**No. SC19-241**

IN THE

# Supreme Court of Florida

JEREMIAH ("JENNA") RODGERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

## APPELLANT'S INITIAL BRIEF

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## PRELIMINARY STATEMENT

This appeal asks the Court to reverse the circuit court's summary denial of Appellant Jeremiah "Jenna" Rodgers's Rule 3.851 motion for postconviction relief based on newly discovered evidence and to remand the case for an evidentiary hearing or vacate Appellant's convictions and death sentence.[1]

The following abbreviations will be used to cite to the record in this cause and will be followed by references to page numbers:

- R. – record from the original trial;
- T. – transcript of the original trial;
- PPR. – record from the new penalty phase;
- PCR. – record from the postconviction proceeding Appellant waived;
- PCSR. – supplemental record from the postconviction proceeding Appellant waived;
- HPCR. – record from Appellant's 3.851 proceeding, which was initiated after *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (2016);
- SPCR. – record from Appellant's successive 3.851 motion, the summary denial of which is appealed here.

All other references will be self-explanatory.

[1] Appellant has gender dysphoria, a medical condition resulting in one's gender identity not aligning with the sex assigned at birth. This motion refers to Appellant by her preferred name and with gender-appropriate pronouns, consistent with prevailing medical standards.

## REQUEST FOR ORAL ARGUMENT

This appeal involves newly discovered evidence raising substantial doubts that Appellant's postconviction waiver and her waivers at other legal junctures were knowing and voluntary. Appellant requests the opportunity for counsel to present oral argument on these issues pursuant to Fla. R. App. P. 9.320.

## STATEMENT OF THE CASE

In 1998, Appellant pleaded guilty to murder. *Rodgers v. State*, 934 So. 2d 1207, 1210 (Fla. 2006). An advisory jury recommended death by a vote of 9 to 3. *Id.* The trial court then made findings of fact and imposed a sentence of death. *Id.* This Court affirmed Appellant's conviction but remanded for a new penalty phase, concluding that the trial court had improperly excluded mitigating evidence. *Id.* at 1220. Shortly after jury selection for the second penalty phase, Appellant waived a jury. *Rodgers v. State*, 3 So. 3d 1127, 1130 (Fla. 2009). The circuit court accepted Appellant's jury waiver and, after a truncated penalty phase, again imposed a death sentence. *Id.* at 1131. This Court affirmed. *Id.* at 1135.

In 2010, Appellant wrote the circuit court asking to end further appeals and expedite the execution process. PCSR. 8. The court accepted Appellant's decision to waive postconviction proceedings and discharged appointed counsel. PCR. 2. Discharged counsel unsuccessfully appealed. *Rodgers v. State*, 104 So. 3d 1087 (2012).

In 2017, Appellant filed a Rule 3.851 motion seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (2016). HPCR. 28. The circuit court summarily denied relief, ruling that Appellant's postconviction waiver barred *Hurst* relief. HPCR. 109-10. This Court affirmed. *Rodgers v. State*, 242 So. 3d 276 (Fla. 2018), *cert denied*, *Rodgers v. Florida*, 139 S. Ct. 592 (2018).

On December 4, 2018, the day after certiorari was denied by the United States Supreme Court, Appellant filed a Rule 3.851 motion based on newly discovered evidence of Appellant's medical condition and its impact on her waivers and competency. The circuit court summarily denied the motion without a hearing and stated that Appellant's postconviction waiver stands. R. 412-13.

On February 27, 2019, the State moved to dismiss the instant appeal. Per the order of the Court, Appellant responded, showing cause why the State's motion should not be granted. The Court denied the State's motion and scheduled full briefing. This brief is filed in accordance.

## STATEMENT OF THE FACTS

### I. At Every Stage, this Case Has Been Impacted by Appellant's Lifelong Medical Condition of Gender Dysphoria

Appellant has gender dysphoria, a medical condition related to the "distress and dysfunction" people experience "when their physical body does not match their gender." SPCR. 133. Until recently, Appellant's medical condition was not previously known to the trial court, defense counsel, or even Appellant. From an

early age, Appellant felt sex role confusion, but she had no understanding of or context for her feelings. SPCR. 134 ("I knew this was the wrong body.").

> [She] was, however, astute enough to know that others would not accept those thoughts as anything other than perverse, that [she] would be ostracized and judged, and that [her] life would be further threatened. So [she] kept it inside. The emotional pain and shame of living with this inner turmoil, however, fueled [her] self-destructiveness, depression, suicidality and self-mutilation, sense of isolation, fear of harm, and anger.

SPCR. 94; 173 ("Ms. Rodgers has had to suppress her female identity throughout most of her life . . . .").

In 2017, for the first time, a medical professional hypothesized that Appellant has gender dysphoria. Although Appellant had been evaluated by medical and mental health professionals throughout her life—and at multiple stages of this capital case—no one had previously diagnosed Appellant with gender dysphoria. And, until 2017, no professional had suggested to Appellant that she is transgender. After the initial suspicion that Appellant has gender dysphoria, medical evaluators continued to review and consider information about Appellant, and Appellant continued to grapple with her condition. In 2018, Appellant accepted her transgender identity, was able to discuss its impact on her life, including critical decisions she has made in her legal proceedings, and was definitively diagnosed with gender dysphoria.

At earlier stages in Appellant's case, gender dysphoria was not clinically recognized. In 2013, gender dysphoria first appeared in the fifth edition of the

Diagnostic and Statistical Manual of Mental Disorders ("the DSM 5"). SPCR. 133, 155. Before 2013, being transgender was pathologized and seen as a mental disorder. *Id.* In the past few years, however, variations from gender norms have grown more socially accepted. SPCR. 163-64. The diagnosis of gender dysphoria recognizes being transgender not as a disorder in and of itself, but as a source of distress and dysfunction from being in the wrong physical body. SPCR. 133.

The extreme distress Appellant experienced from being transgender—marked by self-harm, depression, and self-loathing—manifested in her waivers of constitutional rights. SPCR. 96, 155, 163, 173. The courts, attorneys, and prior mental health evaluators were unaware that Appellant's self-sabotaging behavior, including the decisions to end her legal proceedings, stemmed from her previously undiscovered gender dysphoria. Her gender dysphoria calls into question the validity of her waivers in 2000, 2004, 2007, and 2011—at every stage of this case.

**A. Original Trial Proceedings (1999-2000)**

Prior to Appellant's capital trial, her attorneys were worried she was not competent to proceed. R. 243, 247, 625. Upon motion by the defense, the circuit court ordered Appellant's competency be evaluated. R. 240, 254, 633.

Dr. Lawrence Gilgun evaluated Appellant in 1999 and found she was not competent to proceed. R. 994. He considered Appellant's numerous psychiatric hospitalizations and the great lengths she went to inflict self-harm. R. 988. He noted

her repeated attempts to kill herself, including one attempt where she was found in a pool of her own blood. R. 982-87. Dr. Gilgun concluded Appellant had severe psychiatric problems, was suicidal, and was not competent to stand trial. R. 993-94.[2]

In 2000, Dr. Gilgun again evaluated Appellant. R. 2054. He noted that her actions continued to be self-defeating and unpredictable and that she had continued to self-mutilate since their last meeting. But he found Appellant was no longer suicidal. R. 2057, 2061. As a result, Dr. Gilgun deemed her competent to proceed—with the caveat that her competency relied on being properly and consistently treated with a medication regimen. R. 2075.

At her capital trial, Appellant was represented by two attorneys when the State offered a plea bargain: in exchange for Appellant pleading guilty to first-degree murder and other offenses, the State would not argue during the penalty phase that Appellant was the actual shooter. *Rodgers v. State*, 934 So. 2d 1207 (Fla. 2006).

One of Appellant's attorneys advised her to accept the offer and plead guilty; the other advised Appellant to reject the State's offer and proceed to trial. SPCR. 175, 188. The contradictory advice of her two attorneys deprived Appellant of clear, consistent advice as to whether it was in her best interests to plead guilty or to proceed to trial. R. 855. Alone, Appellant had to make the biggest decision of her

[2] The competency evaluations were jointly ordered in this capital case and Appellant's noncapital case. R. 254.

life. She could not simply decide to follow the informed advice of her counsel because her attorneys pointed her in completely different directions. The attorneys' contradictory recommendations cancelled each other out and left Appellant without counsel to guide her. Ultimately, Appellant accepted the State's offer and pleaded guilty to first-degree murder and three other charges. R. 914.

Appellant would have rejected the State's offer and proceeded to trial had her attorneys not been functionally absent due to their conflicting advice. She was in a position where she felt she had to choose between two attorneys, and that is what she did. Appellant was close with both attorneys and the defense mitigation specialist, and she was pulled in opposite directions as each attorney advised different (and mutually exclusive) courses of action.

As one of her trial attorneys explains,

> [Co-counsel] and I had a difficult relationship, something that worsened greatly by our different views of the plea deal. . . . I was aware [] Jenna had grown emotionally close to her legal team, and I know she was very worried about disappointing one of her attorneys. In addition, she had developed a very close relationship with my sister . . . who was our mitigation specialist, and [Jenna] may have believed that if she chose [co-counsel]'s advice she would anger or be abandoned by [my sister].

SPCR. 188.

After the plea, a third attorney represented Appellant in her efforts to withdraw her plea. R. 879. He notes that Appellant was alone in making her decision.

> Jenna was emotionally fragile and heavily dependent on her legal team, especially [her attorney and her mitigation specialist] . . . [who] were

> sisters and provided Jenna with a familial-type support, which was something Jenna had never before experienced. [Her other attorney] was also supportive of Jenna and visited her at the jail.
>
> * * * *
>
> When I talked to Jenna about her desire to withdraw her plea, she conveyed feeling very alone and unsure of what to do in terms of the plea offer. . . . She told me that she didn't understand what the right thing for her was, because one attorney was telling her one thing and one attorney was telling her another thing.
>
> [] When Jenna spoke to me about her guilty plea, she spoke about her decision in terms of what [one attorney] wanted and what [her other attorney] wanted. She did not talk about any advantages or disadvantages of either course of action, and she did not talk about the consequences of pleading or going to trial. She talked about the change of plea in terms of her lawyers' feelings. She knew [one attorney] felt very strongly that she should plead, but [her other attorney] felt strongly that she should go to trial, and she was afraid of disappointing either of them. She did not want to upset either of them.

SPCR. 177-78.[3]

Appellant's struggles regarding how to plead were exacerbated by her then undiagnosed gender dysphoria, as the condition "fueled [her] self-destructiveness, depression, suicidality, and self-mutilation, sense of isolation, fear of harm, and anger." SPCR. 94. Appellant's gender dysphoria interacted with her trauma-related symptoms, and resulted in her "identity-related difficulties, self-loathing, feeling that she was estranged from others and 'invisible,' inability to cope with ambivalence or

[3] Out of respect, Appellant's prior attorneys refer to her as "Jenna" and with female pronouns, though they only recently learned Appellant is transgender.

emotional ambiguity, and tendencies toward black-and-white thinking." SPCR. 134. A mental health expert has recently stated that "the conflict between her [trial] attorneys . . . may have activated trauma-related recollections and schemas of betrayal and mistreatment in Ms. Rodgers," raising "doubts about her ability to have assisted in her defense at that time." SPCR. 142 (footnote omitted).[4]

At the time of her original trial proceedings and her guilty plea, no one knew the depth and severity of Appellant's struggles and distress. No mental health expert had diagnosed gender dysphoria, and neither the court nor the attorneys (nor Appellant herself) were aware Appellant was transgender. SPCR. 179, 189.

**B. Retrial in Noncapital Case (2004)**

In 1998, Appellant was convicted of attempted murder. SPCR. 227; *State v. Rodgers*, No. 98-CF-274 (Santa Rosa Cty.). Appellant appealed the attempted murder conviction. SPCR. 221. In 2004, the First District Court of Appeals set aside Appellant's conviction. *Rodgers v. State*, 869 So. 2d 604 (Fla. 1st DCA 2004).

On May 20, 2004, the circuit court appointed Laura Coleman as Appellant's new counsel at her retrial. SPCR. 224. Appellant was transported from death row to the Santa Rosa County jail shortly thereafter. SPCR. 326. On June 3, 2004, Appellant

[4] Appellant's youth—specifically her underdeveloped brain and psychosocial immaturity—also "likely affected her ability to reason in a reality-based, consequence-aware way about her legal options when she was working with her legal team in the years following the crime." SPCR. 142, 148 (explaining that, when she pleaded guilty, Ms. Rodgers "did not have a fully mature and developed brain").

wrote a letter to the court, stating that she wished to plead guilty. SPCR. 255. The next day, Appellant met with her attorney for the first time. SPCR. 228.

Two days later, Appellant attempted suicide. SPCR. 311. While in the county jail, she cut a "large gap[]ing wound" into her arm, resulting in significant blood loss. Appellant required emergency transport from the jail to a hospital via ambulance. *Id.*; SPCR. 171 (describing, in the expert's professional opinion, that the incident was "a genuine attempt [by Appellant] to kill herself"). Later that night, Appellant was found with "several pieces of a razor blade." SPCR. 365.

Less than twenty-four hours after trying to kill herself, Appellant pleaded guilty to attempted murder and shooting at or into a building. *State v. Rodgers*, No. No. 98-CF-322 (Santa Rosa Cty.). She knew that this conviction would be used against her as an aggravating factor in her capital case. SPCR. 229, 237. And it was. *Rodgers v. State*, 3 So. 3d 1127, 1131 (Fla. 2009).

During the two weeks between counsel's appointment and Appellant's plea, SPCR. 318, defense counsel had limited involvement with Appellant. Counsel facilitated the plea without taking into account Appellant's suicide attempt, psychiatric history, and recurring self-harm. Counsel failed to conduct any sort of investigation into Appellant's case. She did not interview any witnesses and did not file any motions. Counsel did not inform the circuit court about Appellant's psychiatric history, her trauma history, or her attempt to kill herself the night prior.

Prior to Appellant's plea to an offense that would be used as an aggravator in her capital case, her competency was not evaluated, and no one involved in the case asked her about her suicide attempt the preceding night, her emergency trip to the hospital, or the large bandage on her arm at the time of her plea. SPCR. 328.

In addition to Appellant's suicide attempt, her actions shortly after the plea further bring into question her competency. Appellant wrote to the circuit court, asking it not to entertain any further filings by Mark Olive, the attorney who had previously represented her on direct appeal. Appellant stated that such motions would be filed for the purpose of confusing the court and were "manipulatory antics." SPCR. 292. One month later, Appellant submitted an affidavit asking for Mr. Olive's help to do whatever he felt was best for her. SPCR. 306.

This extreme fluctuation, in such a short period, given Appellant's background, creates further doubt as to Appellant's competency at the time of her guilty plea. SPCR. 162 ("Ms. Rodgers continued to lack a reasonable degree of rationality. . . . This drastic change from noncooperative to cooperative behavior is markedly different from the average person's changes in legal strategy. It suggests that Ms. Rodgers continued to undergo fluctuations in her competency.").

Shortly after Appellant's plea, a consulting psychologist expressed "serious doubts" as to whether Appellant had been competent when she pleaded guilty and whether she "could have had a rational, factual understanding of the nature of [her]

guilty plea on June 6th," particularly when she made a serious effort to kill herself one day prior. SPCR. 280. According to the psychologist, Appellant's severe mental illness and her suicidal ideations influenced her guilty plea. SPCR. 279-80.

Mr. Olive filed a motion to withdraw Appellant's guilty plea. SPCR. 262. The court struck the motion and noted that, had the motion been filed pro se or by Appellant's appointed counsel, Ms. Coleman, Appellant would have been entitled to a hearing on the motion. SPCR. 299. Mr. Olive appealed the decision after appearing pro bono. SPCR. 303. The First District Court of Appeals affirmed. *Rodgers v. State*, 903 So. 2d 941 (Fla. 1st DCA 2005).

At that time, neither Mr. Olive, Ms. Coleman, nor the courts knew Appellant had gender dysphoria. Though that diagnosis would not be rendered for over another ten years, the medical condition "greatly affected [Appellant]'s mental state, her emotional development, and decision-making at that juncture" when she tried to kill herself and pleaded guilty the next morning. SPCR. 145-46, 117-18.

**C. New Penalty Phase (2007)**

On direct appeal from the original trial in Appellant's capital case, this Court affirmed Appellant's conviction but concluded that the trial court had improperly excluded mitigating evidence. The Court vacated her death sentence and remanded for a new penalty phase. *Rodgers v. State*, 934 So. 2d 1207, 1220 (Fla. 2006).

In 2007, Appellant appeared in circuit court for a new penalty phase in her capital case. PPR. 47. Immediately before jury selection was to begin, Appellant informed the circuit court that she did not want to present any evidence of mitigation, apart from her own testimony. PPR. 259-63. Then, immediately after jury selection, Appellant informed the court that she wanted to waive a jury. PPR. 323-24. *See also Rodgers v. State*, 3 So. 3d 1127, 1130 (Fla. 2009).

Appellant's competency was not assessed at any point during the new penalty phase proceedings. In fact, her competency had not been assessed in seven years. PPR 267. Still, the circuit court accepted Appellant's jury waiver. PPR. 331. After a truncated penalty phase, PPR. 339, the court imposed a death sentence. PPR. 78.

According to Dr. Gilgun, who had found Appellant incompetent in 1999, it was a grave omission for Appellant's competency to not be assessed.

> Competency cannot be looked at as a constant or fixed state. A person can be competent at one stage in their life and not at another. . . . [G]iven her history and the [prior] doubts regarding her competency, further evaluations should have been conducted, particularly . . . when Ms. Rodgers was under the significant stress of legal proceedings and was making decisions that greatly affected her future.

SPCR. 159, 173 ("The competency determinations made around the time of Ms. Rodgers's original capital trial were not substitutes for evaluations that should have been conducted at the time of each of her subsequent waivers.").

Appellant's gender dysphoria—and its accompanying depression and discontentment in conjunction with her mental illnesses—help explain Appellant's willingness to waive her rights.

> As a result of [Ms.] Rodgers's mental disorders, and especially the presence of Gender Dysphoria, a lifelong condition, the absence of any competency and/or mental health evaluation that considered the impact of [her] Gender Dysphoria on [her] emotional development, mental state, and decision making at the time of [her] "waiver," and given the new understanding of and diagnostic criteria for Gender Dysphoria, there is substantial doubt as to whether [her] waiver of [her] right to a jury at [her] second penalty phase was knowing and voluntary.

SPCR. 96-97, 117.

When the circuit court accepted Appellant's jury waiver and this Court affirmed, *Rodgers*, 3 So. 3d at 1135, neither had a complete picture of Appellant's medical and mental health status. SPCR. 91-92.

**D. Postconviction Proceedings (2009-2010)**

In 2010, after postconviction counsel had been appointed, the court ordered two experts to evaluate Appellant's competency. PCR.1. Neither expert knew of Appellant's gender dysphoria. PCSR. 33, 99. "Their lack of awareness . . . left the evaluators with limited information from which to render a full and meaningful assessment of the true reasons for [Appellant]'s decision to waive [her] appeal rights then and into the future." SPCR. 96.

In the months after the evaluators met with Appellant, she changed her mind repeatedly. She wrote the court and complained that counsel had not had any contact

with her in over a year and asked to end further appeals and expedite the execution process. PCSR. 8. The court appointed a different attorney to represent Appellant. Appellant subsequently expressed a desire to pursue her appeals and then, shortly thereafter, said she wanted to waive her appeals. PCR. 32.

At a time when Appellant wanted to waive her appeals, she told her lawyer it was because that would allow her to escape from the feeling that she was imprisoned in the wrong body. SPCR. 102. Counsel did not alert the evaluators or the court to Appellant's feelings. This type of distressed feeling would not be recognized by the medical and mental health community as gender dysphoria for several more years—until the 2013 publication of the DSM 5. SPCR. 133.

The postconviction court accepted Appellant's decision to discharge appointed counsel and waive postconviction proceedings. PCR. 2. Discharged counsel unsuccessfully appealed. *Rodgers v. State*, 104 So. 3d 1087 (2012). Still, the circuit court and this Court remained unaware that Appellant had a medical condition that was "present and active at the time when [she] chose to waive [her] right to seek initial postconviction review of [her] death sentence." SPCR. 92.

**E. *Hurst* Postconviction Proceedings (2017-2018)**

In 2016, Dr. Julie Kessel, M.D., conducted a clinical interview of Appellant. HPCR. 56. She then reviewed extensive records on Appellant's childhood, developmental years, and juvenile and adult incarcerations. In 2017, Dr. Kessel

offered a preliminary opinion that Appellant may have gender dysphoria in addition to posttraumatic stress disorder, major depressive disorder, and personality disorder not otherwise specified (borderline and antisocial). HPCR. 62.

The following month, Dr. George Brown, M.D., wrote a report in which he provisionally concurred with Dr. Kessel. HPCR. 65. At that point, however, Dr. Brown could not make a definitive diagnosis of Appellant. HPCR. 69.

Diagnosing gender dysphoria is more complicated than diagnosing other conditions. As Dr. Brown explains, "[G]ender dysphoric people are over four times more likely to [also] have depressive disorders and nearly three times more likely to have PTSD . . . . The constellation of these three diagnoses co-occurring is not uncommon." *Id.* (citation omitted). Such comorbidity has meant that,

> [m]ental health professionals struggled to accurately diagnose [Appellant]. This makes sense now, as survey studies have consistently found that those suffering from gender dysphoria have reported higher rates of suicidal ideation, suicide attempts, and stress-related psychiatric disorders. Additionally, those with independent and serious psychiatric disorders (like major depression, bipolar disorder, borderline personality disorder, and schizophrenia) must be adequately treated for those disorders in addition to, and independently of, gender dysphoria.

SPCR. 197. Dr. Kessel spoke to Appellant's "excruciating pain" and shame she experienced from being transgender as another complication in diagnosing Appellant. HPCR. 62. That gender dysphoria is "an uncommon diagnosis" was another complication. SPCR. 119. These factors meant that, in 2017, neither Dr.

Brown nor Dr. Kessel were able to offer final, complete, or definitive findings as to Appellant's medical situation and its impact on her earlier waivers.

**F. Newly Discovered Evidence Postconviction Proceedings (2018)**

Dr. Kessel and Dr. Brown continued their evaluations of Appellant after providing preliminary reports. They reviewed additional records and expert reports they did not previously have.

Appellant also needed time to process the new gender dysphoria diagnosis and expert hypothesis that she is transgender. Dr. Brown conducted a clinical interview of Appellant in November 2017 and inquired as to Appellant's pronoun preference. SPCR. 111. Appellant requested to be called "JR" and with male pronouns; Appellant said this preference was based on being in a male prison, as her true desire was to be referred to as "Jenna" and with female pronouns. SPCR. 111. Having had months to process Dr. Kessel's thought that Appellant may have gender dysphoria, Appellant felt liberated and was able to speak at length about the shame, distress, and suicidality she felt from being transgender. She told Dr. Brown, when she waived her appeals in 2010, it was a suicidal act. SPCR. 113.

Dr. Sara Boyd, PhD., conducted a clinical interview of Appellant in 2018. SPCR. 122. By that time, Appellant had grown more accepting of her condition and reported a desire to be referenced with feminine pronouns, "consistent with her self-identified gender identity." SPCR. 122. But Appellant "remain[ed] in need of

trauma-informed treatment and gender-related services and [was] continuing to experience related psychological distress." SPCR. 143.

In October 2018, Dr. Brown concluded his evaluation of Appellant. SPCR. 107. From his preliminary report to his final report, Dr. Brown's professional opinions shifted. He was able to definitively diagnose Appellant with gender dysphoria and posttraumatic stress disorder, though he no longer thought Appellant suffers from major depressive disorder. According to Dr. Brown, "the depression [Appellant] experiences is part of [gender dysphoria] and . . . would likely respond to treatments for [gender dysphoria] and not to treatments for depression." SPCR. 118. Dr. Brown added the diagnosis of "[h]istory of psychosis, possibly bipolar disorder" and changed from suspecting personality disorder not otherwise specified (borderline and antisocial) to diagnosing Appellant with antisocial personality disorder. SPCR. 117.

In November 2018, Dr. Kessel concluded her evaluation of Appellant. SPCR. 145. In her final report, recognizing Appellant's progress and in accordance with Appellant's preference, Dr. Kessel used female pronouns and the name "Jenna," as compared to using male pronouns and the name "Jeremiah," as she had in her initial report. *Compare* SPCR. 145 with SPCR. 90.

In December 2018, based on the full assessments rendered by Dr. Brown and Dr. Kessel as well as the opinions of other professionals, Appellant filed a

postconviction motion centered on the newly discovered evidence of gender dysphoria and how its impact rendered Appellant's legal waivers unconstitutional. SPCR. 35. In the motion—and through attached exhibits—Appellant detailed that multiple witnesses have expressed doubts as to Appellant's competence at each point in her legal proceedings when she waived her rights.

- "As a result of . . . the presence of Gender Dysphoria, a lifelong condition, the absence of any competency and/or mental health evaluation that considered the impact of [Appellant's] Gender Dysphoria on [her] emotional development, mental state, and decision making at the time of [her] 'waiver,' and given the new understanding of and diagnostic criteria for Gender Dysphoria, there is substantial doubt as to whether [her] waiver[s] [were] . . . knowing and voluntary." SPCR. 96-97.

- "Given that this serious medical diagnosis [of gender dysphoria] was not considered in the assessment of [Appellant]'s competence in the past, it is highly likely that [Appellant] was not competent to make knowing and informed decisions . . . [of] waiver in the capital case." SPCR. 119.

- "Ms. Rodgers's combination of trauma symptoms (including suicidality) and psychosocial immaturity likely affected her ability to reason in a reality-based, consequence-aware way about her legal options when she was working with her legal team in the years following the crime. . . . I would have doubts about her ability to have assisted in her defense at that time." SPCR. 142 (footnote omitted).

- Gender dysphoria "greatly affected Jenna's mental state, her emotional development, and decision-making at that juncture" of her 2004, 2007, and 2010 waivers. SPCR. 146.

- "I have substantial doubts as to Ms. Rodgers's competency both at the 2004 guilty plea, the 2007 jury/mitigation waiver, and the subsequent waiver of her postconviction rights in 2010-2011. As

a psychiatrist, I question whether Ms. Rodgers was competent to waive her rights . . . .” SPCR. 198.

- “It is my professional opinion that the interplay of Ms. Rodgers’s medical condition of gender dysphoria, along with her multiple diagnoses, mental illnesses, and trauma, have affected her competency on several occasions. I have substantial doubts as to her competency during her 2004 guilty plea to attempted murder, her 2007 waiver of her jury and mitigation, and 2010-2011 waiver of her state postconviction proceedings.” SPCR. 164.

- “Here, where Ms. Rodgers suffers from mental illnesses, including chronic depression and PTSD, her decisions, including the waiver of her rights . . . , are put into perspective with the diagnosis of gender dysphoria. As Ms. Rodgers has had to suppress her female identity throughout most of her life, her self-loathing and depression have manifested in harmful ways, including physical self-injury, suicidal ideation, and waiver of rights in various courts. . . . I have a strong doubt as to Ms. Rodgers’s competency at each of her . . . waivers.” SPCR. 172.

- “During my work on Ms. Rodgers’s case, I had questions about Ms. Rodgers's capacity to make rational decisions. Based on my contact with Ms. Rodgers and my knowledge of her life history, I continue to question her capacity to make rational decisions. My concerns are based on her mental health problems, trauma history, and recurring self-destructive behavior and now her gender dysphoria. At times of high stress especially, Ms. Rodgers’s abilities to protect herself seem to lessen.” SPCR. 155 (expressing “considerable doubts” as to her “ability to make rational decisions” at the times she waived her rights).

- “I believe that the accumulation of Jenna’s trauma history, mental illness, and gender dysphoria raise substantial doubts as to whether Jenna’s decisions [to waive] . . . were knowing, voluntary, or intelligent. . . . I am concerned that, when Jenna sought to waive her rights, her actions were grounded on her irrational suicidal mindset and lack of capacity to help herself. I am very concerned that her actions were not rational or competent.” SPCR. 205-07.

- "Put together, Jenna's trauma history, mental illness, and gender dysphoria, and the manifestations of them I observed such as her diffidence and lack of self-regard, cause me to have substantial doubts as to whether Jenna's decisions to waive . . . were knowing, voluntary, and intelligent." SPCR. 179.

- "I was concerned throughout my representation of Jenna that she was not legally competent to proceed with the trial or assist me in the preparation of her defense. . . . It is certainly believable to me that the pain Jenna suffered from her gender dysphoria was a considerable factor in her self-harming decisions and actions." SPCR. 187-89.

Individually and collectively, these statements demonstrate that Appellant's medical condition affected this case at every stage and invalidates her waivers.

## II. In Summarily Denying Appellant's Postconviction Motion, the Circuit Court Ignored that Appellant Was Challenging Her Waivers with Evidence of Gender Dysphoria Not Previously Available

In the underlying postconviction motion, Appellant challenged her postconviction waiver on the grounds it was rendered involuntary and unintelligent by her then undiagnosed (and still untreated) gender dysphoria. SPCR. 39, 69, 75. She raised similar challenges to her waiver of a penalty phase jury at her resentencing and her waiver of a guilt phase trial at her original proceedings. SPCR. 47, 52, 60, 81. Appellant also challenged the prior denial of *Hurst* relief on the basis that, when the Court denied *Hurst* relief based on Appellant's postconviction waiver, the Court did not have an accurate picture of Appellant's gender dysphoria and its effect on her waivers. SPCR. 39, 47, 52, 60, 67, 75, 81.

The circuit court summarily denied Appellant's postconviction motion, stating that Appellant's postconviction waiver is "valid" and still "stand[s]" and the challenges to her waiver were "not timely filed." SPCR. 413. The court offered no analysis on or support for these findings. The court ignored that the challenges to Appellant's waivers could not have been previously raised, as they were based on newly discovered expert medical opinions that were previously unavailable.

Appellant raised these challenges within two months after the doctors were able to finish their assessments of Appellant. As a result of the time required for the doctors to complete their assessments—in part due to the specific complications of diagnosing a transgender person and the need for Appellant to grapple with the reality that she has a medical condition which went undiagnosed for years—the evidence at the crux of Appellant's postconviction motion was previously unavailable and, in particular, was unavailable when Appellant filed her *Hurst* postconviction motion in 2017.

## SUMMARY OF ARGUMENT

In Argument I, Appellant asserts that her prior waiver of postconviction proceedings does not operate as an absolute bar to all future litigation and does not bar the current litigation. Appellant has timely challenged the waiver with newly discovered medical evidence that was not previously available despite the exercise

of due diligence, and Appellant has presented detailed, individualized evidence that she was not competent at the time of her postconviction waiver.

In Argument II, Appellant asserts that the circuit court erred by summarily denying Appellant's postconviction motion. Appellant timely raised constitutional claims supported by a comprehensive evidentiary proffer. Each of these claims necessitate factual determinations by the circuit court. The current record does not conclusively establish that Appellant is not entitled to relief, and the State has neither conclusively proven that Appellant is entitled to no relief nor that her motion is legally flawed. *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

For the reasons explained herein, Appellant respectfully requests that this Court vacate the decision below and remand for a hearing.

## STANDARD OF REVIEW

A postconviction court's decision of whether to grant an evidentiary hearing depends upon the actual material before the court, not the court's innate belief about the evidence; the ruling as to whether a hearing is appropriate is subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008). When, as here, the circuit court denies postconviction relief without an evidentiary hearing, this Court must accept Appellant's allegations as true. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). The Court must also review the circuit court's application of the law to the facts de novo. *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008).

## ARGUMENT

### I. The Circuit Court Erred by Concluding that Appellant's Prior Waiver Barred Her Postconviction Motion and that the Motion Was Untimely

The circuit court denied Appellant's postconviction motion without an evidentiary hearing, finding that Appellant's postconviction waiver was "valid" and that the motion "not timely filed." SPCR. 413. These findings must be reviewed de novo by this Court. *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009).

#### A. Appellant's Prior Waiver of Postconviction Proceedings Does Not Operate as an Absolute Bar to All Future Litigation and Does Not Bar the Current Litigation

No appeal or postconviction waiver can be an automatic and absolute bar to all future appeals without running afoul of the United States Constitution.

Throughout these proceedings, the State has argued that Appellant's postconviction motion should be denied because of Appellant's prior waiver of her initial postconviction proceedings, citing *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). The State contends that Appellant's 2011 waiver of her then pending state postconviction proceedings—in the parlance of the State, Appellant's *Durocher* waiver—is an absolute, automatic, and irrevocable waiver of all Appellant's postconviction and appeal rights. *See generally Rodgers v. State*, Case No. SC19-241 (Motion to Dismiss, filed Feb. 27, 2019).

The right to forgo postconviction proceedings, however, is, as the State agrees, analogous to the right to forgo appeals. *Id.* at 14. The United States Supreme

Court has recently held an appeal waiver can never be all-encompassing or unconditional.

In February 2019, the Supreme Court decided an appeal-waiver case on point with the issue before this Court. In *Garza v. Idaho*, 139 S. Ct. 738, 749 (Feb. 27, 2019), the Court held that "even the broadest appeal waiver does not deprive a defendant of all appellate claims." Addressing appeal waivers, the Court said the term "can misleadingly suggest a monolithic end to all appellate rights" when, in fact, "no appeal waiver serves as an absolute bar to all appellate claims." *Id.* at 744. The Court explained that appeal waivers do not prohibit every conceivable appeal.

Even individuals who sign comprehensive and wide-ranging waivers retain the right to appeal a number of fundamental issues concerning the validity, scope, and enforceability of their waiver.

> [A]ll jurisdictions appear to treat at least some claims as unwaiveable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary. Consequently, while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain.

*Id.* at 745 (footnote omitted).

The same is true of Florida's postconviction waiver mechanism, which allows death-sentenced Florida inmates to knowingly and voluntarily waive their initial postconviction proceedings, but cannot serve as an absolute bar to all future

litigation, particularly with respect to issues that were unknown at the time of the initial waiver. *Id.* at 744-45; *see also Halbert v. Michigan*, 545 U.S. 605 (2005) (holding that an appellant cannot knowingly and intelligently waive a right that has not been recognized to exist).

This Court must consider Appellant's postconviction waiver in light of the reasoning from *Garza* that an appeal waiver does not serve as an automatic and absolute bar to all appellate claims. Appellant acknowledges that a postconviction waiver—like an appeal waiver—may constrain litigation to a narrower set of postconviction claims than would otherwise be available and that a waiver may present an additional hurdle to relief, but those circumstances are not tantamount to a wholesale bar to litigation. *Campusano v. United States*, 442 F.3d 770, 777 (2d Cir. 2006) (explaining that, while opportunities for appellate success after an appeal waiver may be rare, "such cases are not inconceivable" and courts cannot "cut corners" when constitutional rights are at stake).

This Court has indicated that postconviction proceedings may be litigated subsequent to a waiver when there is a challenge to the appellant's competency at the time of the initial postconviction waiver and, thus, a challenge to the validity of that waiver. The Court has held that, for a postconviction waiver to be valid, it must be "knowing, intelligent, and voluntary." *Silvia v. State*, 123 So. 3d 1148 (Fla. 2013).

The Court has also indicated that, where postconviction proceedings are brought subsequent to a waiver, a challenge to the validity of the prior waiver—as not knowing, intelligent, or voluntary—changes the calculus. On many occasions, the Court has upheld waivers while expressly stating that the Court was not presented with a challenge to the appellant's competency. For example, in *Trease v. State*, 41 So. 3d 119, 126 (Fla. 2010), the Court addressed the appellant's desire to rescind his prior waiver after "he simply changed his mind." The Court upheld the waiver, as the appellant did "not contest the validity of the *Durocher* hearing." *Id.*[5]

In the instant case, Appellant has presented newly discovered evidence claims that challenge her competency at the time of her postconviction waiver, the validity of the *Durocher* hearing, and the errors of defense counsel and the circuit court

[5] *See also Silvia*, 123 So. 3d at 1148 (affirming the dismissal of postconviction proceedings "[o]n the basis of this record" that did not include a challenge to the appellant's competency at the time of his postconviction waiver); *James v. State*, 974 So. 2d 365, 368 (Fla. 2008) (affirming the circuit court's denial of the appellant's request to resume postconviction proceedings because the appellant "asserted no valid basis for avoiding his waiver"); *State v. Silvia*, 235 So. 3d 349, 351 (Fla. 2018) ("Silvia's original, valid postconviction waiver, which he has never contested before this Court, precludes him from claiming a right to relief under *Hurst*."); *Russ v. State*, 107 So. 3d 406 (Fla. 2012) (explaining that counsel did not assert the appellant was incompetent at the time of his postconviction waiver and that, in the absence of an attack on the validity of the waiver, the Court had no basis to set it aside); *Rose v. State*, 249 So. 3d 547, 551 (Fla. 2018) (holding that "on this record, we find no abuse of discretion in the postconviction court's finding" that the appellant's waiver "was knowingly, intelligent, and voluntary"); *Gill v. State*, 107 So. 3d 326, 328 (Fla. 2012) ("In this proceeding, Gill has failed to present any facts that demonstrate he is incompetent; his arguments merely reflect that he wishes to set aside his waiver because he has changed his mind.").

regarding the assessment of her competency. *See generally James*, 974 So. 2d at 368 (explaining that a postconviction waiver can occur "only when it can be . . . ensure[d] that a capital defendant is making an intelligent and knowing decision").

Appellant has presented new, detailed, and individualized assessments from several medical and mental health professionals who opine that Appellant was not competent at the time of her postconviction waiver. R. 89-172. Their conclusions are based on a medical condition that could not have been known to Appellant or her counsel at the time of prior competency assessments or waiver proceedings.

As one expert concluded:

> [T]he presence of untreated Gender Dysphoria was, and is, associated with depression, shame, self-hatred, and self-destructiveness up to and including suicidality expressed as a . . . waiver of rights to a post-conviction review of [Appellant]'s death penalty sentence. As such, it is my opinion that these waivers of rights . . . were not fully voluntary or knowing, predominantly on the basis of the presence of severe, untreated, undiagnosed Gender Dysphoria with associated depression.

R. 119.

> [T]he interplay of [Appellant]'s medical condition of gender dysphoria, along with her multiple diagnoses, . . . ha[s] affected her competency on several occasions. I have substantial doubts as to her competency during her . . . waiver of her state post-conviction rights.

R. 164; *see also* R. 172-73 (explaining that, as a result of Appellant's recent diagnosis of gender dysphoria, there is "a strong doubt" as to Appellant's competency at the time of her postconviction waiver); R. 145 (explaining that, at the time of Appellant's postconviction waiver, her gender dysphoria and comorbid

psychiatric disorders were "present and active . . . and greatly affected [her] mental state, her emotional development, and decision-making").

### B. Appellant Timely Filed the Underlying Postconviction Motion and Challenges to Her Waivers

Appellant filed the postconviction motion underlying these appeals on December 4, 2018—one day after the Supreme Court denied Appellant's petition for a writ of certiorari from the appeal of her prior postconviction motion. Appellant could not have filed the instant postconviction motion any earlier because the circuit court lacked the jurisdiction in light of Appellant's prior postconviction motion based on *Hurst*, the denial of which was being appealed to this Court and then the United States Supreme Court.

When a death-sentenced person has an appeal pending from the denial of a prior motion for postconviction relief, the circuit court "is without jurisdiction" to consider a separate motion for postconviction relief. *Tompkins v. State*, 894 So. 2d 857, 859 (Fla. 2005). In this situation, a circuit court is "divested of jurisdiction to grant postconviction relief" unless "the issues presented in a subsequent motion or petition are unrelated" to those on appeal. *Kimmel v. State*, 629 So. 2d 1110, 1111 (Fla. 1st DCA 1994); *see also Bates v. State*, 704 So. 2d 562, 563 (Fla 1st DCA 1997) ("[A]n appeal of a postconviction relief matter will not deprive trial courts of jurisdiction so long as the issues raised in the two cases are unrelated.").

Here, Appellant was appealing denial of postconviction relief on a *Hurst* claim. She filed a postconviction motion in January 2017. It was denied in May 2017, and she filed a notice of appeal that same month. Until December 3, 2018, when the United States Supreme Court denied her petition for writ of certiorari, Appellant was litigating a postconviction claim based on *Hurst* sentencing errors and then appealing the circuit court's summary denial of the claim. The claims raised in the postconviction motion at issue in the current appeal also pertain to *Hurst* sentencing errors. They are sufficiently related to the issue in the earlier postconviction motion that the circuit court did not have jurisdiction to consider them while the appeal of the prior motion was pending.

"[T]he general rule is that an appeal of an order divests the trial court of jurisdiction except to those matters which do not interfere with the power of the appellate court to determine the issues which are on appeal." *Jordon v. State*, 631 So. 2d 362, 363 (Fla. 1st DCA 1994). The circuit court's consideration of *Hurst*-related issues would have interfered with the appellate courts' power to decide the *Hurst* issue on appeal.

A trial court only "has concurrent jurisdiction during the pendency of an appeal from an order denying postconviction relief to consider a subsequent postconviction motion" if the issues in the subsequent motion are wholly unrelated to those presented in the prior motion. *Boule v. State*, 64 So. 3d 753 (Fla. 5th DCA

2011); *see also Gobie v. State*, 188 So. 2d 34, 35 (Fla. 3rd DCA 1966) (considering the situation when a defendant files a successive postconviction motion while concurrently appealing a denial of a prior one). Because the claims currently before the Court are related to the claim involved in Appellant's prior appeal, the circuit court did not have jurisdiction to consider the current claims until culmination of the prior appeal. That appeal ended on December 3, 2018, and Appellant timely filed her current postconviction motion the following day.

Additionally, Appellant's present motion was timely, as diligent counsel could not have previously discovered Appellant's medical condition of gender dysphoria. Dr. Sarah DeLand, M.D., who testified at Appellant's original trial, explains that mental health experts did not diagnose Appellant with gender dysphoria earlier for the simple reason that the condition was not yet "a recognized diagnosis." SPCR. 196. At the time of Appellant's trial, resentencing, and postconviction waivers, gender dysphoria was not yet in the DSM. SPCR. 155.

In these proceedings, before the circuit court, the State misunderstood when the new evidence was discovered. The State contended that Appellant knew of her gender dysphoria diagnosis "since approximately March of 2016" and that a claim of newly discovered evidence should have been filed within one year of that date. SPCR. 382-83. The State seems to draw the March 2016 date from the fact that Dr. Kessel conducted an initial interview of Appellant at the end of February 2016.

But Dr. Kessel did not render her preliminary professional opinions until January 2017 and did not complete her assessment of Appellant until November 2018. SPCR. 145. Dr. Brown did not make any preliminary assessments until February 2017, did not interview Appellant until November 2017, and did not complete his assessment until October 2018. SPCR. 107. These assessments required time for up-to-date research, meaningful review of voluminous evidence, and consideration of opinions and findings of other professionals. Had the circuit court granted Appellant an evidentiary hearing, Dr. Brown and Dr. Kessel would have testified that their 2017 reports were preliminary, time was necessary for Appellant to grapple with the diagnosis of gender dysphoria, and their own evaluations of Appellant were not complete until late 2018. SPCR. 418.

Nearly every mental health expert who has assessed Appellant over the years has found Appellant's constellation of psychiatric symptoms challenging and time-consuming to analyze. *See, e.g.*, SPCR. 196. Dr. Kessel and Dr. Brown were no exception. No amount of diligence on the part of Appellant could have produced their final assessments earlier. Appellant exercised due diligence in the investigation and preparation of the claims presented in the underlying postconviction motion, and this Court should reverse the circuit court's findings otherwise.

The full extent and impact of Appellant's gender dysphoria was unknown during her previous *Hurst* litigation. This Court denied *Hurst* relief to Appellant

under the assumption that her waivers were competently entered. As Appellant has since uncovered, including through the use of expert analysis, there is significant doubt as to the competency of Appellant's waivers and guilty plea. The condition of gender dysphoria was so impactful, as shown by the new evidence, that the prior denial of *Hurst* relief must be reevaluated.

Since the prior *Hurst* litigation, Appellant has obtained supplemental reports and declarations from Dr. Brown and Dr. Kessel. SCPR. 107, 145. Counsel has also obtained a report from Dr. Sara Boyd, a psychologist, as well as three other medical experts: psychiatrist Dr. Sarah DeLand and psychologist Dr. Lawrence Gilgun, who had both previously evaluated Appellant, and psychologist Dr. Frederic Sautter, who previously reviewed Appellant's extensive mental health history. SPCR. 122, 159, 170, 193. Angela Mason, a social worker who worked on Appellant's case near the time of the original trial, also provided a declaration. SPCR. 151. Finally, prior counsel for Appellant provided counsel with declarations. SPCR. 175, 183, 201.

With this evidence, unavailable at the time of Appellant's prior postconviction motion and the preliminary assessments by Dr. Kessel and Dr. Brown, the two doctors can now offer more detailed and specific professional opinions on how, at the time of her postconviction waiver, Appellant was impaired by undiagnosed and untreated gender dysphoria. R. 107-20, 145-49. These experts could not previously have offered the same assessment of the validity of Appellant's postconviction

waivers. They also can now opine as to the critical impact Appellant's medical condition had at the time of her prior waivers, including her guilty plea and her jury waiver at the second penalty phase proceedings.

The underlying postconviction motion also challenges the prior denial of *Hurst* relief in light of newly discovered evidence. SPCR. 39, 47, 52, 60, 69, 75, 81. As a practical matter, Appellant could not have raised those challenges before *Hurst* relief was denied.

## II. The Circuit Court Erred by Denying Appellant's Postconviction Motion Without an Evidentiary Hearing

The circuit court summarily denied Appellant's postconviction motion. SPCR. 413. That decision is owed no deference by this Court. *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009) ("The decision of whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the written materials before the court, and the ruling of the postconviction trial court on that issue is tantamount to a pure question of law subject to de novo review."). Following "the principle that courts are encouraged to liberally view the allegations to allow evidentiary hearings on timely raised claims," this Court must now "accept the factual allegations of [Appellant] as true." *Id.* Appellant has pleaded allegations that entitle her to an evidentiary hearing and reversal of the circuit court's summary denial.

First, Appellant has demonstrated the evidence central to her postconviction motion was not "known by the trial court, the party, or counsel at the time of trial,"

and neither Appellant nor "defense counsel could have known of such evidence by the use of due diligence." *Id.* Appellant's postconviction claims were timely raised.

Second, Appellant has demonstrated that the newly discovered evidence is "of a nature that it would probably produce" new proceedings. *Id.* Specifically, the newly discovered evidence "give[s] rise to a reasonable doubt" as to Appellant's competency at multiple junctures of her legal proceedings.

In assessing these two matters—diligence and probability—the Court "must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) (citation omitted); *see also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (explaining the Court must consider the cumulative weight of both the newly discovered evidence and the evidence admitted during prior proceedings).

### A. Appellant Has Presented Sufficient Evidence of Diligence to Warrant an Evidentiary Hearing

Allegations of previous unavailability of new facts, as well as diligence of Appellant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995). As the State has not conclusively proven Appellant's postconviction motion was not timely filed, summary denial was in error.

In her postconviction motion, Appellant alleged that her gender dysphoria was unknown at the time of her trial, new penalty phase, and postconviction

proceedings. SPCR. 41. The full extent and impact of the condition was unknown at the time of her 2017 *Hurst* litigation. *Id.*

Appellant has alleged and presented evidence to support that Dr. Kessel did not complete her assessment of Appellant until November 2018 (SPCR. 145), that Dr. Brown did not complete his assessment until October 2018 (SCPR. 107), and that—based on the nuanced complexities of making a gender dysphoria diagnosis and the unique characteristics of diagnosing Appellant with gender dysphoria—neither expert could have completed their evaluation earlier. SPCR. 406, 417-18; *see also supra*, Statement of Facts (I)(F).

Since Appellant did not have the opportunity to prove diligence at an evidentiary hearing, this Court "must accept these allegations as true." *Rivera v. State*, 995 So. 2d 191, 195-96 (Fla. 2008). At a minimum, this Court must remand for an evidentiary hearing on the issue of timeliness and diligence, as this issue involves "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

### B. Appellant Has Presented Sufficient Evidence of Probability to Warrant an Evidentiary Hearing

Factual allegations in support of a Rule 3.851 postconviction motion that are sufficient to state a prima facie claim of newly discovered evidence entitle a defendant to an evidentiary hearing. *See, e.g.*, *McLin v. State*, 827 So. 2d 948 (Fla. 2002); *Keen v. State*, 855 So. 2d 117 (Fla. 2d DCA 2003). Rule 3.851 does not require a defendant to submit affidavits in support of their factual allegations. *Valle*

*v. State*, 705 So. 2d 1331 (Fla. 1997) (discussing in the context of Rule 3.850); *Smith v. State*, 837 So. 2d 1185 (Fla. 4th DCA 2003) (same). But when a defendant does include supporting affidavits, it strengthens the need for an evidentiary hearing. *See, e.g.*, *Johnson v. Singletary*, 647 So. 2d 106, 110 (Fla. 1994).

Additionally, new scientific evaluations relating to evidence presented in prior litigation can qualify as newly discovered evidence. For example, mental health examinations conducted years after trial can produce newly discovered evidence. *State v. Sireci*, 502 So. 2d 1221 (Fla. 1987). In this case, Appellant has presented expert evidence that, for many years, Appellant has been affected by a serious medical condition—a condition not recognized by the medical community until 2013 and not definitively diagnosed in Appellant until 2018—and that her legal decisions were a direct result of the self-loathing, depression, and suicidality brought on by this condition. SPCR. 89-207.

In December 2018, based on this evidence, Appellant filed a postconviction motion contending that her legal waivers were unknowing, unintelligent, and involuntary. SPCR. 35. In the motion—and through attached exhibits—Appellant detailed how multiple witnesses have expressed doubts as to Appellant's competence at each point in her legal proceedings when she waived her rights.

One expert explains that Appellant's gender dysphoria "greatly affected" her mental state and decision-making to the point of rendering her waiver of rights

unknowing and involuntary. SPCR. 146. Another expert says "it is highly likely" Appellant lacked the competency to make knowing and informed waivers in this case. SPCR. 119. A third expert finds Appellant's gender dysphoria "affected her ability to reason in a reality-based, consequence-aware way about her legal options." SPCR. 142. A fourth expert expresses "substantial doubts" as to Appellant's competency at the time of her waivers at her original trial, her second penalty phase, and her postconviction proceedings. SPCR. 198. A fifth expert states that Appellant's "gender dysphoria, along with her multiple diagnoses, mental illnesses, and trauma" affected her competency such that he has serious doubts as whether she had the capacity to voluntarily and knowingly waive her rights. SPCR. 164. A sixth expert finds that Appellant's gender dysphoria has resulted in "self-loathing and depression" that manifested in harmful ways, including waiver of rights. SPCR. 172-73 (expressing "strong doubt" as to whether Appellant was competent at the time of her waivers). Multiple lay witnesses, including a social worker and legal professionals, believe Appellant's then undiagnosed gender dysphoria substantially impeded her ability to assist counsel, to manage her emotional distress and suicidality, to understand the consequences of her actions, and to make decisions in her best interests. SPCR. 155, 179, 187-89, 205-07.

Taken together, this evidence establishes that Appellant's gender dysphoria manifested in her waivers of constitutional rights throughout her capital case

proceedings. R. 96, 155, 163, 173. Appellant's gender dysphoria and related self-injurious behavior and suicidality creates reasonable doubt as to whether her postconviction waiver as well as her guilty plea and penalty phase jury waiver were voluntary, knowing, or intelligent. R. 119, 172-73.

The circuit court erred by failing to accept as true Appellant's allegations and the evidence and statements of the expert and lay witnesses proffered by Appellant. Appellant has established a prima facie claim of newly discovered evidence, which she is entitled to develop at an evidentiary hearing.

### C. Appellant is Entitled to an Evidentiary Hearing on Each of Her Individual Postconviction Claims

Appellant raised seven claims in her postconviction motion. SPCR. 35-86. Although each claim centers on her newly discovered gender dysphoria, the claims are separate and distinct claims that address different constitutional violations at different junctures of her case. The State did not address Appellant's individual claims, neither demonstrating the allegations Appellant set forth are conclusively rebutted by the record nor showing the claims are legally defective. SPCR. 371-94.

The circuit court similarly did not address the claims individually but rather denied Appellant's motion wholly. SPCR. 412-14.

Each of Appellant's postconviction claims provides a legal basis for relief and is supported by detailed factual allegations. Appellant is entitled to an evidentiary

hearing on each claim, and the circuit court erred by denying such. *See generally* Fla. R. Crim. Pro. 3.851(f)(5); *Gaskin*, 737 So. 2d at 516.

**1. The prior denial of *Hurst* relief relied on Appellant's postconviction waiver, which was accepted by the circuit court after flawed and obsolete competency findings that did not account for Appellant's gender dysphoria**

The full extent and impact of Appellant's gender dysphoria was unknown during her previous *Hurst* litigation. The circuit court and this Court denied *Hurst* relief to Appellant under the assumption that her waivers were competently entered. As counsel has since uncovered, including through the use of expert analysis, there is significant doubt as to the competency of Appellant's waivers and guilty plea. The condition of gender dysphoria was so impactful, this new evidence shows, that the prior denial of *Hurst* relief must be reevaluated.

For example, since the prior *Hurst* litigation, counsel has obtained supplemental reports and declarations from Dr. Brown and Dr. Kessel, who originally rendered Appellant's gender dysphoria diagnosis. SPCR. 107, 145. Counsel has also obtained evidentiary proffers from four other medical experts: psychologist Dr. Sara Boyd who evaluated Appellant in 2018; psychiatrist Dr. Sarah DeLand and psychologist Dr. Lawrence Gilgun, who both previously evaluated Appellant; and psychologist Dr. Frederic Sautter, who previously reviewed documentary evidence of Appellant's history. SPCR. 122, 159, 170, 193. A social

worker who previously worked on Appellant's case also provided a declaration, as did Appellant's former attorneys. SPCR. 151, 175, 183, 201.

In evaluating the validity of Appellant's plea and waivers in light of this new evidence, the Court must consider "all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *see also Hildwin*, 141 So. 3d at 1184.

Appellant's newly discovered evidence regarding her diagnosis of gender dysphoria could not have been discovered through due diligence. Appellant carried an intense amount of shame over her transgender identity. SPCR. 113. She felt sex role confusion from an early age, but did not have a name for what she was experiencing. SPCR. 134. Without the realization that she had a medical condition, Appellant could not express to evaluators or others what she was undergoing.

Furthermore, gender dysphoria was not a viable diagnosis at the time of Appellant's original trial or during her later waivers. SPCR. 155 (explaining that gender dysphoria was neither clinically recognized until the 2013 DSM-5 nor previously available as a diagnosis in the same way it is now); SPCR. 153-54, 196.

Appellant's newly discovered diagnosis of gender dysphoria creates a reasonable doubt as to the validity of her waivers throughout her case. Though Appellant was treated as competent at each stage of her waivers—a status Appellant

challenges—the evaluators, counsel, and the courts were not previously privy to Appellant's gender dysphoria at any juncture when she waived her constitutional rights. The courts were also not aware of the full extent and impact of Appellant's gender dysphoria when *Hurst* relief was denied based on the waivers.

Gender dysphoria calls into question the validity of Appellant's waivers, as no one was aware that Appellant's decisions to relinquish her constitutional protections and end her legal proceedings stemmed from her previously undiscovered gender dysphoria. SPCR. 96, 173, 163, 155.

Appellant's gender dysphoria and related suicidality also creates reasonable doubt as to whether Appellant's waivers were voluntary, knowing, or intelligent. SPCR. 173-74, 119. Without fully comprehending the condition at the forefront of Appellant's self-destructive behavior, evaluators were left "with limited information from which to render a full and meaningful assessment of the true reasons for [her] decision to waive [her] appeal rights then and into the future." SPCR. 96.

In light of Appellant's compromised competency and the invalidity of her waivers, this Court must revisit her case in light of *Hurst*. Like her co-defendant, Appellant is entitled to relief under *Hurst*. *State v. Lawrence*, No. 98-CF-0270, Order Granting Defendant's Amended Successive Motion for Postconviction Relief, Vacating Death Sentence (Santa Rosa Cty. 2017).

### 2. Newly discovered evidence shows the unconstitutionality of Appellant's guilty plea and the attendant ineffectiveness of her counsel

At her capital trial, Appellant was represented by two attorneys when the State offered a plea agreement. The State offered that, in exchange for Appellant pleading guilty to first-degree murder and other offenses, the State would not argue during the penalty phase that Appellant was the actual shooter—but would continue to seek the death penalty. *Rodgers v. State*, 934 So. 2d 1207, 1210 (Fla. 2006). One attorney advised Appellant to accept the offer and plead guilty, while the other advised Appellant to reject the State's offer and proceed to trial. *Id.* at 1214; *see also* SPCR. 175, 188. Appellant accepted the State's offer and pleaded guilty. R. 898, 914.

The contradictory advice of her two attorneys deprived Appellant of "the guiding hand of counsel" to which she was constitutionally guaranteed before waiving the panoply of constitutional rights associated with a trial. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). *See generally Santobello v. New York*, 404 U.S. 257, 264 (1971) (J. Douglas, concurring) ("[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt.") (citations omitted).

A guilty plea that is not knowing and voluntary is void and violates due process. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); *Brady v. United States*,

397 U.S. 742, 748 (1970). A knowing and voluntary plea can only occur if the defendant receives reasonably competent assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). A defendant can attack the voluntary and intelligent nature of her guilty plea by showing she received ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985).

To provide effective assistance, counsel must give their client educated advice as to whether she should accept a plea offer or contest the charges at trial. "[A]n accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). It is not sufficient for counsel to articulate the pros and cons of different pleas. "[C]ounsel must . . . offer his informed opinion as to the best course to be followed in protecting the interests of his client." *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir. 1984); *see also Mikenas v. State*, 460 So. 2d 359, 361 (Fla. 1984) ("[A]n attorney is obligated to advise his client of all plea offers . . . and the course of action he deems appropriate under the circumstances.").

Ineffective assistance of counsel during the plea process is generally analyzed under the two-pronged standard of deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill*, 474 U.S. at 56-57. However, there are

instances when "a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984).

"[T]he absence or denial of counsel at a critical stage of a criminal proceeding represents one of the egregious circumstances that requires the presumption of prejudice." *Burdine v. Johnson*, 262 F.3d 336, 344 (5th Cir. 2001); *see also Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (holding that, when a defendant is without the assistance of counsel "during a critical stage of the proceeding," the defendant must be "spared" the requirement of proving prejudice in a Sixth Amendment claim).

In the instant case, counsel's contradictory advice deprived Appellant of assistance when she was deciding whether to accept the State's plea offer. This situation warrants a presumption of prejudice. *Cronic*, 466 U.S. at 659; *Burdine*, 262 F.3d at 344. Appellant could not simply decide to follow the informed advice of her counsel because her attorneys provided her with contrary guidance. Their contradictory recommendations cancelled each other out and left Appellant without counsel to guide her. She had to make her decision alone. This absence of counsel requires the Court presume Appellant was prejudiced.

Assuming arguendo prejudice must be proved, Appellant can do so. Appellant would have rejected the State's offer and proceeded to trial had counsel not been functionally absent due to their conflicting advice. She was in a position where she felt she had to choose between her attorneys, and that is what she did. Appellant was

close with both attorneys, and she was pulled in opposite directions as each attorney advised different (and mutually exclusive) courses of action. SPCR. 188, 177-78.

Appellant's struggles regarding how to plead were exacerbated by her then undiagnosed gender dysphoria combined with her long trauma history. SPCR. 94. She experienced self-destructiveness and suicidality as well as "self-loathing, feeling that she was estranged from others and 'invisible,' inability to cope with ambivalence or emotional ambiguity, and tendencies toward black-and-white thinking." SPCR. 134. Her underdeveloped brain and psychosocial immaturity also "affected her ability to reason in a reality-based, consequence-aware way about her legal options." *Id*.

By giving Appellant conflicting advice, trial counsel failed to adequately assist their client. Appellant—with no legal training, struggling with mental and emotional health problems, and, at best, teetering on the edge of incompetency—did not have the assistance of counsel in deciding whether to plead guilty at her capital trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and analogous provisions of Florida law.

### 3. Appellant should have been granted *Hurst* relief because, due to her newly discovered medical condition, she was incompetent during her 2007 penalty phase and her jury waiver during those proceedings is unconstitutional

The reliance on the validity of Appellant's plea and waivers to deny *Hurst* relief is no longer constitutionally sustainable because the evidence now available

shows that Appellant was incompetent to waive her rights during her 2007 penalty phase and resentencing proceedings. Without those waivers to serve as a procedural barrier to relief, Appellant should be granted *Hurst* relief like any other Florida defendant whose death sentence became final after 2002. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (holding that defendants who were sentenced to death after *Ring v. Arizona*, 536 U.S. 584 (2002), and "under Florida's former, unconstitutional capital sentencing scheme" should receive the retroactive benefit of *Hurst*).

Despite having a long and well-documented history of mental illness—a history that included a prior finding of incompetency—no reasonable assessment was made of Appellant's competency before she was allowed to waive mitigation and a jury at her second penalty phase.

The criminal trial of an incompetent defendant violates due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This due process right cannot be waived. *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

> [A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . [T]he prohibition is fundamental to an adversary system of justice.

*Drope*, 420 U.S. at 171-72. The test for assessing Appellant's competency is whether she "ha[d] sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding—and whether [s]he ha[d] a rational as well as

factual understanding of the proceedings against [her]." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Appellant, "raising a substantive claim of incompetency, . . . must demonstrate . . . her incompetency by a preponderance of the evidence." *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992). It is "inherent[ly] difficult[]" for a court to make a retrospective, or nunc pro tunc, determination of a defendant's competence; thus, when a defendant establishes by a preponderance of the evidence that she was in fact incompetent when she waived her rights, the court must vacate the sentence and order new proceedings. *Drope*, 420 U.S. at 184; *see also Boykin*, 395 U.S. at 243-44 (holding that a waiver of constitutional rights that is not knowing, intelligent, and voluntary is void and violates due process).

At the time of Appellant's new penalty phase and sentencing proceedings, her competency had not been assessed in seven years. During her 2007 resentencing proceedings, no competency evaluations were conducted, and no competency hearing was held. Multiple mental health and legal professionals have expressed bona fide and substantial doubts as to Appellant's competence during her 2007 proceedings. SCPR. 95-96, 111, 142 (footnote omitted), 198, 162-64, 172-74, 155-56, 205-07, 174, 187-89.

As Appellant was not competent during the 2007 proceedings and at the time she waived her rights, including her rights to a penalty phase jury and to present

mitigation, the prior denial of *Hurst* relief is no longer valid and her death sentence cannot stand.[6] With evidence of her newly discovered gender dysphoria—on top of evidence of her prior incompetency and ongoing mental health problems—Appellant establishes by a preponderance of the evidence that she was not competent at the time of her 2007 waivers.

A 1999 finding that Appellant was not competent to stand trial, R. 994, raises a red flag to her competency at the time of her 2007 proceedings and penalty phase waivers. Though the expert found Appellant competent a few months later, he stressed to the trial judge—the same judge who presided over Appellant's 2007 and later proceedings—that her competency hinged on her being adequately treated with medication and that, without a proper medication regimen, she was likely to return to a state of incompetence. R. 995, 2059-61, 2073-80. In Appellant's underlying postconviction proceedings, this expert expressed concerns that Appellant's competency was not assessed prior to her 2007 waiver and resultant doubts as to her competency at that juncture. SPCR. 162-63, 173.

It is well documented that, during her upbringing, Appellant suffered extreme violence and sexual, physical, and emotional abuse from her caregivers. SPCR. 92-95, 151-53, 195-96; *see also* SPCR. 203-04. In her adolescence, Appellant spent "65

[6] To prove this "substantive incompetency claim," Appellant "need not . . . allege any error on the part of any state actor" or defense counsel. *James*, 957 F.2d at 1572.

months of near-continuous incarceration from ages 15-20" in different facilities, including the Dozier School for Boys—the now-shuttered facility infamous for its excessive force and violence against children and adolescents. *See* SPCR. 129-30; *see also* SPCR. 94-94. While in these facilities, Appellant was frequently physically restrained with handcuffs and straightjackets, kept in isolation for mental health reasons, and administered psychotropic medications—measures that have since been proven more damaging than helpful. *Id.*; SPCR. 127-29.

Appellant's history of trauma, mental illness, and serious self-injury and self-mutilation should have triggered a competency evaluation in 2007. "Even a rudimentary investigation into her history should have been a tip-off to Ms. Rodgers's potential to be incompetent and the need for a competency assessment." SPCR. 197-98, 155 ("A basic investigation . . . would have raised red flags about her competency due to her long and difficult trauma history, replete with mental illness, suicide attempts, and self-injury.").

In addition to the information available in 2007, Appellant's recent gender dysphoria diagnosis adds to the likelihood she was not competent then. Her gender dysphoria existed concurrently with the aforementioned mental health and trauma issues. SPCR. 96, 109. Appellant's gender dysphoria—and its accompanying depression and discontentment in conjunction with her mental illnesses—help explain her willingness to waive her rights. Appellant has presented expert testimony

that, based on gender dysphoria, "there is substantial doubt as to whether [Appellant's] waiver of [her] right to a jury at [her] second penalty phase was knowing and voluntary." SPCR. 96-97, 109.

Appellant has established a bona fide doubt as to her competence at the time of her 2007 penalty phase proceedings and constitutional waivers. As a result, the predicate for the prior denial of *Hurst* relief—the validity of those waivers, based on prior flawed competency determinations that did not account for the gender dysphoria condition—is no longer present. Appellant should be granted *Hurst* relief.

**4. Appellant's death sentence cannot survive scrutiny under *Hurst*, given that neither the resentencing court nor resentencing counsel ensured Appellant was competent when she waived her rights at her 2007 penalty phase**

The resentencing court did not act on evidence that called into question Appellant's competency and did not order that Appellant undergo a competency assessment before permitting her to waive a panoply of constitutional rights at her 2007 penalty phase and resentencing. Separate from the court's errors, resentencing counsel was ineffective for failing to raise the issue of Appellant's competency. The failings of the court and resentencing counsel mandate that Appellant's death sentence be vacated and a new penalty phase be ordered.[7]

[7] Under the Florida Rules of Criminal Procedure, if defense counsel has a reasonable ground to believe her client is not mentally competent to proceed, counsel may file a motion requesting the defendant be examined by experts. Fla. R. Crim. P.

Where there is sufficient doubt of the defendant's mental capacity to stand criminal proceedings, such an inquiry includes, at a minimum, a hearing to determine the competency of a defendant. *Pate*, 383 U.S. at 387 (explaining that a hearing is constitutionally guaranteed when the record contains "sufficient indicia of incompetence" to doubt the defendant's competency). *See also Medina v. California*, 505 U.S. 437, 448 (1992) ("If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him.").

Once a genuine doubt has been raised as to a defendant's competency—by the court or defense counsel—the court must conduct a competency hearing. *Pate*, 383 U.S. at 384. *See also* Fla. R. Crim. P. 3.210(a-b). The defendant cannot waive the hearing. *Pate*, 383 U.S. at 384. In this case, both the court and resentencing counsel erred by failing to have Appellant's competency assessed.

**a. The resentencing court erred by failing to ensure Appellant was competent**

"[A] petitioner may allege that the trial court denied him or her due process by failing sua sponte to hold a competency hearing. This is . . . a substantive incompetency claim with a presumption of incompetency and a resulting reversal of

3.210(b)(1-3). The court may, too, of its own accord, set a time for a hearing to determine the defendant's mental condition. Fla. R. Crim. P. 3.210(b).

proof burdens on the competency issue." *James*, 957 F.2d at 1571-72. Under this standard, after Appellant "establish[es] that the trial court should sua sponte have held a competency hearing," the burden shifts to the State to prove harmlessness. *Id.*

A court must sua sponte inquire into a defendant's competency when there are reasonable grounds to doubt her competency. *Pate*, 383 U.S. at 385; *Scott v. State*, 420 So.2d 595, 597 (Fla.1982) ("[I]t is the responsibility of the trial court to conduct a hearing for competency to stand trial whenever it reasonably appears necessary to ensure that a defendant meets the standard of competency."); *Caraballo v. State*, 39 So. 3d 1234, 1252 (Fla. 2010) ("[R]ule 3.210(b) provides that, if the court 'has reasonable ground to believe that the defendant is not mentally competent to proceed,' it shall immediately schedule a hearing to determine the defendant's competency and may appoint experts to evaluate the defendant."); *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987) ("[W]hen a court has a 'bona fide doubt' as to a defendant's competence, it must sua sponte conduct a hearing on his competence to stand trial.").

The trial court was aware Appellant had been previously found incompetent.[8] The court was also aware that Appellant's competency was fluid and precarious. From the series of assessments conducted in 1999 and 2000, the court heard detailed

[8] Judge Rasmussen presided over Ms. Rodgers's resentencing proceedings in 2007. He was also the judge who presided over Ms. Rodgers's original capital trial where he had previously ordered Ms. Rodgers's competency be evaluated.

testimony about Appellant's history of trauma, emotional disturbance, psychiatric treatment, and self-harm. R. 1871-1134.

At Appellant's original penalty phase, the court had heard the testimony of Appellant's familial history of suicide and substance abuse and details of the physical, sexual, and emotional abuse Appellant suffered, T. at 1934-75; testimony that Appellant started self-mutilating at a young age and that her self-harm was documented during her later hospitalization and incarceration, T. at 2109-17; and testimony that Appellant tried to kill herself multiple times. T. at 2216-17.

The court was also aware that, after Appellant's initial capital trial, her mental health continued to deteriorate. The court presided over Appellant's 2004 proceedings in her noncapital case. In that case, the court learned that, in June 2004, the day before her noncapital guilty plea, Appellant tried to kill herself. She cut her arm so brutally that she required emergency hospitalization. SPCR. 258. The court had also reviewed an expert statement, cautioning about Appellant's questionable competency and speculating that, during her noncapital proceedings, "there is a strong possibility" Appellant was "either too psychotic at the time of the guilty plea to understand the proceedings" or that her guilty plea was "a suicidal gesture, rather than a rational response to [her] legal situation." SPCR. 259.

All of this evidence should have prompted the resentencing court to order Appellant's competency be assessed before proceeding with the 2007 penalty phase

and resentencing and certainly before the court accepted any constitutional waivers by Appellant. SPCR. 197-98, 162-65.

Appellant's gender dysphoria adds even more evidence that Appellant was not competent when she waived a jury and mitigation at her 2007 penalty phase. SCPR. 95-96, 111, 142, 162-64, 172-74, 198.

Despite extensive and uncontroverted evidence that Appellant suffered serious mental illness and had previously been found incompetent to stand trial, the resentencing court failed to order a competency evaluation, hold a competency hearing, or suspend the legal proceedings pending a determination of Appellant's competence. The court's failures deprived Appellant of due process and render the proceedings and her waivers constitutionally unreliable.

**b. Resentencing counsel rendered ineffective assistance by failing to ensure Appellant was competent**

Failure to raise a defendant's potential incompetency can be the basis for a claim of ineffective assistance of counsel. *Coker v. State*, 978 So. 2d 809, 810 (Fla. 1st DCA 2008) (recognizing the failure to raise a defendant's alleged incompetency as a ground for asserting ineffective assistance of counsel); *Schultheis v. State*, 12 So. 3d 811, 812 (Fla. 1st DCA 2009) ("A narrow argument that counsel was ineffective for failing to raise the competency issue . . . is cognizable in the postconviction posture."). Ineffective assistance of counsel is analyzed under the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant

must show that counsel's representation fell below an objective level of reasonableness and that, but for counsel's deficient performance, there is a reasonable likelihood an evaluation would have found her not competent. *Id.* at 688.

Resentencing counsel performed deficiently when he ignored evidence that raised a bona fide doubt as to Appellant's competency. Counsel had strong reason to know Appellant's competency was questionable, at best. Counsel told the court he had read all of the files available to him regarding Appellant's mental health. PPR. 257-78. These records included documentation of Appellant's trauma history, numerous psychiatric hospitalizations, juvenile incarcerations, horrific familial history, numerous instances of self-injury and suicide attempts, and many psychiatric diagnoses. The records also included the court-ordered evaluations prior to the original trial, including the earlier finding that Appellant was incompetent to stand trial. R. 995, 2059-61; SPCR. 211-17.

Counsel was obligated to investigate Appellant's competency by retaining an expert to conduct a competency assessment or by requesting the court appoint an expert for such purpose. *Agan v. Singletary*, 12 F.3d 1012 (11th Cir. 1994) (holding counsel ineffective for failing to investigate the defendant's mental state prior to a waiver of constitutional rights); *see, e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003).

> It must be a very rare circumstance [] where a decision not to investigate would be "reasonable" after counsel has notice of the client's history of mental problems. . . . Where a condition may not be visible to a layman, counsel cannot depend on his or her own evaluation of someone's

> sanity once he has reason to believe an investigation is warranted because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court.

*Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990).

Counsel has a duty to ensure his client is "capable of making a rational choice 'among rationally understood probabilities.'" *Galowski v. Berge*, 78 F.3d 1176, 1180 (7th Cir.1996) (citation omitted). Accordingly, counsel should seek an evaluation whenever he has a good faith doubt as to his client's competence. *United States v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir. 1998) (holding that defense counsel has "a professional duty" to bring the issue of competency to the court's attention when there is a doubt as to the client's competency); *Jermyn v. Horn*, 266 F.3d 257, 283 (3rd Cir. 2001) (explaining that counsel's representation is objectively unreasonable when he does not have his client evaluated despite indications of incompetence).

Here, resentencing counsel did nothing to investigate Appellant's competency. This failure was a dereliction of duty that fell below an objective standard of reasonableness. Adequate safeguards must be observed upon a doubt as to a defendant's competency, including the suspension of proceedings pending an evaluation and hearing. *Drope*, 420 U.S. at 171.

Defense counsel has a duty to inform the court when there is "reasonable doubt" as to his client's competence. *Kibert v. Peyton*, 383 F.2d 566, 569 (4th Cir. 1967).

> Of all the actors in a trial, defense counsel has the most intimate association with the defendant. Therefore, the defendant's lawyer is not only allowed to raise the competency issue, but, because of the importance on the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate.

*Boigegrain*, 155 F.3d at 1188–89.

> If counsel fails . . . to alert the court to the defendant's mental status, the fault is unlikely to be made up – particularly where a [waiver] removes the accused from the observation of the court and decreases the probability that counsel will deem it necessary to do further research in pursuit of a defense.

*Bouchillon*, 907 F.2d at 597.

In this case, resentencing counsel had "no justification for ignoring the uncontradicted testimony of [Appellant]'s history of pronounced irrational behavior" even if he believed she might be competent. *Pate*, 383 U.S. at 385-86. "[T]he existence of even a severe psychiatric defect is not always apparent to laymen." *Bruce v. Estelle*, 536 F.2d 1051, 1059 (5th Cir. 1976); *see also Lokos v. Capps*, 625 F.2d 1258, 1267 (5th Cir. 1980) ("One need not be catatonic, raving or frothing, to be [incompetent]."); *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) ("[Defense counsel] is not a trained mental health professional, and his failure to raise petitioner's competence does not establish that petitioner was competent.").

As the records in Appellant's case raised substantial doubts as to her competence, it was objectively unreasonable for resentencing counsel, during the

2007 proceedings and prior to Appellant's waivers, to fail to investigate her competency, alert the court to her questionable competency, or have her evaluated.

To show prejudice from counsel's ineffective assistance to investigate her competency, Appellant must show that there exists "'at least a reasonable probability that a psychological evaluation would have revealed that [s]he was incompetent to stand trial.'" *Nelson v. State*, 43 So. 3d 20, 29 (Fla. 2010) (quoting *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989)). *See also Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988) ("[T]o demonstrate prejudice from counsel's failure to investigate his competency, petitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.'") (citation omitted).

There is a reasonable probability that an evaluation would have found Appellant was not competent for the 2007 proceedings to go forth and for the resentencing court to accept her waiver of constitutional rights. Multiple mental health experts have expressed their professional opinions that Appellant needed to undergo a competency evaluation at these penalty phase proceedings and that, in the absence of one and based on Appellant's history, they have strong doubts that she was competent to proceed. SCPR. 95-96, 111, 142 (footnote omitted), 198, 162-64, 172-74, 155-56, 205-07, 174, 187-89. Appellant's gender dysphoria adds even more

evidence that Appellant was not competent when she waived a jury and mitigation at her 2007 penalty phase. SCPR. 95-96, 111, 142, 198, 162-64, 172-74.

The State has offered no evidence to the contrary.

Because this Court cannot now conclusively determine, eleven years after the fact, that Appellant was competent to waive her constitutional rights and be subjected to a resentencing in 2007, Appellant's death sentence must be vacated. *Drope*, 420 U.S. at 183 (vacating conviction, because even "under the most favorable circumstances," there are "inherent difficulties of . . . a nunc pro tunc determination" of competency); *Pate*, 383 U.S., at 387 (vacating conviction due to "the difficulty of retrospectively determining an accused's competence to stand trial"); *James*, 957 F.2d at 1570 (explaining that there is a "presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the petitioner's competency").

**5. Newly discovered evidence shows that Appellant's waiver of her pending postconviction proceedings was not competent and that, as such, the postconviction waiver does not serve as a barrier to *Hurst* relief**

Appellant's waiver of her pending initial postconviction proceedings does not serve as a barrier to revisiting the prior denial of *Hurst* relief in light of her newly discovered evidence. Initially, under the language of Rule 3.851—or, at least, under the only construction of Rule 3.851 that comports with the United States

Constitution—that waiver was only valid as to the postconviction proceedings that were *pending* at the time of the waiver and did not forever bar subsequent requests for postconviction relief based on newly discovered evidence. *See* Fla. R. Crim. P. 3.851(i) ("This subdivision applies only when defendant seeks both to dismiss *pending* postconviction proceedings and to discharge collateral counsel.") (emphasis added). More importantly, Appellant's waiver of her postconviction proceedings was not competent in light of her newly discovered gender dysphoria and, therefore, cannot any longer serve as a barrier to granting *Hurst* relief.

After Appellant's 2007 resentencing, this Court affirmed her death sentence. *Rodgers v. State*, 3 So. 3d 1127 (Fla. 2009). This case then entered state postconviction proceedings under Rule 3.851. At the start of the postconviction proceedings, the circuit court ordered Appellant to be evaluated by two experts. PCR. 1; PCSR. 1-7, 99-107. Their evaluations occurred fourteen months prior to the hearing held pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). Both doctors found Appellant competent. PCSR. 107, 7. Based on the evaluations, the court found Appellant competent to waive her postconviction proceedings. PCR. 1-3. This Court affirmed. *Rodgers v. State*, 104 So. 3d 1087 (Fla. 2012).

But Appellant was not competent when she discharged counsel and waived her postconviction proceedings. The evaluations that occurred fourteen months prior

to her waiver were obsolete by the time the waiver occurred and did not accurately reflect Appellant's functioning at the time of her postconviction waiver.

Criminal proceedings of an incompetent defendant violate due process. *Drope*, 420 U.S. at 171. This due process right cannot be waived. *Pate*, 383 U.S. at 384. Whether Appellant was competent hinges on whether she "ha[d] sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding—and whether [s]he ha[d] a rational as well as factual understanding of the proceedings against [her]." *Dusky*, 362 U.S. at 402.

To prevail on this claim, Appellant must demonstrate by a preponderance of the evidence that she was incompetent at the time of her postconviction waivers.[9] *James*, 957 F.2d at 1571; *Drope*, 420 U.S. at 184 (explaining that, when a defendant establishes by a preponderance of the evidence that she was in fact incompetent when she waived her rights, the court must order new proceedings). *See generally Boykin*, 395 U.S. at 243-44 (holding that a waiver of constitutional rights that is not knowing, intelligent, and voluntary is void and violates due process).

Here, a preponderance is shown by the prior evaluation that found Appellant incompetent, her history of mental and emotional disturbances, and her lifelong (but previously undiagnosed) gender dysphoria.

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[9] To prove this "substantive incompetency claim," Appellant "need not . . . allege any error on the part of any state actor" or counsel. *James*, 957 F.2d at 1572.

After Dr. Gilgun found, in 1999, that Appellant was not competent to stand trial, he cautioned that her mental and emotional instability was deeply-rooted and would be a recurring problem. He spoke to the need for her to be treated with medication and warned that, without proper treatment, she would become suicidal and act to harm herself. Dr. Gilgun foresaw that the severity of Appellant's mental health problems would create fluidity in her competence. R. 995, 2059-61, 2073-80.

Based on his experience with Appellant, Dr. Gilgun has opined that she was not competent when the circuit court accepted Appellant's postconviction waiver. SPCR. 164. Due to the severity of Appellant's mental illness and the competency fluctuations symptomatic of her psychological problems, Gilgun opined that the competency evaluations conducted fourteen months prior to the *Durocher* hearing were not adequate substitutes for assessments that should have occurred contemporaneous with the *Durocher* hearing. Such a gap—over a year between the evaluations and the competency hearing—was too long for Appellant.

> Competency is generally determined via an evaluation of a defendant's overall mental status and mental state at the time of the examination. As seen with my two evaluations of Ms. Rodgers, which were merely three months apart, competency can fluctuate substantially. The 14-month gap between [the] evaluations and the hearing rendered the evaluations obsolete.

SPCR. 165-66; *see also* SPCR. 173 ("Competency is fluid, and decision-making competency must be assessed at the moment.").

Florida courts have also expressed concerns that a court cannot base a competency finding on an evaluation that was not contemporaneously conducted. *Brockman v. State*, 852 So. 2d 330, 333-34 (Fla. 2d DCA 2003) (holding that assessments from four and eleven months prior to trial "were simply too old to be relevant to a determination of [the defendant's] competency to stand trial" as they did not speak to the defendant's competence at the time of trial); *In re Commitment of Reilly*, 970 So. 2d 453, 454 (Fla. 2d DCA 2007) (explaining that a six-month-old report could not speak to the defendant's present competency and that the "stale report" did not provide substantial evidence to support trial court's finding that defendant was incompetent to proceed); *LeWinter v. Guardianship of LeWinter*, 606 So. 2d 387, 388 (Fla. 3d DCA 1992) (discussing how an examining committee's report that was filed six weeks before the competency proceeding did not accurately reflect the subject's *present* mental state and ability to care for himself).

In addition to the gap in time between the evaluations, Appellant's history also raises a red flag as to her competency at the time of her postconviction waiver. Appellant has suffered from lifelong severe mental illness, been subjected to extensive abuse, and has a history of self-harm. SPCR. 92-94, 151-53, 195-96.

The newly discovered evidence of Appellant's gender dysphoria adds another layer of doubt to her competency at the time of her postconviction waiver. Her gender dysphoria existed concurrently with the aforementioned mental health and

trauma issues Appellant suffered. SPCR. 96, 109-11. Gender dysphoria helps explain Appellant's willingness to waive her rights. SPCR. 96-97, 110-11. The inner turmoil of her gender dysphoria was at the root of her repeated acts of self-harm, including suicide attempts. SPCR. 93-94, 102-03.

In light of Appellant's history and gender dysphoria, multiple mental health experts have significant doubts as to Appellant's competency at the time of her postconviction waiver. SPCR. 97, 111, 164, 173, 198.

With this evidence, Appellant has established a bona fide doubt as to her competence at the time of her postconviction proceedings waiver. As such, her substantive due process rights under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution have been violated. Appellant's state postconviction proceedings should be reinstated, and she should be provided an opportunity to litigate her postconviction claims. At a minimum, this Court should find that her postconviction waiver is not valid and that she is entitled to *Hurst* relief.

#### 6. Appellant is entitled to *Hurst* relief, given that the postconviction court and defense counsel failed to ensure Appellant was competent during her postconviction waiver

In Appellant's prior appeal, this Court relied on an obsolete and flawed competency assessment to affirm the circuit court's order that Appellant was not eligible for *Hurst* relief.

In 2011, the postconviction court erred by accepting Appellant's waiver of postconviction proceedings on the basis of a competency assessment that was out-of-date and incomplete. Separate from the court's error, postconviction counsel was ineffective for failing to obtain a thorough competency assessment to occur contemporaneously with the *Durocher* hearing. Individually and combined, the failings of the court and counsel require that Appellant's state postconviction proceedings be reinstated or her death sentence be vacated.

Where there is a doubt as to the defendant's mental capacity to stand criminal proceedings, there must be a competency inquiry that includes, at a minimum, a hearing. *Pate*, 383 U.S. at 387 (explaining that a hearing is constitutionally guaranteed when the record contains "sufficient indicia of incompetence" to doubt the defendant's competency); *Medina v. California*, 505 U.S. 437, 448 (1992). A doubt can be raised by defense counsel or the court. Fla. R. Crim. P. 3.210(a-b); Fla. R. Crim. P. 3.851(g). But the defendant cannot waive a competency assessment. *Pate*, 383 U.S. at 384.

A competency assessment must be made within a reasonable time. *Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence . . . ."); *Bishop v. United States*, 350 U.S. 961 (1956) (explaining that, while the defendant had no

mental disorder a month prior to trial, a hearing on his sanity at the time of trial was required); *Lane v. State*, 388 So. 2d 1022, 1025 (Fla. 1980) (discussing that a finding of competence made nine months prior to a hearing does not control when evidence of potential incompetency was presented at the hearing).

**a. The postconviction court erred by failing to ensure Appellant was competent**

"[A] petitioner may allege that the trial court denied him or her due process by failing sua sponte to hold a competency hearing. This is . . . a substantive incompetency claim with a presumption of incompetency and a resulting reversal of proof burdens on the competency issue." *James*, 957 F.2d at 1571-72. Under this standard, after Appellant "establish[es] that the [] court should sua sponte have held a competency hearing," the burden shifts to the State to prove that the error was harmless. *Id.*

A court must sua sponte inquire into a defendant's competency when there are reasonable grounds to doubt her competency. *Pate*, 383 U.S. at 385. *See also Scott*, 420 So. 2d at 597 ("[I]t is the responsibility of the trial court to conduct a hearing for competency to stand trial whenever it reasonably appears necessary to ensure that a defendant meets the standard of competency."); *Caraballo*, 39 So. 3d at 1252; *Fallada*, 819 F.2d at 1568.

In this case, by the time Appellant's case was in postconviction proceedings, the circuit court—with the same judge who had presided over Appellant's case for

ten years—knew Appellant suffered from severe mental illness. PCR. 17 ("I'm aware from reading the reports and also from prior trials with Mr. Rodgers that he does have an extensive mental health history including a large number of attempts to take his own life and self-mutilating activity on his behalf.").

The court was also aware that the evaluations finding Appellant competent were completed over a year prior to the *Durocher* hearing. PCR. 12. And the court knew from Dr. Gilgun's warning in 2000 that Appellant's competency was fluid and precarious. R. 995, 2059-61, 2073-80. The court also knew that Appellant's emotional and mental instability had historically manifested as self-harm and suicidality. SPCR. 258-29.

All of the evidence that led the postconviction court to acknowledge Appellant's "extensive mental health history" should have also prompted the court to order Appellant's competency be assessed contemporaneously with the *Durocher* hearing. The court's failure to do so deprived Appellant of due process and renders her state postconviction proceedings waivers constitutionally unreliable.

**b. Postconviction counsel rendered ineffective assistance by failing to ensure Appellant was competent**

Postconviction counsel performed deficiently when he ignored evidence that raised a bona fide doubt as to Appellant's competency. Counsel had strong reason to know Appellant's competency was, at best, questionable. Failure to raise a

defendant's potential incompetency can be the basis for a claim of ineffective assistance of counsel. *Coker*, 978 So. 2d at 810; *Schultheis*, 12 So. 3d at 812.

During the 14-month span between the competency evaluations and the *Durocher* hearing, Appellant sent counsel multiple letters. She expressed she was experiencing substantial inner turmoil and stress. Initially, she wrote of her desire to waive her appeals as a desire to die. She endorsed many psychiatric symptoms, including feelings of abandonment and hopelessness, depression, and being "constantly terrified." She wrote about "excruciating[] pain[]" and instances when she was abused and violated. SPCR. 96. She also wrote to her attorney that she no longer wanted to waive her postconviction proceedings and that she wanted to appeal her case. PCR. 32. These letters should have prompted counsel to request an updated competency evaluation of his client. If nothing else, counsel should have provided the letters to the competency evaluators to factor into their assessments.

Counsel should have also ensured that the evaluators had relevant, available information, including, but not limited to, complete records of Appellant's incarceration on death row, records from Santa Rosa County Jail, relevant records from her non-capital case, and evidence Appellant wavered in her desire to forgo her appeals. Counsel's neglect in failing to provide these records cannot be justified.

At the *Durocher* hearing, postconviction counsel said he did not feel comfortable opining about Appellant's mental state. PCR. 15. Counsel's lack of

confidence in his client's competency should have provoked him to act on the evidence he had regarding Appellant's severe mental illness and fluid mental capacities and to seek a proper, timely competency evaluation of Appellant. Counsel's failure to do so deprived Appellant of effective assistance of counsel.

Ineffective assistance of counsel is analyzed under *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant must show that postconviction counsel's representation fell below an objective level of reasonableness and that, but for counsel's deficient performance, there is a reasonable likelihood an adequate and timely evaluation would have found her not competent. *Id.*

From Appellant's voluminous background records, counsel knew of Appellant's history of trauma, psychiatric hospitalizations, self-injury and suicide attempts, and prior incompetency. It was unreasonable for counsel to fail to ensure Appellant was competent by failing to have her competency evaluated near in time to the *Durocher* hearing and evaluated by experts who had sufficient information to opine on Appellant's mental state. Counsel had "no justification for ignoring the uncontradicted testimony of [Appellant]'s history of pronounced irrational behavior" even if he believed she might be competent. *Pate*, 383 U.S. at 385-86. *See also Bruce*, 536 F.2d at 1059; *Lokos*, 625 F.2d at 1267; *Odle*, 238 F.3d at 1089.

It was objectively unreasonable for postconviction counsel to fail to alert the Court that the evaluations conducted fourteen months prior to the *Durocher* hearing

were stale, unreliable gauges of Appellant's competence at the time of her waivers, particularly when those evaluators did not have significant and critical information about Appellant. By disregarding Appellant's longstanding mental health issues and how they impacted her ability to understand the consequences of waiving her postconviction proceedings and discharging her attorney, postconviction counsel acted below objective standards of adequate representation.

To show prejudice from counsel's ineffective assistance in failing to investigate her competency, Appellant must demonstrate a reasonable probability that a timely evaluation would have concluded she was not competent. *Nelson v. State*, 43 So. 3d at 29; *Futch*, 874 F.2d at 1487. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Alexander*, 841 F.2d at 375 ("[P]etitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.'"). Appellant has made such a showing.

Appellant has provided affidavits, reports, and declarations from expert and medical professionals expressing substantial, legitimate doubts as to Appellant's competency at the time she waived postconviction proceedings and discharged counsel. These experts discuss that the evaluations conducted prior to Appellant's

*Durocher* hearing were not up-to-date and were based on insufficient information. SCPR. 97, 111, 155, 164, 173, 198.

Appellant's gender dysphoria injects additional doubt that Appellant was not competent when she expressed a desire to waive postconviction proceedings and discharge counsel. SCPR. 95-96, 111, 142, 162-64, 172-74, 198.

There is a reasonable probability, given Appellant's history, that, had experts evaluated Appellant near the *Durocher* hearing and been provided available and relevant information, they would have found Appellant was not competent to discharge her counsel and waive her constitutional rights during her postconviction proceedings. The failures of the postconviction court and counsel undermine the reliability of Appellant's postconviction proceedings and her waiver at the time of those proceedings. Appellant's waiver must be vacated; her state postconviction proceedings should be reinstated, or this Court should grant Appellant *Hurst* relief.

### 7. The *Hurst* error infecting Appellant's death sentence is compounded by the fact that it is based on an unreliable aggravating factor

In sentencing Appellant to death, the trial court found the aggravating circumstance that Appellant had been convicted of a prior violent felony. *Rodgers*, 3 So. 3d at 1133. This aggravator was based on a conviction for shooting at or into a building. SPCR. 248. But that conviction resulted from a guilty plea that was not

knowing, intelligent, and voluntary; its lack of reliability renders unconstitutional the death sentence it supports.

"The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990). A death sentence based, in part, on an unreliable prior conviction that was used as an aggravating factor violates the Eighth Amendment and an unreliable prior conviction "provide[s] no legitimate support for [a] death sentence." *Johnson v. Mississippi*, 486 U.S. 578, 586 (1988). An unreliable or vacated conviction has no place in a capital sentencing as an aggravator; it is "'constitutionally impermissible or totally irrelevant to the sentencing process.'" *Id.* at 585 (citation omitted).

Allowing a death sentence to stand when it is based, in part, on an unreliable aggravator violates "the Eighth Amendment's prohibition against cruel and unusual punishment" and subverts the "special need for reliability in the determination that death is the appropriate punishment in any capital case." *Id.* at 582 (citations, internal quotations omitted). *See also Preston v. State*, 564 So. 2d 120 (Fla. 1990) (vacating a death sentence based, in part, on the prior violent felony aggravator after the prior conviction was vacated on ineffective assistance of counsel grounds).

In Appellant's case, the trial court found the prior violent felony aggravator. *Rodgers*, 3 So. 3d at 1133. This aggravator was one of only two aggravators and was weighed against the "substantial mitigation exist[ing] in this case." *Id*.[10]

Appellant has filed a challenge to the conviction in her noncapital case—the very judgment on which her death sentence rests. *State v. Rodgers*, No. No. 98-CF-322 (3.850 Motion, filed on March 1, 2019). Appellant expects to prove in the noncapital proceeding that her guilty plea was not knowing, intelligent, and voluntary—that there are real doubts as to whether she was competent to waive her rights and that she was deprived effective assistance of counsel. Should that judgment be vacated, the Eighth and Fourteenth Amendment require her death sentence also be vacated.

In all capital cases, the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). In "weighing" states, like Florida, the only aggravating factors permitted to be considered by the sentencer are the specified eligibility factors. *Parker v. Dugger*, 498 U.S. 308, 313 (1991); *Richmond v. Lewis*, 506 U.S. 40, 47 (1992). Thus, if one of the aggravating factors was invalid, "the jury could not consider the facts and circumstances relevant

[10] That Appellant would be resentenced to death was not a foregone conclusion. At Appellant's original trial, three jurors voted for life in lieu of a death sentence. *Rodgers*, 934 So. 2d at 1213.

to that factor as aggravating in some other capacity. . . . In a weighing State, therefore, the sentencer's consideration of an invalid eligibility factor necessarily skewed its balancing of aggravators with mitigators and required reversal of the sentence . . . ." *Brown v. Sanders*, 546 U.S. 212, 217 (2006) (citations omitted).

In Appellant's situation, her death sentence must be vacated if the conviction of the prior violent felony is vacated. The Court cannot merely consider the allegations underlying that case as nonstatutory aggravating evidence, as it is possible that a jury now, under *Hurst*, would not find the aggravator to be sufficient after Appellant's prior conviction is vacated. The Court must find the unreliable aggravating factors "skewed its balancing of aggravators with mitigators" and vacate Appellant's death sentence.

## CONCLUSION

Newly discovered evidence of Appellant's gender dysphoria calls into question the validity of her waivers in 2000, 2004, 2007, and 2011—at every stage of this case. This Court can no longer have confidence in the constitutionality of her waivers, the reliability of her death sentence, or the Court's prior denial of *Hurst* relief. For the foregoing reasons, Appellant respectfully requests that the Court reverse the circuit court's order and vacate Appellant's conviction and death sentence or remand for an evidentiary hearing.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Terri L. Backhus, hereby certify that on April 30, 2019, I served this filing by electronic transmission via the e-portal to Assistant Attorney General Charmaine Millsaps at capapp@myfloridalegal.com and charmaine.millsaps@myfloridalegal.com.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated initial brief is in compliance with the requirements of Florida Rule of Appellate Procedure 9.210.

/s/ Terri L. Backhus
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