IN THE SUPREME COURT OF FLORIDA

JOHN HAMPTON,	:	
Appellant,	:	
vs.	:	Case No. SC10-0812
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellant, John Hampton, reasserts the Statement of the Case and Facts as initially set forth in his Initial Brief.

SUMMARY OF THE ARGUMENT

As Mr. Hampton is only responding to Appellee's argument in Issue IV, the summary of that response argument is that Florida's capital sentencing statute violates Ring v. Arizona, 536 U.S. 584 (2002). The recent order in Evans v. McNeil, Case No. 08-10042-Civ-Martinez (S.D. Fla. June 20, 2011)(pending rehearing), (App. A) has found Florida's capital sentencing procedure unconstitutional in light of Ring. This order should be considered persuasive. As the court stated in Evans, without specific jury findings as to aggravators, Florida's capital sentencing statute allows the trial judge to make the factual findings necessary to impose death instead of the jury. This violates Ring and makes Florida capital sentencing scheme unconstitutional.

ARGUMENT

ISSUE IV

IS FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLES OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A SENTENCE OF DEATH, CONSTITUTIONALLY INVALID UNDER RING V. ARIZONA, 536 U.S. 584 (2002)?

The jury in Mr. Hampton's case was instructed on 4 aggravators: 1. Committed by person previously convicted of felony and under sentence of imprisonment, or placed on community control, or placed on probation; 2. Committed while engaged in or an attempt to commit or attempting to commit the crime of robbery or sexual battery or burglary; 3. Committed for financial gain; and 4. Crime was especially heinous, atrocious, or cruel. (V10/T937,938) None of these 4 involved a contemporaneous felony conviction, because no contemporaneous felonies were charged. Only 1 aggravator involved a past conviction—the aggravator for having been previously convicted of a felony and presently placed on probation. That 1 aggravator—being on felony probation at the time of the murder—would not justify a death sentence recommendation by itself in light of all the mitigation. Therefore, the jury was given 3 additional aggravators upon which it based its 9-3 recommendation of death and which did not involve past convictions.

It is also to be noted that the trial court's order imposing the death only found 3 aggravators had been established. It did

not find the aggravator "committed for financial gain." So the jury had 4 aggravators to consider; and without a specific verdict showing how each juror found each aggravator to be proven beyond a reasonable doubt, there is no way of knowing how many aggravators were so found by at least a majority of jurors, let alone by a unanimous jury, nor is there a showing that the jurors did or did not rely on an aggravator specifically rejected by the trial court.

As stated in Evans, op. pp. 91-93 (emphasis added).

> Without a special verdict form, it is possible that the trial judge found the existence of one aggravating factor while the jury found the existence of another resulting in a sentence of death based on an invalid aggravator, i.e., an aggravator not found by the jury.[33] This cannot be reconciled with Ring.
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> [33]The Florida Supreme Court reviewed this on a very limited certified question from the Second District Court of Appeal of an order from the trial court requiring a majority of jurors to agree on existence of particular statutory aggravating factor. The Court found that "[u]nless and until a majority of this Court concludes that Ring applies in Florida, and that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statue (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required." State v. Steele, 921 So.2d 538-545-46 (Fla. 2006). Section C is entitled: "The Need for Legislative Action." Id. at 548. In Section C, the court begins with the fact 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 a majority vote." Id. Here, the Court finds that Ring does apply in

Florida and the Florida sentencing statute is unconstitutional.

More troubling is that there is nothing in the record to show that Mr. Evans's jury found the existence of a single aggravating factory by even a simple majority. The jury was presented with two aggravating factors for its consideration. (D.E. 12, Ex. A., Vol. 39 at 4439-41). As the final vote was nine to three, it is possible that the nine jurors who voted for death reached their determination by having four jurors find one aggravator while five jurors found another. Either of these results would have the aggravator found by less than a majority of the jurors. Although the Court concedes that unanimity may not be required, it cannot be that Mr. Evans's death sentence is constitutional when there is no evidence to suggest that even a simple majority found the existence of any one aggravating circumstance. See generally Apodaca v. Oregon, 406 U.S. 404 (1972)(unanimous jury verdicts required in federal trials but not in state trials). Any one singular aggravating factor may not have been found beyond a reasonable doubt by a majority of the jury. The Court's interpretation of Ring is such that, at the very minimum, the defendant is entitled to a jury's majority fact finding of the existence of an aggravating factor; not simply a majority of jurors finding the existence of any unspecified combination of aggravating factors upon which the judge may or may not base the death sentence.[34] Because the jury may have not reached a majority finding as to any one aggravating factor, the Florida sentencing statute leaves open the very real possibility that in substance the judge still makes the factual findings necessary for the imposition of the death penalty as opposed to the jury as required by Ring.

[34]The Court notes that in Ring, the Supreme Court identified four states with "hybrid" death penalties similar to but not identical to Arizona's. Ring, 536 U.S. at 608 n.6. The "hybrid" states provided for advisory

> verdicts from juries but left ultimate sentencing determinations to the judge. Ring, 536 U.S. at 608 n.6. Those states were Florida, Alabama, Delaware, and Indiana. Id. Of those four states, two—Delaware and Indiana—require that juries make unanimous findings regarding particular, specified aggravating factors. See 11 Del. Code. § 4209 ("In order to find the existence of a statutory aggravating circumstance…beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance. As to any statutory aggravating circumstances…which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on each such circumstances....the Court shall discharge that jury after it has reported its findings and recommendation")(emphasis added); Ind. Code Ann. § 35-50-2-9 ("The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt...and shall provide a special verdict form for each aggravating circumstance alleged"). Alabama, which presently requires at least ten jurors to recommend the death penalty, has proposed legislation pending that would commit the sentencing decision entirely to the jury. See 2011 Alabama Senate Bill No. 247. Florida law, which requires a mere majority for a death penalty recommendation and forecloses special verdict forms to record specific findings by the jury, is an outlier.

The jury's 9-3 death recommendation in Mr. Hampton's case was not specific in that it does not tell us how many, if any, of the aggravators were found beyond a reasonable doubt by a majority of the jurors. As noted in Evans, the 9 jurors who recommended death could have split on which aggravators they believed had been proved beyond a reasonable doubt. They could have been so split

over the 4 factors that none of the factors were found proved by a simple majority. Ring has been violated, Florida's sentencing scheme for death penalty cases is unconstitutional, and Mr. Hampton is entitled to be resentenced to life.

The State has argued that Ring is not applicable in Florida, because death is the statutory maximum for capital cases and Ring only applies when the sentence goes beyond the statutory maximum. The Evans' opinion addresses this argument by holding that under Florida law, the death penalty can only be imposed (providing the defendant does not waive any aspect of the sentencing statutory requirements) if there is a second step after the finding of guilt—a penalty phase wherein the jury gives an advisory sentence based on finding statutory aggravator(s) exist beyond a reasonable doubt, determining whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances, and concluding whether to recommend a sentence of life or death. A recommendation of death must be supported by a simple majority. See § 921.141, Fla. Stat. (2006); and § 775.082(1), Fla. Stat. (2006). After a finding of guilt in a first-degree murder case, a trial court cannot skip the jury's participation in the penalty process and go directly to a death sentence in the absence of a defendant's waiver. If the trial court does not conduct a penalty phase according to the procedure set forth in § 921.141, then the trial court can only impose life imprisonment without parole. § 775.082(1), Fla. Stat. (2006). (The applicable statue in Mr. Evans' case provided for eligibility for parole after 25 years,

but parole is no longer applicable in Mr. Hampton's case since a statutory charge eliminated parole in capital murder cases years ago.) The jury's part in the penalty phase is essential in imposing more than just life in prison—it's essential to imposing a death sentence. Without the jury's participation in the penalty phase, the sentence maximum is life. The State can only impose death if the jury participates in the penalty phase, and that participation must be meaningful.

> While Ring in certain respects has a limited holding, it does clearly provide that the Constitution requires that the jury find, beyond a reasonable doubt, any aggravating factor that must be found before the death penalty may be imposed. Implicit in this holding is that the jury's fact finding be meaningful. As the Florida sentencing statute currently operates in practice, the Court finds that the process completed before the imposition of the death penalty is in violation of Ring in that the jury's recommendation is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge.
>
> Here, the death penalty is a penalty exceeding the maximum penalty (of life imprisonment without the possibility of parole until after 25 years) and, therefore, requires that the additional fact finding required to "enhance" Mr. Evans's sentence must be made by a jury. As the United States Supreme Court instructed in Apprendi and reaffirmed in Ring, "the relevant inquiry is one not of form but of effect." Ring, 536 U.S. at 604. Here, like the Arizona sentencing scheme in Ring, the statute authorizes a "maximum penalty of death only in a formal sense for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance

> before imposition of the death penalty." Id. Simply put, without a separate hearing and a finding that aggravating factors exist and outweigh any mitigating factors, the defendant cannot be sentence (sic) to death. It is that critical finding—the finding of an aggravating factor—which increases the maximum authorized punishment. This requires a jury determination.[32] "[T]he relevant 'statutory maximum,' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.'" Cunningham v. California, 549 U.S. 270,290 (2007) (quoting Blakely, 542 U.S. at 303-04). Accordingly, the death penalty is an "enhanced" sentence under Florida law and the Sixth Amendment requires that the enumerated aggravating factors be found by a jury. See Ring, 536 U.S. at 609.
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> [32]As noted elsewhere in this Order, there are certain exceptions to this rule, such as where the aggravating factor relates to the existence of prior convictions. The Court notes, however, that this case does not fall within that exception or within any of the limitations on the holding in Ring that the Supreme Court listed in footnote 4 of the Ring decision. See Ring, 536 U.S. at 597 n.4. None of the aggravating factors in this case related to prior convictions. Furthermore, as noted above, the jury did not make a unanimous finding regarding an aggravating factor during the penalty phase of Evans's trial.

Evans, op. pp. 89,90.

Even though Evans did not deal with an aggravating factor relating to the existence of a prior conviction, as was argued above a death sentence could not be imposed on the single aggravator of being on felony probation at the time of the offense—especially in light of the mitigation presented in Mr.

Hampton's case. As this Court noted in Green v. State, 975 So. 2d 1081,1088 (Fla. 2088), death is not appropriate in a single-aggravator case where there is substantial mitigation; and the vast majority of cases upholding a death sentence based on a single aggravator have involved a prior murder or manslaughter. More than that one aggravator of being on felony probation would have to be found by the jury beyond a reasonable doubt; and with only a general verdict, we don't have the factual findings as to the aggravators necessary to impose death. Ring applies, and Ring was violated in Mr. Hampton's case.

In State v. Steele, 921 So. 2d 538, 548-549 (Fla. 2005), this Court asked the Legislature to amend the death penalty statute to allow for unanimous jury findings of aggravators and the use of special verdict forms. No legislative action has been taken. Since Florida law is unconstitutional and the Legislature has rejected this Court's request to make changes that would have cured the unconstitutionality, this Court must find Mr. Hampton's death sentence unconstitutional and reverse for imposition of a life sentence.

CONCLUSION

Mr. Hampton relies on his Initial Brief for argument on all the other issues as well as Issue IV in addition to the argument made in this brief. Mr. Hampton's case should be reversed and remanded for a new trial without the possibility of a death sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine Blanco, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of September, 2011.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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