IN THE SUPREME COURT OF FLORIDA

TERANCE G. VALENTINE,

Appellant,

v.

CASE NO. SC18-1102
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The State submits that oral argument is not necessary for appellate review of the denial of the successive postconviction motion. The issues presented may be resolved on the face of the record and case law cited herein. The decisional process will not be significantly aided by oral argument.

PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on direct appeal will be referred to as "DAR V_/_" with the appropriate volume number and page number inserted within the blank spaces. Additionally, the original postconviction proceedings will be referred to as "PCR V_/_" with the referenced page number of the record inserted in the blank. The instant successive postconviction proceedings will be referred to as "R. pp __" with the referenced page numbers of the record inserted in the blank.

STATEMENT OF THE CASE AND FACTS

The State objects to the argumentative portions and selective case holdings presented in Appellant's statement of the case, from pages 5 to 8 of the initial brief. Further, Valentine unabashedly presents improper argument regarding the timeliness of the successive postconviction motion on appeal. (IB, p. 5, 8).

Terance Valentine was convicted of the 1988 first-degree murder of Ferdinand Porche, the attempted first-degree murder of Livia Romero, and other

related offenses, and sentenced to death. *Valentine v. State*, 616 So. 2d 971 (Fla. 1993). Following retrial due to an error in jury selection, the same convictions and sentences were imposed. On appeal, the attempted murder conviction was vacated, but the other convictions and the death sentence were affirmed. *Valentine v. State*, 688 So. 2d 313 (Fla. 1996). Valentine sought certiorari review in the United States Supreme Court, and review was denied on October 6, 1997. *Valentine v. Florida*, 522 U.S. 830 (1997). This Court described the following facts in its initial opinion:

> Livia Romero married Terance Valentine while she was a teenager in Costa Rica and the couple emigrated to the United States in 1975, settled in New Orleans, and adopted a child. After seeking to divorce Valentine in 1986, Romero married Ferdinand Porche and the family moved to Tampa, where they began receiving telephoned threats from Valentine. On September 9, 1988, Valentine armed himself, forced his way into the family's home, wounded Porche, drove both Romero and Porche to a remote area and shot them. Romero survived and immediately told police Valentine was her assailant.
>
> Several weeks after being released from the hospital, Romero began receiving telephone calls from Valentine, which she taped using a telephone and recorder supplied by police. Valentine was eventually arrested and charged with armed burglary, kidnapping, grand theft, first-degree murder and attempted first-degree murder. His motion to suppress a conversation taped on November 7 was denied; an edited tape was played for the jury; and the court subsequently declared a mistrial after the jury was unable to reach a unanimous verdict.
>
> The entire fifteen-minute tape was played for the jury on retrial. Additional evidence included Romero's testimony and that of Porche's neighbor, who testified that on September 9 he saw two men sitting in a faded red and white or red and gray Ford Bronco parked opposite his house between 1 and 3 p.m. Nancy Cioll, a friend of Valentine's and Romero's, testified that about two weeks after the killing, Valentine

> visited her driving a maroon, gray and black Ford Bronco. She said he confessed to the shootings, demonstrated how he had shot Romero, and said he had made a mistake leaving Romero alive. Valentine's alibi defense that he was in Costa Rica at the time of the shootings was disbelieved by the jury and he was convicted on all counts. During the penalty phase, Valentine represented himself and called his daughter and two friends to testify on his behalf.

Valentine, 616 So. 2d at 972.

At the 1994 penalty phase, Valentine waived the advisory jury recommendation and presented his mitigation directly to the trial judge. *Id.*, 688 So. 2d at 315. The Honorable Diana Allen imposed a death sentence on September 30, 1994. She found four aggravating factors: prior violent felony conviction based on the attempted murder conviction; committed during a burglary/kidnapping; heinous, atrocious or cruel; and cold, calculated and premeditated. *Id.*, 688 So. 2d at 316 n.4. The court gave slight weight to the mitigating factors found, including Valentine's lack of prior violence, Valentine's work history and skills that could contribute to the prison system, Valentine's large family that will continue to love and support him, and Valentine's cooperation at his arrest and behavior as a model prisoner. *Id.*, 688 So. 2d at 316 n.5.

On or about May 10, 2001, Valentine filed a motion for postconviction relief. In Valentine's postconviction motion, amongst several other claims, he challenged his conviction based on the same claims he raises in this motion: that his convictions could not stand where they were based on the victim being identified as "Livia

Porche", and that the vehicle Valentine was convicted of stealing was marital property. *Valentine v. State*, 98 So. 3d 44, 50 (Fla. 2012). This Court affirmed the postconviction court's denial of these claims. *Id.*

On December 21, 2017, Valentine filed a successive motion to vacate his judgment and sentence. (R. 148). In the motion, he asserts two claims for relief: there was no corpus delicti for the offenses of grand theft auto, burglary, and (one count of) kidnapping, and a claim of relief pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (R. 148-180). The State filed its response on January 10, 2018. (R. 228). The postconviction court entered the written order denying the successive motion on April 20, 2018. (R. 271-279). As to claim I, the postconviction court decided:

> The Court agrees with the State's response, and finds the instant claim is untimely, successive and procedurally barred. Defendant's sentence became final when the Supreme Court denied certiorari on October 6, 1997. *See* Fla. R. Crim. P. 3.85l(d)(l)(B) ("For purposes of this rule, a judgment is final ... on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Despite Defendant's assertion to the contrary, the instant claim does not fall within any of the time limitation exceptions set forth in rule 3.851. *See* Fla. R. Crim. P. 3.851(d)(2).
>
> As the State notes, Defendant does not cite to or rely on any information that was not already known to him at the time of trial, direct appeal or previous postconviction proceedings. Additionally, Defendant previously raised the same issues regarding the victim's name in the indictment and the grand theft auto conviction in his prior motion for postconviction relief, the postconviction court denied his claims as procedurally barred, and the Florida Supreme Court affirmed the denial of his postconviction motion. *See Valentine*, 98 So. 3d at 50, n.8, 58. Defendant's allegations are still

> procedurally barred. *See Johnson v. State,* 104 So. 3d 1010, 1027 (Fla. 2012) ("Claims that should have been raised on direct appeal are procedurally barred from being raised in collateral proceedings.").
>
> Additionally, Defendant has not demonstrated that a manifest injustice will occur if he cannot raise the instant claim. As the State argues, Defendant waived any objection to the defects in the indictment, and the indictment here was not "so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense." Fla. R. Crim. P. 3.140(o). The Court also finds Defendant's allegations do not rise to a fundamental error that can be raised at any time as he alleges. *See e.g., Deparvine v. State,* 995 So. 2d 351 (Fla 2008) ("Generally, if an indictment or information fails to completely charge a crime under the laws of the state, the defect can be raised at any time."), citing *State v. Gray,* 435 So.2d 816, 818 (Fla.1983). No relief is warranted on claim I.

(R. 273-274). As to the *Hurst* claim(s), the postconviction court decided:

> The Court finds the Florida Supreme Court has repeatedly held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final before *Ring* was decided.[3] *See Hitchcock v. State,* 226 So. 3d 216 (Fla. 2017) (rejecting the defendant's claims relying on *Hurst v. Florida* and *Hurst v. State* to argue that his death sentence is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the corresponding provisions of the Florida Constitution, and article I, sections 15 and 16, of the Florida Constitution, and noting, "We have consistently applied our decision in *Asay V,* denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring ...*"); *Asay v. State,* 224 So. 3d 695, 703 (Fla. 2017) (rejecting defendant's claims regarding the retroactive application of *Hurst v. State,* and Chapter 2017-1, Laws of Florida, and citing its decision in *Hitchcock); Asay v. State,* 210 So. 3d 1, 10-22 (Fla. 2016) (conducting a retroactivity analysis and

concluding that *Hurst* should not be applied to defendant's case, which became final before *Ring); Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (citing *Hitchcock* and *Asay* and rejecting defendant's claims for relief based on *Hurst* and *Perry*, the Eighth Amendment to the United States Constitution, denial of due process and equal protection based on the arbitrariness of the retroactivity decisions *Asay* and *Mosley*, and a substantive right based on the legislative passage of chapter 2017-1); *Mosley*, 209 So. 3d at 1274 ("[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."); Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017) ("We have consistently held that *Hurst* is not retroactive prior to June 24, 2002, the date that *Ring* ... was released."). This Court is bound by the decisions of the Florida Supreme Court.

[3]*Ring* was decided on June 24, 2002. *See Ring,* 536 U.S. at 584.

Here, Defendant's sentence became final when the United State Supreme Court denied certiorari on October 6, 1997. *See* Fla. R. Crim. P. 3.851(d)(l)(B) ("For purposes of this rule, a judgment is final ... on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Because Defendant's sentence was final before *Ring* was decided, the Court finds *Hurst v. Florida* and *Hurst v. State*, and Chapter 2017-1, do not retroactively apply to the instant case. Consequently, Defendant's *Hurst* issues are time-barred. *See Hamilton v. State*,

236 So. 3d 276 (Fla. 2018) (finding trial court properly denied defendant's *Hurst* claim as untimely where his convictions and sentences became final in 1998).

The Court further notes that even if Defendant's sentence became final after *Ring* issued, he would not be entitled to relief because he waived his penalty phase jury and advisory recommendation. Although Defendant asserts his waiver was not knowingly and voluntarily entered, the only basis for his claim is that the right to jury fact-finding did not yet exist, essentially seeking Hurst-based

> relief. However, in *Mullens,* the Florida Supreme Court held that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens,* 197 So. 3d at 40. The Florida Supreme Court has consistently applied *Mullens* and denied any *Hurst* relief to capital defendants who waived the right to a penalty phase jury. *See Brant v. State,* 197 So. 3d 1051, 1079 (Fla. 2016) (rejecting Defendant's postconviction *Hurst* claim, citing *Mullens); Allred v. State,* 230 So. 3d 412 (Fla. 2017) ("This Court has consistently relied on *Mullens* to deny *Hurst* relief to defendants that have waived the right to a penalty phase jury."); *Twilegar v. State,* 228 So. 3d 550 (Fla. 2017) ("As the circuit court correctly recognized, the *Hurst* decisions do not apply to defendants like Twilegar who waived a penalty phase jury."); *Knight v. State,* 211 So. 3d 1, 5 n. 2 (Fla. 2016) (rejecting Defendant's *Hurst* claim and noting "Knight waived his penalty phase jury and, thus, is not entitled to relief."); *Covington v. State,* 228 So. 3d 49, 69 (Fla. 2017) ("A defendant like Covington who has waived the right to a penalty phase jury is not entitled to relief under *Hurst."); Quince v. State,* 233 So. 3d 1017 (Fla. 2018) ("We have since consistently relied on *Mullens* to deny *Hurst* relief to defendants who waived a penalty phase jury.").
>
> Defendant is not entitled to relief on claims II, III and IV.

(R. 275-278). Appellant filed a motion for rehearing on May 7, 2018. (R. 280). The motion for rehearing was denied on June 4, 2018. (R. 288). Appellant filed a notice of appeal on July 3, 2018. (R. 290). Appellant filed an initial brief on September 17, 2018. *Valentine v. State,* SC18-1102.

STANDARD OF REVIEW

A summary denial of a successive 3.851 postconviction motion is reviewed de novo. *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008). "Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' " *Id*. at 1080-81.

SUMMARY OF THE ARGUMENT

The postconviction court correctly denied both of Valentine's claims presented in the successive postconviction motion. The first claim, a "corpus deliciti" claim, was untimely, successive and procedurally barred. Valentine's *Hurst* claim was also untimely, as Valentine's sentence was final in 1997, he is foreclosed from receiving relief.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT CORRECTLY DETERMINED THAT MR. VALENTINE'S CHALLENGES TO HIS CONVICTIONS FOR GRAND THEFT AUTO, BURGLARY AND KIDNAPPING WERE PROCEDURALLY BARRED.

Valentine asserts that his convictions on Count 1 (armed burglary), Count 2 (kidnapping), and Count 4 (grand theft auto) must be reversed because the victim's name, as pled in the Indictment, was "Livia Porche" rather than "Livia Romero." The postconviction court correctly determined this issue to be untimely, successive and procedurally barred:

> The Court agrees with the State's response, and finds the instant claim is untimely, successive and procedurally barred. Defendant's sentence became final when the Supreme Court denied certiorari on October 6, 1997. *See* Fla. R. Crim. P. 3.85l(d)(l)(B) ("For purposes of this rule, a judgment is final ... on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Despite Defendant's assertion to the contrary, the instant claim does not fall within any of the time limitation exceptions set forth in rule 3.851. *See* Fla. R. Crim. P. 3.851(d)(2).
>
> As the State notes, Defendant does not cite to or rely on any information that was not already known to him at the time of trial, direct appeal or previous postconviction proceedings. Additionally, Defendant previously raised the same issues regarding the victim's name in the indictment and the grand theft auto conviction in his prior motion for postconviction relief, the postconviction court denied his claims as procedurally barred, and the Florida Supreme Court affirmed the denial of his postconviction motion. *See Valentine,* 98 So. 3d at 50, n.8, 58. Defendant's allegations are still procedurally barred. *See Johnson v. State,* 104 So. 3d 1010, 1027 (Fla. 2012) ("Claims that should have been raised on direct appeal

> are procedurally barred from being raised in collateral proceedings.").
>
> Additionally, Defendant has not demonstrated that a manifest injustice will occur if he cannot raise the instant claim. As the State argues, Defendant waived any objection to the defects in the indictment, and the indictment here was not "so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense." Fla. R. Crim. P. 3.140(o). The Court also finds Defendant's allegations do not rise to a fundamental error that can be raised at any time as he alleges. *See e.g., Deparvine v. State,* 995 So. 2d 351 (Fla 2008) ("Generally, if an indictment or information fails to completely charge a crime under the laws of the state, the defect can be raised at any time."), citing *State v. Gray,* 435 So.2d 816, 818 (Fla.1983). No relief is warranted on claim I.

(R. 273-274).

In an attempt to circumvent a procedural bar, Appellant presented an alleged defect in the Indictment (name of victim) as a "corpus delicti" claim. However, the procedural bar for this claim is insurmountable as it is barred by a waiver, time bar, subject bar, and the law-of-the-case doctrine.

First, this claim is untimely. A Rule 3.851 motion for postconviction relief must be filed within one year after the judgment and sentence are finalized. Fla. R. Crim. P. 3.851(d). If this time period expires, a motion filed thereafter is procedurally barred unless it alleges:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d) (2). The facts on which this claim is predicated have been known to Appellant since the time of trial, there is no new fundamental right, and there was no postconviction counsel neglect since these claims were already raised in Appellant's original postconviction motion (claim I: arguing that no conviction could be sustained where the indictment identified the victim as "Livia Porche"; claim VII: arguing that he was improperly convicted of grand theft where the property in question was a "marital asset"). (PCR9 pp. 1682-83, 1687). Since there is no excuse for Appellant's untimeliness, as none of the three exceptions apply, this claim is time-barred.

Second, the subject of this claim could have been raised on direct appeal and is procedurally barred. It has long been the law in this State that claims which could have or should have been raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850/3.851. *See Cook v. State*, 792 So. 2d 1197 (Fla. 2001); *Shere v. State*, 742 So. 2d 215 (Fla. 1999); *Ragsdale v. State*, 720 So. 2d 203 (Fla. 1998); *Remeta v. State*, 622 So. 2d 452 (Fla. 1993); *Johnson v. State*, 593 So. 2d 206 (Fla.), *cert. denied*, 506 U.S. 839 (1992);

Raulerson v. State, 420 So. 2d 517 (Fla. 1982); *Meeks v. State*, 382 So. 2d 673 (Fla. 1980). It is also not appropriate to use a different argument to relitigate the same issue. *Harvey v. State*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). The purpose of Rule 3.850/3.851 (2) is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on direct appeal. *McCrae v. State*, 437 So. 2d 1388 (Fla. 1983). Many of the issues typically raised in collateral review are procedurally barred because they were or should have been presented on direct appeal. *See Jennings v. State*, 583 So. 2d 316 (Fla. 1991); *Swafford v. Dugger*, 569 So. 2d 1264 (Fla. 1990); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Blanco v. State*, 507 So. 2d 1377 (Fla. 1987). It is improper to attempt to circumvent the procedural bars by recasting a direct appeal claim as one of ineffective assistance of counsel. *Ventura v. State*, 794 So. 2d 553 n.6 (Fla. 2001); *Waterhouse v. State*, 792 So. 2d 1176, 1181 n.10 (Fla. 2001); *Arbelaez v. State*, 775 So. 2d 909, 915 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995).

Valentine does not rely on any facts which were not known at the time of his trial. This claim obviously was available from the record for Valentine's direct appeal, and his failure to challenge his convictions on this ground at trial and on appeal demonstrates that he has procedurally defaulted any possible error in this regard. *Cook v. State*, 792 So. 2d at 1201.

Third, this claim is barred by the law-of-the-case doctrine. The law-of-the-case doctrine bars reconsideration of those legal issues that were considered and decided in a former appeal. *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001). The law-of-the-case doctrine, which is designed to prevent re-litigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So. 3d 1046, 1047 (Fla. 1st DCA 2015), *citing State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003). The doctrine "prevents the same parties from relitigating issues that have already been fully litigated and determined." *Zeigler v. State*, 116 So. 3d 255, 258 (Fla. 2013), *citing State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)). The law-of-the-case doctrine applies regardless of whether a party employs different arguments to raise the same claim. *Sireci v. State*, 773 So. 2d 34, 40-41 (Fla. 2000) (finding claims procedurally barred and noting that "to the extent that Sireci uses a different argument to relitigate the same issue, the claim remains procedurally barred"); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely variation of prior postconviction issue).

In Valentine's postconviction motion, he challenged his conviction based on the same claims he raises in the instant motion: that his convictions could not stand where they were based on the victim being identified as "Livia Porche" (claim I),

and that the vehicle Valentine was convicted of stealing was marital property (claim VII). (PCR9/1682-83, 1687). The postconviction court denied these claims, finding them to be procedurally barred since they should have been brought on direct appeal. (PCR5/909, 914). This Court affirmed the postconviction court's denial of Valentine's postconviction motion. *Valentine v. State*, 98 So. 3d 44, 50 (Fla. 2012). Therefore, because these claims have been as fully litigated as the law allows, they are barred and may not be relitigated. Repeatedly re-raising procedurally barred claims, as Valentine has done herein, only serves to further clutter the courts' already voluminous dockets.

Finally, the name pled in the Indictment is, at most, a technical flaw, which does not nullify the existence of the charged offenses. Since there was no trial objection, the alleged defect in Valentine's Indictment is waived. "Where a defendant waits until after the State rests its case to challenge the propriety of an indictment, the defendant is required to show not that the indictment is technically defective but that it is so fundamentally defective that it cannot support a judgment of conviction." *Ford v. State,* 802 So. 2d 1121, 1130 (Fla. 2001); *Deparvine v. State*, 995 So. 2d 351, 373 (Fla. 2008); *Williams v. State*, 547 So. 2d 710 (Fla. 2d DCA 1989); *State v. Duarte,* 681 So. 2d 1187 (Fla. 2d DCA 1996); *Jones v. State,* 415 So. 2d 852, 853 (Fla. 5th DCA 1982) ("[W]here the information is merely imperfect or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives

the defect and it cannot be raised for the first time on appeal."). "As explained in *DuBoise v. State*, 520 So. 2d 260 (Fla. 1988), the 'reason for this provision is to discourage defendants from waiting until after a trial is over before contesting deficiencies in charging documents which could have easily been corrected if they had been pointed out before trial.' " *State v. Burnette*, 881 So. 2d 693, 695 (Fla. 1st DCA 2004) (internal citation omitted); s*ee also Toussaint v. State*, 755 So. 2d 170, 171 (Fla. 4th DCA 2000).

The exception to this rule of waiver would be when the charging document, in this case an Indictment, is so fundamentally defective that it cannot support any conviction, such as when it "totally omits an essential element of the crime or is so vague, indistinct or indefinite that the defendant is misled or exposed to double jeopardy". *Burnette*, 881 So. 2d at 695; *see also Ingraham v. State*, 32 So. 3d 761, 766 (Fla. 2d DCA 2010) (internal citations omitted). "Generally, if an indictment or information fails to completely charge a crime under the laws of the state, the defect can be raised at any time." *Deparvine v. State*, 995 So. 2d 351, 373 (Fla. 2008), *citing State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983).

Here, the Indictment was not misleading as to the charged offenses. The Indictment stated the correct statute sections and the correct elements thereof: the only alleged defect was the last name of one of the victims, Livia Romero/Porche. However, this claim states no basis for relief as Valentine makes no attempt to

suggest that he was misled as to the identity of the victim in this case. Florida Rule of Criminal Procedure 3.140(o) provides that no relief can be granted due to any defect in an indictment unless the accused was misled in the preparation of his defense or is exposed to a substantial danger of a subsequent prosecution for the same offense. This is consistent with the rule that any variance between the crime charged by the grand jury and the crime for which a defendant has been convicted is only fatal if prejudicial. *Ingleton v. State*, 700 So. 2d 735, 739 (Fla. 5th DCA 1997). A variance between the allegata and probata is acceptable where there is no material difference, where the defense has been adequately informed of the charge and is adequately protected against another prosecution for the same offense. *Raulerson v. State*, 358 So. 2d 826, 830 (Fla.), *cert. denied*, 439 U.S. 959 (1978). The use of a victim's nickname in an Indictment sufficiently identifies the victim and is not a material variance when it leaves no doubt as to the identity of the victim. *Snipes v. State*, 733 So. 2d 1000, 1004 (Fla. 1999), *citing Raulerson*, *supra*, and *Branch v. State*, 94 Fla. 286, 115 So. 143 (1927).

Here, there was never any doubt as to who the surviving victim was because she had been married to the defendant; therefore, whether she was called Livia Romero or Porche was of no consequence to the defense strategy. In fact, at the evidentiary hearing, Appellant's trial counsel, Simson Unterberger, testified that the defense team was not misled as to the victim's identity. (PCR20/465-67). Livia was

known to the defense team prior to trial and she testified as to her personal account of the offenses at the time of trial; therefore, there was no question as to her identity, or the identified victim in the Indictment. *See Snipes, supra; Brown v. State,* 888 So. 2d 130 (Fla. 4th DCA 2004). Under these facts, any claim challenging the alleged defect in the Indictment has been waived. Further, because the victim, Livia Romero, testified at trial that she was married to Ferdinand Porche [*Valentine,* 98 So. 3d at 51], beyond waiver and procedural bar, this claim would otherwise be denied because there is no merit as there was evidence adduced at trial that the victim was known as Livia Porche.

This Court must enforce the procedural default policy, or appeal will follow appeal and there will be no finality in capital litigation. *See Johnson v. State,* 536 So. 2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality). The express finding by this Court of a procedural bar is also important so that any federal courts asked to consider Valentine's claims in the future will be able to discern the parameters of their federal habeas review. *See Harris v. Reed*, 489 U.S. 255 (1989); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Thus, Valentine is precluded from litigating this issue; this Honorable Court should affirm the summary denial of all claims which are clearly barred from review.

a. Grand theft auto

In addition to the claim raised concerning the victim's name as pled in the Indictment, Valentine asserts that he could not be convicted of grand theft because the property in question was marital property in which Valentine possessed an interest. He alleges that, because he cannot be convicted of stealing his own property, his grand theft conviction must be reversed. Once again, this issue is time barred, successive, and procedurally barred because it could have been presented on direct appeal. *Cook*, 792 So. 2d at 1201. Since it was raised and rejected (as procedurally barred) in a prior postconviction motion and appeal, it is barred by the law-of-the-case doctrine. Therefore, no relief is due.

The claim also fails to state a basis for relief. Livia testified at trial that she purchased the Blazer in New Orleans prior to her marriage to Valentine (DAR2 V9/891-93). She and Ferdinand shared the truck during the time they were together (DAR2 V10/891-93). Valentine never made any legal claim to the property and therefore abandoned any possible interest he may have once had in the vehicle. Further, at the postconviction evidentiary hearing, Valentine's trial counsel, Simson Unterberger, testified that he researched this theory and the title to the Blazer, which had been purchased in 1985 while Valentine was in prison in Costa Rica; Unterberger determined that the defense would not be able to show that Valentine had any ownership interest in the vehicle (PCR20/462-65). Since the property was

acquired prior to, rather than during the marriage of Livia and Valentine, it does not fall into the statutory definition of marital assert provided in Valentine's motion.

In *State v. Herndon*, 27 So. 2d 833 (Fla. 1946), this Court reversed the dismissal of an information filed against a husband which accused him of larceny of his wife's separate property. The Court expressly recognized that a husband has no legal interest in separate property maintained by the wife even during the course of the marriage. The evidence in this case, as well as the registration supplied by Valentine, establishes that this Blazer was owned solely by Livia. Even if Valentine were able to prove that he was a co-owner under community property laws, there is an exception to the general rule that a co-owner cannot steal property where the property is taken from "one who has a special property right in them and a legal right to withhold them from the owner." *Hinkle v. State*, 355 So. 2d 465, 467 (Fla. 3d DCA 1978). The evidence in this case establishes that this exception would be met to permit Valentine's conviction for grand theft.

When Appellant recast this issue as an ineffective assistance of counsel claim (claim XI (7) [(PCR6/1734-35)], the postconviction court granted an evidentiary hearing. (PCR6/1069). After the hearing, the postconviction court denied the claim:

> In this case, it is Defendant's position that trial counsel should have filed a motion to dismiss contesting the State's ability to prove the ownership element of the theft charge. To establish this element, however, the State would only need to prove that Livia had a superior

interest in the Blazer than Defendant. See *D.S.S. v. State*, 850 So. 2d 459, 46 1-62 (Fla. 2003).

At trial, Livia testified that she earned her own income, bought the 1986 Blazer at the end of 1985, and put $4,000.00 down on it. (See trial transcript pp. 951-52). Defendant did not present evidence at the evidentiary hearing to contradict this or otherwise establish that he possessed a superior legal interest in the Blazer at the time of the offense. Rather, Defendant testified that Livia used his $60,000.00 to buy the Blazer and that he and Livia were still legally married when she purchased the Blazer and at the time of the offenses. (See October 13, 2008, transcript pp. 161, 164-65). At best, this evidence, assuming it is credible, might establish that Defendant had a joint interest in the Blazer; however, it is insufficient to establish that he had an interest superior to Livia's. Accordingly, Defendant has failed to establish that counsel was deficient in failing to file a motion to dismiss count four of the indictment on the above asserted ground or that there is a reasonable probability that the outcome of trial would have differed had counsel filed such a motion.

Further, Unterberger testified at the evidentiary hearing that Defendant raised this issue with him and he considered whether it was something that he could address through a motion to dismiss. (See July 22, 2009, transcript pp. 304-05). Unterberger identified State's Exhibit 5 as his June 3, 1994, letter to Defendant wherein he addressed his evaluation and consideration of the claim. (See July 22, 2009, transcript pp. 305-06). He testified that apparently Defendant had sent him a letter regarding the Blazer being a marital asset and "the question seemed to be whether or not he could avoid a conviction of stealing the car by claiming that he had an ownership interest in the car and, therefore, you couldn't steal your own property." (See July 22, 2009, transcript pp. 304-06). He explained further as follows:

And I guess his theory was that [Livia] didn't have the money to buy the car and, therefore, somehow he had an interest and he's asking me to try to get her income tax returns. I advised him that I have no way to get her income tax returns. . . . I told him I didn't follow the argument that he was trying to make based on what I know. There's little doubt that [Mr. Valentine] had little or no involvement in acquiring the Blazer.

> You have to also recall that at the time of the purchase of the Blazer,... Mr. Valentine was in prison in Costa Rica.

(See July 22, 2009, transcript p. 306). Unterberger testified that his files contained a copy of the application for title to the Blazer in the name of Olivia Romero. (See July 22, 2009, transcript pp. 306-07). Unterberger testified that based on his evaluation of the law there would be no basis for him to claim that the Blazer was a marital asset because, as he told Defendant in his June 3, 1994, letter:

> while it might be nice to say that the vehicle is community property... under the Louisiana law, because Olivia didn't have the funds with which to buy it, it is also true that there would seem to be no way to prove that [Defendant] paid for the Blazer and, therefore, had no ownership interest in it at all.

(See July 22, 2009, transcript p. 307). Unterberger's testimony and June 3, 1994, letter to Defendant establish that Unterberger considered Defendant's theory as to ownership of the Blazer, but after research and his evaluation of the law, Unterberger concluded that the theft charge would not be subject to dismissal on Defendant's theory and did not pursue this course of action further. Defendant has not presented anything to establish Unterberger's performance in this regard was deficient or that he was prejudiced by Unterberger's decision not to pursue dismissal on Defendant's asserted ground. Having considered the allegations; testimony, evidence, and argument presented at the evidentiary hearing; the written closing arguments; applicable law; court file; and record; the Court finds Defendant has failed to establish ineffective assistance of counsel for failing to file a motion to dismiss the grand theft charge on the basis of the Blazer being a marital asset. Accordingly, Claim XI (7) is denied.

(PCR13/2437-39).

The postconviction court's legal conclusion was that there was no basis to have the grand theft auto charge dismissed against Valentine. Valentine is not

entitled to relief as the postconviction court correctly denied this claim as untimely, successive, and procedurally barred.

ISSUE II

THE POSTCONVICTION COURT CORRECTLY DETERMINED THAT MR. VALENTINE IS NOT ENTITLED TO *HURST* RELIEF BECAUSE HIS DEATH SENTENCE WAS FINAL ON OCTOBER 6, 1997. FURTHER, BECAUSE VALENTINE WAIVED A SENTENCING JURY, ANY ALLEGED *HURST* ERROR WOULD HAVE BEEN HARMLESS.

Valentine asserts that, despite his sentence being final in 1997, and despite his waiver of a jury recommendation, he is entitled to *Hurst*, relief. The postconviction court correctly determined that Valentine's claim was time-barred, and that he was not entitled to relief:

> The Court finds the Florida Supreme Court has repeatedly held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final before *Ring* was decided.[3] *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) (rejecting the defendant's claims relying on *Hurst v. Florida* and *Hurst v. State* to argue that his death sentence is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the corresponding provisions of the Florida Constitution, and article I, sections 15 and 16, of the Florida Constitution, and noting, "We have consistently applied our decision in *Asay V*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring ...*"); *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017) (rejecting defendant's claims regarding the retroactive application of *Hurst v. State*, and Chapter 2017-1, Laws of Florida, and citing its decision in *Hitchcock); Asay v. State,* 210 So. 3d 1, 10-22 (Fla. 2016) (conducting a retroactivity analysis and concluding that *Hurst* should not be applied to defendant's case,

which became final before *Ring); Lambrix v. State,* 227 So. 3d 112, 113 (Fla. 2017) (citing *Hitchcock* and *Asay* and rejecting defendant's claims for relief based on *Hurst* and *Perry*, the Eighth Amendment to the United States Constitution, denial of due process and equal protection based on the arbitrariness of the retroactivity decisions *Asay* and *Mosley*, and a substantive right based on the legislative passage of chapter 2017-1); *Mosley*, 209 So. 3d at 1274 ("[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."); Hannon v. State*, 228 So. 3d 505, 513 (Fla. 2017) ("We have consistently held that *Hurst* is not retroactive prior to June 24, 2002, the date that *Ring* ... was released."). This Court is bound by the decisions of the Florida Supreme Court.

[3]*Ring* was decided on June 24, 2002. *See Ring,* 536 U.S. at 584.

Here, Defendant's sentence became final when the United State Supreme Court denied certiorari on October 6, 1997. *See* Fla. R. Crim. P. 3.851(d)(l)(B) ("For purposes of this rule, a judgment is final ... on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Because Defendant's sentence was final before *Ring* was decided, the Court finds *Hurst v. Florida* and *Hurst v. State*, and Chapter 2017-1, do not retroactively apply to the instant case. Consequently, Defendant's *Hurst* issues are time-barred. *See Hamilton v. State*,

236 So. 3d 276 (Fla. 2018) (finding trial court properly denied defendant's *Hurst* claim as untimely where his convictions and sentences became final in 1998).

The Court further notes that even if Defendant's sentence became final after *Ring* issued, he would not be entitled to relief because he waived his penalty phase jury and advisory recommendation. Although Defendant asserts his waiver was not knowingly and voluntarily entered, the only basis for his claim is that the right to jury fact-finding did not yet exist, essentially seeking Hurst-based relief. However, in *Mullens,* the Florida Supreme Court held that a

> defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens,* 197 So. 3d at 40. The Florida Supreme Court has consistently applied *Mullens* and denied any *Hurst* relief to capital defendants who waived the right to a penalty phase jury. *See Brant v. State,* 197 So. 3d 1051, 1079 (Fla. 2016) (rejecting Defendant's postconviction *Hurst* claim, citing *Mullens); Allred v. State,* 230 So. 3d 412 (Fla. 2017) ("This Court has consistently relied on *Mullens* to deny *Hurst* relief to defendants that have waived the right to a penalty phase jury."); *Twilegar v. State,* 228 So. 3d 550 (Fla. 2017) ("As the circuit court correctly recognized, the *Hurst* decisions do not apply to defendants like Twilegar who waived a penalty phase jury."); *Knight v. State,* 211 So. 3d 1, 5 n. 2 (Fla. 2016) (rejecting Defendant's *Hurst* claim and noting "Knight waived his penalty phase jury and, thus, is not entitled to relief."); *Covington v. State,* 228 So. 3d 49, 69 (Fla. 2017) ("A defendant like Covington who has waived the right to a penalty phase jury is not entitled to relief under *Hurst."); Quince v. State,* 233 So. 3d 1017 (Fla. 2018) ("We have since consistently relied on *Mullens* to deny *Hurst* relief to defendants who waived a penalty phase jury.").
>
> Defendant is not entitled to relief on claims II, III and IV.

(R. 275-278).

First, this claim is untimely. A Rule 3.851 motion for postconviction relief must be filed within one year after the judgment and sentence are finalized. Fla. R. Crim. P. 3.851(d). If this time period expires, a motion filed thereafter is procedurally barred unless it alleges:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d) (2). Since *Hurst* does not apply to pre-*Ring* defendants, there is no excuse for Appellant's untimeliness, and this claim is time-barred. *See Hamilton v. State*, 236 So. 3d 276 (Fla. 2018) (finding trial court properly denied defendant's *Hurst* claim as untimely where his convictions and sentences became final in 1998).

Additionally, under well-established controlling precedent, *Hurst* is not retroactively applicable to Valentine because his death sentence became final on October 6, 1997, when the United States Supreme Court denied certiorari review. *Valentine v. Florida*, 522 U.S. 830 (1997). In *Asay v. State*, 210 So. 3d 1, 11-22 (Fla. 2016), *cert. denied*, 134 S. Ct. 41 (2017), this Court held that any capital defendant whose death sentence was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided, on June 24, 2002, was not entitled to *Hurst* relief. This Court performed a full retroactivity analysis using the *Witt v. State*, 387 So. 2d 922 (Fla. 1980), test in *Asay*. *Id.*, 210 So. 3d at 15-22. This Court reaffirmed its *Asay* holding in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). This Court, the Eleventh Circuit and the United States Supreme Court have repeatedly held in numerous capital

cases, that *Hurst* does not apply retroactively to defendants like Valentine. *Asay* is firmly established precedent. *Asay* and *Hitchcock* control.

While opposing counsel insists that *Hurst* is retroactive to Valentine under federal law, it is not. The United States Supreme Court has held that *Ring* was not retroactive in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (using the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989)). If a case is not retroactive under the broader state test for retroactivity of *Witt v. State*, 387 So. 2d 922 (Fla. 1980), which the Florida Supreme Court used in *Asay*, it is certainly not retroactive under the narrower federal test for retroactivity of *Teague*. *See Asay*, 210 So. 3d at 15 (describing *Witt* as "more expansive" than *Teague* citing *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005)).

The Eleventh Circuit held that *Hurst* is not retroactive under federal law. *Lambrix v. Sec'y, Fla. Dept. of Corr*., 851 F.3d 1158, 1165, n.2 (2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review" citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)), *cert. denied, Lambrix v. Jones*, 138 S. Ct. 217 (2017); *Lambrix v. Sec'y, Fla. Dept. of Corr*., 872 F.3d 1170, 1182-83 (11th Cir.) (concluding this Court's holding in *Asay* to be "fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro*"), *cert. denied, Lambrix v. Jones*, 138 S. Ct. 312 (2017). *Hurst v. State* is not retroactive under

federal law according to both the United States Supreme Court and the Eleventh Circuit.

Valentine argues that *Hurst v. State* violates retroactivity standards in determining the changes to Florida's capital punishment to be partially retroactive. However, the United States Supreme Court has repeatedly held that certain matters are not retroactive, including in the capital context and including *Ring* itself, which was a Sixth Amendment right-to-a-jury-trial case. *Schriro v. Summerlin*, 542 U.S. 348 (2004). In fact, the United States Supreme Court, itself, has given partial retroactive effect to a change to the penal law. *United States v. Abney*, 812 F.3d 1079, 1098 (D.C. 2016) ("Prior to its decision in *Dorsey*, the Supreme Court 'never held any change in a criminal penalty to be partially retroactive' "). In *Dorsey v. United States*, 567 U.S. 260 (2012), the court held the *Fair Sentencing Act* to be partially retroactive to those offenders who committed offenses prior to the effective date of the act but were sentenced after that date.

Valentine argues that this Court created a new substantive rule in *Hurst v. State*. However, the new *Hurst* rule is procedural. The Supreme Court of the United States found, in *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016), that a change in the law was a substantive, rather than procedural, change when it altered the class of people or range of conduct affected by the law.

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id*., at 351–352, 124 S.Ct. 2519 (citation omitted); *see Montgomery*, supra, at ——–, 136 S.Ct., at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." Schriro, 542 U.S., at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." Ibid. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Id., at 352, 124 S.Ct. 2519.

Welch v. United States, 136 S. Ct. 1257, 1264-65 (2016). The *Welch* court decided that the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), "changed the substantive reach of the Armed Career Criminal Act". *Welch*, 136 S. Ct. at 1265. In explaining how the rule in *Johnson* was not procedural, the *Welch* court stated, "[i]t did not, for example, 'allocate decision making authority' between judge and jury, *ibid.*, or regulate the evidence that the court could consider in making its decision". Here, the new *Hurst* rule allocated the decision-making authority, to determine aggravators, from the judge to the jury, which is the precise example of how the *Welch* court defined a procedural change. There can be no doubt that the *Hurst* rule is a procedural rule.

Nevertheless, Valentine claims that *Hurst v. State* should be retroactive

because the decision addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right. However, Florida law has required that the State prove the aggravating circumstances at the beyond-a-reasonable- doubt standard of proof for decades. *Williams v. State*, 37 So. 3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So. 2d 270, 286 (Fla. 2004)); *Diaz v. State*, 132 So. 3d 93, 117 (Fla. 2013) (explaining that mitigating factors be established by the greater weight of the evidence citing *Mansfield v. State*, 758 So. 2d 636, 646 (Fla. 2000)). And the standard jury instructions for capital cases informs the jury that the standard of proof for aggravators is beyond a reasonable doubt. The "retroactivity" of the beyond a reasonable doubt standard of proof is a non-issue in this case (and other Florida capital cases as well).

The United States Supreme Court has held that, in general, a state court's retroactivity determinations are a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008). State courts may fashion their own retroactivity tests including partial retroactivity tests. A state supreme court is welcome to employ a partial retroactivity approach without violating the federal constitution under *Danforth*. The state retroactivity doctrine employed by this Court

did not violate federal retroactivity standards. This Court's expansion in *Hurst v. State* is only applicable to defendants in Florida, and, consequently, subject to retroactivity analysis under *Witt v. State,* 387 So. 2d 922 (Fla. 1980). This Court has characterized the violation of the right-to-a-jury-trial as procedural, not substantive. *State v. Fleming*, 61 So. 3d 399, 403 (Fla. 2011) (characterizing this Court holding in *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005), that *Apprendi* was not retroactive as having "analyzed *Apprendi* under the *Witt* factors and concluded that the new *Apprendi* rule of procedure did not apply retroactively") (emphasis added). Under *Witt*, this Court found retroactive application applies to those death sentences which were made final after the United States Supreme Court's decision in *Ring*. *Hurst v. State* Consistent with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring, Hurst v. Florida* is not retroactive under federal law. *Hurst v. State* is retroactive under state law only.

Valentine argues that the failure to employ a full retroactive application of *Hurst v. State* means that the death sentence is being imposed in a capricious and arbitrary manner. Essentially, the argument is that there is no meaningful distinction based on the culpability and severity of offense; rather, it is based on the mere date *Ring* was issued. However, Valentine disregards the fact that all of the offenders on death row were placed there after a determination of guilt, through plea or trial, of first-degree murder, beyond a reasonable doubt; therefore, each and every one of the

offenders was found culpable for the most severe of all criminal offenses. Because the constitutional constructs of the past permitted the judge to make the final determination that an aggravator was found beyond a reasonable doubt does not invalidate that finding, thus qualifying the offender to be punished by death. This Court's retroactive application of *Hurst v. Florida* did not create a capital punishment scheme that is arbitrary and capricious. Rather, it has systematically afforded the class of offenders whose capital conviction was not final prior to the new constitutional rule born in *Ring*, to be resentenced in accordance with *Ring/Hurst v. Florida*. Because Valentine's sentence was final when *Ring* issued, he was not entitled to a resentencing under either a state or federal retroactivity analysis.

Further, it is clear that there is no underlying constitutional error in Valentine's case.[1] The unanimous verdict by Valentine's jury establishing his guilt

[1] Significantly, the United States Supreme Court's recent decision in *Jenkins v. Hutton*, 582 U.S. ___, 137 S. Ct. 1769 (2017), confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, the Court reversed and reinstated the death sentence. Like Florida, a single aggravating factor under Ohio law is sufficient to render a capital defendant death eligible. Because the requisite aggravators were established during the guilt phase, Jenkins entered the penalty phase with eligibility for a death sentence firmly established beyond a reasonable doubt. The US Supreme Court concluded that the federal habeas court erred in concluding that inadequate factual findings invalidated his death sentence.

of contemporaneous kidnappings was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point. *See Alleyne v. United States*, 570 U.S. 99, 115-16 (2013) (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."); *Waldrop v. Comm'r, Alabama Dep't of Corr*., 711 Fed. Appx. 900, 923 (11th Cir. Sept. 26, 2017) (unpublished) (In rejecting a *Hurst* claim the Court explained: "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. *See* § 13A-5-45(e)."); *Lowenfield v. Phelps*, 484 U. S. 231, 244-45 (1988) ("The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase").

Just as in *Hitchcock*, Valentine raises various constitutional provisions to argue that *Hurst v. State* should be retroactively applied to him. However, just as in *Asay*, as reaffirmed by *Hitchcock*, *Hurst v. State* does not apply retroactively to Valentine's sentence. This case became final on October 6, 1997, which is prior to

the June 24, 2002, decision in *Ring*. As such, *Hurst v. State* is not retroactive to this case.

Finally, although *Hurst* is clearly not retroactively applicable to Valentine's case, even if it were, this Court should still deny relief on this claim because any alleged *Hurst* error would be harmless given Valentine's waiver of a jury's sentencing recommendation. *See Robertson v. State*, 2016 WL 7043020 at *1 (Fla. Dec. 1, 2016) (stating that *Hurst* did not apply to Robertson because "[w]e have previously held that a defendant who has waived the right to a penalty-phase jury, such as Robertson, is not entitled to relief under *Hurst*."); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016) (holding that Brant was not entitled to postconviction relief under *Hurst* because Brant waived his right to a penalty-phase jury); *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016) (concluding that *Hurst* did not apply to Mullens, because a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence.")

In order to be harmless error, there must be no reasonable possibility that the *Hurst* error contributed to Valentine's death sentence. In *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), this Court rejected a *Hurst* claim in a case where the defendant waived his penalty phase jury. *Id*. at 38. The court stated that, regardless of the exact scope and nature of the rights established in *Hurst*, the defendant was entitled to no

relief because he waived the penalty phase jury. *Mullens*, 197 So. 3d at 38. This Court acknowledged that the United States Supreme Court in *Hurst* "said nothing" about waiving the rights established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). Yet, the United States Supreme Court, in the non-capital context, has stated that "nothing prevents a defendant from waiving his *Apprendi* rights" and that even "a defendant who stands trial may consent to judicial factfinding as to sentence enhancements." *Id*. at 38 (quoting *Blakely v. Washington*, 542 U.S. 296, 310 (2004)). Therefore, this Court ultimately held that "Mullens cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Id*. at 40.

However, Valentine contends that his waiver of a sentencing jury in his case was not valid, because he could not waive a right that did not exist at the time he waived the jury.[2] In support of his contention, Valentine cites to *Halbert v. Michigan*, 545 U.S. 605, 623 (2005) (holding that Halbert could not knowingly waive his right to court-appointed counsel, when the right to court-appointed counsel did not exist

[2] Valentine also makes an argument against harmless error based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). However, Valentine's waiver of a penalty phase jury meant that there was no jury to instruct. As such, *Caldwell* has no relevant, precedential value in this case.

at the time Halbert tendered his *nolo contendere* plea). However, this argument is flawed and should be rejected by this Court.

Valentine's argument is premised on the notion that the "right" announced in *Hurst* is one that did not previously exist, as in *Halbert*. However, that is not the case because Valentine always possessed the right to have a jury render an advisory recommendation as to what the appropriate sentence should be in his case. *See* § 921.141(2), Fla. Stat. (1980) (requiring the jury to render an advisory sentence based upon whether sufficient aggravating circumstances exist to justify imposition of the death penalty). Thus, the right announced in *Hurst* was not a new right that did not previously exist. *Hutchinson v. State*, 243 So. 3d 880 (Fla. 2018) (reaffirming that *Hurst* relief is not available for defendants who waive a penalty phase jury and rejecting claim of entitlement pursuant to the reasoning in *Halbert*). Instead, *Hurst* reflected a mere change in procedure, and held that a defendant could not be sentenced to death based upon a judge's factfinding alone. *See Hurst*, 136 S. Ct. at 624 (holding Florida's death sentencing scheme unconstitutional, because it allowed the judge alone to find the existence of an aggravating circumstance). Accordingly, Valentine's argument that he could not waive a right that did not exist is without merit, because Valentine always possessed the right to a sentencing jury.

Moreover, subsequent changes in the law do not render a prior waiver invalid. As the United States Supreme Court has explained, a defendant who waives a

proceeding or right does so under the current law, and those waivers remain valid regardless of later developments in the law. In *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), the defendant argued that his plea was involuntary when a new decision regarding coerced confessions was issued by the United States Supreme Court. The United States Supreme Court rejected the argument that subsequent changes in the law rendered an earlier plea involuntary. The Supreme Court explained that when a defendant waives his right to a jury trial "he does so under the law then existing." *Id*. at 774. The Court observed that, regardless of whether a defendant might have "pleaded differently" had the later decided cases been the law at the time of the plea, "he is bound by his plea." *Id*. The Court noted the damage that would be wrought on the finality of pleas if courts permitted later changes in the law to be a basis for claiming a plea was involuntary. *See also Brady v. United States*, 397 U.S. 742, 757 (1970) (rejecting an argument that the plea was involuntary because it was based in part on a statute that was declared unconstitutional years later because the fact the defendant did not anticipate a change in the law "does not impugn the truth or reliability of his plea"); *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (stating that "the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension

under which a defendant might labor" including a defendant's failure "to anticipate a change in the law regarding relevant punishments").

Here, Valentine waived the right to a sentencing jury and requested that the trial judge decide the appropriate sentence in his case. Like the situation in *Mullens*, Valentine should not be able to subvert the right to jury factfinding by knowingly waiving that right and then, over fifteen years later, complain that subsequent developments in the law have undermined his sentence. Accordingly, this Court should affirm the postconviction court's decision.

CONCLUSION

Based on the foregoing, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order summarily denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Marie-Louise Samuels Parmer, Samuels Parmer Law Firm, P.A., Post Office Box 18988, Tampa, Florida 33679, **marie@samuelsparmerlaw.com**.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa Martin
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