IN THE SUPREME COURT OF FLORIDA

Case No. SC07-494
Lower Court Case No. 1997-754-A CF

PAUL H. EVANS,

Petitioner,

v.

JAMES R. McDONOUGH,

Secretary, Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

SUZANNE MYERS KEFFER
Assistant CCRC – Lead Counsel
Florida Bar No. 0150177

CHRISTINA SPUDEAS
Assistant CCRC – Second Chair
Florida Bar No. 0342491

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

ARGUMENT IN REPLY

The Petitioner, Mr. Evans, by virtue of this Reply to Response to Petition for Writ of Habeas Corpus, does not abandon or waive any claims or arguments presented in his Petition for Writ of Habeas Corpus. However, this Reply will only concern the following claim.

CLAIM III

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. EVANS OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO NOTICE, A JURY TRIAL, AND HIS RIGHT TO DUE PROCESS

Mr. Evans' case before this Court is in a posture that requires consideration of this issue. The State's boilerplate response insufficiently addresses the merits of this claim, ignores the varied challenges made by Mr. Evans both pretrial and post-trial, and ignores applicable law as applied to the facts of the case at hand. Procedurally and factually, this issue presents a prime opportunity for this Court to come to terms with its inability to reach a consensus opinion and to fully address the merits of the lack of a unanimous jury verdict where the ultimate sentence is death.

Mr. Evans' death sentence was not predicated on a prior violent felony aggravator or a unanimous jury advisory sentence. In the penalty phase, the jury

recommended a sentence of death by a vote of nine-to-three (R. 4460). The trial judge, following the jury's recommendation, sentenced Mr. Evans to death finding two aggravating factors: (1) The crime was committed for pecuniary gain, and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP"). The only statutory mitigator found was Petitioner's age of nineteen when the murder was committed (R. 503-504; 4524).

Respondent argues that Mr. Evans is barred from presenting this claim due to having raised it on direct appeal, and at the same time inconsistently argues that Mr. Evans is barred because he had failed to raise this argument earlier. Neither argument has merit.

Prior to trial, which began on February 4, 1999 (R. 2144), Mr. Evans alleged that Section 921.141, Florida Statutes was unconstitutional because only a bare majority of jurors is sufficient to recommend a death sentence (R. 155-156), and also argued that Section 921.141 unconstitutionally failed to specify whether jurors must find the existence of aggravating factors individually or by a majority (R. 185-189). Furthermore, Mr. Evans had requested that the Court submit a special interrogatory verdict form to the jury during the penalty phase of the

trial showing what aggravating factors the jury found, what mitigating factors the jury found, what the vote was as to each and a statement of facts upon which the jury's verdict as to each aggravating circumstance is based (R. 183-184).

Therefore, Mr. Evans presented pretrial the issue of a unanimous jury determination of any fact that increases the maximum punishment to death. However, at that time, both the lower court and Mr. Evans' did not have the benefit of guidance or precedent by the U.S. Supreme Court in either the *Apprendi*[1] or the *Ring*[2] decisions.

Respondent correctly points out that on direct appeal Petitioner challenged the constitutionality of his death sentence based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Jones v. United States*, 526 U.S. 227 (1999). (Petitioner's Response to Petition for Writ of Habeas Corpus, p. 43).[3] That was due to the fact that the *Apprendi* decision was issued during the pendency of Mr. Evans' appeal. Mr. Evans had filed his notice of appeal on August

[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[2] *Ring v. Arizona*, 536 U.S. 584 (2002).
[3] See also Appellant's Initial Brief, Reply Brief, and Motion for Rehearing in Case No. SC60-96404 –*Evans v. State* (direct appeal).

30, 1999 and his Initial Brief was filed on September 5, 2000.[4] *Apprendi* was decided on June 20, 2000.

This Honorable Court disposed of that issue in a footnote by citing to *Mills v. Moore*, 786 So. 2d 532, 536-37 (Fla. 2001), noting:

> In Evans' remaining points on appeal, he asserts that the trial court erred in imposing the death penalty because the jury made no unanimous findings of fact as to death eligibility. We have previously rejected that argument in *Mills v. Moore, 786 So. 2d 532, 536-37 (Fla. 2001),* cert. denied, *532 U.S. 1015, 121 S. Ct. 1752, 149 L. Ed. 2d 673 (2001).*

Evans v. State, 808 So. 2d 91 (Fla. 2001), note 10.

The problem inherent in Respondent's argument is that much has occurred since the *Mills* decision. Of course, in *Mills*, this Court had decided that,

> *Because Apprendi did not overrule Walton v. Arizona,* 497 U.S. 639; 110 S. Ct. 3047; 111 L. Ed. 2d 511; 1990 U.S. LEXIS 3462; 58 *the basic scheme in Florida is not overruled either…* No court has extended Apprendi to capital sentencing schemes, and the plain language of Apprendi indicates that the case is not intended to apply to capital schemes.

Mills, *Supra*.

[4] *Evans v. State*, Case No. SC60-96404.

However, at the time of the *Mills* decision, this Court did not have the benefit of the decision in *Ring,* rendered on June 24, 2002.

In *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), this Court revisited the holding in *Mills v. Moore*, 786 So. 2d 532 (2001) and addressed the concerns raised by *Ring* and its impact upon Florida's capital sentencing structure. The *Bottoson* and *Moore* decisions resulted in each Florida Supreme Court justice rendering a separate opinion. In both cases, a plurality per curium opinion announced the result denying relief in those cases. In each of the cases, four separate justices wrote separate opinions specifically declining to join the per curium opinion, but "concur[ring] in result only," *Bottoson*, 833 So. 2d at 694-5; *King*, 831 So. 2d at 145, based upon key facts present in those cases. However, those key facts utilized by the Court to deny relief in *Bottoson* and *King* are not present in Mr. Evans' case. A careful reading of those four separate opinions and the facts in Mr. Evans' case reveal that he is entitled to relief.

Furthermore, in the case of *King*, a concurring opinion discussed the impact upon Mills and that line of cases:

> In light of *Ring*, we now know that much of what we said in *Mills* based on *Apprendi* is wrong. *Ring* has overruled *Walton v. Arizona,* 497 U.S. 639; 110 S. Ct. 3047; 111 L. Ed. 2d 511; 1990 U.S. LEXIS 3462; 58. In doing so, *Ring* has held that aggravating factors are not sentencing considerations but elements of the offense. The Court in *Ring* not only overruled its 1990 precedent in *Walton v. Arizona,* 497 U.S. 639; 110 S. Ct. 3047; 111 L. Ed. 2d 511; 1990 U.S. LEXIS 3462; 58 but also receded from its 2000 statement in *Apprendi* that *Apprendi* was not intended to affect capital sentencing schemes. Indeed, *Ring* has now unequivocally told us that because aggravating factors operate as "'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 122 S. Ct. at 2443.

King v. Moore, 831 So. 2d 143 (Fla. 2002) (Pariente, J. concurring).

Clearly, Respondent is incorrect in asserting that Mr. Evans is barred from “raising related issues” in a habeas petition by virtue of having challenged the constitutionality of Florida’s death penalty statute on direct appeal (Respondent’s Response to Petition for Writ of Habeas Corpus, p. 44). In fact, Mr. Evans could not raise a *Ring* issue on direct appeal since *Ring* was not decided until after this Court entered its opinion on December 13, 2001. *Evans v. State*, 808 So. 2d 92 (Fla. 2001).

Furthermore, this Court has found that an appellant is procedurally barred by not preserving the *Ring* claim both at trial and on direct appeal.

> Although notwithstanding that [Wydell Jody] Evans' direct appeal was in the "pipeline" when *Ring* was decided in 2002, this claim is procedurally barred because Evans did not preserve this claim by challenging the constitutionality of Florida's sentencing scheme both at trial and on direct appeal. Notwithstanding this procedural bar, Evans would not be entitled to relief under *Ring* because the trial court found the prior violent felony conviction aggravator applied in his case. *Evans v. State*, 946 So. 2d 1 (Fla. 2006).[5]

In his Petition for Writ of Certiorari filed with the U.S. Supreme Court, Mr. Evans presented the question of whether there was a violation of the Jury, Due Process or Cruel and Unusual Punishment Clauses of the United States Constitution where the jury did not make findings qualifying the defendant for the death penalty. *Ring* was rendered in June 2002, which was subsequent to this Courts decision in Mr. Evans' direct appeal and prior to the July 2002 filing of Mr. Evans' Petition for Writ of Certiorari to the United States Supreme Court. Therefore, clearly Mr. Evans is not barred for failure to raise this argument

[5] This case concerns Appellant/Petitioner Wydell Jody Evans, and not Mr. Paul Evans, Petitioner in the instant cause.

earlier. He raised it at every opportunity, both pretrial and post-trial. However, his Certiorari Petition was denied on October 15, 2002.[6]

The denial of his Certiorari Petition should have no bearing on this Court's review in the instant cause. In the case of *Bottoson v. Moore*, 824 So. 2d 115 (Fla. 2002) this Court granted a stay of execution to allow full briefing and consideration in light on the then recent *Ring* decision although Bottoson had presented the issue in a writ of certiorari which had been denied by the U.S. Supreme Court.[7] There, one Justice noted:

> As this Court has recognized, "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *State v. White*, 470 So. 2d 1377, 1379 (Fla. 1985) (quoting *United States v. Carver*, 260 U.S. 482, 490, 67 L. Ed. 361, 43 S. Ct. 181 (1923)). Indeed, the United States Supreme Court has stated in a long line of pronouncements:
>
> > What is the significance of this Court's denial of certiorari? That question is asked again and again . . . Almost 30 years ago Mr. Justice Frankfurter provided us with an answer to that question that should be read again and again.

---

[6] *Evans v. Florida*, 537 U.S. 951 (2002).

[7] Bottoson's subsequent petition for habeas relief was later denied and the stay of execution was terminated. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002). However, it is important to note that Bottoson had previously been convicted of a violent felony.

"This Court now declines to review the decision of the Maryland Court of Appeals. The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. . . Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening. . . .

"Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." Opinion respecting the denial of the petition for writ of certiorari in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-919, 70 S. Ct. 252, 94 L. Ed. 562.

Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 942, 58 L. Ed. 2d 335, 99 S. Ct. 335-44 (1978)

> (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari).

Bottoson v. Moore, 824 So. 2d 115 (Fla. 2002) (Pariente, J. concurring).

Although this Court has held that *Ring* does not apply retroactively in Florida to defendants whose convictions were final when that decision was rendered, retroactivity does not preclude Mr. Evans from a merits review in the instant cause. *Johnson v. State*, 904 So. 2d 300, 415 (Fla. 2005). *Johnson* was a post-conviction case deciding that Ring does not apply retroactively in Florida to defendants whose convictions already were final when that decision was rendered (although Johnson also had prior violent felony convictions).

Mr. Evans' appeal was final on October 15, 2002 when the United States Supreme Court denied certiorari. *Raleigh v. State*, 932 So. 2d 1054 (Fla. 2006). *Apprendi* was decided on June 20, 2000 and *Ring* was decided on June 24, 2002. Therefore, *Ring* was decided before Mr. Evans' certiorari was denied. Mr. Evans' appeal was not final until after that decision. This is not a retroactive application of the law.

Rather, this case is one of the rare cases in which there is neither a valid separate-conviction aggravator,

nor a jury verdict reflecting a unanimous finding of a death-qualifying aggravator, and does not involve a retroactive application of *Ring* – although admittedly this case comes before this Court in a post-conviction posture.

However, that should not have a bearing on a decision on the merits. In post-conviction cases as well as in direct appeals this Court has pointed to unanimous jury recommendations or aggravating factors resting on convictions of other crimes, or on non-retroactivity of *Ring* in denying *Ring* claims.[8] It is only in the instant case, and in two direct appeal actions where this court has been asked to squarely deal with the situation where there was no unanimous jury recommendation, no contemporaneous or

[8] See, e.g., *Seibert v. State*, 923 So. 2d 460, 474 (Fla. 2006) (relying on prior violent felony aggravator to reject *Ring* claim in direct appeal); *Anderson v. State*, 863 So. 2d 169, 189 (Fla. 2003) (relying on prior violent felony aggravator and unanimous death recommendation in direct appeal); *Blackelder v. State*, 851 So. 2d 650, 654 (Fla. 2003) (relying on prior violent felony aggravator to reject *Ring* claim in direct appeal); *Trepal v. State,* 2003 Fla. LEXIS 2332 (Fla. 2003) (relying on prior violent felony aggravator in post-conviction appeal); *Lugo v. State*, 845 So. 2d 74, 119 n.79 (Fla. 2003) (relying on unanimous guilty verdict on other felonies and "existence of prior violent felonies: in post-conviction appeal); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (relying on prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury in direct appeal); *Raleigh v. State*, 932 So. 2d (Fla 2006)(relying on non-retroactive application of *Ring* in post-conviction appeal).

prior violent felony and no retroactive application of *Ring*.[9]

This is yet a third opportunity for this Court to reassess its consideration and application of *Ring* to Florida death penalty cases. This Court has invited the legislature to do so, but it has failed to act.

The purpose of the rule in *Ring* is to change the very *identity* of the decision maker with respect to critical issues of fact that are decisive of life or death. This change remedies a "structural defect in the constitution of the trial mechanism," by vindicating "the jury guarantee . . . [as] a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Florida has provided for a jury's participation at capital sentencing and gives significance to the jury's decision, but has not applied Sixth Amendment requirements to the jury's participation.

In this Court, Chief Justice Anstead has said that *Ring* "is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v. Georgia*, 409 U.S. 902; 93 S. Ct. 89; 34 L. Ed. 2d

[9] *Coday v. State*, 946 So. 2d 988 (Fla. 2006); *Butler v. State*, 842 So. 2d 817 (Fla. 2003).

163; 1972 U.S. LEXIS 1841, (U.S. 1972)," "Under our dual responsibilities to interpret state law and to enforce the U.S. Constitution, we cannot simply stand mute in the face of such a momentous decision." *Bottoson v. Moore*, 833 So. 2d 693, 703 (Fla. 2002) (Anstead, C.J., concurring in result only), and Justice Pariente has described *Ring* as a "landmark case." *Bottoson v. Moore*, 824 So. 2d 115, 116 (Fla. 2002) (Pariente, J., concurring).

Justice Cantero, speaking for the majority, invited the Legislature to revisit Florida's capital sentencing scheme to require some unanimity in the jury's recommendations, noting that "Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote."[10] *Florida v. Steele*, 921 So. 2d 538 (Fla 2005). Two years have passed since that request, and no legislative action has been taken. This does not preclude this Court from reconsidering its prior decisions

[10] Upon remand of the case of *Ring* to the Arizona Supreme Court, that court expressly considered whether the existence of an aggravating circumstance implicit in the jury's verdict, or based on a prior felony conviction, or otherwise established beyond a reasonable doubt, is not subject to the requirements of *Ring.* The Arizona Supreme Court expressly rejected this argument. *Duest v. State*, 855 So. 2d 33 (Fla. 2003) (Justice Anstead dissent).

and to reach the correct consensus to apply the *Ring* decision to Florida's death penalty sentencing scheme.

In *Ring*, the United State Supreme Court specifically acknowledged that it was receding from precedent and reversing its prior Sixth Amendment jurisprudential course when it noted that "although 'the doctrine of stare decisis is of fundamental importance to the rule of law,' [the Court's] precedents are not sacrosanct." *Ring v. Arizona,* 536 U.S. 584 (2002). As Justice Scalia explained:

"Since *Walton v. Arizona,* 497 U.S. 639; 110 S. Ct. 3047; 111 L. Ed. 2d 511; 1990 U.S. LEXIS 3462; 58, I have acquired new wisdom…"

It is time for this Honorable Court to claim, "Since *Ring*, we have acquired new wisdom."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first-class postage prepaid to Leslie Campbell, Asst. Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401, on the 15th day of October, 2007.

SUZANNE MYERS KEFFER
Assistant CCRC – Lead Counsel
Florida Bar No. 0150177

CHRISTINA SPUDEAS
Assistant CCRC – Second Chair
Florida Bar No. 0342491

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 Courier New type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

SUZANNE MYERS KEFFER