No. SC19-241

IN THE

Supreme Court of Florida

JEREMIAH ("JENNA") RODGERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT ON THE STATE'S REFUSAL TO USE FEMALE PRONOUNS

Throughout its brief, the State consistently and repeatedly uses male pronouns to reference Appellant and insists it will refer to Appellant "as appellant or by his proper name." Answer Brief at 1.

Appellant's name is Jenna Rodgers or Ms. Rodgers, and she is properly referenced with female pronouns. Using male pronouns and identifiers to reference Appellant is inappropriate, unprofessional, and disrespectful.

The State's "deliberate ascription of an incorrect identify" to Appellant is a form of harassment. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 959 (2019).

> Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity. For example, imagine a scenario in which xenophobes harass a coworker they know to be from India by referring to him as an "Arab." This deliberate ascription of an incorrect identity is a form of racism – among other things, it expresses the idea that all people with brown skin are "Arab" and that Indian identity is unworthy of respect. Similarly, intentional misgendering expresses stereotypes about what real "men" and "women" are and informs its target that their own gender identity is unworthy of respect.

Id. (footnotes omitted).

"The law does not protect a person's right to be identified in any manner they wish; it prohibits harassment based on sex." *Id.* (discussing administrative code provisions in the District of Columbia, New York, and California that prohibit

harassment by misgendering). *See* D.C. Mun. Regs. Tit. 4, § 808.2 ("Deliberately misusing an individual's preferred name, form or address, or gender-related pronoun" "may constitute evidence of unlawful harassment.").

The State has never contested the reality that Appellant is transgender.[1] And the State has presented no evidence that contradicts the gender dysphoria diagnosis Appellant has received from multiple doctors. Making legal arguments about the timeliness of Appellant's claims and about her prior waiver does not justify the State intentionally misgendering Appellant and, by extension, harassing her.

In the legal community, the American Bar Association has amended the Model Rules of Professional Conduct to protect transgender people from harassment. "It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of sex . . . [and] gender identity . . . in conduct related to the practice of law." American Bar Association, "Model Rules of Professional Conduct," Rule 8.4, https://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/aba-policies-related-to-issues-of-sogi-2018.pdf.

[1] At a status hearing before the circuit court, counsel for the State stated that Appellant's gender dysphoria diagnosis was not disputed. HPCR. 151 ("I don't -- I don't dispute that—I don't dispute this diagnosis—that some diagnosis like this is in the record.").

Appellant requests that the Court—as well as the State and the State's counsel—refer to Appellant appropriately and with female pronouns and identifiers or, at a minimum, with gender-neutral pronouns and the identifier "Appellant."

ARGUMENT

I. Appellant Timely Filed Her Postconviction Motion Based on Newly Discovered Evidence of Gender Dysphoria and Its Impact on Her Waivers.

The State contends that, when filing a claim on newly discovered evidence based on a previously unavailable mental health diagnosis, the one-year clock starts ticking at "the date of the examination, not the date of the report" of the expert. Answer Brief at 20. This contention ignores the complexity of mental health assessments and should not be adopted by the Court in this case.

A clinical interview alone is insufficient for a thorough and comprehensive mental health assessment. Information from multiple sources allows the mental health professional to corroborate or question information provided by the evaluee during an interview. Depending on the circumstances, a thorough and comprehensive forensic assessment may include a review of relevant background records, psychological testing, interviews of collateral witnesses, consultation with other examining mental health professionals, and even an additional clinical interview after the passage of some time. Any one of these components of the

assessment may also prompt the mental health professional to seek additional information or to request the retaining legal team seek additional information.

The American Academy of Psychiatry and the Law has released guidelines for forensic assessments, stressing that the quality of assessments are critical and that assessments should include data from multiple sources.

> Forensic assessment is one of the basic building blocks that form the foundation of the practice of psychiatry and the law, in addition to report-writing and giving testimony in court. Similar to any foundation, the integrity of the process depends on how well each brick is laid upon the other. In psychiatry and the law, the quality of the final product depends on the quality of the assessment, regardless of the practitioner's report-writing skills.

American Academy of Psychiatry and the Law, "Practice Guideline for the Forensic Assessment," at S3, http://www.aapl.org/docs/pdf/Forensic_Assessment.pdf.

A quality assessment incorporates information from multiple sources and is not based solely on one clinical interview.

> Collateral sources of information, when available, are usually an important element of the forensic assessment. With the consideration of multiple data sources, varying points of view may have to be reconciled. Memory deficits, effects of treatment, and malingering may affect the evaluee's statements. Collateral information may add to or complement the evaluee's account and may be compared with the evaluee's account to help detect malingering and assess reliability. However, the biases of various reporters also should be considered.
>
> Collateral information for the expert's review may include written records, recordings, and collateral interviews. Records from police, psychiatric and medical treatment, school, the military, work, jail, and financial institutions may be appropriate, depending on the type of assessment. Reviewing assessments performed by other experts may

> help determine the consistency of reporting; as well, psychological testing scores and brain imaging may be relevant.
>
> The expert opinion may benefit from interviews with several sources, including family members, colleagues, friends, victims, and witnesses, and the sources will vary by type of assessment. . . . The collateral information to be sought depends on the specific question posed by the referring agent and the circumstances of the case. Collateral data are especially important in reconstructive assessments, such as those for sanity, testamentary capacity, and disability, in which the evaluee's mental state in the past is the focus. Alternatively, in a competency assessment, police reports and allegations against the evaluee, as well as the reasons the court or attorney are requesting the assessment, are particularly relevant. A review of these materials may lead the psychiatrist to request additional materials or interviews. Experts should endeavor to obtain all necessary and relevant information as early in the process as possible, as subsequent revelations of contradictory or inconsistent data may change the expert's opinion.

Id. at S8 (footnotes omitted).

The AAPL recognizes that review of collateral information often occurs after the psychiatrist conducts a clinical interview.

> In general, the evaluator should review relevant documents as they become available. Reviewing collateral data before conducting interviews provides the expert with a more comprehensive understanding of the case, so that the expert may ask additional appropriate questions and note any inconsistencies. However, in certain circumstances, reviewing information before an interview may not be desirable because of, for example, concerns that the written information may bias the evaluator. In some cases, a review may not be possible. . . . [S]ome records may not be available or may not be reviewed because of time constraints. . . . Collateral data facilitate objectivity and may aid in opinion formulation, furthering understanding of the evaluee's mental state at various points in time, such as before an accident or at the time of the offense. Criminal defendants' or civil plaintiffs' reports and recollections may differ from more objective and contemporaneous records. Such data may also help in assessing accuracy or malingering.

Id. at S8-S9 (footnotes omitted).

The assessments conducted by Dr. Kessel and Dr. Brown are consistent with the guidelines of their professions. Both doctors based their medical diagnoses on extensive data from multiple sources. They were thorough and deliberate in rendering their professional opinions. Dr. Brown completed his assessment of Appellant in October 2018, SPCR 107, and Dr. Kessel completed her assessment of Appellant in November 2018. SPCR 145. Appellant filed her successive postconviction motion based on newly discovered evidence in December 2018. SPCR. 35. It was timely and filed well within one year of when the doctors completed their assessments.[2]

The State has offered no evidence for its assertion that Dr. Kessel's and Dr. Brown's assessments could have been completed within one year from Dr. Kessel's initial interview with Appellant. But the State's insistence that the experts could have completed their assessments earlier does highlight the need for an evidentiary hearing in this matter. *See Gaskin v. State,* 737 So. 2d 509, 516 (Fla. 1999) ("While

[2] The State alleges that George R. Brown, M.D., did not examine Appellant personally. Answer Brief at 9. That is inaccurate. Dr. Brown initially reviewed records regarding Appellant and provisionally concurred with the gender dysphoria diagnosis rendered by Julie B. Kessel, M.D. HPCR. 65. Dr. Brown conducted a clinical interview of Appellant in November 2017. SPCR. 111. In October 2018, he finalized his opinions and, while differing from Dr. Kessel on some matters, definitely diagnosed Appellant with gender dysphoria. SPCR. 107.

the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief.").

Where the circuit court denied postconviction relief, as here, this Court must accept as true all of Appellant's allegations—including those regarding when the mental health experts completed their assessments and when the experts were able to render definitive conclusions about Appellant, her diagnosis, and the impact of her gender dysphoria on her decision-making and waivers. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009) ("In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record.").

This Court should not adopt the State's unsubstantiated and unsupported allegations of when the assessments of Appellant were completed or when they could have been completed. Appellant has asserted with detailed factual support that Dr. Brown completed his evaluation in October 2018 and that Dr. Kessel completed her evaluation in November 2018. SPCR 107, 145. Appellant has asserted that both doctors would have testified at an evidentiary hearing that their 2017 reports were preliminary, that more time was needed for Appellant to grapple with the idea that she is gender dysphoric, and that the doctors' evaluations were not complete until late 2018. SPCR. 418. *See Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009) (explaining

that, when considering whether the defendant has "established a prima facie showing . . . sufficient to require an evidentiary hearing" the court considers "the statements made during the Huff haring in conjunction with the assertions in the motion"). The Court must accept Appellant's allegations as true. *Ventura*, 2 So. 3d at 197-98.

II. Appellant's Prior Waivers are Not Valid, and This Court Should Not Ignore Newly Discovered Evidence That the Waivers Were Not Entered Into Voluntarily.

The State "agrees that the issue of the voluntariness of the *Durocher* waiver itself is unwaivable," but then asks the Court to look past the newly discovered evidence that shows Appellant's waiver was not voluntary. Answer Brief at 30. That is impossible.

Appellant's waivers and their questionable validity are inextricably intertwined with Appellant's gender dysphoria, a lifelong medical condition that was not known to the courts, the mental health experts, or Appellant at the time of her prior waivers. Now that Appellant has presented detailed, individualized evidence from multiple experts about this condition as well as evidence that a diagnosis of the condition was not previously available—and the State has never proffered any evidence that challenges Appellant's proffer—the State and the Court cannot pretend Appellant's gender dysphoria does not now exist and did not exist at the times she self-destructively and involuntarily waived her rights.

The State objects to Appellant not delineating "what claims . . . are waived by entering into a *Durocher* waiver and what claims are not waived and why." Answer Brief at 30. But Appellant need not assess all possible claims and opine on whether they are waived under a *Durocher* waiver. The issue in this case is whether Appellant can be bound by waivers that she entered into when she was not competent and was actively suffering from untreated, undiagnosed gender dysphoria, which created such distress, shame, confusion, and suicidality that her decision-making capacity was impaired, and her waivers were not voluntary.

The law is clear that Appellant cannot now be bound by such waivers. For a postconviction waiver to be valid, it must be "knowing, intelligent, and voluntary." *Silvia v. State*, 123 So. 3d 1148 (Fla. 2013). *See also Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Pate v. Robinson*, 383 U.S. 375, 384 (1966); *Dusky v. United States*, 362 U.S. 402, 402 (1960); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

The State attempts to cast this litigation as *Hurst* litigation, stressing its position that "*Hurst* claims are waivable," Answer Brief at 29, but that mischaracterizes this litigation. This litigation is based on Appellant's newly discovered medical condition, the distress of which resulted in Appellant engaging in self-harm and self-sabotaging decision-making, and rendered her not competent to waive her constitutional rights in 2000, 2004, 2007, and 2011. At every stage of this case, these waivers have been used to deny her *Hurst* relief. *See Rodgers v. State*,

242 So. 3d 276, 276-77 (2018) ("[T]he *Hurst* decisions do not apply to defendant, like Rodgers, who waive a penalty phase jury."). But while *Hurst* is undoubtedly part of this litigation, the newly discovered evidence of Appellant's gender dysphoria and related incompetence cannot be set aside.

III. At a New Penalty Phase, Evidence of Appellant's Gender Dysphoria Would Probably Result in a Life Sentence.

The State contends that "a diagnosis of gender dysphoria would not result in a life sentence at a new penalty phase. . . . Rodgers would still receive a death sentence." Answer Brief at 43. This contention is refuted by the fact that Appellant's initial trial resulted in three votes for Appellant's life to be spared. *Rodgers v. State*, 934 So. 2d 1207, 1214 (2006). Today, under post-*Hurst* unanimous sentencing, those three votes would be enough for Appellant to be sentenced to life.

Moreover, those three jurors recommended life on a fraction of the evidence available now—evidence that now includes but is not limited to Appellant's newly discovered medical condition of gender dysphoria and evidence Appellant "was under the domination" of her co-defendant. *See Rodgers*, 934 So. 2d at 1219.

The newly discovered evidence of Appellant's gender dysphoria is the type of medical, individualized mitigating evidence that would probably result in one juror voting to spare Appellant's life.

> [Appellant] has been suffering from, and has been deeply influenced by, undiagnosed and untreated Gender Dysphoria and associated life-permeating symptoms and relational problems emanating from this

> psychiatric diagnosis. Gender Dysphoria (DSM-5, 302.85) is a significant psychiatric disorder . . . . GD has been determined to be a "serious medical condition" warranting treatment in prison settings by numerous Federal District Courts, including in Florida, since 2002.

SPCR. 117.

This Court previously vacated Appellant's death sentence on the grounds that Appellant was prejudiced by the exclusion of evidence that Appellant was under the domination of her co-defendant.

> Rodgers was entitled to have considered by the jury the evidence as to whether, under the circumstances of the Robinson murder, Rodgers was so less culpable than [co-defendant] Lawrence for the murder of Robinson that Rodgers should not be sentenced to death. The relative culpability of Rodgers and Lawrence was relevant in this penalty phase. This was clearly relevant here since the State stipulated as part of Rodgers' plea bargain that the State would not argue that Rodgers was the actual shooter of Robinson. Given the extensive mitigation which was presented in the case, including Rodgers' significant mental health history, we cannot say that the State has shown that there is no reasonable possibility that that the error in excluding this evidence did not contribute to the sentence of death. Therefore, we find that the denial of the admission of the specified evidence from the Lawrence residence was harmful error and requires a new penalty phase.

Id. at 1219-20.

Certainly, with the evidence Appellant was under the domination of her co-defendant combined with the evidence that Appellant has gender dysphoria, a lifelong medical condition that was undiagnosed and untreated at the time of the offense, it is probable that, at a new penalty phase, one juror would vote to spare Appellant's life. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (explaining that

claims of newly discovered evidence require a probability showing); *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) ("In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case.'") (citation omitted).

A showing of probability that "at least *one* juror would have struck a different balance" is all that is required. *Cf. Wiggins v. Smith*, 539 U.S. 510 (2003) (emphasis added); *Cone v. Bell*, 556 U.S. 449, 452 (2009) (stating that a lower court must determine whether there is a probability that newly discovered evidence "would have altered at least *one* juror's assessment of the appropriate penalty") (emphasis added).

IV. This Appeal Presents Legal Issues That Were Not Decided in Appellant's Prior Appeal and Are Not Barred by the Law-of-the-Case Doctrine.

This appeal is not barred by the law-of-the-case doctrine, contrary to the State's assertions. Answer Brief at 17. The doctrine is not an "absolute" bar, *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997), and does not apply here. Before the circuit court, the State urged that Appellant's postconviction motion be rejected on the basis of the law-of-the-case doctrine. SPCR. 381. The circuit court, while noting that Appellant "raised similar claims" to the claims raised in her prior postconviction

proceedings, properly did not find that the doctrine barred consideration of the motion. SPCR. 413.

"The doctrine of law of the case is limited to rulings on questions of law actually presented and considered on a former appeal." *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1063 (Fla. 1983). It "requires that questions of law *actually decided* on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't of Transp. v. Juliano,* 801 So. 2d 101, 105-06 (Fla. 2001) (emphasis added).

In the postconviction motion underlying this appeal, Appellant raised multiple claims that—while involving issues of *Hurst* sentencing errors and gender dysphoria, which were relevant to this Court's prior decision in Appellant's case—have neither been presented to an appellate court nor decided by an appellate court.

Appellant's prior appeal raised one claim: her death sentence was unconstitutional under the Sixth and Eighth Amendments in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *Rodgers*, 242 So. 3d at 276-77. The prior postconviction motion and the appeal of its denial did touch on Appellant's medical conditions, including gender dysphoria, but did not raise the same legal issues Appellant raises here. *Id.* at 277 ("Rodgers has not proffered any newly discovered evidence that would warrant revisiting the validity of this waiver."); *id.* at 280 (Pariente, J., concurring) (explaining that

Appellant's gender dysphoria diagnosis was not before the Court as a claim of newly discovered evidence).

In the postconviction motion underlying this appeal, Appellant raised multiple legal claims based on the newly discovered evidence of her gender dysphoria: she was denied substantive due process as a result of being incompetent at her second penalty phase, when she waived her penalty phase jury, and when she waived her postconviction proceedings; she was denied procedural due process as a result of the court's and defense counsel's failures to ensure she was competent at various critical stages of this case; she was denied the effective assistance of counsel when she pleaded guilty; and her death sentence is based on an unreliable aggravating factor. SPCR. 35-84. None of these claims have been considered by this Court in the context of Appellant's newly discovered evidence of gender dysphoria.

In *Juliano*, the Court "reaffirmed the principle that an issue is not foreclosed by the doctrine of the law of the case merely because it could have been presented in an earlier appeal." *Fitchner v. Lifesouth Cmty. Blood Centers, Inc.*, 88 So. 3d 269, 275 (Fla. 1st DCA 2012). "[T]he law of the case doctrine 'has no applicability to, and is not decisive of, points presented upon a second writ of error that were not presented upon a former writ of error and consequently were not before the appellate court for adjudication.'" *Juliano*, 801 So. 2d at 106 (citation omitted). The doctrine "does not bar consideration of a point" that "could have been presented"; it bars only

reconsideration of issues that were specifically presented and decided in an earlier appeal. *Fitchner*, 88 So. 3d at 275.

On appeal from the denial of Appellant's prior postconviction motion, this Court was not presented with and did not decide any claims related to newly discovered evidence. As a result, those claims cannot be barred by the law-of-the-case doctrine. "[T]he law-of-the-case doctrine is not applicable to a legal question that has not yet been decided on appeal." *Delta Prop. Mgmt. v. Profile Investments, Inc.*, 87 So. 3d 765, 770 (Fla. 2012).

The doctrine also does not apply in situations where the latter postconviction motion presents the trial court with new factual allegations. *Murray v. State*, 3 So. 3d 1108, 1116 (Fla. 2009) (stating that the doctrine does not apply once "additional facts [are] placed in evidence"); *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1266 (Fla. 2006) (stating that the doctrine does not apply when there has been a "change in the facts" upon which the prior decision was based).

In the instant case, Appellant's postconviction motion presented new evidence regarding Appellant's medical condition of gender dysphoria, its import, and its impact on her competency at times when she waived constitutional rights. This evidence was not previously presented to the Court, and consideration of it cannot be barred by the law-of-the-case doctrine.

"The law-of-the-case doctrine was meant to apply to matters litigated to finality, not to matters that remain essentially unresolved . . . . [A] plaintiff should be permitted to assert a new theory" for relief. *Wells Fargo Armored Servs. Corp. v. Sunshine Sec. & Detective Agency, Inc.*, 575 So. 2d 179, 180 (Fla. 1991). As the claims currently before the Court have not been previously raised and have not been ruled upon by this Court, they are not barred by the law-of-the-case doctrine.

Moreover, "an exception to the general rule binding the parties to 'the law of the case'" exists "where 'manifest injustice' will result from a strict and rigid adherence to the rule." *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965) ("[T]he law of the case does not rigidly bind a court to its former decisions, but is only addressed to its good sense.") (internal quotations, citation omitted). "[E]xceptional circumstances" can also open a matter "for discussion or consideration in subsequent proceedings in the case." *Greene v. Massey*, 384 So. 2d 24, 28 (Fla. 1980).

A capital case where multiple mental health experts have expressed serious doubts as to Appellant's competence at multiple critical legal junctures based on a newly discovered medical condition qualifies as an exceptional situation where the Court should hear claims to prevent manifest injustice. Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations, internal quotations omitted). *See also Halbert v. Michigan*, 545 U.S. 605 (2005) (explaining that a defendant

cannot waive a right that has not been recognized, as such a waiver cannot be a knowing and intelligent act); *Smith v. Yeager*, 393 U.S. 122, 126 (1968) (holding that a defendant cannot waive a "right or privilege [that] was of doubtful existence" at the time of the waiver).

V. Appellant Cannot Properly Reply to Arguments Made by the State For the First Time on Appeal and That the Circuit Court Did Not Address.

The State asks the Court to reverse course regarding the retroactivity of *Hurst*, to recede from *Mosely v. State*, 209 So. 3d 1248 (Fla. 2016), and to adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). Answer Brief at 51-52. The State did not make this argument before the circuit court, and the circuit court did not consider the correctness of *Mosely* or the applicability of *Teague*, and the circuit court's order did not address these issues. This is not now the proper forum for the State to make such sweeping arguments. Appellant cannot fully respond to such arguments in a reply brief.

If the Court would like Appellant to address whether the Court should recede from *Mosely* and/or adopt the *Teague* doctrine, Appellant asks the Court to expressly order such briefing and to provide Appellant an opportunity to submit full briefing on the matter.

The State similarly offers the Court its opinion regarding proposed amendments to Rule 3.851(i) of Florida Rule of Criminal Procedure 3.851 and

Florida Rule of Appellate Procedure 9.142(d). Answer Brief at 33-38. Again, the State did not make these arguments before the circuit court, and the circuit court's order did not address the proposed amendments. If the Court requests briefing on this matter, Appellant will certainly provide briefing on the proposed amendments. But this reply brief is not the proper forum for Appellant to do so.

VI. The Current Litigation is Based on the Wishes and Desires of Appellant and in Accordance with Counsel's Professional Responsibilities.

The State speculates that undersigned counsel "may be filing these postconviction motions and appeals contrary to Rodgers' wishes" and is ignoring counsel's duty "to abide" by the client's wishes. Answer Brief at 38, 39. These allegations are false. Undersigned counsel, as officers of the court, have already stated that the instant litigation is consistent with Appellant's wishes. Counsel explained this in Appellant's Brief in Response to Order to Show Cause.

> [T]he State ignores that Appellant desires to have undersigned counsel litigate the instant appeal, just as Appellant desired to have counsel litigate all of the claims that were raised before the circuit court.
>
> While Appellant may have previously expressed a desire to waive postconviction proceedings and counsel, the record is clear that Appellant no longer desires such. In 2015, at the request of Appellant, undersigned counsel was appointed to represent Appellant and has been litigating legal claims on her behalf since. Appellant wants to pursue postconviction relief and to do so with the assistance of current counsel; therefore, counsel has a duty to challenge Appellant's convictions and sentences in postconviction proceedings and to appeal a denial to this Court. *See Garza*, 2019 WL 938523, at *5 ("Where . . . a defendant has expressly requested an appeal, counsel performs deficiently by

> disregarding the defendant's instructions."); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) ("[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.").
>
> This appeal is brought before the Court in accordance with the desires of Appellant and the "fundamental decisions" the State contends Appellant is entitled to make about Appellant's own case. This matter does not arise from a mere change of mind on the part of Appellant, but from significant newly discovered evidence that reveals, among other things, the invalidity of her prior waiver.

Appellant's Brief in Response to Order to Show Cause, at 11.

It is disingenuous and unethical for the State to persist in accusing counsel of ignoring counsel's duties and misrepresenting Appellant's position to the Court. At each step of litigation in this matter, counsel has fully complied with Rule 4-1.2(a), the rule regarding a lawyer's duty "to abide by client's decisions," as well as all other provisions of the Rules Regulating the Florida Bar. Any allegations by the State otherwise are wholly without merit.

CONCLUSION

Appellant's gender dysphoria and the distress and self-harm it caused manifested in her waivers of constitutional rights. SPCR. 96, 155, 163, 173. The newly discovered gender dysphoria calls into question the validity of Appellant's waivers in 2000, 2004, 2007, and 2011—at every stage of this case.

Appellant's prior waiver of postconviction proceedings does not operate as an absolute bar to all future litigation and does not bar the current litigation. Appellant

has timely challenged the waiver with newly discovered medical evidence that was not previously available despite the exercise of due diligence, and Appellant has presented detailed, individualized evidence that she was not competent at the time of her postconviction waiver.

The circuit court erred by summarily denying Appellant's postconviction motion. Appellant timely raised constitutional claims supported by a comprehensive evidentiary proffer. Each of these claims necessitate factual determinations by the circuit court. *See Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

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

Respectfully submitted,

/s/ Terri L. Backhus
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CERTIFICATE OF SERVICE

I, Terri L. Backhus, hereby certify that on June 4, 2019, I served this filing by electronic transmission via the e-portal to Assistant Attorney General Charmaine Millsaps at capapp@myfloridalegal.com and charmaine.millsaps@myfloridalegal.com.

/s/ Terri L. Backhus
Terri L. Backhus

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated initial brief is in compliance with the requirements of Florida Rule of Appellate Procedure 9.210 and is prepared in Times New Roman 14-point font.

/s/ Terri L. Backhus
Terri L. Backhus