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STATE OF WASHINGTON

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CHARLES RAY WALTERS,

Defendant/Appellant.

REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

The Response treats the key issue as whether the state can drag a defendant with a long-final second-degree murder conviction in to court, over that defendant's objection, to vacate the conviction. Response Brief, pp. 5-14.

Actually, Mr. Walters has not appealed the Superior Court's decision to vacate his conviction over his objection. Instead, on this appeal, Mr. Walters challenges the Superior Court's decision to allow the state to re-prosecute him, a second time, after the state got his conviction vacated over his objection. Specifically, the single issue he raises is: When the trial court vacates a criminal defendant's second-degree murder judgment (which became final almost 20 years earlier) at the state's request and *over the defendant's objection* – in a case where the defendant never appealed, never sought post-conviction relief, and warned the state that he would oppose reinstatement of charges on double jeopardy grounds if his final judgment were vacated – does reinstatement of first-degree murder charges violate state and U.S. constitutional protections against double jeopardy?

With respect to this issue, the Response makes three basic arguments.

First, the Response provides this Court with a statement of the

supposed facts of the crime that is designed to inflame rather than inform (Response, p. 4). But those “facts” lack support in the record, those “facts” are irrelevant to the issue presented, and hence that entire factual statement should be stricken. See Section II.

Second, the state argues that Andress¹ and Hinton² provide controlling authority allowing the Superior Court to not just vacate the invalid felony-murder conviction, but also to re-prosecute the same defendant, for the same crime, after the conviction is invalidated *at the state’s behest* and over the defendant’s objection. Response, pp. 5-10, 10-14. In fact, the state goes so far as to claim that with those decisions, “this court [already] invalidated the conviction of every single defendant convicted of that crime from the effective date of the statute, July 1, 1976, through the effective date of the new statute” Response, p. 7. But in reality, neither Andress nor Hinton ever discussed this issue of whether such convictions are voidable at the state’s behest, or void *ab initio*. When the Hinton Court ruled that the criminal defendants in those cases were “entitle[d] to relief,”³ this Court was doing so in the context of a criminal defendant who was seeking relief. The Hinton decision thus

¹ In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

² In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

³ Response, p. 8 (quoting Hinton, 152 Wn.2d at 860).

holds only that the criminal defendant who seeks relief from an invalid conviction is entitled to the relief he seeks. See Section III.

Third, the Response claims that prior state case law allows this Court to not just vacate a defendant's conviction over his objection, but also to reinstate charges against him thereafter. Response, pp. 11-16. This Court has now conclusively held to the contrary in State v. Hall, ___ Wn.2d ___, 2008 LEXIS 55 (January 31, 2008), decided just last week. See Section IV.

The same result is compelled by U.S. Supreme Court precedent on this issue, United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975). We explained that decision in some detail in the Opening Brief, and we find no response to the holding of Wilson, or our detailed examinations of its consequences, anywhere in the Response. In fact, we cannot even find any mention of the Wilson decision at all – the most significant, controlling decision, regarding the Double Jeopardy Clause issue on which this case turns – anywhere in the state's Response. As a result of Hall and Wilson, the state is barred from trying Mr. Walters now for the homicide that he pled guilty to before. See Section V.

II. THE “FACTS” STATEMENT PROVIDED IN THE RESPONSE HAS NO SUPPORT IN THE RECORD

The state provides this Court with a statement of the supposed

facts of the crime in its Response, at p. 4. That paragraph essentially says that Mr. Walters ran over the victim on purpose.

But there is nothing in the record to support that version of the facts.

Instead, the record shows that although Charles Walters was charged with premeditated first-degree murder (CP:1-3), the state did not pursue that charge. The state permitted him to plead guilty to felony murder in the second degree based on assault, in violation of RCW 9A.32.050(1)(b). CP:10-11. That is a crime with no intent to kill.

The Statement of Defendant on Plea of Guilty confirms that there was no intent to kill. The elements of the crime are listed there as: “in Pierce County on 6-5-88 did unlawfully assault Mike Coon, and as a proximate result thereof did cause his death.” CP:4.

The record even shows that the circumstances of this crime were so exceptionally mitigated that the state agreed that Mr. Walters could plead guilty, knowing that his attorney would ask for a sentence below the standard range. CP:5.

Further, the record shows that the judge, at sentencing, did not think that the standard sentence for felony murder was appropriate – he thought it was far too harsh. CP:112-14. Instead, he imposed an exceptional sentence of one-half the low end of the standard range or 5

years, 1½ months because of a variety of mitigating factors, including Walters' aberrant conduct, youth, prior nonviolent behavior, and "outstanding history as a young person, student and contributed to others. He has a bright future. He has support in the community." CP:114-15.

The statement of facts contained in the state's Response brief, unlike the statement of facts provided in our Opening Brief and reiterated here, is not based on the record. It contains no cites.

It should therefore be stricken. First, since it lacks cites to the record (see Response, p. 4), it fails to comply with RAP 10.3(a)(4). Second, since it sets forth facts that were never litigated or proven in this case, it conflicts with the rule that the appeal must be limited to matters in the record of the case before the court.⁴ Third, striking the offending brief or portion is a permissible remedy under RAP 10.7, requiring compliance with brief-writing rules.

⁴ See, e.g., State v. Elmore, 139 Wn.2d 250, 302, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000) ("In general, an appellate court is confined to evidence presented to the trial court."... this rule affords the trier of fact the full opportunity to consider all admissible evidence.") (citing Erection Co. v. Dep't of Labor & Indus., 121 Wn.2d 513, 522, 852 P.2d 288 (1993); Casco Co. v. Public Util. Dist. No. 1, 37 Wn.2d 777, 784-85, 226 P.2d 235 (1951)).

III. NEITHER ANDRESS NOR HINTON ADDRESSED THE ISSUE POSED HERE, THAT IS, WHETHER A FINAL CONVICTION TERMINATES JEOPARDY AND BARS RE-PROSECUTION UNLESS IT IS THE DEFENDANT HIMSELF WHO HAS CHALLENGED THE CONVICTION

The state's next argument is that Andress and Hinton have already resolved this issue, by holding not just that a Superior Court can vacate an invalid conviction of felony murder – but by further holding that the Superior Court must thereafter allow the state to re-prosecute for the same crime when the conviction is invalidated at the state's behest over the defendant's objection. Response, pp. 5-10, 10-14.

The state even asserts that Andress and Hinton themselves “invalidated the conviction of every single defendant convicted of that crime from the effective date of the statute, July 1, 1976, through the effective date of the new statute” Response, p. 7.

But a review of Andress and Hinton shows that they never even discussed this issue. In fact, every single one of the petitioners in Andress and Hinton filed the personal restraint petition that resulted in vacation of the conviction.

The state cagily asserts that one of those petitioners, Mr. Hinton, gained his requested relief of vacature of his second-degree felony murder conviction, and then that “the practical effect was to reinstate the original

charging document.” Response Brief, p. 12, n. 5. But this Court did not vacate Mr. Hinton’s conviction over his objection – this Court vacated Mr. Hinton’s conviction at Mr. Hinton’s behest. And this Court did not direct reinstatement of the charging instrument in Mr. Hinton’s case over his objection – this Court instead concluded its decision in that case by stating, in full, “The personal restraint petitions are granted, and these cases are remanded for further proceedings.” Hinton, 152 Wn.2d at 862. So the Hinton decision did not resolve the question presented here, that is, when a conviction is vacated at the state’s behest, and over the defendant’s clear objection and warning that he would oppose re-prosecution on double jeopardy grounds, may the state once again prosecute the defendant for the same – or, as in this case, a higher degree – crime.

In sum, in Andress and Hinton this Court ruled that the criminal defendants who sought relief, were “entitle[d] to relief.”⁵ It did not rule that criminal defendants who do not seek relief can have convictions vacated over their objections, and it did not rule that criminal defendants who do not seek relief can have vacated convictions reinstated over their objections.

⁵ Response, p. 8 (quoting Hinton, 152 Wn.2d at 860).

**IV. THE HALL DECISION DOES RESOLVE THE ISSUE
POSED HERE – FAVORABLY TO MR. WALTERS**

The Response continues by asserting that prior state case law allows this Court to not just vacate a defendant's conviction over his objection, but also to reinstate charges against him thereafter. Response, pp. 11-16.

Whatever may be said of the case law that preceded the Response, there is now conclusive Washington Supreme Court authority post-dating the Response that does resolve the specific issue posed here. In State v. Hall, decided just last week, this Court ruled that where, as here, a defendant does not attack his felony murder conviction based on Andress and Hinton, the state cannot vacate the conviction over his objection and re-prosecute him for that crime:

This case asks us to determine whether the State may, pursuant to CrR 7.8(b), move to vacate a criminal conviction against a defendant's objections and/or whether double jeopardy principles preclude the State from retrial without a defendant's consent. More specifically, in this case, we are asked whether the State can retry a defendant where he has fully served his sentence. We hold under the facts of this case the State is precluded from retrying the defendant, and we reverse the trial court's order granting the State's motion to vacate appellant's original conviction and amend the information.

Hall, 2008 LEXIS 55 at *1.

The only difference between the Hall case and this case is that Mr.

Hall apparently appealed not just the order reinstating charges against him, but also the order vacating his original conviction. Mr. Walters certainly appeals the order reinstating charges against him. However, he did not appeal the order vacating his conviction. Thus, following Hall, this Court must reverse the order reinstating Mr. Walters' charges. However, since there was no challenge to the order vacating his original conviction, that order shall not be disturbed.

V. **HALL IS CONSISTENT WITH U.S. SUPREME COURT PRECEDENT HOLDING THAT A FINAL CONVICTION TERMINATES JEOPARDY AND BARS RE-PROSECUTION UNLESS THAT FIRST JEOPARDY IS CONSIDERED "CONTINUING" – AND IT IS "CONTINUING" IF THE DEFENDANT CHALLENGES IT, BUT NOT IF THE STATE DOES**

Hall is completely consistent with the principal decision cited in the Opening Brief on the double jeopardy question, that is, United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232. In that case, the Supreme Court also addressed whether the government had the right to challenge a criminal conviction on appeal, given the protection against double jeopardy, and then seek to re-prosecute the defendant at a new trial thereafter. That Court also ruled that the answer to that question is no: "a defendant c[an] seek a new trial after conviction, even though the government enjoy[s] no such right." Wilson, 420 U.S. 332, 343.

It is therefore baffling for the state to argue that "This defendant ...

makes the *novel argument* that, because it was the State who sought to vacate his admittedly invalid conviction, jeopardy not only attached with his entry of an invalid plea but became unconditionally final when he did not move to vacate it.” Response, p. 17 (emphasis added).

The argument is not novel.

As discussed above, and as explained in the Opening Brief at pp. 9-14, it was made *and accepted* by the Supreme Court in 1975 in Wilson.

It was reiterated by the Supreme Court in 1977, when that Court again stated that the double jeopardy clause protects the finality of the conviction “*for the defendant’s benefit*,” rather than for the state’s benefit. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

It was the basis for the Supreme Court’s earlier decision in Benton v. Maryland, 395 U.S. 784, 797, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), that once the defendant has been convicted the court is “not free to vacate the plea either on the government’s motion or sua sponte” and permit re-prosecution.

The state completely ignored Wilson (and certainly did not anticipate the unanimous outcome of Hall). It now has no way to answer the fact that both are controlling authority on the Double Jeopardy issue raised here.

VI. CONCLUSION

This Court should reverse the Superior Court's decision allowing reinstatement of first-degree murder charges, and remand with instructions that the order vacating the conviction is final and both the Information and Amended Information must be dismissed.

DATED this 4th day of February, 2008.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA #16709
Attorney for Charles Walters

CERTIFICATE OF SERVICE

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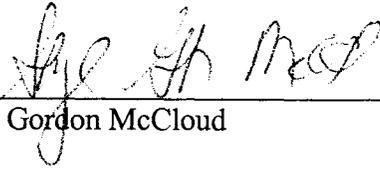
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The undersigned hereby certifies that on the 4th day of February, 2008, a copy of the foregoing REPLY BRIEF was forwarded to the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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