IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALFREDIE STEELE,

Respondent.

____________________________/

CASE NO. SC04-802
2d DCA No. 2D04-1049
Lower Tribunal No. 03-02280CFAES

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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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?

Steele asserts that under the holding in Ring v. Arizona, 536 U.S. 584 (2002) "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" (Answer Brief at p. 13) This argument mistakenly relies on the United States Supreme Court's application of the Arizona law as interpreted by the Arizona Supreme Court. This Court has repeatedly held that Florida's death sentencing statute, Sec. 921.141, does not suffer from the same constitutional infirmities as the Arizona statute. Because eligibility for a death sentence is decided upon the conviction for first degree murder, Florida law does not require either notice of the aggravating factors that will be presented by the State, or special verdict 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).

Steele's reliance on Hootman v. State, 709 So. 2d 1357 (Fla. 1998), abrogated on jurisdictional grounds, State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998), to support his premise that aggravators define the criminal conduct misses the point. At issue in Hootman was not a defendant's "eligibility" for the death penalty which was the concern in Ring but rather his actual selection based upon the addition of new aggravators. This Court explained:

> While the addition of an aggravating circumstance to be considered in determining whether the sentence will be death or life without parole does not guarantee the harsher sentence, it may have a direct effect on the decision and thus result in a harsher sentence than might have been imposed were that aggravating circumstance not available.
>
> Id. at 1360

Steele was put on notice of the possible aggravating factors by virtue of the statute and nothing in Ring alters that fact. As the aggravators are not elements of the offense, they do not need to be alleged in the indictment or otherwise presented to

the defendant pretrial. Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (finding "meritless" claim that aggravating circumstances must be charged in the indictment submitted to the jury).

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 State agrees that as a general rule Florida law does not prohibit special jury instructions or verdict forms where *the* unique facts and circumstances of a particular case require same for clarification for the jury. Darling v. State, 808 So. 2d 145, 160 (Fla. 2002) (Noting that it is within trial court's discretion to give special instructions if court finds it necessary due to the particular facts of any case.) This proposition aside, the issue presented in the instant case is whether it is error for a judge to *sua sponte* change the verdict form to correct a perceived problem in the statute where this Court has repeatedly upheld the constitutionality of the statute and where the perceived need for clarification is not peculiar to the defendant who is on trial. It is the State's position that the actions of the trial court were improper in that changes to statutes and rules should only be imposed by legislation and later implementive court rules, not by individual trial judges.

Notably, Steele's reliance upon Chief Justice Pariente's

dissent in Davis v. State, 859 So. 2d 465, 486, n. 11 (Fla. 2003), proves the point that any changes to the statute should be done by the legislature. The dissent relies heavily upon *legislation* from other states to show that of the four hybrid states identified in Ring, Florida is now the sole jurisdiction in which a jury can recommend death by a bare majority vote. Our legislature has determined that no changes to the statute are necessary.

Steele's argument in support of the lower court's actions, relies on the fact that the decisions in King v. Moore, 831 So. 2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) were plurality decisions. As Steele concedes, however, a majority of this Court agreed in both cases that our statute is constitutional. (Answer Brief at p. 17) Furthermore, even though some members of the Bottoson/King Court expressed concern that explicit jury findings may be necessary for meaningful appellate review, this position has not been adopted by the legislature or a majority of this Court and, therefore, is not the law in Florida. Finally, despite the numerous attempts to challenge our statute based on Ring, this Court consistently rejects those challenges and the United States Supreme Court continues to deny the invitation to review our statute in the face of those challenges. See e.g. 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).

The circuit court's alteration of substantive and procedural laws disregards a large body of law upholding our statute and, in effect, usurps the legislative function and this Court's implementation of same through rules of procedure and standardized jury instructions. As our statute remains constitutional, it is a departure from essential requirements of the law for a circuit court to fashion a perceived "remedy" to correct unsupported allegations of unconstitutionality.

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 September, 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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