

DOCKET No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LENARD JAMES PHILMORE,

Petitioner

VS.

STATE OF FLORIDA,

Respondent.

**APPLICATION FOR SIXTY (60) DAY EXTENSION OF TIME IN WHICH TO FILE
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA ADDRESSED
TO JUSTICE CLARENCE THOMAS**

ATTACHMENT A

Philmore v. State, NO. SC17-711 (Fla. January 25, 2018)

234 So.3d 567
Supreme Court of Florida.

Lenard James PHILMORE, Appellant,
v.
STATE of Florida, Appellee.

No.

SC17

-

711

[January 25, 2018]

Synopsis

Background: Defendant, whose sentence of death had been affirmed by the Supreme Court, 820 So. 919, filed a successive motion for postconviction relief. The Circuit Court, Martin County, *Elizabeth Ann Metzger, J.*, denied relief. Defendant appealed.

[Holding:] The Supreme Court held that the jury's unanimous recommendation of the death sentence, in addition to defendant's confession and the aggravation in defendant's case, rendered harmless beyond a reasonable doubt any error under *Hurst v. State, 202 So.3d 40*.

Affirmed.

Canady and *Polston, JJ.*, concurred in the result.

Lawson, J., concurred specially and filed opinion.

Quince, J., dissented and filed opinion.

West Headnotes (3)

[1] Sentencing and Punishment

➤ Harmless and reversible error

Jury's unanimous recommendation of the death sentence for defendant convicted of first-degree murder and other offenses, in addition to defendant's confession and the aggravation in defendant's case, rendered

harmless beyond a reasonable doubt any error under *Hurst v. State, 202 So.3d 40*, which interpreted the United States Supreme Court's decision in *Hurst v. Florida, 136 S.Ct. 616*, which held that the Sixth Amendment required a jury, not a judge, to find each fact necessary to impose a death sentence. (Per curiam opinion, with three justices concurring, two justices concurring in the result, and one justice concurring specially.) U.S. Const. Amend. 6.

Cases that cite this headnote

[2] Courts

➤ Construction of federal Constitution, statutes, and treaties

Jury

➤ Peremptory challenges

Jury

➤ Death penalty

Hurst v. State, 202 So.3d 40, which interpreted the United States Supreme Court's decision in *Hurst v. Florida, 136 S.Ct. 616*, which held that the Sixth Amendment required a jury, not a judge, to find each fact necessary to impose a death sentence, does not affect the merits of a *Batson* claim. (Per curiam opinion, with three justices concurring, two justices concurring in the result, and one justice concurring specially.) U.S. Const. Amend. 6.

Cases that cite this headnote

[3] Courts

➤ Construction of federal Constitution, statutes, and treaties

Jury

➤ Peremptory challenges

Jury

➤ Death penalty

A *Batson* claim addresses who sits on the jury while *Hurst v. State, 202 So.3d 40*, which interpreted the United States Supreme Court's decision in *Hurst v. Florida, 136 S.Ct. 616*, affects what the jury must do, once empaneled, in order to constitutionally sentence the defendant to death. (Per curiam

opinion, with three justices concurring, two justices concurring in the result, and one justice concurring specially.) [U.S. Const. Amend. 6](#).

Cases that cite this headnote

***568** An Appeal from the Circuit Court in and for Martin County, [Elizabeth Ann Metzger](#), Judge—Case No. 431997CF001672CFAXMX

Attorneys and Law Firms

[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

[Pamela Jo Bondi](#), Attorney General, Tallahassee, Florida, and [Leslie T. Campbell](#), Assistant Attorney General, West Palm Beach, Florida, for Appellee

Opinion

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, 123 S.Ct. 179, 154 L.Ed.2d 162 (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](#), — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and this Court's 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), 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.

[1] 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 harmless beyond a reasonable doubt. See [Davis v. State](#), 207 So.3d 142, 173-75 (Fla. 2016), cert. denied, — U.S. —, 137 S.Ct. 2218, 198 L.Ed.2d 663 (2017).

As to Philmore's other claims alleging due process and Eighth Amendment violations, we conclude that Philmore is not ***569** entitled to relief on these claims because the jury's unanimous recommendation renders any [Hurst](#) error harmless beyond a reasonable doubt.

[2] [3] Finally, Philmore is not entitled to relitigate his [Batson v. Kentucky](#), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (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.

[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](#), — U.S. —, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (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.

All Citations

234 So.3d 567, 43 Fla. L. Weekly S33

Footnotes

- 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, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).