

No. 17-7171

IN THE
Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

*On Petition for a Writ of Certiorari to the
Supreme Court of Florida*

PETITIONER'S SUPPLEMENTAL BRIEF

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
billy_nolas@fd.org

The purpose of this supplemental brief is to notify the Court of a recent development regarding an issue discussed in Respondent's brief in opposition and Petitioner's reply brief.

Respondent's brief noted that, in addition to seeking *Hurst v. Florida*, 136 S. Ct. 616 (2016), relief by filing a state habeas petition directly in the Florida Supreme Court, resulting in the decision below, Petitioner also sought *Hurst* relief by filing a post-conviction motion in the state trial court. At the time of Respondent's brief, Petitioner's appeal from the trial court's denial of the separate *Hurst* post-conviction motion was pending in the Florida Supreme Court. Respondent argued that this Court should not grant a writ of certiorari to review the decision below in this case while the separate state appeal was ongoing. *See* Brief in Opposition at 1-2 n.1.

In reply, Petitioner explained that the separate appeal was not a reason to deny a writ of certiorari in this case because the Florida Supreme Court would undoubtedly deny *Hurst* relief again in the separate appeal based on a law-of-the-case analysis and/or by simply re-applying its per se harmless-error rule. The question presented in this petition should be addressed now, Petitioner maintained, to stop the Florida Supreme Court from applying its unconstitutional harmless-error rule in more capital cases. *See* Petitioner's Reply at 4 n.4.

The separate state *Hurst* appeal is no longer an issue. On March 8, 2018, the Florida Supreme Court, as Petitioner predicted, affirmed the denial of *Hurst* relief. The state court's opinion is attached to this brief, and is also available at *Guardado v. State*, No. SC17-1903, 2018 WL 1193196 (Fla. Mar. 8, 2016).

Respectfully submitted,

/s/ Billy H. Nolas

BILLY H. NOLAS

Counsel of Record

SEAN T. GUNN

Office of the Federal Public Defender

Northern District of Florida

Capital Habeas Unit

227 North Bronough St., Suite 4200

Tallahassee, FL 32301-1300

(850) 942-8818

billy_nolas@fd.org

MARCH 2018

Supreme Court of Florida

No. SC17-1903

JESSE GUARDADO,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 8, 2018]

PER CURIAM.

This case is before the Court on appeal from an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE CASE AND FACTS

The underlying facts of this case were described in this Court's opinion on direct appeal. *Guardado v. State*, 965 So. 2d 108, 110-12 (Fla. 2007). This Court affirmed Guardado's convictions and sentence of death. *Id.* at 120. This Court also affirmed the denial of Guardado's initial postconviction motion. *Guardado v. State*, 176 So. 3d 886 (Fla. 2015).

In 2017, Guardado filed a motion for postconviction relief arguing that he was entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). That motion was continued to give Guardado an opportunity to proceed in this Court with a habeas petition. Guardado filed a petition for a writ of habeas corpus arguing that he was entitled to relief pursuant to both *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). This Court held:

We agree with Guardado that *Hurst* is applicable in his case. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). However, because we find that the *Hurst* error in this case is harmless beyond a reasonable doubt, we deny Guardado's petition. As we stated in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016):

[T]he jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. . . . The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death.

Accordingly, the *Hurst* violation in this case is harmless beyond a reasonable doubt and, as in *Davis*, does not entitle Guardado to relief.

Guardado v. Jones, 226 So. 3d 213, 215 (Fla. 2017).

Subsequently, the circuit court returned to its consideration of Guardado's successive motion for postconviction relief and summarily denied Guardado's motion, stating:

The current state of the law indicates *Hurst* would apply to the defendant's case. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). However, the law is also clear the defendant is not entitled to a new

penalty phase based on a harmless error analysis. *See Davis v. State*, 207 So. 3d 142 (Fla. 2016). Indeed, this court is bound by the decision of the Supreme Court of Florida determining any *Hurst* error in the instant case is harmless beyond a reasonable doubt. *Guardado v. [Jones]*, No. SC17-389, 2017 WL 1954984 (Fla. May 11, 2017) (denying the defendant's petition for a writ of habeas corpus); *Guardado v. [Jones]*, No. SC17-389, 2017 WL 4150352 (Fla. Sept. 19, 2017) (denying the defendant's motion for rehearing). Therefore, the defendant is not entitled to relief under *Hurst*. As a result, the instant motion is denied.

Guardado v. State, No. 2004-CF-000903, order at 2-3 (Fla. 1st. Cir. Sept. 27, 2017).

Guardado filed the instant appeal. On October 31, 2017, this Court issued an order to show cause why the lower court's order should not be affirmed.

DISCUSSION

Guardado's argument here is nearly identical to that contained in his petition for a writ of habeas corpus filed in this Court on March 8, 2017, which this Court denied in *Guardado v. Jones*, 226 So. 3d at 215. The proceedings below originated on July 5, 2016, but were continued to permit Guardado to seek *Hurst* relief from this Court via his habeas proceedings. After this Court denied Guardado's habeas petition, the postconviction proceedings resumed and the circuit court denied Guardado's motion. Order at 1.

The circuit court correctly concluded that this Court has addressed Guardado's claims. Guardado's arguments in the present appeal are indistinguishable from those contained in his habeas petition.

Further, we have considered and rejected Guardado's claim that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), affect this Court's harmless error analysis in *Hurst*. See, e.g., *Franklin v. State*, 43 Fla. L. Weekly S86 (Fla. Feb. 15, 2018); *Truehill v. State*, 211 So. 3d 930 (Fla. 2017); *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017).

Because Guardado's claims have been previously rejected, we affirm the circuit court's summary denial of Guardado's successive motion for postconviction relief.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and LAWSON, JJ., concur.

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

An Appeal from the Circuit Court in and for Walton County,
Kelvin C. Wells, Judge - Case No. 662004CF000903CFAXMX

Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender,
Northern District of Florida, Tallahassee, Florida; and Clyde M. Taylor, Jr. of
Taylor & Taylor, LLC, St. Augustine, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Lisa A. Hopkins, Assistant Attorney
General, Tallahassee, Florida,

for Appellee