In the Supreme Court of Florida

JEREMIAH M. RODGERS,

Appellant,

v. CASE NO. SC19-241

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JEREMIAH M. RODGERS, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the prosecution or the State. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

On July 24, 2000, Rodgers entered a plea of guilty as a principal to the first-degree murder of Jennifer Robinson, conspiracy to commit murder, giving alcohol to a minor, and abusing a human corpse. *Rodgers v. State*, 934 So.2d 1207, 1210 (Fla. 2006). The Florida Supreme Court affirmed the convictions but remanded for a new penalty phase. *Id*. at 1209, 1221-1222.

At the second penalty phase, Rodgers waived his right to a jury. *Rodgers v. State*, 3 So.3d 1127, 1130 (Fla. 2009). There was no jury recommendation at the second penalty phase due to the waiver. The trial court found two aggravating circumstances: 1) the prior violent felony; and 2) cold, calculated, and premeditated (CCP). *Id*. at 1133. Following the resentencing proceedings, the Florida Supreme Court affirmed the death sentence. *Id*. at 1135. Rodgers did not seek review of his death sentence in the United States Supreme Court, so his sentence become final 90 days after the opinion was issued on February 5, 2009, which was on Monday, May 7, 2007. Fla. R. Crim. P 3.851 (d)(1) (defining finality in capital cases); *Rodgers v. State*, SC07-1652, (no motion for rehearing filed).

Rodgers was found competent to plead guilty in the first appeal. *Rodgers*, 934 So.2d at 1210. Rodgers was found competent again to waive his right to a penalty phase jury during his second penalty phase in the second appeal. *Rodgers*, 3 So.3d at 1132-33.

On July 5, 2010, during the state postconviction proceedings, before any 3.851 motion for state postconviction relief was filed, Rodgers wrote a letter to Judge Rusmussen seeking to waive his statutory right to postconviction counsel and all state postconviction proceedings.

On April 6, 2011, the trial court held a hearing to conduct a personal on-the-record waiver colloquy as required by state law. Fla. R. Crim P. 3.851(i); *Durocher v. Singletary*, 623 So.2d 482, 485 (Fla. 1993) (requiring trial courts to

evaluate defendants to determine if they understand the consequences of waiving collateral counsel and proceedings). The trial court first inquired into Rodgers' competency to waive postconviction proceedings. The trial court appointed Dr. Harry McClaren and Dr. Gregory A. Prichard to examine Rodgers for comptency to waive. Both experts filed written reports with the trial court setting forth their findings as required by rule 3.851(i)(4). Dr. Prichard had administrated a WAIS I.Q. test. (*Durocher* appeal PC Vol. I 9).[1] Rodgers had a full scale I.Q. of 108 which put him "firmly in the average to high average intellectual range." (*Durocher* appeal PC Vol. I 9). Both experts found the defendant to be competent. Based mainly on two mental health experts' reports, the trial court found Rodgers competent to waive postconviction proceedings.

During the waiver colloquy, the trial court explained to Rodgers that if he waived his postconviction proceedings: "this basically means the case is over." Rodgers responded: "I understand." The trial court noted "that would include a federal review of state claims. Do you understand that as well?" Rodgers responded: "Yes, I do." The trial court continued: "Do you also understand, sir, that state postconviction motions and federal habeas corpus proceedings or petitions have time limitations? And that even if you wanted to reinstate the proceedings at a later date, you may waive those type proceedings and it may be too late for you to do so in either state or federal or both courts?" Rodgers responded: "Yes, I do." (*Durocher* appeal PC Vol. I 19-21).

On April 20, 2011, the state postconviction court entered a written order finding Rodgers competent and that he waived postconviction proceedings. The state trial court wrote:

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[1] This is a reference to the record on appeal in the *Durocher* appeal. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (SC11-1401).

> the Court is satisfied Defendant is competent to make a decision waiving his right to counsel and his right to postconviction proceedings and finds Defendant waives those rights. The Court further finds Defendant's waiver is freely, voluntarily, and intelligently entered, Defendant having articulated his reasons for his decision after being advised of his rights to counsel and further postconviction review, had benefit and advice of counsel, and expressed a knowledgeable understanding of the rights he is waiving and the consequences thereof.

((*Durocher* appeal PC Vol. I 2).

The order was appealed to the Florida Supreme Court. This Court affirmed the waiver in an unpublished opinion. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (unpublished) (SC11-1401). The Florida Supreme Court concluded: "Rodgers was fully aware of and understood the consequences of waiving postconviction counsel and proceedings." *Id.* On October 17, 2012, the Florida Supreme Court affirmed the trial court's order finding Rodgers competent and finding the waiver of postconviction counsel and postconviction proceedings to be voluntary.

On January 11, 2017, Rodgers, represented by Billy Nolas of the Capital Habeas Unit (CHU) of the Federal Defender's Office, filed a successive 3.851 motion for postconviction relief in this capital case raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), in the state court. On February 14, 2017, the State filed an answer to the successive motion asserting the motion should be summarily denied because Rodgers waived any right to *Hurst* relief twice over. The State explained that Rodgers waived any *Hurst* claim first by waiving his penalty phase jury at the resentencing and then Rodgers waived the claim again by waiving all postconviction proceedings. Fla. R. Crim P. 3.851(i); *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993).

On May 2, 2017, the trial court summarily denied the successive motion based on the waivers. (Succ. PC at 109-111).

On appeal to this Court, Rodgers argued that both his waivers were invalid due to his undiagnosed and untreated gender dysphoria. *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (SC17-1050), *cert. denied*, *Rodgers v. Florida*, 139 S. Ct. 592 (2018). This Court held that a capital defendant who waived his penalty phase jury was not entitled to *Hurst* relief based on its existing precedent of *Mullens v. State*, 197 So.3d 16, 40 (Fla. 2016). This Court noted that it had "consistently held that the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury." *Id.* at 276. This Court rejected Rodgers' attempt to "avoid this result by attacking the waiver itself" by arguing that his "recently diagnosed condition of gender dysphoria" rendered him incompetent to waive. *Id.* at 277. As this Court explained, "the time for Rodgers to contest the prior competency determination has passed." *Id.* (citing Fla. R. Crim. P. 3.851(d)(1)). This Court observed that Rodgers did "not proffered any newly discovered evidence that would warrant revisiting the validity of this waiver." *Id.* This Court explained that there is a "narrow exception" to the general procedural bar which allows a claim of inadequate mental health assistance based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), which normally must be raised in the direct appeal, to be raised in postconviction proceedings but only for those cases involving psychiatric examinations "so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." *Id.* at 277 (citing *Raleigh v. State*, 932 So.2d 1054, 1060 (Fla. 2006)). This Court affirmed the trial court's summary denial of the *Hurst* claim.

Justice Pariente wrote a concurring opinion noting that the issue in the case was whether Rodgers' waivers were invalid because he suffered from "undiagnosed and untreated gender dysphoria when he made the waivers." *Rodgers*, 242 So.3d at 277 (Pariente, J., concurring). She concurred with the majority because "both

the trial court and this Court were aware of Rodgers' long history of mental illness" when determining Rodgers' competency to waive and therefore, the waivers remained "valid." *Id.* She then detailed the "troubling history" of Rodgers' mental illness including his "difficult childhood" and "long history of suicide attempts." *Id.* at 278. Justice Pariente noted the mitigation testimony at the first penalty phase included Professor David Foy's testimony regarding a diagnosis of post-traumatic stress disorder and Dr. Sarah Deland testimony regarding her diagnoses of post-traumatic stress disorder, disassociative disorder, substance abuse in remission, and borderline personality disorder. *Id.* She thought Rodgers' reported suicidality, self-mutilations, and severe depression" were "consistent with the severe symptoms of untreated gender dysphoria." Justice Pariente observed, however, that the claim of gender dysphoria was ***not*** being raised as a claim of newly discovered evidence or a claim of ineffective assistance of counsel and therefore, she concluded that the waivers remained valid. *Id.* at 279-80 (emphasis added).

Rodgers then filed a petition for writ of certiorari in the United States Supreme Court raising an argument for the first time that he only waived the statutory right to a jury during the penalty phase, not the constitutional right to a jury recently recognized by *Hurst*. On December 3, 2018, the United States Supreme Court denied the petition. *Rodgers v. Florida*, 139 S.Ct. 592 (2018) (No. 18-113).

The day after the United States Supreme Court denied the petition, on December 4, 2018, Rodgers, again represented by CHU-N, filed yet another successive postconviction motion in the state trial court arguing yet again that his waivers were involuntary due to his gender dysphoria. (2018 Succ. PCR 35-86). Taking a hint from Justice Pariente's concurrence, Rodgers in the 2018 successive motion couched the claim of gender dysphoria as a claim of newly discovered evidence this time around. Rodgers originally, in the 2017 postconviction motion,

relied on an expert report dated January 31, 2017, from Julie B. Kessel, M.D., a board-certified psychiatrist, who examined Rodgers on February 26, 2016, and a report dated February 9, 2017, from George R. Brown, M.D., a board-certified psychiatrist, who did not examine Rodgers but reviewed various records, who opined that there was "a high likelihood" that Rodgers suffered from Gender Dysphoria Disorder to support his claim of gender dysphoria. In the 2018 successive postconviction motion, Rodgers, in addition to relying on supplemental reports from both Dr. Kessel and Dr. Brown, relied on declarations from psychologist Dr. Sara Boyd; psychiatrist Dr. Sarah Deland; psychiatrist Dr. Lawrence Gilgun; and psychiatrist Dr. Frederic Sautter. Rodgers also relied on a declaration from social worker Angela Mason, as well as declarations from three of Rodgers' prior attorneys - Mark Olive; Denny LeBoeuf; and Tivon Schardl. (2018 Succ. PCR 87-366).

On December 21, 2018, the State filed a motion to dismiss the successive postconviction motion in the state trial court due to the *Durocher* waiver and, in the alternative, an answer to the 2018 successive postconviction motion. (2018 Succ. PCR 371-394). The State asserted that, based on Rodgers's *Durocher* waiver of postconviction proceedings, the trial court should dismiss the successive motion explaining that a dismissal rather than a denial was the only proper mechanism to enforce the *Durocher* waiver. *Id.* at 371-72. The State also asserted that the trial court should prohibit Rodgers' federal habeas counsel from filing any future pleadings in state court unless and until a death warrant is signed. *Id.* at 372.

On January 4, 2019, the CHU-N filed a response to the State's motion to dismiss. (2018 Succ. PCR 400-408). The CHU-N argued that the law-of-the-case doctrine did not apply because, while the Florida Supreme Court addressed the voluntariness of the waivers due to gender dysphoria in the prior appeal, it did not

address the claim specifically as a claim of newly discovered evidence. *Id.* at 400-04. The CHU-N also asserted the motion was timely because the defense mental health experts took years to complete their diagnoses and reports. *Id.* at 404-06. And the CHU-N took the position that the *Durocher* waiver was not a bar to the postconviction motion because the motion was an attack on the voluntariness of that waiver. *Id.* at 406-07.

On January 18, 2019, following a case management conference, the trial court summarily denied the postconviction motion. (2018 Succ. PCR 412-414). Judge John Simon observed that Rodgers had "discharged postconviction counsel and waived postconviction proceedings." *Id.* at 412. The trial court also noted that Rodgers had also waived his penalty phase jury at the second penalty phase. *Id.* The trial court noted that the Florida Supreme Court had found all of these waivers to be valid. *Id.* at 413. The trial court also noted that Rodgers had "raised similar claims" in his 2017 postconviction motion which this Court had also affirmed. *Id.* (citing *Rodgers v. State*, 242 So.3d 276 (Fla. 2018)). "Consequently," the trial court found, "the waivers stand" and Rodgers was not entitled to any relief. *Id.*

On February 12, 2019, Rodgers appealed the denial of his successive motion to the Florida Supreme Court. The State filed a motion to dismiss the appeal due to the *Durocher* waiver and based on the law-of-the-case doctrine, which this Court denied. This appeal follows.

SUMMARY OF ARGUMENT

Opposing counsel asserts that Rodgers' death sentence violates *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). She claims that Rodgers' waiver of the jury at the second penalty phase and later waiver of all postconviction proceedings were both involuntary due to the newly discovered evidence of a diagnosis of gender dysphoria. Opposing counsel bases this claim on a report dated January 31, 2017, from Julie B. Kessel, M.D., a board-certified psychiatrist, who examined Rodgers on February 26, 2016, as well as a report dated February 9, 2017, from George R. Brown, M.D., a board-certified psychiatrist, who did not examine Rodgers but reviewed various records, who opined that there was "a high likelihood" that Rodgers suffered from Gender Dysphoria Disorder. Dr. Kessel diagnosed Rodgers with gender dysphoria resulting in depression.

First, this claim is barred by the law-of-the-case doctrine. Rodgers has already raised a *Hurst* claim which was rejected by this Court due to the waiver of the jury at the resentencing. *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (SC17-1050), *cert. denied*, *Rodgers v. Florida*, 139 S.Ct. 592 (2018). In that appeal, this Court rejected Rodgers' assertion that the waiver of a jury was invalid due to his undiagnosed and untreated gender dysphoria. While the opposing counsel now frames the same claim as a claim of newly discovered evidence, reframing the same claim in a new legal cloak does not operate to negate the law-of-the-case doctrine. This Court has rejected this exact claim of involuntariness of a waiver based on gender dysphoria and should not permit relitigation of the same claim in another appeal.

Second, the claim of newly discovered evidence is untimely because it was not raised within one year of the discovery of the new diagnosis of gender dysphoria. The new diagnosis of gender dysphoria was discovered when the new defense

mental health expert examined Rodgers on February 26, 2017. So, any claim of newly discovered evidence based on that diagnosis should have been filed by February 26, 2018, to be timely but the current successive postconviction motion was not filed until months later on December 4, 2018. As the trial court correctly found, the claim of newly discovered evidence is untimely.

Third, the claim of newly discovered evidence of a new diagnosis of gender dysphoria, if viewed as a claim of newly discovered evidence of a violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985), is procedurally barred. As this Court explained in its prior decision addressing this same claim of gender dysphoria, claims of inadequate mental health examinations based on *Ake* must be raised in the direct appeal and are not properly raised in postconviction proceedings. *Rodgers v. State*, 242 So.3d 276, 277 (Fla. 2018). While a "narrow" exception exists for grossly insufficient examinations allowing those claims to be raised in postconviction proceedings, the narrow exception does not apply and this *Ake* claim remains procedurally barred.

Fourth, Rodgers waived any right to *Hurst* relief twice over. Rodgers waived his right to a jury at the second penalty phase. A defendant who waives a jury necessarily waives the right to jury findings, which is the basis of *Hurst*. Under this Court's precedent of *Mullens v. State*, 197 So.3d 16 (Fla. 2016), which this Court has consistently followed in numerous other capital cases, a defendant who waives the right to a penalty phase jury is not entitled to any *Hurst* relief. As the trial court correctly concluded, quoting this Court's decision in the prior appeal, "the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury." *Rodgers*, 242 So.3d at 276-77. Rodgers also waived all postconviction proceedings as permitted by this Court's decision in *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993). And this Court has affirmed the validity of that *Durocher* waiver twice including recently against an attack based on a claim of undiagnosed

gender dysphoria. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012); *Rodgers v. State*, 242 So.3d 276 (Fla. 2018). A *Durocher* waiver is not limited pending or existing postconviction claims. Rather a *Durocher* waiver includes all possible claims and all future claims. Under *State v. Silvia*, 235 So.3d 349 (Fla. 2018), a defendant who waives postconviction proceedings waives all future claims including *Hurst* claims which did not exist at the time of the original waiver. The *Hurst* claim was waived twice over.

Fifth, this is not a valid claim of "newly" discovered evidence. It is not a new diagnosis at all. The claim is based on Dr. Kessel's findings of gender dysphoria leading to depression. But the State's mental health expert, Dr. Greer, diagnosed Rodgers with depression and testified to that diagnosis at the first penalty phase. The diagnosis of depression was known to the trial court, Rodgers, trial counsel, the State, and to the jury at the time of the resentencing and therefore is not new. Alternatively, even treating the diagnosis of depression as new, the claim of newly discovered evidence fails. A diagnosis of depression would not result in a finding of incompetency to waive the jury at the second penalty phase or in a finding of incompetency to waive postconviction proceedings prior to the *Durocher* colloquy. Depression does not render a defendant legally incompetent to waive rights.

Sixth, the *Ake* claim is meritless. Rodgers was examined by seven mental health experts over the years. Rodgers was provided with at least one competent mental health expert which is all *Ake* requires. That the latest defense mental expert does not agree with the prior mental experts' various diagnoses does not amount a valid *Ake* claim.

And, finally, regardless of any waivers or bars, Rodgers should not be granted any *Hurst* relief. This Court should adopt the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989), and recede from *Mosley v. State*, 209 So.3d 1248 (Fla. 2016). Neither *Hurst v. Florida* nor *Hurst v. State* should be applied

retroactively. Rodgers' sentence was final years before either *Hurst v. Florida* or *Hurst v. State* were decided, so he should not be entitled to any *Hurst* relief.

For all these reasons, the trial court properly summarily denied the successive postconviction motion.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE 3.851 MOTION RAISING A SIXTH AMENDMENT RIGHT TO A JURY TRIAL CLAIM BASED ON *HURST V. FLORIDA*, 136 S.CT. 616 (2016), AND *HURST V. STATE*, 202 SO.3d 40 (Fla. 2016), IN A CASE WITH A WAIVER OF THE PENALTY PHASE JURY AND A WAIVER OF ALL POSTCONVICTION PROCEEDINGS? (Restated)

Rodgers asserts that the death sentence violates *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). The claim of newly discovered evidence of gender dysphoria is barred by the law-of-the-case doctrine, is untimely, and is procedurally barred. This is appeal is literally a redo of the 2017 appeal denying the same claim. Moreover, Rodgers waived any right to *Hurst* relief twice over. Rodgers waived the right to a jury trial at the second penalty phase. Under this Court's precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief. In this Court's words, a defendant may not "subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens v. State*, 197 So.3d 16, 40 (Fla. 2016). As the trial court correctly concluded, quoting this Court's decision in the prior appeal, "the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury." *Rodgers*, 242 So.3d at 276-77. And Rodgers waived all postconviction proceedings as permitted by this Court decision in *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993). Under this Court precedent of *State v. Silvia*, 235 So.3d 349 (Fla. 2018), a defendant who waives postconviction proceedings waives all future claims including any future *Hurst* claims. The *Hurst* claim was waived twice over. Both the waiver of the penalty phase jury and the *Durocher* waiver remain valid regardless of any gender dysphoria. Any claim based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), is both

procedurally barred and meritless. Rodgers was examined by numerous mental health experts over the years who all concluded that he was competent, including just prior to the *Durocher* waiver hearing. Furthermore, this Court should adopt *Teague* and hold that neither *Hurst v. Florida* nor *Hurst v. State* applies retroactively to any capital defendant. The trial court properly summarily denied the successive postconviction motion. Due to the *Durocher* waiver, this Court should dismiss this appeal rather than merely affirm the trial court's denial of this frivolous and repetitive appeal.

Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Furthermore, the scope of a waiver is a question of law and questions of law are reviewed *de novo*. *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (stating that the validity and scope of appellate waivers are reviewed *de novo*). The standard of review, therefore, is *de novo*.

The postconviction court's ruling

The state postconviction court summarily denied the successive postconviction motion. (2018 Succ. PCR 412-414). The postconviction court noted that Rodgers had waived the right to a penalty phase jury at the resentencing. *Id.* at 412. The postconviction court also noted that Rodgers had waived postconviction proceedings. *Id.* The postconviction court observed that both it and the Florida Supreme Court had previously found both waivers to be valid. *Id.* at 413 (citing

Rodgers v. State, 3 So.3d 1127, 1132-33 (Fla. 2009), and *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012)).

The postconviction court found the successive postconviction motion to be untimely. (2018 Succ. PCR 413 citing Fla.R.Crim.P. 3.851(d)(1), Fla.R.Crim.P. 3.851(2)(A), and *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008)). The postconviction court also observed that Rodgers had raised "similar" claims in a prior successive postconviction motion filed in the trial court on January 11, 2017, which the trial court had summarily denied and which this Court had affirmed. *Id.* at 413 (citing *Rodgers v. State*, 242 So.3d 276 (Fla. 2018)). "Consequently," the postconviction court concluded, "the waivers stand" and Rodgers was not entitled to any *Hurst* relief. *Id.* The postconviction court quoted this Court's statement that: "We have consistently held that the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury." *Id.* (quoting *Rodgers*, 242 So.3d at 276-77).

This Court's prior decision

In the prior appeal of the denial of the 2017 successive postconviction motion, Rodgers argued to this Court that both of his waivers were invalid due to his undiagnosed and untreated gender dysphoria. *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (SC17-1050), *cert. denied*, *Rodgers v. Florida*, 139 S.Ct. 592 (2018). This Court held that a capital defendant who waived his penalty phase jury was not entitled to *Hurst* relief based on its existing precedent of *Mullens v. State*, 197 So.3d 16, 40 (Fla. 2016). This Court noted that it had "consistently held that the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury." *Rodgers*, 242 So.3d at 276. This Court rejected Rodgers' attempt to "avoid this result by attacking the waiver itself" by arguing that his "recently diagnosed condition of gender dysphoria" rendered him incompetent to waive. *Id.*

at 277. As this Court explained, "the time for Rodgers to contest the prior competency determination has passed." *Id.* (citing Fla. R. Crim. P. 3.851(d)(1)). This Court observed that Rodgers did "not proffered any newly discovered evidence that would warrant revisiting the validity of this waiver." *Id.* This Court explained that there is a "narrow exception" to the general procedural bar which allows a claim of inadequate mental health assistance based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), which normally must be raised in the direct appeal, to be raised in postconviction proceedings but only for those cases involving psychiatric examinations "so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." *Id.* at 277 (citing *Raleigh v. State*, 932 So.2d 1054, 1060 (Fla. 2006)). This Court affirmed the summary denial of the *Hurst* claim.

Justice Pariente wrote a concurring opinion noting that the issue in the case was whether Rodgers' waivers were invalid because he suffered from "undiagnosed and untreated gender dysphoria when he made the waivers." *Rodgers*, 242 So.3d at 277 (Pariente, J., concurring). She concurred with the majority because "both the trial court and this Court were aware of Rodgers' long history of mental illness" when determining Rodgers' competency to waive and therefore, the waivers remained "valid." *Id.* She then detailed the "troubling history" of Rodgers' mental illness including his "difficult childhood" and "long history of suicide attempts." *Id.* at 278. Justice Pariente noted the mitigation testimony at the first penalty phase included Professor David Foy's testimony regarding a diagnosis of post-traumatic stress disorder and Dr. Sarah Deland testimony regarding her diagnoses of post-traumatic stress disorder, disassociative disorder, substance abuse in remission, and borderline personality disorder. *Id.* She thought Rodgers' reported suicidality, self-mutilations, and severe depression" were "consistent with the severe symptoms of untreated gender dysphoria." *Id.* at 280. Justice Pariente

observed, however, that the claim of gender dysphoria was ***not*** being raised as a claim of newly discovered evidence or a claim of ineffective assistance of counsel and therefore, she concluded that the waivers remained valid. *Id.* at 279-80 (emphasis added).

The law-of-the-case doctrine

This appeal is barred by the law-of-the-case doctrine. Under the law-of-the-case doctrine, all questions of law decided on appeal govern the case through all subsequent stages of the proceedings. *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001) (citing *Greene v. Massey*, 384 So.2d 24, 28 (Fla. 1980)).

Rodgers, in the prior appeal, raised a claim that both of the waivers were invalid due to gender dysphoria disorder. This Court explicitly rejected that claim in that prior appeal. *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (SC17-1050). This Court has already rejected the claim that Rodgers' gender dysphoria rendered him incompetent to waive the penalty phase jury, which ends the matter. Rodgers may not rechallenge this Court's conclusions in a second appeal. The same claim may not be relitigated *ad infinitum* merely by couching the exact same claim based on the same facts under a different legal theory.

Simply getting a new expert does not entitle a defendant to relitigate old claims under the disguise of newly discovered evidence. *Asay v. State*, 210 So.3d 1, 23 (Fla. 2016) (stating that merely "obtaining a new expert to review the same records does not create newly discovered evidence" citing *Howell v. State*, 145 So.3d 774, 775 (Fla. 2013)); *Johnson v. State*, 135 So.3d 1002, 1030 (Fla. 2014) (explaining, in the context of claims of ineffectiveness, the fact that a capital defendant has "now secured the testimony of a more favorable mental health expert simply does not establish that the original evaluations were insufficient" citing *Carroll v. State*,

815 So.2d 601, 618 (Fla. 2002)). Here, opposing counsel simply had the same defense mental health expert, Dr. Julie B. Kessel, who had written a report diagnosing Rodgers with gender dysphoria as the basis for the 2017 litigation write an updated report and used that report as the basis for the 2018 litigation. Getting more defense mental health experts or having the old experts write new reports does not negate the law-of-the-case doctrine and its prohibition on relitigation.

While this Court in the prior appeal limited its discussion to the jury waiver in its opinion and did not address the *Durocher* waiver, the law-of-the-case doctrine still applies to both waivers because the underlying challenge to the validity of both waivers is the same claim of involuntariness due to gender dysphoria. *Rodgers v. State*, 242 So.3d 276 (Fla. 2018). This Court rejected the claim of involuntariness due to gender dysphoria and that holding applies to both waivers. This Court has already found Rodgers to be competent to waive despite a diagnosis of gender dysphoria, which ends the matter. This entire appeal is barred by the law-of-the-case doctrine.

Untimeliness

The successive postconviction motion is untimely. Normally, a postconviction motion in a capital case must be filed within one year of the death sentence becoming final. Fla.R.Crim.P. 3.851(d)(1)(A). Rodgers' death sentence become final after the direct appeal of the second penalty phase in 2009. *Rodgers v. State*, 3 So.3d 1127 (Fla. 2009). Rodgers did not seek review of his death sentence in the United States Supreme Court, so his sentence become final 90 days after this Court's opinion was issued February 5, 2009, which was Wednesday, May 6, 2009. So, any postconviction motion was due by Thursday, May 6, 2010. The

current successive postconviction motion, however, was filed over eight years later on December 4, 2018.

Rodgers attempts to use the exception for claims of newly discovered evidence to avoid the untimeliness of the motion. Fla.R.Crim.P. 3.851(d)(2)(A) (providing that no postconviction motion filed beyond the one-year time limitation shall be considered unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence"). But any claim of newly discovered evidence must be filed within one year of the discovery of the new evidence.[2] The 2018 successive postconviction motion, however, was not filed within year of the discovery of the new diagnosis of gender dysphoria. Dr. Julie B. Kessel examined Rodgers on February 26, 2016, so any postconviction motion based on the new diagnosis should have been filed by February 26, 2017. But the current postconviction motion was not filed until December 4, 2018. So, even using the date of the discovery of the new diagnosis of gender dysphoria to restart the one-year clock, the motion was over nine months late.[3]

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[2] *Glock v. Moore*, 776 So.2d 243, 251 (Fla. 2001) (stating that any "claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence"); *Cherry v. State*, 959 So.2d 702, 705 (Fla. 2007) (same quoting *Glock*); *Reed v. State*, 116 So.3d 260, 264 (Fla. 2013) (finding the newly discovered evidence claim failed to meet the "one-year deadline" because the postconviction motion raising the claim was filed over three years after the affidavits supporting the claim were signed citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), and *Clark v. State*, 35 So.3d 880, 892 (Fla. 2010)).

[3] The State recognizes that the CHU filed the prior postconviction motion raising the claim of involuntariness due to gender dysphoria on January 11, 2017, but that does not make the current postconviction motion filed in 2018 raising the same claim of involuntariness due to gender dysphoria any less untimely. It simply means that the CHU needed to raise the claim ***as a claim of newly discovered evidence*** in the earlier postconviction motion for the claim of newly

Opposing counsel asserts that the clock restarts on the date the experts' reports are written. But the starting date for this restart provision should be the date of the examination, not the date of the report. Otherwise, the attorney for the defendant or a *pro se* defendant control the date and have the power to manipulate the restart provision at will merely by having the expert delay writing the report. Restart provisions should not be in the control of defense attorneys or defense experts. Furthermore, one year from the examination is a gracious plenty of time for the expert to write a report and for counsel to receive the report and then write the postconviction motion. After all, this provision operates to restart a clock which may have expired years ago, as in this case, and any court should be wary of interpreting a provision that restarts a time frame in a broad manner exactly because it is a reset button. Starting from the date of the examination in February of 2016, any motion had to be file by February of 2017 to be timely. The current postconviction motion is still untimely even restarting the clock for newly discovered evidence. The current successive postconviction motion is untimely.

Procedural bar

If the claim of newly discovered evidence of gender dysphoria is viewed as a claim of newly discovered evidence of a violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985), as this Court did in the prior appeal, then the claim is procedurally barred because it was not raised in the direct appeal of the second penalty phase or in the appeal of the *Durocher* waiver. *Rodgers v. State*, 3 So.3d 1127, 1131 (Fla. 2009) (listing the two issued raised as being: 1) whether the trial court erred by not conducting a competency hearing after Rodgers waived his right to a penalty

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discovered evidence to be timely.

phase jury and waived the presentation of significant mitigation; and 2) whether the death sentence is disproportionate); *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (rejecting a claim that the *Durocher* colloquy was cursory). In neither appeal, was *Ake* even cited in the initial briefs, much less raised as a separate issue.

Claims that the mental health examinations were inadequate based on *Ake* must be raised in the direct appeal. *Raleigh v. State*, 932 So.2d 1054, 1060 (Fla. 2006) (stating that *Ake* claims, in which a defendant asserts that he did not receive adequate mental health assistance, are generally "procedurally barred on postconviction review because it should have been presented on direct appeal" with a narrow exception for psychiatric examinations "so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage") (citations omitted). Rodgers did not raise an *Ake* claim in the direct appeal of the resentencing or in the *Durocher* appeal. These two *Ake* claims were required to be raised in those direct appeals and cannot be raised now in these successive postconviction proceedings. Because these two *Ake* claims were not raised in those respective direct appeals, they are procedurally barred.

This Court in the prior appeal noted that generally claims of inadequate mental health examinations based on *Ake* are procedurally barred in postconviction proceedings because such claims should be raised in the direct appeal. *Rodgers v. State*, 242 So.3d 276, 277 (Fla. 2018). The Florida Supreme Court explained that there is a "narrow exception" allowing an *Ake* claim of inadequate mental health assistance to be raised in postconviction proceedings but the exception applies only to those cases involving "psychiatric examinations so ***grossly*** insufficient that they ignore clear indications of either mental retardation or organic brain damage." *Id.* at 277 (citing *Raleigh v. State*, 932 So.2d 1054, 1060 (Fla. 2006)) (emphasis added). The Florida Supreme Court noted,

however, that Rodgers did not proffer any newly discovered evidence "of either mental retardation or organic brain damage" that would warrant revisiting the validity of the waiver. *Id.*

A claim of gender dysphoria does not fall into the exceptions identified by the Florida Supreme Court in *Raleigh* and *Rodgers*. Gender dysphoria is not intellectual disability or organic brain damage. The numerous prior mental health examinations of Rodgers simply were not "grossly insufficient," as required by *Raleigh*. So, the *Raleigh* exception does not apply and this claim remains procedurally barred. The claim of newly discovered evidence is a procedurally-barred *Ake* claim.

Waivers of the *Hurst* claim

Rodgers waived his *Hurst* claim twice over. First, Rodgers waived his right to a jury at the second penalty phase. A waiver of a jury is a waiver of jury findings which is the basis of a *Hurst* claim and, under this Court's precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief. Second, Rodgers waived all postconviction proceedings years ago. A *Durocher* waiver of postconviction proceedings includes all possible future claims which includes a *Hurst* claim.

Waiver of the jury at second penalty phase

Rodgers is not entitled to any *Hurst* relief due to his waiver of a penalty phase jury. At the second penalty phase, Rodgers waived the jury. *Rodgers*, 3 So.3d at 1130. As the trial court correctly concluded, quoting this Court's decision in the prior appeal, "the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury." *Rodgers*, 242 So.3d at 276-77.

A defendant who waives a jury trial has waived his Sixth Amendment right to jury findings, which is the basis for *Hurst v. Florida* and *Hurst v. State* in the first place.[4] As this Court explained in *Galindez v. State*, 955 So.2d 517, 519 (Fla. 2007), under *Apprendi* and its progeny, "a judge may not find any fact that exposes a defendant to a sentence exceeding the relevant statutory maximum, unless that fact inheres in the verdict, ***the defendant waives the right to a jury finding***, or the defendant admits the fact. (emphasis added). This claim is akin to a defendant insisting on a bench trial after a full waiver colloquy and then asserting on appeal that the bench trial violated his right to a jury trial. A defendant may not waive a penalty phase jury and then insist on his rights to jury findings on the aggravators or weighing.

Furthermore, due to the waiver, this Court cannot conduct a harmless error analysis. Under this Court's current precedent, this Court looks to whether the jury's final recommendation of death was unanimous to determine if the *Hurst* error is harmless. *Davis v. State*, 207 So.3d 142, 175 (Fla. 2016); *Everett v. State*, 258 So.3d 1199, 1200 (Fla. 2018) ("We have consistently relied on *Davis* to deny *Hurst* relief to defendants who have received a unanimous jury recommendation of death" citing numerous cases), *pet. for cert. filed*, *Everett v. Florida*, No. 18-8300 (Feb. 27, 2019). But, in a case where the defendant has waived a penalty phase

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[4] *Cf. Blakely v. Washington*, 542 U.S. 296, 303 (2004) (explaining the statutory maximum for purposes of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (noting that sentencing a defendant based on facts that the defendant assented to during the plea colloquy does not violate *Apprendi*); *United States v. Yancy*, 725 F.3d 596, 601 (6th Cir. 2013) (explaining that "when a defendant knowingly admits the facts necessary for a sentence enhancement in the context of a plea, simultaneously waiving his Sixth Amendment right to a jury trial, no *Apprendi* problem arises" citing cases).

jury, obviously, there is no jury vote. This Court cannot conduct its standard harmless error analysis in this case and that inability is due to the defendant's own conduct of waiving the penalty phase jury. Opposing counsel totally ignores the consequences of the waiver of the jury, such as the inability to conduct a harmless error analysis of a *Hurst* error, in her arguments to this Court.

Moreover, under this Court's well-establish precedent, a capital defendant who waives a penalty phase jury may not raise a *Hurst* claim. In *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), the Florida Supreme Court rejected a *Hurst* claim in a case where the defendant had waived his penalty phase jury. Mullens pleaded guilty to two counts of first-degree murder and one count of attempted first-degree murder and waived his right to a penalty phase jury. The Florida Supreme Court observed that, regardless of the exact scope and nature of the rights established in *Hurst v. Florida*, the defendant was entitled to no relief because he waived the penalty phase jury. *Mullens*, 197 So.3d at 38. The Florida Supreme Court observed that the United States Supreme Court in *Hurst v. Florida* "said nothing" about waiving the rights established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), but the United States Supreme Court, in the non-capital context, had stated that "nothing prevents a defendant from waiving his *Apprendi* rights" and that even "a defendant who stands trial may consent to judicial factfinding as to sentence enhancements." *Id.* at 38 (quoting *Blakely v. Washington*, 542 U.S. 296, 310 (2004)). The Florida Supreme Court observed that "accepting such an argument would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death. *Id.* at 40. The Florida Supreme Court wrote that "Mullens cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has

fundamentally undermined his sentence." *Id.* at 40. The Florida Supreme Court denied any *Hurst* relief.

This Court has consistently followed its decision in *Mullens* including in this case. *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Davis v. State*, 207 So.3d 177, 212 (Fla. 2016); *Wright v. State*, 213 So.3d 881, 902-03 (Fla. 2017), *cert. granted and judgment vacated on other grounds*, *Wright v. Florida*, 138 S.Ct. 360 (2017); *Robertson v. State*, 2016 WL 7043020 (Fla. Dec. 1, 2016) (No. SC16-1297); *Knight v. State*, 211 So.3d 1, 5 (Fla. 2016); *Deassure v. State*, 230 So.3d 411, 412 (Fla. 2017); *Allred v. State*, 230 So.3d 412, 413 (Fla. 2017); *Covington v. State*, 228 So.3d 49, 69 (Fla. 2017); *Twilegar v. State*, 228 So.3d 550, 551 (Fla. 2017); *Hutchinson v. State*, 243 So.3d 880, 883 (Fla. 2018); *Lynch v. State*, 254 So.3d 312, 322 (Fla. 2018) ("Based on our clear and repeated precedent, Lynch is not entitled to *Hurst* relief in light of his valid waiver of a penalty phase jury"), *cert. denied*, *Lynch v. Florida*, 139 S.Ct. 1266 (2019); *Robinson v. State*, 260 So.3d 1011, 1016 (Fla. 2018) ("Our decision in *Mullens* controls this case."); *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (this case).

Opposing counsel simply ignores this Court's statement in *Mullens* that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens*, 197 So.3d at 40. The claim that Rodgers is entitled to *Hurst* relief regardless of the waiver of the penalty phase jury is contrary to this Court's controlling and consistently followed precedent. *Mullens* controls and mandates the denial of this claim.

***Durocher* waiver**

Rodgers then waived any *Hurst* relief again by waiving all postconviction proceedings. Under *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993), Rodgers

may not raise any claim in postconviction because he waived any and all postconviction proceedings years ago. And this Court has affirmed that waiver twice. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (SC11-1401); *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (SC17-1050), *cert. denied*, *Rodgers v. Florida*, 139 S.Ct. 592 (2018). A defendant who waives postconviction proceedings waives all future claims and any appeals of those claims as well.

Years after the second penalty phase, Rodgers waived all postconviction relief. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012). Rodgers discharged his state postconviction counsel and waived all postconviction proceedings. As part of the colloquy, the state court explained to Rodgers that if he waived his postconviction proceedings: "In other words, this basically means the case is over." Rodgers responded: "I understand." The trial court continued: " . . . even if you wanted to reinstate the proceedings at a later date, you may waive those type proceedings and it may be too late for you to do so in either state or federal or both courts?" Rodgers responded: "Yes, I do." It is clear from this exchange that Rodgers understood that he was waiving all postconviction proceedings forever.

This Court recently considered the scope of a *Durocher* waiver on a *Hurst* claim in *State v. Silvia*, 235 So.3d 349 (Fla. 2018). This Court reversed a trial court's grant of *Hurst* relief in a case where the *Durocher* waiver was entered prior to *Hurst v. Florida* being decided by the United States Supreme Court. The trial court had concluded that a defendant cannot waive a claim that does not exist at the time of the waiver and granted the defendant a new penalty phase despite the *Durocher* waiver. But this Court disagreed. This Court concluded that the valid *Durocher* waiver, which explicitly included the understanding that he was losing permanently his right to take advantage of any changes that may occur in the law, precluded a defendant from claiming a right to benefit of *Hurst*. *Id.* at 351-52. Only Justice Lewis dissented. *Silvia*, 235 So.3d at 354 (Lewis, J., dissenting)

(expressing the view that the "newly established constitutional right" generated by *Hurst* were "a sufficient basis to avoid" any *Durocher* waiver); *see also Davis v. State*, 257 So.3d 100, 109 (Fla. 2018) (Polston, J., dissenting) (stating that "a valid waiver of both postconviction counsel and proceedings is a ***permanent*** waiver" citing *James v. State*, 974 So.2d 365 (Fla. 2008), and *Trease v. State*, 41 So.3d 119 (Fla. 2010)) (emphasis added). This Court recently relied on *Silvia* to deny *Hurst* relief based on a *Durocher* waiver of postconviction proceedings that occurred in 2003 long before *Hurst v. Florida* was decided in 2016. *Alston v. State*, 243 So.3d 885, 886 (Fla. 2018), *cert. denied*, *Alston v. Florida*, 139 S.Ct. 416 (2018). Under this Court's precedent of *Silvia* and *Alston*, a capital defendant who waives postconviction proceedings, waives all future claims and all future appeals as well.

Furthermore, in the appeal of the 2017 postconviction motion, Rodgers asserted that he could not have knowingly waived a *Hurst* claim because *Hurst* had not been decided at the time of his *Durocher* waiver in 2011. See SC17-1050 IB at 20-23; RB at 7. In the prior appeal of this same claim, federal habeas counsel argued that Rodgers' waiver of postconviction proceedings was not a waiver of all postconviction proceedings. Rather, he asserted that future claims, such as newly discovered evidence claims or claims based on newly created rights, may be litigated, despite the *Durocher* waiver. But, the State countered, *Durocher* waivers have never been limited in that manner. See SC17-1050 AB at 10-11;13-18. Traditionally, a *Durocher* waiver has included all postconviction proceedings and all types of claims. The State pointed out that if *Durocher* was limited in that manner, then this Court's decisions in *James v. State*, 974 So.2d 365 (Fla. 2008), and *Trease v. State*, 41 So.3d 119 (Fla. 2010), that a capital defendant may not simply change his mind and reinstate his previously waived postconviction proceedings would make little sense. The State explained that *Durocher* waivers

are not limited to the claims raised in the initial postconviction proceeding and that when a capital defendant explicitly waives all postconviction proceedings, all means all. Indeed, in this particular case, the waiver could not possibly be limited to the pending claims because the initial motion had not even been filed at the time of the waiver. Rodgers waived postconviction proceedings before the 3.851 motion was due. There were no "pending" claims at the time of the *Durocher* waiver in this case. A *Durocher* waiver means a defendant waives all postconviction proceedings forever including all future claims and all future appeals as well.

Rodgers' reliance on *Halbert v. Michigan*, 545 U.S. 605 (2005), is misplaced. IB at 26. The application of *Halbert* to this case was explored at length in the prior appeal of this same claim. Federal habeas counsel previously argued, just as they do now, that Rodgers' waiver of postconviction proceedings was not a waiver of all postconviction proceedings. They asserted that future claims, such as newly discovered evidence claims or claims based on newly created rights, may be litigated, despite the *Durocher* waiver. *Rodgers v. State*, SC17-1050 IB at 3, 20-24; RB at 4-7. The State, in its answer brief in the prior appeal, countered the case of *Halbert* with the cases of *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), *Brady v. United States*, 397 U.S. 742, 757 (1970), and *United States v. Ruiz*, 536 U.S. 622, 630 (2002), and distinguished *Halbert*. *Rodgers v. State*, SC17-1050 AB at 13-18. While this Court did not explicitly address the scope of the *Durocher* waiver in its opinion in the prior appeal in this case, this Court did just that in *Silva*. And this Court was aware of the defense's *Halbert*-based arguments and the State's position regarding those *Halbert*-based arguments in *Silvia* because the State addressed the trial court's ruling in *Silvia* in its answer brief in prior appeal. *Rodgers v. State*, SC17-1050 AB at 17-18. The State also filed notices of related case in both *Rodgers* and *Silvia* informing this Court that the two cases involved

the same issue and urging the court to consider the cases together. *Rodgers v. State*, SC17-1050 (State's notice of related case dated July 31, 2017); *State v. Silvia*, SC17-337 (State's notice of related case dated August 1, 2017). The holding of *Silvia* is that a defendant, who enters a *Durocher* waiver, waives future claims, specifically future *Hurst* claims. In other words, this Court has already rejected the defense's *Halbert*-based arguments in *Silvia*. *Halbert* does not apply but *Silvia* does.

Rodgers is not entitled to any type of postconviction relief or any type of postconviction appeal due to his waiver of postconviction proceedings. Rodgers may not raise any claim including a *Hurst* claim because he waived any and all postconviction proceedings and postconviction claims years ago. And that *Durocher* waiver included any and all future claims as established in *Silvia* and *Alston*. The *Hurst* claim has been waived and this appeal should be dismissed.

Hurst claims are waivable

Opposing counsel dramatically overreads *Garza v. Idaho*, 139 S.Ct. 738 (2019), in asserting that waivers cannot be automatic and absolute bars to future litigation. IB at 24. The *Garza* Court did not hold, or even hint, that absolute waivers are unconstitutional. The *Garza* Court explained that waiver are often not absolute because the scope of a waiver depends on the "language" of the waiver like the language of any contract and observed that the language of appellate waivers varies "widely," often leaving some claims that are outside the scope of the waiver which may be litigated. *Garza*, 139 S.Ct. at 744. The *Garza* Court observed that "all jurisdictions appear to treat at least some claims as unwaiveable," but that is a statement summarizing the law in various jurisdictions, not a statement constitutionalizing the concept of unwaivable claims. *Id.* at 745.

The *Garza* Court also observed that most courts agree that defendants retain the right to challenge the validity of the waiver itself. *Id.* And while the State certainly agrees that the issue of the voluntariness of the *Durocher* waiver itself is unwaivable, under the logic of *Pate v. Robinson*, 383 U.S. 375, 384 (1966), in which the United States Supreme Court observed it was "contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waived his right to have the court determine his capacity to stand trial," that only means that the voluntariness of the *Durocher* waiver itself is unwaviable. But, under this Court's *Durocher* procedure there is an automatic and mandatory appeal of any such waiver to determine its voluntariness. Fla.R.Crim.P. 9.142(d). And in this case, this Court held Rodgers' *Durocher* waiver was voluntary years ago. There certainly is no constitutional right to a second, much less a third, determination of voluntariness of the waiver which is what this appeal amounts to.

Furthermore, while opposing counsel insists that not all types of claims are waived by entering a *Durocher* waiver, opposing counsel never delineates what claims she believes are waived by entering into *Durocher* waiver and what claims are not waived and why. Nearly all rights, including constitutional rights, are waiveable. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (noting a "criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution" citing cases and a criminal defendant may waive a rule-based rights); *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are similarly subject to waiver" citing cases). Competency and the jurisdiction of the court are probably the only unwaivable claims. *Cf. Roman v. State*, 163 So.3d 749, 751 (Fla. 2d DCA 2015) (stating that a defendant who is presumptively incompetent cannot waive his right to a competency determination).

Opposing counsel certainly that does not explain why a *Hurst* claim would ever fall into the category of unwaivable postconviction claims. If a criminal defendant may entirely waive his constitutional right to a jury trial and enter plea, it makes no sense to assert that he can not waive his constitutional right to jury findings in sentencing which is what a *Hurst* claim is. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (stating that a plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment and discussing the rights that are waived by entering a guilt plea). *Hurst* claims are waivable and Rodgers did just that by entering a *Durocher* waiver.

Waiver of state postconviction counsel

Rodgers also waive his statutory right to state postconviction counsel as part of the *Durocher* waiver. In the recent case of *Davis v. State*, 257 So.3d 100 (Fla. 2018), this Court held that the capital defendant's partial waiver of postconviction proceedings was valid. Davis waived postconviction proceedings but he did not waive postconviction counsel. *Id*. at 105. Davis retained state postconviction counsel to litigate future claims related to his execution. *Id*. at 105, 106. Normally, capital defendants waive all postconviction proceedings and all postconviction claims and seek to discharge postconviction counsel as well, which was the situation in the original *Durocher* case. Atypically, Davis wanted to waive postconviction proceedings but to retain postconviction counsel to litigate certain limited postconviction claims, if a death warrant was signed. The *Davis* Court affirmed the partial waiver of the postconviction claims and the retention of postconviction counsel, reasoning "a defendant has the right to enter a waiver to some or all postconviction claims." *Id*, at 107. In a footnote, the *Davis* majority noted that the text of rule 3.851(i) was inconsistent with this Court's precedent in

two ways: 1) the rule only covers dual waivers of both postconviction claims and postconviction counsel; and 2) the rule refers to "pending" claims but this Court's precedent is that a *Durocher* waiver includes future claims as well. *Id.* at 107, n.8. The majority stated that: "this Court's case law has interpreted waivers as encompassing ***all*** postconviction claims, possible future changes in the law, ***and*** execution-related challenges. *Id.* at 107, n.8 (emphasis added). The majority referred the matter to the Criminal Court Steering Committee to consider possible revisions to rule 3.851(I). *Id.* at 107, n.8. This Court concluded that the postconviction court properly allowed Davis allowed the partial waiver of postconviction claims and the retention of postconviction counsel. *Id.* at 108.

Justice Polston dissented based on the current language of rule 3.851(i), which is limited to waivers of both postconviction claims and postconviction counsel. *Davis*, 257 So.3d at 108 (Polston, J., dissenting). Justice Polston noted that, under this Court's precedent, a capital defendant may not represent himself *pro se* in postconviction proceedings. *Id.* at 108, n.9 (citing *Gordon v. State*, 75 So.3d 200 (Fla. 2011)).[5] Justice Polston stated that this Court's precedent "indicates that a valid waiver of both postconviction counsel and proceedings is a ***permanent*** waiver." *Id.* at 109 (citing *James v. State*, 974 So.2d 365 (Fla. 2008), and *Trease v. State*, 41 So.3d 119 (Fla. 2010)) (emphasis added). Justice Polston observed that "our precedent and the plain language of the rule do not authorize

[5] This Court's current rules of court also prohibit a capital defendant from representing himself in postconviction proceedings in either the trial court or in this Court. Fla. R. Crim. P. 3.851(b)(6) (providing: "A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only bases for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or subdivision (i) of this rule.").

a partial waiver of only some postconviction claims while retaining postconviction counsel to raise postconviction claims at some point in the future." *Id.* at 109.

Proposed amendments to rules 3.851and rule 9.142

This Court is currently considering amending a rule of criminal procedure, rule 3.851(i), and a rule of appellate procedure, rule 9.142(d), to limit *Durocher* waivers to the waiver of postconviction proceedings without discharging state postconviction counsel. *Florida Bar News,* Vol. 46 No. 2 at 26 (Feb. 2019) (seeking comments). The proposed amendment to rule 3.851(i) also deletes the word "pending" postconviction proceedings. On April 1, 2019, this Court also received a petition from the criminal court steering committee which was submitted in response to this Court's directions in a footnote of *Davis*. *In Re Amendments to Florida Rule of Criminal Procedure 3.851 and Florida Rule of Appellate Procedure 9.142*, SC19-509. The Steering Committee discusses possible amendments to rule 3.851(i), and possible amendments to rule 9.142(d).[6] The Steering

[6] The rule of appellate procedure governing "Review of Dismissal of Postconviction Proceedings and Discharge of Counsel in Florida Rule of Criminal Procedure 3.851(i) Cases," rule 9.142(d), provides:

> (1) Applicability. This rule applies when the circuit court enters an order dismissing postconviction proceedings and discharging counsel under Florida Rule of Criminal Procedure 3.851(i).
>
> (2) Procedure Following Rendition of Order of Dismissal and Discharge.
>
> (A) Notice to Lower Tribunal. Within 10 days of the rendition of an order granting a prisoner's motion to discharge counsel and dismiss the motion for postconviction relief, discharged counsel shall file with

Committee advocates retaining postconviction counsel in all *Durocher* waiver cases in light of the prohibition on *pro se* representation in rule 3.851(b)(6). Petition at 2.[7] The Steering Committee in the petition referred to four open questions: 1) whether the waiver of postconviction proceedings is limited to currently pending postconviction claims; 2) whether the waiver includes future postconviction claims before a warrant is signed; 3) whether the waiver includes previously unripe and

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> the clerk of the circuit court a notice of appeal seeking review in the supreme court.
> (B) Transcription. The circuit judge presiding over any hearing on a motion to dismiss and discharge counsel shall order a transcript of the hearing to be prepared and filed with the clerk of the circuit court no later than 25 days from rendition of the final order.
> (C) Record. Within 30 days of the granting of a motion to dismiss and discharge counsel, the clerk of the circuit court shall electronically transmit a copy of the motion, order, and transcripts of all hearings held on the motion to the clerk of the supreme court.
> (D) Proceedings in the Supreme Court of Florida. Within 20 days of the filing of the record in the supreme court, discharged counsel shall serve an initial brief. Both the state and the prisoner may serve responsive briefs. All briefs must be served and filed as prescribed by rule 9.210.

[7] Rule 3.851(b)(6) is an expansion of this Court's existing caselaw prohibiting *pro se* representation in the appeals of capital cases to postconviction litigation in the trial court. *Davis v. State*, 789 So.2d 978 (Fla. 2001) (prohibiting *pro se* representation in postconviction appeals in capital cases); *Gordon v. State*, 75 So.3d 200 (Fla. 2011) (prohibiting *pro se* representation in postconviction appeals in capital cases). Appellate courts may force an attorney on a criminal defendant in both capital and criminal cases because the right of self-representation is limited to criminal trials. *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) (holding the right of self-representation established in *Faretta v. California*, 422 U.S. 806 (1975), does not extend to direct appeals). *Faretta* does not extend to direct appeals, much less postconviction proceedings.

execution-related claims after a warrant is signed; and 4) whether the original waiver colloquy should explicitly address these issues. Petition at 3.

But the first and second questions of whether a *Durocher* waiver includes future claims, as well as future claims that depend on new developments in the law that occur after the waiver has already been entered, were answered by this Court in *State v. Silvia*, 235 So.3d 349 (Fla. 2018), and *Alston v. State*, 243 So.3d 885, 886 (Fla. 2018), *cert. denied*, *Alston v. Florida*, 139 S.Ct. 416 (2018). *Durocher* waivers are ***not*** limited to pending claims or to existing legal claims; rather, a *Durocher* waiver includes all future claims, as well as future claims that depend on new developments in the law. *Durocher* waivers are not, and have never been limited, to pending claims. Indeed, this case is an example of that. In this case there were no pending claims at the time of the *Durocher* waiver in 2011. Rodgers had not filed any 3.851 postconviction motion yet. So, there were no "pending" claims at the time of the original *Durocher* waiver in this case.

As to the third question of whether a *Durocher* waiver excludes previously unripe and execution-related claims, after a warrant is signed, only certain claims may be raised in the warrant litigation. After a warrant is signed, only certain limited types of claims may be raised in the warrant litigation in a *Durocher* waiver case. This Court should include in the rule explicit limitations on the types of claims that may be raised in the warrant litigation of a *Durocher* waiver case to claims that are unwaivable or were not ripe until a warrant is signed, such as a claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986), or claims directly related to the execution itself, such an Eighth Amendment method of execution challenge to the current protocol or a claim of newly discovered evidence with that type of claim being limited to a convincing

claim of actual, factual innocence of the murder.[8] Only those claims that are unwaivable, have become ripe, are directly executed-related, or involve actual innocence of the murder may be raised in the warrant litigation. Any other types of claims may ***not*** be raised in the warrant litigation of a *Durocher* waiver case due to the original waiver. *Davis*, 257 So.3d at 108 (affirming a partial *Durocher* waiver that allowed the defendant to raise execution-related claims after a warrant was signed).

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[8] *Cf*. *Pate v. Robinson*, 383 U.S. 375, 384 (1966) (stating that a defendant whose competency to stand trial is in question, cannot knowingly or intelligently waive his right to a competency hearing or determination); *United States v. Kowalczyk*, 805 F.3d 847, 857 (9th Cir. 2015) (determining that a defendant, whose competency to stand trial is in question, cannot waive the right to counsel for the competency hearing citing *Pate*); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 895-96 (1991) (Scalia, J., concurring) (observing that even some structural errors may be forfeited and waived); *Panetti v. Quarterman*, 551 U.S. 930 (2007) (the statutory bar to filing a successive federal habeas petition does not apply to a *Ford* claim that was not ripe until the time of the execution); *Garza v. Idaho*, 139 S.Ct. 738, 745 (2019) (finding deficient performance of trial counsel for refusing to file a notice of appeal because the plea agreement included an appellate waiver, despite the defendant's explicit wish to appeal, reasoning that because some types of appellate claims are unwaivable, counsel has a duty to file a notice of appeal if the defendant wants to appeal and stating that "no appeal waiver serves as an absolute bar to all appellate claims."); *McQuiggin v. Perkins*, 569 U.S. 383 (2013) (holding the miscarriage of justice exception applies to the habeas statute of limitations allowing the court to consider an untimely but "convincing" claim of actual factual innocence). Normally, claims of newly discovered evidence can cover an vast array of evidence and claims, including claims of newly discovered evidence of impeachment or a lesser sentences but claims of newly discovered evidence in *Durocher* cases should be limited to a "convincing" claim of actual, factual innocence of the murder itself. *Rozzelle v. Sec'y, Fla. Dept. of Corr.*, 672 F.3d 1000, 1016 (11th Cir. 2012) (explaining that a claim of being guilty of only a lesser degree of homicide is not a proper claim of actual factual innocence). And the voluntariness and validity of the original *Durocher* waiver would not be at issue during the warrant litigation because the voluntariness of the original *Durocher* waiver would have been determined by this Court years earlier under the mandatory, fast-track appeal of such waivers required by the appellate rules. Fla. R. App.P. 9.142(d).

As to the fourth question asked by the committee regarding whether the original *Durocher* waiver colloquy should explicitly address these issues, the original *Durocher* colloquy and the text of rule 3.851(i) should include a required statement during the colloquy by the judge explicitly informing the defendant that by waiving all postconviction proceedings, he is waiving all litigation until a warrant is signed and, that even after the warrant is signed, the defendant may only raise certain limited claims. But the *Durocher* colloquy and rule 3.851(i) should not divide postconviction claims into complex categories or encourage partial waivers of only particular types of claims because that will only increase the amount and complexity of the issues in *Durocher* appeals.

The proposed amendments to the rules mandating a defendant retain postconviction counsel could create problems that are highlighted by the original *Durocher* case itself. In *Durocher*, the capital defendant, who was under a death warrant, did not want any appeals and did not want CCR representing him but CCR ignored his wishes and filed appeals and next friend petitions anyway. *Durocher*, 623 So.2d at 482 ("Durocher, however, objects to CCR's representing him."). Indeed, Durocher wrote a letter to this Court stating that he wanted to drop all appeals and that attorneys knew this "but choose to waste time and the tax payers money in opposing me." *Id.* at 483. This Court stated that "we cannot deny Durocher his right to control his destiny . . ." *Id.* at 484. This Court directed the trial court to conduct a waiver colloquy to determine if Durocher understood the consequences of such a waiver and if he was competent to waive. *Id.* at 485. This Court then stated that if the waiver was found to be valid, the petition would be dismissed. *Id.* This Court also held that CCR had "no standing as a next friend to proceed on Durocher's behalf." *Id.*

So, the real problem in *Durocher* was that state postconviction counsel filed pleadings against the defendant's own wishes which may be the situation in this

case as well. In this case, at the second penalty phase before Rodgers waived the jury, Rodgers told the judge:

> I'm 30 years old. I'm healthy, and I-I can't imagine living 50 more years in prison. That's worse than death. So a death sentence is, you know-they are both miserable ways to me, but, you know, a death sentence is, you know, in some strange way it gives me peace. It gives me an expected end, because this is not easy.

Rodgers, 3 So.3d at 1129. As part of the jury waiver colloquy, Rodgers told the court, "If I could sign a paper right now, and get a death sentence, and go back to death row, I would do it. To expedite the process, I would do it, you know." *Id.* at 1130. Here, as in the original *Durocher* case, the CHU may be filing these postconviction motions and appeals contrary to Rodgers' wishes as expressed at the second penalty phase and at the *Durocher* hearing.

If the Court decides, in light of the prohibition on *pro se* representation in capital cases in rule 3.851(b)(6), as well as in this Court's caselaw of *Davis* and *Gordon*, to mandate the retention of postconviction counsel, as advocated by Steering Committee, this Court needs to clarify the role that retained counsel in a *Durocher* case will play in future litigation. And that clarification must be informed by the relevant United States Supreme Court precedent on the subject of the types of decisions that are reserved for the defendant personally to make and which operate to bind counsel's hands.

Decisions reserved for the defendant

Certain decisions are reserved for the defendant, not counsel, to make. Recently, in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), the United States Supreme Court addressed the issue of the relationship between a defendant andhis attorney in terms of who is in charge of the certain basic decisions such as whether to concede identity and guilt to the crime. The High Court held that the capital defendant had the Sixth Amendment right to insist that his counsel

refrain from conceding guilt. The *McCoy* Court observed that, while trial management is the lawyer's province, some decisions "are reserved for the client" to personal make. *Id.* at 1508. The High Court listed those decisions that are personal to a defendant as being "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). The United States Supreme Court then added the right to concede guilt to that list of personal decisions which includes whether to take an appeal. *Barnes*, 463 U.S. at 751 (stating that the "accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal); *Garza v. Idaho*, 139 S.Ct. 738, 746 (2019) (stating the accused has "the ultimate authority to decide whether to take an appeal").

The logic of the United States Supreme Court in *McCoy*, *Garza,* and *Barnes*, applies equally to *Durocher* waivers. The right to forgo postconviction proceedings is akin to the right to forgo appeals and therefore, the decision to waive postconviction proceedings is personal to the defendant and the defendant's decision in this area binds postconviction counsel. So, postconviction counsel has a duty to abide by his client's waiver of postconviction proceedings and refrain from filing any pleadings in state court. Rodgers' current counsel, like counsel in *Durocher*, seem to be ignoring that duty.[9] It is clearly improper for the CHU to

[9] The CHU was appointed as federal habeas counsel to represent Rodgers in federal court on November 11, 2015. However, as of May of 2019, the CHU has not filed a federal habeas petition in federal court. Any federal habeas petition would be untimely due to Rodgers' own actions of waiving all state postconviction relief. Moreover, Rodgers explicitly waived federal habeas review because the waiver colloquy in state court covered federal habeas review.

Furthermore, the CHU should not be appearing in state court. In this case, Rodgers' original state postconviction discharged counsel, Robert A. Harper, died in 2013, shortly after being discharged. Rodgers lacks state postconviction

be filing pleadings in direct contravention of Rodgers' wishes under the United States Supreme Court's precedent of *Barnes*, *McCoy*, and *Garza*. This Court should clarify in both this case and in any amendments to either rule 3.851(i) or rule 9.142(d) that any postconviction counsel, representing a capital defendant who has waived postconviction proceedings, is precluded from filing ***any*** pleading of ***any*** type in ***any*** state court until a warrant is signed.

Newly discovered evidence

Ignoring the waivers and directly addressing the claim as a claim of newly discovered evidence, the claim fails. Opposing counsel relies on new mental health experts' reports diagnosing Rodgers with gender dysphoria to support the claim of newly discovered evidence. Originally, in the 2017 postconviction motion, opposing counsel based this claim of incompetency to enter a waiver on a report dated January 31, 2017, from Julie B. Kessel, M.D., a board-certified psychiatrist, who examined Rodgers on February 26, 2016, and a report dated February 9, 2017, from George R. Brown, M.D., a board-certified psychiatrist, who did not

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counsel due to his own waiver of state postconviction counsel in 2011. The proper solution to the lack of state postconviction counsel, if the amended rule is adopted, is to appoint Capital Collateral Regional Counsel - North (CCRC-N), as state postconviction counsel. The problem with the CHU appearing in state court is it is against Supreme Court precedent of *Harbison v. Bell*, 556 U.S. 180, 189 (2009), and the Eleventh Circuit precedent of *Gary v. Warden*, 686 F.3d 1261 (11th Cir. 2012), for federal habeas counsel to appear in state court when the state provides state postconviction counsel. This recently occurred in the warrant litigation in the case of *Long v. State,* SC19-726, where the federal district judge, based on a letter from Chief Judge Carnes of the Eleventh Circuit and Sixth Circuit precedent of *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011), denied the CHU-M motion for authorization to appear in state court the day of the evidentiary hearing. *Long v. Sec'y, Fla. Dept. of Corr.*, 8:13-cv-02069 (M.D. Fla) (Doc. #38) (order of May 3, 2019, denying the CHU-M motion for authorization to appear in state court).

examine Rodgers but reviewed various records, who opined that there was "a high likelihood" that Rodgers suffered from Gender Dysphoria Disorder. Then, in the current 2018 postconviction motion, opposing counsel additionally relied on supplemental reports from both Dr. Kessel and Dr. Brown, as well as on declarations from psychologist Dr. Sara Boyd; psychiatrist Dr. Sarah Deland; psychiatrist Dr. Lawrence Gilgun; and psychiatrist Dr. Frederic Sautter. Rodgers also relied on a declaration from social worker Angela Mason, as well as declarations from three of Rodgers' prior attorneys — Mark Olive; Denny LeBoeuf; and Tivon Schardl.

This is not a valid claim of newly discovered evidence. To be "newly" discovered evidence, the evidence must have been "unknown" to the trial court, the party, or counsel "at the time" of the trial or penalty phase. *Smith v. State*, 213 So.3d 722, 736 (Fla. 2017) (citing *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)); *Merck v. State*, 260 So.3d 184, 197 (Fla. 2018) (explaining that to be considered newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of it by the use of diligence" citing *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) (quoting *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-29 (Fla. 1994)), and concluding that the timing of the game of pool was not newly discovered evidence because the game of pool was discussed at trial). But, as in *Merck*, the diagnosis of major depression is not new. Rodgers' own expert in the 2017 and 2018 successive postconviction motions, Dr. Kessel, explained that gender dysphoria leads to depression. While the source of the depression being gender dysphoria is new, the diagnosis of depression itself is not new. The diagnosis of depression was presented to the jury during the first penalty phase, who nonetheless recommended a death sentence by a vote of none to three. *Rodgers v. State*, 934 So.2d 1207, 1213 (Fla. 2006). At the first penalty

phase, the State presented Dr. Richard Greer, who was the Chief of Forensic Psychiatry at the University of Florida. *Id.* at 1213. Dr. Greer's primary diagnosis of Rodgers' was antisocial personality disorder but his secondary diagnosis was depression. *Id.*[10] So, the diagnosis of depression is not new. The diagnosis of depression was known to the trial court, Rodgers, and trial counsel (as well as to the first jury), and therefore, it does not qualify as newly discovered evidence. As in *Merck*, a diagnosis discussed at trial is not newly discovered evidence.

But even treating the diagnosis of depression due to gender dysphoria as though it were new, Rodgers still fails both prongs of the test for newly discovered evidence. The first prong of legal test for newly discovered evidence requires due diligence and the second prong requires the new evidence be of such nature that it would probably produce an acquittal or lesser sentence at a retrial. *Taylor v. State*, 260 So.3d 151, 158 (Fla. 2018) (explaining that the test for claims of newly discovered evidence originally enunciated in *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998), requires 1) diligence and 2) be of such nature that it would probably produce an acquittal on retrial). Rodgers fails both prongs.

As to the first prong of diligence, even looking at federal habeas counsel's diligence rather than trial counsel's diligence, the CHU was not diligent in pursuing this claim of newly discovered evidence. At very least, the claim of newly discovered evidence of a new diagnosis of gender dysphoria should have been included as a claim of newly discovered evidence in the 2017successive postconviction motion rather than being raised later in 2018 as a claim of newly discovered evidence in a separate successive postconviction motion. To have been diligent, opposing counsel should have plead the claim, in the alternative, as a

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[10] One of the defense experts, Dr. Deland, also diagnosed Rodgers with a personality disorder, *i.e.*, borderline personality disorder, during the first penalty phase. *Rodgers*, 934 So.2d at 1213.

claim of newly discovered evidence in the prior successive postconviction motion filed in 2017 which was based on the same diagnosis of gender dysphoria. The claim of newly discovered evidence should have been raised in the earlier successive postconviction motion. The CHU was not diligent.

As to the second prong of probably producing an acquittal or probably resulting in a lesser sentence, the new diagnosis of gender dysphoria would not result in a life sentence. The second prong of legal test for newly discovered evidence requires that the new evidence be of "such nature that it would probably produce an acquittal on retrial" — meaning that it "weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability." *State v. Murray*, 262 So.3d 26, 36 (Fla. 2018) (citing *Jones v. State*, 709 So.2d 512, 526 (Fla. 1998)). A claim of newly discovered evidence can also be premised on a claim that the new evidence would likely result in a lesser sentence. *Taylor v. State*, 260 So.3d 151, 158 (Fla. 2018) (explaining that if the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence citing *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991)).

But a diagnosis of gender dysphoria would not result in a life sentence at a new penalty phase. Rodgers, along with the co-perpetrator Lawrence, murdered a teenage girl, following a detailed written plan which included a plan to dismember her, after attempting to murder a random third person and after murdering Lawrence's cousin by stabbing him in three separate incidents over the course of six weeks. The first jury was aware of Rodgers' mental problems through the testimony of two defense mental health experts and the State's mental health expert but nonetheless recommended death sentence by a vote of nine-to-three. *Rodgers v. State*, 934 So.2d 1207, 1213 (Fla. 2006) (recounting the testimony of Rodgers' abysmal childhood and the testimony three mental health

experts including two defense experts, Professor David Foy and Dr. Sarah Deland, who diagnosed Rodgers with post-traumatic stress disorder and noting the jury at the first penalty phase recommended a death sentence by a nine-to-three vote); *Lawrence v. State*, 969 So.2d 294, 297 (Fla. 2007) (noting that Rodgers shot the 18-year old victim in the back of the head, then, after Lawrence cut off her calf muscle, Rodgers took pictures of her body including a picture of Lawrence's hand holding her foot); *Lawrence*, 969 So.2d at 298, n.1 (describing the prior attempted murder and prior murder that were the basis for the prior violent felony aggravator in this case noting that, 39 days before this murder, Rodgers attempted to murder "an elderly victim who was quietly sitting in his living room watching television with his family" by shooting him in the back and then, 28 days before this murder, Rodgers and Lawrence "murdered Lawrence's cousin, Justin Livingston, by stabbing him repeatedly and attempting to strangle him."). Rodgers would still receive a death sentence.

Indeed, opposing counsel does not even seem to be asserting that the new diagnosis would result in a life sentence. Instead, opposing counsel seems to be asserting that the new diagnosis of gender dysphoria would result in Rodgers being found to be incompetent to waive the penalty phase jury at the second penalty phase which would also mean that he would have been incompetent to proceed at all during the second penalty phase and that the new diagnosis of gender dysphoria would result in Rodgers being found to be incompetent to waive postconviction proceedings as well, which would also mean that Rodgers would have been incompetent to proceed at all at during the postconviction proceedings.

Assuming that the *Jones* test for newly discovered evidence even applies to

waivers rather than being limited to trials or penalty phases,[11] a diagnosis of

[11] In *Long v. State*, 183 So.3d 342, 345 (Fla. 2016), this Court noted the "conundrum" in applying the test for newly discovered evidence in a plea case because there is no trial at which evidence was introduced to compare the new evidence against as required under *Jones* and its progeny. This Court adopted as a second prong, in plea cases, that the defendant must demonstrate a "reasonable probability that, but for the newly discovered evidence, the defendant would not have pleaded guilty and would have insisted on going to trial" from *Grosvenor v. State*, 874 So.2d 1176 (Fla. 2004). But the *Grosvenor* standard does not fit a claim of newly discovered evidence. The test for a claim of newly discovered evidence in plea cases should be even more stringent than *Jones* and should not be based an a mere assertion that he would have insisted on a trial.

First, the test for a defendant who enters a guilty plea and then years later claims he is innocent should require that he provide a reasonable explanation as to why he entered a guilty plea in the first place despite his now claimed innocence. Florida law requires a defendant admit to the factual basis of the crime before pleading guilty. Fla. R. Crim. P. 3.170(C) (providing that the trial court may not accept a guilty plea if "a defendant stands mute, or pleads evasively"); Fla. R. Crim. P. 3.170(k) (requiring that the trial court determine "that there is a factual basis for the plea of guilty"); *Shannon v. State*, 406 So.2d 87, 88 (Fla. 1st DCA 1981) (explaining the purpose of requiring a factual basis for a plea is to prevent "an unwitting admission of guilt to a crime which the defendant did not commit" citing *Bright v. State*, 317 So.2d 864 (Fla. 4th DCA 1975)); *Koenig v. State*, 597 So.2d 256, 258 (Fla. 1992) (concluding a plea was invalid, in part, because the trial court failed to inquire into the factual basis for the plea despite a stipulation to the factual basis). A defendant's "solemn declarations in open court carry a strong presumption of verity" including those made as part of a plea colloquy which create a "formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Winthrop-Redin v. United States*, 767 F.3d 1210, 1217 (11th Cir. 2014) (rejecting a collateral attack on the voluntariness of a plea that was contrary to the defendant's sworn statements made during the plea colloquy quoting *Blackledge*, 431 U.S. at 74); *United States v. Palmer*, 456 F.3d 484, 491 (5th Cir. 2006) (stating that a "plea is more than a mere confession; it is an admission that the defendant committed the charged offense."). The *Long* Court ignored all of this. A defendant who entered a guilty plea, as opposed to a nolo or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), should, at least, be required to explain why he falsely admitted to the crime during the plea colloquy.

Second, the threshold showing of innocence should be required to be higher in plea cases. As a practical matter, the State often loses, or may not even develop key evidence in the first place, in plea cases. And claims of newly discovered

gender dysphoria would not result in the Rodgers being found to be incompetent to enter either the waiver of the jury at the second penalty phase or to enter the *Durocher* waiver of postconviction proceedings. The new diagnosis of gender dysphoria would not be likely to result in a different outcome in the numerous competency determinations over the years in this case.

Gender dysphoria and its related depression do not render a person mentally incompetent to stand trial, to enter a plea, or to waive rights. Depression from gender dysphoria does not invalidate pleas or waivers. Rodgers' own expert in the 2017 and 2018 successive postconviction motions, Dr. Kessel, explained that gender dysphoria leads to depression. But even major depression does not invalidate a waiver. *Garcia v. Bravo*, 181 Fed. Appx. 725, 730, n.2 (10th Cir. 2006) (observing that major depression does not show that a plea was involuntary citing *Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995)). A diagnosis of depression would not result in a finding of incompetency to waive the jury at the second penalty phase or in a finding of incompetency to waive postconviction proceedings prior to the *Durocher* colloquy. The gender dysphoria did not render either of Rodgers' two waivers involuntary. Depression does not render a defendant legally incompetent to waive rights.

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evidence in Florida are permitted to be raised at any time including decades after the plea, when it is no longer possible to develop that evidence. Because a claim of newly discovered evidence is akin to a claim of actual innocence, the standard for a threshold showing of actual innocence should be higher, not the mere reasonable probability of the *Grosvenor* standard. *House v. Bell*, 547 U.S. 518, 554 (2006) (explaining that the threshold showing for a freestanding claim of actual innocence would necessarily be "extraordinarily high"). In plea cases, defendants should not only be require to explain entering the plea in the first place but also be required to meet a much higher standard for a threshold showing of innocence than the *Grosvenor* standard or the normal *Jones* standard. Only the most compelling case of innocence should operate to vacate a guilty plea. This Court should clarify *Long* and require an explanation for entering the plea and then also require a higher threshold showing of innocence in light of the plea.

Opposing counsel cites no decision from any court holding that depression renders a defendant incompetent to waive rights. Nor does Justice Pariente in her sole concurring opinion cite to any decision invalidating a waiver based solely upon a diagnosis of depression. *Rodgers*, 242 So.3d at 277 (Pariente, J., concurring). Rodgers' waivers remain valid, despite the new diagnosis of gender dysphoria.

Merits of the *Ake* claim

Ignoring the law-of-the-case doctrine, the time bar, the procedural bar, and both waivers, any claim based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), is meritless. This Court viewed the claim as an *Ake* claim in the prior appeal because fundamentally, opposing counsel is asserting that seven mental health experts, who examined Rodgers over the years, misdiagnosed Rodgers resulting in the gender dysphoria remaining untreated and invalidating the waivers in this case.

But *Ake* did not create a right to effective assistance of experts or a right to multiple mental health experts or the right to a helpful diagnosis. *Ake*, 470 U.S. at 79 (specifically limiting the due process right being recognized to the "provision of ***one*** competent psychiatrist") (emphasis added); *Leavitt v. Arave*, 646 F.3d 605, 610 (9th Cir. 2011) (explaining that *Ake* is limited to a right to ***one*** competent psychiatrist despite the fact that psychiatry is not an exact science and observing that neither the Ninth Circuit nor the Supreme Court has ever held that a trial court violated *Ake* by refusing to appoint a second, let alone third, mental health expert) (emphasis in original). While *Ake* requires the appointment of a defense mental health expert, not merely a court mental health expert; *Ake* does not speak to the expert's qualifications or performance. *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017) (holding that *Ake* clearly established a defendant's right to an independent

defense expert). While the *Ake* Court spoke in terms of a "competent" psychiatrist conducting an "appropriate" examination, it did not create a right to effective assistance of mental health expert. *Ake*, 470 U.S. at 83. This Court has observed that *Ake* did not establish a claim of ineffective assistance of mental health expert. *Walls v. State*, 926 So.2d 1156, 1177 (Fla. 2006) (stating that *Ake* did not establish a claim of ineffective assistance of mental health expert citing federal cases). Federal courts do not read *Ake* as authorizing claims of ineffective assistance of mental health expert either. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) (rejecting the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990) (explaining that the ultimate result of recognizing a right to effective assistance of a mental health expert would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis); *Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990); *Walls v. McNeil*, 2009 WL 3187066, *77 (N.D. Fla. Sept. 30, 2009) (observing that *Ake* did not establish a claim of ineffective assistance of mental health expert).

And, regardless of the exact scope of *Ake*, there was no violation of *Ake* in this particular case. Rodgers was examined time and time again throughout the years by several different mental health experts and then found competent by different judges in both state court and federal court. Rodgers has been found competent multiple times over the years in state court and those findings have been affirmed on appeal by this Court. Rodgers was found competent to plead guilty before the first penalty phase and then Rodgers was found competent again years later when he waived his right to a penalty phase jury during his second penalty phase, and then Rodgers was found competent yet again years after that when he waived his postconviction proceedings. *Rodgers*, 934 So.2d at 1210; *Rodgers*, 3 So.3d at

1132-33. As this Court observed in the *Durocher* appeal, "two mental health experts examined Rodgers in preparation for the *Durocher* hearing, and both determined that Rodgers was competent." *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012). Indeed, the Florida Supreme Court characterized the claim of mental incompetency during the *Durocher* appeal as being "without merit." *Id.*

Rodgers was examined by three mental health experts before the first capital trial: 1) Dr. Lawrence Gilgun, Ph.D., whose report is dated December 7, 1999; 2) Dr. Harry A. McClaren, Ph.D., whose report is dated December 10, 1999; and 3) Dr. Scott Benson who evaluated Rodgers on December 27, 1999.[12] On January 18, 2000, following a competency hearing, Judge Kenneth Bell found Rodgers to be competent to stand trial. Rodgers had also been evaluated in the federal murder prosecution and found competent by a federal judge. Additionally, Rodgers was found competent to plead guilty to the capital charges in April of 2000 by a third judge. During the first penalty phase in 2000, the defense presented Professor David Foy and Dr. Sarah Deland, both of whom diagnosed Rodgers with post-traumatic stress disorder. *Rodgers v. State*, 934 So.2d 1207, 1213 (Fla. 2006). The State presented Dr. Richard Greer who diagnosed Rodgers with personality disorders and depression. *Id.* Dr. Greer testified that Rodgers had antisocial personality disorder and borderline personality disorder, with "antisocial probably being predominant." (T. resentencing Vol. 13 2309). Then Rodgers was

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[12] Dr. Gilgun originally thought that Rodgers was incompetent to stand trial because he was unable to control himself but Dr. Gilgun acknowledged that much of Rodgers' behavior was manipulative and self-serving. Dr. Gilgun also acknowledged that Rodgers appeared to understand and follow counsel's advice and that Rodgers understood the process and the role of defense counsel, the prosecutor, and the court. While Dr. Gilgun originally found Rodgers incompetent due to an inability to control himself, Dr. Gilgun ultimately found Rodgers competent to stand trial just a few months later. The other two experts found Rodgers competent to stand trial.

examined again and found competent again in 2011 in the capital case prior to the *Durocher* hearing. Both Dr. Harry McClaren and Dr. Gregory A. Prichard examined Rodgers prior to the *Durocher* hearing and both mental health experts prepared written reports finding Rodgers competent to waive postconviction proceedings. As this Court observed in the *Durocher* appeal, "two mental health experts examined Rodgers in preparation for the Durocher hearing, and both determined that Rodgers was competent." *Rodgers v. State*, 104 So.3d 1087, 2012 WL 5381782 (Fla. 2012) (unpublished).

This is not a case where no mental evaluations were performed until recently. Rodgers was examined in both state and federal courts, in 1999 before entering a plea in this case, and then was examined in 2000 for the first penalty phase by three different mental heath experts, and then examined yet again, in 2011, prior to the *Durocher* hearing. Nor is this a case where there was only one mental health expert of questionable qualifications examined Rodgers — far from it — few defendants have been evaluated as many times by as many mental health experts as Rodgers has been over the years. At least seven different mental health experts examined Rodgers over the years and none of them found Rodgers incompetent. The sheer number of mental health experts in this case rebuts any possible *Ake* claim. *Ponticelli v. State*, 941 So.2d 1073, 1104, n.34 (Fla. 2006) (concluding an *Ake* claim was "without merit" where four mental heath experts were appointed to determine competency); *Hodges v. State*, 885 So.2d 338, 352-53 (Fla. 2004) (rejecting an *Ake* claim as lacking "merit" because the defendant "had access to multiple mental health experts" who "performed all of the essential tasks required by *Ake*."). Here, as in *Ponticelli* and *Hodges*, and for much the same reasons, there was no violation of *Ake*.

Rodgers was provided with at least one competent mental health expert which is all *Ake* requires. A capital defendant who was provided with several different

defense mental health experts simply does not have a valid *Ake* claim in either the direct appeal or in the postconviction proceedings. That the latest defense mental expert does not agree with the prior mental experts' various diagnoses does not amount a valid *Ake* claim. Just because opposing counsel has hired new mental health experts, who have a new twist on the old diagnosis of depression, does not mean that the original mental health experts' findings were inadequate. *Johnson v. State*, 135 So.3d 1002, 1030 (Fla. 2014) (explaining, in the context of claims of ineffectiveness, the fact that a capital defendant has "now secured the testimony of a more favorable mental health expert simply does not establish that the original evaluations were insufficient" citing *Carroll v. State*, 815 So.2d 601, 618 (Fla. 2002)); *Leavitt v. Arave*, 646 F.3d 605, 610 (9th Cir. 2011) (rejecting an *Ake* claim and observing that psychiatry is not an exact science, and psychiatrists disagree widely and frequently on the appropriate diagnosis). Any *Ake* claim is meritless.

Retroactivity of *Hurst*

Even if both of the waivers were invalid, Rodgers still should not be granted relief based on either *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), or *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). This Court should recede from *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), and hold that neither *Hurst v. Florida* nor *Hurst v. State* apply retroactively.[13]

[13] The issue of reconsideration of this Court's retroactivity of *Hurst* cases is currently pending in this Court in the case of *Owen v. State*, SC18-810. On April 24, 2019, this Court ordered full briefing of the issue of "whether this Court should recede from the retroactivity analysis in *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Mosley v. State*, 209 So.3d 1248 (Fla. 2016); and *James v. State*, 615 So.2d 668 (Fla. 1993)." The State's brief in *Owen* will present the State's argument regarding retroactivity in greater detail than this brief does.

Adopting *Teague*

For all the reasons given by Justice Cantero in his concurring opinion in *Windom v. State*, 886 So.2d 915 (Fla. 2004), this Court should adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). *Windom v. State*, 886 So.2d 915, 942-50 (Fla. 2004) (Cantero, J., concurring) (advocating that Florida courts adopt *Teague* in place of the "now-outmoded" state test of *Witt v. State*, 387 So.2d 922 (Fla. 1980)). This Court should do as many other state supreme courts have done and adopt *Teague* as the test for retroactivity in Florida. *Windom*, 886 So.2d at 943, n.28 & n.29 (Cantero, J., concurring) (listing the numerous state supreme courts that have adopting *Teague* as the state test for retroactivity in whole or in part and noting only six state supreme courts have not adopted *Teague*).[14]

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[14] Additional state supreme courts have adopted *Teague* since Justice Cantero wrote his concurring opinion in 2004. *See e.g.*, *Thiersaint v. Comm'r of Corr.*, 111 A.3d 829, 840 & n.11 (Conn. 2015) (adopting *Teague* formally as the state test for retroactivity in the wake of the United States Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), clarifying that states may have more liberal tests for retroactivity and noting that thirty-three other states and the District of Columbia likewise apply *Teague* in deciding state law claims); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (adopting *Teague* as the state test of retroactivity on remand from the United States Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), clarifying that states may have more liberal tests for retroactivity based on finality concerns). Justice Cantero listed the six other state supreme courts that had not adopted *Teague* at the time as being Alabama, Alaska, Michigan, Missouri, South Dakota, Utah, Wyoming, and also stated that Tennessee did not follow *Teague* as to state law decisions. *Windom*, 886 So.2d at 943, n.29. The Alabama Supreme Court has since adopted *Teague*. *Ex parte Williams*, 183 So.3d 220, 224 & n.2 (Ala. 2015) (stating that Alabama has adopted *Teague* citing *In Ex parte Harris*, 947 So.2d 1139, 1143-47 (Ala. 2005), and rejecting an argument based on *Danforth v. Minnesota*, 552 U.S. 264 (2008), that the state should adopted a more liberal state retroactivity test), *cert. granted, judgment vacated on other grounds, Williams v. Alabama*, 136 S.Ct. 1365 (2016). Wyoming now follows *Teague* for federal law cases. *State v. Mares*, 335 P.3d 487, 501-04 (Wyo. 2014). Tennessee now follows *Teague* including in

This Court should follow the concurring opinion in *Windom* and adopt *Teague* as the state test for retroactivity in place of *Witt*.

Additionally, *Teague* is the logical companion case to *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* created the concept of automatic pipeline retroactivity under which a defendant automatically receives benefit of any change in the law, even if the change in the law occurred months after his trial was completed while his case was pending on appeal. Before *Griffith*, courts performed the same retroactivity analysis on cases that were pending on direct appeal as those cases that were decades old and in postconviction without any consideration of finality.[15] *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966) (holding the same three *Stovall/Linkletter* factors applied to both convictions pending on direct appeal and to final convictions). But once the United States Supreme Court adopted broad and automatic pipeline retroactivity for all cases pending on appeal in *Griffith*, it made logical sense to narrow the cases that received benefit of retroactivity in postconviction by adopting *Teague* a couple of years later. What

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state law cases. *Bush v. State*, 428 S.W.3d 1, 19-20 (Tenn. 2014) (noting that the Tennessee Legislature by enacting the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-122, had abrogated the prior state test for retroactivity and had adopted *Teague* for all types of cases). The trend of state courts adopting *Teague* has continued even in the wake of *Danforth.*

[15] *Griffith*, 479 U.S. at 320-21 (explaining the history of retroactivity and the prior tests for retroactivity citing *Stovall v. Denno*, 388 U.S. 293 (1967) (using three factors to determine retroactivity); *Linkletter v. Walker*, 381 U.S. 618 (1965) (using three factors to determine retroactivity). The three retroactivity factors used in both *Stovall* and *Linkletter* are: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Griffith*, 479 U.S. at 321. Those three factors are the same three factors used by the state test for retroactivity of *Witt*. *Mosley*, 209 So.3d at 1277 (explaining that Florida's test for retroactivity, *Witt*, uses the three factors from the older federal tests of *Stovall* and *Linkletter* citing *Witt*, 387 So.2d at 926).

many commentators misunderstand about the creation of the narrower test of *Teague* in postconviction was that it was a direct result of adopting a much broader and automatic test of retroactivity for all cases on direct appeal in *Griffith*. *Johnson* was dramatically broadened into *Griffith* while *Stovall* and *Linkletter* were narrowed into *Teague*. Furthermore, the combination of *Griffith* and *Teague* give finality its proper due while *Stovall* and *Linkletter* did not.[16] Because, this Court follows *Griffith,* as it is constitutionally required to do by *Griffith* itself, it should also adopt the companion case of *Teague*. *Griffith*, 479 U.S. at 328 (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"); *Smith v. State*, 598 So.2d 1063, 1065 (Fla. 1992) (discussing the history of the pipeline concept and *Griffith*). Because *Griffith* and *Teague* are a logically complementary pair of cases, this Court should follow *Teague*. *Witt,* like *Stovall* and *Linkletter*, does not give finality its paramount place in retroactivity analysis. For all these reasons, this Court should adopt *Teague*.

Teague* and *Hurst

Under *Teague*, *Hurst v. Florida* is not retroactive. The United States Supreme Court has held that *Ring v. Arizona*, 536 U.S. 584 (2002), was not retroactive using *Teague* in *Schriro v. Summerlin*, 542 U.S. 348 (2004). Both the Eleventh Circuit and the Ninth Circuit have held that *Hurst v. Florida* is not retroactive under *Teague*. *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165, n.2 (11th

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[16] *Griffith*, 479 U.S. at 321-22 (explaining that the Court in *United States v. Johnson*, 457 U.S. 537 (1982), drew a distinction for purposes of retroactivity for the first time based on finality following the logic of Justice Harlan's dissent in *Desist v. United States*, 394 U.S. 244, 256 (1969), and concurring opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971)).

Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim because *Hurst v. Florida* did not apply retroactively). No federal appellate court has held to the contrary.

While there are differences between the holding of the United States Supreme Court in *Hurst v. Florida* and the holding of this Court in *Hurst v. State*, *Hurst v. State* is not retroactive under *Teague* either. The United States Supreme Court in *Hurst v. Florida*, in effect, held that the finding of an aggravating factor was an element that must be found by the jury. In contrast, this Court in *Hurst v. State* mandated additional jury findings, such as sufficiency of the aggravators, mitigation, and weighing, as well as requiring unanimity of those findings and of the jury's final recommendation. But those additional aspects of *Hurst v. State* are not retroactive under *Teague* either.

The case of *Ivan V. v. City of New York*, 407 U.S. 203 (1972), which requires retroactive application of the beyond a reasonable doubt standard of proof, does not apply because Florida has required the aggravators to be proven at the beyond a reasonable doubt standard for decades.[17] If a rule of law is not new, there is no retroactivity analysis required. *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (defining a "new rule" for purpose of retroactivity as one that "breaks new ground

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[17] *Williams v. State*, 37 So.3d 187, 194-95 (Fla. 2010) (stating that the State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance); *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009) (explaining that the State must prove the existence of an aggravator beyond a reasonable doubt citing *Parker v. State*, 873 So.2d 270, 286 (Fla. 2004)); *Diaz v. State*, 132 So.3d 93, 117 (Fla. 2013) (explaining that mitigating factors be established by the greater weight of the evidence citing *Mansfield v. State*, 758 So.2d 636, 646 (Fla. 2000)); *cf. Floyd v. State*, 497 So.2d 1211, 1214 (Fla. 1986) (striking an aggravator that was not proven "beyond a reasonable doubt").

or imposes a new obligation," such as a decision that explicitly overrules an earlier holding). Florida's standard of proof for aggravating circumstances is not new. So, no retroactivity analysis is required at all. And neither *Hurst v. Florida* nor *Hurst v. State* are standard of proof cases anyway. The issue in both *Hurst* cases was who decides - the judge versus the jury - not the standard of proof. And the new unanimity requirement established by this Court in *Hurst v. State* is not equivalent to a standard of proof. They are two very different concepts. *Ivan V.* is simply not at issue.

While this Court in *Hurst v. State* mandated the jury make additional findings, such as sufficiency of the aggravators, mitigators, and weighing, that does not turn those additional required jury findings into elements. Under both Florida statutes and Florida caselaw, the additional findings are not elements. According to Florida's new death penalty statute, aggravating factors are the only elements in Florida and it is a jury's finding of "at least one aggravating factor" that makes the defendant eligible for death. § 921.141(2)(b)(2), Fla. Stat. (2018). Under the text of Florida's death penalty statute, the only "element" is the finding of one aggravating factor. Additionally, this Court recently directly held that the additional jury findings required by *Hurst v. State* are not elements. *Foster v. State*, 258 So.3d 1248, 1251-53 (Fla. 2018) (holding the additional jury findings required "are not elements of the capital felony of first-degree murder"). None of the additional jury findings required by *Hurst v. State* are elements; rather, they are selection factors. *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (contrasting eligibility factors with the selection decision). The additional jury findings are "other determinations" that require "subjective judgment," not an eligibility fact which is limited to "the existence of an aggravating circumstance." *Hurst*, 202 So.3d at 81-82 (Canady, J., dissenting). So, *Ivan V.* has no application to any retroactivity determination in any Florida capital case.

This Court in *Hurst v. State* also imposed a requirement of unanimity for those additional findings and the jury's recommendation of death. The issue of unanimity is currently pending in the United States Supreme Court in an non-capital case. *Ramos v. Louisiana*, 139 S.Ct. 1318 (2019) (granting the petition for writ of certiorari in a second degree murder case to review Louisiana law which permits nonunanimous verdicts when ten out of twelve jurors vote to convict) (No. 18-5924). It seems unlikely that the Court will overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), which permitted nonunanimous verdicts in twelve person juries, in light of *Williams v. Florida*, 399 U.S. 78 (1970), which permits six person juries. *Gonzalez v. State*, 982 So.2d 77, 78 (Fla. 2d DCA 2008) (noting that Connecticut, as well as Florida, permits six-person juries for life felonies and that Indiana and Massachusetts permit six-person juries for less serious felonies). Nonunanimous verdicts from ten of twelve-person juries are more difficult to obtain for the prosecution than unanimous verdicts from six-person juries. Four more persons have to vote to convict in Louisiana than in Florida.[18]

But, even if the United States Supreme Court overrules *Apodaca* in *Ramos* and requires unanimous verdicts from twelve-person juries, that holding is not likely to be retroactive. *Cf. Whorton v. Bockting*, 549 U.S. 406, 409 (2007) (holding that *Crawford v. Washington*, 541 U.S. 36 (2004), regarding Confrontation Clause rights, was not retroactive under *Teague* and observing that it is unlikely that there is any watersheld rule of criminal procedure that has not yet emerged, as required by *Teague*). The unanimity requirement of *Hurst v. State* is not

[18] The modern trend in other countries is to permit nonunanimous verdicts of twelve-person juries. Both New Zealand and Jamaica repealed their prior requirement of unanimous verdicts. Indeed, even present day England does not require unanimous verdicts. Juries Act, 1974, c. 23, §17 (Eng. & Wales)

retroactive either. Neither *Hurst v. Florida* nor *Hurst v. State* are retroactive under *Teague*.

Under *Teague*, *Hurst v. Florida* does not apply to any sentence that was final before January 12, 2016, when the United States Supreme Court decided that case. And, under *Teague*, *Hurst v. State*, does not apply to any sentence that was final before November 3, 2016, when the Florida Supreme Court issued its mandate in that case.[19] Rodgers' sentence became final on Monday, May 7, 2007, which was 90 days after the direct appeal opinion of the resentencing was issued. Fla.R. Crim P. 3.851(d)(1). Rodgers' sentence was final in 2007, which was many years before either *Hurst v. Florida* or *Hurst v. State* were decided in 2016. Because Rodgers' case was final nearly a decade before *Hurst v. Florida* or *Hurst v. State* was decided, neither decision should apply to him. Under *Teague*, neither *Hurst v. Florida* or *Hurst v. State* apply retroactively and Rodgers is not entitled to a third penalty phase.

***Witt* and stare decisis**[20]

Alternatively, even applying the traditional state retroactivity test of *Witt*, this Court should recede from *Mosley* and hold that neither *Hurst v. Florida* nor *Hurst v. State* are retroactive.

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[19] *Thibodeau v. Sarasota Mem'l Hosp.*, 449 So.2d 297, 298 (Fla. 1st DCA 1984) (stating: "It is well settled that the judgment of an appellate court, where it issues a mandate, is a final judgment" citing *O.P. Corporation v. The Village of North Palm Beach*, 302 So.2d 130, 131 (Fla.1974), and *Robbins v. Pfeiffer*, 407 So.2d 1016, 1017 (Fla. 5th DCA 1981)).

[20] The State's briefs in *Asay* and *Mosley* did not make an argument advocating the adoption of *Teague* in place of *Witt*. *See Mosley*, SC14-436 (State's Supp. AB filed May 2, 2016); *See Asay*, SC16-223 (State's AB at 68 n.11; 79 n.14; and AB at 68, 73 relying on *Johnson* which used a *Witt* analysis filed Feb. 19, 2016).

The doctrine of stare decisis should not prevent this Court from receding from *Mosley*. *Cf. Okafor v. State*, 225 So.3d 768, 775-76 (Fla. 2017) (Lawson. J., concurring). If the *Mosley* Court had followed the doctrine of stare decisis, then *Hurst v. State* would not have been found to be retroactive. The *Mosley* Court ignored existing precedent in violation of stare decisis. This Court's existing precedent was that right-to-jury-trial cases were not applied retroactively. This Court had routinely held that neither *Apprendi* nor its progeny, including its death penalty progeny, such as *Ring v. Arizona*, were retroactive under *Witt*. *Hughes v. State*, 901 So.2d 837 (Fla. 2005) (holding *Apprendi* was not retroactive after performing an extensive *Witt* analysis); *Johnson v. State*, 904 So.2d 400 (Fla. 2005) (holding that *Ring v. Arizona* was not retroactive after performing an extensive *Witt* analysis); *State v. Johnson*, 122 So.3d 856 (Fla. 2013) (holding *Blakely v. Washington*, 542 U.S. 296 (2004), was not retroactive after performing an extensive *Witt* analysis). In *Johnson*, this Court did a full-blown *Witt* analysis that consisted of over 20 paragraphs that discussed each of the *Witt* factors at length and then concluded that *Ring* was not retroactive. *Johnson*, 904 So.2d at 405, 407 ("we hold that *Ring* does not apply retroactively in Florida to defendants whose convictions already were final when that decision was rendered" and "we now hold that *Ring* does not apply retroactively in Florida."). The *Johnson* Court's main reasoning was that jury factfinding did not seriously increase accuracy so, *Ring* should not be applied retroactively. This Court observed that "reasonable minds continue to disagree over whether juries are better factfinders" than judges are and therefore, it cannot be said that judicial factfinding ***seriously*** diminishes accuracy. *Id*. at 410 (emphasis in original).[21] The *Johnson* Court also explained

[21] Judicial factfinding is more reliable than jury factfinding. A Florida judge, is required to have a law degree and at least 10 years of experience in the law, as well as specialized training in capital cases, whereas the lay persons on

that if *Ring* were applied retroactively, it would result in new penalty phases that would have to be conducted "decades" after the murder which would be "extremely difficult" and which would be less accurate than the prior penalty phase. *Id.* at 411. New penalty phases held years after the crime decrease reliability. But all of that logic applies equally to both *Hurst v. Florida* and *Hurst v. State*. The *Mosley* Court should have followed *Johnson* and held that *Hurst v. State* was not retroactive under *Witt*.

Furthermore, as a matter of logic, if the seminal case is not retroactive, then neither is its progeny. *Jeanty v. Warden, FCI–Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (observing "if *Apprendi*'s rule is not retroactive on collateral review, then

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the jury have no such background. The judge also has the advantage of presiding at other murder trials to compare the facts of the capital case with, which the jurors lack. A trial judge may also have extensive trial experience before becoming a judge where he proved facts. Judges are more accurate fact finders.

The United States Supreme Court did not create their *Apprendi* jurisprudence due to a concern that judicial factfinding was not accurate enough. Rather, the basis was Justice Scalia's concern that sentencing enhancements made by judges were eroding the constitutional right-to-a-jury-trial. *Monge v. California*, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting) (criticizing sentencing enhancements as circumventing the constitutional right to a jury trial and giving a hypothetical example of a defendant convicted by a jury of simple misdemeanor battery that has a 30-day sentence but having his sentence enhanced by the judge making factual findings regarding the crime at a lower standard of proof resulting in a sentence equivalent to that of a serious felony such as a life sentence or even a death sentence). Accuracy was not the basis for *Apprendi* or its progeny *Ring* and *Hurst*. Even Justice Breyer who advocates for jury sentencing in capital cases does so on the basis that the judge is a "single government official" and that juries are "more attuned to the community's moral sensibility," not that juries are more accurate fact finders than judges and he invokes the Eighth Amendment to do so, not the Sixth Amendment right-to-a-jury-trial provision. *Hurst v. Florida*, 136 S.Ct. at 624 (Breyer, J., concurring); *Ring*, 536 U.S. 584, 614-16 (Breyer, J., concurring) ("I believe that jury sentencing in capital cases is mandated by the Eighth Amendment" and stating that the "comparative advantage" of jurors over judges is that they are "more attuned to the community's moral sensibility," and can "express the conscience of the community on the ultimate question of life or death.").

neither is a decision applying its rule" citing cases). It is inconsistent to hold *Apprendi* itself is not retroactive, as this Court did in *Hughes*, but then hold its progeny, *Hurst*, is retroactive, as this Court did in *Mosley*. *Mosley* conflicts with *Hughes*, *Johnson,* and *State v. Johnson*, as well as with basic logic.

True stare decisis would mandate following the existing precedent of *Hughes*, *Johnson,* and *State v. Johnson* and would mean that *Hurst* was not retroactive either. While the *Mosley* Court referred to *Johnson* and acknowledged it had held that *Ring* did not apply retroactively, it brushed *Johnson* aside saying it was based on a misunderstanding of *Ring*'s application to Florida at that time. *Mosley*, 209 So.3d at 1276. Justice Canady noted in his dissent that the detailed reasoning of *Johnson* was rejected by the *Mosley* majority "without any discussion of that reasoning" and observed that this "is not the way any court should treat a carefully reasoned precedent." *Mosley*, 209 So.3d at 1286 (Canady, dissenting). As the dissent in *Mosley* noted, the conclusion that *Hurst* is not retroactive should "ineluctably" follow from *Johnson*. *Mosley*, 209 So.3d at 1285 (Canady, dissenting). The *Mosley* dissent also noted that the outcome in *Johnson* followed inevitably from the Court's earlier decision in *Hughes*. *Mosley*, 209 So.3d at 1285-86. Justice Canady also noted that the existing precedent of *Hughes* which had held *Apprendi* was not retroactive because it merely "shifted certain fact-finding from judge to jury" but did not "impugn the very integrity of the fact-finding process or present the clear danger of convicting the innocent," applied with equal force to any retroactivity analysis of *Hurst*. *Id*.

Additionally, *Mosley* is also in tension with *Asay v. State*, 210 So.3d 1 (Fla. 2016). Both cases were issued by the same court on the same day and both employed a *Witt* analysis. But one case — *Mosley* — holds that a violation of the right-to-a-jury-trial right is retroactive and the other case — *Asay* — holds that same right is not retroactive. This outcome establishes that Justice Cantero's

concern about the *Witt* factors being "vague and malleable" was quite justified. *Windom*, 886 So.2d at 942. Overruling *Mosley* would have the benefit of restoring consistency with *Hughes*, *Johnson,* and *State v. Johnson*, as well as with *Asay*.

Nor is the *Mosley* Court's reliance on *James v. State*, 615 So.2d 668 (Fla. 1993), entitled to the protection of the doctrine of stare decisis. *Mosley*, 209 So.3d at 1274-75 (discussing the fundamental fairness rationale of *James*). *James* was an unwarranted deviation from the established state test for retroactivity of *Witt*. *James*, 615 So.2d at 671 (Grimes, J., dissenting) (explaining that *Espinosa v. Florida*, 505 U.S. 1079 (1992), was not retroactive under *Witt* and observing that the "public can have no confidence in the law if court proceedings which have become final are subject to being reopened each time an appellate court makes a new ruling."); *Mosley*, 209 So.3d at 1291 (Canady, J., dissenting) (advocating the abrogation of *James* altogether because it is irreconcilable with *Witt* as it gave "no consideration to the framework for retroactivity established in *Witt*.").[22]

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[22] This Court should recede from *James v. State*, 615 So.2d 668 (Fla. 1993), as well *Mosley*. In addition to *James* being in direct conflict with the standard retroactivity test of *Witt*, *James* confuses preservation with retroactivity. *Hitchcock v. State*, 226 So.3d 216, 218 (Fla. 2017) (Lewis, J., dissenting) (advocating that defendants who "properly preserved" a right-to-jury-findings challenge prior to *Ring* should be entitled to *Hurst* relief based on the "preservation approach" of *James*), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017); *Gaskin v. State*, 218 So.3d 399, 402-3 (Fla. 2017) (Pariente, J., dissenting) (advocating a *James* exception to *Mosley* for those defendants who "asserted, presented, and preserved" a right-to-jury-findings challenge before *Ring v. Arizona*). *James* is a true outlier. No court employs a "preservation approach" to retroactivity. While a few commentators advocate such an approach, all federal courts follow *Teague* and no state court follows a "preservation approach" to retroactivity. *Asay*, 210 So.3d at 31 & n.21 (Lewis, J., dissenting) (citing Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 232 (1998)). But those commentators ignore the "deeply problematic" aspect of a "preservation approach" to retroactivity, highlighted by Justice Canady, which is that both defense trial and appellate counsel would ignore all precedent, no matter

how long standing in time or well established by number of cases that precedent was, and raise every possible issue. *Mosley*, 209 So.3d at 1291 (Canady, dissenting). Indeed, one commentator advocating for the "preservation approach" criticized even the older federal test for retroactivity as being undesirable because it "discouraged litigation" which is an open admission that a "preservation approach" to retroactivity would encourage litigation and result in vastly more retrials. Yin, *A Better Mousetrap*, 25 AM. J. CRIM. L. at 236 (quoting Professor Mishkin). Kitchen-sink appellate briefs, raising scores and scores of issues in the face of controlling precedent against them, would be the inevitable result. Indeed, appellate counsel would likely be viewed as ineffective for not filing such briefs and would be trained to do just that. And proper retroactivity analysis should depend on the importance of the change in the law and the age of the case, not on defense counsel's actions.

Oddly, the *Mosley* Court, while invoking and discussing *James*, did not actually employ the *James* "preservation approach" to retroactivity. The *Mosley* majority did not grant *Hurst* relief to those defendants who had raised a Sixth Amendment right-to-jury-findings claim based on *Ring* or *Apprendi* and corresponding deny *Hurst* relief to those defendants who had not raised a *Ring* or *Apprendi* claim, as it would have done if it were actually following the preservation approach of *James*. *Lambrix v. Singletary*, 641 So.2d 847, 848 (Fla. 1994) (denying retroactive application of *Espinosa* based on *James* because Lambrix did not raise the issue in his direct appeal). Instead, the *Mosley* majority granted *Hurst* relief based on a date regardless of whether the defendant had raised a right-to-jury findings claim or not. So, *James* was really invoked by the *Mosley* Court as support for a totally different approach to retroactivity.

But, more importantly, finality is the overriding concern in retroactivity analysis including in capital cases and *James* totally ignores finality. *Mosley*, 209 So.3d at 1291 (Canady, J., dissenting) (observing that the majority in applying *James*, forsakes and jettisons any thought of the State's interest in finality despite how weighty that interest and noting *James* "totally disregarded the State's strong interest in finality in the postconviction context"); *Teague*, 489 U.S. at 309 (explaining that without finality, "the criminal law is deprived of much of its deterrent effect"); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (stating that the finality concerns in retroactivity apply equally in the capital sentencing context); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009) (adopting *Teague* as the state test of retroactivity, on remand from the United States Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), because the main concern in retroactivity analysis "is the finality of convictions"). The "preservation approach" to retroactivity ignores the age of the case in its analysis whereas *Griffith* and *Teague* do not. What these commentators who believe that current retroactivity tests do not afford as much relief as they think is desirable do not understand is

As Justice Canady noted in his dissent, the *Mosley* Court had not treated this Court's precedent with the respect that it was due under the doctrine of stare decisis, so that doctrine certainly should not prevent this Court from overruling *Mosley*. Decisions that do not respect the doctrine of stare decisis, such as *Mosley*, should not be entitled to its protections. Indeed, true respect for the doctrine of stare decisis would mandate overruling *Mosley*.[23]

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that *Griffith* and *Teague* are a complementary set of cases, as explained above. For these reasons, *James* should be overruled.

[23] The *Mosley* Court created a new type of retroactivity test of partial retroactivity. The *Mosley* Court took more of an "atonement approach" to retroactivity than a "preservation approach" to retroactivity, despite its incantation of *James*. The *Mosley* Court sought to atone for the Florida Legislature's "inaction" in not revising the state's death penalty statute and the United States Supreme Court's "delay" in overruling *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Mosley*, 209 So.3d at 1274 (referring to "the unique jurisprudential conundrum caused by the United States Supreme Court's ***delay*** in reviewing the constitutionality of Florida's capital sentencing scheme in light of *Ring*"); *Mosley*, 209 So.3d at 1280 (stating that it was "now for this Court to determine whether to deny relief to those defendants who were sentenced to death under an invalid statute based solely on the United States Supreme Court's ***delay*** in overruling *Hildwin* and *Spaziano*"); *Mosley*, 209 So.3d at 1283 (stating that defendants "who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year ***delay*** in applying *Ring* to Florida"); *Mosley*, 209 So.3d at 1283 (stating that "defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's ***delay*** in explicitly making this determination"). The "atonement approach" to retroactivity is not only unprecedented in its desire to atone for another and higher court's actions but is also particularly odd in light of the United States Supreme Court's admonition to lower courts not to take it upon themselves to overrule the High Court's precedent. *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249, 1257-63 (11th Cir. 2012) (reversing a federal district court's order declaring Florida's death penalty statute unconstitutional based on *Ring* and refusing to overrule *Spaziano* and *Hildwin* because the Court "has told us, over and over again" to leave it "to that Court the prerogative of overruling its own decisions" citing numerous

The doctrine of stare decisis is not is "an inexorable command" and the doctrine is at its "weakest" when a constitutional decision is at issue because such a decision can only be altered by constitutional amendment. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). While courts often list many considerations in the decision to overrule precedent, in many ways, it is reliance on the existing precedent that is the critical factor in any stare decisis analysis because that is the main basis for the entire doctrine of stare decisis in the first place. *Brown v. Nagelhout*, 84

Supreme Court cases), *cert. denied*, *Evans v. Crews*, 569 U.S. 994 (2013). Not only had the United States Supreme Court denied scores of petitions for writ of certiorari in Florida capital cases raising *Ring* claims over the years since *Ring* was decided in direct appeal cases, but it denied review yet again in *Evans*. And about two years before granting review in *Hurst*, the United States Supreme Court had denied a petition in a direct appeal case raising a *Ring* claim that was indistinguishable from *Hurst* with a dissenting opinion from three Justices of this Court urging the High Court to review that case. *Peterson v. State*, 94 So.3d 514, 538 (Fla. 2012), *cert. denied*, *Peterson v. Florida*, 568 U.S. 1071 (2012) (No. 12-6741); *Peterson*, 94 So.3d at 538 (Pariente, J., dissenting) (expressing the view Florida's death penalty statute, "as applied in circumstances like those presented in this case," was unconstitutional under *Ring*). Nor is *Hurst v. Florida* the only incidence of the United States Supreme Court taking its sweet time to decide an *Apprendi* issue. The High Court has still not decided the effect of *Apprendi* on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which permits judicial determination of prior convictions, despite several justices urging them to do so over the years. *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) (urging the Court to reconsider the *Almendarez-Torres* exception); *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) (Thomas, J., dissenting from the denial of certiorari) (urging the Court to reconsider the *Almendarez-Torres* exception and noting the importance of the High Court granting review due to the rule that only the High Court itself can "overrule one of its precedents"). Given the United States Supreme Court's repeated directions to lower courts to leave the task of overruling their precedent to them and this Court's urging the High Court to review particular cases, there is little to atone for. And this Court's expansion of *Hurst v. State*, as opposed to the limited holding of *Hurst v. Florida* itself regarding an aggravating factor, has no atonement aspect to it. The *Mosley* majority granted retroactive benefit not just of *Hurst v. Florida* but retroactive benefit of its own decision of *Hurst v. State* as well. But the main problem with the "atonement approach" to retroactivity, besides its incoherence, is that it ignores the importance of finality in any proper retroactivity analysis.

So.3d 304, 309, 311 (Fla. 2012) (noting that "reliance interests are of particular relevance" in stare decisis analysis and then overruling precedent after determining that "no reliance interests" were implicated); *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (observing that stare decisis has special force when legislators or citizens have acted in reliance on a previous decision); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash & Lee L. Rev. 411, 414 (2010) (noting reliance interests are a critical part of stare decisis and advocating that reliance considerations rather than other considerations play the determinative role in whether to overrule precedent).[24] The doctrine of stare decisis is based on the recognition that even bad decisions can be valuable because parties may have made critical decisions based on that bad decision and overruling such decisions can cause great losses, especially in civil cases due to those reliance interests. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that adhering to precedent is usually the wise policy, because often "it is more important that the applicable rule of law be settled than it be settled right"). As the United States Supreme Court explained in *Payne v. Tennessee*, 501 U.S. 808 (1991), in a capital case where the Court overruled its precedent, considerations in favor of stare decisis are "at their acme in cases involving property and contract rights, where reliance interests are involved" but observing "the opposite is true" in cases

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[24] This Court's stare decisis jurisprudence does on occasion put the overriding emphasis on reliance but it does not do so consistently. *Compare Brown v. Nagelhout*, 84 So.3d 304, 309, 311 (Fla. 2012) (listing many considerations but noting that "reliance interests are of particular relevance" in stare decisis analysis and then overruling precedent after determining that "no reliance interests" were implicated), *with N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 637-38 (Fla. 2003) (listing many considerations of unworkable, reliance, disruption, and dramatic change in the premises but incorrectly stating that stare decisis is at it "zenith" when dealing with a "divisive societal controversy" and refusing to overrule precedent).

"involving procedural and evidentiary rules" and then overruling precedent because no such reliance interests were at stake. *Id.* at 828. *See also United States v. Gaudin*, 515 U.S. 506, 521 (1995) (explaining the role of stare decisis is "reduced" when applied to procedural rules which do serve as guides to lawful behavior").[25]

Here, as in *Payne*, there is no such countervailing reliance interests at stake. Neither Rodgers nor any other capital defendant actually relied to their determent on either *Mosley* or *Hurst*. Indeed, Rodgers did not rely on either *Apprendi* or *Ring v. Arizona* because neither of those cases had been decided at the time of this murder in 1998. The existing precedent at the time of this murder was *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), which were the cases overruled by the United States Supreme Court in *Hurst v. Florida*. *Hurst v. Florida*, 136 S.Ct. at 623 ("We now expressly overrule *Spaziano* and *Hildwin* in relevant part."). And, under either *Spaziano* and *Hildwin* or *Hurst*, Rodgers could still be sentenced to death for this murder. Not only do criminal

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[25] While reliance interests are often highest in the civil context, reliance interests can be at stake in the criminal context as well. Both the State and, on occasion, a criminal defendant can have justifiably relied on existing law as the basis for their conduct. *See e.g., Davis v. United States*, 564 U.S. 229 (2011) (holding, when the police conduct a search based on objectively reasonable reliance on existing precedent, the exclusionary rule does not apply). A criminal defendant may also have a reliance interest in existing substantive law. *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Rogers v. Tennessee*, 532 U.S. 451 (2001) (explaining that *Bouie* restricts retroactive application of judicial interpretations of criminal statutes to those interpretations that are unexpected and indefensible by reference to precedent). But one of the main limitation on a criminal defendant claiming reliance on existing law is that the reliance must be justifiable reliance. As Justice Scalia explained in a concurring opinion, which was critical to the holding of that decision, one of the main goals of stare decisis is "preserving justifiable expectations," and that goal was "not much at risk" because those that relied on the existing precedent to tell the truth to Congress or the courts, instead of lying, "have no claim on our solicitude." *Hubbard v. United States*, 514 U.S. 695, 717 (1995) (Scalia, J., concurring).

defendants not rely procedural cases, such as *Spaziano*, *Hildwin*, *Hurst*, or *Mosley*, when committing murder, they do not change their legal positions during trials, appeals, or postconvictions proceedings in reliance on those types of decisions either. While capital defendants, who were granted *Hurst* relief due to *Mosley,* in cases where a new judgment and sentence of life has been entered, arguably have a reliance interest, under the reasoning of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108-09 (2003), which provides that when a court enters findings sufficient to establish a "legal entitlement to the life sentence," double jeopardy bars any retrial of the appropriateness of the death penalty, capital defendants in the remaining cases, where no new judgment has been entered, do not. The true core of doctrine of stare decisis, justifiable reliance, does not apply to those remaining capital defendants and the *Mosley* decision. Because there are no reliance interest at stake in the remaining cases, stare decisis is not a valid basis for refusing to recede from *Mosley*.

This Court should adopt *Teague* and recede from *Mosley* in the remaining cases that are pending on appeal in this Court. § 43.44, Fla. Stat. (2018); *In re Amendments to Florida Rules of Judicial Admin. & Florida Rules of Appellate Procedure*, 125 So.3d 743 (Fla. 2013). But, under either a *Teague* analysis or a *Witt* analysis, this Court should recede from *Mosley* and hold that *Hurst v. Florida* and *Hurst v. State* do not apply retroactively.

In this case, regardless of the waivers or which retroactivity test is applied, *Hurst* should ***not*** be applied retroactively to Rodgers. Rodgers should not be granted a third penalty phase.

Johnson v. Mississippi claim

The State declines to address each of the additional claims raised in passing in the initial brief, most of which are untimely claims of ineffectiveness that

should have been raised in the initial postconviction motion and are now procedurally barred in postconviction proceedings or are claims of ineffectiveness of postconviction counsel, which are not cognizable at all. *Moore v. State*, 132 So.3d 718, 724 (Fla. 2013) (noting that this Court does not recognize claims of ineffective assistance of postconviction counsel citing *Kokal v. State*, 901 So.2d 766, 777 (Fla. 2005)). But the State will briefly address the *Johnson v. Mississippi*, 486 U.S. 578 (1988), claim, because of the recent ruling from the state trial court rejecting the challenge to that conviction.

In *Johnson v. Mississippi*, the United States Supreme Court held that consideration of a prior conviction to support an aggravating factor, if the prior conviction is later vacated, violates the Eighth Amendment and requires a new penalty phase at which the vacated prior conviction is not considered. Rodgers argues that his plea to the prior federal conviction for murder, used to the support the prior violent felony aggravator in this case, was involuntary due to his gender dysphoria. IB at 72.

In this case, at the second penalty phase, the State introduced evidence relating to two prior violent crimes that Rodgers had committed: the attempted murder of Leighton Smitherman and the first-degree murder of Justin Livingston. *Rodgers v. State*, 3 So.3d 1127, 1130 (Fla. 2009). The State cross-examined Rodgers ,who testified at the second penalty phase bench trial, regarding the details of these prior convictions. *Rodgers*, 3 So.3d at 1130. Following the second penalty phase, the state trial court found two aggravating circumstances: 1) Rodgers was previously convicted of another capital felony or a felony involving the use of violence; and 2) the murder was committed in a cold, calculated, and premeditated manner (CCP). *Id.* at 1131. The prior violent felony aggravator was supported by two different convictions based on two separate incidents. One of the prior conviction was the attempted murder of Smitherman which was

prosecuted in state court and the other prior conviction was a conviction for the murder of Livingston which was prosecuted in federal court.

Rodgers confessed to the Livingston murder and entered a guilty plea in the federal case of *United States v. Rodgers*, No. 3:98-cr-0073-002-RV-MD (N.D. Fla. Doc. # 270 - June 6, 2007 plea hearing). The federal conviction for murder has never been challenged, much less vacated.[26] And the recent challenge to the state conviction for attempted murder was recently rejected by the state court. *State v. Rodgers*, 1998-CF-0322 (Fla. First Judicial Circuit, Santa Rosa Cty, order of Judge John Simon, Jr. dated April 30, 2019, denying a claim of newly discovered evidence raised in a 3.850 postconviction motion was untimely and finding a lack of diligence because the new diagnosis of gender dysphoria from Dr. Julie Kessel was made in February 26, 2016, but the motion was not filed until more than two years later on December 4, 2018).

Any *Johnson v. Mississippi* claim regarding either prior convictions is waived due to the *Durocher* waiver.

Alternatively, regardless of the *Durocher* waiver, the *Johnson v. Mississippi* is meritless as a matter of law. As this Court has explained, a valid *Johnson* claim requires that the underlying conviction actually be vacated, not mere challenged.[27]

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[26] The CHU-N filed a motion in the federal case for a copy of the pres-sentencing investigation report on April 14, 2016, which was granted. (Doc. #271; #272). But no federal habeas petition under § 2255 or any other type of postconviction motion to vacate the plea was ever filed, as of May 6, 2019, according to the federal district court's docketing. Because they are counsel of record in the well aware that they have never challenged the plea in the federal conviction.

[27] *Wickham v. State*, 124 So.3d 841, 864 (Fla. 2013) (rejecting claim of ineffective assistance of appellate counsel for not raising a *Johnson v. Mississippi* claim which would have been meritless because the two prior felonies used to support the prior violent felony aggravator had not been vacated citing *Phillips v. State*, 894 So.2d 28, 36 (Fla. 2004)); *Lukehart v. State*, 70 So.3d 503, 513 (Fla.

But the federal conviction has not been vacated. Indeed, the federal conviction has never even been challenged in federal court. And the challenge to the state conviction on the basis of gender dysphoria was recently rejected by the state postconviction court. *State v. Rodgers*, 1998-CF-0322 (Fla. First Judicial Circuit, Santa Rosa Cty, order dated April 30, 2019). Neither of the prior convictions has been vacated. This simply is not a valid *Johnson v. Mississippi* claim.

Furthermore, because there were two separate convictions, either one of which would supported the finding of the prior violent felony aggravator, any *Johnson v. Mississippi* error would be harmless. *Johnson v. Mississippi* errors are harmless when the prior violent felony aggravator is supported by another similar conviction or a more serious conviction. *Moon v. Head*, 285 F.3d 1301, 1317 (11th Cir. 2002) (holding a *Johnson v. Mississippi* error involving eight prior convictions that were vacated was harmless because the death sentence was supported by other convictions for armed robbery and kidnapping that had not been vacated); *see also Hogue v. Johnson*, 131 F.3d 466, 502 (5th Cir. 1997) (holding a *Johnson v. Mississippi* error was harmless); *Nixon v. Epps*, 405 F.3d 318, 332 (5th Cir. 2005) (same). Both of the underlying convictions would have to be vacated for there to be harmful *Johnson v. Mississippi* error. But neither of the two convictions used

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2011) (rejecting claim of ineffective assistance of trial counsel for not raising a *Johnson v. Mississippi* claim as meritless because the prior violent felony conviction for child abuse had not been vacated and was still a valid conviction and therefore, this was "not a cognizable claim"); *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006) (rejecting a *Johnson v. Mississippi* claim because the two prior felonies used to support the prior violent felony aggravator had not been vacated and were still valid convictions citing *Buenoano v. State*, 708 So.2d 941, 952 (Fla. 1998)); *Bundy v. State*, 538 So.2d 445, 447 (Fla. 1989) (rejecting a *Johnson v. Mississippi* claim because the Utah conviction for aggravated kidnapping, which was a basis for the prior violent felony aggravator, had not been vacated citing *Straight v. State*, 488 So.2d 530 (Fla. 1986)).

to support the prior violent felony aggravator in this case has been vacated by any court.

The *Johnson v. Mississippi* claim has been waived, is meritless because neither of the prior convictions has never been vacated, and, any error would be harmless even if one of the convictions ever was vacated.

Dismissal is the appropriate remedy

Dismissal of this appeal, not a mere denial of the *Hurst* claim, is the appropriate remedy in this case. Simple denials in *Durocher* cases negate the waiver. The parties have to brief the issues and this Court has to expend its resources deciding those issues, all of which is contrary to the *Durocher* waiver. These types of frivolous appeals necessarily violate the new state constitutional provision, commonly known as Marsy's Law, which prohibit "unreasonable delay" in the "prompt and final conclusion of the case and any related postjudgment proceedings." Fla. Const. Art. I, § 16(b)(10); *Dep't of State v. Hollander*, 256 So.3d 1300 (Fla. 2018) (addressing the ballot summary of Marsy's Law).

Additionally, denying the claim rather than dismissing the claim in the 2017 appeal simply emboldens the defense bar to file additional appeals which is exactly what happened here.

Furthermore, allowing capital defendants to file appeals after this Court has affirmed the voluntariness of the *Durocher* waiver for no reason amounts to simply allowing them to change their mind regarding the waiver in direct violation of this Court's holdings in *James v. State*, 974 So.2d 365 (Fla. 2008), and *Trease v. State*, 41 So.3d 119 (Fla. 2010). But this is worse than a change of mind, because it is, in effect, the third appeal of the voluntariness of Rodgers' *Durocher* waiver. In the words of the Fifth District, "enough is enough." *Burgess v. State*, 125 So.3d 352, 353 (Fla. 5th DCA 2013) (directing the clerk not to accept any further *pro se* filings

concerning the case unless they are filed by a member of The Florida Bar quoting *Isley v. State*, 652 So.2d 409, 410 (Fla. 5th DCA 1995)); *Simpkins v. State*, 909 So.2d 427, 428 (Fla. 5th DCA 2005) (concluding the appeal was "frivolous and an abuse of process" and directing the clerk not to accept any further *pro se* filings concerning the case unless they are filed by a member of The Florida Bar quoting *Isley*). Indeed, in one case, the Fifth District stated regarding an appeal raising the same issue yet again: "This court is not going to listen to this argument any longer." *Henderson v. State*, 903 So.2d 999, 1000 (Fla. 5th DCA 2005) (concluding the appeal was "frivolous and an abuse of process" and directing the clerk not to accept any further *pro se* filings concerning the case unless they are filed by a member of The Florida Bar). As Judge Posner observed, frivolous criminal appeals "do the criminal defendant no good." *United States v. Cooper*, 170 F.3d 691, 692 (7th Cir.1999). They simply "clog the court system and, worse, they hurt meritorious criminal appeals by inviting sweeping rulings and by engendering judicial impatience with the entire class of criminal defendants." *Id.* As this Court recently observed, regarding a petitioner who had a "persistent history" of filing *pro se* petitions that were frivolous, such frivolous appeals abuse "the judicial process and burdened this Court's limited judicial resources." *Wetzel v. Travelers Companies, Inc.*, 2019 WL 1474478 (Fla. Apr. 4, 2019) (directing the clerk not to accept any further *pro se* filings concerning the case unless they are filed by a member of The Florida Bar who determines the cause may have merit and can be brought in good faith); *Schofield v. State*, 244 So.3d 154 (Fla. 2018) (directing the clerk, in light of the defendant's "extensive history of filing meritless pro se petitions," not to accept any further *pro se* filings unless they are filed by a member of The Florida Bar who determines the cause has merit and can be brought in good faith). The admonition that "enough is enough" applies with equal, if not greater, force to attorneys.

The United States Supreme Court recently discussed the delays in capital cases, in a case where the murder occurred over two decades ago and where the appeal, state postconviction proceedings, and federal habeas had been completed years ago, but the defendant had "managed to secure delay through lawsuit after lawsuit." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133-34 (2019). The *Bucklew* Court noted that "both the State and the victims of crime have an important interest in the timely enforcement of a sentence" which had been frustrated. *Id.* at 1133. The High Court then stated that the people of the state, the surviving victims, and others like them "deserve better." *Id.* at 1134. Indeed, both the majority and the dissent in *Bucklew* agreed that the long delays that now typically occur in capital cases are "excessive." *Id.* at 1134; *Id.* at 1144 (Breyer, J., dissenting). According to the *Bucklew* Court, courts "can and should protect settled state judgments" by "invoking their ***equitable powers to dismiss*** or curtail suits that are pursued in a dilatory fashion." *Id.* at 1134 (emphasis added).

This Court should do exactly what the United States Supreme Court recently recommended: it should invoke its equitable powers to dismiss this appeal. This appeal is beyond dilatory; indeed, it is beyond frivolous; it is repeated frivolousness filed solely for the sake of delay. This Court should not only dismiss this appeal rather than affirm the denial of the claim, it should also warn opposing counsel not to file any further pleadings until a warrant is signed. That is what a *Durocher* waiver is and the only means to enforce *Durocher* waivers is for this Court to dismiss without briefing any appeals filed in *Durocher* waiver cases and issue warnings to counsel not to file any pleadings in any Florida court until a warrant is signed. This appeal should be dismissed.

Accordingly, the trial court properly summarily denied the successive postconviction motion raising the same claim of involuntariness of the two waivers due to gender dysphoria as the prior successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by e-portal to TERRI BACKHUS, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Ste. 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: terri_backhus@fd.org this 17th day of May, 2019.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.

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