IN THE SUPREME COURT OF FLORIDA

TERRANCE TYRONE PHILLIPS,

Appellant,

v. **Case No. SC12-876**

STATE OF FLORIDA, **Death Penalty Case**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State reiterates and incorporates its Statement of the Case and Facts from the Answer Brief, with the following additions pertinent to the issues on which this Court allowed supplemental briefing.

Appellant was found guilty by a jury as charged on all counts: first-degree murder of Reynaldo Antunes-Padilla, first-degree murder of Mateo Hernandez-Perez, armed burglary, attempted armed robbery, and conspiracy to commit armed robbery. (R1:27-30; R3:556-562). Following the penalty phase, the jury recommended by a vote of eight-to-four that Appellant receive the death penalty for the murders of Reynaldo Antunes-Padilla and Mateo Hernandez-Perez. (R3:582-583).

The trial court followed the jury's eight-to-four recommendations and sentenced Appellant to death for Antunes-Padilla's murder and for Hernandez-Perez's murder. (R4:629-638). Appellant was also sentenced to life imprisonment on the armed burglary and attempted armed robbery convictions and fifteen years' prison on the conspiracy conviction. (R4:629-638).

The trial court found three aggravating factors: (1) the Appellant was previously convicted of another capital felony for the contemporaneous murders of Antunes-Padilla and Hernandez-Perez; (2) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, community control, or on felony probation for possession of a controlled

substance; (3) The capital felony was committed while the Appellant was engaged in the commission, of attempt to commit, any robbery or burglary. (R4:651-653). The trial court found one statutory mitigator: the age of the Appellant at the time of the crime. (R4:656-657). The trial court also found nine non-statutory mitigating circumstances. (R4:657-662).

After briefing was completed, Appellant requested that this Court allow supplemental briefing to address the application of the recent decisions in Hurst v. Florida, -U.S.-, 136 S.Ct. 616 (2016) and Oats v. State, 181 So. 3d 457 (Fla. 2015). This Court granted Appellant's motion.

SUMMARY OF ARGUMENTS

Appellant is entitled to no relief based on the United States Supreme Court's opinion in Hurst v. Florida, 136 S.Ct. 616 (2016) because his guilt phase jury found him guilty of multiple prior violent felonies. There was no Sixth Amendment error in the imposition of Appellant's death sentences, since a jury undeniably found the facts necessary to enhance his sentences to death. Appellant was under probation at the time of the offense. Appellant was found guilty of two counts of murder. These recidivist aggravators were found by a unanimous jury beyond a reasonable doubt and are an exception to Ring v. Arizona, 536 U.S. 584 (2002).

Appellant's reliance on §775.082(2), Florida Statutes, as requiring imposition of a life sentence for his murder conviction, is misplaced. The statute provides only that a life sentence would be imposed if the death penalty itself has been ruled unconstitutional. A plain reading of the statute does not support Appellant's strained interpretation. The United States Supreme Court has not held that death as a penalty violates the Eighth Amendment, but has stricken only Florida's current statutory procedures for implementation. Accordingly, §775.082(2) is not applicable.

Appellant's claim of structural error, which can never be harmless, is easily refuted by United States Supreme Court case law. In this case, any potential Sixth Amendment error would be harmless beyond a reasonable doubt given the

recidivist aggravators for his prior conviction and contemporaneous felony convictions. Accordingly, Appellant's death sentences must be affirmed.

Moreover, Appellant's claim that this Court's ruling in Oats v. State, 181 So. 3d 457 (Fla. 2015) requires a full reevaluation of intellectual disability is clearly refuted by the record. Appellant's own doctor testified that he was not intellectually disabled and Appellant has not presented any additional facts that would require a reevaluation of intellectual disability.

ARGUMENTS

ARGUMENT V: APPELLANT IS NOT ENTITLED TO RELIEF BASED ON HURST V. FLORIDA.

Appellant asserts that his death sentence should be stricken and he should be resentenced to life in prison, due to the recent opinion in Hurst v. Florida, 136 S.Ct. 616 (2016). However, Hurst does not apply in this case as there is a recidivist aggravator and Appellant was under probation at the time of the offense. The Appellant was convicted of the contemporaneous murders of Hernandez-Perez and Antunes-Padilla, burglary and attempted robbery, by a unanimous jury, the prior violent felony aggravator was necessarily found. Moreover, the United States Supreme Court did not find the death penalty unconstitutional and §775.082(2) has not been triggered entitling Appellant to resentencing to life imprisonment. Further, any alleged error is harmless. For these reasons, Appellant's argument must be rejected and the death sentences imposed in this case must be affirmed.

A. The Standard of Appellate Review.

The constitutionality of a statute is reviewed *de novo*. Scott v. Williams, 107 So. 3d 379 (Fla. 2013). This Sixth Amendment right to a jury trial claim is purely a matter of law and pure issues of law are reviewed *de novo*. Cf. Plott v. State, 148 So. 3d 90, 93 (Fla. 2014) (stating that because a claim of an Apprendi/Blakely error "is a pure question of law," the "Court's review is de novo.").

B. Hurst does not Apply to Appellant's Case Because Of The Recidivist Aggravator

Hurst does not apply to Appellant's case as his case involves a recidivist aggravator. Appellant was under a sentence of probation at the time of these murders and that was one of the aggravators found as a basis for both death sentences. (R4:652).

In Hurst, this Court specifically extended the Sixth Amendment protections first identified in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) to Florida cases. Hurst, 136 U.S. at 622. The holding in Apprendi was that any fact, "other than the fact of a prior conviction," that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Apprendi, 530 U.S. at 490. The exception for prior convictions in Apprendi was based on the recidivist exception established in Almendarez-Torres v. United States, 523 U.S. 224 (1998).

This Court, based on the exception, has repeatedly observed that Ring does not apply to cases involving recidivist aggravators, such as the prior violent felony aggravator or the under sentence of imprisonment aggravator. McCoy v. State, 132 So. 3d 756, 775-76 (Fla. 2013); Johnson v. State, 104 So. 3d 1010, 1028 (Fla. 2012); and Hodges v. State, 55 So. 3d 515, 540 (Fla. 2010). In the wake of Hurst that same logic, based on the exception for prior convictions, remains valid and

applies. Even after Hurst, the United States Supreme Court recently denied certiorari review in two pipeline cases involving recidivist aggravators. Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016) (No. 15-6075) (under-sentence-of-imprisonment aggravator with an 8-4 jury recommendation); Smith v. State, 170 So. 3d 745 (Fla. 2015), cert. denied, 2016 WL 280862 (Jan. 25, 2016) (No. 15-6430).

In this case, Appellant was convicted of possession of a controlled substance-MDMA Ecstasy. On November 9, 2009, he was sentenced to probation. However, the Appellant was on felony probation a mere 45 days prior to commission of these murders. (R 3:419; 4:653, n.13). The trial court found this as an aggravator in sentencing Appellant to death. Therefore, Appellant was eligible for the death penalty based on his status of being on probation before the trial based on this recidivist aggravator.

C. Based on the Jury Convictions at the Guilt Phase, Hurst v. Florida Does Not Apply.

Appellant submits that Hurst determined that eligibility for the death penalty does not occur in Florida until the judge makes the ultimate determination that sufficient aggravating factors outweigh the mitigating factors to justify a sentence of death. (SB at 9-10). He argues that Hurst found this capital sentencing scheme unconstitutional. Appellant argues that even the finding by the judge of a prior violent felony does not now render the statute constitutional. However,

Appellant's argument is misplaced. In Hurst, the United States Supreme Court held that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S.Ct. at 624. Accordingly, if a jury finds an aggravating circumstance, it would satisfy the requirements of Hurst. Therefore, the finding of a prior violent felony based on unanimous jury convictions is acceptable as an aggravating factor.

In Hurst, the United States Supreme Court specifically extended the Sixth Amendment protections first identified in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) to Florida cases. Hurst, 136 U.S. at 622. The Court recognized the critical distinction of an enhanced sentence supported by a prior conviction. Ring, 536 U.S. at 598 n.4 (2002) (noting Ring does not challenge Almendarez-Torres v. United States, 523 U.S. 224 (1998) "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence."); see also Alleyne v. United States, 133 S.Ct. 2151, 2160 n.1 (2013) (affirming Almendarez-Torres provides valid exception for prior convictions). Importantly, Hurst was convicted only of first-degree murder and his death sentence was not supported by any prior convictions or an express jury verdict from the guilt phase finding facts constituting an aggravating factor. Unlike Hurst, Appellant's case is consistent with both

Apprendi and Ring and does not conflict with any other case.

In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010), cert. denied, 132 S.Ct. 224 (Oct. 3, 2011) (No. 10-11173); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010), cert. denied, 562 U.S. 878 (Oct. 4, 2010) (No. 09-11400). Death is presumptively the appropriate sentence when at least one aggravator has been found. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As the availability of the death sentence in a particular circumstance is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative"). Therefore, the finding of a prior violent felony based on a unanimous jury conviction is acceptable as an aggravating factor and Hurst did not disturb this particular aspect of Florida death penalty jurisprudence.

In this case, the jury found multiple aggravating factors that render Appellant eligible for the death sentence and allows the trial court to sentence him to death. The jury unanimously found Appellant guilty of the contemporaneous first-degree murders, armed burglary, conspiracy to commit armed robbery, and attempted armed robbery, making him independently eligible for a death sentence under Florida law. See Gonzalez v. State, 136 So. 3d 1125, 1168 (Fla. 2014); Frances v. State, 970 So. 2d 806, 822 (Fla. 2007); Gudinas v. State, 879 So. 3d 616, 617 (Fla.

2004). The trial court found the aggravators of prior violent felony conviction based on the contemporaneous murders. Therefore, aggravating factors were found by this unanimous jury rendering Appellant's sentences of death constitutional, satisfying the requirement of Apprendi, Ring, and Hurst.

Accordingly, Appellant's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, 136 S.Ct. at 624. This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific jury findings as to the existence of an aggravating circumstance. Therefore, as the jury convicted Appellant of contemporaneous murders, a fact which supports the finding by the trial court of the aggravator, this Court should affirm Appellant's sentences of death.

C. Appellant is Not Entitled to a Life Sentence Pursuant to Section 775.082(2).

Appellant asserts that because Hurst concluded that Florida's death statute is facially invalid, he is entitled to be resentenced to life in accordance with §775.082(2). (SB at 16). Appellant's arguments are clearly misplaced as Hurst only invalidated Florida's procedures for implementation, finding that they facially could result in a Sixth Amendment violation if the judge makes factual findings

which are not supported by a jury verdict. Therefore, §775.082(2) does not apply by its own terms.

Section 775.082(2) provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. Situations where this occurred were in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Appellant suggests that the holding in Hurst parallels the decision in Furman, requiring the commutation of all death sentences to life as in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). However, Appellant is misreading and oversimplifying the Donaldson decision. Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, Donaldson held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. Donaldson observed the new statute §775.082(2) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its

materiality in considering the entire matter." Donaldson, 265 So. 2d at 505.

The focus and primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson does not purport to resolve issues with regard to pipeline cases pending before the Court on direct appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required. But it is interesting to observe that this was before Dobbert v. Florida, 432 U.S. 282 (1977) was decided.

At any rate, there are several reasons for this Court to reject the blanket approach of commuting all capital sentences currently pending before this Court on direct appeal such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506

(Roberts, C.J., concurring specially). The Court held that the death penalty as imposed for murder and for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible.

Hurst, on the other hand, is a specific ruling to extend the Sixth Amendment protections first identified in Ring to Florida cases. The holding in Hurst limited the required jury factfinding to the existence of one aggravating factor. See Hurst, 136 S.Ct. at 624 ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is ... unconstitutional."). The Court overruled Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for the imposition of the death penalty." Hurst, 136 U.S. at 624. In so doing, the Court did not expressly disturb Proffitt v. Florida, 428 U.S. 242 (1975) (holding that Florida's capital sentencing scheme does not violate the Eighth Amendment as interpreted by Furman).

By equating Hurst with Furman, Appellant reads Hurst far too broadly. As we know, Hurst did not have a prior or contemporaneous conviction. Revealingly,

however, following release of the Hurst opinion, the United States Supreme Court denied certiorari review of two direct appeal decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences supported by prior violent felony convictions. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016) (No. 15-6075); Smith v. State, 170 So. 3d 745 (Fla. 2015), cert. denied, 2016 WL 280862 (Jan. 25, 2016) (No. 15-6430). After Furman, there was no existing capital cases left intact. After Hurst, the United States Supreme Court has provided no express reason to disturb any capital sentences supported by prior or contemporaneous convictions. Because Hurst did not find that the death penalty was constitutionally prohibited, §775.082(2) does not mandate a blanket commutation of death sentences as Appellant requests.

Furthermore, the practice in other states does not suggest that commutation of all non-final death sentences in Florida is necessary under Hurst. In Arizona, the Arizona Supreme Court rejected blanket commutation, finding that the unconstitutional portion of the statute could be severed to preserve pending death cases. State v. Pandeli, 161 P.3d 557 (Ariz. 2007). This is the approach this Court should take. This Court has repeatedly recognized its obligation to uphold any portion of the statute, to the extent there is a reasonable basis for doing so, based on the rule favoring validity. Donaldson, 265 So. 2d at 501, 502-03; Driver v. Van Cott, 257 So. 2d 541 (Fla. 1972); Davis v. State, 146 So. 2d 892 (Fla. 1962).

There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case. The Court remanded Hurst for a harmlessness determination. In considering whether a new sentencing proceeding may be required by Hurst in a pending pipeline case, this Court needs to determine whether Sixth Amendment error occurred on the facts of that particular case; that is, whether a jury factfinding as to an aggravating circumstance, such as a contemporaneous felony, is apparent on the record. If there was a Sixth Amendment violation, the question shifts to the impact of that error, and whether any prejudice to the defendant may have occurred. With this approach, this Court is respecting those death sentences that can be salvaged upon finding that any potential constitutional error was harmless, while protecting the Sixth Amendment rights of defendants. In this case, a new sentencing proceeding is not needed as the jury's conviction of contemporaneous murder is clear on the face of the record.[1]

D. Appellant is also Not Entitled to Any Relief under a Harmless Error Analysis

Appellant claims that Sixth Amendment error occurred in his case and alleges that such error was necessarily "structural," and not amenable to a harmless error

[1] Nor does double jeopardy prohibit a new penalty phase in pipeline cases with Hurst errors. (SB at 17). Double jeopardy only prohibits a new penalty phase when a defendant was originally acquitted of death. Satazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732 (2003). A defendant who was originally sentenced to death based on a jury recommendation of death can have no valid double jeopardy claim.

analysis. (SB at 24). This argument must be rejected as the United States Supreme Court in Hurst necessarily remanded the case for an harmless error analysis.

The United States Supreme Court remanded Hurst itself to this Court for determination of harmlessness, noting that "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." Hurst, 136 S. Ct. at 624. This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be and often is harmless beyond any reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla. 2008). See also Pena v. State, 901 So. 2d 781, 783 (Fla. 2005) (failure to instruct jury on age requirement was not fundamental error).

Not all constitutional errors merit an automatic reversal because "most constitutional errors can be harmless." Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Arizona v. Fulminate, 499 U.S. 279, 306 (1991)). Whether a constitutional error is harmless depends on whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder at 15 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). In this case, any error in having the trial court find the aggravating factors would not change the sentence of death received by Appellant. The trial court's finding of a prior violent felony conviction, under sentence of probation, and murder

committed during the course of attempted robbery and burglary is supported by the evidence presented beyond a reasonable doubt and the jury's verdict. See Windom v. State, 886 So. 2d 915, 949 (Fla. 2004) (Cantero concurrence) ((stating that "even if the [Apprendi] error affected 'substantial rights,' it did not seriously affect the fairness, integrity, or public reputation of the proceedings") quoting United States v. Cotton, 535 U.S. 625, 633-34 (2002)).

Appellant murdered two victims while engaged in the contemporaneous felony of armed burglary, conspiracy to commit armed robbery, and attempted armed robbery. Appellant and three other codefendant's planned to enter the victim's home and rob them. (T. 7:379-380; 8:436). Appellant entered the home of the victims with a gun and put that gun to one of their heads. (T. 7:325-326, 384-385, 440). After a fight ensued, the other three codefendant's were able to exit the home. (T. 7:329, 386; 8:441-442). However, Appellant remained in the home, shooting and killing Hernandez-Perez and Antunes-Padilla. (T. 7:329, 386; 8:443).

The jury's unanimous verdict for the contemporaneous felonies unquestionably qualified Appellant for the death sentence. On the facts, the jury would have found all three aggravators if asked to do so. Under the Apprendi/Ring/Hurst line of cases, no possible constitutional error prejudiced Appellant on these facts. Any Hurst error was harmless. Accordingly, Appellant's death sentences should be upheld.

ARGUMENT VI: APPELLANT IS NOT INTELLECTUALLY DISABLED AND THERE IS NO NEED FOR A REEVALUATION.

In his brief, Appellant maintains that subsequent to the filing of his initial brief, this Court issued a ruling in Oats v. State, 181 So. 3d 454 (Fla. 2015), that requires that he get a chance to present evidence of his intellectual disability. However, Appellant's allegations lack merit as Oats does not apply to Appellants' case. Appellant failed to raise a claim of intellectual disability under Rule 3.203, which would have provided him with the opportunity to fully present his claim. Further, the record reflects that his IQ score was a 76, which excludes him from the class of cases that Hall and Oats addressed.

A. The Standard of Appellate Review.

The standard of review is *de novo* as this Court reviews the legal conclusions of the lower court. State v. Herring, 76 So. 3d 891, 895 (Fla. 2011); see also Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004). "We review the circuit court's determination that a defendant is not mentally retarded for competent, substantial evidence, and we do not reweigh the evidence or second guess the circuit court's findings as to the credibility of the witnesses." Franqui v. State, 59 So. 3d 82, 91 (Fla. 2011).

B. Oats is Distinguishable from Appellants' Case

Appellant argues that the recent decision in Oats v. State, 181 So. 3d 454 (Fla. 2015) requires a "full reevaluation" of Appellant's intellectual disability. (SB at

31). However, Appellant's reliance on Oats is totally misplaced as Appellant never claimed he had intellectual disability sufficient to act as a bar to execution and, unlike Oats, he was not prevented from presenting any evidence in support of his claim. The evidence concerning Appellant's IQ score was presented as mitigation for the jury's consideration and was found by the trial court in mitigation. (R. 4:659). Thus, the claim as now presented is barred and without merit. Further, Appellant has not shown that any subsequent reevaluation is needed to show that he is not intellectually disabled.

In Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), the United States Supreme Court held that the Eighth Amendment prohibits the execution of an individual with an intellectual disability. Oats, 181 So. 3d at 463. Subsequently, in Hall v. Florida, 134 S.Ct. 1986 (2014), the United States Supreme Court held that an individual with an IQ score within a range of 70-75 must be allowed to show additional evidence of the other two prongs in an attempt to prove intellectual disability.

Following the decision in Hall, this Court in Oats, determined that the lower court had committed three errors in rejecting Oats' intellectual disability claim: (1) failing to consider all three elements of intellectual disability, (2) failing to consider evidence that had been presented during prior proceedings in making its decision on intellectual disability, and (3) requiring that the defendant show that he

had been diagnosed as intellectually disabled before the age of 18. Oats, at 459-460, 467-469.

Oats filed a motion to determine his intellectual disability as a bar to execution pursuant to Florida Rule of Criminal Procedure 3.203. Oats, at 458. The testimony presented at a 1990 evidentiary hearing established Oats was without a doubt intellectually disabled, as conceded by the State. Id. at 463. At the Rule 3.203 hearing, held almost 25 years after the 1990 hearing, it was established that over the course of his life, Oats' IQ scores ranged from 54 to the highest of 70. Id. at 463-465. However, there was no diagnosis of intellectual disability before the age of 18 and the trial court denied the motion on that basis. Id. at 465. Based on the United States Supreme Court decision in Hall, this Court reversed and remanded for the trial court to make additional findings.

However, Oats is distinguishable from the case at hand as it is substantially different. Appellant did not file a rule 3.203 motion to assert that he was intellectually disabled. Rather, his low IQ was presented simply as mitigation. Here, as the record shows, the trial court considered and found the facts that were presented to him as mitigation and found that mitigation, stating:

> **3. The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty. § 921.141(6)(h), Fla. Stat.**
>
> **A. The Defendant has a borderline low IQ, a severe speech impediment, and learning disability.**
>
> This mitigating circumstance was established based on the

> testimony of family members, as well as forensic psychologist, Dr. Michael D'Errico. Family members, including Priscilla Jenkins, Velecia Douglas, Kamillar Jenkins, Terrance Douglas, and Nathaniel Thomas, testified that the Defendant has always suffered from a speech impediment, which appears to have improved over time. This impediment involved the Defendant having difficulty pronouncing words and talking very slowly. There was also testimony that as a result of the Defendant's speech impediment, people would make jokes but that the Defendant would not get mad and just learned to deal with it. Family members also testified the Defendant had a learning disability, was in special education classes, and received speech therapy in school.
>
> Dr. D'Errico conducted an evaluation of the Defendant on January 16, 2012. Prior to conducting the evaluation, Dr. D'Errico reviewed the Defendant's school records, which revealed the Defendant was in special education classes from first through ninth grade for specific learning disabilities. The records reflect that the Defendant received speech therapy between first and fourth grade for a speech impediment. Dr. D'Errico conducted testing on the Defendant revealing an I.Q. score of 76, an I.Q. in the bottom 5% of the population. Dr. D'Errico concluded the Defendant has significantly subaverage intelligence and falls in the borderline range of intellectual functioning. Dr. D'Errico testified that this conclusion was consistent with psychometric intelligence testing performed on the Defendant when he was still in school.
>
> Dr. D'Errico did testify, however, that he is unable to say he noticed any speech impediment while meeting with the Defendant on January 16, 2012. He also testified that the Defendant's school records indicated that from as early as kindergarten, the Defendant displayed disruptive behavior, behavior that Dr. D'Errico stated could have contributed to the Defendant's poor performance in school. The Court finds that these mitigating circumstances were established and gives the circumstances regarding the Defendant's borderline I.Q. and learning disability moderate weight, and the circumstance regarding the Defendant's speech impediment slight weight, in determining the appropriate sentences to be imposed in Counts One and Two.

(R. 4:657-659).

Appellant’s evaluation by his own doctor established that he was not

intellectually disabled, which was clearly established by the mental health experts in Oats. (T: 11:1056-1058, 1064). Moreover, Appellant's lowest IQ score was 76. (T. 11:1057). He therefore does not fall in the Hall range. Additionally, he did not attempt nor was he precluded from raising a claim under 3.203. Nor was he prevented from presenting any additional evidence of his intellectual deficits including any evidence of deficits in adaptive functioning onset prior to turning 18. (T. 11:1057). Therefore, even if this claim was not barred, this Court's holding in Oats does not support a claim of error and does not require another evaluation.

C. Hurst Does Not Require that Issues of Intellectual Disability Be Presented to a Jury.

Appellant asserts that based on the logic of Hurst, the Sixth Amendment right to a jury attaches to an intellectual disability determination. He asserts that since intellectual disability raises a question of fact, such fact finding is for a jury to make. (SB at 32). Despite Appellant's allegations, the United States Supreme Court's holding in Hurst does not require that a determination of intellectual disability has to be found by a jury. A finding of intellectual disability is a circumstance that results in a decrease in the penalty and as such does not have to be determined by a jury. Walker v. True, 399 F.3d 315, 326 (4th Cir. 2005) (rejecting claim that Ring requires a jury determination of mental retardation, and reasoning that "an increase in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease"). Therefore, as

a finding of intellectual disability decreases the penalty, it does not have to be submitted to the jury. Cf. Alleyne v. United States, 133 S. Ct. 2151 ("any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt."). Accordingly, this claim is without merit and this Court should affirm Appellant's judgment and sentences of death.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Terrance Phillips's convictions and sentences.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on February 23, 2016: Martin J. McClain, Esq. at martymcclain@earthlink.net.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
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