

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-1102**

TERENCE G. VALENTINE

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Valentine's successive motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Mr. Valentine waived his right to a penalty phase jury and was sentenced to death in violation of the Sixth and Eighth Amendments. The United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), held that the Sixth Amendment "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S. Ct. at 621, and further that Florida law and the Eighth Amendment require a unanimous jury verdict prior to sentencing an individual to death. The issues in this case are whether: (1) whether this Court will deny relief to Mr. Valentine who unknowingly waived his Sixth and Eighth Amendment rights to jury fact-finding and a unanimous jury verdict as to death; and (2) whether such a holding contravenes federal constitutional law.

CITATIONS

Citations shall be as follows: The record on appeal from Mr. Valentine's trial proceedings shall be referred to as "TR1" or "TR2" followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal

for the successive postconviction motion is comprised of one volume and shall be referred to as “R” followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Valentine respectfully requests that this Honorable Court permit oral argument.

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STATEMENT OF THE CASE

I. Trial Court Proceedings

The State of Florida charged Mr. Valentine by indictment on September 21, 1988 with Count One, Burglary-Armed, F.S. 810.02, a first degree felony; Count Two, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Three, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Four, Grand theft-Second Degree, F.S. 812.014 (2)(B), a second degree felony; Count Five, First Degree Murder, F.S. 782.04, a capital felony; and Count Six, Attempted Murder-First Degree, F.S. 782.04 and F.S. 777.04, a first degree felony.

Mr. Valentine's first trial resulted in a mistrial where the jury was unable to reach a verdict. After a second trial, Mr. Valentine, who has consistently maintained his innocence of these crimes and presented evidence that he was in Costa Rica at the time of the crimes, was convicted on all counts. The jury recommended death on the first-degree murder charge and the judge imposed a sentence of death. The Florida Supreme Court reversed the conviction and vacated the sentence due to the State's improper use of peremptory challenges pursuant to *State v. Neil*, 457 So.2d 481 (Fla. 1984). *Valentine v. State*, 616 So.2d 971 (Fla. 1993).

On retrial, Mr. Valentine was again convicted on all counts. Mr. Valentine then waived his right to a non-unanimous, advisory jury sentence and presented

mitigating evidence directly to the judge. The trial court sentenced Mr. Valentine to death on September 30, 1994.

Mr. Valentine timely appealed. Mr. Valentine raised the following claims on direct appeal arguing that the trial court erred by (1) finding that the husband and wife privilege did not bar Romero's testimony about Porche's murder; (2) denying Valentine's motion to suppress post-arrest statements that Valentine had made to the police; (3) denying Valentine's motion to strike testimony by the state's footprint expert on the ground that the testimony was too speculative; (4) declining Valentine's motion to appoint a jury selection expert; (5) not allowing Valentine to have the concluding argument before the jury even though Valentine had presented alibi witnesses during his defense; (6) giving the jury the standard jury instruction on reasonable doubt; (7) convicting Valentine of attempted first-degree murder because the conviction could rest on attempted felony murder, which is a nonexistent offense; (8) finding the murder to have been cold, calculated, and premeditated; and (9) failing to find several mitigators. This Court denied all claims except this Court reversed the conviction for attempted first-degree murder and vacated that sentence. However, this Court still affirmed the remaining convictions and sentences, including the sentence of death. *Valentine v. State*, 688 So.2d 313 (Fla. 1996), cert. denied, 522 U.S. 830, 118 S.Ct. 95, 139 L. Ed. 2d 51 (1997). Mr. Valentine's case became final in 1997 upon the denial of certiorari.

Mr. Valentine timely pursued his rights to collaterally challenge his convictions and sentence of death. Mr. Valentine filed a motion for post-conviction relief. The motion was amended several times. In his final amended motion, Mr. Valentine raised the following claims: (1) his conviction could not be sustained because the alleged name of the victim was “Livia Porche” and the only proof offered showed that the victim's name was “Livia Maria Romero”; (2) the trial court erred by denying his motion to sever all counts in the indictment relating to Ferdinand Porche; (3) the trial court erred in allowing the introduction of inculpatory recorded communications that were deliberately elicited from Valentine after he had been indicted; (4) “fruit of the poisonous tree” should not have been introduced at trial because it resulted from Valentine's illegal arrest; (5) law enforcement failed to advise the Costa Rican consulate of Valentine's arrest and also failed to advise Valentine of his rights to contact the consulate under the Vienna Convention on Consular Relations; (6) he was denied a fair trial due to prosecutorial misconduct during closing argument which rendered the guilty verdicts fundamentally unfair and unreliable; (7) he was improperly convicted of grand theft because the property that was allegedly stolen was a marital asset acquired during Valentine's marriage to Romero; (8) he was improperly sentenced to death because his vacated conviction for attempted murder was the sole support for the prior violent felony aggravator found by the sentencing court; (9) the trial court erred in failing to file written reasons

for its departure from the sentencing guidelines; (10) the prosecutor directed an illegal search of Mr. Valentine's jail cell and improperly seized Mr. Valentine's personal papers; (11) that, as explained in fifteen subclaims, he was denied effective assistance of counsel; (12) he was denied effective assistance of counsel by penalty phase counsel's failure to investigate and uncover mental health mitigation and by penalty phase counsel's failure to otherwise prepare for the penalty phase of the trial; (13) he was deprived of a fair trial due to cumulative procedural and substantive error; (14) his right to be free from cruel and unusual punishment will be violated because he may not be competent at the time of his execution. *Valentine v. State*, 98 So. 3d 44, 50 (Fla. 2012). Mr. Valentine timely filed a petition for writ of certiorari which was denied on October 6, 1997. *Valentine v. Florida*, 522 U.S. 830 (1997).

On appeal from the denial of his post-conviction motion, Valentine raised the following claims: (A) counsel was ineffective for failing to object or otherwise prevent Livia Valentine nee Romero from being referred to or portrayed as divorced from Valentine and married to Ferdinand Porche; (B) counsel was ineffective for failing to adequately investigate and uncover mental health mitigation; and (C) the postconviction court erred in summarily denying three ineffective assistance of counsel claims. *Valentine v. State*, 98 So. 3d 44, 51 (Fla. 2012). This Court denied all his claims. *Id.*

Mr. Valentine timely filed a petition for writ of habeas corpus with the federal district court. That case is stayed pending exhaustion of Mr. Valentine's *Hurst* remedies. *Valentine v. Secretary, Dept. of Corr.*, 8:13-cv-30-T-23TBM.

On Dec. 21, 2017, Mr. Valentine timely filed a successive motion to vacate his convictions and sentences pursuant to Fla. R. Crim. Pro. 3.851. Based on the new Florida law arising from *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017), and the enactment of Chapter 2017-1, Valentine filed his successive motion to vacate and presents his claims for relief arising from the resulting new Florida law. On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. The decision declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's first effort to rewrite Fla. Stat. § 921.141 in attempt to cure the constitutional deficiencies.

On October 14, 2016, this Court issued its decision in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, this Court concluded that the Sixth and the Eighth Amendments required a unanimous jury verdict recommending a death sentence before one could be imposed. As this Court explained in *Hurst*, "Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a

defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses." *Hurst v. State*, 202 So. 3d 40, 72 (Fla. 2016) (internal citations omitted). Accordingly, the jury must unanimously find that sufficient aggravators exist to justify a death sentence and that the aggravators outweigh the mitigating factors present in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful, even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst*, 202 So. 3d at 59 ("the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.") See also *Hurst*, 202 So.3d at 62, n. 18.

On December 22, 2016, this Court decided *Mosley*. After conducting a *Witt* and *James* analysis, this Court decided that *Mosley* was entitled to the retroactive effect of *Hurst* and the error was not harmless. Therefore, *Mosley's* death sentence was vacated and he was entitled to a new penalty phase. 209 So. 3d at 1284.

On March 13, 2017, Chapter 2017-1 was enacted, which finally created a constitutional capital sentencing scheme in Florida. Florida law further evolved on June 15, 2017 when this Court issued *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017). Bevel’s conviction became final after *Ring v. Arizona*, 536 U.S. 884 (2002), therefore Bevel was entitled to retroactive Hurst relief. *Id.* at 1175. Further, *Bevel* acknowledges that *Hurst* has affected the prejudice analysis of *Strickland* claims. See *id.* at 1179. Although Bevel’s jury recommendation was unanimous, his death sentence was vacated because the “unpresented evidence of substantial mitigation” could have swayed one juror, which “would have made a critical difference.” *Id.*

Valentine’s successive motion was filed within one year of the issuance of *Mosley*, *Bevel* and the enactment of Chapter 2017-1, all of which have established new Florida law. The claims below could not have been raised previously because these claims arise from changes in Florida law caused by these opinions and the statutory amendment. These claims were not ripe until now because their basis did not exist before these changes in Florida law. Further, Fla. R./Crim. Pro. 3.851(2)(C) provides for the filing of a motion when the Defendant alleges that prior “post-conviction counsel, through neglect, failed to file the motion.”

As to Mr. Valentine’s claim alleging a violation of the corpus delicti rule, and the failure of the State to have the allegata meet the probata, prior counsel failed to file a motion on Mr. Valentine’s behalf alleging such a claim and, further, because

the State failed to establish the essential elements of the crimes of which Mr. Valentine was convicted, a manifest injustice would occur should he be precluded from filing his Motion. Accordingly, Valentine's motion was timely. (R., p. 148-182).

The State filed a response on January 10, 2018. (R., p. 228 - 250). A case management conference was held on February 8, 2018. (R. p. 292-308). The lower court denied Valentine's motion on April 20, 2018. (R., p. 271-79). Valentine filed a timely motion for rehearing on May 7, 2018, which was denied on June 4, 2018. (R., p. 288). This appeal follows.

STANDARD OF REVIEW

The standard of review is *de novo*. See *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). The lower court's rulings are reviewed *de novo* and deference is given to factual findings supported by competent and substantial evidence. See *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF ARGUMENT

ARGUMENT I: The State failed to prove the elements of the crimes as the allegata did not meet the probata. This failure rises to fundamental error and a manifest injustice. This Court should dismiss and set aside Mr. Valentine's sentences and convictions.

ARGUMENT II: Mr. Valentine did not validly waive his Sixth and Eighth

Amendment rights to a unanimous penalty phase jury verdict and jury fact finding and is entitled to a new constitutional penalty phase despite this Court's precedent in *Mullens*. Valentine could not waive a right that was unconstitutionally withheld from him and had not been acknowledged by this Court at the time of Valentine's waiver, or, at the time *Mullens* was decided. On its face, such a waiver could never be knowing, voluntary and intelligent under federal law and nor could *Mullens* preclude relief. Further, this Court's retroactivity analysis violates the Federal Constitution and Valentine submits that he is entitled to *Hurst* review and relief.

CLAIM I

MR. VALENTINE'S CONVICTIONS FOR GRAND THEFT AUTO, BURGLARY AND KIDNAPPING CANNOT STAND AS THE STATE FAILED TO PROVE THE CRIME AS THE ALLEGATA DID NOT MEET THE PROBATA. AS THIS WAS FUNDAMENTAL ERROR THIS CLAIM MAY BE RAISED AT ANY TIME UNDER FLORIDA LAW

In order to sustain a conviction, it is axiomatic that the State must prove each and every element in the indictment, including the identity of the victim. The Due Process Clause protects a defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358 (1970). It is the State, and the State alone who bears this burden of proof. *Mullaney v. Weber*, 421 U.S. 684 (1975). Elements must be charged in the indictment and proven by the State beyond and to the exclusion of a reasonable doubt. *Jones v. United States*, 526 U.S. 227 (1999). *Franki v. State*, 699 So. 2d 1312 (Fla. 1997). The allegata shall fulfill the probata in order to sustain a

lawful conviction. “Regardless of whether evidence is direct or circumstantial, proof of elements of *corpus delicti* must be established beyond a reasonable doubt.” *Freeman v. State* 101 So. 2d 887 (Fla. 2d DCA 1958). “The term ‘*corpus delicti*’ connotes the body of the offense, or, otherwise stated, the substance of the crime. 26 Am.Jur. section 6, p. 159. As applied to homicide cases in the Florida jurisdiction, the *corpus delicti* consists of three essential ingredients: (1) the fact of death, (2) the existence of the criminal agency of another person as the cause of death, and (3) the *identity* of the [victim].” *Id.* at 888 (emphasis added).

Where the indictment in this case alleged the name of the victim to have been “Livia Porche”, and the only proof offered to sustain such allegation showed that her name was “Livia Maria Romero,” a conviction cannot be sustained. “A material variance between the name alleged, and that proved, is fatal. Primarily, it is a question of identity and the essential thing in the requirement of correspondence between the allegation of the name in the indictment and the proof is that the record must be such as to inform the defendant of the charge against him and to protect him against another prosecution for the **same offense**.” *Raulerson v. State*, 358 So. 2d 826, 830 (Fla. 1978) (emphasis added). Mr. Valentine submits that the name of the person, as alleged in the indictment, is an essential element in the legal description of the offense, and the failure to prove it is fatal to a conviction. *Jacobs v. State*, 35 So. 65 (Fla. 1903); *see also, Valentine v. State*, 98 So. 3d 48, n. 2 and 3 (Fla. 2012).

In Mr. Valentine's case, there exists a material variance between the name alleged – Livia Porche - and the fact proved, such that Mr. Valentine was not protected against another prosecution for the same offense.

These errors rose to the level of fundamental error and plain error that affected Mr. Valentine's fundamental rights. *United States v. Bergman*, 852 F.3d 1046 (11th Cir. 2017); *United States v. Cobb*, 842 F.3d 1213 (11th Cir. 2016). Error is plain when it contradicts precedent from the Supreme Court or the reviewing court. *United States v. Cruickshank*, 837 F.3d 1182 (11th Cir. 2016). Fundamental error is not subject to harmless error review. *Ramroop v. State*, 214 So. 3d 657 (Fla. 2017). Mr. Valentine's convictions must be vacated.

The lower court rejected this claim, finding the claim to be “untimely, successive and procedurally barred.” (R., p. 273). The lower court found the claim untimely because “the instant claim does not fall within any of the time limitation exceptions set forth in rule 3.851.” *Id.* at 274. However, this new evidence was only found after numerous Chapter 119 and public records requests so it the State cannot fairly say the claim is untimely. The lower court further found that Mr. Valentine had not demonstrated a “manifest injustice.” *Id.* This was error.

As Mr. Valentine set out in his motion, the State charged Mr. Valentine with burglary, kidnaping, grand theft auto, and attempted murder. On September 21, 1988, the State had or should have known about documents from the medical examiner's

office dated September 14, 1988 which set out the proper legal name and marital status of Livia Valentine nee Romero as being the girlfriend of Mr. Porche. After Mr. Valentine was sentenced, this Court held that the crime of attempted first-degree felony murder does not exist in Florida. *State v. Gray*, 654 So.2d 552 (Fla.1995). This Court held that because “the jury may have relied on this legally unsupportable theory, the conviction for attempted first-degree murder must be reversed. *See Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).” *Valentine v. State*, 688 So. 2d at 317. This Court, however, upheld the convictions for burglary, kidnapping and grand theft auto. Those convictions cannot be sustained because the State failed to correct the false testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972).

The Conviction for Grand Theft Auto Must be Set Aside

The conviction for grand theft auto must fail. Count Four of the Indictment charged that the Defendant did knowingly and unlawfully obtain or use, or endeavor to obtain or use, certain, property of another, to-wit: a Chevy blazer, the property of Livia and Ferdinand Porche. However, the vehicle in question was registered to “Livia Romero” as evidenced by the vehicle application form from the State of Louisiana and the State failed to amend the Indictment to reflect the true ownership of the vehicle. The 1986 Chevy Blazer in question **was not** the property of Livia and Ferdinand Porche as stated in the Indictment. Therefore, the conviction for theft of that vehicle cannot be

sustained. The car alleged to have been stolen in the Indictment was bought and registered in New Orleans, Louisiana (a communal property state) by L.M. Romero.

¹ The Louisiana Civil Code, Art. 2340, Presumption of community, provides: “Things in the possession of a spouse during the existence of a regime of community of assets and gains are presumed to be community, but either spouse may prove that they are separate property. The presumption is strong and a spouse who would rebut it must do so by clear and convincing evidence. *Succ. of Lyons*, 452 So.2d 1161 (La.1984); *Dance v. Dance*, 552 So.2d 658 (La.App. 2d Cir.1989). “ *Johnson v. Johnson*, 582 So. 2d 926, 928 (La. Ct. App. 1991).

Because Louisiana is a community property state, each spouse under La. State Constitution, Art. 2336, Ownership of community property- has a one-half interest in any property purchased or owned by their spouse. La. Const. Art 2369.1 “After termination of community property regime, the provisions governing co-owner apply to former community property, unless otherwise provided by law or judicial act. La. Const Art 2369.2. Thus, each spouse owns one-half interest in former community property and its fruits and products. Mr. Valentine and Livia Romero Valentine married on September 22, 1972. Mr. Valentine legally owned and/or had a one-half interest in the car he was alleged to have stolen.

¹ The VIN (1G8CS18R8[C or G or 6]8117864) of the car was registered to Livia Maria Romero Gutierrez. Counsel is seeking a copy of the VIN and registration of the car and seeks to amend the pleading upon receipt of the documents.

Because Mr. Valentine maintained a legally recognized ownership interest in the 1986 Blazer – granted by the laws of the State of Louisiana and recognized by Fla. Stat. 90.202(2)(laws of sister states) - he cannot be guilty of theft of the car. *Jenkins v. State*, 898 So. 2d 1134 (Fla. 1st DCA 2005); *Brennan v. State*, 651 So. 2d 244, 246 (Fla. 3d DCA 1995), *Hinkle v State*, 355 So. 2d 465, 467 (Fla. 3d DCA 1978). “It is the established law of this state that a co-owner of property cannot be held guilty of [theft] of said property. This is true because the co-owner is in lawful possession of the joint property and cannot be guilty of (1) taking the property (2) of another, two of the essential elements of [theft and grand theft auto]. The only exception to this rule is in the unique situation where an owner takes his own goods from one who has a special property right in them and a legal right to withhold them from the owner. As a general rule, however, one cannot steal his own goods.” *Hinkle*, 355 So. 2d at 467. The State showed no such proof that the purported “owner” of the car had the right to withhold the use of the car from Mr. Valentine.

This Court should set aside Mr. Valentine’s conviction for Grand Theft Auto in Count Four of the Indictment.

The Conviction for Burglary Must be Set Aside

To support a conviction of burglary the State must prove elements of ownership. Ownership of the building or structure is a material element of the crime of burglary. *In re M.E.*, 370 So.2d 795, 796 (Fla.1979). The purposes of the ownership

element are to prove the accused does not own the property and to sufficiently identify the offense to protect the accused from a second prosecution for the **same** offense. *In re M.E.*, 370 So.2d at 796–97.

This Court has held that the ownership element in burglary is **not the same** as ownership in property law. Thus, ownership is a material element of the crime of burglary and the State must prove the ownership consistent with the allegations in the Indictment. To support a conviction for burglary, The State must prove that the victim is the same person as alleged in the Indictment. *Miller v State*, 233 So. 2d 448 (Fla. 1st DCA 1970).

During the course of the trial, Mrs. Valentine was allowed to falsely testify that she divorced Mr. Valentine in Jefferson Parish, Louisiana, then started dating Ferdinand Porche and ultimately married Porche in 1986. (FSC ROA Vol. VII p. 484-485). Although Livia admitted that she was still married to Valentine, (FSC ROA Vol. IX p. 805), during the trial, she also testified falsely that she filed for divorce from Valentine and that she married Porche on December 2, 1986 in Jefferson Parish, Louisiana. (FSC ROA Vol. X p. 956-958). Defense counsel obtained a “Certification” from the deputy Clerk in Jefferson Parish, Louisiana and provided that document to the State prior to trial. The Certificate stated in pertinent part that a diligent search of the records failed to disclose any record, report, statement, data compilation or entry reflecting the commencement or initiation of an action or law

suit to terminate or dissolve the marriage of Mr. Valentine and Mrs. Valentine, nee Livia Romero. Additionally, the Certificate stated that in searching the marriage indices, the clerk did not find a marriage license recorded for Livia and Ferdinand Porche. (FSC ROA Vol. X p. 967-968). Therefore, Livia Valentine's legal name is not as alleged by the State. *Valentine*, 98 So. 3d 48, n. 2 and 3.

The Kidnapping Conviction Cannot Stand

Count Two of the Indictment charged that Defendant did forcibly, secretly or by threat, confine, abduct or imprison Livia Porche. (FSC ROA Vol. 1 p.32-35). While the Indictment alleged the individual kidnapped was "Livia Porche," Livia Porche does not exist. *Valentine*, 98 So. 3d 48, n. 2 and 3. The indictment charged the offenses to have been committed on Livia Porche, but the testimony given at trial was that the victim was Livia Maria Romero. (FSC ROA Vol. VII p. 464-467). The State misrepresented her legal name 272 times in the trial. There was no valid proof that Livia Romero was known by the surname of Porche as alleged in the indictment.

The name of the person assaulted, as alleged in the indictment, is an essential element in the legal description of the offense, and the failure to prove it is fatal to the conviction. *McFarland v. State*, 154 Ind. 442, 56 N.E. 910; *Regina v. Dent*, 2 Cox, Cr. Cas. 354; *Regina v. Frost*, Dearsly's Crown Cas. 474; *Jackson v. State*, 55 Wis 589, 13 N.W. 448; *English v. State*, 30 Tex. App. 470, 18 S. W. 94; *Perry v. State*, 4 Tex. App. 566; *Davis v. People*, 19 Ill. 74; *Penrod v. People*, 89 Ill. 150; *Hensley v.*

Commonwealth, 1 bush (Ky.) 11, 89 Am. Dec. 604. Because of the failure to prove the surname Porche, as charged in the indictment, the proof fails to sustain the charge as made by such indictment. *Burroughs v. State*, 17 Fla 643 (Fla. 1880).

In a prosecution for kidnaping, a material variance between the allegations and proof is fatal. “Insufficiency of proof, in other words, is legal error.” *Jackson v. Virginia*, 443 U.S. 307 (1979). A variance between the allegations and proof as to the name of the person assaulted raises questions of identity. The name of the person assaulted as alleged in the indictment is an essential element in the legal description of the offense, and the failure to prove it is fatal to a conviction.

In an indictment, the true legal name of the alleged victim is a part of the description of the offense and is required to be correctly given. The indictment in this case did not otherwise identify the alleged victim except by the name of Livia Porche. *Snipes v. State*, 733 So.2d 1000 (Fla. 1999). There having been no other description of the alleged victim in the indictment, the failure to prove the name as stated in the information is fatal to the conviction. *Wharton’s Criminal Procedure*, § 158, p. 212; *Wharton’s Criminal Evidence*, § 94, p. 285; *31 Corpus Juris*, 848, § 465; *State v. Dudley*, 7 Wis. 664; *Luttrell v. State*, 65 Tex Cr. R. 102, 143 S.W. 628; *Gandy v. State*, 27 Neb. 707, 43 N.W. 747, 44 N.W. 108; *State v. English*, 67 Mo. 136; *Irwin v. State*, 117 Ga. 722, 45 S. E. 59; *People v. Hughes*, 41 Cal 234; *United States v. Howard*, 26 Fed. Cas. 388, No. 15103; *State v. Sherrill*, 81 N.C. 550; *Jacob v. State*,

651 So.2d 147 (Fla. 2d DCA 1995). Trial counsel did not challenge this variance in the Indictment; he was ineffective. Although no objection was made at trial this constitutes fundamental error because the guilty verdict could not have been obtained without the assistance of the alleged error. *Boyd v. State*, 200 So. 3d 685 (Fla. 2015).

Here, the conviction must be reversed upon the authority of *Jacobs v. State*, 35 So. 65 (1903) and its progeny. There is no evidence in the record to identify Mrs. Livia Maria Valentine as the person alleged to have been the victim. See *Rose v. State*, 507 So.2d 630 (Fla. 5th DCA 1987) (“An attempted robbery of ...any person is a distinctly different factual event and crime from an attempted robbery of...any other person.”). See also *Lattimore v. State*, 202 So.2d 3 (Fla. 3d DCA 1967). Therefore, the conviction cannot be sustained.

The testimony and evidence presented during Mr. Valentine’s trial clearly indicated that the person allegedly confined, abducted or imprisoned was not Livia Porche as stated in the Indictment. It is evident on the record, that the conviction for kidnaping cannot be sustained.

Due to the violations of the corpus delecti and ineffective assistance of counsel, this Court must set aside Defendant’s judgment of conviction and sentence for grand theft auto, burglary and kidnapping.

CLAIM II

MR. VALENTINE COULD NOT KNOWINGLY HAVE WAIVED HIS RIGHTS TO A UNANIMOUS JURY VERDICT BECAUSE THAT RIGHT DID NOT YET EXIST. THEREFORE, HIS JURY WAIVER WAS NOT

KNOWING AND VOLUNTARY AND WAS OBTAINED IN VIOLATION OF MR. VALENTINE'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATE'S CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION. FURTHER. THIS COURT'S PARTIAL RETROACTIVITY CUTOFF IS UNCONSTITUTIONAL

This Court's rulings – finding that Hurst does not apply to those defendants whose case became final prior to the issuance of *Ring*, and who waived an advisory jury – cannot be reconciled with federal constitutional law. While Mr. Valentine recognizes that to some degree this Court's precedent precludes relief, Mr. Valentine argues that these rulings violate his federal constitutional rights or have not been squarely addressed by this Court.

The lower court rejected these arguments finding that this Court has “repeatedly held that *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to case that were final before *Ring* was decided.” (R., p. 276) (citing *Mullens v. State*, 197 So. 3d 16 (Fla. 2016)). The lower court further determined that in *Mullens*, this 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.’” (R. p. 278). While the lower court's ruling is consistent with this Court's precedent, Mr. Valentine respectfully argues that this Court's rulings violate Mr. Valentine's Fifth, Sixth, Eighth and Fourteenth Amendment rights and results in the arbitrary and capricious imposition and application of the death penalty

in violation of the federal Constitution.

Mr. Valentine makes the following arguments. 1) This Court should not deny Mr. Valentine's motion based on *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), because Mr. Valentine could not waive a right not yet recognized by the courts. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Management Health Systems, Inc. v. Access Therapies, Inc.*, No. 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) ("It is axiomatic that a party cannot waive a right that it does not yet have.") *Cruz v. Lowe's Home Centers, Inc.*, No. 8:09-cv-1030-T-30MAP, 2009 WL 2180489, at *3 (M.D. Fla. Jul. 21, 2009) (same); *cf. Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not "inevitably waive all antecedent constitutional violations" and a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established"). And, 2) this Court's finding of partial retroactivity violates Mr. Valentine's Eighth and Fourteenth Amendment rights.

The United States Supreme Court has long held that a valid waiver of a constitutional right must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Halbert*, the Court held that where the appellate court considers the merits of the claim in ruling a motion for leave to appeal, a defendant has a constitutional right to appointed counsel in filing the motion for leave to appeal. 545 U.S. at 618-19. Michigan argued that even if the defendant had a constitutional right to appointed counsel he had

waived that right when he pled *nolo contendere*. *Id.* at 623. The Court found, however, that the defendant did not waive his right to counsel because he “had no recognized right to appointed appellate counsel he could elect to forgo.” *Id.* Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) (plurality opinion of Black, J.).

The holding of *Mullens* is also contrary to *Johnson, Halbert* and the federal constitution. *Mullens* holds that there is no *Hurst* error where the defendant waived a jury recommendation at sentencing. *Mullens*, 197 So. 3d at 39. But this Court has failed to articulate a convincing rationale for its holding, relying on essentially a harmless error analysis that cannot be squared with *Smith v. Yeager*, 393 U.S. 122, 126 (1968), where the Court observed that a reviewing court cannot “examine the state of [] mind, or presume” an intentional relinquishment of a known right or privilege. *Id.* Prior to *Hurst*, however, a Florida defendant could not have knowingly waived *Hurst*-required jury factfinding because that right was not yet recognized by the courts. The pre-*Hurst* defendant could only waive the right to a jury recommendation of life or death.

This Court also erroneously relied on other state court cases which did not actually address the waiver of sentencing rights. By way of example, this Court cited *State v. Murdaugh*, 97 P.3d 844 (Ariz. 2004) but that case held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), do not invalidate an earlier guilty plea. *Id.* at 854. This Court also relied on *Moore v. State*, 771 N.E. 2d 46 (Ind. 2002), but that case was not

about the effect of a purported waiver after recognition of a new sentencing right – rather, it erroneously concluded that the rights provided by *Apprendi* did not apply to Indiana law in effect at the time the defendant pleaded guilty. But, *Moore* itself was overruled by *Blakely* two years later. See *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005)(applying *Blakely* after guilty plea.)

Other state courts called to address a waiver in the context of *Blakely v. Washington*, 524 U.S. 296 (2004) have held that that a defendant could not have knowingly waived a right to have a jury determination of facts relevant to sentencing enhancement because that right did not exist. *State v. Dittman*, 719 NW. 2d 644, 654 (Minn. 2006); *State v. Franklin*, 878 A.2d 757, 771 (N.J. 2005); *State v. Curtis*, 108 P.3d 1233, 1236 (Wash. App. 2005); *State v. Meynardie*, 616 S.E. 2d 21, 24 (N.C. App. 2005).

At the time of Mr. Valentine’s death sentencing, before *Hurst*, Florida’s unconstitutional capital-sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a death sentence. Mr. Valentine, therefore, waived only the right to a jury recommendation, not to his then-unrecognized Sixth and Eighth Amendment rights to a unanimous jury fact-finding prior to the imposition of a sentence of death. Under the cases cited above, Mr. Valentine could not have waived his right to jury fact-finding or a unanimous jury verdict.

Further, even supposing that this Court’s conclusion that a pre-*Hurst* defendant

could waive *Hurst* relief, Mr. Valentine’s waiver was also not knowing, voluntary, and intelligent, *Mullens*, 197 So. 3d at 39(waiver of jury sentencing must be “knowingly, voluntarily, and intelligently made”); *Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010) (waiver of post-conviction counsel and post-conviction proceedings must be “knowing, intelligent, and voluntary”), because it did not consider the possibility that Florida’s death-sentencing scheme would be found unconstitutional, *see Rodgers v. Jones*, 3:15-cv-507-RH, ECF No. 15 (N.D. Fla. Aug. 24, 2016) (federal district court order noting Defendant’s waiver was pre-*Hurst* and did not address “the possibility that the entire Florida sentencing scheme would be held unconstitutional”). Mr. Valentine only waived his right to a non-unanimous jury recommendation. He was never asked about the implications of his waiver and was instructed that the judge would be the final sentence under Florida law.

Hurst v. Florida was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida’s capital sentencing jurisprudence. The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida’s capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence must be found by a jury beyond a reasonable doubt, pursuant to the capital defendant’s constitutional right to a jury trial. *Hurst*, 136 S. Ct. at 621. *Hurst v. Florida* held that “Florida’s capital sentencing scheme violates the Sixth Amendment” It invalidated Fla. Stat. §§

921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition of a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, the FSC held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst*, 202 So. 3d at 57.

Hurst Should Apply Retroactively to Mr. Valentine

"*Hurst* applies retroactively to defendants whose sentences became final after the United States Supreme Court issued its decision in *Ring*." *Peterson v. State*, 221 So. 3d 571, 585 (Fla. 2017). Valentine's sentence became final on October 6, 1997. Therefore, Valentine falls outside of the category of defendants this Court has

identified as eligible for the retroactive effect of *Hurst*. Valentine, however, is entitled to the retroactive application of *Hurst* under federal law. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state postconviction court to apply it retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016). Further, in capital cases, the Eighth and Fourteenth Amendments impose boundaries on a this Court’s creation and application of such an arbitrary partial retroactivity rule. “[I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). “If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds, Hurst v. Florida*, 136 S.Ct. 616 (2016).

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the Court reiterated that death sentences be reliable and free from arbitrary factors:

The fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special “need for reliability in the determination that death is the appropriate punishment” in any capital case. . . . Although we have acknowledged that “there can be ‘no perfect procedure for deciding in which cases governmental authority should be used to impose death,’ “ we have also made it clear that such decisions cannot be predicated on mere “caprice” or on “factors that are constitutionally impermissible or

totally irrelevant to the sentencing process.”

Id. at 584-85 (internal citations omitted).

This principle is also consistent with the Fourteenth Amendment right to equal protection. “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other,” to a uniquely harsh form of punishment, then equal protection of the laws is violated. *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 541 (1942).

This Court’s partial retroactivity ruling violates both of these precepts, creating an equally culpable class of defendants entitled to relief from an unconstitutional system while denying relief to others whose criminal culpability is indistinguishable or less, such as Mr. Valentine. Anything less than *Hurst* relief for all post-*Ring* defendants leads to disparate treatment among Florida capital defendants in violation of the Equal Protection Clause and the Eighth Amendment.

This Court has granted *Hurst* relief in many cases that were more egregious than Mr. Valentine’s. *See e.g., Cole v. State*, 221 So. 3d 534 (Fla. 2017) (two victims buried alive and seven aggravating factors found); *Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (five men were shot in the head execution style and six aggravating factors found); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (three counts of first-degree murder where one of the victims was a law enforcement officer and five aggravating factors found); *Bradley v. State*, 214 So. 3d 648 (Fla. 2017) (murder of Brevard

County Sheriff's Deputy, Barbara Pill, and five aggravating factors found); *Pasha v. State*, 42 Fla. L. Weekly S569 (Fla. May 11, 2017) (defendant murdered his wife and another victim by cutting their throats and four aggravating factors found); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (defendant was convicted of the kidnapping, robbery, and first degree murder of an 81 year old woman and the jury unanimously found four out of five aggravating factors on a special verdict form); *Davis v. State*, 217 So. 3d 1006 (Fla. 2017) (two counts of first-degree murder, five aggravating factors found for one murder and three for the other); *Snelgrove v. State*, 217 So. 3d 992 (Fla. 2017) (elderly couple brutally beaten and stabbed to death and five aggravating factors found); and *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017) (two counts of first-degree murder and six aggravating factors found). As all of these cases were more aggravated and exhibit facts that are more heinous, the only way to distinguish Valentine's case is that he waived his right to a jury.

However, Valentine's case offers additional considerations that demonstrate his Hurst error was not harmless. In Mr. Valentine's case, the judge applied an improper aggravator (attempted murder) which this court struck. This alone should warrant setting aside Mr. Valentine's sentence of death. *Clemons v. Mississippi*, 494 U.S. 738 (1990). There is no doubt that a properly instructed jury would not have unanimously returned a death recommendation. In the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) must be

correctly instructed as to its sentencing responsibility. Individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry*, 210 So. 3d 630. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *See Caldwell*, 472 U.S. at 341.

It is likely that at least one juror would not join a death recommendation if Valentine was granted a resentencing in front of a jury because the proper *Caldwell* instructions would be required. The probability of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation, and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *See Caldwell*, 472 U.S. at 330 (“In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of

responsibility to an appellate court.”). Where the jurors’ sense of responsibility for a death sentence is not explained or is diminished, a jury’s verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 (“Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”).

Furthermore, society’s evolving standards of decency demand that Valentine be granted *Hurst* relief, as the jury vote has evolved from a bare majority, to ten-to-two, to unanimous. In *Hurst*, this Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury “unanimity in a recommendation of death in order for death to be considered and imposed.” 202 So. 3d at 61. From a review of the capital sentencing laws throughout the United States, this Court in *Hurst* found that a national consensus reflecting society’s evolving standards of decency was apparent:

The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

202 So. 3d at 61. Accordingly, this Court in *Hurst* concluded:

the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

202 So. 3d at 63. *See Hurst*, 202 So. 3d at 73 (Pariente, J., concurring); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016).

A capital defendant's life no longer lies in the hands of a judge or a bare majority; it lies in the hands of twelve individuals. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972)). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase jury has voted unanimously in favor of the imposition of death. The Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This

class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment. Therefore, Valentine must be granted relief and the opportunity to make a constitutional decision regarding his waiver of a constitutional jury sentencing. It is arbitrary that a defendant who was convicted of triple murders with an eleven-to-one vote receives relief, while Valentine is denied the same opportunity. *See Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (“In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State’s contention that any *Ring*- or *Hurst v. Florida*-related error is harmless.” *Id.* “We also reject the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst v. Florida*.” *Id.*). To find that the *Hurst* error was harmless and deny this right to Valentine would be manifest injustice and a violation of his equal protection rights. *See* U.S. Const. amend. XIV.

Conclusion

Mr. Valentine could not have knowingly and intelligently waived a constitutional right that did not yet exist under Florida law but that should have been afforded to him and every capital defendant. Now that unanimous jury fact-finding is required under the Sixth and Eighth Amendment to sentence a defendant to death, the conversations and assessments between counsel and capital defendants, and the decisions that are made, change dramatically. Moreover, the colloquy required by a

court in cases of waivers will also evolve. *Hurst* impacts an attorney's strategy and decision-making advice throughout the trial, and, more importantly, a capital defendant's decision-making about whether to waive a sentencing jury verdict and fact-finding. No longer will the jury's role in determining death-eligibility be advisory and based on a bare majority; the jury must make the ultimate decision of whether the defendant's life will be spared, and any sentence of death must be unanimous. The new constitutional statute changes the harmlessness analysis because the landscape of *voir dire* and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments.

Mr. Valentine never had the constitutional benefit of the option of a penalty phase jury returning a unanimous death verdict premised upon findings of fact. There is no way of knowing what aggravators, if any, a jury unanimously could have found proven beyond a reasonable doubt, if jurors would have unanimously found the aggravators sufficient for death, or if the jurors would have unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Further, each individual juror would be instructed that they individually carried the immense responsibility of whether a death sentence was authorized or a life sentence was

mandated. The jurors would be told that they each were authorized to preclude a death sentence simply to be merciful. These are all important considerations for a conversation regarding waiving a jury. Reviewing courts cannot speculate as to what the findings or vote would be if Mr. Valentine was allowed a constitutional jury sentencing.

Mr. Valentine requests that this Court determine that his waiver was not knowing and voluntary, vacate his sentences of death and order a new constitutional penalty phase proceeding.

Therefore, Valentine must be granted relief and the opportunity to make a constitutional decision regarding his waiver of a constitutional jury sentencing. It is arbitrary that a defendant who was convicted of a triple murder with an eleven-to-one vote receives relief, while is denied the same opportunity. *See Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (“In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State’s contention that any *Ring*- or *Hurst v. Florida*-related error is harmless.” *Id.* “We also reject the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst v. Florida*.” *Id.*). To find that the *Hurst* error was harmless and deny this right to Valentine would be manifest injustice and a violation of his equal protection rights. *See* U.S. Const. amend. XIV.

CONCLUSION

Mr. Valentine respectfully requests that this Court reverse the lower court's rulings, vacate his convictions and sentence of death, or, in the alternative, any other such remedy as justice provides.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Lisa Martin, Lisa.Martin@myfloridalegal.com & cappapp@myfloridalegal.com; on this 12th day of September 17, 2018.

Respectfully submitted,

/s/ Marie-Louise Samuels Parmer

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100.

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