DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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JASON DIRK WALTON,

Petitioner,

vs.

STATE OF FLORIDA, and JULIE L. JONES,
Secretary, Florida Department of Corrections

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED--CAPITAL CASE

Questions

1. When changes in a state's substantive criminal set out the elements of capital murder which the prosecution must prove to the satisfaction of a unanimous jury before death is a possible sentence, does it violates the Due Process Clause to have that substantive criminal law apply retrospectively to cases in which the homicides were committed in 1981 and 1982, while not applying the new substantive law to a case in which the homicides were committed in 1983. Under the Due Process Clause can a conviction of capital murder be required in cases involving 1981 and 1982 homicides before death is a permissible sentence, while death sentences for convictions of the lesser offense of first degree murder for homicides committed in 1983 remain intact?

2. When changes in a state's substantive criminal set out the elements of capital murder which the prosecution must prove to the satisfaction of a unanimous jury before death is a possible sentence, does it violates the Eighth Amendment to have that substantive criminal law apply retrospectively to cases in which the homicides were committed in 1981 and 1982, while not applying the new substantive law to a case in which homicides were committed in 1983. Under the Eighth Amendment can a conviction of capital murder be required in cases involving 1981 and 1982 homicides before death is a permissible sentence, while death sentences for convictions of the lesser offense of

first degree murder for homicides committed in 1983 remain intact?

3. When State law provides that a death sentence may be vacated and a resentencing ordered when new evidence would probably result in a less severe sentence at a resentencing, does it violate the Eighth Amendment to ignore changes in law that require juror unanimity, instead of a majority vote, as to the elements of capital murder, which were not previously regarded as elements, from consideration of the probable outcome at a resentencing?

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PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

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Petitioner, **JASON DIRK WALTON,** is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court issued on May 17 ,2018.

CITATION TO OPINION BELOW

The Florida Supreme Court's opinion appears at *Walton v. State*, 246 So. 3d 246 (Fla. 2018). The opinion is attached to this Petition as Attachment A.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court entered its opinion on May 17, 2018. A motion for rehearing was filed on June 1, 2018. The Florida Supreme Court denied the rehearing motion on July 5, 2018. This order is attached as Attachment B.

Mr. Walton filed an application for an extension of his time to file this petition for a writ of certiorari. On October 1, 2018, Justice Thomas granted the application and extended the time for filing this petition until Sunday, December 2, 2018. This order is attached as Attachment C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 7, 2015, Mr. Walton filed a successive motion for post conviction relief. It was filed in the trial court in Pinellas County, Florida. The motion was based on newly discovered evidence and the Florida case law regarding claims arising from the discovered of new, previously unavailable evidence which if introduced at a resentencing would probability result in a less severe sentence. In the motion, Mr. Walton asserted that if the newly discovered evidence were presented at a resentencing, it was likely that he would receive less severe sentences.

Mr. Walton currently has three death sentences which were imposed in a case that began with a March 1983 indictment in which Mr. Walton and three co-defendants were charged with three counts of first degree murder. Mr. Walton was tried and convicted on all three counts in February of 1984. A penalty phase proceeding followed. After the jury returned a death recommendation, the judge imposed a death sentence on each of the three counts. On appeal, the Florida Supreme Court affirmed the convictions, but vacated the death sentences and remanded for a new penalty phase proceedings. *Walton v. State*, 481 So. 2d 1197 (Fla. 1985).

Mr. Walton's second penalty phase proceeding began on August 12, 1986. Evidence was presented that Mr. Walton and his three co-defendants went one of the victims' residence because they understood that money and cocaine was stashed in the house. McCoy, the co-defendant who had entered into a plea agree with the State, testified that he had understood that there would be a lot of money and cocaine in he house. McCoy was not in the house when he heard shots fired. He had gone to start the car as they were getting ready to leave. After he heard the shots, the other three got in the car and they all left.

At the resentencing, the State called a psychiatrist to testify as to effect on the mental condition of the eight-year-old son of one of the victims. The eight-year old had in the house at the time of the murders. He was put in the bathroom and not harmed.

The jury was instructed that it "must consider" six aggravating circumstances. (R2 852-53). The jury was not advised that Florida law required two of the six aggravators to merge and considered as one aggravator. As to the cold, calculated and premeditated aggravator, the jury was not instructed that the State had to prove beyond a reasonable doubt that there had been a pre-existing plan to kill. As to the heinous, atrocious or cruel aggravator, the jury was not instructed on a narrowing construction. The instruction given was the same one found unconstitutionally vague in *Espinosa v. Florida*, 505 U.S. 1079

(1992).[1] The jurors were instructed that in their advisory role they were to consider:

> whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R852). They were not told that these were questions of fact and that the State had to prove beyond a reasonable doubt that aggravators were sufficient and that aggravators had to outweigh the mitigators.

On August 14, 1986 the jury returned death recommendations by a vote of 9 to 3. Three jurors voted for life sentences on all three counts. Presumably, these three jurors did not find that "sufficient aggravating circumstances exist[ed]" and/or that insufficient "mitigating circumstances existed to outweigh any aggravating circumstances found to exist."

On August 29, 1986, the judge imposed three death sentences. In his written findings, the judge found that five aggravating factors had been shown. He said that no mitigating factors had been shown.

At the time that Mr. Walton's death sentences were imposed in 1986, the judge was aware that both triggermen, Cooper and Van

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[1]The Florida Supreme Court later noted that the instructions given to Mr. Walton's jury in 1986 violated his Eighth Amendment rights under *Espinosa v. Florida* and *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). The HAC and CCP instructions failed to advised the jury of narrowing principles that limited the scope of those aggravators. *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003) ("the instructions were clearly insufficient under the United States Supreme Court's, as well as this Court's, jurisprudence governing instructions designed to narrow the class of defendants constitutionally eligible for the death penalty").

Royal, had also received three death sentences. Cooper's death sentences had affirmed by the Florida Supreme Court. *Cooper v. State*, 492 So. 2d 1059 (Fla. 1986). Van Royal's direct appeal was still pending. The other co-defendant, McCoy, was not a triggerman, and life sentences had been imposed pursuant to his plea deal with the State.

Within weeks of the imposition of Walton's death sentences, Van Royal's death sentences were vacated and life sentences were ordered to be imposed. *Van Royal v. State*, 497 So. 2d 625 (Fla. 1986).

In Mr. Walton's second direct appeal, he argued that it was error to allow a psychiatrist to testify about the mental condition of the victim's son. The Florida Supreme Court found that the psychiatrist's testimony "was erroneously admitted," but the error was found to be harmless *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989).

Mr. Walton also argued that the State's closing arguments had been improper. The Florida Supreme Court wrote "we do not condone the prosecutor's conduct and this conduct could be reversible error under different circumstances." *Id.* at 625.

Despite the finding a psychiatrist's testimony had been "erroneously admit[ted]" and improper prosecutorial argument had been made to the jury, the death sentences were affirmed.

In the intervening years, Mr. Walton had unsuccessfully challenged his death sentences in several collateral proceedings. Then in 2014, new and previously unavailable evidence appeared.

At a resentencing proceeding for Richard Cooper,[2] one of the co-defendants, a statement made by Cooper during his clemency proceedings was revealed when the State used it against Cooper. This statement was potential favorable to Mr. Walton. Further, the jury at Cooper's resentencing returned a life recommendation when the jury split 6 to 6 on whether to recommend life or death sentences. As a result, Cooper received three life sentences.

Mr. Walton's May 7, 2015 successive motion asserted that Cooper's life sentences, his clemency statement and the statements made by the prosecutor at Cooper's resentencing, constituted new evidence favorable to Mr. Walton which if introduced at a resentencing likely result in a less severe sentence. Under Florida law, if the evidence alleged to be new was found to qualify as in fact new, a resentencing was warranted if the result of such a resentencing would probably result in a less severe sentence.

After conducting an evidentiary hearing on Mr. Walton's claim, the judge found that Mr. Walton's claim was timely presented and that Cooper's life sentences qualified as new evidence. This meant that Mr. Walton's entitlement to a resentencing turned on whether an analysis of all the evidence that would be admissible at a resentence, if one were ordered, would result in less severe sentences. However, the judge denied relief on the claim and said that "Cooper's life sentence was

[2]In 2011, the Eleventh Circuit granted Cooper habeas relief on an ineffective assistance of counsel claim and vacated Cooper's death sentences. *Cooper v. Sec'y, Dep't of Corr.*, 646 F. 3d 1328 (11th Cir. 2011).

based on finding [Mr. Walton] more culpable." (PCR4 1278).[3] So for that reason, the judge ruled that Mr. Walton had not shown that a different outcome at a future resentencing was more likely than not.

The denial of the newly discovered evidence claim issued on December 31, 2015, twelve days before the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In his rehearing motion, Mr. Walton's argued that in light of *Hurst v. Florida* rehearing was warranted because it should be part of the analysis of the probability of a less severe sentence being imposed at a resentencing that would be governed by *Hurst v. Florida*. On February 8, 2016, the motion was denied "without prejudice to any right Defendant may have to file a separate motion based on *Hurst*." (PCR4 1312).

Mr. Walton appealed. During the appeal, he asked the Florida Supreme Court to relinquish jurisdiction to the trial court so that a motion for post conviction relief based on *Hurst v. Florida* and the March 7, 2016 enactment of Chapter 2016-13, Laws of Florida which rewrote Florida's capital sentence laws. On September 13, 2016, the relinquishment request was granted, and

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[3]But, Cooper's life sentences resulted from a jury's 6-6 recommendation, which under Florida law in 2014 was treated as a life recommendation. The six jurors voting for death may have found the State's argument at Cooper's resentencing convincing. ("**There is no reason for those three people to die but for the fact that Mr. Cooper took it upon himself that my freedom is far more important than those people's lives.**" (PCR4 552) (emphasis added). "**Each of the three victims were shot with the Savage shotgun which Mr. Cooper admitted carrying and using.**" (PCR4 555) (emphasis added). The 6-6 life recommendations for Cooper did not reflect a finding that Mr. Walton was more culpable than Cooper.

Mr. Walton presented a 3.851 motion based on *Hurst v. Florida* and on the enactment of Chapter 2016-13. Mr. Walton's motion argued that because the revised § 921.141 would govern at a resentencing, the changes made by the enactment of Chapter 2016-13 had be part of analysis of whether at a resentencing Mr. Walton would probably receive a more favorable outcome, i.e. life sentences. After the Florida Supreme Court issued rulings on October 14, 2016, that juries would have to unanimously find the facts necessary to authorize a death sentence, Mr. Walton asserted that at a future resentencing its extremely likely that a jury would not unanimously agree to return a death recommendation and essentially convict Mr. Walton of capital murder and authorize the judge to consider death as a sentencing option.

The presiding judge entered an order denying the successive Mr. Walton's motion on January 13, 2017, and subsequently denied Mr. Walton's motion for rehearing. The judge's rulings were then made part of Mr. Walton's appeal when jurisdiction reverted back to the Florida Supreme Court.

At that time, the parties filed their briefs on the appeal with the Florida Supreme Court. In his briefing to the Florida Supreme Court, Mr. Walton challenged the lower court's refusal to consider the law that would govern at a resentencing if one were ordered while deciding whether a less severe sentence would be the probable result at a resentencing. Mr. Walton contended that the refusal to recognize that jury unanimity finding the elements necessary to increase the penalty from a life sentence of death

was error that infected Mr. Walton's death sentence with unreliability in violation of *Johnson v. Mississippi*, 486 U.S. 578 (1988).

On June 8, 2017 after he had filed his initial brief in the his then pending appeal, Mr. Walton filed a petition for writ habeas corpus in the Florida Supreme Court. This petition was based upon the changes the legislature made to § 921.141, which identified the facts that had to be found before a judge was authorized to impose a death sentence. The changes resulting from the enactment of Chapter 2016-13 and Chapter 2017-1, Laws of Florida, rewrote Florida's capital sentencing scheme. This meant that Florida's substantive criminal law was rewritten.

In *Perry v. State*, 210 So. 3d 630 (Fla. 2016), the Florida Supreme Court addressed Chapter 2016-13 and how it had rewritten § 921.141, Fla. Stat. Under the revisions set out in Chapter 2016-13, the Florida Supreme Court found that the State had to prove certain statutorily identified facts before death would be a possible sentence. It was for the jury to determine whether the State had met its burden. Under Chapter 2016-13, the jury had to:

> find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist.

Perry v. State, 210 So. 3d at 639. Under Chapter 2016-13, the penalty for first degree murder was life imprisonment, unless the jury found that the State had proven additional facts. In order:

> to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a

> sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death.

Perry v. State, 210 So. 3d at 640. The Florida Supreme Court held that under Chapter 2016-13, it the jury's role to make the "findings on all statutory elements required to impose death." *Id*. Because the Florida Supreme Court regarded these additional facts as elements and Florida law required elements to be found by a unanimous jury, it ruled that the provision in Chapter 2016-13 allowing for a less than unanimous jury was constitutional:

> we construe the fact-finding provisions of the revised section 921.141, Florida Statutes, constitutionally in conformance with *Hurst* to require unanimous findings on all **statutory elements** required to impose death. The Act, however, is **unconstitutional** because it requires that only ten jurors recommend death as opposed to the constitutionally required unanimous, twelve-member jury.

Id. (emphasis added).

This constitutional deficiency in Chapter 2016-13 was corrected when the legislature enacted Chapter 2017-1. It was the only change made to the revisions to § 921.141 that had been made by Chapter 2016-13. The effective date for Chapter 2017-1 was the date of enactment, March 13, 2017.

Mr. Walton habeas claim rested on the revisions made in § 921.141 by Chapter 2016-13 and Chapter 2017-1 which all became operational when Chapter 2017-1 was enacted. Moreover, the changes made to § 921.141 were meant to apply retrospectively in prosecutions for homicides committed before the statutory changes were enacted.

Noting that the substantive criminal law setting forth the

elements of capital murder which was put in place by Chapter 2016-13 and Chapter 2017-1 would govern in a cases in which the homicides were committed before those in Mr. Walton's case. Death sentences had been vacated and resentencings had been ordered in *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Card had been convicted of a 1981 homicide. His conviction became final in 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984). At the resentencing order in *Card v. Jones*, the jury would be applying the law enacted in 2017 to determine whether Card guilty of capital, i.e whether he had committed a capital murder in 1981. Unless he was found guilty of capital murder, he would receive a life sentence on his first degree murder conviction.

Mr. Walton also cited to a 2017 circuit court order that vacated J.B. Parker's death sentence and ordered a resentencing. The State had filed appeal from that order, but then dismissed it. Parker had been convicted of a 1982 homicide and sentenced to death. The conviction and death sentence became final in 1985. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). At the resentencing, that the circuit court had order in 2017, the jury would be applying the law enacted in 2017 to determine whether Parker was guilty of capital murder, i.e. whether he had committed a capital murder in 1982.

Given that the substantive criminal law defining the elements of capital murder that was enacted in 2017 was be applied retrospectively to events occurring in 1981 and 1982, he argued in his habeas petition that his rights under the Due Process Clause of the Fourteenth Amendment and his rights under

the Eighth Amendment were being violated by the arbitrary manner in which the substantive criminal law of Florida was being applied in a scattershot manner. No valid justification existed for Mr. Walton to have three death sentences imposed on his first degree murder convictions for homicides committed in 1983, while the substantive criminal law being applied in Jim Card's case and J.B. Parker's case precluded the impose of death as a sentence unless they were found ti have committed capital murder in 1981 and 1982, respectfully.

In responding to Mr. Walton's habeas petition, the State treated the petition as seeking to have *Hurst v. Florida* applied retroactively. The State did not address Mr. Walton's actual claim which concern statutory changes in Florida's substantive criminal law being applied retrospectively in an arbitrary and random manner.

The Florida Supreme Court issued one opinion in which it addressed both Mr. Walton's appeal and his habeas petition. *Walton v. State*, 246 So. 3d 246 (Fla. 2018). As to Mr. Walton newly discovered evidence, the Florida Supreme Court refused to consider the new substantive law requiring jury unanimity as to the elements of capital murder when analyzing whether it was probable that at a resentencing, Mr. Walton would receive a less severe sentence. The justification that the court gave for this was its accusation that "Walton is attempting to circumvent this Court's retroactivity holding. . . ." *Walton v. State*, 246 So. 3d at 252. The court expressed no concern for the reliability of his death sentence as shown by the new evidence, Cooper's life

sentence and the revised § 921.141 unanimity requirement that was adopted to improve the reliability of the death sentences imposed in Florida.

In denying Mr. Walton's habeas petition, it did not address to address the issue raised by Mr. Walton which was about the revised § 921.141 and the changes made to Florida's substantive criminal. Instead, it addressed the retroactivity of *hurst v. Florida*. It asserted that it had already decided that because Walton's death sentence became final in 1990, *Hurst* did not retroactively apply to him. *Walton v. State*, 246 So. 3d at 253.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO CONSIDER WHETHER THE DUE PROCESS CLAUSE AND/OR THE EIGHTH AMENDMENT ARE VIOLATED BY THE RETROSPECTIVE APPLICATION OF STATUTORY CHANGES IN SUBSTANTIVE CRIMINAL LAW TO SOME CAPITAL DEFENDANTS CONVICTED OF MURDERS COMMITTED BEFORE THE SUBSTANTIVE CHANGES WERE ENACTED WHILE IT IS NOT APPLIED TO OTHERS.

Identifying the elements of a criminal offense or the facts to be proven beyond a reasonable doubt before a particular sentence is authorized is a matter of substantive law and a legislative function under the separation of powers provision in the Florida Constitution. *See* § 921.002 (1) ("The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately

incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy.").

"The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889)." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). "Selective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

Florida is arbitrarily applying is substantive criminal law defining the elements of capital murder which must be found proven by the State before death is a possible punishment. It applies in two cases in which the homicides were committed in 1981 and 1982, while it is not applied in Mr. Walton's case involving homicides committed in 1983.

Further, the Eighth Amendment is implicated by the arbitrary or capricious application of substantive law and undermines the reliability of consistency of the decision making process, as well as the decision to impose a death sentence. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the US Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special " 'need for reliability in the determination that death is the appropriate punishment' " in any capital case. See *Gardner v. Florida,* 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J.,

> concurring in judgment)(quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' " **we have also made it clear that such decisions cannot be predicated on** mere "caprice" or on "**factors that are constitutionally impermissible or totally irrelevant to the sentencing process.**" *Zant v. Stephens*, 462 U.S. 862, 884-885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson v. Mississippi, 486 U.S. 584-85 (emphasis added).

Because the Due Process Clause and the Eighth Amendment are to protect against arbitrary government action, the arbitrary manner in which the substantive criminal law identifying the elements of capital murder is being retrospectively applied in arbitrarily, certiorari review by this Court is warranted.

As it stands now, Mr. Walton has received death sentences even though he has not been convicted of capital murder as that crime has been defined under Florida substantive criminal law. The definition of capital murder now set forth in § 921.141, Fla. Stat. is being applied to the criminal prosecutions of James Card and J.B. Parker in 1981 and 1982, while it is not applied to many other cases in which death sentences have been imposed for murders committed after those at issue in *Card v. Jones* and *Parker v. State*.

In Mr. Walton's case which arises from a 1983 homicide, the State was not held to prove the elements of capital murder beyond a reasonable doubt to the satisfaction of a unanimous jury. In fact, three jurors voted to recommend a life sentence. Mr. Walton's death sentence stands even though he was not convicted of capital murder, while Mr. Card and Mr. Parker will not receive

death sentences for murders committed earlier in 1981 and 1982 unless the elements of capital murder are proven beyond a reasonable doubt and their juries return verdicts in essence convicting them of capital murder.

Certiorari review is warranted here to determine whether the Due Process Clause and/or the Eighth Amendment require that the substantive criminal law set forth in the revised § 921.141 that is being applied to the 1981 homicide in *Card v. Jones* and the 1982 homicide that J.B. Parker committed, should also be applied in Mr. Walton's case in which he received a death sentences for a 1983 homicides even though he was not and has not been convicted of capital murder.

II. THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO CONSIDER WHETHER THE ARBITRARY REFUSAL TO CONSIDER THE LAW THAT WOULD GOVERN A RESENTENCING WHEN EVALUATING THE PROBABILITY THAT MR. WALTON WOULD RECEIVE A LESS SEVERE SENTENCE AT A RESENTENCING INFECTED THE PROCEEDINGS WITH UNRELIBILITY IN VIOLATION OF THE EIGHTH AMENDMENT PRINCIPLES UNDERGIRDING THE EIGHTH AMENDMENT.

As this Court explained in *Johnson v. Mississippi*, a rule that permits a capital defendant to obtain sentencing relief when new evidence shows that the jury heard "evidence that has been revealed to be materially inaccurate" comports with the Eighth Amendment.[8] *Johnson v. Mississippi*, 486 U.S. at 590. Such a rule "reduces the risk that [a death] sentence will be imposed arbitrarily." *Id.* at 587. permitting such claims reduced the risk of the arbitrary imposition of a death sentence:

> A rule that regularly gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. Cf. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92

> L.Ed. 1690 (1948). **To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.**

Johnson v. Mississippi, 486 U.S. at 586-87 (emphasis added).

At issue was Mr. Walton's new evidence and whether is demonstrated that his death sentence was likely unreliable. Mr. Walton presented qualifying newly discovered evidence – the life sentence that Cooper, his codefendant and a triggerman, received at a 2014 resentencing. Under the governing standard, Mr. Walton is entitled to a resentencing if it is likely that at the resentencing he will receive a less severe sentence. Pursuant to the requisite analysis, this Court is to decide whether the qualifying newly discovered evidence, along with all the admissible evidence that has been presented in prior collateral proceedings, when viewed in conjunction with the evidence that was presented at the 1986 resentencing suggests the likelihood that a more favorable sentence would result.

At no time did the State dispute that if Mr. Walton's resentencing is held tomorrow, he would very likely receive a life sentence. For that matter the Florida Supreme Court did not dispute that fact either. Instead, it did not address the likely outcome at a resentencing at which the jury would have to unanimously find the elements necessary to convict him of capital murder and authorize the judge to consider death as a sentence, which otherwise he would not be able to do. The Florida Supreme Court's failure to address the issue raised shows its lack of concern for the reliability of Mr. Walton's death sentence. This despite the concern for reliability shown by the requirement that

the jury must find the elements of capital murder before a death sentence is permitted as a sentence upon a conviction of first degreee murder.

Respondent's refusal to actually address the issue Mr. Walton raised, along with the Florida Supreme Court's inability to hear what Mr. Walton's claim was and/or address Petitioner's Due Process Clause and Eighth Amendment arguments, show why certiorari review is warranted. The Florida Supreme Court has made it clear that is done with reviewing anything that it thinks is or may be a *Hurst* issue.

But when one actually looks at what the legislature has done and how the Florida Supreme Court has ruled in post-*Hurst* cases, there is inconsistencies in logic. There is a failure to come to grips with how the Florida Supreme Court has failed to recognize the difference between procedural rules and substantive law that defines criminal offenses by identifying their elements. Confusing what is procedural and what is substantive law has injected a high dosage of unreliability along with a cup of arbitrary rulings into the capital cases in Florida, which will continue to fester and grow until this Court has to step in as it has had to do before.

It falls to this Court to conduct a principled analysis of the due process implications of the Florida Supreme Court's ruling in Petitioner's case. There is no logic to the Florida Supreme Court's ruling. Certiorari review is warranted.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by electronic service to Timothy A. Freeland, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, on this 3rd day of December, 2018.

/s/ Martin J. McClain
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