

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-68

SONNY BOY OATS, JR.,

Petitioner,

v.

**JULIE L. JONES, SECRETARY,
DEPARTMENT OF CORRECTIONS,**

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, by and through counsel, and responds as follows to Oats' petition for a writ of habeas corpus which was filed on January 17, 2017 (Petition). For the reasons set out below, Respondent asserts that this Honorable Court should deny the petition.

RESPONSE TO INTRODUCTION

Petitioner's Introduction is argumentative and is denied.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State asserts that the issues raised in Petitioner's untimely second successive petition are meritless; therefore, the State respectfully requests that this Court deny his request for oral argument on this petition.

RESPONSE TO PROCEDURAL HISTORY

The procedural history of the case and facts contained in the petition is significantly augmented. In his most recent appearance before this Court, this Court summarized the facts of this case in the following way:

Sonny Boy Oats, Jr., was tried and convicted of the December 1979 robbery of a convenience store and the first-degree murder of the store clerk. This Court affirmed Oats's conviction on direct appeal but held that the trial court erroneously found three aggravating factors and remanded to the trial court for entry of a new sentencing order. *Oats v. State*, 446 So. 2d 90, 95–96 (Fla. 1984). On remand, the trial court reweighed the valid aggravators and reimposed the death penalty, a sentence that this Court then affirmed. *Oats v. State*, 472 So. 2d 1143 (Fla. 1985). This Court later affirmed the denial of Oats's initial

motion for postconviction relief and denied his petition for a writ of habeas corpus. *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994).

During the 1990 postconviction proceedings, Oats asserted that his trial counsel rendered ineffective assistance by failing to present statutory and nonstatutory mitigation evidence at the penalty phase based on an inadequate investigation of the available mitigation, including evidence pertaining to Oats's intellectual disability. In addition, Oats alleged that he was resentenced when he was incompetent. Numerous experts presented testimony regarding Oats's intellectual disability.

...

The circuit court denied Oats's motion on the basis that Oats failed to present sufficient evidence that his intellectual disability manifested before the age of 18. Oats appealed.

While the appeal was pending, the United States Supreme Court vacated this Court's decision in *Hall v. State*, 109 So. 3d 704, 711 (Fla. 2012), holding that this Court erred in applying the definition of an "intellectual disability" too strictly and that Florida's definition was unconstitutional because it "create[d] an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S.Ct. at 1990. This Court ordered the parties to submit supplemental briefing to address whether the decision in *Hall* impacted this case in any manner.

After consideration of the record, the briefs, and the supplemental briefs, we now conclude that the circuit court erred when it determined that Oats did not establish that his intellectual disability manifested prior to the age of 18. Accordingly, 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.

Oats v. State, 181 So. 3d 457, 460–61, 465 (Fla. 2015), *reh'g denied* (Mar. 15, 2016).

Petitioner's case became final over thirty years ago, on October 7, 1985, when his petition for a writ of certiorari to the United States Supreme Court – after a second penalty phase – was denied. *Oats v. Florida*, 474 U.S. 865, 106 S. Ct. 188, 88 L. Ed. 2d 157 (1985)

Subsequently, Oats filed a motion for postconviction relief. This Court summarized those proceedings as follows:

In October 1987 Oats filed a postconviction motion raising the following issues: 1) denial of independent and competent assistance of mental health experts; 2) violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); 3) trial court erred in not suppressing Oats' statement and counsel was ineffective regarding the suppression issue; 4) counsel was ineffective for not developing Oats' lack of mental capacity and for failing to request an instruction on voluntary intoxication; 5) counsel was ineffective for not developing and presenting more mitigating evidence; and 6) error regarding the aggravators. After the governor signed Oats' death warrant in April 1989, the state filed a response to Oats' rule 3.850 motion. The trial court granted an indefinite stay, denied the second and sixth issues as procedurally barred, and scheduled an evidentiary hearing on the remaining issues. At that hearing Oats presented testimony from seven mental health experts and from several family members. The state presented testimony from a psychiatrist, two psychologists, a prison medical technician, and several correctional officers. After the hearing, the court denied all requested relief.

Oats v. Dugger, 638 So. 2d 20, 21 (Fla. 1994).

Defendant appealed and petitioned for writ of habeas corpus. This Court held that: (1) evidence presented in postconviction hearing supported the finding that Oats had been competent to stand trial, and (2) Oats was procedurally barred from seeking habeas relief on the basis of issues he had raised on direct appeal or

on issues which could have been raised on direct appeal. This Court denied Petitioner's habeas petition and affirmed the denial of postconviction relief by the trial court. *Id.* Petitioner petitioned for a writ of certiorari to the United States Supreme Court which was denied on Jan. 9, 1995. *Oats v. Singletary*, 513 U.S. 1087, 115 S. Ct. 744, 130 L. Ed. 2d 645 (1995).

After his murder conviction and death sentence were affirmed on direct appeal and he was denied state postconviction and habeas relief, Petitioner sought a federal writ of habeas corpus. The United States District Court for the Middle District of Florida denied his petition and Petitioner appealed. The Court of Appeals for the Eleventh Circuit held that: (1) Petitioner failed to show that he was prejudiced by trial counsel's failure to provide psychiatrists with information on his background and mental health history; (2) Petitioner failed to show prejudice arising from counsel's failure to seek suppression of evidence based on Petitioner's lack of capacity to waive his *Miranda*¹ rights; (3) no reasonable probability existed that jury would have returned life sentence if defense counsel had presented additional expert and family testimony in penalty phase; (4) Petitioner's procedural due process rights were not violated when trial court failed, at resentencing, to conduct a *sua sponte* competency hearing; and (5) Petitioner was not entitled to impaneling of a new advisory jury after his death sentence was vacated and the

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

case was remanded for resentencing. *Oats v. Singletary*, 141 F.3d 1018 (11th Cir. 1998). Petitioner moved for rehearing which was denied *en banc* on November 17, 1998. *Oats v. Singletary*, 163 F.3d 1362 (11th Cir. 1998). Petitioner next petitioned for writ of certiorari to the United States Supreme Court was denied on June 14, 1999. *Oats v. Moore*, 527 U.S. 1008, 119 S. Ct. 2347, 144 L. Ed. 2d 243 (1999).

On or about March 14, 2002, Oats filed a Successive Motion to Vacate Judgment of Conviction and Sentence in the circuit court pursuant to *Florida Rule of Criminal Procedure 3.850*² claiming he was mentally retarded and therefore barred from execution based on *Atkins v. Virginia*, 536 U.S. 305 (2002). Oats was evaluated, discovery was conducted, and an evidentiary hearing was held on September 28-29, 2010, and June 17, 2011. After all of the evidence was presented, and after Oats had the opportunity to “re-open” his presentation, the Circuit Court ultimately issued an order denying all relief on March 14, 2012. On or about April 4, 2012, Oats appealed the denial of his successive amended motion to this Court. After briefing from the parties, on December 17, 2015, the case was remanded to the circuit court in order for Oats to present additional evidence for a full re-evaluation of whether or not Oats is intellectually disabled, based upon the United States Supreme Court’s opinion in *Hall v. Florida*, 134 S.Ct. 1986 (2014).

² The motion was amended or supplemented on or about November 29, 2004, February 5, 2007, and September 10, 2010.

On October 28, 2016, Oats filed a successive postconviction motion in the circuit court. The parties submitted memorandums in support of their respective positions. Although a hearing is currently scheduled for March 15, 2017, Oats filed a motion to continue the hearing and a motion to stay circuit court proceedings based on the outcome of this case.

Oats filed a Second Successive Petition for Writ of Habeas Corpus in this Court on January 17, 2017. On January 18, 2017, this Court ordered the State to respond by February 2, 2017, with a reply brief due on or before February 13, 2017. On February 1, 2017, the State sought a 30-day extension which this Court granted on February 3, 2017. This Court issued its order for the Respondent to file its response on or before March 6, 2017 with all other times extended accordingly. This Response follows.

Petitioner now argues again – in this second successive habeas petition – that he is entitled to relief because another jury was not empaneled for his resentencing under the guise that *Hurst* grants him the “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.” *Hurst* granted no such rights to Petitioner and his claims should be denied.

RESPONSE TO JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

In this original action, the Petitioner raises claims challenging the constitutionality of his convictions and sentences and the judgement of this Court. Under Article V, Section 3(b)(9) of the Florida Constitution, this Court has jurisdiction. *See* Fla. R. App. P. 9.100(a).

RESPONSE TO ARGUMENT FOR HABEAS CORPUS RELIEF

HURST DOES NOT RETROACTIVELY APPLY.

Primarily, this habeas petition must be denied because it is procedurally barred. As this Court stated in 1994 on the denial of Petitioner’s original habeas claims³ raised in 1989, “[h]abeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were

³ Oats’ original claims were: **1) trial court erred in refusing to empanel a new jury**; 2) the sentencing order does not provide a factual basis for the death penalty; 3) improper instruction on the heinous, atrocious aggravator under *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); **4) instructions improperly set out aggravators that could be considered**; 5) the cold, calculated, and premeditated aggravating circumstance is vague; **6) the jury was misinformed as to the vote needed to recommend a penalty**; **7) *Caldwell* violation**; and **8) executing the mentally retarded is cruel and unusual punishment** *Oats v. Dugger*, 638 So. 2d at 21–22 (“Oats admits that he raised issues 1, 3, and 5 on direct appeal. These issues are, therefore, procedurally barred. The same is true of the remaining issues because they could have been, but were not, raised on direct appeal.”) (footnote omitted, bold emphasis added).

raised on direct appeal.” *Oats v. Dugger*, 638 So. 2d at 22 (citing *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992)).

Petitioner seeks to resurrect his previously litigated claims relief under the color of the United States Supreme Court’s opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the decision of this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

In addition to the procedural bar to re-litigating these claims for a third time, Petitioner’s successive habeas petition should be denied because it is untimely. *See* Fla. R. Crim. P. 3.851(d)(3). Petitioner’s successive habeas petition was filed January 17, 2017, which is well beyond the filing of his initial brief filed in the appeal of the circuit court's order on the initial motion for postconviction relief. Petitioner’s successive petition is untimely because he timely filed an appeal of the circuit court’s denial of his motion for post-conviction relief and an accompanying habeas petition in this Court. *See* Fla. R. Crim. P. 3.851(d)(3); *compare Strong v. State*, 851 So. 2d 758 (Fla. Dist. Ct. App. 2003) (“There are no prescribed time limits for filing a request for a belated postconviction motion on ground that petitioner's lawyer had failed to file a timely motion, and thus, petition for writ of habeas corpus, filed more than nine years after initial conviction, was improperly denied as untimely; however, on remand state was entitled to opportunity to

develop defense of laches.”) This is a second successive habeas petition raising essentially the same claims as his first and thus, should be denied.

Petitioner’s death sentence was final on October 7, 1985. This was almost twenty years prior to the decision in *Ring* in 2002. Under this Court’s controlling precedent of *Asay*, *Hurst* is simply not retroactive to Oats for any of the relief he claims it entitles him to.

In *Hurst v. Florida*, the United States Supreme Court declared the portion of Florida’s capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of *Ring v. Arizona*, 536 U.S. 583 (2002). This Court held that *Hurst v. Florida* can be retroactively applied to cases that were not final when the *Ring* opinion was issued on June 24, 2002. *Mosley v. State/Jones*, 41 Fla. L. Weekly S629, 2016 WL 7406506 (Fla. Dec. 22, 2016). Significantly, the Court also held that any case in which the death sentence was final before *Ring* was decided would not receive relief based on *Hurst*. *Asay v. State/Jones*, 41 Fla. L. Weekly S646, 2016 WL 7406538, *13 (Fla. Dec. 22, 2016); *see also Mosley v. State/Jones*, 41 Fla. L. Weekly S629, 2016 WL 7406506, *18 (Fla. Dec. 22, 2016) (“[W]e have now held in *Asay v. State* that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*.”) *See Gaskin v. State*, No. SC15-1884, 2017 WL 224772, at *2 (Fla. Jan. 19,

2017) (“Gaskin is not entitled to relief under *Hurst v. Florida*. See *Asay v. State*, —So. 3d —, —, 2016 WL 7406538 at *13 (Fla. 2016) (holding that *Hurst* is not retroactive to cases that became final before the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)); *Bogle v. State*, No. SC11-2403, 2017 WL 526507, at *16 (Fla. Feb. 9, 2017) (“Bogle is not, however, entitled to *Hurst* relief because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided. See *Asay v. State*, —So. 3d —, —, 41 Fla. L. Weekly S646, S652, 2016 WL 7406538 (Fla. Dec. 22, 2016)); *Wainwright v. State*, No. SC15-2280, 2017 WL 394509, at *2 (Fla. Jan. 30, 2017) (“In his third claim on appeal, Wainwright asserts that the circuit court erred in summarily denying his claim that the imposition of the death penalty violated his Sixth Amendment right to trial by jury. We find no error in the summary denial of this claim. See *Asay v. State*, Nos. SC16–223, SC16–102, & SC16–628, 2016 WL 7406538 (Fla. Dec. 22, 2016)).

Despite this Court’s bright-line rulings in *Asay*, *Gaskin*, *Bogle*, and *Wainwright*, Petitioner still asserts that *Hurst* applies in his case. Petitioner goes even further to assert that *Hurst* applies in his pre-*Ring* case for the completely unrelated issue of intellectual disability, suggesting that a jury should have to unanimously find that a defendant does, or does not meet the legal criteria for that bar to execution. Not only does *Hurst* not contemplate anything remotely close to

what Petitioner is suggesting – conflating elements of a crime and affirmative legal defenses – Petitioner cannot validly claim that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*. Just as *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst*. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005). As the United States Supreme Court has explained, “for every argument why juries are more accurate factfinders, there is another why they are less accurate.” *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). The accuracy of Petitioner’s death sentence has been fully litigated and this Court has fully considered the fundamental fairness argument of universal retroactive application and, as a result, Oats is not entitled to retroactive application of *Hurst*.

CLAIM I

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

In this claim, Petitioner argues that, under *Hurst*, this Court must vacate Petitioner’s death sentence and order a jury trial on the issue of his intellectual disability. Petitioner asserts that under § 921.137(4), once brought to issue, the existence of a defendant’s intellectual disability is a question of fact that the sentencing judge must resolve before the court is authorized to impose a death

sentence. Because this is so, Petitioner asserts that average intelligence is an “element” under *Ring/Hurst* that expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict and thus, must be submitted to, and found unanimously by, a jury. (*Petition* at 25).

Primarily, it is important to note that Petitioner cites absolutely no support for his proposition that *Hurst*, or any other authority, entitles a defendant to a jury trial on the issue of intellectual disability. Moreover, neither in *Hurst*, nor any of the subsequent cases analyzed under *Hurst* has the United States Supreme Court or this Court held that the existence of intellectual disability is one of the required factual findings by the jury under *Ring*.

It is beyond question that the United States Supreme Court, as well as this Court and the legislative body of Florida, intended the factors relevant to a finding on intellectual disability to be considered by the court, and are simply not within the purview of the jury. *See Hall*, 134 S.Ct. at 2001; *Oats v. State*, 181 So. 3d at 467 (“ . . . the circuit court did not analyze the remaining prongs . . .”) (emphasis added). In pertinent part, Rule 3.203 (e) and (g) of the Florida Rules of Criminal Procedure clearly state:

(e) Hearing on Motion to Determine Intellectual Disability. The circuit court shall conduct an evidentiary hearing on the motion for a determination of intellectual disability. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is intellectually disabled. The court shall enter a written order prohibiting the imposition of the death penalty

and setting forth the court's specific findings in support of the court's determination if the court finds that the defendant is intellectually disabled as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. If the court determines that the defendant has not established intellectual disability, the court shall enter a written order setting forth the court's specific findings in support of the court's determination.

(g) Finding of Intellectual Disability; Order to Proceed. If, after the evidence presented, the court is of the opinion that the defendant is intellectually disabled, the court shall order the case to proceed without the death penalty as an issue.

Fla. R. Crim. P. 3.203 (bold emphasis in original, underline emphasis added).

Hurst did nothing to change or invalidate this pre-trial, non-jury-finding procedure.

As a matter of practicality, as stated in *Hall v. Florida*, 134 S. Ct. 1986, 2001, 188 L. Ed. 2d 1007 (2014), “[i]ntellectual disability is a condition, not a number . . . [c]ourts must recognize, as does the medical community, that the IQ test is imprecise. *Id.* The Supreme Court also stressed that a single factor should not be considered dispositive because the three relevant factors must be considered together in an interrelated assessment. *Oats v. State*, 181 So. 3d 457, 467 (Fla. 2015), *reh'g denied* (Mar. 15, 2016). And yet, Petitioner proposes that a jury of his peers, untrained in the medical or legal professions, are now Constitutionally required under *Hurst* to unanimously “diagnose” a defendant as being of average intelligence (presumably after hearing evidence, much of which is completely

inadmissible) before any defendant having raised ID can become eligible for a sentence of death.

Moreover, a finding of intellectual disability is a legal defense – a shield to the imposition of a death sentence based upon the Eighth Amendment under *Atkins v. Virginia*, 536 U.S. 304 (2002). It is not, and cannot, also be a jury fact-finding sword under the Sixth Amendment line of *Ring/Hurst* cases.

In *Hurst v. State*, this Court combined the Sixth Amendment analysis of the Supreme Court in *Hurst v. Florida*, and added an Eighth Amendment component to determine that our state constitution essentially requires a unanimous jury recommendation and concluded that weighing is a “fact” that must be found by the jury. However, with a conformity clause in Florida binding the court to go no further than the Supreme Court on interpreting the Eighth Amendment, such an interpretation, in the State’s view, is unsound. *See In re Bohannon*, 2016 WL 5817692 (Ala. Sept. 30, 2016) (noting that “*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment” and that [. .] “*Hurst* focuses on the jury’s factual finding of the existence of an aggravating circumstance to make a defendant death-eligible[.]”); *State v. Belton*, 2016 WL 1592786, *9, (Ohio Apr. 20, 2016) (observing that “Federal and state courts have upheld laws similar to Ohio’s, explaining that if a defendant has already been

found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring* [.]” and that “[w]eighing is not a fact-finding process subject to the Sixth Amendment[.]”).

Even if *Hurst v. Florida* requires the unanimous finding of aggravators, that those aggravating factors outweigh the mitigating factors, and that the aggravators are sufficient to impose a penalty of death, as “elements,” which the State contests,⁴ it simply does not follow that *Hurst* contemplates a jury finding on intellectual disability or that that finding – a pre-trial, legal issue that serves as a bar to execution – would constitute a factual sentencing element. The process and analysis for a determination of intellectual disability is inapposite in form and structure to an element submitted to the jury. As recognized in *Thompson v. State*, 208 So. 3d 49 (Fla. 2016), *reh'g denied*, No. SC15-1752, 2017 WL 237658 (Fla. Jan. 19, 2017), “[a]s this Court stated in *Oats, Hall* did not just require that courts

⁴ The State recently submitted a certiorari petition in *Hurst* asking the Supreme Court to grant review of this Court’s interpretation of *Hurst* to include the balancing of aggravators and mitigators as an essential element of death eligibility. *Florida v. Hurst*, Case No. 16-998, *petition for writ of certiorari*, filed by the State on February 13, 2017. As noted, this Court’s interpretation of *Hurst* conflicts with at least two recent state supreme court decisions from Ohio and Alabama. In addition, the Federal courts of appeal have uniformly rejected the argument that *Apprendi* and its progeny require a capital jury to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors or that such “facts” need to be charged in an indictment. *See United States v. Fields*, 516 F.3d 923, 950 (10th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931, 993-94 (9th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007); *United States v. Fields*, 483 F.3d 313, 345-46 (5th Cir. 2007); *United States v. Purkey*, 428 F.3d 738, 748 (8th Cir. 2005).

consider the statistical error margin in determining IQ, it also changed the manner in which intellectual disability evidence must be considered: ‘courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive ... because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs.’ 181 So.3d at 467–68. In *Hall*, the United States Supreme Court made clear that the assessment for intellectual disability is a ‘conjunctive and interrelated assessment.’ 134 S.Ct. at 2001.” *Thompson v. State*, 208 So. 3d 49. Oats has already had a fair opportunity to present all of his evidence and to show that the Constitution prohibits his execution, and his conviction and sentence still stand. Moreover, as a practical matter, the State cannot be required to disprove, as elements of every capital crime, the existence of any affirmative defenses a defendant may first raise 25 years after he is convicted. For all these reasons, his claim must be denied.

CLAIM II

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

In this claim, Petitioner argues that, under *Hurst*, this Court must vacate Petitioner’s death sentence because he was not accorded a second sentencing jury for his 1984 resentencing. Petitioner asserts that in his original trial in 1981, jurors

were instructed on aggravators that this Court subsequently found to be error, and the jury's sense of responsibility was diminished under *Caldwell*.

Primarily, this claim and its subparts must be denied because it is procedurally barred. Oats raised this exact issue of empaneling a new jury for his resentencing on direct appeal, and in his original habeas petition in 1989. In 1985, this Court said:

Appellant also asserts that the trial court erred in failing to impanel a jury to rehear evidence and to make a recommendation as to the proper sentence. Quite the contrary, the trial court correctly interpreted and applied our instructions:

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. ... Accordingly, ... this cause is remanded to the trial court for entry of a new sentencing order in accordance with the views expressed herein.

Oats, 446 So. 2d at 95, 96.

Oats v. State, 472 So. 2d 1143, 1144–45 (Fla. 1985).

In 1994, this Court stated, “Oats filed a habeas corpus petition with this court in May 1989 raising the following issues: 1) trial court erred in refusing to empanel a new jury . . .” *Oats v. Dugger*, 638 So. 2d at 21. This Court found that the issue was procedurally barred in 1994,⁵ and it is procedurally barred now when Oats attempts to litigate it for a third time.

⁵ “Oats admits that he raised issues 1, 3, and 5 on direct appeal. These issues are, therefore, procedurally barred.” *Oats v. Dugger*, 638 So. 2d at 22.

This Court has previously stated that “habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion.” *Mann v. State*, 112 So. 3d 1158, 1164 (Fla. 2013) (citing *Wyatt v. State*, 71 So. 3d 86, 112 n. 20 (Fla. 2011)); *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994). Because Petitioner’s argument in the instant petition is simply a restatement of his arguments in his previous habeas petition, and on appeal, now under the color of *Hurst* – which is not retroactive to pre-*Ring* cases as argued *supra* – this Court should deny this claim.

To the extent Petitioner argues his *Caldwell* claim, that must also fail, as Oats failed to object at trial on the basis of *Caldwell*, so that issue was not preserved for review on appeal. Moreover, Oats raised the *Caldwell* claim in his 1987 postconviction motion, and again in his 1989 original habeas petition. This Court stated, in 1994:

Oats raises the same issues before this Court that he did before the trial court. Postconviction motions cannot be used as a second appeal for issues that were or could have been raised on direct appeal. *Parker v. State*, 611 So. 2d 1224 (Fla. 1992). We agree with the trial court that the alleged *Caldwell* violation and claims of error regarding the aggravators are procedurally barred.

Oats v. Dugger, 638 So. 2d at 21.

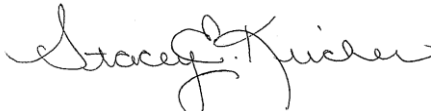
Petitioner asks this Court to overturn its precedent in habeas petitions and allow Oats to argue, for a third time, that his rights were infringed by his resentencing. What Oats fails to recognize, however, is that this Court explicitly did not extend the retroactivity of *Hurst* to pre-*Ring* cases, such as the Petitioner's, so *Hurst* does not apply to Oats.

Moreover, the errors Petitioner argues that occurred in the 1981 sentencing phase, and his reliance on *Stringer v. Black*, 503 U.S. 222, 232 (1992) are misplaced. The errors from the 1981 trial were fully considered in this Court's decision to remand Petitioner's case for a new sentencing phase. When raised below, this Court affirmed the circuit court's decision not to require a new jury be empaneled. Subsequently, this Court then affirmed the procedures and outcome in Petitioner's re-sentencing. Petitioner is not entitled to re-litigate his pre-*Ring* claims under *Hurst* and his Petition should be denied.

WHEREFORE, the State requests that this Court deny Petitioner's successive petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 6, 2017, a true and correct copy of the foregoing has been furnished by electronic transmission via e-portal/e-mail to: Martin J. McClain, Special Assistant CCRC-South, martymcclain@earthlink.net; Nicole M. Noël, Assistant CCRC-South, noeln@ccsr.state.fl.us; 1 East Broward Blvd., Suite 444, Ft. Lauderdale, FL 33301.

/s/



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