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

SONNY BOY OATS, JR.,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

MARTIN J. McCLAIN
Special Assistant CCRC-South
Fla. Bar No. 0754773
martymcclain@earthlink.net

NICOLE M. NOËL
Assistant CCRC-South
Fla. Bar No. 41744
noeln@ccsr.state.fl.us

CCRC-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284
COUNSEL FOR PETITIONER

INTRODUCTION

A. Intellectual disability and *Hurst v. Florida*.

A defendant found to be intellectually disabled is ineligible for the imposition of a death sentence. This has been Florida law since June 12, 2001, when legislation was enacted barring death sentences on those found as a matter of fact to be an intellectually disabled:

> A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.

§ 921.137(2), Fla. Stat. When a defendant raises his intellectual disability as a bar to the imposition of a death sentence, a death sentence may not be imposed if the sentencing court finds that the defendant is intellectually disabled. Instead, the court "shall enter a written order that sets forth with specificity the findings in support of the determination." § 921.137(4). Under the statute, intellectual disability is a question of fact to be resolved by the sentencing judge before a defendant who has asserted his intellectual disability can be sentenced to death. An intellectually disabled defendant is not eligible for a death sentence under Florida statutory law.

On December 17, 2015, this Court ordered an evidentiary hearing on whether Sonny Boy Oats was intellectually disabled and ineligible for a death sentence:

> 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. A remand of this proceeding is particularly necessary in light of the dispositive opinion in *Hall*, in which the United States Supreme Court disapproved our opinion in *Cherry* and provided additional guidance pertaining to the necessary showing under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), for **establishing ineligibility for the death penalty as a result of an intellectual disability**.

Oats v. State, 181 So. 3d 457, 460 (Fla. 2015) (emphasis added). Mr. Oats had asserted that he is "intellectually disabled and thus cannot be sentenced to death." *Id.* at 459. This Court reversed the circuit court's denial of Mr. Oats' claim and ordered further proceedings due to the strength of the evidence that Mr. Oats is intellectually disabled:

> The evidence presented to the circuit court in fact strongly leads to the conclusion that Oats established both his low IQ and onset of an intellectual disability prior to the age of 18. However, because the circuit court did not analyze the remaining prongs, and because neither the circuit court nor the parties and their experts had the benefit of *Hall*, we remand for further proceedings consistent with this opinion, including providing the parties with an opportunity to present additional evidence at an evidentiary hearing to enable a full reevaluation of whether Oats is intellectually disabled.

Id. at 471. Thus, Mr. Oats' eligibility for a death sentence, which he has raised and put at issue, is an open and unresolved question of fact.

On January 12, 2016, the United States Supreme Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), and held that a jury must find "every

fact necessary to render [a defendant] eligible for the death penalty." In *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016), this Court explained:

> 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**.

(Emphasis added). Then in *Mosley v. State*, _ So. 3d _, 2016 WL 7406506 *18 (Fla. Dec. 22, 2016), this Court stated:

> [T]his Court interpreted the United States Supreme Court's holding in *Hurst v. Florida* and held "that the Supreme Court's decision in ***Hurst v. Florida*** **requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury**. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense."

(Emphasis added).

Under *Hurst v. State* and *Mosley v. State,* the factual determination necessary to render Mr. Oats eligible for a death sentence has yet to be made. Because this Court held Mr. Oats' eligibility for a death sentence to be an open question due his claim of intellectual disability, current Florida law means that his death sentence has been entered prematurely and must be vacated.

B. Fundamental fairness requires *Hurst v. Florida* and *Hurst v. State* to be applied retroactively to Mr. Oats' case.

In *Hurst v. Florida*, the U.S. Supreme Court held that every fact necessary to authorize a court to impose a death sentence is subject to the Sixth Amendment right to a jury trial. In *Hurst v. State*, this Court held that this right to a jury trial under Florida law and under the Eighth Amendment means that the jury must unanimously find those facts necessary to authorize a death sentence.

In *Mosley v. State*, this Court addressed the retroactivity of *Hurst v. Florida* and *Hurst v. State*, and explained that under Florida law, a death sentenced defendant is entitled to the benefit of those decisions. *Mosley v. State*, 2016 WL 7406506 at *20 n.13. Under the analyses set forth in *Mosley*, Mr. Oats is entitled to receive the benefit of *Hurst v. Florida* and *Hurst v. State*.

First, there has not been a factual finding that Mr. Oats is not intellectually disabled. Without such a finding, Mr. Oats is not now eligible to be sentenced to death under Florida law. In fact, his eligibility is an open question that requires fact finding. A death sentence surely cannot be final before the requisite eligibility determination has been made, particularly when *Hurst v. Florida* and *Hurst v. State* govern as to how the eligibility fact finding must be made.

Second, Mr. Oats in his recent appeal to this Court argued that *Ring v. Arizona*, 536 U.S. 584 (2002), applied to his intellectual disability claim:

> [O]nce a prima facie showing was made of his mental retardation, Mr. Oats' sentence of death could no longer be considered final or valid until the fact necessary for the imposition of a sentence of death had been made in compliance with the Sixth Amendment.

(Initial Brief at 100, *Oats v. State*, Case No. SC12-749). In reversing and remanding, this Court elected to not address Mr. Oats' *Ring*-based argument which was set forth in Argument V of his initial brief. *Oats v. State*, 181 So. 3d at 465. Under *Hurst v. Florida* and *Hurst v. State*, Mr. Oats' argument was meritorious and does not involve the retroactive application of those decisions, since this Court's ruling was not final when *Hurst v. Florida* issued. Principles of judicial economy warrant resolution of the unresolved issue before the circuit court conducts an evidentiary hearing on remand.

Third, after his death sentence was vacated by this Court due to error in the consideration of three of six aggravating circumstances,[1] Mr. Oats argued that he was deprived of his right to a penalty phase jury before his resentencing. At his resentencing and in his direct appeal Mr. Oats argued that the refusal to impanel a jury was constitutional error. *See* Initial Brief at 18, *Oats v. State*, Case

[1] This Court explained why Mr. Oats' death sentence could not stand and a resentencing was required: "[b]ecause the judge weighed three impermissible aggravating factors, in addition to the three permissible ones, against the single mitigating factor of Oats' age, we cannot know if the result would have been different if the impermissible factors had not been present." *Oats v. State*, 446 So. 2d 90, 95-96 (Fla. 1984).

No. 65,381 ("The Failure To Provide Oats With A Jury On Resentencing Deprives Him Of An Important Ingredient In The Imposition Of The Death Sentence And In The Review Of That Sentence."). Mr. Oats also argued that Florida's capital sentencing scheme was unconstitutional in failing to require juror unanimity when returning a death recommendation. *Id*. at 27 ("The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law."). 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.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Oats respectfully requests oral argument on this petition and the issues raised herein.

PROCEDURAL HISTORY

On January 30, 1980, Sonny Boy Oats was indicted for first degree murder and robbery (R1. 1521).

A jury trial commenced on February 2, 1981 (R1. 1-1114). During voir dire, the prospective jurors were repeatedly told that their sentencing recommendation only needed to be made by a majority vote, that their recommendation was not binding, and/or that the Court made the ultimate decision. (R1. 120-21, 123, 195, 315, 386, 392-93, 409, 421, 587-88, 594).

On February 6, 1981, the jury returned a verdict finding Mr. Oats guilty of first degree murder and robbery with a firearm (R1. 1109).

A penalty phase was then conducted on February 10, 1981 (R1. 1275). At the beginning of the penalty phase, the judge instructed the jury as follows: "The final decision was to what punishment shall be imposed rests solely with the Judge of this Court, which is myself in this case. However, the law requires that you, the Jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant" (R1. 1115).

In his opening statement, the prosecutor told the jury, "[y]ou vote by majority. In other words seven could vote life, five death, and your recommendation would be life; eight could vote death, four could vote life, and your recommendation would be death" (R1. 1116). In closing, the prosecutor reiterated, "Remember this: this is only an advisory sentence. The ultimate responsibility for the sentence rests with the Court. The Court. That's what he's

paid for" (R1. 1245).

The prosecutor also argued that the six aggravating circumstances that the judge would be addressing in his instructions required the jury to return a death recommendation (R1. 1237) ("There is absolutely, positively no question that those [six] aggravating circumstances weigh against the defendant."). In his closing before the jury, the prosecutor specifically relied upon aggravators that this Court would later rule were not to be part of the weighing in Mr. Oats' case. As to the pecuniary gain aggravator, the prosecutor argued it did not merge with the "in the course of a robbery aggravator and should separately weighed by the jury: "I disagree with one thing [defense counsel] said this morning: 'That's double counting.' It's not. So those are two distinct aggravating circumstances" (R1. 1238). As to the heinous atrocious or cruel aggravator, the prosecutor argued:

> It's for you to determine, when he shot this woman in the face at close range, was that extremely wicked or shockingly evil. You'll probably hear some arguments—I know [defense counsel] alluded to it earlier—that a single shot does not constitute heinous. Well you know, that's for you to decide. It's your decision as to whether or not this shooting in the face was cruel, heinous.

(R1. 1238-39).

Before sending the jury out to deliberate, the judge instructed the jury:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the

> Defendant for his crime of first-degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence **based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty** and **whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist**.

(R1. 1263-64) (emphasis added).

The judge instructed the jury on the six aggravating circumstances it was to consider: (1) that Oats was previously convicted of a violent felony; (2) that the homicide occurred during the commission of a robbery; (3) the homicide was committed to avoid arrest; (4) the homicide was committed for pecuniary gain; (5) the homicide was especially heinous, atrocious or cruel (HAC); and (6) the homicide was committed in cold, calculated and premeditated manner (CCP) (R1. 1264-65). The jury was instructed on the seven statutory mitigating circumstances and the catch-all non-statutory mitigating circumstance. (R1. 1264-66).

The judge again instructed the jury that "[i]n these proceedings it is not necessary that the verdict of the Jury be unanimous, but a verdict may be rendered upon the finding of a majority of the Jury" (R1. 1267). The judge's instructions concluded by reiterating the advisory nature of the jury's recommendation: "the advisory opinion of the Jury is the Jury advising—with respect to first-degree

murder, it's advisory to the Court. The Court has the option of either imposing the death sentence or of life imprisonment" (R1. 1273).

One hour after retiring to deliberate on February 10, 1981, the jury returned a death recommendation (R1. 1275). However, the verdict did not reflect how many jurors voted to recommend a death sentence. It only indicated that a majority of the jury had voted to recommend a death sentence. The jurors were polled, but were only asked whether they agreed that their recommendation was by a "majority vote" (R1. 1276). Mr. Oats asked that the jury disclose the jury vote, but the judge denied the request (R1. 1277).

After the jury was discharged, the judge sentenced Mr. Oats the very same day. The judge imposed a death sentence and issued his written findings in which he found the six aggravators on which he had instructed the jury. Turning to mitigators, the judge found one statutory mitigating circumstance had been established—Mr. Oats' age (R1. 1677-78).

On February 23, 1984, this Court vacated Mr. Oats' sentence of death and remanded for a resentencing. This Court found that the judge's weighing process had included three "impermissible" aggravating circumstances. *Oats v. State*, 446 So. 2d 90, 95 (Fla. 1984). This Court held that the pecuniary gain aggravator had been improperly weighed because Florida law required this aggravator to merge

with the "in the course of a robbery" aggravator. *Id*. (in circumstances like those in Mr. Oats' case "only one aggravating factor may be counted" and weighed against the mitigation).[2] This Court also held the heinous, atrocious, or cruel aggravator was improperly found and weighed because "a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance." *Id*.[3]

This Court also ruled that the previous conviction of a crime of violence was invalid because the prior conviction had been vacated on appeal. However, because another conviction had been returned when the case was remanded for retrial, this Court ruled that the judge on remand could rely on the new conviction to find the aggravator present.[4] *Oats v. State*, 446 So. 2d at 95.

On remand, Mr. Oats argued that a new jury should be impaneled. Mr. Oats asserted that the original trial jury, over defense objection, heard evidence,

---

[2] The prosecutor in Mr. Oats' case had specifically argued to the jury that the aggravators should not be merged and that both should be separately included in the weighing process (R1. 1238).

[3] The prosecutor in Mr. Oats' case had specifically urged the jury to find that "when [Mr. Oats] shot this woman in the face at close range" it was "extremely wicked or shockingly evil," and to include this aggravator in the weighing process (R1. 1239).

[4] The original conviction at issue was for robbery and attempted first degree murder. *See Oats v. State*, 407 So. 2d 1004 (Fla. 5th DCA 1981). However, after the conviction was vacated, on remand Mr. Oats was convicted of robbery and attempted second degree murder, a lesser offense (R2. 1815-17).

instruction and argument upon erroneous and inapplicable aggravating factors (R2. 1756-81). Mr. Oats maintained that the failure to impanel a new jury depriving him of his right to have a properly instructed jury hear only properly admitted evidence and consider only applicable aggravating factors in accordance with Florida law when considering whether sufficient aggravating circumstances existed to justify a death sentence and whether those aggravating circumstances outweighed the mitigating circumstances presented by the defense. On April 26, 1984, the judge denied Mr. Oats' motion and, without empaneling a new penalty phase jury, the judge instead gave "due weight" to previously returned death recommendation.[5] (R2. 1855). He then re-imposed a sentence of death.[6] The judge then adopted the written findings in support of a death sentence which had been prepared by the State prior to the hearing, finding four aggravators and only one mitigator (R2. 1767-70).

Mr. Oats filed a notice of appeal on May 25, 1984. In his Initial Brief filed with this Court, Mr. Oats argued that the circuit court's refusal to impanel a jury for

---

[5] The judge stated that he "ha[d] carefully considered and given due weight to the recommended sentence of death returned by the trial jury" (R2. 1767).

[6] This Court's opinion vacating Mr. Oats' death sentence and remanding for a resentencing had issued on February 23, 1984. A death sentence was reimposed by the sentencing judge just sixty-two days later on April 26, 1984, even though this Court's mandate did not issue until April 3, 1984.

the resentencing was reversible error:

> The failure of the lower court to convene a jury for resentencing violates the right afforded the Appellant by virtue of Section 921.141(1), Florida Statutes (1983), the proscription against cruel and unusual punishment and the proscription against the deprivation of life with due process of law.

(IB at 14, Case No. 65,381). Mr. Oats argued that the impaneling of a jury for a capital sentencing proceeding was mandatory under Fla. Stat. § 921.141(1).[7] (IB at 15, Case No. 65,381). Mr. Oats relied upon *State v. Dixon*, 283 So. 2d 1, 7-8 (Fla. 1973):

> the jury—the trial jury if there was one, or a specially called jury if jury trial was waived—must hear the new evidence presented at the post conviction hearing and make a recommendation as to the penalty, that is, life or death.

(IB at 15, Case No. 65,381). In his Initial Brief, Mr. Oats then stated:

> In *Messer v. State*, 330 So.2d 137, 142 (Fla. 1976), this Court characterized the input of the jury in the "scheme of checks and balances" as an "integral part." This Court found that "the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation."

(IB at 16, Case No. 65,381). Mr. Oats then asserted:

> Neither the Florida Legislature nor this Court contemplated the imposition of the extreme penalty of death without twelve

[7] Mr. Oats quoted the statutory language: "the sentencing proceeding **shall** be conducted before a jury impaneled for the purpose . . . ." *Id*. (emphasis in original).

> citizens expressing the view of the conscience of the community. Indeed, the Florida statutory scheme, which receives its vitality from the role of the jury, reflects the Legislature's acknowledgment of the function of a jury.

(IB at 16, Case No. 65,381). Mr. Oats observed: "Indeed, it has long since been the role of the jury in capital cases, to speak to the question of life or death. Florida Acts of 1872, number 15 Chapter 1877." (IB at 17, Case No. 65,381).

Mr. Oats then set forth a section of his argument that he captioned:

> The Function Of The Jury In The Factfinding Process On The Question Of Life Or Death Is Critical And The Failure To Provide A Jury For This Purpose Injects Unreliability Into The Sentencing Process And Renders Any Ensuing Death Penalty Violative Of the Eighth Amendment Proscription Against Cruel And Unusual Punishment And The Fourteenth Amendment Proscription Against Deprivation Of Life Without Due Process Of Law.

(IB at 17, Case No. 65,381). Herein, Mr. Oats identified critical functions that a jury performed in the capital sentencing process. First was the link with contemporary community values. The second function is to "meaningfully channel the limited discretion afforded the sentencing judge." (IB at 17, Case No. 65,381). Mr. Oats then argued: "Another function is to provide a comparative basis by which the findings of the sentencing judge is measured, for the purposes of both reliability and appellate review." *Id.*

Then, after referencing *Gardner v. Florida*, 430 U.S. 349 (1977), Mr. Oats

argued: "Thus, the jury is crucial in determining the reliability of the sentencing process" (IB at 18, Case No. 65,381). Mr. Oats contended that denying him a new jury at his resentencing rendered the proceeding unconstitutional: "Reliability is a factor of paramount importance in determining the appropriateness of the infliction of the penalty of death." *Id*.

Mr. Oats then captioned the next section of his argument: "The Failure To Provide Oats With A Jury On Resentencing Deprives Him Of An Important Ingredient In The Imposition Of The Death Sentence And In The Review Of That Sentence." In this section, Mr. Oats argued that the trial jury's death recommendation was tainted by the same error that tainted the judge's original death sentence and did not provide Mr. Oats with his right to a jury:

> Here, the original sentencing jury recommended a sentence of death. (R 1695) However, this Court determined that the trial court erred in its determination of three of the aggravating circumstances. *Oats v. State*, 446 So.2d 90, 94 (1984); (R 1749) The original record in this cause expressly shows that the prosecutor argued to the jury each one of the aggravating circumstances which were either stricken by this Court or found to be unsupported by the evidence. (R 1117-1119, 1127-1140) The jury was instructed by the lower court that it could consider each one of the aggravating factors which has been stricken or found not to exist by this Court. (R 1264-1265).

(IB at 20, Case No. 65,381). Accordingly, Mr. Oats submitted: "A factfinding process such as this, infected with aggravating circumstances which should not

have been considered, is grossly unreliable." *Id*.

Mr. Oats then argued that the sentencing judge had erroneously considered and relied upon the error-tainted death recommendation:

> Additionally, the trial judge was obviously influenced by the tainted jury recommendation for death following the first trial in determining that this factor had been established. As argued in Point II, *infra*, the jury considered improper evidence concerning this precise issue.

(IB at 23, Case No. 65,381).

Mr. Oats also argued that besides the age mitigator found by the judge, there was a wealth of mitigating evidence presented by Mr. Oats on which a jury could have rested a binding life recommendation:

> The appellant proved that he was under the domination of a person named Adell. Adell instigated the robbery; when the appellant objected to going along, Adell threatened the appellant with being left in the woods and gave him a white pill under false pretense. (R. 846, 847, 854, 921-922)
>
> Moreover, there was substantial evidence adduced by the appellant showing that his life had been marred by physical and emotional abuses and disturbances, including at the time of the incident. (R 921-922, 1149-1206, 1221-1233) Yet, the trial court did not find as a *mitigating* circumstance that the appellant was under extreme mental or emotional disturbance. [*Cf. Kampff v. State*, 371 So.2d 1007 (1979) (extreme and *chronic* problem with *alcoholism* satisfied test of being under extreme or emotional disturbance)].

(IB at 24-25, Case No. 65,381) (Brackets in original).

Finally, Mr. Oats addressed the constitutional infirmities in Florida's capital sentencing statute. Here, Mr. Oats specifically argued that under Florida's statutory scheme, he had been deprived of his right to trial by a unanimous jury:

> The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

(IB at 27, Case No. 65,381).

In its Answer Brief, the State responded to Mr. Oats' claim that he had been deprived of his right to trial by a unanimous jury:

> Appellant contends that the Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or a substantial majority thus resulting in an arbitrary and unreliable application of the death sentence. The record does not disclose what the majority was in the advisory sentence. Indeed the recommendation could have been unanimous. An objection such as this cannot rest on mere conjecture or speculation.

(AB at 25, Case No. 65,381). The State did not acknowledge that the death recommendation returned by the original jury had been tainted by the same error that tainted the judge's decision to impose a death sentence.

On appeal, this Court affirmed the sentence of death. *Oats v. State*, 472 So. 2d 1142 (Fla. 1985). Without addressing Mr. Oats' specific arguments, this Court found that the trial court had not erred in refusing to impanel a jury. This Court

simply quoted language from its earlier opinion: "Because a new jury would be considering essentially the same evidence as was presented to the original jury, we find no reason to resubmit the evidence to a jury." *Id*. at 1145.

When Mr. Oats challenged the refusal to impanel a new jury in collateral proceedings, this Court ruled that Mr. Oats was procedurally barred from raising an issue that he had raised in his direct appeal which this Court had rejected on the merits. *Oats v. Dugger*, 638 So. 2d 20, 22 (Fla. 1994).

On March 15, 2002, Mr. Oats filed a Rule 3.851 motion in which he argued that his death sentence violated his Sixth Amendment right to a jury trial under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On August 13, 2002, Mr. Oats filed a memorandum relying on *Ring v. Arizona*, 536 U.S. 304 (2002), as establishing that he had been deprived of his Sixth Amendment right to a jury trial.

After his Rule 3.851 motion was denied, Mr. Oats appealed and argued in his Initial Brief filed in this Court that:

> Any fact that must be found in order to render a criminal defendant eligible for the imposition of a death sentence constitutes an element of the offense of a capital murder and is subject to all of the Sixth Amendment rights applicable to the State of Florida by virtue of the Fourteenth Amendment. *Ring v. Arizona*, 536 U.S. 584 (2002).

(IB at 99, Case No. SC12-749). On the basis of *Ring*, Mr. Oats argued:

[O]nce a prima facie showing was made of his mental retardation, Mr. Oats'

sentence of death could no longer be considered final or valid until the fact necessary for the imposition of a sentence of death had been made in compliance with the Sixth Amendment.

(IB at 100, Case No. SC12-749).

In reversing and remanding for further proceedings, this Court elected to not address Mr. Oats' *Ring*-based argument. *Oats v. State*, 181 So. 3d at 465.

On October 28, 2016, Mr. Oats filed a successive Rule 3.851 based upon *Hurst v. Florida* and *Hurst v. State*.

Circuit court proceedings on Mr. Oats' intellectual disability claim and his *Hurst*-related claims are ongoing. An evidentiary hearing on Mr. Oats' intellectual disability has not yet been set.[8]

---

[8] Mr. Oats is filing this petition before an evidentiary hearing is conducted on the issue because judicial economy warrants a determination of the issues presented herein before an evidentiary hearing occurs. *See In re Amendments to the Fla. Rules of Crim. Pro. And Fla. Rules of App. Pro.*, 875 So. 2d 563, 567-68 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, "death is different." *See, e.g., Walker v. State*, 707 So.2d 300, 319 (Fla. 1997); *Crump v. State*, 654 So. 2d 545, 547 (Fla. 1995). The dynamics of a capital case and those of a noncapital case are different not just in degree, but in kind. A death penalty case, involving the ultimate penalty, invokes a host of pre- and post-trial procedures, as well as requirements for court and counsel, that do not exist in any other context. To ensure that those procedures, which can be time-consuming and expensive, are invoked only when death is a possible sentence, the defendant, the State, and the judicial system all should desire a prompt determination of mental retardation. The invocation of capital case procedures in a case in which, ultimately, the defendant cannot be sentenced to death wastes time and judicial resources. Especially **during these tight budget times for the judiciary and the entire state, we should implement procedures that consider not only the defendant's constitutional rights but also, when consistent with those rights, the most efficient use of**

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). *See* Art. 1, Sec. 13, Fla. Const. The petition presents issues which concern the continued viability and constitutionality of Mr. Oats' death sentence. This Court has jurisdiction to entertain a petition for a writ of habeas corpus, an original proceeding governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Art. V, § 3(b)(9), Fla. Const. The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Mr. Oats' right under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that his rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994) (holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); *Shue v. State*, 397 So. 2d 910 (Fla. 1981) (holding that this Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); *Makemson v. Martin County*, 491 So. 2d 1109 (1986) ("[t]he courts have authority to do things that are

---

judicial and legal resources.") (emphasis added).

essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"). This Court has explained: "It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court." *Rose v. Palm Beach City*, 361 So. 2d 135, 137 n.7 (1978). This Court must protect Mr. Oats' Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Where constitutional rights—whether state or federal—of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. This Court is required to exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). This Court has not hesitated to exercise its inherent jurisdiction to review issues arising in the course of capital post-conviction proceedings. *State v. Lewis*, 656 So. 2d 1248 (Fla. 1995). The reasons set forth herein show that the Court's exercise of its jurisdiction, and of its authority to grant habeas relief, are warranted in this action.

GROUNDS 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 INTELLECTUAL 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*.

A. Intellectual disability[9] renders a defendant ineligible for a death sentence.

On June 12, 2001, legislation was enacted in Florida to preclude the imposition of a death sentence on intellectually disabled defendants. Section 921.137(2), Fla. Stat., sets forth this bar:

> A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.

If a court finds the defendant is intellectually disabled, it "may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination." § 921.137(4). As a result, an intellectually disabled defendant is not eligible for a death sentence under Florida

[9] Intellectual disability was previously referred to as mental retardation. To avoid confusion, herein Mr. Oats simply uses intellectual disability whenever referencing the condition.

statutory law that has been in effect since 2001.[10] *See Ring v. Arizona*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").

After Florida statutorily barred the imposition of a death sentence on intellectually disabled defendants, the U.S. Supreme Court ruled that the Eighth Amendment barred the execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002).

In 2004, this Court promulgated Fla. R. Crim. P. 3.203, which was titled: Defendant's Mental Retardation as a Bar to Imposition of the Death Penalty. *See In re Amendments to the Fla. Rules of Crim. Pro. And Fla. Rules of App. Pro.*, 875 So. 2d 563 (Fla. 2004). Rule 3.203 employed the definition of intellectual disability (mental retardation) that the legislature had adopted in § 921.137. Rule 3.203 also provided a mechanism for intellectually disabled defendants who had received a death sentence before the enactment of § 921.137 to challenge their death sentences on the basis of their intellectually disability.

In *Hall v. State*, 201 So. 3d 628, 629 (Fla. 2016), this Court held that "Hall

[10] Under § 921.137(4), a defendant's intellectual disability is a question of fact that the sentencing judge must resolve before he or she is authorized to impose a death sentence. Unless the defendant is found to be not intellectually disabled as a matter of fact, the judge is not authorized to impose a death sentence.

has demonstrated that he meets the clinical, statutory, and constitutional requirements to establish that his intellectual disability serves as a bar to execution." In *Cardona v. State,* 185 So. 3d 514, 525 (Fla. 2016), this Court observed that: "Prior to this retrial, Cardona alleged that she suffered from an intellectual disability, **which would make her ineligible for the death penalty**." (Emphasis added). In *Thompson v. State,* _ So. 3d _, 2016 WL 6649950 *1 (Fla. Nov. 10, 2016), this Court held that "[b]ecause 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).

Clearly, a death sentence is not authorized in the case of a defendant who asserts his or her intellectual disability unless a finding is made that the defendant is not intellectual disabled. Mr. Oats timely asserted his intellectual disability rendered him eligible to be sentenced to death as this Court noted. *Oats v. State*, 181 So. 3d at 463 ("Oats filed a timely motion seeking to vacate his death sentence on the ground that he is intellectually disabled."). 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.").

B. *Hurst v. Florida* and *Hurst v. State*.

In *Hurst v. Florida*, the United States Supreme Court held the Sixth Amendment right to a jury trial applied to all facts that are statutorily necessary before a Florida judge is authorized to impose a death sentence must be found by a jury. *Hurst v. Florida*, 136 S. Ct. at 621 ("Any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury.").

This Court in *Hurst v. State* addressed *Hurst v. Florida* and concluded:

> 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). Based upon this reading of *Hurst v. Florida*, this Court in *Hurst v. State* then ruled:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty— are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that

> the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

Hurst v. State, 202 So. 3d at 53-54. The right to a unanimous jury was also applied to the jury's consideration of whether to extend mercy. *See id*. at 56 ("Historically, it was the finding by the jury of all the elements necessary for conviction of murder that subjected the defendant to the ultimate penalty, unless mercy was expressed in the verdict of the jury as allowed by law."). *See Perry v. State*, _ So. 3d _, 2016 WL 6036982 *8 (Fla. Oct. 14, 2016) ("This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the 'mercy' recommendation.").

Subsequently in *Mosley v. State*, this Court stated:

> [T]his Court interpreted the United States Supreme Court's holding in *Hurst v. Florida* and held "that the Supreme Court's decision in ***Hurst v. Florida*** **requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury**. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." *Hurst*, 202 So.3d at 44. Reviewing Florida's capital sentencing scheme, the Court concluded that "these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a

> reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." *Id*. Further, we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, **the jury's recommendation for a sentence of death must be unanimous**. *Id*.

Mosley v. State, _ So. 3d _, 2016 WL 7406506 *18 (Fla. Dec. 22, 2016) (emphasis added).

Under Florida law, a trial court may not consider imposing a death sentence unless it finds that a defendant claiming intellectual disability is not in fact intellectual disabled. Accordingly, *Hurst v. State* must apply when the defendant's intellectual disability is at issue. Mr. Oats is entitled to a unanimous jury trial on his intellectual disability.

Further, it is clear that a death sentence imposed before a finding has been made that the defendant is not intellectually disabled cannot stand. Such a death sentence is not statutorily authorized. It is simply invalid. Mr. Oats' death sentence must be vacated and is not authorized until a jury has unanimously determined that Mr. Oats is not intellectually disabled.

C. Conclusion.

This Court must vacate Mr. Oats' death sentence and order a jury trial on the issue of his intellectual disability.

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 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.

A. Introduction.

In Mr. Oats' first direct appeal, this Court found that improper aggravating circumstances had been considered and weighed during the 1981 penalty phase proceeding. As a result, this Court vacated Mr. Oats' death sentence and ordered a resentencing.[11]

This Court identified error in the factual basis for the "conviction of another capital felony or a felony involving the use or threat of violence." *Oats v. State*, 446 So. 2d at 94. This Court explained:

> In support of the factor of conviction of another capital felony or a felony involving the use or threat of violence, the state introduced evidence of three prior convictions: a burglary in 1976 and the ABC robbery and attempted murder. Burglary is neither a capital felony nor is it per se a felony involving the use

[11] This Court noted that the trial judge in his written findings had found and weighed six aggravating circumstances. However, this Court ruled "that the trial court erred in its determination of three of the aggravating circumstances." *Oats v. State*, 446 So. 2d at 94.

> or threat of violence. As for the ABC crimes, appellant objected at trial to the introduction of the conviction because Oats had not been sentenced yet and hence his time for appeal had not expired. The reversal of that conviction brings to the Court a question that was reserved in *Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S. Ct. 2036, 68 L.Ed.2d 342 (1981), where we said, "We do not have the problem which would arise from the consideration as an aggravating circumstance of a conviction valid at the time of sentencing, that is subsequently reversed and vacated by an appellate court." 395 So.2d at 499. We now hold that in such a situation the vacated conviction cannot be used as an aggravating factor. Therefore, the trial court was in error in finding this aggravating circumstance present.

Id. at 94-95. After finding that the 1976 burglary had been improperly introduced into evidence, this Court ignored that fact when it then wrote:

> We note, however, that appellant has again been convicted of the ABC crimes and that that conviction has been affirmed. Although the use of this aggravating factor was in error at the time it was found, and we therefore disallow it, were we to remand for a new penalty phase trial the jury could properly consider evidence of the later, valid conviction. Because a new jury would be considering essentially the same evidence as was presented to the original jury, we find no reason to resubmit the evidence to a jury.

Id. at 95. As to the ABC crimes, this Court also ignored the fact that the original conviction was for robbery and attempted first degree murder, while the conviction returned at the retrial was for robbery and attempted second degree murder. While the conviction returned at the retrial provided a basis for finding the aggravator, the erroneous admission of the 1976 burglary and the erroneous admission of evidence

of an attempted first degree murder conviction—when on retrial the conviction was for an attempted second degree murder—inflated the weight of the aggravating circumstance when considered by the 1981 jury.[12]

Next, this Court found error when two aggravating circumstances were not merged into one aggravating circumstance as Florida law required:

> Concerning the next aggravating factor, that of commission of the crime during a robbery, this must be looked at in tandem with the factor of the crime being committed for pecuniary gain. The state proved both of these factors but the trial court erred by doubling up on them. **These two circumstances must be considered cumulative and may not be considered**

---

[12] In *Duest v. Singletary*, 967 F.2d 472 (11th Cir. 1992), the Eleventh Circuit found Eighth Amendment error when improper evidence was introduced to support the "previously convicted of a crime of violence" aggravator even though the properly admitted evidence still established the aggravator's existence. The Eleventh Circuit concluded:

> [the jury] considered evidence that incorrectly indicated that (1) Duest had been convicted of a crime involving violence, and that (2) the underlying conduct for which he was convicted reflected a murderous intent. The fact that Duest may have committed some of the underlying conduct alleged in the indictment—that is, the armed assault—in no way renders harmless the effects such inaccuracies may have had on the jury. The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death.

967 F.2d at 482. *See Duest v. Singletary*, 997 F.2d 1336 (11th Cir. 1993) (adhering to the earlier decision following remand by the US Supreme Court); *Singletary v. Duest*, 507 U.S. 1048, 1049 (1993) (vacating the 967 F.2d 472 decision for further consideration in light of *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

> **individually when the only evidence that the crime was committed for pecuniary gain was the same evidence of the robbery underlying the capital crime**. *Perry v. State*, 395 So.2d 170 (Fla.1980); *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S. Ct. 2929, 53 L.Ed.2d 1065 (1977). Thus, only one aggravating factor may be counted.

Oats v. State, 446 So. 2d at 95 (emphasis added). While this Court did find that the judge's consideration of an extra aggravating circumstances in the weighing process tainted his result, the jury's consideration of an invalid aggravating circumstance was not addressed. *See Stringer v. Black*, 503 U.S. 222, 232 (1992) ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.").

The third aggravating circumstance that this Court found had been erroneously included in the weighing process was the "heinous, atrocious or cruel" aggravator:

> The trial judge found that the murder was especially heinous, atrocious, or cruel. However, as we noted in *Kampff v. State*, 371 So.2d 1007 (Fla.1979), a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance. Here, the state has failed to introduce any other evidence to prove this circumstance.

Oats v. State, 446 So. 2d at 95. Again, while this Court found the judge's consideration of another extra aggravating circumstance in the weighing process

had tainted his conclusion that the aggravators outweighed the mitigators, the jury's consideration of this aggravator was not addressed. *See Stringer v. Black*, 503 U.S. at 232 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.").

At Mr. Oats' 1984 resentencing, Mr. Oats asserted that the original trial jury, over defense objection, heard evidence, instruction, and argument based upon erroneous and inapplicable aggravating factors (R2. 1756-81). Mr. Oats argued that he was entitled to a jury at the resentencing. His motion was denied, his objections overruled, and a new jury was not impaneled. In re-imposing a death sentence, the judge stated that he "ha[d] carefully considered and given due weight to the recommended sentence of death returned by the trial jury" (R2. 1767). He then re-imposed a death sentence of death and adopted the written findings in support of a death sentence which had been prepared by the State prior to the hearing, finding four aggravators and only one mitigator (R2. 1767-70).

On appeal, Mr. Oats argued that he had been deprived of his right to a jury at his capital resentencing proceeding. He also argued that Florida law was unconstitutional in depriving him of his right to a unanimous jury during the penalty phase of his capital trial.

This Court affirmed. As to Mr. Oats' argument that he was deprived of his right to a jury, this Court simply stated: "the trial court correctly interpreted and applied our instructions." *Oats v. State*, 472 So. 2d at 1145.

B. The basis for the 1981 death recommendation.

At the 1981 trial, the jury was repeatedly informed that its role during the penalty phase was only an advisory one and that their recommendation would not be binding, and/or that the Court made the ultimate decision (R1. 120-21, 123, 195, 315, 386, 392-93, 409, 421, 587-88, 594). In his penalty phase closing, the prosecutor went so far as to state to the jurors: "Remember this: this is only an advisory sentence. The ultimate responsibility for the sentence rests with the Court. The Court. That's what he's paid for" (R. 1245). *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985) ("**In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences** when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.") (emphasis added).

In his penalty phase closing, the prosecutor addressed the six aggravating circumstances on which the jury would be instructed. He argued that each of the six had to be found by the jury, and when weighed against Mr. Oats, the six aggravating circumstances required the jury to return a death recommendation (R1.

1237) ("There is absolutely, positively no question that those [six] aggravating circumstances weigh against the defendant."). In going through the six aggravating circumstances, the prosecutor specifically relied upon aggravators that this Court later ruled should not have been part of the weighing process. As to the pecuniary gain aggravator, the prosecutor argued it did not merge with the in-the-course-of-a-robbery aggravator and should separately weighed by the jury: "I disagree with one thing [defense counsel] said this morning: 'That's double counting.' It's not. So those are two distinct aggravating circumstances" (R. 1238).[13] As to the heinous, atrocious, or cruel aggravator, the prosecutor argued:

> It's for you to determine, when he shot this woman in the face at close range, was that extremely wicked or shockingly evil. You'll probably hear some arguments -- I know [defense counsel] alluded to it earlier -- that a single shot does not constitute heinous. Well you know, that's for you to decide. It's your decision as to whether or not this shooting in the face was cruel, heinous.

(R1. 1238-39).[14]

Before sending the jury out to deliberate, the judge instructed the jury:

---

[13] This argument was directly contrary to controlling law. The prosecutor told the jury to do exactly what this Court said was forbidden: weigh an extra and invalid aggravating circumstance.

[14] The prosecutor urged the jury to find and weigh an aggravating circumstance that this Court ruled had been erroneously found and weighed by the sentencing judge. The prosecutor's argument ignored case law construing the aggravator, case law that the jury was unaware of.

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first-degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence **based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty** and **whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist**.

(R1. 1263-64) (emphasis added). The advisory recommendation was to be based on weighing the aggravating circumstances against the mitigating circumstances.

The judge instructed the jury on the six aggravating circumstances it was to consider: (1) that Oats was previously convicted of a violent felony; (2) that the homicide occurred during the commission of a robbery; (3) the homicide was committed to avoid arrest; (4) the homicide was committed for pecuniary gain; (5) the homicide was especially heinous, atrocious, or cruel (HAC); and (6) the homicide was committed in cold, calculated and premeditated manner (CCP) (R1. 1264-65). The jury was instructed on the seven statutory mitigating circumstances and the catch-all non-statutory mitigating circumstance (R1. 1264-66).[15]

[15] As Mr. Oats explained to this Court on appeal, besides the age mitigator found by the judge, there was a wealth of mitigating evidence presented by Mr. Oats based upon which a jury could find additional mitigating circumstances:

The judge again instructed the jury that "[i]n these proceedings it is not necessary that the verdict of the Jury be unanimous, but a verdict may be rendered upon the finding of a majority of the Jury" (R1. 1267). The judge's instructions concluded by reiterating the advisory nature of the jury's recommendation: "the advisory opinion of the Jury is the Jury advising – with respect to first-degree murder, it's advisory to the Court. The Court has the option of either imposing the death sentence or of life imprisonment" (R1. 1273).

The 1981 jury's death recommendation was tainted by at least as much Eighth Amendment error as the judge's findings in support of the death sentence. The jury's recommendation is invalid. *See Stringer v. Black*, 503 U.S. at 232

> The appellant proved that he was under the domination of a person named Adell. Adell instigated the robbery; when the appellant objected to going along, Adell threatened the appellant with being left in the woods and gave him a white pill under false pretense. (R 846847, 854, 921-922)
>
> Moreover, there was substantial evidence adduced by the appellant showing that his life had been marred by physical and emotional abuses and disturbances, including at the time of the incident (R 921-922, 1149-1206, 1221-1233). Yet, the trial court did not find as a *mitigating* circumstance that the appellant was under extreme mental or emotional disturbance. [*Cf. Kampff v. State*, 371 So.2d 1007 (1979) (extreme and *chronic* problem with *alcoholism* satisfied test of being under extreme or emotional disturbance)].

(IB at 24-25, Case No. 65,381) (Brackets in original). The mitigating evidence before the jury could have led the jury to return a binding life recommendation.

("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.").

C. This Court's rejection of Mr. Oats' argument that he was erroneously deprived of his right to a jury was error under *Hurst v. Florida* and *Hurst v. State*.

On appeal from his 1984 resentencing, Mr. Oats argued that the failure to impanel a jury at the resentencing deprived him of his right to a jury. Mr. Oats' arguments in this regard have been accepted as meritorious by this Court in *Hurst v. State*.

Mr. Oats argued that the impaneling of a jury for a capital sentencing proceeding was mandatory under § 921.141(1) (IB at 15, Case No. 65,381). Mr. Oats quoted *State v. Dixon*, 283 So. 2d 1, 7-8 (Fla. 1973):

> [T]he jury—the trial jury if there was one, or a specially called jury if jury trial was waived—must hear the new evidence presented at the post conviction hearing and make a recommendation as to the penalty, that is, life or death.

(IB at 15, Case No. 65,381). *See Hurst v. State*, 202 So. 3d 56 ("In an effort to meet these requirements for individualized sentencing that narrows the class of murders and murderers for which the death penalty is appropriate, Florida has required the jury to consider evidence of aggravating factors concerning the circumstances of the crime, as well as evidence of mitigating circumstances that a jury may find

renders the death penalty inappropriate for an individual defendant in a specific case.").

In his Initial Brief, Mr. Oats wrote:

> In *Messer v. State*, 330 So.2d 137, 142 (Fla. 1976), this Court characterized the input of the jury in the "scheme of checks and balances" as an "integral part." This Court found that "the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation."

(IB at 16, Case No. 65,381). Mr. Oats then asserted:

> Neither the Florida Legislature nor this Court contemplated the imposition of the extreme penalty of death without twelve citizens expressing the view of the conscience of the community. Indeed, the Florida statutory scheme, which receives its vitality from the role of the jury, reflects the Legislature's acknowledgment of the function of a jury.

(IB at 16, Case No. 65,381). Mr. Oats observed: "Indeed, it has long since been the role of the jury in capital cases, to speak to the question of life or death. Florida Acts of 1872, number 15 Chapter 1877." (IB at 17, Case No. 65,381). *See Hurst v. State*, 202 So. 3d at 55-56 ("Historically, it was the finding by the jury of all the elements necessary for conviction of murder that subjected the defendant to the ultimate penalty, unless mercy was expressed in the verdict of the jury as allowed by law.").

Mr. Oats captioned a section of his argument as follows:

> The Function Of The Jury In The Factfinding Process On The

> Question Of Life Or Death Is Critical And The Failure To Provide A Jury For This Purpose Injects Unreliability Into The Sentencing Process And Renders Any Ensuing Death Penalty Violative Of the Eighth Amendment Proscription Against Cruel And Unusual Punishment And The Fourteenth Amendment Proscription Against Deprivation Of Life Without Due Process Of Law.

(IB at 17, Case No. 65,381). Herein, Mr. Oats identified critical functions that a jury performed in the capital sentencing process. First was the link with contemporary community values:

> This function was best expressed in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) wherein the Supreme Court of the United States emphasized that juries "do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."

(IB at 16, Case No. 65,381). *See Hurst v. State*, 202 So. 3d at 61 ("'[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.' *Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)").

Mr. Oats wrote that the second "function is to meaningfully channel the limited discretion afforded the sentencing judge." (IB at 17, Case No. 65,381). *See Hurst v. State*, 202 So. 3d at 60 ("As we hold in this case, the unanimous finding of the aggravating factors and the fact they are sufficient to impose death, as well as

the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.").

Mr. Oats then argued: "Another function is to provide a comparative basis by which the findings of the sentencing judge is measured, for the purposes of both reliability and appellate review." (IB at 17, Case No. 65,381). Mr. Oats emphasized: "Reliability is a factor of paramount importance in determining the appropriateness of the infliction of the penalty of death." (IB at 18, Case No. 65,381). *See Hurst v. State*, 202 So. 3d at 60 ("If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.").

Mr. Oats specifically argued that under Florida's statutory scheme, he had been deprived of his right to trial by a unanimous jury:

> The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right

to a jury and to due process of law.

(IB at 27, Case No. 65,381). *See Hurst v. State*, 202 So. 3d at 57 ("Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.").

Most importantly, Mr. Oats asserted that "the function of the jury in the factfinding process on the question of life or death is critical" and he specifically argued: "A death sentence imposed without a jury is fatally defective because a jury serves several critical functions in the capital sentencing process." (IB at 17, Case No. 65,381). *See Hurst v. State*, 202 So. 3d at 59 ("we conclude that under the commandments of *Hurst v. Florida*, Florida's state constitutional right to trial by jury, and our Florida jurisprudence, the penalty phase jury must be unanimous **in making the critical findings and recommendation that are necessary before a sentence of death may be considered** by the judge or imposed.") (Emphasis added).

This Court's rejection of Mr. Oats' arguments that he was deprived of his right to a jury at his resentencing and its affirmance of his death sentence is irreconcilable with *Hurst v. Florida* and *Hurst v. State*.

D. Mr. Oats is entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State*.

When Mr. Oats challenged the refusal to impanel a new jury in prior collateral proceedings, this Court ruled that by virtue of the law of the case doctrine, Mr. Oats was procedurally barred from raising an issue that he had raised in his direct appeal and which this Court had rejected on the merits. *Oats v. Dugger*, 638 So. 2d 20, 22 (Fla. 1994).

The law of the case doctrine was addressed by this Court in *State v. Owen*, 696 So. 2d 715 (Fla. 1997). There, this Court had previously ruled that statements obtained from Duane Owen were inadmissible, as they had been obtained in violation of Owens' rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Owen v. State*, 560 So. 2d 207 (Fla. 1990), *cert denied, Florida v. Owen*, 498 U.S. 855.[16] Prior to Owens' retrial, the United States Supreme Court rendered a decision in *Davis v. United States*, 512 U.S. 452 (1994).[17] On the basis of *Davis*, the State

[16] The United States Supreme Court denied Florida's petition for a writ of certiorari on October 1, 1990, meaning that the ruling in *Owen v. State* was final as of that date.

[17] The decision in *Davis* issued on June 24, 1994, over four years after *Owen*

argued that Owens' statements should be held to be admissible at Owens' retrial. "[T]he trial court held the confession inadmissible. The State next filed a petition for a writ of certiorari in the district court of appeal." *State v. Owen*, 696 So. 2d at 717. "Because the suppression of Owens' confession was the law of the case, the [district] court denied the petition but certified [a] question" to this Court. *Id*. Thereupon, this Court explained:

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue*, 452 So.2d 550, 552 (Fla.1984). However, **the doctrine is not an absolute mandate, but rather a self-imposed restraint** that courts abide by **to promote finality and efficiency** in the judicial process and prevent relitigation of the same issue in a case. *See Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). **This Court has the power to reconsider and correct erroneous rulings** in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.

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

In *Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965), this Court held that an appellate court was not "wholly without authority to reconsider and reverse a previous ruling that is 'the law of the case.'" This Court then explained:

---

v. State had issued, and three years and eight months after *Owen v. State* was final.

> We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only **as a matter of grace**, and not as a matter of right; and that an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made **except in unusual circumstances** and **for the most cogent reasons-and** always, of course, only **where 'manifest injustice' will result from a strict and rigid adherence to the rule.**

Id. (emphasis added). This Court then noted one example of an exception to the law of the case doctrine arose when warranted by "considerations of public policy in order to give effect to the law of a sister state and judicial orders regularly entered pursuant to such law." *Id*. This Court then noted:

> Another clear example of a case in which **an exception** to the general rule **should be made** results from **an intervening decision** by a higher court contrary to the decision reached on the former appeal, the correction of the error making unnecessary an appeal to the higher court.

Id. (emphasis added). To make clear that it was not limiting the exceptions to the law of the case doctrine, this Court observed: "Other examples which have appealed to courts of other jurisdictions as proper exceptions to the general rule are set out in the annotation in 87 A.L.R.2d, at pp. 299 et seq." Thus, *Strazzula* stands for the proposition that "the [Florida Supreme Court] has the power to reconsider and correct an erroneous ruling that has become 'the law of the case.'" *Strazzula*, 177 So. 2d at 5.

In *State v. Owen*, this Court relied upon its decision in *Strazzula* when it invoked an exception to the law of the case doctrine to revisit and overturn its decision in *Owen v. State*:

> An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner*, 452 So.2d at 552; *Strazzulla*, 177 So.2d at 4. Thus, the Supreme Court's decision in *Davis* qualifies as an exceptional situation.

State v. Owen, 696 So. 2d at 715. *See Thompson v. State*, 2016 WL 6649950 *1 (Fla. Nov. 10, 2016) ("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)").

Hurst v. Florida is an intervening decision by a higher court that warrants setting aside the law of the case that is contrary to this Court's decision in *Oats v. State*, 472 So. 2d at 1145. Under *Hurst v. Florida* and *Hurst v. State*, the decision in *Oats v. State* must be set aside.

E. Under *Hurst v. Florida* and *Hurst v. State*, Mr. Oats' death sentence must be vacated and a resentencing ordered.

Mr. Oats was deprived of his right to a jury. A jury was not impaneled. There is substantial mitigation in the record. The State cannot prove the *Hurst* error harmless beyond a reasonable doubt. Mr. Oats' death sentence must be vacated and a resentencing ordered.

The U.S. Supreme Court in *Hall v. Florida*, 134 S. Ct. at 2001, recently explained:

> The death penalty is the gravest sentence our society may impose. **Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.** Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

(Emphasis added). Surely this applies to Mr. Oats' circumstances, where he was deprived of the opportunity to have a jury know what aggravating circumstances were proper to consider, to hear his mitigation, and then weigh the aggravation and the mitigation and return a recommendation. Mr. Oats must be given a fair opportunity to present his case for a life sentence to a jury.

CONCLUSION

For all the reasons discussed herein, Mr. Oats respectfully urges this Court to find that he has a right to a unanimous jury determine his intellectual disability, and that he was erroneously 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 petition has been furnished by electronic mail to all counsel of record on this 17th day of January 2017.

CERTIFICATE OF FONT

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

Respectfully submitted,

/s/ Martin J. McClain
MARTIN J. McCLAIN
Special Assistant CCRC
Florida Bar No. 0754773
martymcclain@earthlink.net

NICOLE M. NOËL
Assistant CCRC-South
Florida Bar No. 41744
noeln@ccsr.state.fl.us
CCRC-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, FL 33301
(954) 713-1284
(954) 713-1299 (fax)