No. _____

IN THE

Supreme Court of the United States

JEREMIAH ("JENNA") RODGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the newly discovered evidence of a criminal defendant's medical condition, including gender dysphoria, may implicate the voluntariness of prior waivers made by the defendant?

2. Whether a defendant is required, in order to avoid application of a procedural bar, to advance a diagnosis or medical condition that has yet to be fully accepted by the medical community, and which has not been conclusively determined to apply to the defendant?

3. Whether a waiver of proceedings by a defendant constitutes an absolute bar to any future claims pertaining to the validity of the waiver?

4. Whether the Florida Supreme Court's disenfranchisement of a defendant's attempts to vindicate her constitutional rights deprives her of due process, equal protection and fair access to the courts?

PARTIES TO THE PROCEEDINGS

Petitioner, Jeremiah ("Jenna")[1] Rodgers, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

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

NOTICE OF RELATED CASES[2]

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Santa Rosa County, Florida
State of Florida v. Jeremiah Martel Rodgers, Case No. 98-CF-274
Judgment Entered: November 21, 2000

Direct Appeal:
Florida Supreme Court (Case No. SC01-1HH85)
Rodgers v. State, 934 So. 2d 1207 (Fla. 2006) (reversed death sentence)
Judgment Entered: June 29, 2006

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (Case No. 06-6858)
Rodgers v. Florida, 549 U.S. 1080 (2006)
Judgment Entered: December 4, 2006

Resentencing Proceeding:
Circuit Court of Santa Rosa County, FL
State of Florida v. Jeremiah Martel Rodgers, Case No. 98-CF-274
Judgment Entered: June 20, 2007

Second Direct Appeal:
Florida Supreme Court (Case No. SC07-1652)
Rodgers v. State, 3 So. 3d 1127 (Fla. 2009) (affirming)
Judgment Entered: February 5, 2009

Initial Postconviction Proceedings:
Circuit Court of Santa Rosa County, FL
State of Florida v. Jeremiah Martel Rodgers, Case No. 98-CF-274
Judgment Entered: April 18, 2011 (dismissing proceedings)

Florida Supreme Court (Case No. SC11-1401)
Rodgers v. State, 104 So.3d 1087 (Fla. 2012) (Table) (affirming)
Judgment Entered: October 17, 2012

Second Postconviction Proceedings (*Hurst*):
Circuit Court of Santa Rosa County, FL
State of Florida v. Jeremiah Martel Rodgers, Case No. 98-CF-274

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[2] Petitioner will subsequently file a petition for writ of certiorari arising from her non-capital case (No. 1D19-1965) (Fla. 1st DCA 2019), the conviction of which was used against her as an aggravator in this case. This is discussed *infra* at 13-14.

Judgment Entered: May 2, 2017 (denying motion)

Florida Supreme Court (Case No. SC17-1050)
Rodgers v. State, 242 So.3d 276 (Fla. 2018) (affirming)
Judgment Entered: February 8, 2018
Rehearing Denied: April 24, 2018 (2018 WL 1920599)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (Case No. 18-113)
Rodgers v. Florida, 139 S. Ct. 592 (2018) (Mem)
Judgment Entered: December 3, 2018

Third Postconviction Proceedings (*Newly Discovered Evidence*):
Circuit Court of Santa Rosa County, FL
State of Florida v. Jeremiah Martel Rodgers, Case No. 98-CF-274
Judgment Entered: January 18, 2019 (denying motion)

Florida Supreme Court (Case No. SC19-241)
Rodgers v. State, 288 So.3d 1038 (Fla. 2019) (affirming)
Judgment Entered: November 21, 2019
Rehearing Denied: February 11, 2020 (2020 WL 639404)

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DECISION BELOW

The Florida Supreme Court's decision is available at 288 So.3d 1038 (Fla. 2019), *reh'g denied* 2020 WL 639404 (Fla., Feb. 11, 2020), and is reprinted at Attachment A.[3]

JURISDICTION

The judgment of the Florida Supreme Court was entered on November 21, 2019. Rehearing was denied on February 11, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides, in relevant part:

> Excessive bail shall not be required...nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[3] Citations to non-appendix material from the record below are as follows: R. – record from original trial; T – transcript of original trial; PPR – record from second penalty phase; PPT – transcript from second penalty phase; PCR – record from waived postconviction proceeding; PSCR – supplemental record from waived postconviction proceeding; HPCR – record from postconviction proceeding initiated after *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); SPCR – record from successive postconviction motion giving rise to the instant petition.

STATEMENT OF THE CASE

I. Introduction

Jeremiah Rodgers did not want to live. Jenna Rodgers does. Ms. Rodgers' gender dysphoria is undisputed, and although her death sentence would have been vacated under *Hurst v. Florida*[4] and *Hurst v. State*[5] [6] were it not for waivers she made prior to *Hurst*, no court has adequately and substantively considered the effect of Ms. Rodgers' gender dysphoria on the competency and voluntariness of those waivers.

Throughout Ms. Rodgers' life, she has felt "compelled to wear a mask to hide the fact that everything below the surface is female." SPCR 113. Yet, until recently, she has not had a context for understanding the implications of those feelings, and believed death was the only avenue to relief from her distress. This is through no fault of Ms. Rodgers—rather, it is because gender dysphoria has not been a well-recognized condition in our society and the diagnosis was not even available to Ms. Rodgers prior to her waivers.

Gender dysphoria was not clinically recognized until 2013, when it first appeared

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[4] 136 S. Ct. 316 (2016).

[5] 202 So. 3d 40 (Fla. 2016).

[6] The Florida Supreme Court's receding opinion in *State v. Poole*, 45 Fla. L. Weekly S41, 2020 WL 370302 (Fla. Jan. 23, 2020), clarified, 45 Fla. L. Weekly S121 (Fla. Apr. 2, 2020), does not change this. The *Poole* decision has not been presented to this Court for certiorari review, and is not yet settled law. Additionally, even if *Poole* becomes settled law, it does not mean that Ms. Rodgers' death sentence would have been reinstated. Several prisoners whose death sentences were vacated by the *Hurst* decisions had already been resentenced prior to *Poole*, and the Florida Supreme Court has not yet decided whether *Poole* has any impact on prisoners with final judgment vacating their death sentences via *Hurst* who have yet to be resentenced. It is simply not possible to predict what posture Ms. Rodgers' case would be in had she received *Hurst* relief when she first sought it in 2017.

in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-V"). SPCR 133, 155. This new diagnosis as articulated in the DSM-V recognized that gender dysphoria is not interchangeable with being transgender. Before the new diagnostic criteria, the condition of being transgender itself was pathologized and seen as a mental disorder. SPCR 133. However, in recent years, variations from gender norms have become more widely socially recognized. SPCR 163-64. Being transgender is simply one of several variations from traditional binary gender norms. It is not a disorder. SPCR 133. Gender dysphoria, however, is a disorder that can arise as a result of being transgender. It occurs when a transgender individual experiences distress and dysfunction from being in the wrong physical body. SPCR 133. This shift in diagnostic criteria is of utmost importance, as it recognizes that the treatment for this distress and dysfunction is not simply to compel one with gender dysphoria to accept the gender identity that traditionally aligns with their biological body. Thus, prior to a 2016 evaluation of Ms. Rodgers—the first time she was evaluated after gender dysphoria became a recognized diagnosis, she had no framework through which to understand her condition, or the impact it had on other aspects of her life, including her capital litigation.

In addition to this clinical shift, several factors arising from Ms. Rodgers' individual background posed a barrier to proper evaluation and diagnosis. Before her incarceration in the instant case, Ms. Rodgers was subjected to lifelong physical, sexual, and mental abuse.[7] She was raised in an environment that adhered to strict gender

[7] *See, e.g.*, SPCR 92 (chronicling "harsh beatings" by Ms. Rodgers' "mentally disturbed and erratic mother" and "violent, abusive and racist father"); 92-93 (Ms. Rodgers was forced to have sex with her mother, repeatedly raped by her mother's "johns", and

norms and espoused prejudice against minorities—particularly as it pertained to sexual identity and orientation. SPCR 92. This environment, as a result of systematic abuse, terror, isolation, discrimination, and lack of education, taught Ms. Rodgers that if she was honest about what she was experiencing,

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

SPCR 94.[8] As such, "Ms. Rodgers has had to suppress her female identity throughout most of her life[,]" SPCR 173, and has not, until recently, had a safe and educated space to fully express and process her feelings and gain clarity regarding why she has felt such dissonance with her body, why she felt so unequipped to proceed throughout her life as a biological male, or the significant interplay of this condition—gender dysphoria—with other aspects of her life such as her preexisting psychiatric conditions, and the trauma stemming from her lifelong history of victimization and exposure to bigotry. SPCR 93, 134, 164.

This interplay of the extreme distress Ms. Rodgers experienced from being transgender, coupled with her pre-existing vulnerabilities, manifested in self-harm, depression, self-loathing, suicidality—and ultimately in waivers of constitutional rights.

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brutally raped as a 16 year-old in an adult prison); 92 (Ms. Rodgers was publicly punished via "emotional debasement, and by frank humiliation," such as being made to wear diapers and wet underwear on her head).

[8] *See also* SPCR 93 (discussing the "inherent dangers of expressing these thoughts openly in any environment, including correctional facilities"); SPCR 112.

SPCR 96, 155, 163, 173. At every prior stage of Ms. Rodgers' capital litigation, the courts, attorneys, and prior mental health evaluators were unaware that her self-sabotaging behavior—including the decisions to end her legal proceedings—stemmed from the complex effect of her undiscovered gender dysphoria. Her gender dysphoria, when viewed in conjunction with her history as a whole, calls into question the validity of each of her waivers in this case.

As Ms. Rodgers and her defense team have become aware of these factors and their potential impact on her legal proceedings, Ms. Rodgers has diligently attempted to raise them in court. However, she has been blocked at each turn. Now, as expressed in the opinion below, the Florida Supreme Court has not only improperly barred her claim from review, but seeks to bar her from any further filings in the state courts without express permission of the state circuit court. This collective disenfranchisement of Ms. Rodgers' attempts to vindicate her constitutional rights deprives her of due process, equal protection, fair access to the courts, and undermines the reliability of her death sentence.

II. Procedural History[9]

In 1998, Petitioner pleaded guilty to murder. *Rodgers v. State*, 934 So. 2d 1207, 1210 (Fla. 2006). An advisory jury recommended death by a vote of 9 to 3, after which the trial court made findings of fact and imposed a death sentence. *Id.* The Florida Supreme Court affirmed the conviction but remanded for a new penalty phase after

[9] To best reflect the fact that Ms. Rodgers' gender dysphoria was undiscovered throughout the entirety of her pre-*Hurst* litigation, the remainder of the Statement of the Case will refer to Ms. Rodgers as Petitioner.

concluding that the trial court had improperly excluded mitigating evidence. *Id.* at 1220. At resentencing, Petitioner waived the presentation of mitigation witnesses including mental health experts, stating "my intention is not to put up a defense at all...death is my only escape." PPT 10, 12. Upon learning after jury selection had begun that it was possible to waive a sentencing jury,[10] Petitioner waived a jury, explaining to the judge, "I can count on a death sentence with you I feel...If I could sign a paper right now, and get a death sentence, and go back to death row, I would do it." *Rodgers v. State*, 3 So. 3d 1127, 1130 (Fla. 2009); PPT 75, 81. The circuit court accepted the jury waiver without conducting any further evaluation of Petitioner's present competency as it pertained to the jury waiver.[11] *Rodgers v. State*, 3 So. 3d at 1131; PPT 81-82. The circuit court imposed a death sentence that was subsequently affirmed by the Florida Supreme Court. *Id.* at 1135.

In 2009, in the early stages of state postconviction review, Petitioner wrote to the circuit court asking to end further appeals and expedite the execution process. PSCR 8.

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[10] Prior to the commencement of Petitioner's resentencing proceedings on May 7, 2007—the date of the waiver—Petitioner "didn't know that I could waive this—the right to a jury[.]" PPT 77.

[11] Upon learning of Petitioner's request to waive a jury, resentencing counsel neither conducted any inquiry into Petitioner's competency nor requested such an inquiry from the court. PPT 75-82. The circuit court, relying solely on Petitioner's cursory assurances that counsel had not coerced Petitioner into this waiver and that Petitioner understood what a jury waiver entailed, found that Petitioner understood "the consequences and the seriousness of waiving his right to a jury recommendation on the penalty phase. I'm satisfied...that the decision was freely, voluntarily, and intelligently made after he's had the benefit and advice of counsel and considered the ramifications." PPT 82. Despite Petitioner's history of mental illness and suicidality, and despite Petitioner's admission to wishing for an expedited death, PPT 75, 81, the court never inquired as to Petitioner's competency or state of mind.

The court accepted the waiver after an April 6, 2011, hearing pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993), and discharged appointed counsel. PCR 1-3. In finding Petitioner competent, the circuit court relied on evaluations prepared in February 2010 by two mental health experts, Drs. Prichard and McLaren,[12] PCR 11-12; PCSR 1-7, 99-107, and the court's impression that Petitioner was "very articulate" and "intelligent." PCR 17. Discharged counsel unsuccessfully appealed. *Rodgers v. State*, 104 So. 3d 1087 (Fla. 2012).

In 2016, after having been appointed counsel for the purpose of vindicating newly recognized constitutional rights under this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), Petitioner was evaluated by a medical professional, Dr. Julie Kessel, who preliminarily hypothesized that Petitioner suffered from gender dysphoria. Although Petitioner had been evaluated by medical and mental health professionals throughout her life and at multiple stages of this capital litigation, no one had previously rendered a gender dysphoria diagnosis, nor suggested such a hypothesis to Petitioner.

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[12] Under Florida law, these competency evaluations, conducted over one year prior to the *Durocher* hearing, were stale and not sufficient to gauge Petitioner's present competency. *See, e.g., Brockman v. State*, 852 So. 2d 330, 333-34 (Fla. 2d DCA 2003) (holding that assessments from four and eleven months prior to trial "were simply too old to be relevant to a determination of [the defendant's] competency"); *In re. Commitment of Reilly*, 970 So. 2d 453, 454 (Fla. 2d DCA 2007) (explaining that a six-month-old report could not speak to the defendant's present competency and that the "stale report" did not provide substantial evidence to support the trial court's finding); *LeWinter v. Guardianship of LeWinter*, 606 So. 2d 387, 388 (Fla. 3d DCA 1992) (discussing how a report filed six weeks prior to competency proceeding did not accurately reflect the subject's *present* mental state and ability to care for himself). Nevertheless, at no point during the *Durocher* hearing did Petitioner's counsel request—or the court order—a renewed competency evaluation. Instead, the court simply acquiesced to Petitioner's desire not to be evaluated. PCR 16.

Although Dr. Kessel had rendered only a preliminary hypothesis regarding Petitioner's gender dysphoria, and although further evaluation of Petitioner by a more specialized medical professional was necessary in order to reach concrete conclusions, Petitioner—in order to comply with procedural time limits—filed a motion under Fla. R. Crim. P. 3.851 seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). HPCR 28. The motion addressed Petitioner's prior waivers, and challenged the competency and voluntariness of those waivers based on the preliminary evidence of gender dysphoria. The circuit court summarily denied relief, ruling that Petitioner's prior waivers barred *Hurst* relief. HPCR 109-10. The court refused to re-examine the validity of Petitioner's waivers on the cursory grounds that the claim was time-barred for having been filed more than one year after Petitioner's death sentence became final and that the claim did not "allege that [it was] predicated on facts that were unknown to Defendant or his counsel and could not have been ascertained by the exercise of due diligence." The Florida Supreme Court affirmed on timeliness grounds, finding that "the time for Rodgers to contest the prior competency determination has passed" and "Rodgers has not proffered any newly discovered evidence that would warrant revisiting the validity of this waiver." *Rodgers v. State*, 242 So. 3d 276, 277 (Fla. 2018), cert denied, *Rodgers v. Florida*, 139 S. Ct. 592 (2018). Concurring in the result, Justice Pariente voiced concerns about the effect of untreated gender dysphoria when viewed in tandem with Petitioner's history of mental health issues, but concurred in the denial of relief because "the recent specific diagnosis of gender dysphoria, not raised as a newly discovered evidence claim, does not invalidate

Rodgers' waivers." *Rodgers*, 242 So. 3d at 280.

Throughout the pendency of Petitioner's *Hurst* litigation, and as necessary to support a conclusive diagnosis, Petitioner was further evaluated by medical professionals with specialized expertise in gender dysphoria. Simultaneously, Petitioner grappled with her condition, coming to terms with the new light it shed on numerous aspects of her life history, as well as the consequences it had rendered on her prior litigation and the potential ramifications for her life within the prison system if Petitioner accepted this diagnosis. Consistent with scientific understanding regarding gender dysphoria, this process was gradual. *See generally*, Ashley Austin, "There I Am": A Grounded Theory Study of Young Adults Navigating a Transgender or Gender Nonconforming Identity Within a Contest of Oppression and Invisibility, 75 Sex Roles 215 (2016) (detailing "slow and gradual" process of understanding and accepting one's transgender identity); Georgina Mullen & Geraldine Moane, *A Qualitative Exploration of Transgender Identity Affirmation at the Personal, Interpersonal, and Sociocultural Levels*, 14:3 International Journal of Transgenderism 140 (2013) (same); *see also*, J.E. SUMERAU & LAIN A.B. MATHERS, AMERICA THROUGH TRANSGENDER EYES 37 (2019).

Eventually, in 2018, Petitioner was able to accept her transgender identity and cooperate with her defense team by opening up and discussing her condition's impact on her life, including critical decisions she has made in her legal proceedings. As a result of the cumulative corroborating information discovered between Dr. Kessel's initial hypothesis and the final conclusions memorialized at the end of 2018, Petitioner's evaluating medical professionals were able to render a definitive diagnosis of gender

dysphoria.

One day after this Court declined to conduct certiorari review of Petitioner's *Hurst* challenge, Petitioner filed a successive Rule 3.851 motion, raising as newly discovered evidence Petitioner's gender dysphoria and its impact on her waivers and competency. The circuit court again summarily denied without a hearing and stated that the postconviction waiver stands. SPCR 412-13. Petitioner appealed to the Florida Supreme Court, which affirmed the circuit court's denial.[13] *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019). Further, the Florida Supreme Court instructed that Petitioner be barred from raising further claims without first seeking leave from the state circuit court. *Id.* at 1040.

III. Additional Relevant Facts

From its infancy, Ms. Rodgers' capital litigation has been marred with concerns regarding her mental health and self-harming behavior. Yet, through no fault of Ms. Rodgers or her defense team, no prior stages of litigation have been conducted with the benefit of a full picture of her condition. As a result, all prior concerns regarding Ms. Rodgers' competency and self-destructiveness fell short of establishing the invalidity of Ms. Rodgers' waivers.

A. Trial

[13] The State moved to dismiss Petitioner's appeal, claiming that this claim was the same as the *Hurst* challenge filed in 2017, and that Petitioner should be disallowed from filing any postconviction claims until an execution was signed. Mot. To Dismiss, *Rodgers v. State*, No. SC19-241 (Fla. Feb. 27, 2019). The Florida Supreme Court denied the motion to dismiss. Order, *Rodgers v. State*, No. SC19-241 (Fla. Mar. 21, 2019).

Prior to Petitioner's capital trial, her[14] attorneys worried she was not competent to proceed. R 240-50, 625. Upon motion by the defense, the circuit court ordered that Petitioner's competency be evaluated as it pertained to the capital offense and a non-capital trial proceeding in the same timeframe. R 240, 254, 633. Petitioner was evaluated by Dr. Lawrence Gilgun in 1999, who considered Petitioner's psychiatric hospitalizations prior to 1998 and "a long documented history" of self-harm and suicide attempts, including an attempt to shoot herself, an incident in which Petitioner slit her throat, an incident in which Petitioner's wounds required over 100 stitches, and a near-death attempt while incarcerated where Petitioner was found in a pool of her own blood and "Life-Flighted" for inpatient hospital treatment due to severe blood loss. R 2060-61, 2071-72, SPCR 130, 194, 204. Dr. Gilgun opined that Petitioner "continues to make serious suicidal gestures and...is genuinely suicidal" and not competent to stand trial. In 2000, Dr. Gilgun conducted another evaluation and noted that while Petitioner's behavior was still unpredictable and self-defeating and she continued to self-mutilate and show poor judgment, she was no longer actively suicidal. R 2058-61. Because Petitioner was not currently suicidal, Dr. Gilgun deemed her competent to proceed, with the caveat that Petitioner continued to exhibit instability, her competency was conditioned upon proper and consistent medication, and "it would not at all surprise me

[14] It bears repeating that although this petition utilizes feminine pronouns in accordance with prevailing medical standards, at each stage of Petitioner's litigation prior to the *Hurst* decision, Petitioner's counsel was unaware of Petitioner's gender dysphoria, utilized male pronouns, and believed Petitioner's preferred gender to be male. Even after the preliminary hypothesis of gender dysphoria, Petitioner needed time to grapple with the ramifications of her condition, and was not comfortable using feminine pronouns in publicly available pleadings until 2018.

if this situation changes." R 2075-85. Throughout both evaluations, Dr. Gilgun remained unaware of Petitioner's gender dysphoria and did not take it into account while rendering his conclusions regarding Petitioner's competency.

As Petitioner's trial drew closer, the State offered a plea bargain: in exchange for Petitioner pleading guilty to first-degree murder and other offenses, the State would not argue during the penalty phase that Petitioner was the actual shooter. *Rodgers v. State*, 934 So. 2d 1207 (Fla. 2006). Petitioner was represented by two attorneys at the time, one male and one female. Her attorneys presented conflicting advice regarding whether Petitioner should accept the offer and plead guilty, or refuse the offer and proceed to jury trial. R 855; SPCR 175, 188. Petitioner's female lawyer advised her to plead, whereas Petitioner's male lawyer advised her to reject the plea offer. Petitioner accepted her female attorney's advice and entered the plea. R 914. Neither of Petitioner's lawyers knew of Petitioner's gender dysphoria, the way it exacerbated Petitioner's vulnerable mental state, or the impact it had on which attorney's advice Petitioner was likely to follow upon receiving conflicting advice regarding the plea offer.

B. Retrial in Non-Capital Case

In 1998, Petitioner was convicted of attempted murder. SPCR 227. Petitioner appealed, and in 2004, the Florida state court set aside Petitioner's conviction. *Rodgers v. State*, 869 So. 2d 604 (Fla. 1st DCA 2004). Prior to meeting her attorney for the non-capital retrial, Petitioner wrote a letter to the court stating she wished to plead guilty. SPCR 255. Three days later, Petitioner attempted suicide by cutting a "large gap[]ing wound" into her arm near an artery, resulting in significant blood loss and requiring

emergency transport from jail to hospital via ambulance. SPCR 280, 311. The incident was considered by experts to be "a genuine attempt [by Petitioner] to kill herself"). SPCR 171. Petitioner was later found with "several pieces of a razor blade[,]" further emphasizing the extent of Petitioner's suicidality. SPCR 365. Less than twenty-four hours later, Petitioner pleaded guilty to attempted murder and other charges, knowing the conviction would constitute an aggravating factor used to obtain a death sentence in her capital case. SPCR 229, 237; *Rodgers v. State*, 3 So. 3d 1127, 1131 (Fla. 2009). Petitioner's counsel did not inform the circuit court of Petitioner's attempt to kill herself the night before, or of her history of psychiatric illness and trauma, and no inquiry was conducted regarding Petitioner's competency. SPCR 227-44.

After Petitioner's plea, she displayed further erratic behavior suggestive of suicidality. SPCR 280, 292, 306. A consulting psychologist expressed "serious doubts" as to Petitioner's competency at the time of her plea, as a result of severe mental illness and "a suicidal wish to die." SPCR 280. Concerned, Petitioner's former counsel, Mark Olive, filed a motion to withdraw the plea. SPCR 262-75. The circuit court struck the motion but noted that, had it been filed pro se or by then-appointed counsel, Petitioner would have been entitled to a hearing. SPCR 300-01. Mr. Olive appealed the decision pro bono, but the Florida state court affirmed. SPCR 303; *Rodgers v. State*, 903 So. 2d 941 (Fla. 1st DCA 2005).

All of these actions occurred without knowledge of Petitioner's gender dysphoria, which meant that the deciding courts were unaware that there was an undiscovered factor "greatly affect[ing Petitioner]'s mental state, her emotional development, and

decision-making" at the time of her plea to offenses that were used as aggravators at her capital resentencing. SPCR 145-46; 117-18.

C. Second Penalty Phase

The Florida Supreme Court vacated Petitioner's death sentence due to the trial court's improper exclusion of mitigation evidence. *Rodgers v. State*, 934 So. 2d 1207, 1220 (Fla. 2006). Immediately before jury selection was to begin for the 2007 penalty phase, Petitioner informed the circuit court that—against counsel's advice—she did not want to present any mitigation evidence apart from her own testimony. PPR 47-49; *see also* 256-59 ("my intention is not to put up a defense at all"), PPT 10 (same). Immediately after jury selection, on the same day Petitioner learned she could waive a jury, she informed the court that she wished to do so. PPR 323-24, PPT 74-75; *Rodgers v. State*, 3 So. 3d 1127, 1130 (Fla. 2009). Petitioner's reasoning for these choices was "death is my only escape[,]" PPT 12, and "I can count on a death sentence with you I feel...If I could sign a paper right now, and get a death sentence, and go back to death row, I would do it." PPT 75, 81.

No competency assessment was performed, nor had one been performed in the past seven years. PPR 267, PPT 8-9, 11, 19. Yet, the trial court accepted Petitioner's mitigation and jury waivers. PPR 331, PPT 81-82. Dr. Gilgun, who had evaluated Petitioner prior to her capital plea, explained that accepting Petitioner's waivers without conducting further competency evaluations was a grave mistake:

> Competency cannot be looked at as a constant or fixed state. A person can be competent at one stage in their life and not at another. . . . [G]iven her history and the [prior] doubts regarding her competency, further evaluations should have been conducted, particularly. . . .when Ms.

> Rodgers was under the significant stress of legal proceedings and was making decisions that greatly affected her future.

SPCR 165, 173 ("Competency is fluid, and decision-making competency must be assessed at the moment. The competency determinations made around the time of Ms. Rodgers's original capital trial were not substitutes for evaluations that should have been conducted at the time of each of her subsequent waivers.").

After a truncated penalty phase with no mitigation witnesses or evidence other than Petitioner's testimony, the court imposed a death sentence. PPR 78, 339. Again, neither the circuit court that accepted Petitioner's waiver, nor the Florida Supreme Court that affirmed its validity, *Rodgers*, 3 So. 3d at 1135, knew of Petitioner's gender dysphoria or its interplay with her pre-existing mental illnesses and other individual vulnerabilities. Had these courts had the full picture, it would have raised dispositive red flags regarding Petitioner's willingness to waive her rights:

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

SPCR 96-97; *see also* SPCR 117-18 (characterizing Petitioner's pleas and waivers as "state assisted suicide").

D. Initial Postconviction Waiver

In 2010, after appointing state postconviction counsel, the circuit court appointed two experts to evaluate Petitioner's competency. PCR 1; PCSR 33, 99.. Again, the

evaluating experts were unaware of Petitioner's gender dysphoria, and thus unable to formulate a fully educated opinion of Petitioner's state of mind. "Their lack of awareness . . . left the evaluators with limited information from which to render a full and meaningful assessment of the true reasons for [Petitioner]'s decision to waive [her] appeal rights then and into the future." SPCR 96.

Petitioner's erratic behavior continued. She wrote to the court, complaining about her counsel and asking to end further appeals and "have the Governor sign my death warrant[.]" PCSR 8. When the court appointed a different attorney on her behalf, she expressed a desire to pursue her appeals, only to soon change her mind again and ask to waive her appeals and proceed toward execution. PCR 32.[15] Petitioner confided in her counsel that her motivation to drop her appeals was to seek death, which she believed would allow her to escape from the feeling that she was imprisoned in the wrong body. SPCR 102. Counsel did not bring this to the attention of Petitioner's mental health evaluators, or to the court, and Petitioner was herself unable to understand or contextualize her feelings and motivations. Indeed, this sense of distress and impairment resulting from a feeling of imprisonment in the wrong body would not be recognized by the medical and mental health community—as gender dysphoria—for several more years until the 2013 publication of the DSM-V. SPCR 133.

Thus, at the time the circuit court accepted Petitioner's postconviction waiver and discharged appointed counsel, PCR 2, and at the time the Florida Supreme Court

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[15] Although over a year passed between Petitioner's 2010 evaluations and the *Durocher* hearing at which Petitioner waived her postconviction rights, and despite Petitioner's erratic behavior, no closer-in-time competency evaluation took place.

affirmed, those courts remained unaware that Petitioner had a medical condition that was "present and active at the time when [she] chose to waive [her] right to seek initial postconviction review of [her] death sentence." SPCR 92.

E. *Hurst* Postconviction Proceedings

In 2016, Dr. Julie Kessel, M.D.,[16] conducted a clinical interview of Petitioner in conjunction with new litigation to vindicate Petitioner's rights after *Hurst*. HPCR 56. After her initial meeting with Petitioner, Dr. Kessel reviewed extensive records regarding Petitioner's childhood, developmental years, and incarceration as a juvenile and adult. In 2017, Dr. Kessel expressed a preliminary opinion that Petitioner may have gender dysphoria in addition to posttraumatic stress disorder, major depressive disorder, and a personality disorder not otherwise specified. HPCR 62. Because gender dysphoria is an uncommon and easily misdiagnosed condition, and because Dr. Kessel did not specialize in gender dysphoria, Petitioner's counsel retained Dr. George Brown, M.D., who had over thirty years of clinical practice and study regarding transgender health issues (including in forensic and prison settings), and whose contemporary work has particularly focused on gender dysphoria. SPCR 107-08. Dr. Brown wrote a report in which he provisionally concurred with Dr. Kessel. HPCR 65-70. However, Dr. Brown could not make a definitive diagnosis to a reasonable degree of professional certainty without further investigation of Petitioner's condition. HPCR 69.

Diagnosing gender dysphoria is more complicated than diagnosing other medical

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[16] Although Dr. Kessel is "Board Certified by the American Board of Psychiatry and Neurology" and is "familiar with forensic mental health issues in Florida and the Florida capital sentencing statute[,]" she does not specialize in gender dysphoria.

and mental health conditions. Dr. Brown explained, "[G]ender dysphoric people are over four times more likely to [also] have depressive disorders and nearly three times more likely to have PTSD . . . . The constellation of these three diagnoses co-occurring is not uncommon." SPCR 117 (citation omitted). Such comorbidity meant that despite red flags such as Petitioner's attempts at autopenectomy,[17]

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

SPCR 197. Dr. Kessel spoke to Petitioner's "excruciating pain" and the shame she experienced from being transgender as another complication in diagnosing Petitioner. HPCR 62.[18] Another complicating factor is that gender dysphoria is "an uncommon diagnosis with which few otherwise experienced clinicians have any expertise." SPCR 119. These factors meant that, in 2017, neither Dr. Brown nor Dr. Kessel were able to offer final, complete, or definitive findings as to Petitioner's medical situation and its impact on her earlier waivers. To offer anything other than preliminary opinions would have been professionally unreasonable.

F. Newly Discovered Evidence

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[17] *See* SPCR 102-03, 114, 130, 203 (detailing Petitioner's attempts to cut off her penis).
[18] *See also* SPCR 96 ("[T]he complexity of [her] inner emotional life and the interconnectedness of [her] mental disorders, and [her] choice to withhold that deeply personal, painful, and shameful reality, left the evaluators with limited information from which to render a full and meaningful assessment"); SPCR 113 ("The depression is never disconnected from the gender problem").

After providing the preliminary opinions utilized to challenge Petitioner's sentence under *Hurst*, Drs. Kessel and Brown continued to evaluate Petitioner. They reviewed additional records and expert reports, and communicated with Petitioner as she grappled with this new and confusing potential diagnosis. SPCR 107-20, 146.

Having masked and compartmentalized her feelings for so long,[19] Petitioner needed time to process the expert hypothesis that she is transgender, to be educated regarding the gender dysphoria diagnosis, and to consider the implications for her safety that would come from accepting and publicly admitting to such a diagnosis.[20] In furtherance of this, Dr. Brown conducted a clinical interview with Petitioner in November 2017 and inquired as to Petitioner's pronoun preference. SPCR 111. Petitioner requested the use of male pronouns, and "JR" as a proper name rather than "Jeremiah"; although Petitioner inwardly desired identification as "Jenna" and with female pronouns, Petitioner was not comfortable with this while confined in a male prison. SPCR 111.

Having had months to process Dr. Kessel's preliminary hypothesis, Petitioner—who had previously refused to see Dr. Brown—felt safe enough to speak at length to Dr.

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[19] SPCR 112 (describing Petitioner's "awareness of her transgender feelings as "the number one overwhelming thing in [her] life, nothing else compares.") (quotations omitted).

[20] SPCR 112-13 ("In a way it's almost worse than a death sentence to me when it comes public here [that I am transgender]...I just wanted to die rather than continue to live in this body in this place...I was looking forward to [execution]...I just wanted them to [kill me]"); *see also* Annette Bromdal et al., *Whole-Incarceration-Setting Approaches to Supporting and Upholding the Rights and Health of Incarcerated Transgender People*, INT'L. J. TRANSGENDERISM, (available at https://www.tandfonline.com/doi/pdf/10.1080/15532739.2019.1651684).

Brown about the shame, distress, and suicidality she felt from being transgender. SPCR 111-16. Petitioner admitted that she had not previously been able to understand her condition,[21] but now having a new lens through which to view her past feelings and experiences, she was able to contextualize and develop insight into her past decisions throughout the litigation process. Specifically, Petitioner understood and expressed for the first time that when she waived her appeals in 2010, it was a suicidal act. SPCR 113; 116 ("[I] buried myself because I thought the only option [to being transgender] was death"). Still, Petitioner struggled to fully open up about the extent of her distress and, Dr. Brown was not yet able to definitively diagnose Petitioner with gender dysphoria.

As Petitioner continued to struggle with expressing aspects of her suspected gender dysphoria, her legal team sought to encourage open disclosure by retaining a female psychologist, Dr. Sara Boyd, PhD.,[22] to conduct a clinical interview of Petitioner. SPCR 122. By the time of Dr. Boyd's 2018 interview, Petitioner had grown more accepting of her condition and reported a desire to be identified with female pronouns, "consistent with her self-identified gender identity." SPCR 122. Dr. Boyd was able to assist Petitioner in understanding how the symptoms of her gender dysphoria had infused several aspects of her life leading up to—and throughout—her capital litigation. SPCR 133-45, 142-43. Dr. Boyd warned, however, that Petitioner "remain[ed] in need of trauma-informed treatment and gender-related services and [was] continuing to

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[21] *See, e.g.*, SPCR 112 ("I was ignorant"); SPCR 116 (Petitioner "never knew there was a solution[.]") (quotations omitted).

[22] Dr. Boyd's specialization as a trauma-informed forensic psychologist differs from that of Dr. Kessel, who is a medical doctor.

experience related psychological distress." SPCR 143.

As Petitioner continued to develop insight, she became more able to work with her legal team, including the evaluating experts. By October 2018, Dr. Brown had enough information to conclude his evaluation of Petitioner. SPCR 107. From his preliminary to final reports, Dr. Brown's professional opinions shifted. He was able to definitively diagnose Petitioner, to a reasonable degree of medical certainty, with gender dysphoria and posttraumatic stress disorder. He also retracted his prior opinion that Petitioner suffers from major depressive disorder, instead opining that "the depression [Petitioner] experiences is part of [gender dysphoria] and . . . would likely respond to treatments for [gender dysphoria] and not to treatments for depression." SPCR 118. Dr. Brown added the diagnosis of "[h]istory of psychosis, possibly bipolar disorder" and changed from suspecting personality disorder not otherwise specified to diagnosing Petitioner with antisocial personality disorder. SPCR 117.

Lastly, in November 2018, Dr. Kessel concluded her evaluation of Petitioner. SPCR 145. In her final report, she confirmed her prior hypothesis of a gender dysphoria diagnosis and, in accordance with Petitioner's preference, utilized female pronouns and the name "Jenna," as compared to using male pronouns and the name "Jeremiah," as she had in her preliminary report. *Compare* SPCR 145 with SPCR 90.

In December 2018, based on the full assessments and conclusions rendered by Drs. Brown and Kessel, as well as other expert opinions and lay witness accounts, Petitioner filed a postconviction motion centered on newly discovered evidence of gender dysphoria and how the its impact, combined with Petitioner's other mental health

vulnerabilities and traumatic life history, rendered Petitioner's legal waivers invalid and death sentence unconstitutional. SPCR 35. In that motion and its exhibits, Petitioner presented substantial lay and expert evidence that she was not competent at each point in her legal proceedings when she waived her rights:

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

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

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

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

- "I have substantial doubts as to Ms. Rodgers's competency both at the 2004 guilty plea, the 2007 jury/mitigation waiver, and the subsequent waiver of her postconviction rights in 2010-2011. As a psychiatrist, I question whether Ms. Rodgers was competent to waive her rights . . . ." SPCR 198.

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

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

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

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

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

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

The evidence proffered in Petitioner's postconviction motion demonstrates that Petitioner's newly discovered medical condition impacted this case at each stage of litigation, and serves to invalidate her waivers. Petitioner's guilty plea, sentencing jury

waiver, and postconviction waiver were involuntarily, unintelligently, and incompetently rendered as a result of the impact of Petitioner's gender dysphoria in conjunction with her other mental health conditions. SPCR 39, 47, 52, 60, 67, 69, 75, 81.[23]

The circuit court summarily denied relief, stating that the waiver was "valid" and still "stand[s]" and the challenges to the waiver were "not timely filed." SPCR 413. The Florida Supreme Court affirmed on these grounds. Those courts failed to address Petitioner's arguments that the challenges to Petitioner's waivers could not have been previously raised, as the newly discovered condition underlying the challenges was not a recognized diagnosis until 2013, Petitioner was not represented by counsel and had no access to experts from 2013 until 2016, and gender dysphoria is a uniquely complicated diagnosis that—despite diligence on the part of Petitioner and her legal team—could not be definitively attributed to Petitioner until late 2018. Those courts failed to address Petitioner's evidence that the presence and impact of gender dysphoria in addition to Petitioner's pre-existing mental health diagnoses was not simply a redundancy, but an exacerbating condition that worked in conjunction with the previously known conditions to render Petitioner incompetent to waive her rights. And, the Florida Supreme Court seeks to further deprive Petitioner of her ability to vindicate constitutional rights by barring Petitioner from being heard in the state courts.

REASONS FOR GRANTING THE WRIT

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[23] Petitioner also challenged the state courts' prior denial of *Hurst* relief on the basis that, when the state courts denied *Hurst* relief based on Petitioner's prior waiver, the courts were not fully aware of Petitioner's gender dysphoria which, when combined with her other mental health vulnerabilities, invalidated the prior waiver.

This Court has jurisdiction to hear Ms. Rodgers' case, because it presents an important question of federal law and the state court's grounds for denying Ms. Rodgers' claim were not "adequate" to support the judgment and "independent" of federal law. *See Michigan v. Long*, 463 U.S. 1032 (1983). This case also involves a misinterpretation of *Garza v. Idaho*, 139 S. Ct. 738 (2019) and requires this Court's clarification of its recent precedent.

I. This Case Presents an Important Issue of Federal Law, and the State Court's Grounds for Denying Ms. Rodgers Access to the Courts Were Not Adequate to Support the Judgment or Independent of Federal Law.

A. The State Time Bar Was Incorrect.

Ms. Rodgers' case involves important federal constitutional challenges to the validity of her guilty plea, jury waiver, and postconviction waiver. Ms. Rodgers filed in state court within one year of the date upon which the basis for challenging her plea and waivers—namely, her previously undiagnosed and untreated gender dysphoria—could reasonably have been discovered. The state court summarily dismissed Ms. Rodgers' claim as time-barred, asserting that Ms. Rodgers should have filed earlier because "the record shows Rodgers knew of the gender dysphoria diagnosis at some point between a February 26, 2016, evaluation by a psychiatrist and the filing of the January 11, 2017, successive postconviction motion[,]" *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019) (rehearing denied Feb. 11, 2020). This reasoning is incorrect.

1. Gender dysphoria was not a recognized diagnosis at the time of Ms. Rodgers' guilty plea, sentencing, and postconviction

waivers.

Prior to 2013, individuals who identified with a gender different than the one assigned to them at birth were diagnosed with gender identity disorder. This changed with the publication of the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V), which eliminated the diagnosis of gender identity disorder, and added gender dysphoria. The change was not a simple renaming of interchangeable diagnostic criteria. Rather, it was a recognition that gender dysphoria is a wholly different condition than gender identity disorder.

The removal of gender identity disorder from the DSM-V and identification of gender dysphoria was a "reconceptualization" that made "important clarifications in the criteria" for a diagnosis, in order to "better characterize the experiences" of affected individuals. Most importantly, gender dysphoria did not pathologize gender nonconformity as had gender identity disorder. In other words, the DSM-V recognized that being transgender itself is not a psychiatric condition. Instead, the psychiatric condition is defined by clinically significant distress and functional impairment that some transgender individuals experience as the result of their assigned gender not aligning with their identity.

Gender dysphoria is a condition that disproportionately impacts transgender individuals,[24] but not all transgender people have gender dysphoria. By removing gender identity disorder from the DSM-V, medical professionals hoped to destigmatize the state

[24] Gender dysphoria primarily affects transgender individuals, but can also occur in individuals who are non-binary or intersex. *See* https://www.nhs.uk/conditions/gender-dysphoria/ (last accessed June 15, 2020).

of being transgender. At the same time, by classifying gender dysphoria as a psychiatric condition, medical professionals recognized the suffering experienced by some transgender individuals, including anxiety, depression, refusal to participate in socially-expected situations (such as school or work), self-harm, and suicidal behavior.[25] Importantly, the diagnosis of gender dysphoria recognizes that the suffering is treatable without stripping someone of their transgender identity.

The emergence of gender dysphoria as a diagnosis signaled a functional shift in the way medical professionals—and our society in general—view transgender issues. Under this new framework, transgender individuals are no longer seen as inherently disordered, and treatment for gender dysphoria focuses on eliminating the distress of a mismatch between one's biological sex and gender identity (often by helping the transgender person to live as their preferred gender) rather than attempting to repress the individual's identity and force them to live incongruently with how they feel.

Ms. Rodgers was without counsel or access to expert evaluations from the time of her 2010 postconviction waiver, *Rodgers v. State*, 104 So.3d 1087 (Table) (Fla. 2012) (affirming discharge of postconviction counsel), until the appointment of federal counsel on November 11, 2015. Further, Ms. Rodgers was without counsel authorized to litigate in state court until August 24, 2016. This means that for years after the emergence of gender dysphoria as a diagnosis, Ms. Rodgers was not in a position to discover and raise her diagnosis.

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[25] *See* http://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255?p=1 (last accessed June 15, 2020).

2. The experts assisting Ms. Rodgers could not have rendered their conclusions any earlier than they did.

The state court decisions overlooked Ms. Rodgers' arguments that, for purposes of beginning the one-year clock for a claim based on newly discovered evidence uncovered by a mental health expert, the triggering date must be the date of the expert's conclusion (often designated in a finalized report), not the date of the expert's initial evaluation. A clinical interview alone was insufficient for a thorough and comprehensive assessment of Ms. Rodgers' condition; instead, the relevant medical guidelines dictate that a reliable mental health assessment incorporates collateral information from multiple sources.[26]

Gender dysphoria is a unique condition that requires particular diagnostic nuance and thoroughness. The DSM-V's reconceptualized diagnostic criteria "caution[ed] against a hasty diagnosis with the potential unintended consequence of inappropriate treatment for clients[.]" It would have been professionally unreasonable for Ms. Rodgers' experts to render conclusions prior to when they did so, and it would have been contrary to good faith and judicial economy for Ms. Rodgers to have filed a newly discovered evidence claim prior to such conclusions. Ms. Rodgers filed her newly discovered evidence claim well within one year of the date upon which her experts were able to render a diagnosis to a reasonable degree of medical certainty. Thus, the state time bar was inappropriate.

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[26] *See* American Academy of Psychiatry and the Law, "Practice Guidelines for the Forensic Assessment," at S3, S8-9 (available at http://www.aapl.org/docs/pdf/Forensic_Assessment.pdf) (last accessed June 15, 2020).

Although Ms. Rodgers' evaluating expert, Dr. Kessel, M.D., provided a January 2017 "initial report"[27] suggesting that Ms. Rodgers may be suffering from gender dysphoria, that report alone did not constitute a reasonably certain diagnosis sufficient to raise a good-faith claim based on newly discovered evidence. For one thing, gender dysphoria "is an uncommon diagnosis with which few otherwise experienced clinicians have any expertise." SPCR 104-05. In this unique situation, once the initial observation of gender dysphoria was raised, further evaluation was necessary by a clinician specializing in gender dysphoria.[28]

Dr. George Brown, M.D., has specialized in clinical practice and study of transgender health issues for over 30 years, with a particular focus on gender dysphoria. Dr. Brown is a longtime member of the Board of Directors of the World Professional Association for Transgender Health (WPATH) and authored several standards of care used by medical practitioners worldwide to evaluate and treat gender dysphoria. Additionally, Dr. Brown has extensive experience working with incarcerated individuals with gender dysphoria and other transgender health concerns. SPCR 107-08. When he

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[27] SPCR 145.

[28] While Dr. Kessel's observations would have necessitated an additional evaluation by a clinician specializing in gender dysphoria in any similarly situated case, that need was especially pronounced here. Ms. Rodgers has previously self-reported malingering in order to manipulate her proceedings. *See, e.g.*, SPCR 117, 129. Due to this prior claim of malingering by Ms. Rodgers, it was imperative that any diagnosis—particularly one as uncommon and significant to Ms. Rodgers' legal proceedings as gender dysphoria—be examined carefully and confirmed by someone with extensive expertise in the field. Had Ms. Rodgers' attorneys not sought additional evaluations to confirm Dr. Kessel's initial assessment, her attorneys would have left Ms. Rodgers vulnerable to an argument by opposing counsel that Ms. Rodgers was malingering, or that her claim of gender dysphoria and its impact on the voluntariness of her plea and waivers was refuted by the state court record.

reviewed Dr. Kessel's initial report in early 2017, he concurred that it was likely correct, but could not confirm the gender dysphoria diagnosis. SPCR 103-05. At that point in time, Dr. Brown had only reviewed Ms. Rodgers' records, and had not conducted an in-person evaluation. After conducting that evaluation and reviewing further records under the appropriate medical standards articulated by WPATH, Dr. Brown was finally able to render a conclusive diagnosis of gender dysphoria on October 16, 2018. SPCR 117, 119.

Additionally, rendering a reasonably certain medical diagnosis of gender dysphoria is a much broader task than determining whether someone's biological sex aligns with their preferred gender. As discussed earlier, being transgender is not the same as suffering from gender dysphoria. Not everyone who is transgender will experience the level of distress or impaired psychological and external functioning that is crucial to a gender dysphoria diagnosis. Thus, a diagnosis of gender dysphoria turns not simply on whether someone is transgender, but on whether someone is suffering from a particular form of distress or impaired functioning as a result, and rendering a diagnosis of gender dysphoria requires excluding other psychiatric conditions as the source of distress or impaired functioning. SPCR 133.

Ms. Rodgers has a history rife with trauma and multiple psychological diagnoses,[29] and before rendering a reasonably certain diagnosis of gender dysphoria,

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[29] From 1999 to 2017, Ms. Rodgers has received multiple diagnoses, including Adjustment Disorder, Bipolar Disorder, Impulse Control Disorder, Post-Traumatic Stress Disorder, Personality Disorder NOS, Borderline Personality Disorder, Antisocial Personality Disorder, Major Depressive Disorder, Substance Abuse,

her evaluating experts needed time to ensure that the symptoms of her gender dysphoria were not attributable to those other conditions and experiences. This required close attention to Ms. Rodgers' state of mind over an extended period of time, as well as careful research into her life history. Such assessment is further complicated by the fact that comorbid mental health disorders, especially mood and anxiety disorders, are significantly more prevalent in individuals with gender dysphoria than in the general population. SPCR 117, 141, 155, 164, 172, 197.

Additionally complicating matters was the barrier to open and effective expert communication posed by Ms. Rodgers' incarceration throughout the process of her evaluation. Unlike many individuals seeking diagnosis and treatment for gender dysphoria, Ms. Rodgers was confined by the logistics of being incarcerated. She could not simply schedule an appointment with an expert practitioner at her leisure; nor could she communicate by phone or email the way non-incarcerated individuals seeking diagnosis and treatment could do. And, Ms. Rodgers was further hindered by the fear of maltreatment inherent to her incarceration in a male prison. These factors extended the length of time necessary for Drs. Brown and Kessel to reach a definitive diagnosis.

Ms. Rodgers' treating experts had the arduous and time-intensive task of attempting to qualify whether Ms. Rodgers' suicidality and self-harming behavior resulted from her gender dysphoria (which would constitute a good-faith basis for pleading a constitutional challenge to the validity of her plea and waivers based on newly

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Anxiety, Schizophrenia, Dysthymia, Psychosis, and Paranoid Delusional Disorder. *See, e.g.*, SPCR 96-97, 117, 130, 133-34, 141, 145, 164, 170, 172, 194, 196-97, 203.

discovered evidence of her gender dysphoria), or whether her self-destructive decisions were satisfactorily attributable to Ms. Rodgers' other mental health conditions previously known to the court (which would defeat a newly discovered evidence claim.) Consistent with their professional guidelines, which required thorough and deliberate research, data gathering, and corroboration, the conclusions of Drs. Brown and Kessel were finalized and memorialized in October and November 2018, respectively. Ms. Rodgers filed her newly discovered evidence claim in state court in December 2018—well within one year of the finalized reports.

B. The State Courts' Knowledge of Ms. Rodgers' Co-Morbid Mental Health Conditions at the Time of Her Guilty Plea, Jury Waiver, and Postconviction Waiver Does Not Invalidate Her Constitutional Challenges Based on Newly Discovered Evidence of Her Gender Dysphoria.

As explained above, Ms. Rodgers has consistently attempted to vindicate her constitutional rights since the appointment of federal counsel in 2015, and has been summarily barred at every turn. In restricting Ms. Rodgers' access to judicial review, the state courts have relied on Ms. Rodgers' prior waivers—despite myriad proffered lay and expert evidence that they were the involuntary byproduct of untreated gender dysphoria—to prevent Ms. Rodgers from fully presenting evidence of her waivers' involuntariness. To justify this denial of access to the courts, the state courts suggest that Ms. Rodgers' untreated gender dysphoria is irrelevant to understanding her as an individual, and understanding why she relinquished her constitutional rights and sought death.

The Florida Supreme Court opined that Ms. Rodgers' gender dysphoria cannot

constitute newly discovered evidence because the "symptoms that are now attributed to gender dysphoria (e.g., severe depression, self-mutilation, reported suicidality) were known to the courts that accepted and affirmed the validity of Rodgers' plea and waivers[,]" *Rodgers v. State*, 288 So.3d 1038, 1040 (Fla. 2019) (quoting *Rodgers IV*, 242 So. 3d at 277 (Pariente, J., concurring in result)), and "[t]he medical community's subsequent assignment of a name to the cause of known symptoms is not newly discovered evidence[.]" *Id.* This finding flies in the face of what the medical and scientific community knows about gender dysphoria.

Gender dysphoria is not simply a superfluous name for symptoms. It is a distinct diagnosis, promulgated because it is qualitatively different than other conditions involving depressive and self-destructive symptoms. Ms. Rodgers' symptoms cannot properly be evaluated without understanding the context of her underlying gender dysphoria. Indeed, if other conditions such as her previously diagnosed mood and personality disorders could properly explain her symptoms, there would have been no need to promulgate a separate diagnosis in the DSM-V to "better characterize [Ms. Rodgers'] experiences".

What the state court ignored is that diagnostic classifications matter, because the underlying cause of symptoms matters. Understanding the condition responsible for behaviors is critical, because behaviors do not occur in a vacuum, and without understanding the impetus, an individual's state of mind can easily be misjudged. For instance, the external symptoms of Child Traumatic Stress are frequently the same as the symptoms of Attention Deficit Hyperactivity Disorder. However, the treatments are

entirely different. If an assessment of that child's condition proceeded without understanding the underlying cause of the symptoms, the child could easily be misdiagnosed and treatment would be ineffective. In Ms. Rodgers' case, had the courts known of her untreated gender dysphoria, they would have had an entirely different lens through which to view her self-destructive symptoms. That lens would have included information such as that individuals comprising a "sexual minority" are more disposed to suicide than their non-sexual minority peers.[30] The courts would have had the benefit of knowing that even within the sexual minority subset, a disproportionate number of transgender individuals will attempt suicide.[31] The courts would have known that the number jumps to 46% of transgender individuals attempting suicide when they come—as Ms. Rodgers did—from families with "restrictive attitudes toward sexuality[.]"[32] And, the courts would have known that the rate of suicidal ideation in individuals with *gender dysphoria* (as opposed to transgender individuals overall), the rate of suicidal ideation is further elevated.[33] With this knowledge, the courts would have been more likely to recognize Ms. Rodgers' plea and waivers for what they were—a suicide attempt via legal process. This likelihood undermines the reliability of her death sentence, and necessitates correction by this Court.

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[30] *See* https://www.cdc.gov/violenceprevention/suicide/fastfact.html (last accessed June 15, 2020).
[31] A. Hass et. al., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* (*available at* http://www.suicideinfo.ca/resource/siecno-20140036/) (last accessed June 15, 2020).
[32] Sahika Yuksel et al., *A Clinically Neglected Topic: Risk of Suicide in Transgender Individuals*, 54:28 ARCH. NEUROPSYCHOLOGY (2017).
[33] Elena Garcia-Vega et al., *Suicidal Ideation and Suicide Attempts in Persons with Gender Dysphoria*, Vol. 30:3 283 PSCIOTHEMA (2017).

Ms. Rodgers' proffered expert reports make clear that symptoms arising from gender dysphoria cannot be treated as interchangeable with symptoms of similar presentation arising from other disorders. Dr. Kessel expressed "substantial doubt"[34] that the waiver was valid, a conclusion largely based on the fact that the trial court—which was aware that Ms. Rodgers had a history of self-harm and suicidality—lacked awareness of the impact of gender dysphoria on Ms. Rodgers' emotional development and mental state. Drs. Kessel and Brown found that the effect of gender dysphoria was critical and distinct from Ms. Rodgers' other mental health conditions, including Post Traumatic Stress Disorder and mood and personality disorders.[35] Further, Dr. Kessel was aware that several of Ms. Rodgers' mental health symptoms (including self-mutilation and suicidality) were on record at the time of Ms. Rodgers' plea and waivers, but explained that gender dysphoria casts those symptoms in a new light.[36] Dr. Kessel specifically found that "the absence of any competency and/or mental health evaluation *that considered the impact of [Ms. Rodgers'] Gender Dysphoria* on [Ms. Rodgers'] emotional development, mental state, and decision making at the time of [her trial-level and postconviction waivers]" was sufficient to undermine their validity.

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[34] SPCR at 97; *see also* SPCR 117 (describing the symptoms of gender dysphoria as "life-permeating" and distinct from those of other psychiatric disorders).

[35] SPCR at 95-96; *see also* SPCR at 103 (Dr. Brown examines how Ms. Rodgers' feelings of shame, disgust, and self-loathing are closely woven with her diagnosis of gender dysphoria).

[36] SPCR at 95-96 (gender dysphoria "has been an important part of [Ms. Rodgers'] psychological development as well as being a serious risk factor for the development of each of [her] other disorders"); *see also* SPCR 134 ("Ms. Rodgers' Gender Dysphoria symptoms interact with her trauma-related symptoms, and are probably inextricable").

The state court's assumption that knowledge of Ms. Rodgers' gender dysphoria is irrelevant to the voluntariness of her waivers because the lower courts knew she was depressed and self-destructive misunderstands the science of gender dysphoria, disenfranchises Ms. Rodgers' right to an individualized sentencing,[37] and shows a fundamental crack in our criminal justice system through which transgender individuals are vulnerable to falling. The only remedy that can protect Ms. Rodgers' rights to due process, reliable and individualized sentencing, and equal protection within the criminal justice system, is a remand to the lower courts for an evidentiary hearing in accordance with Florida law,[38] in which Ms. Rodgers may present evidence of how the circumstances surrounding her untreated gender dysphoria rendered her prior waivers involuntary.

II. This Case Requires Clarification of This Court's Recent Precedent in *Garza v. Idaho*, 139 S. Ct. 738 (2019).

Not only did the lower courts refuse to hear Ms. Rodgers' challenge to the validity of her plea and waivers, they now seek to further restrain her from vindicating her constitutional rights. In its opinion affirming the lower court's summary denial of Ms. Rodgers' constitutional challenges, the Florida Supreme Court took the further step of prospectively barring Ms. Rodgers from further state court proceedings. *See Rodgers v. State*, 288 So.3d 1038, 1040 (Fla. 2019) (instructing that "future filings should not be

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[37] *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

[38] *See Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999) ("While 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.").

made on Rodgers' behalf in the circuit court without first seeking leave from the circuit court and explaining how the appointment of counsel and the proposed filing are authorized in light of Rodgers' valid waiver.") That prospective bar misapplies this Court's decision in *Garza* that an appeal waiver can never be all-encompassing or unconditional.

In *Garza*, this Court held that "even the broadest appeal waiver does not deprive a defendant of all appellate claims." *Id.* at 749. Addressing appeal waivers, this Court said the term "can misleadingly suggest a monolithic end to all appellate rights" when, in fact, "no appeal waiver serves as an absolute bar to all appellate claims." *Id.* at 744. This Court explained that appeal waivers do not prohibit every conceivable appeal.

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

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

Id. at 745 (footnote omitted). The same is true of Florida's postconviction waiver mechanism, which allows death-sentenced inmates to knowingly and voluntarily waive their initial postconviction proceedings, but cannot serve as an absolute bar to all future litigation, particularly with respect to issues that were unknown at the time of the initial waiver. *Id.* at 744-45; *see also Halbert v. Michigan*, 545 U.S. 605 (2005) (holding that an appellant cannot knowingly and intelligently waive a right that has not been recognized

to exist.)

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

The Florida Supreme Court's own caselaw indicates that postconviction proceedings may be litigated subsequent to a waiver when there is a challenge to the validity of that waiver, such as competency. For a Florida postconviction waiver to be valid, it must be "knowing, intelligent, and voluntary." *Silvia v. State*, 123 So. 3d 1148 (Fla. 2013); *see also James v. State*, 974 So. 2d 365, 368 (Fla. 2008) (explaining that a postconviction waiver can occur "only when it can be . . . ensure[d] that a capital defendant is making an intelligent and knowing decision"). The Court also indicated that, where postconviction proceedings are brought subsequent to a waiver, a challenge to the validity of the prior waiver—as not knowing, intelligent, or voluntary—changes the calculus. On many occasions when the Florida Supreme Court has upheld waivers, it has expressly stated that the Court was not presented with a challenge to the

appellant's competency.[39]

In this case, Ms. Rodgers has presented the state court with a newly discovered evidence claim that challenges her competency at the time of her postconviction waiver, the validity of the waiver, the validity of the *Durocher* hearing, and the errors of defense counsel and the circuit court regarding assessment of her competency. She has presented new, detailed, and individualized assessments from several medical and mental health professionals who opine that Ms. Rodgers was not competent at the time of her postconviction waiver. Their conclusions are based on an untreated medical condition that could not have been known to Ms. Rodgers or her counsel during prior competency assessments or waiver proceedings, and which calls into question the validity of her waiver as not knowing, intelligent, and voluntary. As one expert concluded:

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

SPCR 119.

> [T]he interplay of [Petitioner]'s medical condition of gender dysphoria,

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[39] *See, e.g., Silvia v. State*, 123 So. 3d 1148 (Fla. 2013) (affirming the dismissal of postconviction proceedings "[o]n the basis of this record" that did not include a challenge to the appellant's competency at the time of his postconviction waiver); *State v. Silvia*, 235 So. 3d 349, 351 (Fla. 2018) ("Silvia's original, valid postconviction waiver, which he has never contested before this Court, precludes him from claiming a right to relief under *Hurst*."); *Russ v. State*, 107 So. 3d 406 (Fla. 2012) (explaining that, in the absence of an attack on the validity of the waiver, the Court had no basis to set it aside); *Trease v. State*, 41 So. 3d 119, 126 (Fla. 2010) (Florida Supreme Court upholding the waiver as the appellant did "not contest the validity of the [competency] hearing."

> along with her multiple diagnoses, . . . ha[s] affected her competency on several occasions. I have substantial doubts as to her competency during her . . . waiver of her state post-conviction rights. SPCR 164.

SPCR 164. *See also* SPCR 173 (due to Ms. Rodgers' recent diagnosis of gender dysphoria, there is "a strong doubt" as to her competency at the time of her postconviction waiver); SPCR 145 (at the time of Ms. Rodgers' postconviction waiver, her gender dysphoria and comorbid psychiatric disorders were "present and active . . . and greatly affected [her] mental state, her emotional development, and decision-making").

Despite being presented with myriad evidence sufficient to challenge the validity of Ms. Rodgers' waiver, the Florida Supreme Court views the waiver as an absolute bar to future litigation without first obtaining permission of the state circuit court. This defies the spirit of *Garza*, and functionally strips Ms. Rodgers of her ability to access the courts. The state circuit court has consistently summarily denied relief to all of Ms. Rodgers' claims since the appointment of federal counsel in 2015. By forcing Ms. Rodgers to seek permission from that court before being allowed to file any new constitutional challenges, the Florida Supreme Court forces Ms. Rodgers to proceed in exercises of futility that disallow her from any reasonable opportunity to present the merits of her challenges. Put differently, Ms. Rodgers has a right to a proceeding to bring challenges to her plea and sentences. The Florida Supreme Court's instruction would "den[y] that proceeding altogether". *Garza*, 139 S. Ct. at 747. This case requires this Court's clarification of *Garza* to prohibit such a denial of access to the courts.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.