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APPENDIX

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Supreme Court of Florida

No. SC17-711

LENARD JAMES PHILMORE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 25, 2018]

PER CURIAM.

Lenard James Philmore is a prisoner under sentence of death whose sentence became final on October 7, 2002. See Philmore v. State, 820 So. 2d 919 (Fla.), cert. denied, 537 U.S. 895 (2002). The facts underlying Philmore's sentence of death, which was imposed after a jury unanimously recommended death, id. at 925, were fully explained in this Court's opinion on direct appeal. Id. at 923-25. Following the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), and this Court's decision on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), Philmore filed a successive motion for postconviction relief pursuant to Florida Rule of Criminal

Procedure 3.851, arguing that these decisions render his death sentence unconstitutional under both the United States and Florida Constitutions.[1] This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we affirm the postconviction court's order denying relief.

As the postconviction court found, Hurst applies retroactively to Philmore's sentence of death. See Mosley v. State, 209 So. 3d 1248, 1283 (Fla. 2016). In its order below, the postconviction court found "beyond a reasonable doubt that any Hurst error was harmless," stating:

> This was a highly aggravated case, the jury was instructed that the aggravators must be established beyond a reasonable doubt, the evidence supporting the aggravators for prior and contemporaneous violent felony convictions was significant and uncontested, there was no statutory mitigation, the nonstatutory mitigation was minimal, the jury was not required to recommend death if the aggravators outweighed the mitigators, and the jury recommendation was unanimous. And to date, the Florida Supreme Court has not found Hurst error harmful in any unanimous jury cases.

(Citation omitted.) Based on the jury's unanimous recommendation for a sentence of death, coupled with Philmore's confession and the aggravation in this case, we agree with the postconviction court that the Hurst error in Philmore's case is

1. Specifically, Philmore relied on Hurst v. Florida and Hurst to argue in the court below that his death sentence is unconstitutional under the Fifth, Sixth, and Eighth Amendments to the United States Constitution, as well as the corresponding provisions of the Florida Constitution. Philmore's Eighth Amendment claim also includes the assertion that the jury was improperly instructed as to its sentencing responsibility pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985).

harmless beyond a reasonable doubt. See Davis v. State, 207 So. 3d 142, 173-75 (Fla. 2016), cert. denied, 137 S. Ct. 2218 (2017).

As to Philmore's other claims alleging due process and Eighth Amendment violations, we conclude that Philmore is not entitled to relief on these claims because the jury's unanimous recommendation renders any Hurst error harmless beyond a reasonable doubt.

Finally, Philmore is not entitled to relitigate his Batson v. Kentucky, 476 U.S. 79 (1986), claim in light of Hurst, which does not affect the merits of a Batson claim. A Batson claim addresses who sits on the jury while Hurst affects what the jury must do, once empaneled, in order to constitutionally sentence the defendant to death.

Accordingly, we affirm the postconviction court's order denying relief.

It is so ordered.

LABARGA, C.J., and PARIENTE and LEWIS, JJ., concur.
CANADY and POLSTON, JJ., concur in result.
LAWSON, J., concurs specially with an opinion.
QUINCE, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LAWSON, J., concurring specially.

See Okafor v. State, 225 So. 3d 768, 775-76 (Fla. 2017) (Lawson, J., concurring specially).

QUINCE, J., dissenting.

I cannot agree with the majority's finding that the Hurst error was harmless beyond a reasonable doubt. As I have stated in other cases, "[b]ecause Hurst requires 'a jury, not a judge, to find each fact necessary to impose a sentence of death,' the error cannot be harmless where such a factual determination was not made." Hall v. State, 212 So. 3d 1001, 1036-37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (citation omitted) (quoting Hurst v. Florida, 136 S. Ct. 616, 619 (2016)); see also Truehill v. State, 211 So. 3d 930, 961 (Fla. 2017) (Quince, J., concurring in part and dissenting in part). Accordingly, I dissent.

An Appeal from the Circuit Court in and for Martin County,
Elizabeth Ann Metzger, Judge - Case No. 431997CF001672CFAXMX

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, Adriana C. Corso, and Ali A. Shakoor, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

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for Appellee

APPENDIX

B

Filing # 57432069 E-Filed 06/07/2017 01:16:26 PM

Supreme Court of Florida

TUESDAY, JUNE 6, 2017

CASE NO.: SC17-711
Lower Tribunal No(s).:
431997CF001672CFAXMX

LENARD JAMES PHILMORE vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The parties in the above case are directed to file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). Parties may include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument.

Appellant's initial brief, which is not to exceed twenty-five pages, is to be filed by June 26, 2017. Appellee's answer brief, which shall not exceed fifteen pages, shall be filed ten days after filing of appellant's initial brief. Appellant's reply brief, which shall not exceed ten pages, shall be filed five days after filing of Appellee's answer brief.

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Documents

Title	File
Supreme Court Order	2017-711_Order_220260.docx

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APPENDIX

C

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA

STATE OF FLORIDA,

FELONY DIVISION
CASE NO. 431997CF001672A

vs.

LENARD JAMES PHILMORE,

Defendant.
_____/

ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CASE came before the court on the Defendant's motion filed on January 9, 2017; the State's answer filed on January 30, 2017; the State's corrected answer filed on January 31, 2017; and the case management hearing conducted on March 17, 2017, in this capital postconviction case pursuant to Florida Rule of Criminal Procedure 3.851. The court finds and orders as follows.

The Defendant seeks to have his death sentence vacated pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). It is undisputed that the Defendant is entitled to retroactive application of *Hurst* because the Defendant's judgment and sentence became final on October 7, 2002, after the *Ring v. Arizona*, 536 U.S. 583 (2002) opinion was issued on June 24, 2002. *See Mosely v. State*, Nos. SC14-436, SC14-2108, 2016 WL 7406506 (Fla. Dec. 22, 2016).

The Defendant qualifies for resentencing relief unless the *Hurst* error was harmless beyond a reasonable doubt. *See Hurst*, 202 So.3d at 67 (recognizing that a *Hurst* error is capable of harmless error review); and *Hurst v. Florida*, 136 S. Ct. at 624 (remanding to the state court to determine whether the error was harmless). The postconviction court can conduct a harmless error review of the record without the need for an evidentiary hearing.

The Florida Supreme Court has explained the appropriate standard for a harmless error review as follows:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State*, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error

> test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.] DiGuilio*, 491 So.2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate: *26 The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. *DiGuilio*, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.31 *Hurst*, 202 So.3d at 68 (alteration in original).

Mosley v. State, 2016 WL 7406506, at *25–26 (Fla. Dec. 22, 2016). The postconviction court need not address the State's position that the burden in this postconviction harmless error review rests with the Defendant, and not with the State.

Following is a summary of the facts relevant to the imposition of the Defendant's death sentence:

> After a penalty phase in which the State and the defense presented both lay and expert witnesses, the jury recommended a sentence of death by a vote of twelve to zero. The trial court then held a *Spencer* hearing, allowing both sides to present legal arguments and evidence. The trial court found the following five aggravators: (1) defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of a kidnapping; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the capital felony was committed for pecuniary gain; and (5) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). The court found no statutory mitigation, but found the following nonstatutory mitigation: (1) defendant was *926 both the victim and witness of physical and verbal abuse by an alcoholic father (moderate weight); (2) defendant has a history of extensive drug and alcohol abuse (some weight); (3) severe emotional trauma and subsequent posttraumatic stress (moderate weight); (4) defendant was molested or raped, or both, at a young age (some weight); (5) defendant was classified as severely emotionally handicapped (little weight); (6) defendant has exhibited the ability to form close loving relationships

(moderate weight); (7) defendant's cooperation with the State (moderate weight); and (8) defendant has expressed remorse for causing the death of Perron (little weight). The trial court rejected the nonstatutory mitigator that the defendant suffered brain damage at an early age. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court agreed with the jury's recommendation and imposed the death penalty.

Philmore v. State, 820 So. 2d 919, 925–26 (Fla. 2002) (footnotes omitted).

On this record, the court finds beyond a reasonable doubt that any *Hurst* error was harmless. This was a highly aggravated case, the jury was instructed that the aggravators must be established beyond a reasonable doubt, the evidence supporting the aggravators for prior and contemporaneous violent felony convictions was significant and uncontested, there was no statutory mitigation, the nonstatutory mitigation was minimal, the jury was not required to recommend death if the aggravators outweighed the mitigators, and the jury recommendation was unanimous. *See Davis v. State*, 207 So. 3d 142, 173-175 (Fla. 2016). And to date, the Florida Supreme Court has not found *Hurst* error harmful in any unanimous jury cases. Consequently, there is no reasonable possibility that *Hurst* error affected the sentence in this case.

Further, the court incorporates by reference the State's corrected answer and adopts the State's reasoning in finding the remaining claims/sub-claims procedurally barred, purely speculative, and/or beyond the scope of *Hurst* relief. Therefore,

The Defendant's motion is denied.

DONE AND ORDERED in chambers in Stuart, Florida, on March 17, 2017.

ELIZABETH A. METZGER
CHIEF JUDGE

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