Fla. L. Weekly at S191.

Since the question of whether Ring applies in Florida has still not been answered, as can be seen by these statements, it was prudent of the trial court in this case to take steps to prevent reversal if this Court or the Untied State Supreme Court rules that Ring does apply to Florida. If the law were to change, the trial court's ruling would facilitate appellate review of Mr. Steele's case. By having the jury record its findings, the appellate court will be able to determine if the judge based the sentence on aggravating factors that were found by the jury and by what vote. In addition, if it becomes a requirement that the aggravating factors have to be found by a unanimous jury, the special verdict form would enable the court to determine whether the findings were unanimous and would protect against the case being reversed.

In Ring, the United States Supreme Court described Florida as a hybrid state where a jury gives an advisory sentence to the court. Ring, 536 U.S. at 608. In footnote 11 in Davis v. State, 859 So.2d 465, 486 (Fla. 2003), Judge Pariente in a dissenting opinion stated,

> "In a concurring opinion in Way v. State, 760 So.2d 903, 924 (Fla. 2000), I identified Florida as being 'in a small

> minority of jurisdictions with a statute that allows the imposition of the death penalty even though the jurors' vote is less than unanimous.' In Ring, the United States Supreme Court named Florida, Alabama, Indiana, and Delaware as the four states having hybrid death schemes involving both judge and jury in the sentencing process. [citations omitted] In Alabama, a jury recommendation of death, which reflects a finding of the existence of at least one aggravating circumstance, requires the vote of at least ten jurors. See Ala. Code § 13A-5-46(f)(2002). Indiana requires a unanimous jury finding of the existence of at least one aggravating circumstance to support a death recommendation, and in legislation passed since Ring, now also requires special verdict forms on aggravating circumstances. See Overstreet v. State, 783 N.E.2d 1140, 1161 (Ind. 2003) (citing to Ind. Code § 35-50-2-9(d), amended by P.L. 117-2002 § 2). Delaware changed its capital sentencing law shortly after the Ring decision and now prohibits a death sentence in the absence of a unanimous jury finding beyond a reasonable doubt of the existence of at least one aggravating circumstance. See 73 Del. Laws 423 (2002) (amending Del. Code Ann. tit.11, § 4209(4)(e)(1)). Thus, of the four hybrid states identified in Ring, Florida is now the sole jurisdiction in which the jury can determine that an aggravating circumstance exists, and thereby recommend death, by a bare majority vote."

Since Florida is the only state remaining that allows a finding of an aggravating circumstance by a bare majority vote, it is likely that this requirement will soon be changed. The trial court's order simply puts measures in place to assist the appellate courts if and when that change occurs.

As in Windom, in the cases decided by the Florida Supreme Court since Ring, the court has based its affirmance on the fact that the jury did find an aggravating factor, such as the defendant having a prior violent felony or committing the murder during a felony or because the jury's finding was unanimous. Fennie v. State, 855 So.2d 597 (Fla. 2003). The language used by the court indicates that if the factors had not been found by the jury or were not unanimous that the court may have reversed based on Ring. In Fennie, in his concurring in part and dissenting in part opinion Judge Anstead stated,

> "I find it telling that the majority feels compelled, in this postconviction case, to specifically recognize that the jury's advisory sentence in this case was unanimous and that one of the aggravating circumstances was inherent in the jury's guilt phase conviction. This recognition suggests, of course, that in cases where there is no unanimous recommendation or 'exempt' aggravating circumstance, a postconviction argument based on Ring might be meritorious."
>
> Fennie, 855 So.2d at 611.

Since Florida's death penalty statute is currently under debate, the trial court took the necessary steps to help protect against reversal if there is a change in the law. This action is not against the essential requirements of the law, does not cause irreparable harm to the state, or result in a miscarriage of justice.

In Ring, the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment because it allocated to the judge rather than the jury the responsibility of making the findings of fact necessary to impose a death sentence. Ring, 536 U.S. at 609. The Florida Supreme Court has nevertheless concluded that it must uphold the constitutionality of Florida's statute unless and until the United States Supreme Court overrules Hildwin v. Florida, 490 U.S. 638 (1989) and expressly applies Ring to Florida. See Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002). In Bottoson, five justices wrote separately to express their opinion that Florida's statute is problematic under Ring, while concurring in the decision to defer to the United State Supreme Court. Bottoson, 833 So.2d at 703-734. Justice Pariente stated that she would require explicit jury findings on each aggravator, Justice Quince suggested that the jury be given special interrogatories at the penalty phase, and Justice Anstead stated that under the current situation there cannot be any meaningful appellate review because it is impossible to tell which aggravating circumstance were found by the jury and by how many jurors. Id. at 702; 708; 723.

Florida's capital sentencing statute suffers from the identical flaw that led the Court in Ring to declare the Arizona statute unconstitutional. Florida law, like

Arizona law, makes imposition of the death penalty contingent on the judge's factual findings regarding the existence of aggravating factors. Section 775.082(1), Florida Statutes, which prescribes the punishment for a "capital felony," states specifically that a defendant may be sentenced to death only if "the proceeding held to determine sentence according to the procedure set forth in Section 921.141 results in findings by the court that such person shall be punished by death, otherwise, such person shall be punished by life imprisonment." Section 775.082(1), Fla. Stat. (1995). Section 921.141(3), Florida Statutes, provides in turn that "[n]othwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." To enter a sentence of death, the judge must make "specific written findings of fact based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." Section 921.141 (3), Florida Statutes (2003). Thus, in Florida, as in Arizona, although the maximum sentence authorized for first-degree murder is death, a defendant convicted of first-degree murder cannot be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury. See Bottoson, 833 So.2d at 703-734. Therefore, like the statute in Arizona, the Florida

statute is unconstitutional under the Sixth and Fourteenth Amendments.

In Globe v. State, 29 Fla. L. Weekly S119a (Fla. 2004), decided March 18, 2004, three justices wrote a concurring opinion in which they suggested that similar steps as the trial court took in the present case be utilized and that the jury instructions and verdict forms be reevaluated in light of Ring. The concurring opinion states,

> "At the very least, jurors should be told that they are the finders of fact on aggravating circumstances. In addition, special verdict forms specifying each aggravating circumstance found by the jury will assist the trial court in determining whether to impose the death penalty, and will also facilitate review by the appellate court, especially in a harmless error analysis. Some trial judges have been using special verdict forms since Ring; in fact, some judges were using special verdict forms even before Ring. I would thus suggest that the Committee on Standard Jury Instructions in Criminal Cases, in conjunction with the Steering Committee on Criminal Law, study the matter and propose changes to the verdict form and instructions on the jury's role in the penalty phase that this Court can then consider and either reject, accept or modify."
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> Globe, 29 Fla. L. Weekly at S119a.

In order to alleviate some of the constitutional infirmities of the Florida statutory scheme, in the present case, the trial judge ordered that some of these safeguards would be put into place. The trial judge ordered that the state would need to give notice to the defense as to what aggravating circumstances it sought to

prove and that the jury would need to record its findings on a special verdict form. The state argues that the trial court is creating new law by requiring the jury to record their findings. Requiring the jury to record what it was already doing is not creating new law and does not affect the jury in any substantive way. The state expresses concern that the trial judge may only rubber stamp the finding of the jury, but trial judges are well aware of their obligations and simply requiring the jury to record their findings will not affect trial judges' ability to fulfill their obligations.

The state further argues that the court's ruling provides relief that was not requested and that is contrary to Mr. Steele's arguments. However, during the hearing on the motion, the trial judge asked defense counsel if the curative measures would solve the potential constitutional problems and defense counsel indicated that the curative measure would cure the constitutional issues in part. (T. 8.) The court has not rewritten the statutes, but instead has fashioned a remedy that will facilitate meaningful appellate review, no matter how the law may be changed in the meantime. Therefore, the Respondent respectfully requests that the certified questions be answered in the negative.

CONCLUSION

The trial court's order requiring the State to provide notice to the defense as to what aggravating factors it is seeking to prove and requiring the jury to record their findings are curative steps to protect against reversal if the current death penalty procedures are changed or are found to be unconstitutional. The additional requirements do not cause irreparable harm to the state and do not affect the prosecutor's discretion in seeking the death penalty, but establish procedures that will facilitate meaningful appellate review. The trial court did not depart from the essential requirements of law in establishing these curative procedures and the order does not result in a miscarriage of justice. Therefore, this Court should reverse the Second District Court of Appeal's granting of certiorari in regard to the portion of the order requiring notice of the aggravating factors and affirm the denial of certiorari in regard to the portion of the order requiring the jury to use a special verdict form. Mr. Steele respectfully requests that this Court answer the certified questions in the negative.

Respectfully submitted,

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_____

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari, Writ of Prohibition and Request for Stay has been furnished by hand delivery to the Honorable Lynn Tepper, Circuit Judge, Pasco County Courthouse, 38053 Live Oak Avenue, Room 106C, Dade City, Florida 33523-3819; by U.S. Mail to Candace M. Sabella, Assistant Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013; and by hand delivery to the Honorable Bernie McCabe, State Attorney, Pasco County Courthouse, 38053 Live Oak Avenue, Dade City, FL. 33523, this _____ day of _____, 2004.

_____

COUNSEL FOR RESPONDENT

Certification of Type Size and Style

Undersigned Counsel certifies that the size and style of type used in this Petition is Times New Roman, 14 point, a font that is not proportionately spaced and does not exceed 10 characters per inch.

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COUNSEL FOR RESPONDENT