IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-68

SONNY BOY OATS, JR.,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

In his habeas petition, Mr. Oats included a section entitled "Introduction," which explained the basis and context of the two claims that were then separately pled in the habeas petition. The heading "Introduction" was used the way a dictionary defines the word; i.e., "an explanatory section at the beginning of a book, report, or speech." In other words, the Introduction was meant to introduce and explain the claims or arguments that followed. The Introduction was a road map intended to provide the reader guidance up front as to the bases on which Mr. Oats was seeking habeas relief. Retired Justices of this Court speaking at CLE events have recounted how helpful introductions can be to a reader who needs to know what facts may or may not be important when reading the statement of the case and/or procedural history. Though the Florida Rules of Appellate Procedure do not require a habeas petitioner to set forth an introduction, the rules do not preclude a party from including an introduction in a petition invoking an appellate court's original jurisdiction. *See* Fla. R. App. P. 9.100.

The "Introduction" that Mr. Oats set forth in his habeas petition was intended to introduce and explain the arguments that he presented to this Court in the petition. Of course, that means the "Introduction" was, and was meant to be, argumentative; i.e., "consisting of or characterized by argument." *See*

https://www.merriam-webster.com/dictionary/argumentative.

In the Response to the Petition, Respondent includes a section labeled "Response to Introduction." The content of this section in its entirety is: "Petition's Introduction is argumentative and is denied." (Response at 2.)[1] This is akin to responding to an argument by asserting "the argument is argumentative and is denied." While that may not be the best way to present an appellate court with a counter-argument, that is not why Mr. Oats is calling attention to this.

Respondent's pleading, entitled "Response to Petition for Writ of Habeas

[1]There is a section of the Response that purports to be in response to Mr. Oats' argument for habeas relief, but is separate from the portions of the Response labeled as argument as to "Claim I" and "Claim II". The section of the Response that is neither attached to "Claim I" or "Claim II" is labeled "*Hurst* Does Not Retroactively Apply." Response at 8-12. In many ways, this section seems to function as an introduction to Respondent's arguments. However, like a highway to nowhere, Respondent's arguments do not intersect with any arguments made in the habeas petition. Claim I of Mr. Oats' petition did not involve a retroactive application of *Hurst*. It concerned whether the evidentiary hearing this Court ordered in December of 2015—and which has yet to occur—is subject to the right to trial by jury. *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016) ("We conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty."). The bases for Claim II of the petition, i.e. the fundamental fairness approach to retroactivity that was set forth in *Mosley v. State*, _ So. 3d _, 2016 WL 7406506 (Fla. Dec. 22, 2016), and the manifest injustice exception to the law of the case doctrine set forth in *Thompson v. State*, 208 So. 3d 49 (Fla. 2016), are not addressed in the Response. The bases for Claim II of Mr. Oats' petition are ignored and not discussed by Respondent.

Corpus" is not really a response to Mr. Oats' petition, or more precisely to the arguments and claims he has set forth in his habeas petition. To use a tired analogy, Mr. Oats is talking apples and the Response talks oranges. It is not easy to reply to a response that does not address the actual arguments and claims that were presented, but instead discusses arguments and claims that were perhaps made by some other habeas petitioner in some other case. Thus, Mr. Oats feels obligated to reiterate what his arguments and claims are, while also addressing in some fashion the red herrings tossed out in the Response.

The problem with the Response begins with its treatment of the Introduction. There, Mr. Oats clearly spelled out that he was presenting two separate and distinct claims. Claim I concerned the evidentiary hearing that this Court ordered in this case. *Oats v. State*, 181 So. 3d 457, 460 (Fla. 2015) ("We accordingly reverse the denial of Oats's rule 3.203 motion and remand to the circuit court to reconsider whether Oats is intellectually disabled."). Within this Court's December of 2015 opinion, this Court explained: "Prior to the United States Supreme Court's 2002 holding in *Atkins*, Florida had already implemented a prospective **prohibition on imposing the death sentence upon an intellectually disabled defendant**. *See* ch. 2001–202, § 1, Laws of Fla. (enacting § 921.137, Fla. Stat. (2001))." *Id.* at 466 (emphasis added). Thus, under Florida statutes a capital defendant who raises his

intellectual disability is not eligible for a death sentence unless and until a judge finds that he or she is not intellectually disabled. Florida Statute § 921.137 is entitled: "Imposition of the death sentence upon an intellectually disabled defendant prohibited." As a result of this Court's 2015 decision in *Oats*, Mr. Oats' eligibility for a death sentence, which he has raised and put at issue, is an open and unresolved question of fact.

Because Mr. Oats' eligibility for a death sentence was found by this Court in 2015 to be an open question requiring additional fact finding and evidentiary development, he argued in Claim I that the additional findings of fact were came within the scope of *Hurst v. State*, where this Court held:

> Upon review of the decision in *Hurst v. Florida*, as well as the decisions in *Apprendi* and *Ring*, we conclude that the Sixth Amendment right to a trial by jury mandates that under Florida's capital sentencing scheme, **the jury—not the judge—must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty**.

Hurst v. State, 202 So. 3d at 53 (Emphasis added).

As explained in the Introduction, Claim I does not involve the retroactive application of *Hurst v. Florida* or *Hurst v. State*. Retroactivity addresses the question of whether a new decision should apply to cases where the judgment was final before the new case issued. However, since Mr. Oats' intellectual disability

has not been determined and is therefore not final, retroactivity is not at issue here. Claim I concerns whether the right to a jury trial attaches to the factual finding that a defendant is not intellectually disabled, which must necessarily be made before a death sentence can be imposed. *See* Fla. Stat. § 921.137 ("Imposition of the death sentence upon an intellectually disabled defendant prohibited.")

The Introduction explained that Claim II was premised upon *Mosley v. State*, 2016 WL 7406506 (Fla. Dec. 22, 2016), which held that *Hurst v. State* would be applied retroactively when required by fundamental fairness:

> Under *Mosley v. State*, fundamental fairness requires that *Hurst v. Florida* and *Hurst v. State* be applied retroactively to Mr. Oats' case given that he argued in circuit court and on appeal that he was entitled to have a jury impaneled before his resentencing and that he was entitled to juror unanimity before a death recommendation could be returned.

(Petition at 6). Specifically, this Court held in *Mosley:*

> This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence.

Mosley v. State, 2016 WL 7406506, at *19. *See also Thompson v. State*, 208 So. 3d at 50 ("to fail to give Thompson the benefit of *Hall*, which disapproved of *Cherry*, **would result in a manifest injustice**, which is an exception to the law of the case

doctrine. *See State v. Owen*, 696 So.2d 715, 720 (Fla.1997)") (emphasis added).

Mr. Oats explained in the Introduction that he should receive the retroactive benefit of *Hurst v. State*, not on the basis of *Witt v. State*, 387 So. 2d 922 (Fla. 1980), **but on the basis of fundamental fairness and manifest injustice** given the history of his case and this Court's prior rejection of his argument that he was entitled to a jury at his resentencing – a resentencing ordered by this Court after it struck three aggravating circumstances.

The Response utterly ignores the dual bases on which Mr. Oats argued for the retroactive application of *Hurst*. Nowhere in its Response does Respondent address the fundamental fairness basis for retroactive application of *Hurst* set forth in *Mosley*, or the manifest injustice basis for retroactive application of new law set forth in *Thompson*.

Not only does Respondent refuse to respond to the Introduction, she refuses to address the arguments and claims that Mr. Oats actually set forth in his petition.

REPLY TO RESPONSE TO REQUEST FOR ORAL ARGUMENT

Respondent opposes oral argument, asserting that the issues Mr. Oats raises are meritless. However, as is clear from consideration of the Response in its entirety, Respondent has either not understood or ignored Mr. Oats' arguments and failed to address his claims. The only argument that Respondent attempts to

address is Mr. Oats' assertion that the right to a jury trial attaches to the factual determination of his intellectual disability. As to this, Respondent states, "it is important to note that Petitioner cites absolutely no support for his proposition that *Hurst*, or any other authority, entitles a defendant to a jury trial on the issue of intellectual disability." As discussed *infra,* Mr. Oats disputes the claim that he "cites absolutely no support" for his argument. He does however readily acknowledge that he cannot cite a case on point that addresses Florida's intellectual disability statute in the wake of *Hurst v. State*. That is because this is a case of first impression. This is the first time this issue has come before this Court since *Hurst v. State* was issued in October 2016. That alone warrants oral argument and a full discussion of the issue. This Court granted oral argument in *Walls v. State*, _ So. 3d _, 2016 WL 6137287 (Fla. Oct. 20, 2016), because it was a case of first impression as to whether *Hall v. Florida*, 134 S. Ct. 1986 (2014), was retroactive. For the same reason, oral argument should be granted here.

REPLY TO RESPONSE TO PROCEDURAL HISTORY

Respondent cites to nothing that Mr. Oats omitted from the procedural history set forth in his petition. But in the response, Respondent provides a Reader's Digest version of the procedural history, omitting reference to the objections made and the arguments presented that demonstrate why the

fundamental fairness and manifest injustice principles set forth in *Mosley* and *Thompson* apply here.

REPLY TO RESPONSE TO JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

Respondent concedes that this Court has jurisdiction.

REPLY TO RESPONDENT'S ARGUMENT THAT "*HURST* DOES NOT RETROACTIVELY APPLY"

A. Timeliness and previously litigated

Respondent has a four page section of the Response that is a free-floating, standalone argument that "*Hurst* does not retroactively apply." (Response at 8-12.) Within this section, Respondent includes an argument that Mr. Oats' habeas petition "should be denied because it is untimely." (Response at 9.) Respondent also complains that "Petitioner seeks to resurrect his previously litigated claims relief [sic] under the color of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the decision of this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)." (Response at 9.)

These assertions are not claim specific, but are made as to the habeas petition as a whole. These assertions need to be unpacked.

First, contrary to Respondent's assertion, Claim I is timely and has not been made previously by Mr. Oats. On December 17, 2015, this Court vacated the

denial of Mr. Oats' intellectual disability claim, and remanded for an evidentiary hearing and additional factfinding as to whether Mr. Oats is intellectually disabled and eligible for the imposition of a death sentence. *Oats v. State*, 181 So. 3d at 471. In remanding for an evidentiary hearing, this Court found a prima facie basis for Mr. Oats' claim which necessitated written findings that Mr. Oats is not intellectually disabled in order for him to be eligible for a death sentence. *Id*. at 465 ("We reverse the circuit court's order and remand for the circuit court to make additional findings after applying the recent Supreme Court decision in *Hall* and the correct legal standards.").

The evidentiary hearing has not yet been conducted. In the meantime, on October 14, 2016, this Court issued *Hurst v. State* and held that "right to a trial by jury mandates that under Florida's capital sentencing scheme, **the jury—not the judge—must be the finder of every fact**, and thus every element, **necessary for the imposition of the death penalty**." *Hurst v. State,* 202 So. 3d at 53 (emphasis added). Claim I argues that this Court's October 14, 2016 decision in *Hurst v. State* applies to the determination of whether Mr. Oats is ineligible for a death sentence because he is intellectually disabled. *See Cardona v. State*, 185 So. 3d 514, 525 (Fla. 2016) ("Prior to this retrial, Cardona alleged that she suffered from an intellectual disability, **which would make her ineligible for the death penalty**.")

(emphasis added); *Thompson v. State*, 208 So. 3d at 50 ("Because Thompson's **eligibility or ineligibility for execution** must be determined in accordance with the correct United States Supreme Court jurisprudence, this case is a prime example of preventing a manifest injustice if we did not apply *Hall* to Thompson.") (emphasis added).

While Claim I is presented within one year of the decision in *Hurst v. State*, it does not involve the retroactive application of *Hurst v. State*, but rather its application to an intellectual disability evidentiary hearing that is to be held on a date yet to be determined; i.e., in the future. At this point in time, Mr. Oats' eligibility for the death penalty is unresolved. Quite simply, the issue that Claim I presents is whether the jury trial right discussed in *Hurst v. State* applies to the determination of Mr. Oats' eligibility for the death penalty, a factual matter that remains an open, unresolved question and is to be resolved at some date in the future.

Turning to Claim II, Mr. Oats is in fact seeking the retroactive benefit of the October 14, 2016 decision in *Hurst v. State* on the basis of the November 10, 2016 decision in *Thompson* and the December 22, 2016 decision in *Mosley*. Mr. Oats has filed Claim II well within a year of these decisions and thus the claim is timely.

Both *Thompson* and *Mosley* set forth bases for obtaining the retroactive

benefit of a new decision from either the U.S. Supreme Court or this Court. *Thompson* sets forth the manifest injustice exception to the law of the case doctrine, while *Mosley* sets forth the fundamental fairness approach to retroactivity. Both the manifest injustice exception and the fundamental fairness approach provide a basis for obtaining the retroactive benefit of a new a qualifying decision, where an appellate court erroneously denied a petitioner who had previously and unsuccessfully presented an argument for relief that has now been found meritorious. That means that to qualify for the manifest injustice exception and the fundamental fairness approach, Mr. Oats must have previously presented and litigated the claim that has now been found meritorious in *Hurst v. State*. Thus, Respondent's complaint that Mr. Oats "seeks to resurrect his previously litigated claims" actually demonstrates that Mr. Oats is entitled to the retroactive benefit of *Hurst v. State* under both *Thompson* and *Mosley*.

B. *Asay v. State*

Respondent argues that Mr. Oats cannot obtain the benefit of *Hurst v. State* in light of *Asay v. State*, _ So. 3d _, 2016 WL 7406538 (Fla. Dec. 22, 2016). This assertion is totally irrelevant to Claim I. But even as to Claim II, *Asay* was limited to a retroactivity analysis under *Witt v. State* of the Sixth Amendment decision in *Hurst v. Florida*. This Court in *Asay* did not address the fundamental fairness

approach set forth in *Mosley*, or the manifest injustice exception to the law of the case doctrine discussed in *Thompson*, which are the bases for Claim II. Further, *Hurst v. State* had not been pled or raised by the parties and was not discussed by this Court in *Asay*. Courts are limited to deciding the issues actually raised and briefed by the parties.[2] As explained by the United States Supreme Court:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (opinion for the court by Scalia, J.). In this case, petitioners did not ask us to hold that there is no constitutional right to informational privacy, and respondents and their amici thus understandably refrained from addressing that issue in detail. It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.

Nat'l Aeronautics and Space Admin. v. Nelson, 532 U.S. 134, 147 n.10 (2011).

[2]Besides *Asay*, Respondent also argues that Mr. Oats is precluded from obtaining the retroactive benefit of *Hurst v. State* by the published decisions in *Gaskin v. State*, _ So. 3d _, 2017 WL 224772 (Fla. Jan. 19, 2017), and *Bogle v. State*, _ So. 3d _, 2017 WL 526507 (Fla. Feb. 9, 2017), and the unpublished decision in *Wainwright v. State*, 2017 WL 394509 (Fla. Jan. 30, 2017). However, *Hurst v. State* was not argued as a basis for relief in those cases; thus, it was not at issue. Further, the defendants in those three cases did not argue for retroactive application of *Hurst v. State* or *Hurst v. Florida* on the basis of either the manifest injustice exception to the law of the case doctrine under *Thompson* or the fundamental fairness approach under *Mosley*.

This Court has also held that appellate courts should not address an issue that was not briefed or argued by the parties.[3] *See e.g.*, *State v. Simpson*, 554 So. 2d 506, 510 n.5 (Fla. 1989) ("After the relevant events of this case occurred, the legislature has changed the standard of proof from clear and convincing to a preponderance of the evidence. Ch. 87-110, Laws of Florida. The parties have not briefed this issue and we thus do not address any matter associated with the enactment of chapter 87-110."); *Arab Termite and Pest Control of Florida, Inc. V. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982) ("The parties have not briefed [whether the trial court's decision was affirmatively supported by the record or by the findings in the judge's order]. We therefore remand the case to the district court to prove the appropriate appellate review.").

Arguing that *Asay* established a bright-line rule that no capital defendant whose death sentence was final before June 24, 2002 can obtain the retroactive benefit of *Hurst v. Florida*, Respondent asserts that Mr. Oats is precluded from obtaining the retroactive benefit of *Hurst v. Florida*. In making this assertion, Respondent simply does not address *Thompson*'s manifest injustice exception to

[3]This basic precept of appellate review stems from Article III, Section 2's Case-or-Controversy Clause, as issuing an opinion on issues that were not briefed or argued appears advisory and is certainly not a "concrete, living contest between adversaries." *See, e.g.*, *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

law of the case doctrine or *Mosley*'s fundamental fairness alternative approach to retroactivity. Respondent does not dispute that *Thompson* and *Mosley* are controlling precedent. Respondent does not argue that either decision has been overturned or overruled. Instead, Respondent pretends they do not exist and were not raised by Mr. Oats as the basis for Claim II.[4]

Respondent further fails to recognize that *Hurst v. State* provides a different constitutional basis for relief than that provided by *Hurst v. Florida*. Thus, a determination regarding the retroactivity of *Hurst v. Florida* is not necessarily controlling as to a claim based on *Hurst v. State*. In this regard, Respondent argues that "[j]ust as *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst[v. Florida]*." (Response at 12.) For this, Respondent cites *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004), where the U.S. Supreme Court stated that it was not clear that a jury was any more reliable of a factfinder than a judge was. Completely ignored by Respondent is the fact that *Hurst v. State* required a unanimous death recommendation as opposed to a simple

[4]However, after the decision in *Mosley* issued, the State filed a motion for rehearing complaining that the fundamental fairness approach set forth therein needed to be removed from the opinion because "this Court has created confusion and caused an unnecessary unsettling of the law." (Motion for Rehearing at 2, *Mosley v. State*, Case No. SC14-2108). This Court rejected the State's argument and denied the motion for rehearing.

majority recommendation. Of course, a unanimous death recommendation is more reliable than a simple majority recommendation. And we know this because this Court specifically said so in *Hurst v. State*.

This Court explained: "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice." *Hurst v. State*, 202 So. 3d at 58. This Court specifically noted that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Id.* at 59. The new Florida law enhances and promotes the reliability of death sentences that juries unanimously authorize:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:
>
> > The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise

> effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.
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> *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that "[b]oth the defendant and society can place special confidence in a unanimous verdict." *Id*. Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

Hurst v. State, 202 So. 3d at 58.

> We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.

Id. at 59.[5] Implicit in the holding that unanimity promotes reliable death sentences

[5]The unanimity requirement set forth in *Hurst v. State* significantly distinguishes the change in Florida law brought about by *Hurst v. Florida* from the change in Arizona law that accompanied *Ring v. Arizona*. The change in Arizona simply meant going from judge sentencing to jury sentencing. *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) ("When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy."). This Court specifically found that going from a majority jury recommendation that was merely advisory to requiring a unanimous jury death recommendation before a judge could consider a death sentence enhanced reliability. *Hurst v. State*, 202 So. 3d at 63 ("In a capital case, the gravity of the proceeding and the concomitant juror responsibility weigh even more heavily, and it can be presumed that the penalty phase jurors will take special care to understand and follow the law."). *See*

is the acknowledgment that non-unanimous death sentences are less reliable.

The enhanced reliability arises from the unanimity requirement contained in *Hurst v. State*, which was not found in *Hurst v. Florida* and which was not part of the *Witt* analysis of *Hurst v. Florida* set forth in *Asay*.

Respondent's argument, which is based upon *Asay*, simply does not address or respond to the arguments presented by Mr. Oats in the two separate and distinct claims on which he seeks habeas relief from this Court.

REPLY TO RESPONSE TO CLAIMS FOR HABEAS CORPUS RELIEF

CLAIM I

BECAUSE AN INTELLECTUALLY DISABLED DEFENDANT IS NOT ELIGIBLE FOR A DEATH SENTENCE AND THE SENTENCING JUDGE MUST FIND AS A MATTER OF A FACT THAT A DEFENDANT WHO HAS RAISED THE ISSUE IS NOT INTELLECTUALLY DISABLED BEFORE A DEATH SENTENCE MAY BE IMPOSED, THE RIGHT TO A UNANIMOUS JURY ATTACHES TO THE DETERMINATION OF A DEFENDANT'S INTELLECTUAL DISABILITY UNDER *HURST V. FLORIDA* AND *HURST V. STATE*.

When Respondent turns to Claim I, she restates the claim in a fashion clearly

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Caldwell v. Mississippi, 472 U.S. at 341 ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death.").

more to her liking. In the Response, Claim I is captioned:

> A SUGGESTION OF INTELLECTUAL DISABILITY IS NOT AN ELEMENT, AND TO REQUIRE A JURY TO MAKE A FINDING ON A LEGAL BAR TO EXECUTION STRETCHES *HURST* BEYOND ANY REASONABLE INTERPRETATION (RESTATED).

(Response at 12.)

First, the issue here involves so much more than "a suggestion" of intellectual disability. This Court has specifically explained:

> Oats's intelligence quotient (IQ) has never been in genuine dispute. Based on numerous psychological tests, Oats's IQ is between 54 and 67, well within the range for an individual who has an intellectual disability. Up until the current litigation, **expert after expert consistently recognized that Oats has an intellectual disability** as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM)—**a fact the State previously conceded in 1990** when litigating whether trial counsel was ineffective in failing to present mental mitigation, including Oats's intellectual disability. Recent records from prison also show that the Florida Department of Corrections is concerned that Oats may be intellectually disabled.

Oats v. State, 181 So. 3d at 459 (emphasis added). This Court further noted that evidence regarding Mr. Oats' intellectual disability was presented in 1990, eleven years before Fla. Stat. § 921.137 was enacted precluding the imposition of death sentences on intellectually disabled defendants:

> During the 1990 postconviction proceedings, based on all of this evidence, **the State conceded that Oats without a**

> **doubt had an intellectual disability under the applicable DSM**, specifically stating, "Under the DSM–III criteria, **the defendant falls in the mildly mentally retarded area. No doubt about that**." However, according to the State, this did not entitle Oats to relief on his ineffective assistance of counsel claim because the jury already heard evidence that Oats had low intelligence, and it would not have recommended a life sentence even if the additional evidence had been presented.

Id. at 463 (emphasis added).

This is not a case involving a barely audible "suggestion" of intellectual disability. This Court has determined that Mr. Oats' intellectual disability claim is real and substantial, and that his eligibility for a death sentence is an open question that requires evidentiary development and factual determinations by a finder of fact. *Oats v. State*, 181 So. 3d at 465 ("We reverse the circuit court's order and remand for the circuit court **to make additional findings** after applying the recent Supreme Court decision in *Hall* and the correct legal standards.") (emphasis added).

Respondent's reference to a "suggestion" of intellectual disability evinces her desire for a change of facts or circumstances. This is reflective more of a desire to win the case than an effort to engage in serious analysis of a serious issue in order to see justice done.

Second, in Respondent's restatement of the claim—to make it easier for her

to prevail—she employs phrasing that implies intellectual disability is a legal issue, not a factual one: "AND TO REQUIRE A JURY TO MAKE A FINDING ON A LEGAL BAR TO EXECUTION". The question of whether Mr. Oats is intellectually disabled is a factual one. We know this because this Court said so:

> In reviewing the circuit court's determination that Oats is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So.3d 891, 895 (Fla.2011).

Oats v. State, 181 So. 3d at 465-66. *See Hall v. State*, 201 So. 3d 628, 638 (Fla. 2016) ("The United States Supreme Court was clear that this state is not free "to define intellectual disability as [it] wishe[s]," and **the unrefuted evidence** in this case has consistently demonstrated that Hall meets the clinical and statutory definition of intellectual disability. **The record evidence** in this case overwhelmingly supports the conclusion that "Hall has been [intellectually disabled] his entire life.") (emphasis added).

Further, this Court held in *Hurst v. State* that the jury in a capital case must return a unanimous death recommendation, otherwise the State is legally barred from imposing a death sentence. There is no valid difference between the unanimous findings of facts necessary to return a death recommendation which authorizes the imposition of a death sentence under *Hurst v. State*, and the findings

of fact necessary to conclude that a defendant is not intellectually disabled and thus eligible to be sentenced to death.

After trying to restate Mr. Oats' claim, Respondent seizes upon the fact that Mr. Oats has no on-point case law to cite for the proposition that *Hurst v. State* applies to the factual finding required by § 921.137 that Mr. Oats is not intellectually disabled before a death sentence is authorized. Respondent wants this to be significant. But of course, Respondent has no cases to cite addressing the intersection between *Hurst v. State* and § 921.137, because *Hurst v. State* just issued on October 14, 2016.

The issue presented by Mr. Oats is one of first impression. That means this Court has yet to decide an issue over which no other court has jurisdiction; i.e., how a Florida statute intersects with a new decision by this Court holding that under the Florida Constitution all facts necessary to render a defendant eligible for a death sentence must be found by a unanimous jury.

Respondent then tries to find significance in the U.S. Supreme Court's failure in *Hall v. Florida*, 134 S. Ct. 1986 (2014), to hold that a jury must determine a defendant's intellectual disability. But *Hall v. Florida* issued two years before *Hurst v. Florida*, and two and a half years before *Hurst v. State*. The issue of the right to a jury trial was not before the Court in *Hall v. Florida*.

Respondent next argues that Rule 3.203 does not require a jury to determine a defendant's intellectual disability. Of course, Rule 3.203 was promulgated in accord with § 921.137, which also does not require a jury to determine a defendant's intellectual disability. These circumstances are no different than those arising under Florida law declared unconstitutional in *Hurst v. Florida*. Up until January 12, 2016, the sentencing judge in a Florida capital case made all the findings of fact required by § 921.141 and this Court's jurisprudence.

The only reason Respondent offers up as to why the fact finding required by § 921.137 is different than the fact finding required by § 921.141 such that the right to a unanimous jury verdict is not required, boils down to nothing more than this: no one thought about it before.

Respondent's argument that intellectual disability is a legal defense and thus cannot be subject to the jury trial right is in essence the same argument the State unsuccessfully made in *Hurst v. State* regarding the issue of whether the finding that aggravation outweighed mitigation was a fact.[6]

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[6]Respondent, perhaps unwittingly, conceded that her arguments do not hold water and are contrary to *Hurst v. State* when she indicated she was contesting the holding in *Hurst v. State*, and explained that certiorari review was being sought. (Response at 16.) Mr. Oats notes that in *Hurst v. State*, this Court found that the Sixth Amendment decision in *Hurst v. Florida*—when read in conjunction with the Florida Constitution and then applied to the Florida statute—meant that a unanimous death recommendation was now required in Florida. This Court's

Respondent's reference to decisions from Alabama and Ohio are irrelevant as to whether *Hurst v. State* (which relied upon the Florida Constitution) requires the factual determination mandated by Florida Statute § 921.137 to be made by a jury. Courts in Alabama and Ohio were not addressing the application of the Florida Constitution to a Florida statute.

What Respondent fails to address within her discussion of Claim I is the fact that at this moment in time, Mr. Oats has not been found eligible for the imposition of a death sentence. *Oats v. State*, 181 So. 3d at 463. How can Mr. Oats' death sentence be valid if the findings as to his eligibility have yet to be made? Respondent's only tangentially related statement is that "The accuracy of Petitioner's death sentence has been fully litigated . . . ." (Response at 12.) That is simply not true, since Mr. Oats' eligibility for a death sentence has yet to be determined as this Court held in December of 2015.

CLAIM II

HURST V. FLORIDA AND *HURST V. STATE* ESTABLISH THAT THIS COURT ERRED WHEN IT REJECTED MR. OATS' CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A

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decision in *Hurst v. State* does not and cannot possibly be in conflict with state court decisions in Alabama and Ohio, because those decisions by definition do not involve either the Florida Constitution nor the Florida statute construed by this Court over the past 40 years. It should be apparent that this is Florida, not Alabama nor Ohio.

JURY TRIAL WHEN A JURY WAS NOT IMPANELED AT HIS RESENTENCING AND DID NOT CONSIDER WHETHER SUFFICIENT AGGRAVATING CIRCUMSTANCES EXISTED TO JUSTIFY A DEATH SENTENCE AND WHETHER THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES.

As to Claim II, Respondent's restated argument is:

HURST DOES NOT ENTITLE OATS TO RE-LITIGATE HIS PREVIOUSLY DENIED CLAIMS (RESTATED).

(Response at 17.) However, two cases (which Respondent refuses to address) say otherwise. In *Thompson,* this Court found that Thompson had previously litigated his intellectual disability claim; however, a subsequent decision from the US Supreme Court established that this Court had erred in rejecting the claim based on an unconstitutional statutory interpretation. This Court held that a failure "to give Thompson the benefit of *Hall,* which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine." *Thompson v. State,* 208 So. 3d at 50. Under *Thompson*, it is entirely proper for Mr. Oats to re-litigate a previously rejected claim, given that the decision in *Hurst v. State* demonstrates the manifest injustice of depriving Mr. Oats of his right to a jury recommendation.

Similarly, for the reasons this Court explained in *Mosley*, it would violate fundamental fairness to deprive Mr. Oats of the benefit of *Hurst v. State* when he

has repeatedly and unsuccessfully sought to vindicate his right to a jury at his resentencing. This Court's rejection of Mr. Oats' repeated challenges to the denial of a jury at his resentencing does not comport with *Hurst v. State*. The fact that Mr. Oats repeatedly litigated his right to a penalty phase jury at his resentencing is precisely what establishes that it would violate fundamental fairness to deprive him of the benefit of *Hurst v. State*.

CONCLUSION

For all the reasons discussed herein, Mr. Oats respectfully urges this Court to find that he has a right to a unanimous jury determination of his intellectual disability and that he was unconstitutionally deprived of his right to a jury when a jury was not impaneled at his resentencing. Accordingly, his death sentence must be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished by electronic mail to all counsel of record on this 29th day of March 2017.

CERTIFICATE OF FONT

This is to certify that the this Reply has been reproduced in 14 point Times New Roman type, a font that is not proportionately spaced.

Respectfully submitted,

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