NO. 12-1134

IN THE UNITED STATES SUPREME COURT

PAUL H. EVANS, *Petitioner*,

v.

SEC'Y, FLORIDA DEPT. OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

WHETHER THIS COURT SHOULD REVIEW AN ELEVENTH CIRCUIT DECISION CONCLUDING THAT FLORIDA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL?

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OPINION BELOW

The decision of the Eleventh Circuit is reported at *Evans v. Sec'y, Fla. Dep't. of Corr.*, 699 F.3d 1249 (11th Cir. 2012).

JURISDICTION

The Eleventh Circuit's opinion reversing the district court's order on October 23, 2012. The Eleventh Circuit denied rehearing on December 18, 2012. According to this Court's docket, Evans filed his petition for writ of certiorari on March 18, 2013. The petition appears to be timely. See Sup. Ct. R. 13.1 ("petition for a writ of certiorari to review ... timely when it is filed with the Clerk of this Court within 90 days after entry of the

judgment"); 28 U.S.C. § 2101(c) (providing: "[a]ny other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . ."). Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

The Fourteenth Amendment of the United States Constitution, section one, provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The facts of this crime and the procedural history of the case are recited by the Eleventh Circuit in its published opinion. Evans, 699 F.3d at 1252-55; *see also Evans v. McNeil*, 2011 WL 9717450, *1-*6 (S.D.Fla. Jun 20, 2011)(quoting *Evans v. State*, 808 So.2d 92, 95–98 (Fla. 2002)).

Evans raised a Sixth Amendment right-to-a-jury-trial claim in the direct appeal relying on

Jones v. United States, 526 U.S. 227 (1999). The Florida Supreme Court rejected the claim in a footnote. *Evans v. State*, 808 So.2d 92, 110, n.10 (Fla. 2001). The Florida Supreme Court stated: "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)." The Florida Supreme Court denied rehearing and issued the mandate on February 12, 2002. *Ring* was decided four months later on June 24, 2002. After *Ring* was issued, Evans sought certiorari review of his right-to-a-jury-trial claim in this Court, now explicitly relying on *Ring*. This Court denied review. *Evans v. Florida*, 537 U.S. 951 (2002)(No. 02-5345).

Evans then filed a motion for postconviction relief in the state trial court. In his state postconviction motion, Evans raised a claim that Florida's death penalty statute violated the Sixth Amendment explicitly relying on *Ring*.

In his postconviction appeal to the Florida Supreme Court, Evans raised, as issue VIII, a claim that "Florida's capital sentencing statute violates the Sixth and Fourteenth Amendments under *Ring v. Arizona*." (PC IB at 99-100). Evans argued that Florida's statute was unconstitutional under *Ring* because "Florida law only requires the judge to consider the recommendation of a majority of the jury." (PC IB at 99 citing Fla. Stat.

§921.141(3)). Evans also asserted that Florida's statute was unconstitutional because "[n]either the sentencing statute, nor the jury instructions in Mr. Evans' case required that all jurors concur in finding any particular aggravating circumstance . . ." (PC IB at 99). Evans also argued that *Ring* was violated because the "aggravating circumstances were not alleged in the indictment." (PC IB at 100). Evans also cited the footnote in *Jones* in his initial brief. (PC IB at 100 citing *Jones*, 526 U.S. at 243 n.6).

The State in its answer brief in the postconviction appeal asserted that the *Ring* claim was procedurally barred as well as meritless under controlling precedent. (PC AB at 98-99). The State did not assert that the issue was barred by the non-retroactivity doctrine. Rather, the State took the position that the claim was procedurally barred because "a similar claim was raised and rejected on direct appeal, thus rendering this matter barred and meritless." (PC AB at 98 citing PC-R.4 1127-28). The State explained that in the direct appeal, "Evans challenged the constitutionality of his death penalty based upon *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) and *Jones v. United States*, 526 U.S. 227 (1999)" which had been rejected by the Florida Supreme Court. (PC AB at 98 citing *Evans*, 808 So.2d at 110, n.10.). The State noted that the trial court found, "a similar claim was raised and rejected on direct appeal, thus rendering this matter barred and meritless." (PC AB at 98 citing PCR Vol. 4 1127-28).

The Florida Supreme Court, however, denied the claim finding *Ring* is not retroactive. *Evans v. State*, 995 So.2d 933, 952 (Fla. 2008). The Florida Supreme Court reasoned that Evans' death sentence became final on February 2002 and because "*Ring* was not decided until June 2002, Evans cannot rely on it to vacate his death sentence. *Evans*, 995 So.2d at 952 (citing *Schriro v. Summerlin*, 542 U.S. 348 (2004) and *Johnson v. State*, 904 So.2d 400 (Fla. 2005)).

Evans then filed a petition for writ of habeas corpus in the Southern District of Florida on December 1, 2008. See *Evans v. McNeil*, Case No. 2:08-cv-14402-JEM. In his petition, as issue XVII, Evans asserted that Florida's death penalty scheme and his death sentence violated *Ring* because the jury only recommends a sentence, but the judge actually decides what sentence to impose. (Doc #1 at 176-177). Evans argued that Florida's death penalty statute assigned the responsibility for finding an aggravating circumstance to the judge rather than the jury. (Doc #1 at 176). Evans argued that "Florida law only requires the judge to consider the recommendation of the majority of the jury." (Doc #1 at 176 citing § 921.141(3)). Evans stated that "[n]either the sentencing statute nor the jury instructions in Mr. Evans' case required that all jurors concur in finding any particular aggravating circumstance or whether sufficient aggravating circumstances exist or whether sufficient aggravating circumstances exist which outweigh mitigating circumstances." (Doc #1 at 176-177). Evans also asserted that his death sentence was

unconstitutional because the aggravating circumstances were not listed in the indictment relying on a footnote in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). (Doc #1 at 177).

The district court granted habeas relief based on the *Ring* claim. (Doc #21 at 78-93). The district court reviewed the *Ring* claim *de novo*. The district court found the Florida Supreme Court's decision rejected the *Ring* claim on the basis of non-retroactivity to be "an unreasonable application of clearly established federal law." (Doc #21 at 79). The district court found that the Florida Supreme Court's decision was an unreasonable application of *Schriro v. Summerlin*, 542 U.S. 348 (2004), because Evans' conviction was not final when *Ring* was decided. Evans' certiorari petition was pending in the United States Supreme Court on the date that *Ring* was decided. (Doc #21 at 79). The district court concluded that "*Ring* is to be applied to his case and the Court will review Mr. Evans' claim *de novo*." (Doc #21 at 79-80).

The district court then found that Florida sentencing statute as it "currently operates in practice . . . is in violation of *Ring*" and granted habeas relief on that basis. (Doc #21 at 89,93). The district court found that *Ring* applies to Florida and that "the Florida sentencing statute is unconstitutional." (Doc #21 at 91-92, n. 33). The district court concluded that Evans' death sentence cannot be constitutional "when there is no evidence to suggest that even a simple majority found the existence of any one aggravating circumstance."

(Doc #21 at 92 citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

Respondents filed a 59(e) motion to alter or amend. (Doc. #22). The district court denied the 59(e) motion in an eighteen page order. (Doc. #27 1-18). The district court declined to clarify whether the ruling that Florida's death penalty statute was unconstitutional was a matter of the statute being facially unconstitutional or as-applied to Evans' particular case. (Doc. #27 at 2).

The State of Florida appealed the district court's order to the Eleventh Circuit. On appeal, the State's position was that the district court reviewed the wrong decision. The district court should have reviewed the opinion of the Florida Supreme Court in the direct appeal, not the opinion of the Florida Supreme Court in the postconviction appeal. The State argued that the district court had improperly conducted a *de novo* review of a later decision rather than properly applying the AEDPA to the earlier decision. And that the direct appeal decision was entitled to AEDPA deference under *Greene v. Fisher*, 565 U.S. -, 132 S.Ct. 38 (2011). The State asserted that clearly established federal law at the time of the direct appeal was *Apprendi v. New Jersey*, 530 U.S. 466 (2000), not *Ring*.

Alternatively, the State claimed, even under *de novo* review, the district court had improperly refused to follow *Schad v. Arizona*, 501 U.S. 624 (1991). The district court basically adopted the

dissent in *Schad* which was improper under any standard of review.

The Eleventh Circuit conducted a *de novo* review of the *Ring* claim. The Eleventh Circuit identified four issues that it was avoiding by engaging in *de novo* review "including: 1) whether the claim is procedurally barred because Evans did not raise it in the state trial court and on direct appeal; 2) whether the Florida Supreme Court's rejection of the claim in the state collateral proceeding is subject to deference under 28 U.S.C. § 2254(d)(1); 3) whether any *Ring* error in this case would have been harmless in light of the evidence establishing that if Evans committed the murder he must have done it for pecuniary gain; and 4) whether any of the four previously listed issues have been waived by the State." *Evans*, 699 F.3d at 1265, n.9. For this reason, the Eleventh Circuit did not address the State's *Greene*-based arguments.

The Eleventh Circuit then concluded that the district court had not followed the controlling precedent of *Hildwin v. Florida*, 490 U.S. 638 (1989), which had upheld Florida's death penalty statute against a Sixth Amendment right-to-a-jury trial challenge. The Eleventh Circuit explained that it is the Supreme Court's "prerogative alone to overrule one of its precedents." *Evans*, 699 F.3d at 1263-65 (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)). The Eleventh Circuit reversed the district court's order finding Florida's death penalty statute unconstitutional.

REASONS FOR DENYING THE WRIT

WHETHER THIS COURT SHOULD REVIEW AN ELEVENTH CIRCUIT DECISION CONCLUDING THAT FLORIDA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL?

Petitioner Evans asserts that Florida's death penalty statute violates the Sixth Amendment right to a jury trial provision as interpreted in *Ring v. Arizona*, 536 U.S. 584 (2002). Evans argues that *Hildwin v. Florida*, 490 U.S. 638 (1989), which held that Florida's death penalty statute did not violate the right to a jury trial, is no longer good law because this Court in *Ring* "directly repudiated the holding, reasoning, and language" of *Hildwin*. *Hildwin*, however, remains good law in light of this Court's more recent developments in the area of the right to a jury trial. Far from repudiating *Hildwin*, this Court has reaffirmed the "holding, reasoning, and language" of *Hildwin* in its more recent cases. In this Court's view, Florida juries do make factual findings regarding an aggravating circumstance when recommending a death sentence. Evans mistakenly believes that this case provides an "ideal" vehicle for resolving the issue of the viability of *Hildwin* because the Eleventh Circuit reviewed the claim *de novo*. But the Eleventh Circuit did so for ease of analysis. To grant relief, this Court would have to address the threshold issue of whether the Florida Supreme Court's direct appeal decision is due AEDPA deference. Because the Florida Supreme Court addressed the

Sixth Amendment claim on the merits in the direct appeal, the AEDPA applies and de novo review would be improper. Under the AEDPA, the Florida Supreme Court's decision must be contrary to, or an unreasonable application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which was the clearly establish law at the time of the state court's decision. This case is a tangled skein of procedural complexities, which the Eleventh Circuit specifically noted. This case emphatically is not an ideal vehicle. Furthermore, Evans relies on inaccurate statistics and mischaracterizations to establish the importance of this issue. This Court should deny review.

The development of this Court's current jury-trial jurisprudence

Evans recites the history and development of this Court's current right-to-a-jury-trial jurisprudence discussing both *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring* in an attempt to establish that this Court has repudiated *Hildwin*. Pet. at 9-12. But glaringly omitted from the discussion of this Court's new jurisprudence is the foundational case of *Jones v. United States*, 526 U.S. 227 (1999). It is a footnote in *Jones* that became the holding of *Apprendi*. Id. at 243, n.6 (stating "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."). *Jones* is the

foundation of both *Apprendi* and *Ring*. And in that foundational case, this Court discussed "fact-finding in capital sentencing" and *Hildwin*. *See Jones*, 526 U.S. at 250-51. Of Florida capital juries, the *Jones* Court observed: "[i]n *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 250-51. *Hildwin*, which involved a jury recommendation of death, and therefore, a jury finding of at least one aggravating circumstance, is still good law as this Court explained in *Jones*. This Court reaffirmed the "holding, reasoning, and language" of *Hildwin* in *Jones*. Evans' argument that *Hildwin* "is no longer good law" is fatally flawed because it ignores this Court's pronouncement to the contrary in the foundational case of *Jones*. Pet. at 9.

Certiorari review should not be granted purely for the sake of repeating this Court's clarification of *Hildwin* already given in *Jones*. This Court normally does not grant review merely to reaffirm a prior case, and Petitioner certainly provides no reason for this Court to do so here. Rather, he merely ignores this Court's statements in *Jones*. Review should not be granted merely to engage in a redo.

Fact-finding in Florida capital sentencing

Evans states that "Florida juries do not make factual findings regarding the existence of the aggravating circumstances that are required to expose a defendant to the death penalty." Pet. at 12-13. This Court knows that Florida juries do just that. This Court has observed that when a Florida jury recommends death, it has "necessarily engage[ed] in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 250-51.

Evans' statement is also contradicted by the Eleventh Circuit's opinion in this case. The Eleventh Circuit observed that Florida's "death sentencing procedures do provide jury input about the existence of aggravating circumstances that was lacking in the Arizona procedures the Court struck down in *Ring*." *Evans*, 699 F.3d at 1261.

And the Florida Supreme Court disagrees with Evans' statement as well. *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005)(reading *Ring* to require a jury finding that at least one aggravator exists, not that a specific aggravator does and explaining that given the language of the standard jury instructions, "such a finding already is implicit in a jury's recommendation of a sentence of death" quoting *Jones*); *Ault v. State*, 53 So.3d 175, 205 (Fla. 2010)(stating: "[u]nder Florida law, in order to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating

circumstance listed in the capital sentencing statute.").

Every relevant court disagrees with Evans' statement regarding fact-finding in capital sentencing by Florida juries – this Court, the Eleventh Circuit, and the Florida Supreme Court. Each of these courts has determined that Florida juries do make factual findings regarding the aggravating circumstances when recommending a death sentence. Florida juries, in compliance with *Ring*, find at least one aggravating circumstance prior to recommending a death sentence.

Special verdicts and unanimity

Evans claims that a factual finding of an aggravating circumstance cannot be inferred from a jury recommendation of death "because even a simple majority of jurors is not required to agree on any particular aggravating circumstance." Pet. at 13. Evans is confusing the disparate concepts of special verdicts and unanimity with the requirement that the jury, not a judge, find the elements of a crime. His claim, like the district court's order, ignores this Court's holding in *Schad v. Arizona*, 501 U.S. 624 (1991), that jurors are not required to agree on any particular theory and that special verdicts are not required.

While there were no special jury findings detailing exactly which aggravating circumstances the jury found in this case, that is not a *Ring* claim. *Ring* concerns the role of the jury in finding elements versus the role of a judge in sentencing,

not jury unanimity or special verdicts. Evans, like the district court, is tangling two, if not three, separate lines of cases together. Review of this case will involve more than deciding a single *Ring* claim. Like the district court, Evans believes that the Sixth Amendment should require special verdicts detailing the jury's findings regarding the particular aggravating circumstances that they found. Pet. at 21. But that is a *Schad* claim, not a *Ring* claim. Evans is really advocating that this Court overrule both *Hildwin* and *Schad*.

Indeed, he may be advocating that this Court overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), as well as *Hildwin* and *Schad*. Pet. at 21. In *Apodaca*, this Court concluded that the Sixth Amendment does not require juror unanimity in state cases. See *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3035, n.14 (2010)(discussing the holding in *Apodaca* and noting Justice Powell's concurrence was the opinion of the Court). While unclear, Evans seems to be taking the position that all twelve jurors should be required to unanimously find the same aggravating circumstance before recommending a death sentence. Pet. at 21 (citing a law review article suggesting that dissenting juror's views are "passed over in deliberations"). Evans is asking this Court to overrule *Apodaca* and *Schad*, as well as *Hildwin*.

Petitioner claims that the Florida Supreme Court and the Eleventh Circuit are flouting this Court's decision in *Ring*. Pet. at 13. But a necessary corollary to that claim is that Evans is

accusing this Court of flouting it own decision as well. There have been scores of petitions for writ of certiorari filed from Florida cases raising *Ring* claims in direct appeal cases in the decade since *Ring* was decided - all of which this Court has denied.[1] None of these courts are ignoring *Ring*. Rather, these courts simply have a different view of *Ring* and the constitutionality of hybrid sentencing statutes than Evans.

Additionally, this Court has already denied review of this claim once and nothing has changed since that original denial. *Evans v. Florida*, 537 U.S. 951 (2002)(No. 02-5345)(denying petition for writ of certiorari from direct appeal). This Court denied this *Ring* claim the first-time around and Evans provides no additional reason to pique this Court's interest the second-time around. Instead, he ignores the fact that this Court has already denied review once on his *Ring* claim. This Court should deny review again.

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[1] See, e.g. *Guardado v. State*, 965 So.2d 108, 117-18 (Fla. 2007), *cert. denied*, *Guardado v. Florida*, 552 U.S. 1197, 128 S.Ct. 1250 (2008)(No. 07-8094); *Bailey v. State*, 998 So.2d 545, 556 (Fla. 2008), *cert. denied, Bailey v. Florida*, 129 S.Ct. 2395 (2009)(No. 08-9241); *Turner v. State*, 37 So.3d 212, 229 (Fla. 2010), *cert. denied*, *Turner v. Florida*, - U.S. -, 131 S.Ct. 426 (2010)(No. 10-6270); *Caylor v. State*, 78 So.3d 482, 500 (Fla. 2011), *cert. denied*, *Caylor v. Florida*, 132 S.Ct. 2405 (2012)(No. 11-9648); *Bright v. State*, 90 So.3d 249, 264, n.7 (Fla. 2012), *cert. denied*, *Bright v. Florida*, 133 S.Ct. 300 (2012)(No. 12-5151).

Importance of the issue

Evans asserts that the issue of hybrid capital sentencing and right to a jury trial is "extraordinarily important" because Florida disproportionately imposes the death penalty and leads the nation in "wrongful" convictions. Pet. at 19. Both reasons are inaccurate. Florida does not "disproportionately" impose the death penalty. And, as this Court has explained, the concept of "wrongful" convictions has no connection to the constitutionality of a death penalty statute. *Kansas v. Marsh*, 548 U.S. 163, 180 (2006).

Petitioner claims that Florida imposes 13% of death sentences nationwide, but only accounts for 6% of the nation's population. Pet. at 19. This statistic is misleading because it includes those states that have abolished the death penalty in the percentage of the nation's population. The more accurate statistic would be the rate per capita that Florida imposes the death penalty compared with the rate per capita that other death penalty states do so. And even then, one state necessarily will rank the highest and another state necessarily will rank the lowest – that is the nature of such lists. The Sixth Amendment is not a bell curve and it certainly is not a bell curve with no deviations allowed.

Evans does not explain the connection between "wrongful convictions" and the death penalty. One concerns guilt and the other concerns punishment. As this Court observed, the accuracy of guilt-phase determinations in capital

cases "is simply irrelevant" to the question of the constitutionality of state's capital sentencing system. *Kansas v. Marsh*, 548 U.S. 163, 180 (2006).

Moreover, Evans is confusing legal error with innocence. They are not equivalent. Justice Scalia has distinguished between the concept of exoneration and innocence, explaining that most reversals are based on legal errors "that have little or nothing to do with guilt." *Marsh*, 548 U.S. at 198 (Scalia, J., concurring). He noted the widespread mischaracterization of reversible error as innocence – a mischaracterization rife throughout this petition. *Id*. at 196.

Justice Scalia explained that claims of actual innocence among death–row inmates are wildly exaggerated. In his words, there is not a "single verifiable case" of an innocent person being executed but "it is easy as pie to identify plainly guilty murderers who have been set free." *Id*. at 199.

Based merely on a website, which advocates abolishing the death penalty, Petitioner asserts that "twenty-four people on the Florida's death row have been exonerated." Pet. at 22. Justice Scalia noted that this particular website's list of exonerees contains many "dubious candidates" including the Florida case of Delbert Tibbs. *Marsh*, 548 U.S. at 197 (Scalia, J., concurring)(discussing the Death Penalty Information Center's list and its defects). Justice Scalia discussed a leading law review article that had pointed to the Florida case

of James Adams as an example of an innocent person who had executed. *Marsh*, 548 U.S. at 190-91 (discussing Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J.Crim. L. & C. 523 (2005)). Justice Scalia then detailed the highly incriminating evidence in the Adams case and noted that the article did not account for any of this highly incriminating evidence, which provoked him to label the article as inaccurate, careless, and unworthy of credence. This inaccurate, careless, and incredible article is the basis of the website's list of exonerees upon which Evans relies in his petition. Furthermore, this Court recently denied review of an Eighth Amendment challenge to Florida's death penalty statute for not requiring unanimous jury recommendations of a death sentence based on these same statistics and website. *Mann v. Florida*, - S.Ct. -, 2013 WL 1420518 (April 10, 2013).

Petitioner's classification of Florida as being "the State with the worst record of wrongful convictions" is based on flimsy sources and mischaracterizations. Pet. at 22. While the State agrees that capital punishment is an important matter, it is hard to credit Evans' claim that Florida's hybrid capital sentencing is a matter that is "extraordinarily important" and uniquely worthy of this Court's time when that argument is supported with inaccurate statistics and wildly exaggerated assertions regarding "wrongful" convictions in Florida, citing sources that are inaccurate, careless, and unworthy of credence.

This case is a very poor vehicle

Evans asserts that this case is "an ideal vehicle" to address the matter of hybrid capital sentencing systems and the Sixth Amendment right to a jury trial. Pet. at 22. It is not. Far from being a good vehicle, this case is a tangled skein of procedural complexities, starting with the issue of whether the Florida Supreme Court's direct appeal opinion rejecting a Sixth Amendment claim is due AEDPA deference.

The Eleventh Circuit reviewed the *Ring* claim *de novo* for ease of analysis, explaining that by reviewing and denying the claim *de novo*, it was unnecessary to decide a number of issues. *Evans*, 699 F.3d at 1265, n.9. The Eleventh Circuit identified four issues that it was avoiding by engaging in *de novo* review. While the Eleventh Circuit reviewed the claim *de novo* for ease of analysis, this Court would not have that luxury. *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2265 (2010)(explaining that courts cannot grant habeas relief without determining whether the AEDPA applies but courts may deny habeas relief by engaging in *de novo* review when it is unclear whether AEDPA deference applies)(emphasis added). This Court would have to address several procedural issues that were not addressed by either the district court or the Eleventh Circuit before reaching the issue of the viability of *Hildwin*, any one of which could, in the end, prevent this Court from reaching the merits.

One of the major threshold issues is whether the Florida Supreme Court's decision in the direct appeal is due AEDPA deference. That issue involves a twist on this Court's decision in *Greene v. Fisher*, 565 U.S. -, 132 S.Ct. 38 (2011)(holding that "clearly established federal law," for purposes of the AEDPA, means the law established at the time of the state court's decision, not at the time of finality). *Ring* had not been decided at the time of the Florida Supreme Court's decision in the direct appeal. Evans raised a Sixth Amendment right-to-a-jury-trial claim in the direct appeal relying on *Jones v. United States*, 526 U.S. 227 (1999). The Florida Supreme Court rejected the claim in a footnote. *Evans v. State*, 808 So.2d 92, 110, n.10 (Fla. 2001). The Florida Supreme Court denied rehearing and issued the mandate on February 12, 2002. *Ring* was decided four months later on June 24, 2002. After *Ring* was issued, Evans sought certiorari review of his right-to-a-jury-trial claim in this Court, now explicitly relying on *Ring*. This Court denied review. *Evans v. Florida*, 537 U.S. 951 (2002)(No. 02-5345). Such a procedural history mirrors the procedural history of *Greene* creating the same legal issue which means that AEDPA deference is due to the Florida Supreme Court's direct appeal opinion under *Greene*.

There is a twist, however. This Court in *Greene* observed that the defendant's "predicament is an unusual one of his own creation" because he neither filed a petition for writ of certiorari nor raised the issue in his state postconviction motion. *Greene*, 132 S.Ct. at 45. Evans, in contrast with *Greene*, did both. Evans filed a petition for writ of

certiorari raising the *Ring* claim and he raised the *Ring* claim in his state postconviction proceedings as well. So, this case would involve a twist on *Greene* rather than a straight-forward application of *Greene*.

While Petitioner is correct that the State did not challenge the district court's ruling regarding the Florida Supreme Court's retroactivity decision in the postconviction appeal, the State most certainly did challenge the failure of the district court to accord the Florida Supreme Court's decision in the direct appeal AEPDA deference. Pet. at 25. The State's position was that Evans' Sixth Amendment claim was raised in the direct appeal and was properly rejected under *Apprendi*, which was the law at the time of the state-court's decision, and that the Florida Supreme Court's decision in the direct appeal was not contrary to, or an unreasonable application of, the clearly established law of *Apprendi*. Neither *Greene* nor the twist on *Greene* was addressed by the Eleventh Circuit because they denied relief using the simple expedient of *de novo* review but this Court would have to address that argument to grant relief. Petitioner does not mention the threshold issue of whether the Florida Supreme Court's direct appeal decision is due AEDPA deference under *Greene* in his petition.

Ignoring this threshold issue, Evans asserts that this case is one where the AEDPA permits de novo review because the state court decided a federal claim in a way that was 'contrary to' clearly established Supreme Court precedent. Pet. at 24

(citing *Johnson v. Williams*, 133 S.Ct. 1088, 1097 (2013)). Evans asserts that this is that rare case where "§ 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge" Pet. at 23 (quoting *Williams*, 133 S.Ct. at 1097). Evans is not entitled to either *de novo* review or an unencumbered opportunity to make his case before a federal judge. Evans is overlooking the actual holding in *Williams* which was that, when a state court issues an order that addresses some claims but summarily rejects without discussion other claims, the federal habeas court must presume, subject to rebuttal, that the other claims were adjudicated on the merits and accord the state-court decision AEDPA deference. This Court concluded that a federal court may not just assume that the state court simply overlooked the federal claim and proceed to adjudicate the claim de novo. The *Williams* Court held that federal courts should assume the opposite. *See also Harrington v. Richter*, 562 U.S. -, 131 S.Ct. 770 (2011)(holding that when a state court issues an order that summarily rejects without discussion all the claims raised by a defendant, the federal habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits and accord the state-court decision AEDPA deference).

In this case, Evans cannot argue that the Florida Supreme Court overlooked the claim because they explicitly addressed the claim in a footnote. *Evans v. State*, 808 So.2d 92, 110, n.10 (Fla. 2001). *Williams* and *Richter* apply with even more force to a state-court rejection of a claim in a

footnote because there can be no rebuttal of the presumption that the state court in fact addressed the claim on the merits. The AEDPA applies.

Additionally, Evans argues that this case is a good vehicle because it does not involve aggravating circumstances that are exempt from *Ring*, such as the prior violent felony aggravator or the under-sentence-of-imprisonment aggravator, unlike the case of *Hampton v. State*, 103 So.3d 98, 116 (Fla. 2012), petition for cert. filed (U.S. Feb. 20, 2013)(No. 12-8923). Pet. at 25. Evans also argues that this case is a good vehicle because it does not involve the felony murder aggravating circumstance where *Ring* is satisfied in the guilt phase, unlike the case of *McGirth v. State*, 48 So.3d 777, 796 (Fla. 2010), *cert. denied*, 131 S.Ct. 2100 (2011). Pet. at 26.

But this Court recently denied review of a case where such aggravating circumstances were not present. *Peterson v. State*, 94 So.3d 514 (Fla. 2012), *cert. denied*, *Peterson v. Florida*, 133 S.Ct. 793 (Dec 10, 2012)(No. 12-6741). *Peterson* involved a *Ring* claim, where none of the "automatic" aggravators, such as the prior violent felony or the felony-murder aggravator, was present, and where the jury recommended a death sentence by a seven-to-five vote. *Peterson*, 94 So.3d at 538 (Pariente, J., dissenting as to sentence). In *Peterson*, three Justices dissented on the *Ring* claim based on reasoning that was similar to the district court's reasoning in this case and indeed, the dissent cited and quoted the district court's ruling in this case. *Peterson*, 94 So.3d at 540 (citing

and quoting *Evans v. McNeil*, No. 08–14402–CIV, slip op. at 78–93, 89 (S.D.Fla. June 20, 2011)). *Peterson* had all of the advantages that Petitioner identifies this case as having and none of the procedural disadvantages, yet this Court declined review of that case. *Peterson* was a much "cleaner" case than this case. Indeed, Peterson was absolutely pristine. *Peterson*_was a direct appeal opinion from the Florida Supreme Court with no procedural hurdles, not a federal habeas case with numerous procedural hurdles, yet this Court declined review.

Moreover, there are additional significant aspects of this case not addressed by the Eleventh Circuit in its opinion. The Eleventh Circuit understandably wanted to remind the district courts in their jurisdiction that it is not their prerogative to overrule or to ignore controlling Supreme Court precedent, even under de novo review. Therefore, the Eleventh Circuit spent a great deal of their effort reminding the district court of this Court's repeated instructions to lower courts to follow existing precedent and took the district court to task for embracing "the exhilarating opportunity of anticipating" the overruling of a Supreme Court decision because only this Court may overrule its precedents. *Evans*, 699 F.3d at 1263-65 (explaining that it is the Supreme Court's "prerogative alone to overrule one of its precedents" quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001) and citing numerous other cases from this Court to the same effect and quoting Judge Hand). That discussion consumes several pages of the opinion. The

Eleventh Circuit explained that *Hildwin* was "directly on point, and it is binding on us," and on the district court as well. Id. at 1264. While quite understandable, many substantive aspects of this case, consequently were not addressed in the Eleventh Circuit's opinion. Left unaddressed by the Eleventh Circuit's opinion was the district court's reasons for ruling Florida's death penalty statute unconstitutional. The Eleventh Circuit did not address either of the district court's reasons for ruling the statute unconstitutional in any manner. With all of these complexities and omissions, this case emphatically is not an ideal vehicle.

Accordingly, for these reasons, the petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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