IN THE

SUPREME COURT OF FLORIDA

Jeremiah Rodgers, Appellant, v. State of Florida, Appellee.	Case No. 17-1050

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF APPELLANT

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PRELIMINARY STATEMENT/INTERESTS OF AMICI

This brief is being filed by the American Civil Liberties Union (ACLU) and the American Civil Liberties Union of Florida (ACLU-FL), in support of the Appellant, Jeremiah Martel Rodgers.

The ACLU is a nationwide nonpartisan organization of over one million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions and our nation's civil rights laws. Through the ACLU's Capital Punishment Project, its Lesbian, Gay, Bisexual and Transgender Project, and its National Prison Project, the organization focuses on defending the rights of persons facing capital punishment, defending the rights of transgender individuals, and defending the rights of individuals in all custodial settings. The ACLU of Florida is the ACLU's state affiliate and has approximately 48,000 members in the State of Florida equally dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the majority of her life,[1] Appellant Jeremiah Rodgers has been "cruelly imprisoned within a body incompatible" with her true gender. *Farmer v.*

[1] *Amici* refer to Rodgers using the gender pronouns of she/her consistent with her gender identity, which is female. As Rodgers explained to counsel years ago: "My entire life I've felt compelled to wear a mask to hide the fact that everything below

Moritsugu, 163 F.3d 610, 611 (D.C. Cir. 1998). During that time, she has also been physically imprisoned in Florida's youth facilities and prisons, where the State never provided her with appropriate treatment for her gender dysphoria, the symptoms of which have been documented at least since she was 14 years old when she attempted self-castration while in state custody. In 2007, after decades of unconstitutionally denying her necessary medical care, the State sought Rodgers's execution for a capital-murder offense for a second time (the first sentence had been reversed). At that time, Rodgers waived her right to a jury trial on the question of her sentence in hopes of ensuring an expeditious execution and thereby allowing her to end the life of pain made inevitable by the State's failure to treat her serious medical condition. In essence, the State benefitted from its unconstitutional deprivation of Rodgers's medical care.

Understood in this context, the validity of Rodgers's 2007 jury waiver is subject to serious doubt. Not once did the circuit court, any expert, or any lawyer address the serious consequences of her untreated gender dysphoria, which had been documented for years. It was not until 2016 that any expert looked back at the evidence of this persistent medical condition to consider whether it rendered Rodgers's waivers invalid. When that evidence was presented to the circuit court in

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the surface is female. I feel like a woman." (ROA 68). Referring to a transgender person with gender appropriate pronouns is consistent with prevailing medical standards and case law.

her motion for relief under *Hurst v. Florida*, 202 So. 3d 40 (Fla. 2016), the court did not consider it. Rather, it denied Rodgers's *Hurst* claim without considering whether the prior waiver of her jury right was subject to serious doubt. This Court should remand for an evidentiary hearing on this crucial issue.

The signs of Rodgers's female gender emerged early in life but she did not have the support or resources to access the treatment necessary to alleviate her distress. (ROA 33). Instead, she was subjected to violence and shame. She spent the majority of her life in prison settings, self-mutilating and self-destructing, culminating in her decisions, out of desperation and hopelessness, to expedite her death by waiving her rights to a jury and post-conviction review. (ROA 33, 69).

As the Supreme Court has recognized, because "society takes from prisoners the means to provide for their own needs," *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011), the government has an "obligation to provide medical care for those whom it is punishing by incarceration," *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Failing to provide medical care that could avoid causing a prisoner to "suffer or die," is plainly "incompatible with the concept of human dignity and has no place in civilized society." *Plata*, 131 S. Ct. at 1928. But this possibility could come to pass because Rodgers sought death to end the suffering of her untreated condition.

Rodgers has long suffered from gender dysphoria, the medical diagnosis given to individuals whose gender identity–a person's innate sense of being a

particular gender–differs from the sex assigned at birth, causing clinically significant distress. (ROA 57); Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 5th edition (302.85) (5th ed. 2013). According to medical consensus, gender dysphoria intensifies over time and, when inadequately treated, can lead to, among other things, clinically significant psychological distress, debilitating depression, self-surgery, and suicidality. *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1170 (N.D. Cal.), *appeal dismissed and remanded,* 802 F.3d 1090 (9th Cir. 2015). Based on her experience over more than two decades, Rodgers believed that she faced a future in prison without treatment for her serious and painful medical condition. She undoubtedly viewed that prospect as a fate worse than execution, which is precisely the evidence the court below should have more closely considered before summarily dismissing her *Hurst* claim.

Amici submit this brief to highlight for the Court the nature and severity of gender dysphoria, to explain the consequences of withholding appropriate treatment for this condition, including a legally and medically sufficient evaluation, and to therefore highlight why prior determinations as to Rodgers's competence to waive her constitutional rights are subject to serious doubt. The undersigned *amici* urge the court to grant Rodgers's request that the decision below be vacated and that she be afforded an evidentiary hearing at which these issues may be fully explored.

STATEMENT OF FACTS

To supplement the facts set forth in Rodgers's brief, *amici* offer the following facts speaking to the long-standing documentation of her gender dysphoria in the record, and the doubt that information, properly understood, casts on Rodgers's competence to make the waivers on which the court below relied to deny her meritorious *Hurst* claim.

Rodgers has not only spent her life trapped in a body that did not match her female identity but has also spent the majority of it incarcerated by the State of Florida without any medical treatment for her condition. Beginning at age 13 she was incarcerated in juvenile detention and then half way houses, and then at 16 was sent to prison following a conviction for car theft. (ROA 59). In 1998, within a year of her release at age 20, she was arrested on this capital case. *Id.*

While in state custody, in 1991, at the age of 14, and again in 1995 at age 18, she attempted to cut off her penis. (ROA 68). As one expert, Dr. Julie Kessel, notes of Rodgers: she "was hospitalized on several occasions in forensic mental health settings and institutions for severe depression, suicidality, ... [and] cut h[er] throat on several occasions, at least one such occasion resulting in a life threatening injury" (ROA 59).

The staff charged with her care took note. In 1995, mental-health staff documented that her cutting behaviors and "attempt at autopenectomy," which

resulted in extensive medical and psychiatric treatment, were "related to sexual identity/guilt issues." (ROA. 68). A clinician in 1996 found that she was suffering from gender identity disorder, and, that same year, Dr. Valero observed that she "tends to self-lacerate over [her] sexual/gender identity issue." (ROA 68). In another 1996 progress note, Rodgers's gender identity disorder was identified "as the root of [her] problems." (ROA 68). Yet corrections staff did nothing to treat this serious medical condition. *See* Point II, *infra*.

After this Court reversed Rodgers's previous death sentence due to ineffective assistance of counsel, in 2007 she purportedly waived her right to a jury trial in the second trial for her life. *Rodgers v. State,* 934 So. 2d 1207, 1210 (Fla. 2006). On May 15, 2007, before her resentencing trial, the circuit court accepted Rodgers's purported waiver of her jury right without any exploration into the basis of her strong desire to die. Defense counsel informed the court of her intent to waive her jury right, and asked her questions on the record. Tr. Vol. *1 Pre-trial Motions and Jury Selection*, at 74-77.[2] But defense counsel–who had a duty to review Rodgers's corrections records disclosing the serious problems outlined above, *Bevel v. State*, __ So.3d __, 2017 WL 2590702, at *8 (Fla. 2017)—never

[2] Because of their central importance and the ease with which they can be examined and verified, the Court should take judicial notice of the prior records concerning the waiver. *See, e.g.*, *Schwab v. State*, 969 So. 2d 318, 322–23 (Fla. 2007). The transcript would appear to be part of the record on appeal this Court reviewed in *Rodgers v. State*, 3 So. 3d 1127 (Fla. 2009).

told the court about Rodgers's serious health crisis stemming from her untreated gender dypsphoria. Tr. at 74-81.

At the waiver proceeding, the court never asked Rodgers why she wanted to die, and no one explored her longstanding self-mutilation and harm that the State had (during her incarceration) consistently tied to her gender. The circuit court heard only Rodgers's testimony that, in her words, the motivation for the waiver was: "[i]f I could sign a paper right now, and get a death sentence, and go back to death row, I would do it. To expedite the process I would do it, you know . . . because I just want to be done with it. I've been done with it." *Id.* at 81; *see also id.* at 75 ("I can count on a death sentence with you I feel," but not with the jury). This desire for certain and expedited death was never explored further.

Despite its documented existence, Rodgers's gender dysphoria never became part of the judge-sentencing proceeding either. When this Court reviewed her death sentence on direct appeal, the issue was not mentioned. *Rodgers v. State*, 3 So. 3d 1127, 1133 (Fla. 2009) (reviewing evidence of abuse and mental illness Rodgers had suffered in and out of prison, parental abandonment and drug addiction, family suicide history, remorse, but nothing pertaining to gender or her unsuccessful attempts at auto-castration and repeated self-mutilation).

When Rodgers later sought to put the final nail in her coffin by waiving her right to post-conviction review, the circuit court collected expert reports regarding

her competence, on which it greatly relied. Tr. *State v. Rodgers* (April 6, 2011), at 5-6.[3] Nowhere in the long colloquy did the court ask Rodgers about her documented history of gender issues and attempts to remove her genitals. *Id.* at 2-29. Consistent with her intent to end her life and the appeals that could keep her alive, Rodgers denied any mental illness and disclaimed any need for medical treatment. *Id.* at 7-8, 15. At no point did the court consider that she had long been incarcerated without treatment for her gender dysphoria.

The pain and anguish caused by Rodgers's untreated condition was something she disclosed to her defense counsel, Robert A. Harper, before purporting to waiver her right to post-conviction review. *Id.* at 1-29. The waiver hearing took place on April 6, 2011, after Rodgers had recently written to Harper informing the attorney that her gender identity disorder was the driving force behind her desire to die. In these letters, she wrote Harper to explain how her "gender dysphoria and the trauma and excruciating pain of [her own] life have caused [her] to lose [her] will to live and to choose death over life." (ROA 62) (expert paraphrasing letters to Harper); *see also* (ROA 68) (quoting same letters). At the waiver hearing, Harper did not disclose to the court these desperate pleas from his client. Whatever the reason for that omission, the result was that the court

[3] The Court should take judicial notice of this transcript as well, which was before this Court in the appeal filed under Florida Supreme Court docket number SC11-1401. *See also* (ROA 26-27).

lacked readily-available and recent information undermining Rodgers's competence to waive her constitutional rights.

The same pattern continued with experts. In Dr. Prichard's report, on which the court heavily relied, Tr. *State v. Rodgers* (April 6, 2011), at 5-6, Dr. Prichard claimed to have reviewed "available records." Prichard Report, Feb. 16, 2010, at 1.[4] Dr. Prichard's seven-page report generically mentioned her self-mutilation and cutting, but never said a word of Rodgers's gender dysphoria or attempts to remove her genitals. Like the circuit court, Dr. Prichard readily believed Rodgers's global explanation that her prior mental-health hospitalizations and self-injuries were manipulations. Whether Dr. Prichard's failure to discuss the impact of Rodgers's gender identity and accompanying distress was willful or a negligent oversight, his findings are subject to serious doubt because of this failure.

Dr. McLaren's report suffered from the same deficiencies. For both that hearing and his own previous 1999 evaluation of Rodgers, he purported to have reviewed "voluminous documents . . . in regard to the defendant's past mental health, correctional, and criminal history." McClaren Report, at 1. And yet, Dr. McClaren, too, failed to acknowledge, discuss, or assess in any fashion, the impact Rodgers's gender identity disorder and resulting self-mutilation had on her competence. *Id.* at 1-8.

[4] These reports appear to have been reviewed by this Court on appeal under docket number 11-1401. (ROA 27).

I. Untreated gender dysphoria causes severe harm and can lead to suicidality.

For decades, courts have held that gender dysphoria (previously known as gender identity disorder (GID) and transsexualism) is a serious medical condition that warrants treatment. *See, e.g.*, *Meriwether v. Faulkner*, 821 F.2d 408, 411 (7th Cir. 1987) (recognizing transsexualism as a serious medical need that should not be treated differently than any other psychiatric disorder); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995) (prison officials must provide treatment to address the medical needs of prisoner with gender identity disorder); *Fields v. Smith*, 712 F. Supp. 2d 830, 855-56 (E.D. Wis. 2010) (gender identity disorder is a serious medical need for purposes of the Eighth Amendment), *aff'd*, 653 F.3d 550 (7th Cir. 2011); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011) (upholding district court decision recognizing gender identity disorder as a serious medical need for purposes of the Eighth Amendment); *see also O'Donnabhain v. C.I.R.*, 134 T.C. 34 (U.S. Tax Ct. 2010) (holding that gender identity disorder is a "serious, psychologically debilitating condition").

Experts agree that gender dysphoria causes severe anguish and pain that is unrelenting absent appropriate treatment. *See, e.g.*, *Norsworthy*, 87 F. Supp. 3d at 1170 (world-renowned expert explaining that "[t]he condition is associated with 'severe and unremitting emotional pain.'"). In his report before the circuit court, expert Dr. George Brown set forth the literature showing that the shame triggered

by gender dysphoria, particularly in unsupportive environments like those Rodgers has navigated, "produces feelings of self-hatred, disgust and loathing." (ROA 69) (internal quotations omitted).

Indeed, without adequate treatment, the experience of feeling hopelessly imprisoned in a body that does not align with their gender identity can escalate to such a degree that many prisoners with gender dysphoria incarcerated in men's prisons resort to self-surgery to remove their testicles, or even suicide. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 553 (7th Cir. 2011) ("A person with GID often experiences severe anxiety, depression, and other psychological disorders. Those with GID may attempt to commit suicide or to mutilate their own genitals."); *Diamond v. Owens*, 131 F.Supp.3d 1346, 1354 (M.D. Ga. 2015) (citations omitted) ("If [gender dysphoria is] left untreated or if treatment is discontinued, there is a 'severe risk' the individual will experience suicidality[,] the impulse to engage in self-castration and self-harm . . . clinically significant depression, anxiety, and mental impairment."); *see also generally* George R. Brown, *Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder*, 12 Int'l J. of Transgenderism 31 (2010).

Rodgers's history closely tracks this deadly progression. Her serious attempts to cut off her penis, her severe depression, suicidality, breaks with reality and self-mutilations are consistent with the most severe cases of gender dysphoria,

which are regularly documented by the courts and trigger constitutional obligations to provide treatment under a consensus in the law.

II. Rodgers has not been evaluated or treated for gender dysphoria in accordance with prevailing legal standards or medical protocols.

The medically recognized protocols for treating persons with gender dysphoria are outlined in the World Professional Association for Transgender Health ("WPATH") Standards of Care,[5] which have been deemed authoritative by the courts (as shown below) and by all the major medical associations.[6] The applicable policy statement of the National Commission on Correctional Healthcare ("NCCHC") requires corrections officials treating persons with gender dysphoria to follow the WPATH standards.[7] Florida does not dispute Rodgers's documented history of gender dysphoria going back to her teenage years. See (ROA 78-79). But it fails to acknowledge that Florida failed to provide treatment

[5] WPATH, Standards of Care, available at http://bit.ly/2ev2aHy.

[6] *See, e.g.*, Am. Med. Ass'n, Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients (2016), goo.gl/ifbrG9;Am. Psychiatric Ass'n, Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012), https://goo.gl/U0fyfv; Hembree, W.C., et al. *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline* (2009), goo.gl/TGkRor.

[7] NCCHC Policy Statement, Transgender Health Care in Correctional Settings (adopted October 18, 2009 and reaffirmed with revision, April 2015), http://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care.

that could have changed the course of her life, and certainly could have changed the purported waiver of important rights on which the State now seeks to rely.

During Rodgers's incarceration as a teen and young adult, the Florida corrections staff charged with her care were repeatedly made aware of the symptoms and risks of her untreated and severe gender dysphoria. *Estelle*, 429 U.S. at 103-105 (setting out this duty of care). Most prominently, at ages 14 and 18, she attempted to cut off her penis. (ROA 59, 68). The State repeatedly took note of her condition, citing to the relevant diagnoses at the time of transexualism and gender identity disorder. *See*, *supra*, Statement of Facts; (ROA 68); App. Br. at 7, n.5. Yet, despite the obvious and severe harm to Rodgers, the State did not provide any treatment. This alone amounts to a constitutional violation, on top of the State's failure to diagnose her gender dysphoria. *See, e.g.*, *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (the "need for protection against continued self-mutilation constitutes a serious medical need"); *Lee v. Downs*, 641 F.2d 1117, 1121 (4th Cir. 1981) ("[P]rison officials have a duty to protect prisoners from self-destruction or self-injury.").

A. The WPATH Standards of Care outline appropriate treatment for prisoners with gender dysphoria.

Under the established medical consensus, the disabling experience of gender dysphoria requires particular medical treatment, including thorough recognition and affirmation of a person's core gender identity, and in some cases, other forms

of treatment, such as hormone therapy and surgical intervention. *See* WPATH Standards of Care. These protocols reflect the evidence-based standard of care and are highly effective at treating gender dysphoria. *Id*. Without this treatment, negative and deadly health consequences are foreseeable. *See*, *supra*, section I.

The WPATH Standards of Care make clear that all treatment protocols apply in institutionalized settings, including prisons. Standards of Care at 67. The Standards provide:

> People should not be discriminated against in their access to appropriate health care based on where they live, including institutional environments such as prisons or long-/intermediate-term health care facilities (Brown, 2009). Health care for transsexual, transgender, and gender nonconforming people living in an institutional environment should mirror that which would be available to them if they were living in a non-institutional setting within the same community.

Standards of Care at 67-8. The National Commission on Correctional Health Care echoes this mandate, noting that "[t]he health risks of overlooking the particular needs of transgender inmates are so severe that acknowledgment of the problem and policies that assure appropriate and responsible provision of health care are needed."[8] The position of the NCCHC on treatment of transgender persons in custody is to follow the prevailing community standards that WPATH outlines.[9]

[8] http://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care
[9] *Id*.

Courts also consistently rely on the WPATH Standards of Care to establish constitutional and statutory norms for the appropriate treatment of transgender prisoners. *See, e.g.*, *De'lonta*, 708 F.3d at 522-23 ("The Standards of Care … are the generally accepted protocols for the treatment of GID."); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231-232 (D. Mass. 2012) ("The course of treatment for [GID] followed in the community is governed by the 'Standards of Care' promulgated by [WPATH]."); *Fields v. Smith*, 712 F. Supp. 2d 830, 844 (E.D. Wisc. 2010) ("The Standards of Care are a document that articulates professional consensus about the treatment of [GID], and it's produced by the WPATH organization and distributed throughout the world to organizations such as the World Health Organization and other providers of health care worldwide."), *aff'd*, 653 F.3d 550 (7th Cir. 2011); *cf. Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 n.4 (N.D. Ga. 2010) (rejecting defendant's claim that WPATH Standards of Care are not a consensus of medical professionals and finding "sufficient evidence that statements of WPATH are accepted in the medical community").

Treatment for gender dysphoria under the WPATH Standards of Care can include a range of treatment options, including for individuals in prison. This treatment includes some or all of the following depending on the needs of the patient:

- Changes in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity);
- Hormone therapy to feminize or masculinize the body;
- Surgery to change primary and/or secondary sex characteristics (e.g. breasts/chest, external and/or internal genitalia, facial features, body contouring);
- Psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression. . . .

WPATH Standards of Care at 9-10. And as the NCCHC makes clear, treatment must be individualized and initiated, when necessary, while someone is in custody. "Policies that make treatments available only to those who received them prior to incarceration or that limit transition and/or maintenance are inappropriate and out of step with medical standards and should be avoided." NCCHC Statement.

B. Rodgers's evaluations and treatment have failed to meet the minimum legal and medical standards.

Rodgers has not received any treatment for her gender dysphoria, much less the treatment outlined above. The record makes plain that until the recent evaluations by Drs. Kessel and Brown, she had never been assessed or treated by a provider familiar with gender dysphoria. As Dr. Brown explained, "this is an uncommon diagnosis with which few experienced clinicians have any expertise." (ROA at 70-1). The State's failure to provide treatment by clinicians with this expertise is wildly out of step with the minimum medical and legal requirements for treating individuals with gender dysphoria. With treatment, the entire course of

Rodgers's life may have been different, including the decisions that led to her incarceration and to her actions waiving all her rights to post-conviction relief.

Adequate care of a patient with gender dysphoria requires qualified, appropriately trained clinicians with clinical experience in the treatment of the condition. The WPATH Standards of Care emphasize the importance of supervised training and first-hand clinical experience. Standards of Care at 22-5. Without an evaluation by a trained clinician, the nature and severity of Rodgers's condition and medical needs could not even be reasonably assessed within constitutional standards. *See, e.g*, *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) (constitution violated where prisoner "denied access to medical personnel capable of evaluating the need for treatment" (internal quotations omitted)); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1086 (11th Cir.1986) ("The failure to provide diagnostic care" constitutes deliberate indifference); *Waldrop v. Evans*, 871 F.2d 1030, 1036 (11th Cir. 1989) ("[P]rison officials have an obligation to take action or to inform *competent* authorities once the officials have knowledge of a prisoner's need for medical or psychiatric care."); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) ("'Adequate medical care requires treatment by qualified medical personnel who provide services that are of a quality acceptable when measured by prudent professional standards in the community, tailored to an inmate's particular medical needs, and that are based on medical considerations.").

Courts have consistently held prison officials liable for the harms that flow to a prisoner where the officials have limited treatment for gender dysphoria solely based on financial, moral, or administrative concerns. *See, e.g.*, *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) ("[J]ust because [Defendants] have provided [Plaintiff] with some treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment.").

Rodgers has received no treatment for gender dysphoria, including no appropriate clinical assessment or follow-up care despite documentation of her severe gender dysphoria going back to at least 1991 when she attempted self-castration. (ROA 69). Instead she, as Dr. Brown explains, lived a lifetime of "shame, a sense of disgust and self-loathing, and self-destructive behaviors." (ROA 69). This all-consuming nightmare, which caused her to feel "compelled to wear a mask" her whole life, led to the equivalent of "suicide by cop" whereby she felt driven—not by choice but by necessity—to hasten her death. (ROA 68).

III. Because neither the court nor any expert considered the untreated pain of Rodgers's longstanding gender dysphoria as motivation to die in assessing her competence to waive valuable rights, the prior determination is subject to substantial doubt.

Rodgers's *Hurst* claim arrived in the circuit court with the evidence of her long history of gender dysphoria finally unearthed and fully presented by experts qualified to explain the seriousness of her condition. (ROA 56-71). The circuit

court, however, elected to rely on the purported waivers Rodgers had previously entered in 2007 and 2011. (ROA 209-10). Even the mildest scrutiny of the competence determination reveals that the waivers are subject to substantial doubt because the competence determinations never considered the contemporaneous and significant evidence of Rodgers's gender dysphoria. *See, e.g.*, *Barnes v. State*, 124 So. 3d 904, 916 (Fla. 2013) (requiring legitimate, substantial doubt about prior competence determination to reopen it). This is not a case of a new expert, with a new report, based on old psychological issues. *See Bush v. Wainwright*, 505 So. 2d 409, 410 (Fla. 1987). Rather, this is evidence of a "long psychiatric history indicating incompetency," *id.* at 410, that existed in 2007 when Rodgers purportedly waived her right to a jury, but which the experts and court both failed to acknowledge or appreciate.

The substantial doubts about Rodgers's competence to waive her rights arise from the fact that her struggle with gender dysphoria had been well known and documented at the time of the purported waivers, but no one considered it. The evidence that existed but which was not made known to the judge is outlined above. In sum, by 2007, the State had long ago identified Rodgers's gender identity disorder, her attempts to auto-castrate and end her life, as well as the many other signs of severe mental distress. But the experts who claimed Rodgers was competent never once mentioned or considered this information. Indeed, Rodgers

herself did not disclose this information because of her desire to be executed to escape the unremitting pain caused by the medical condition that the State had known about, but never treated. The circuit court determined Rodgers's competence to waive her rights in the dark.

Whether the circuit court in the first instance correctly accepted Rodgers's waivers is not the issue. Now, however, the waivers, and Rodgers's competence to make them, have come into serious question based on the severe and untreated medical condition discussed in this brief. The court erred by failing to give meaningful consideration to these issues. The court instead summarily dismissed Rodgers's *Hurst* claim as barred by her prior unexamined waivers. "Whatever the ultimate merits" of Rodgers's claim, the information before the circuit court certainly does not "conclusively show that [Rodgers] is not entitled to any relief." *Jones v. State*, 478 So. 2d 346, 347 (Fla. 1985). The Court should therefore "reverse and remand with instructions that [Rodgers] be granted an evidentiary hearing." *Id.*

CONCLUSION

For the above reasons, the decision below should be vacated and this Court should order the circuit court to hold an evidentiary hearing on the competence of Rodgers to have waived her constitutional rights.

Respectfully submitted,

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Certificate of Service

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Certificate of Compliance

Amici certify that this brief complies with the type size, font, and spacing requirements set forth in Fla. R. App. P. 9.210(a)(2).

/s/ Daniel B. Tilley
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