IN THE FLORIDA SUPREME COURT
Case No. SC17-1083

JASON DIRK WALTON,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

REPLY TO RESPONDENT'S REPLY TO RESPONSE TO THE ORDER TO SHOW CAUSE

COMES NOW, the Petitioner, **JASON DIRK WALTON**, by and through undersigned counsel and submits this reply to Respondent's reply to his response to this Court's order to show cause.[1] In reply to Respondent's reply, Mr. Walton states:

1. It is unclear from her reply whether Respondent read either the habeas petition and/or Mr. Walton's response to the

[1]On September 27, 2017, this Court ordered Mr. Walton to show cause on October 17, 2017, as to "why the petition for a writ of habeas corpus should not be denied in light of this Court's decision in *Hitchcock v. State*, SC17-445." This Court's order then indicated that Respondent "may file a reply on or before Wednesday, November 1, 2017." It also provided that "Petitioner may file a reply to Respondent's reply on or before Monday, November 13, 2017." On October 18, 2017, this Court extended the time for Mr. Walton to show cause until October 24, 2017, and it indicated that all other times were extended accordingly. On October 25, 2017, this Court extended the time for Mr. Walton to show cause until October 27, 2017. Mr. Walton filed his response to the show cause order on October 25, 2017. Mr. Walton filed an amended response along with a motion to accept the amended response to the show cause order as timely filed on October 30, 2017. The next this Court granted the motion and accepted the response as timely filed and ordered all other times to be adjusted accordingly. Respondent filed her reply on November 9, 2017. As a result of this Court's extension of all other times and court holidays, this pleading is timely filed on November 27, 2017. In accordance with this Court's directive, this pleading is styled a "reply to Respondent's reply."

show cause, or alternatively, whether Respondent somehow misunderstood what Mr. Walton's habeas claim is about. Certainly, Respondent's reply does not in anyway address what Mr. Walton raised in his habeas petition which was premised upon the March 13, 2017 enactment of Chapter 2017-1 and the revisions it made to § 921.141, Fla. Stat. Respondent's reply instead has addressed issues that Mr. Walton had included in his pending 3.851 appeal in Arguments II, III, and IV of the amended initial brief filed in Case No. SC16-448. This Court did not issue a *Hitchcock* stay in that appeal, nor was a show cause order issued in that appeal.

2. To the extent that Respondent did not understand the arguments that Mr. Walton made on the basis of the March 13, 2017 enactment of Chapter 2017-1, Mr. Walton endeavors herein to more clearly explain what his position is and why *Hitchcock v. State* is inapplicable and does not provide a basis for denying the pending habeas petition.

3. On March 13, 2017, Chapter 2017-1 became law. It revised Florida's capital sentencing statute, § 921.141. The revised § 921.141 now provides that a defendant convicted of first degree murder cannot receive a death sentence unless the State convinces a jury to unanimously return a "death recommendation." Before the jury can return a unanimous death recommendation, the jury must first "identify[] each aggravating factor" that it has unanimously found proven beyond a reasonable doubt. *See* § 921.141(2)(b). Next, the jury must unanimously find beyond a reasonable doubt that the aggravating circumstances, it

unanimously found, are sufficient to justify a death sentence. Then, the jury must unanimously find beyond a reasonable doubt that "aggravating factors exist which outweigh the mitigating circumstances found to exist." *See* Fla. Stat. § 921.141(2)(b)(2). Finally, the jurors must unanimously vote to recommend a death sentence. Only if a unanimous death recommendation is returned is a judge authorized to impose a death sentence.

4. Under the revised § 921.141, a defendant convicted of first degree murder cannot receive a death sentence unless and until a jury returns a unanimous verdict in which it makes the findings necessary to increase the range of punishment and authorize a judge to impose a death sentence. The findings to be made by a unanimous jury are what separate first degree murder from a next higher degree of murder for which death is a permissible penalty. While the statute calls the jury's unanimous verdict a "death recommendation," it is functionally a verdict finding a defendant guilty of a higher degree of murder, what can be called capital first degree murder.

5. In *Ring v. Arizona*, 536 U.S. 584, 604-05 (2002), the US Supreme Court explained:

> *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury. *See, e.g.*, 530 U.S., at 492, 120 S.Ct. 2348 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); *id.*, at 494, n. 19, 120 S.Ct. 2348 ("[W]hen the term 'sentence enhancement' is used to describe an

> increase beyond the maximum authorized statutory sentence, **it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict**."); *id.*, at 495, 120 S.Ct. 2348 ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (internal quotation marks omitted)); *see also id.*, at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.").

(Emphasis added). In his concurrence, Justice Scalia explained that it did not matter how the legislature labeled the findings that were necessary to increase the range of punishment; what mattered was what was necessary under the statute to authorize an increase in the range of punishment:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

Ring v. Arizona, 534 U.S. at 610 (Scalia, J., concurring).

6. The revised § 921.141 identifies those findings that a jury must unanimously make to increase a first degree murder conviction (for which the death penalty is not authorized) to a capital first degree murder conviction (for which a judge may impose death as a sentence). In *Alleyne v. United States*, 570 U.S. 99 (2013), the US Supreme Court explained:

> When a finding of fact alters the legally prescribed punishment so as to aggravate it, **the fact necessarily forms a constituent part of a new offense** and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Alleyne, 570 U.S. at _, 133 S. Ct. at 2162 (emphasis added). Under the revised § 921.141, first degree murder plus the additional elements set forth in the statute constitute a different crime **are constituent parts of a new offense**, a higher degree of murder for which a death sentence is authorized. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."). Under the revised § 921.141, the maximum punishment for first degree murder is life imprisonment. For a death sentence to be authorized, the defendant must be found guilty of the next higher degree of murder, in essence capital first degree murder.

7. The additional elements identified in the revised § 921.141 (that are necessary for a capital first degree murder conviction) go beyond requiring a finding of one aggravator, which the State of Florida maintained was all that was necessary under the old version of the statute to render a first degree murder conviction subject to the death penalty. In fact in

Griffin v. State, 866 So. 2d 1, 7-8 (Fla. 2003), this Court held:

> Griffin also includes an assertion that he is innocent of and ineligible for the death penalty. In order to prevail on such a claim, a defendant "would have to show constitutional error invalidating all of the aggravating circumstances upon which the sentence was based." *In re Medina*, 109 F.3d 1556, 1566 (11th Cir.1997). In Griffin's case, the trial court found four aggravating circumstances: CCP, previous conviction of a violent felony (based on the attempted murder of Officer Crespo), that the murder was committed during the course of a burglary, and that the murder was committed to avoid arrest. Griffin has not shown constitutional error that would invalidate all of these aggravating circumstances.

The existence of one aggravator was enough. Therefore, the revised § 921.141 changed the elements that had to be proven beyond a reasonable doubt and that the jury had to unanimously find in order for a conviction of capital first degree murder to be rendered. The conviction of capital first degree murder is what is necessary to giver a judge the authority to impose death as a sentence. The additional elements, over and above those required for first degree murder, that are necessary to authorize a death sentence must be proven beyond a reasonable doubt to the satisfaction of all twelve jurors. The jury must find the defendant guilt of the new offense, capital first degree murder.

8. The legislature intended the substantive elements of capital first degree murder to govern in all homicide cases, even those homicides committed before the revisions were enacted.[2] The

[2]At a case management hearing on November 9, 2017, in *State v. Pittman*, a Polk County case in which the defendant is under a death sentence for 1990 homicides, the State acknowledged that if Mr. Pittman's death sentences were vacated for any reason and a "resentencing" ordered, the revised § 921.141 would govern, and before Mr. Pittman could be again sentenced to death, the jury

revised § 921.141 was intended to apply retrospectively, i.e. to first degree murder prosecutions in which the homicide at issue occurred before the enactment of Chapter 2017-1. Because a defendant convicted of first degree murder, as opposed to capital first degree murder, cannot receive a death sentence, a "resentencing" is functionally a guilt phase trial of the elements necessary for a conviction of the new offense, capital first degree murder. Only upon such a conviction is a judge authorized to impose a death sentence. *See Blakely v. Washington*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *Bishop, supra*, § 87, at 55, and the judge exceeds his proper authority.").

9. Defendants who were convicted of first degree murder before March 13, 2017 and who receive a "resentencing" cannot again receive a death sentence on the basis of the previously returned first degree murder conviction in light of the revised § 921.141. A jury must return a verdict which is functionally a finding of guilt of the next highest degree of murder, capital first degree murder, before a judge is authorized to impose death as a sentence. Absent verdict showing that a unanimous jury made the requisite findings, and in essence convicting the defendant of capital first degree murder, the only permissible sentence is

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would have to unanimously make all the findings necessary to authorize the presiding judge to consider imposing a death sentence.

a sentence of life imprisonment. It does not matter if a first degree murder conviction had been previously been returned and had been final since 1982, 1984, or 1985.

10. Recently, a "resentencing" was ordered for William White whose first degree murder conviction became final on November 29, 1982, and has remained intact ever since. *White v. State*, 415 So. 2d 719 (Fla. 1982), *cert denied*, 459 U.S. 1155 (1982). The "resentencing" was recently ordered by the circuit court earlier this year. While the State initially filed a notice of appeal, it then voluntarily dismissed its appeal. *See White v. State*, Case No. SC17-995. On September 19, 2017, the Mr. White was given a life sentence, the only sentence available under the revised § 921.141, when the State chose not seek a conviction of capital first degree murder.

11. A "resentencing" has also been ordered for James Card whose first degree murder conviction became final on November 5, 1984, and has remained intact ever since. The Florida Supreme Court recently vacated his death sentence and ordered a "resentencing." *Card v. Jones*, 219 So. 3d 47 (Fla. 2017). Under the revised § 921.141, the "resentencing" will actually be a trial on whether to convict Mr. Card of the next higher degree of murder.

12. A "resentencing" has been ordered for J.B. Parker whose first degree murder conviction became final on January 26, 1986. *Parker v. State*, 476 So. 2d 134 (Fla. 1985). The "resentencing" was recently ordered by a circuit court. While the State did file

an appeal, it voluntary dismissed its appeal. *See Parker v. State*, Case No. SC17-794. Under the revised § 921.141, the "resentencing" will actually be a trial on whether Mr. Parker is guilty of the higher degree of murder than first degree murder.

13. As it appears now, the substantive right to a life sentence unless a jury unanimously convicts of the next higher degree of murder attaches to all first degree murder convictions regardless of the date of conviction, so long as any death sentence previously imposed was not final prior to June 24, 2002. Even then, if for any reason the previously imposed death sentence is vacated and a "resentencing" is ordered, the convicted defendant will receive a life sentence unless the State convinces a jury to return a unanimous verdict making the necessary findings for a conviction of the higher degree of murder for which death is authorized as a sentence.

14. At issue here is whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Eighth Amendment, and/or the Florida Constitution are violated when the State of Florida changes the elements of the highest degree of murder, which is punishable by death, and applies those changes in substantive law retrospectively to White, Card, and Parker, but not to Mr. Walton. *See Blakely v. Washington*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *Bishop, supra*, § 87, at 55, and the judge exceeds his proper authority.").

15. This issue arising the March 13, 2017 revisions to § 921.141 was not presented in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), and it was not addressed there by this Court. Since *Hitchcock* does not govern and does not require this Court to affirm the trial court's order, this must constitute "cause" as to why *Hitchcock* does not control. Full briefing and consideration of Mr. Walton's habeas petition is warranted.

16. Under the Eighth Amendment, this Court is obligated to take extra care in capital case to insure that the decision to impose a death sentence is reliable. In *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999), this Court held:

> We acknowledge **we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner**, as well as having an administrative responsibility to work to minimize the delays inherent in the postconviction process.

(emphasis added). *See Johnson v. Mississippi*, 486 U.S. at 584 ("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.").

17. In order to be sentenced to death, Florida law now requires a defendant to be convicted of capital first degree murder, i.e. first degree murder and those additional facts required to convict of the next higher degree of murder and authorize an increase in the range of punishment to include death as a sentencing option. A jury must unanimously find that the

State has proven those additional and necessary facts beyond a reasonable doubt for a defendant to stand convicted of capital first degree murder, thereby authorizing the judge to impose death.

18. Just like William White was only convicted of first degree murder, Mr. Walton has been only convicted of first degree murder, a crime for which death is not an authorized punishment. The advisory jury's death recommendation was not unanimous, but a vote of 9-3. There is no valid basis for Mr. White to receive a life sentence on his conviction of a first degree murder committed in 1978, while Mr. Walton has been given death sentences on his convictions of first degree murder committed in 1983.

19. *Hitchcock* did not address the issue that Mr. Walton presented in his habeas petition, and Respondent has not argued otherwise. "Cause" has been shown.

WHEREFORE, Mr. Walton submits "cause" exists and full briefing and consideration of his arguments under the Eighth and Fourteenth Amendments should be ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2017, I electronically filed the foregoing motion with the Court's electronic filing system which will send a notice of electronic filing to opposing counsel of record.

/s/ Martin J. McClain