

235 So.3d 294  
Supreme Court of Florida.

Kevin Don FOSTER, Appellant,  
v.  
STATE of Florida, Appellee.

No. SC17-1141  
|  
[January 29, 2018]

### Synopsis

**Background:** Motion was filed for post-conviction relief following affirmance of death sentence, 778 So.2d 906. The Circuit Court, Lee County, Joseph Cardwell Fuller, Jr., J., No. 361996CF001362000BCH, denied motion. Movant appealed.

**[Holding:]** The Supreme Court held that Supreme Court's *Hurst*, 136 S.Ct. 616, decision invalidating capital sentencing scheme did not apply retroactively to death sentence that became final in 2001.

Affirmed.

Pariente, J., concurred in result and filed statement.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

**[1] Courts**  In general;retroactive or prospective operation

United States Supreme Court's *Hurst*, 136 S.Ct. 616, decision invalidating capital sentencing scheme as violating Sixth Amendment did not apply retroactively to death sentence that became final in 2001. U.S. Const. Amend. 6.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Lee County, Joseph Cardwell Fuller, Jr., Judge—Case No. 361996CF001362000BCH

### Attorneys and Law Firms

Neal Dupree, Capital Collateral Regional Counsel, Jason Kruszka, Staff Attorney, and Scott Gavin, Assistant Capital Collateral Regional Counsel, Southern Region, Ft. Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Stephen D. Ake, Senior Assistant Attorney General, Tampa, Florida, for Appellee

### Opinion

PER CURIAM.

\*295 We have for review Kevin Don Foster's appeal of the circuit court's order denying Foster's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Foster's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, — U.S. —, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Foster's appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, — U.S. —, 138 S.Ct. 513, — L.Ed.2d — (2017). After this Court decided Hitchcock, Foster responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Foster's response to the order to show cause, as well as the State's arguments in reply, we conclude that Foster is not entitled to relief. Foster was sentenced to death following a jury's recommendation for death by a vote of nine to three, and his sentence of death became final in 2001. Foster v. State, 778 So.2d 906, 912 (Fla. 2000). Thus, Hurst does not apply retroactively to Foster's sentence of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Foster's motion.

The Court having carefully considered all arguments raised by Foster, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, — U.S. —, 138 S.Ct. 513, — L.Ed.2d — (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

### All Citations

235 So.3d 294, 43 Fla. L. Weekly S47