No. 12-1134

IN THE
Supreme Court of the United States

PAUL H. EVANS,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF

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The State effectively agrees with most of the key points made in the Petition. It agrees that Florida law does not require even a bare majority of jurors to find that any one aggravating factor is present before the judge hears new evidence, makes his or her own findings about aggravating and mitigating circumstances, imposes a death sentence, and writes to justify that sentence based on his or her own findings without ever knowing what the jury found. The State continues to rely on *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), as the primary basis for its defense of this sentencing system, thereby putting Florida in conflict with every other state that retains the death penalty. And it does not dispute that the last state-court decision on the merits of Evans's claim under *Ring v. Arizona*, 536 U.S. 584 (2002), was contrary to clearly established federal law.

Instead, the State argues that this Court should deny review for two reasons. First, it claims that this case is a poor vehicle for resolving the conflict between *Ring* and Florida's capital sentencing regime. Second, it attempts to defend the regime on the merits by relying on unrelated cases decided before *Ring*.

Neither of these responses is persuasive. While the State calls this case a "tangled skein of procedural complexities," its vehicle argument is in fact one simple assertion: that the federal courts, rather than reviewing the last state-court decision on the merits of Evans's *Ring* claim, should have

reviewed and given deference to an earlier Florida Supreme Court decision involving a Sixth Amendment claim that was issued before *Ring* was even decided. Br. in Opp. at 19. The State has never prevailed with this argument because there is absolutely no authority to support it. Regardless, the State waived this argument in the district court.

The State's merits arguments, based solely on cases decided before *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), only underscore the State's unwillingness to comply with the Sixth Amendment. There are no impediments to *de novo* review of Evans's claim, and this Court should grant certiorari to clarify that *Hildwin* is no longer good law and resolve the conflict between Florida and every other death penalty state.

1. The State's vehicle argument is meritless. The State does not dispute that the Florida Supreme Court's decision on Evans's *Ring* claim in state post-conviction proceedings was contrary to clearly established federal law because it relied on the false premise that Evans's conviction became final when the Florida Supreme Court ruled on his direct appeal, rather than when this Court denied his timely petition for certiorari on direct appeal. Br. in Opp. 21. Nor does the State dispute that that incorrect ruling was the last reasoned state-court decision adjudicating Evans's *Ring* claim. Although the court did not reach the underlying question of whether *Ring* requires Florida juries to find the aggravating factors necessary to impose a death sentence, it declined to accept the State's arguments

for procedural default under state law and issued a reasoned decision on the federal basis for the claim. Pet. App. 236a. Indeed, at oral argument before the Eleventh Circuit, the State expressly conceded that the Florida Supreme Court's post-conviction ruling was a decision on the merits.

Instead, the State attempts to create a vehicle problem by advancing the novel argument that the federal courts should have ignored the Florida Supreme Court's decision on Evans's *Ring* claim, and instead reviewed and given AEDPA deference to the Florida Supreme Court's decision in Evans's direct appeal, which rejected a similar Sixth Amendment claim before *Ring* was decided. *Id.*

There is no precedent to support this position. This Court has repeatedly instructed that federal courts in habeas proceedings should review the last state-court decision adjudicating the merits of the federal claim. *See, e.g.*, *Johnson v. Williams*, 133 S. Ct. 1088, 1094 n.1 (2013) (noting that "[c]onsistent with our decision in *Ylst v. Nunnemaker*," the Ninth Circuit examined "the last reasoned state-court decision"); *Greene v. Fisher*, 132 S. Ct. 38, 44–45 (2011) (explaining that the relevant state-court decision is "the last state-court adjudication on the merits" of the federal claim); *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991) ("[W]e begin by asking which is the last *explained* state-court judgment on the [federal] claim." (emphasis in original)).

The only case the State cites in support of its vehicle argument is *Greene v. Fisher*. The State asserts that this case presents a "twist" on *Greene*

that this Court would have to resolve as a "threshold issue." Br. in Opp. 21.

That is nonsense. This case is not a "twist" on *Greene* — it is simply outside of *Greene*'s scope. In *Greene*, this Court held that the relevant "clearly established Federal law" in habeas proceedings is the law at the time of the last state-court adjudication on the merits of the federal claim. 132 S. Ct. at 44–45. In *Greene*, the last state-court adjudication happened to be the Pennsylvania Superior Court's decision in Greene's direct appeal. *Id.* at 45.

But the facts of Greene are simply not the facts of this case. Here, there is no dispute that the last state-court adjudication on the merits of Evans's *Ring* claim was the 2008 decision of the Florida Supreme Court in state post-conviction proceedings. *See* Pet. App. 236a. Nor is there dispute that *Ring* was clearly established federal law at the time of that decision and was a decision Evans was entitled to invoke. Thus, *Greene* is inapposite.

In any event, the State has waived this argument. When the State responded to Evans's federal habeas petition in district court, it agreed that the relevant state-court decision was the Florida Supreme Court's decision in post-conviction proceedings. *See id. at* 49a–52a. It was not until the district court granted habeas relief that the State filed a motion to amend the judgment asserting for the first time that the district court should instead have reviewed the Florida Supreme Court's decision on direct appeal. *Id.* at 52a–53a. The district court found that the State's argument was not properly before the court

because the State failed to articulate any reason for not raising its argument earlier. *Id.* at 48a–49a, 52a. The Eleventh Circuit also noted that the State may have waived this argument, though it did not decide that question because it applied *de novo* review. *Id.* at 33a n.9.

The procedural history of this case may be unusual, but it is not complicated. The last state-court adjudication on the merits of Evans's *Ring* claim was the decision of the Florida Supreme Court in state post-conviction proceedings. In that decision, the Florida Supreme Court rejected Evans's claim on the merits by applying a finality rule that was, concededly, contrary to the clearly established law of *Griffith v. Kentucky*, 479 U.S. 314 (1987). *See* Pet. 23–24; Pet. App. 236a. On federal habeas review, the district court gave appropriate AEDPA deference to that decision but concluded that it was contrary to or based on an unreasonable application of clearly established law. Pet. App. 180a. The State does not challenge that decision. Br. in Opp. 21.

Evans is therefore entitled to *de novo* review of his claim that his death sentence was imposed in violation of *Ring*. *Johnson*, 133 S. Ct. at 1097 ("AEDPA permits *de novo* review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent."); *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then

resolve the claim without the deference AEDPA otherwise requires."). The federal district court and the Eleventh Circuit correctly applied *de novo* review, and there are no threshold issues that would prevent this Court from doing the same.

The State has also conceded that there is no possibility of harmless error in this case because it does not involve any aggravating factors related to prior convictions or necessarily encompassed by the jury's guilt-phase verdict. Br. in Opp. 23. This case is thus an ideal vehicle to resolve the conflict between Florida's (and the Eleventh Circuit's) reliance on *Hildwin* and this Court's decision in *Ring*.

2. The State's attempt to defend its capital sentencing regime on the merits only demonstrates that there is no way to reconcile Florida's system with *Ring*.

a. The State first asserts that *Hildwin* "remains good law" and has been "reaffirmed" by this Court's "more recent cases." Br. in Opp. 9. This is both wrong and disingenuous. The only authority that the State cites for this proposition is dicta in *Jones v. United States*, 526 U.S. 227 (1999), a case that was decided *before* either *Ring* or *Apprendi*. The State's puzzling claim that *Jones* supports the idea that *Hildwin* is "still good law" after its language, reasoning, and holding were later rejected in *Ring* shows just how indefensible the State's continued reliance on *Hildwin* actually is. Moreover, the language from *Jones* is of little consequence given that two years later, in *Ring* itself, this Court

recognized that Florida juries do not make findings on aggravating circumstances and that there was no meaningful distinction between the capital sentencing regimes in Florida and Arizona. *Ring*, 536 U.S. at 598; Pet. at 11–12.

b. The State then claims that "Florida juries do make factual findings" and are "in compliance with *Ring*" while at the same time admitting that not even a bare majority of jurors is required to find that a "specific aggravator" exists. Br. in Opp. 12–13. The State argues that inferring a finding of some combination of aggravating circumstances from a non-binding, non-unanimous sentencing recommendation is justified by this Court's decision in *Schad v. Arizona*, 501 U.S. 624 (1991).

Schad held that Arizona juries need not agree on a particular theory of felony or premeditated murder so long as they unanimously convict the defendant of the elements of first-degree murder. *Schad v. Arizona*, 501 U.S. 624 (1991). This Court concluded that it was constitutionally permissible for Arizona to choose "not to treat premeditation and the commission of a felony as independent elements of the crime." *Id.* at 637.

But *Schad* has no relevance here, because this Court already concluded in *Ring* that each enumerated aggravating factor does "operate as the functional equivalent of an element of a greater offense" when it is necessary for imposition of the death penalty. 536 U.S. at 609 (internal quotation marks omitted). The State's assertion that *Schad* allows it to define aggravating factors as theories

rather than elements is merely a repackaging of the "sentencing factor" argument that this Court has repeatedly rejected. *See, e.g.*, *Ring*, 536 U.S. at 604; *Apprendi*, 530 U.S. at 476–77.

Moreover, the majority opinion in *Schad* itself shows that its holding cannot be extended to support the State's position. The State is asserting that, under *Schad*, it is "in compliance" with *Ring* when seven out of twelve jurors recommend death, each implicitly finding a different aggravating circumstance. Florida's current death penalty statute enumerates sixteen different aggravating circumstances, including: committing the capital felony to avoid lawful arrest; for pecuniary gain; in a manner that is especially cold, calculated, and premeditated; against a person who is a law enforcement officer engaged in the performance of his official duties; against a person less than 12 years of age; against a person who is particularly vulnerable due to advanced age; or committing a capital felony while being a criminal gang member or sexual predator. *See* Fla. Stat. § 921.141(5) (2010). According to the State, a majority of the jury can decide that "at least one" aggravating circumstance exists by combining any of these "theories," no matter how factually distinct they might be. *See* Br. in Opp. at 12–13 (asserting "that jurors are not required to agree on any particular theory").

The *Schad* opinion makes clear that it would never permit the State to define "aggravating circumstance" in such a vague and meaningless way: "[N]othing in our history suggests that the Due

Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." 501 U.S. at 633.

The State's reliance on *Schad* is thus merely another attempt to create complexity where there is none. The State has admitted that not even a simple majority of jurors in Florida is required to find the fact that exposes a defendant to a sentence of death. That alone establishes Florida's refusal to implement *Ring*'s holding that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

3. This Court should not be misled by the State's assertion that granting relief in this case would require this Court to overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972). In *Apodaca*, this Court held that the Sixth and Fourteenth Amendments were not violated by guilty verdicts of 10–2 in non-capital state criminal cases. *Id.* This Court has never decided whether a unanimous verdict is required in capital cases. But in any event, although every other state has interpreted *Ring* to require a unanimous jury finding on each aggravating circumstance, this Court need not reach that question in order to grant relief in this case. As noted repeatedly, Florida does not require even a simple majority of jurors to find the existence of a particular aggravating circumstance.

4. Finally, the State does not even attempt to dispute that its interpretation of *Ring* and the Sixth Amendment is in conflict with every other state that retains the death penalty. As previously noted in the petition, and explained further by amici, every state other than Florida has interpreted *Ring* to require a unanimous jury finding on at least one aggravating circumstance. *See* Pet. 17–18; NACDL Amicus Br. 10–22. The other "hybrid" states that used an advisory jury at the time *Ring* was decided — Alabama, Delaware, and Indiana — have changed their sentencing procedures to require such a finding. Pet. 17–18, 18 n.4; NACDL Amicus Br. 10–19.

The State's brief in opposition only reinforces the conclusion that this failure to follow *Ring* will persist until this Court intervenes. This case presents the perfect opportunity for this Court to resolve this conflict and clarify that *Hildwin* is no longer good law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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