IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. SC04-802

v. **2d DCA No. 2D04-1049**

Lower Tribunal No. 03-02280CFAES

ALFREDIE STEELE,

Respondent.

_____/

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

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT REGARDING CERTIFIED CONFLICT

This Court has postponed its decision on jurisdiction in this case. (See, Order dated June 5, 2003). The District Court has certified the following two questions for this Court's review:

> (1) 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?
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> (2) 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?

STATEMENT OF CASE AND FACTS

Defendant Steele was charged by Indictment filed June 18, 2003, with first degree murder of a Pasco Sheriff's Deputy on June 1, 2003, by shooting him in the back with a high-powered firearm while he sat in his patrol car in the early morning hours before daylight. (Petitioner's Exhibit 2)[1]

On September 15, 2003, the Defendant filed a pretrial Motion to Bar Imposition of Death Sentence as unconstitutional,

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[1] Exhibits referred to are those exhibits attached in the appendix to the State's Petition for Writ of Certiorari, Writ of Prohibition and Request for Stay, filed March 11, 2004 in the Second District Court of Appeal and are included in the record on appeal. As the State was not furnished a copy of that record, the exhibits will be designated as they were in the court below.

pursuant to Ring v. Arizona, 536 U.S. 584 (2002). A hearing was held on the motion on January 8, 2004 (Pet. Exh. 4) and the motion was denied by an order dated February 10, 2004. (Pet. Exh. 1) Despite rejecting the claim that Florida's capital sentencing procedure is unconstitutional under Ring, the circuit judge, nevertheless, first suggested and then imposed requirements which she felt would "cure the constitutional issues." (Pet. Exh. 4, pp. 8, 10, 17-18) The circuit court, *sua sponte*, granted relief, unrequested in the Defendant's Motion, requiring the State to provide notice of the aggravating factors it would argue and requiring completion of interrogatory verdict forms as to which aggravators were found by the jurors to have been established beyond a reasonable doubt and the vote on each. The State objected. (Pet. Exh. 4, pp. 34-35)

The State sought the review of the Second District Court of Appeal to reverse the circuit court's order requiring the State to provide notice of aggravators it will argue and requiring interrogatory verdict forms to specify which aggravators were found by the jury and the vote thereon. On April 23, 2004, the Second District issued its opinion agreeing that the trial court's order requiring the State to provide notice of aggravators departs from the essential requirements of law. With regard to the State's challenge to the special verdict

forms, the Second District found that the order does not depart from the essential requirements of the law.

Because this ruling may affect many cases that may ultimately be reviewed by the Florida Supreme Court, the District Court certified the foregoing questions.

SUMMARY OF THE ARGUMENT

The two certified questions should be answered in the affirmative as this Court has consistently rejected challenges to Florida's death penalty statute based on Ring. Accordingly, the trial court's *sua sponte* decision to fashion remedies to what it perceived were infirmities in the statute should be reversed.

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 State sought discretionary review in the Second District Court of Appeals of two rulings by the trial court. After reviewing the lower court's order, the district court reversed the trial court's order requiring the State to give notice of the aggravators. Although the district court found that this portion of the order departed from the essential requirements of the law, it certified the following question to this Court.

> (1) 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 district court's basis for reversing the lower court's order was set forth as follows:

> In Vining v. State, 637 So. 2d 921 (Fla. 1994), the Florida Supreme Court held that because the aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), Florida Statutes (1987), there is no reason to require the State to notify defendants prior to trial or the penalty phase of the aggravating factors that it intends to prove. The United States Supreme Court's decision in Ring does not affect the holding in Vining because Ring does not require the State to provide notice of aggravators. See Kormondy v. State, 845 So. 2d 41, 54

> (Fla. 2003). Therefore, the trial court's order requiring the State to provide notice of aggravators departs from the essential requirements of law. See State v. Richman, 861 So. 2d 1195 (Fla. 2d DCA 2003); Allstate Ins. Co. v. Hodges, 855 So. 2d 636 (Fla. 2d DCA 2003).
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> State v. Steele, 872 So. 2d 364 (Fla. 2004)

The State urges this Court to answer the first certified question in the affirmative and affirm the district court's holding as to this issue for the following reasons.[2]

It is the State's position that the trial court's *sua sponte* fashioning of its own remedy for the constitutional infirmities that Steele urged resulted from the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), was a departure from the essential requirements of law. 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, and that Florida law does not require either notice of the aggravating factors that will be presented by the State, or special verdict

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[2] The standard of review for certiorari requires a showing of "departure from the essential requirements of the law" or "a violation of a clearly established principle of law resulting in a miscarriage of justice." Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003). The standard of review for the pure questions of law is *de novo*. D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003), citing Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

forms to record which aggravators were found by the jury and the vote thereon. Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) ("Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury.") See also Lynch v. State, 841 So. 2d 362, 378 (Fla.), cert. denied, 124 S. Ct. 189 (2003); Vining v. State, 637 So. 2d 921 (Fla. 1994); Patten v. State, 598 So. 2d 60 (Fla. 1992); Hildwin v. Florida, 490 U.S. 638 (1989); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Even before Ring, this Court consistently rejected arguments that either prior notice of the aggravators or a unanimous vote by the jurors was required. Gore v. State, 475 So. 2d 1205 (Fla. 1985); Patten, supra; Brown v. Moore, 800 So. 2d 223, 225 (Fla. 2001); Cole v. State, 841 So. 2d 409, 429-30 (Fla. 2003); Lewis v. Moore, 838 So. 2d 1102, 1122 (Fla. 2002); Hurst v. State, 819 So. 2d 689, 702-03 (Fla. 2002). See King v. State, 808 So. 2d 1237 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla.), cert. denied, 536 U.S. 962 (2002).

Additionally, this Court has unanimously rejected a rule amendment that would have required reciprocal pretrial delineation of aggravating and mitigating circumstances.

Amendments to Florida Rule of Criminal Procedure 3.220(h), 700 So. 2d 381 (Fla. 1997). In its opinion rejecting the proposed rule, this Court acknowledged the unfair prejudice to the State of potentially having aggravating factors excluded when there was little likelihood that any similar sanctions would or could be imposed upon the defense.

This Court has also held that Sec. 921.141(5) sufficiently informs a defendant of the aggravators he must defend against to obviate any necessity for the State to give notice of the aggravators it will rely on. Vining, supra; Lynch, supra. Because Florida's capital sentencing statute does not make the death sentence an enhancement of a life sentence, the aggravators are not elements of a charged offense for which a defendant must receive notice to afford due process. Bottoson, supra; Mills v. Moore, 786 So. 2d 532, 538 (Fla. 2001).

Moreover, even though there is no constitutional right to pretrial discovery, Perry v. State, 395 So. 2d 170 (Fla. 1980), the Florida rules of procedure have, since 1972, provided for a broad process of reciprocal discovery that may be invoked by the defense. Fla. R. Crim. P. 3.220 (2003). Under this rule, the State must provide the defense with a list of all witnesses with relevant information, allow access to all evidence either taken from the accused or intended to be used at trial, disclose

statements of witnesses and the defendant and reveal the results of expert examinations and scientific tests. In addition, Florida was one of the first states to allow full pretrial depositions of virtually all witnesses in felony cases, a right that applies equally to the guilt and penalty phases of a capital trial.

Thus, a capital defendant in Florida has far more rights and a far better opportunity to prepare for trial and sentencing than in many other jurisdictions in the United States - not as a matter of constitutional right, but by the courtesy of this Court's rule-making authority. For the trial court to rule that the federal constitution requires more, is a clear departure from existing precedent and an unwarranted denigration of the federal and state judicial systems that provide more limited discovery rights.

Since this Court continues to hold that aggravating factors are not elements of capital murder that must be alleged in the indictment, the trial court's ruling imposes an unwarranted additional discovery burden upon the State that cannot be matched by any reciprocal burden upon the defense to plead the mitigating circumstances they intend to present.[3] The trial

[3] To achieve a reciprocal balance and require notice of mitigating evidence potentially violates the dictates of Hitchcock v. Dugger, 481 U.S. 393 (1987), which precludes

court's imposition of this burden only upon the State insures the imbalance of obligation and remedy that so troubled the Supreme Court. This is a harm that cannot be belatedly corrected by a post trial appeal and which should therefore be remedied through interlocutory review.

For individual circuit courts to require more than has been held by the Florida Supreme Court to satisfy Florida statutory and constitutional law and U.S. constitutional law is also an unlawful intrusion into the prosecutorial function, in requiring the State to give prior notice of aggravators it will rely on, and into the legislative branch of government, in requiring special verdict forms as to aggravating factors found and the vote thereon. See State v. Jordan, 630 So. 2d 1171 (Fla. 5th DCA 1993) (order requiring State to answer interrogatories to reveal its decision to seek the death penalty was quashed and certiorari granted). This Court has recognized that a state attorney has absolute discretion in whether and how to prosecute. State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986); State v. Cain, 381 So. 2d 1361, 1368 (Fla. 1980) (see especially note

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limiting mitigating circumstances presented to the jury. Similarly, the requirement that jurors specify the vote with regard to each aggravator could potentially have a chilling effect on the deliberative process, interfering with the jury's obligation to conduct an individualized sentencing determination contrary to Hitchcock.

8, “the courts are not to interfere with the free exercise of the discretionary powers of the prosecutor in his control over criminal prosecutions”).

In Bloom, the Court reversed a trial judge’s decision not to impanel a death-qualified jury, based on the judge’s determination that the death penalty would not apply on the facts of the case. In holding that this determination unconstitutionally infringed upon an exclusively executive function, the Court noted that approval of such a pretrial determination would require a modification of Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), which recognized that the State need not divulge the intended aggravating factors.

The State urges this Court to affirm the district court’s decision that the trial court’s order departed from the essential requirements of the law and to answer the question in the affirmative.

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?

In addition to ordering the State to provide pretrial notice of the aggravators, the trial court also fashioned its own remedy for any potential Ring errors by ordering special verdict forms for the jury with regard to its penalty phase findings. The district court rejected the State's argument, finding that since Florida law does not specifically prohibit a trial judge from using a special verdict form such as the one ordered here, the trial court's order as to the special verdict form does not depart from the essential requirements of law. Nevertheless, since the ruling could affect many cases that are solely within the jurisdiction of this Court, the court also certified the foregoing question. The State asks this Court to find that it is a departure from the essential requirements of law, in a death penalty case, to use a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury.

The district court correctly states that Florida law does not specifically prohibit a trial judge from using a special

verdict form. However, it is well recognized that trial courts should adhere to the standard instructions in the absence of extraordinary circumstances. cf. Speights v. State, 668 So. 2d 316, 318 (Fla. 4th DCA 1996) Those extraordinary circumstances were not present in the instant case as this Court has consistently rejected any claim that Ring calls for special verdict forms. Moreover, there was no request for a special verdict form. The suggestion was made by the trial judge in order to fashion a remedy to a problem that does not exist. Thus, while it may be appropriate in some cases where particular factual issues require a trial court to depart from the standard instructions, this is not such a case. The departure from the standard instructions here was a result of the trial judge's incorrect view of the law as it applies to death penalty proceedings and was not on facts unique to this case that would require discretion on the trial judge's part.

Accordingly, the trial court's ruling erroneously creates new law by changing the deliberative process of the jurors established in 921.141(2), reflected in the Jury Instructions for Penalty Proceedings in capital cases, in a substantive way, and improperly invades the jury's province. Compare Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995). The statute requires the jurors to render their advisory sentence based only

on “(a) Whether sufficient aggravating circumstances exist . . .; (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.” The trial court’s order improperly expands the advisory function of the jurors, beyond that established by the statute and standard jury instruction, to also inform the judge of which aggravating factors were found and by what vote.

The requirement of the proposed special verdict form constitutes an impermissible intrusion on the deliberation of the jury. Said intrusion serves no lawful or necessary purpose related to the advisory sentence submitted to the court. Under Florida’s statutory sentencing procedures for death penalty cases, it is the court that determines what a proper sentence should be. It is the court that is required to review the advisory sentence of the jury, make the requisite weighing of aggravating and mitigating circumstances, and then if a death penalty is imposed, set forth in writing the court’s findings upon which the sentence of death is based. The change in procedure mandated by the lower court’s ruling could have the undesirable result of the judge’s rubber stamping the jury recommendation rather than conducting the independent weighing

required by Florida law. See Ross v. State, 386 So. 2d 1191 (Fla. 1980).

Trial courts are required by statute to clearly state their findings of fact showing that sufficient mitigating circumstances exist to outweigh the aggravating circumstances. Said findings must be based upon the circumstances of subsections (5) and (6) of Sec. 921.141 and upon the records of the trial and sentencing proceedings and not on the number of juror votes each aggravator receives. Nor should they be. Thus, the trial court's deviation from the law only serves to obtain facts that are not relevant to Florida's sentencing procedure.

The special verdict form is outside the capital sentencing statute, the procedural rules and contradicts the standard jury instruction that "it is not necessary that the advisory sentence of the jury be unanimous." Standard Jury Instruction 7.11 Jones v. State, 569 So. 2d 1234 (Fla. 1990) (unanimous agreement upon the existence of specific aggravating factors is not required.) Accord James v. State, 453 So. 2d 786, 792 (Fla.), cert. denied, 469 U.S. 1098 (1984); Alvord v. State, 322 So. 2d 533, 536 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).[4]

[4] The United States Supreme Court agrees that the jury is not required to unanimously concur on a single theory. See Schad v. Arizona, 501 U.S. 624 (1991).

Accordingly, the judge's proposed plan to record the number of votes for each factor can only result in confusion for the penalty phase jury by erroneously suggesting that a certain number of votes are necessary for each factor before it can be considered in the ultimate recommendation. The potential for this confusion is balanced against having factual findings that this Court has already deemed unnecessary.

The State recognizes that at least three members of the Court have urged reevaluation of the standard penalty-phase instructions and verdict form in light of Ring, Globe v. State, 29 Fla. L. Weekly S119 (Fla. March 18, 2004) (Pariente, J., specially concurring with Anstead, C.J., and Lewis, J., concurring), but notes that such a change in procedure would be contrary to the death penalty statute. As this Court has consistently recognized, a statute may only be construed consistent with legislative intent and will not be rewritten by the court. State v. Elder, 382 So. 2d 687 (Fla. 1980); Brown v. State, 358 So. 2d 16, 20 (Fla. 1978). Nowhere in Section 921.141 does it provide for the jury to make findings with regard to aggravating factors. In fact, as previously noted, that burden is placed squarely on the shoulders of the trial judge. There is no legal basis for the trial court or this Court to rewrite that statute in order to cure any issues that

may or may not result from Ring. As the Defendant's Motion expresses it is violative of the Eighth and Fourteenth Amendments of the U.S. Constitution and Article I, sections 9 and 17 of the Florida Constitution for trial judges "to improvise their own remedies" and for defendants to be "sentenced to death under procedures that literally vary from judge to judge." (Pet. Exh. 3, p. 12) Since Sec. 921.141 has been held to be constitutional, there are no infirmities to be remedied.

Accordingly, the State urges this Court to find that the trial court has departed from essential requirements of the law in fashioning what she perceived to be a remedy which would satisfy Defendant's allegations of unconstitutionality. These are changes that should only be imposed by legislation and later implementive court rules, not by individual trial judges.

CONCLUSION

Wherefore, the two certified questions should be answered in the affirmative and this Court should affirm the finding of the Second District with regard to the trial court's order requiring the State to divulge the aggravating factors being considered and reverse the district court's affirmance of the trial court's order requiring the jury to answer special

interrogatory forms of which aggravators were found and by what vote.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the Honorable Lynn Tepper, Circuit Judge, Pasco County Courthouse, 38053 Live Oak Avenue, Room 106C, Dade City, Florida 33523-3819; to Joy K. Goodyear, Esq. and Thomas J. Hanlon, Esq., Office of the Public Defender, Pasco County Courthouse, 38053 Live Oak Avenue, Dade City, Florida 33523-3805; and to the Honorable Bernie McCabe, State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this _____ day of June, 2004.

CERTIFICATION OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR THE STATE OF FLORIDA