CAPITAL CASE

No. 20-5117

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim of newly discovered evidence of gender dysphoria as untimely under state law in state successive postconviction litigation.

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019).

JURISDICTION

On February 12, 2019, Rodgers, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a notice of appeal from the trial court's summary denial of a successive postconviction motion in the Florida Supreme Court. On November 21, 2019, the Florida Supreme Court affirmed the trial court's summary denial of the successive postconviction motion. *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019) (SC19-241).[1] On December 6, 2019, Rodgers filed a motion for rehearing. On February 11, 2020, the Florida Supreme Court denied the rehearing. On July 10, 2020, Rodgers filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d).[2] Petitioner asserts jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While opposing counsel relies on the Eighth Amendment and the Fourteenth Amendment in the petition, neither of those constitutional provisions applies because, as will be explained in greater detail, the issues being raised in the petition are solely matters of state law. No federal constitutional provision is at issue.

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[1] The Florida Supreme Court's docketing is available online under case number SC19-241.

[2] This Court, in response to the COVID-19 outbreak, extended the deadline to timely file a petition from 90 days to 150 days.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Rodgers and the co-perpetrator, Lawrence, are serial killers. In the words of the Florida Supreme Court, Rodgers and Lawrence "coldly decided to murder" the victim in this capital case "solely for the depravity of the act." ***Rodgers v. State***, 3 So.3d 1127, 1134 (Fla. 2009).

Facts of the case

On March 29, 1998, Lawrence and Rodgers were driving around Santa Rosa County, Florida, looking to find somebody to shoot and kill. ***Lawrence v. State***, 846 So.2d 440, 443 n.3 (Fla. 2003). After Lawrence pulled his truck off to a secluded area near the Smitherman's property, Rodgers got out of the truck with a Lorcin .380 handgun. *Id.* at n.3. The elderly victim, Leighton Smitherman, was sitting in a chair inside his house in the living room watching a movie with his wife and adult daughter. *Id.* Rodgers shot Smitherman through a window hitting the victim in his back. Rodgers returned to the truck and they drove away. A bullet casing from the Lorcin .380 handgun was found outside the house. Rodgers, a few weeks later, used the same handgun to shoot the teenage victim in the capital case in the back of her head. *Id.*; ***Rodgers v. State***, 934 So.2d 1207, 1210 (Fla. 2006). Rodgers gave a tape-recorded confession to the attempted murder of Smitherman to law enforcement. ***Rodgers***, 934 So.2d at 1210 (noting the May 13, 1998, tape-recorded confession to the Smitherman attempted murder).

Then, ten days after the attempted murder, on April 9, 1998, Lawrence and Rodgers murdered Lawrence's cousin. The three of them, Lawrence, Rodgers, and Lawrence's cousin, Justin Livingston, were riding around in Lawrence's truck smoking marijuana. ***Lawrence***, 846 So.2d at 443 n.3. After arriving at a remote location at the Navy's Spencer Field, all three got out of the truck. *Id.* at n.3. Both Rodgers and

Lawrence surreptitiously retrieved knives from the toolbox of the truck. Rodgers stabbed the victim twice in the chest area and then attempted to strangle him. *Id.* While Justin Livingston was laying down, wounded and pleading for mercy, Lawrence stabbed him in the back multiple times killing him. *Id.*; *see also Lawrence v. State*, 969 So.2d 294, 298 n.1 (Fla. 2007).

Then approximately four weeks after the murder of Lawrence's cousin, on May 7, 1998, Rodgers and Lawrence murdered again, this time killing a teenage girl named Jennifer Robinson. *Rodgers*, 934 So.2d at 1209-10. Rodgers pretended to be taking Jennifer on a date after picking her up at her home and meeting her mother. *Id.* at 1209. After getting the underage victim drunk on Everclear, they both had sex with her. *Id.* at 1210. Rodgers then shot her in the back of her head. *Id.* Lawrence cut off her calf muscle to take as a trophy which was later found in Lawrence's freezer. *Wood v. State*, 209 So.3d 1217, 1236 (Fla. 2017) (discussing the facts of this murder for purposes of proportionality review). Rodgers took photographs of the victim's body including a photograph of Lawrence holding her severed foot. *Lawrence*, 846 So.2d at 443. They both covered her body with debris. *Rodgers*, 934 So.2d at 1210. Rodgers showed the photographs of the victim's body to two other people. *Id.* at 1209. When the deputies arrested Rodgers two days later in another county, Rodgers had the murder weapon. *Id.* While at first denying any involvement, Rodgers, a few days later, confessed to shooting Jennifer Robinson. *Id.* at 1209-10. Rodgers also testified at the second penalty phase admitting to shooting her. (RR Vol. 3 279). On cross, Rodgers again admitted several times to being the actual shooter in this case. (RR Vol. 3 315, 316).

These were three separate incidents that occurred over the course of six weeks. The prior state attempted murder conviction and the prior federal murder conviction were used to establish the prior violent felony aggravating factor in the capital case.

Rodgers v. State, 3 So.3d 1127, 1130, 1133 (Fla. 2009) (noting the state trial court had found two aggravating factors: 1) the prior violent felony based on the prior attempted murder and the prior murder; and 2) the murder was committed in a cold, calculated, and premeditated manner (CCP)).

Procedural history of the capital case

On July 24, 2000, Rodgers entered a plea of guilty as a principal to the first-degree murder of Jennifer Robinson; conspiracy to commit murder; giving alcohol to a minor; and abusing a human corpse. *Rodgers*, 934 So.2d at 1210. The Florida Supreme Court affirmed the convictions but remanded for a new penalty phase. *Id.* at 1221-22.

Rodgers filed a petition for writ of certiorari in this Court regarding the convictions. On December 4, 2006, this Court denied the petition. *Rodgers v. Florida*, 549 U.S. 1080 (2006) (No. 06-6858).

At the second penalty phase, Rodgers waived the right to a penalty phase jury. *Rodgers v. State*, 3 So.3d 1127, 1130 (Fla. 2009). There was no jury recommendation due to the waiver. Rodgers testified at the bench penalty phase. Rodgers admitted to being the one who shot Jennifer Robinson. (RR Vol. 3 279). On cross, Rodgers again admitted several times to being the actual shooter. (RR Vol. 3 315, 316). The State also cross-examined Rodgers regarding the details of both prior convictions as well. *Rodgers*, 3 So.3d at 1130. The trial court found two aggravating circumstances: 1) the prior violent felony and 2) CCP. *Id.* at 1133. The Florida Supreme Court affirmed the death sentence. *Id.*

The Florida Supreme Court issued its opinion on February 5, 2009. Rodgers did not file a petition for writ of certiorari in this Court regarding the death sentence. So, the death sentence became final on Thursday, May 7, 2009.

On July 5, 2010, during the state postconviction proceedings, before the in itial state postconviction motion was filed, Rodgers wrote a letter to Judge Rusmussen seeking to waive both the statutory right to postconviction counsel and all postconviction proceedings. On April 6, 2011, the trial court held a hearing to conduct a personal on-the-record waiver colloquy regarding postconviction proceedings as required by state law. Fla. R. Crim. P. 3.851(i); *Durocher v. Singletary*, 623 So.2d 482, 485 (Fla. 1993) (requiring trial courts to evaluate defendants to determine if they understand the consequences of waiving collateral counsel and proceedings). On April 20, 2011, the state postconviction court entered a written order finding Rodgers competent and concluding the waiver was voluntary.

The order was appealed to the Florida Supreme Court in a mandatory fast-track appeal required by Florida's rule of court governing *Durocher* postconviction waivers. Fla. R. Crim. P. 3.851(i)(8). On October 17, 2012, the Florida Supreme Court affirmed the trial court's order finding Rodgers competent to discharge postconviction counsel and waive postconviction proceedings. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (SC11-1401).

On November 11, 2015, the federal district court appointed the Capital Habeas Unit of the Office of the Federal Defender of the Northern District of Florida (CHU-N), as federal habeas counsel to represent Rodgers in federal court. *Rodgers v. Sec'y, Fla. Dep't of Corr.*, 3:15-cv-00507-RH (N.D. Fla.). As of this date, however, the CHU-N has not filed a federal habeas petition in federal court. The federal district court authorized the CHU-N to appear in state court to litigate a *Hurst* claim, despite the waiver of state postconviction counsel and waiver of all state postconviction proceedings.

On January 11, 2017, Rodgers, represented by the CHU-N, filed a successive rule 3.851 motion for postconviction relief in the state trial court raising a claim based

on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), in the state court. On February 14, 2017, the State filed an answer to the successive postconviction motion arguing that Rodgers waived any right to *Hurst* relief twice over by waiving the penalty phase jury and by waiving postconviction proceedings. On May 2, 2017, the trial court summarily denied the successive motion.

Rodgers appealed the denial of the successive postconviction motion to the Florida Supreme Court. The Florida Supreme Court held that *Hurst v. State* does not apply to defendants, like Rodgers, who waive a penalty phase jury, relying on their prior decision in *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016). *See Rodgers v. State*, 242 So.3d 276 (Fla. 2018).

Rodgers then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's decision. In that petition, Rodgers argued that the waiver of the penalty phase jury was involuntary asserting that a defendant cannot waive an unknown and unestablished right, relying on *Halbert v. Michigan*, 545 U.S. 605 (2005). On December 3, 2018, this Court denied the petition. *Rodgers v. Florida*, 139 S.Ct. 592 (2018) (No. 18-113).

The day after this Court denied that petition, on December 4, 2018, Rodgers, represented by federal habeas counsel, the CHU-N, filed yet another successive postconviction motion in the state trial court arguing that the waivers were involuntary due to gender dysphoria. The 2018 successive state postconviction motion raised a claim of newly discovered evidence of gender dysphoria asserting the condition rendered the pleas and waivers involuntary. On December 21, 2018, the State filed a motion to dismiss the successive postconviction motion due to the *Durocher* waiver and, in the alternative, an answer. On January 4, 2019, federal habeas counsel filed a response. On January 18, 2019, the state trial court summarily denied the successive

postconviction motion.

Rodgers appealed the summary denial of the successive postconviction motion to the Florida Supreme Court. The State filed a motion to dismiss the entire appeal due to the *Durocher* waiver and the law-of-the-case doctrine, which the Florida Supreme Court denied. On November 21, 2019, the Florida Supreme Court affirmed the trial court's denial of the successive postconviction motion. *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019) (SC19-241). On December 6, 2019, Rodgers filed a motion for rehearing. On February 11, 2020, the Florida Supreme Court denied the rehearing.

On July 10, 2020, Rodgers, represented by federal habeas counsel, the CHU-N, filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT REJECTING A CLAIM OF NEWLY DISCOVERED EVIDENCE OF GENDER DYSPHORIA AS UNTIMELY UNDER STATE LAW IN STATE SUCCESSIVE POSTCONVICTION LITIGATION.

Petitioner Rodgers seeks review of the Florida Supreme Court's decision holding that the claim of newly discovered evidence of gender dysphoria, which was raised in a successive postconviction motion filed in state court, was untimely under state law. There is no federal question being raised in the petition. Both the procedural issue of the timeliness of the successive postconviction motion filed in state court, as well as the underlying substantive issue of the application of the Florida Supreme Court's decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), to this case, are matters solely of state law. Because the petition presents issues that do not raise any federal questions, this Court lacks jurisdiction to grant the petition. Moreover, there is no conflict between this Court's jurisprudence regarding time limitations or waivers and the Florida Supreme Court's decision finding the successive postconviction motion to be untimely. Rodgers cites no case from this Court holding, or even hinting, that time limitations on successive postconviction motions filed in state court violate federal law. There certainly is no conflict with this Court's decision in *Johnson v. United States*, 544 U.S. 295 (2005). Nor is there any conflict between the federal circuit courts or state courts of last resort and the Florida Supreme Court's decision. Rodgers cites no federal circuit court case or state supreme court case holding that time limitations on successive postconviction motions filed in state court violate federal law. Nor is misapplication a basis for review. The Florida Supreme Court's application of a state rule of court to this case was correct as a matter of state law. Furthermore, this case is a poor vehicle to address the issue of voluntariness of either the waiver of the penalty phase jury or

or the waiver of the state postconviction proceedings because regardless of the waivers, Rodgers' death sentence remains valid under this Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), on two separate grounds. Any opinion on the issue of the waivers would be advisory. Review should be denied.

The Florida Supreme Court's decision in this case

Rodgers appealed the state trial court's summary denial of the successive postconviction motion raising the claim of newly discovered evidence of incompetency due to gender dysphoria to the Florida Supreme Court. The Florida Supreme Court rejected the claim concluding that the "new" diagnosis of gender dysphoria was not, in fact, new and alternatively, even if the diagnosis was viewed as new, the claim was untimely under state law. *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019).

The Florida Supreme Court first explained that for a claim of newly discovered evidence to be considered timely, the claim was "required to have been filed within one year of the date upon which the claim became discoverable through due diligence." *Rodgers*, 288 So.3d at 1039. The Florida Supreme Court cited a Florida case and a Florida rule of court in support of that statement. *Id.* (citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), and Fla. R. Crim. P. 3.851(d)(1)-(2)). The Florida Supreme Court timed the one year as starting from some point between the date of the psychiatrist's evaluation of Rodgers in 2016 and the filing of the prior state postconviction motion in early 2017. *Id.* at 1039. The Florida Supreme Court noted, however, that the current successive postconviction motion had not been filed until nearly two years later on December 4, 2018. The Florida Supreme Court reasoned that because Rodgers knew of the diagnosis of gender dysphoria in 2016 but had not filed the claim until late in 2018, the successive postconviction motion was not timely. And therefore, the claim of newly discovered evidence was "time-barred." *Id.*

Alternatively, the Florida Supreme Court concluded that even without the time bar, the summary denial was proper because the evidence at issue was "not newly discovered." *Rodgers*, 288 So.3d at 1039. The Florida Supreme Court explained that, under state law, to prevail on a newly discovered evidence claim, two requirements must be met: 1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and 2) the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Id.* (citing *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) (*Jones II*)). The Florida Supreme Court concluded that in this case, the first prong of *Jones II* regarding the evidence not having been known at the time of the trial, "ends the inquiry" because the essence of the evidence was known at the time of the pleas and the waivers. *Rodgers*, 288 So.3d at 1040. The Florida Supreme Court reasoned that Rodgers' symptoms that are now attributed to gender dysphoria, such as severe depression, self-mutilation, and suicide attempts, were all known at the time of the pleas and waivers and therefore were not newly discovered evidence at all. The Florida Supreme Court reasoned that the "medical community's subsequent assignment of a name to the cause of known symptoms is not newly discovered evidence." *Id.*

The Florida Supreme Court further concluded, even if the diagnosis could be viewed as newly discovered evidence, Rodgers was not diligent as required by *Jones II* because Rodgers waited until 2018 to raise the claim, despite knowing about the diagnosis in 2016. *Rodgers*, 288 So.3d at 1040. The Florida Supreme Court affirmed the lower court's summary denial of the successive postconviction as "time-barred and, in any event, not based upon newly discovered evidence." *Id.* The Florida Supreme Court stated that "because Rodgers validly waived postconviction proceedings and counsel, future filings should not be 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." *Id.*

Issues are solely a matter of state law

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court explained that it lacks jurisdiction over a case if a state court's decision rests upon two grounds, one of which is a state law ground and the other is a federal ground if the state law ground is independent of the federal ground and adequate itself to support the judgment. *Id.* at 1038 n.4 (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). Provided the state law is not "interwoven" with federal law, this Court's jurisdiction "fails." *Id.* (citing *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917)).

The two issues being raised in the petition are ***not*** interwoven with federal law. Rather, the issues are purely issues of state law. Whether a successive postconviction motion filed in state court is timely or not is solely a matter of state law. And the underlying substantive claim based on the Florida Supreme Court's decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), is also a matter of state law. There is no federal question presented in the petition.

The timeliness of state postconviction motions filed in state court is a matter of state law, not a matter of federal law. The Florida Supreme Court in this case relied on a Florida case and a Florida court rule of court to determine the claim was untimely. *Rodgers*, 288 So.3d at 1039 (citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), and Fla. R. Crim. P. 3.851(d)(1)-(2)). The Florida Supreme Court did not

cite or discuss federal law at any point in its determination of timeliness. So, the state law in the Florida Supreme Court's decision was ***not*** interwoven with any federal law. The procedural issue of timeliness is purely a matter of state law and therefore, under *Long*, this Court lacks jurisdiction.

The underlying substantive issue in the case regarding the Florida Supreme Court's decision in *Hurst v. State* is also purely a matter of state law. Fundamentally, Rodgers is arguing that gender dysphoria rendered both the waiver of the penalty phase jury at the resentencing and the waiver of postconviction proceedings involuntary and therefore, *Hurst v. State* should be applied to this case, regardless of the waivers. *Rodgers*, 288 So.3d at 1039 (describing the claim). But whether Rodgers is entitled to any relief based on the Florida Supreme Court's decision in *Hurst v. State,* as opposed to any relief based on this Court's decision in *Hurst v. Florida,* is also a matter of state law. Federal habeas counsel's entire theory as to why Rodgers is entitled to a third penalty phase depends on the unique aspects of *Hurst v. State* as well as on the retroactivity of *Hurst v. State* and its exceptions. But all of that is a matter of state law.[3]

While this Court recently held that *Hurst v. Florida* is not retroactive, the Florida Supreme Court has held that their decision in *Hurst v. State* is partially retroactive. *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020) (stating that *Hurst v.*

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[3] The Florida Supreme Court recently receded from *Hurst v. State* "except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, ___ So.3d ___, 2020 WL 3116597 (Fla. Jan. 23, 2020) (SC18-245). The Florida Supreme Court's decision in *State v. Poole* closely follows this Court's decisions in *Hurst v. Florida* and *McKinney v. Arizona*, 140 S.Ct. 702 (2020). Only one aggravating factor is required for a defendant to be eligible for the death penalty under Florida law. *State v. Poole*, 2020 WL 3116597 at *11,*15. Rodgers would ***not*** be entitled to a third penalty phase under *State v. Poole* due to the prior convictions including the prior federal murder conviction. *Smith v. State*, ___ So.3d ___, ___, 2020 WL 1057243, *6 (Fla. Mar. 5, 2020) (rejecting a *Hurst v. State* claim due to the prior convictions citing *State v. Poole*).

Florida does not apply retroactively on collateral review); *Mosley v. State*, 209 So.3d 1248, 1276-83 (Fla. 2016) (using the state retroactivity test of *Witt v. State*, 387 So.2d 922 (1980), to determine the retroactivity of *Hurst v. State*). Rodgers' death sentence became final in 2009, which was many years before this Court's decision in *Hurst v. Florida* in 2016. So, this Court's decision in *Hurst v. Florida* does not apply at all. Rodgers is not entitled to any relief in any federal court under *McKinney*.

The retroactivity of the Florida Supreme Court's decision in *Hurst v. State*, however, is a matter of state law. *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008). As the Eleventh Circuit recently observed regarding the retroactivity of *Hurst v. State*, state-law retroactivity determinations have "no significance in federal court." *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1332-33 (11th Cir. 2019) (explaining that "Florida may make its own choice about the retroactivity of a given case as a matter of state law" and that Florida "has its own retroactivity standard"), *pet. for cert. filed* April 23, 2020 (No. 19-8341). The Eleventh Circuit in *Knight* followed federal retroactivity principles noting the obligation of federal courts "to apply federal retroactivity standards." *Id.* at 1334. Federal law does not give Rodgers the right to pick and choose those aspects of the Florida Supreme Court's state retroactivity determinations that are favorable.

Under Florida law, Rodgers was not entitled to any relief due to a state law exception to *Hurst v. State* that applies when a capital defendant waives the penalty phase jury. The Florida Supreme Court refused to grant Rodgers a third penalty phase due to the waiver of the penalty phase jury in this case. *Rodgers v. State*, 242 So.3d 276 (Fla. 2018) (stating that the Florida Supreme Court has "consistently" held that *Hurst* does not apply to defendants, like Rodgers, who waive a penalty phase jury citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)). The Florida Supreme Court created an exception to their *Hurst v. State* decision for capital defendants who waive their

penalty phase juries in *Mullens*. But the *Mullens* exception is also a matter of state law. The Florida Supreme Court did not cite any federal case in support of its reasoning in *Mullens*. Instead, the Florida Supreme Court in *Mullens* cited a South Dakota case and an Illinois case. *Mullens*, 197 So.3d at 40 (citing *State v. Piper*, 709 N.W.2d 783, 808 (S.D. 2006), and *People v. Rhoades*, 753 N.E.2d 537, 543 (Ill. App. Ct. 2001)). The reasoning of the Florida Supreme Court in *Mullens* was ***not*** interwoven with federal law. Moreover, this Court has repeatedly denied review of Florida capital cases involving the *Mullens* exception including in *Mullens* itself as well as in Rodgers' prior petition. *Mullens v. State*, 197 So.3d 16, 40 (Fla. 2016), *cert. denied*, *Mullens v. Florida*, 137 S.Ct. 672 (2017) (No. 16-6773); *Rodgers v. State*, 242 So.3d 276, 276-77 (Fla. 2018), *cert. denied*, *Rodgers v. Florida*, 139 S.Ct. 592 (2018) (No. 18-113).[4] The *Mullens* exception is also a matter of state law.

The substantive issue of *Hurst v. State* and its retroactivity as well as its exceptions are all purely matters of state law. Under *Long*, this Court also lacks jurisdiction over the substantive issue of *Hurst v. State* and its exceptions.

Both the procedural issue of the untimeliness of the successive postconviction claim and the underlying substantive issue of *Hurst v. State* being presented in the petition are solely matters of state law. There is no federal question presented in the petition. So, this Court lacks jurisdiction over this case.

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[4] *See e.g.*, *Covington v. State*, 228 So.3d 49, 69 (Fla. 2017), *cert. denied*, *Covington v. Florida*, 138 S.Ct. 1294 (2018) (No. 17-7400); *Twilegar v. State*, 228 So.3d 550 (Fla. 2017), *cert. denied*, *Twilegar v. Florida*, 138 S.Ct. 2578 (2018) (No. 17-8236); *Quince v. State*, 233 So.3d 1017 (Fla. 2018), *cert. denied*, *Quince v. Florida*, 139 S.Ct. 165 (2018) (No. 17-9401); *Hutchinson v. State*, 243 So.3d 880 (Fla. 2018), *cert. denied*, *Hutchinson v. Florida*, 139 S.Ct. 261 (2018) (No. 19-5377); *Lynch v. State*, 254 So.3d 312, 322 (Fla. 2018), *cert. denied*, *Lynch v. Florida*, 139 S. Ct. 1266 (2019) (No. 18-7118); *Robinson v. State*, 260 So.3d 1011, 1015-16 (Fla. 2018), *cert. denied*, *Robinson v. Florida*, 140 S.Ct. 152 (2019) (No. 18-9363); *see also Brant v. State*, 284 So.3d 398, 399-400 (Fla. 2019), *pet. for cert. filed* June 29, 2020, *Brant v. Florida*, No. 19-8845.

No conflict with this Court's jurisprudence

There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision holding the state successive postconviction motion was untimely. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court has never recognized a federal constitutional right to state postconviction proceedings, much less recognized a federal constitutional right to state successive postconviction proceedings. And this Court certainly has never held, or even hinted, that state courts could not put reasonable time limitations on state postconviction proceedings. To the contrary, this Court has upheld time limitations in related contexts. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (upholding, in a capital case, a one-year time limitation on federal habeas review); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 70 (2009) (holding that Alaska's postconviction DNA test procedures, which required the claim be diligently pursued, did not violate the federal due process clause). So, even if there was a federal constitutional right to state postconviction litigation, it would not prevent the state courts from requiring that postconviction claims be brought in a timely manner. There is no federal constitutional right to untimely successive postconviction proceedings in state court.

This Court has certainly not expressed any constitutional concerns with the reasonable time limitations and diligence requirements in federal habeas litigation. This Court read the federal habeas one-year limitation period on new claims in 28 U.S.C. § 2255(f)(4), as requiring due diligence. In *Johnson v. United States*, 544 U.S. 295 (2005), this Court held that the vacating of two Georgia state convictions that had been used to enhance a federal sentence restarted the clock to timely file a federal habeas petition under § 2255(f)(4), but that the petitioner was not diligent. The *Johnson* Court concluded that § 2255(f)(4) applied and would permit a habeas

petitioner to file a timely federal habeas petition if the petition was filed within a year of the prior conviction being vacated by the state court. But the *Johnson* Court explained that § 2255(f)(4) only applies if the habeas petitioner "has shown due diligence." *Id.* at 302. This Court then determined that Johnson had not been diligent in challenging his state prior convictions in state court because he waited over three years from his federal sentencing to file the challenges to the prior convictions in state court. *Id.* at 311. This Court found that Johnson waiting over 21 months after the federal sentence was final to go into state court was unreasonable and noted that Johnson offered no explanation for that delay. *Id.* This Court concluded: "Johnson fell far short of reasonable diligence in challenging the state conviction." *Id.* This Court emphasized the habeas statute's "clear policy calls for promptness." *Id.* This Court thought that time limitations and a diligence requirement regarding new claims were necessary to prevent turning federal courts into "a forum for difficult and time-consuming reexaminations of stale state proceedings." *Id.* at 303.

Here, the Florida Supreme Court relied on their prior caselaw interpreting an state rule of court, rule 3.851(d), that is roughly equivalent to § 2255(f), to determine that the successive postconviction motion was untimely because Rodgers had not been diligent. *Rodgers*, 288 So.3d at 1039 (citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), and Fla. R. Crim. P. 3.851(d)(1)-(2)). The Florida Supreme Court in this case did exactly what this Court in *Johnson* did regarding diligence. The Florida Supreme Court may interpret a state criminal rule as mandating promptness, just as this Court interpreted the federal habeas statute as mandating "promptness." *Johnson*, 544 U.S. at 311. And Rodgers' petition is an attempt to do exactly what this Court in *Johnson* warned against, which is turning this Court into a "forum" for "reexamining" a "stale" claim regarding a waiver of a penalty phase jury found to be voluntary by the Florida Supreme Court over a decade ago, in 2009, as well as reexamining a waiver of

postconviction proceedings found to be voluntary by the Florida Supreme Court years ago, in 2012. *Rodgers*, 3 So.3d at 1131-33 (rejecting a challenge to Rodgers' competency to waive the penalty phase jury at the resentencing); *Rodgers*, 242 So.3d 276 (Fla. 2018) (rejecting a second challenge to the waiver of the penalty phase jury at the resentencing); *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (finding waiver of state postconviction proceedings and state postconviction counsel to be voluntary). Rodgers' attacks on the waivers are not only "stale" attacks, they are repetitious attacks. *Rodgers v. Florida*, 139 S.Ct. 592 (2018) (No. 18-113) (denying review of a similar issue).

There is no conflict between this Court's decision in *Johnson* and the Florida Supreme Court's decision in this case. To the contrary, the Florida Supreme Court's decision in this case closely tracks this Court's decision in *Johnson*.

Federal habeas counsel attempts to create conflict with this Court's decision in *Garza v. Idaho*, 139 S.Ct. 738 (2019), but fails. Pet. at 36. There is no conflict between *Garza* and the Florida Supreme Court's decision that the successive postconviction claim was untimely. In *Garza*, this Court held trial counsel's performance was deficient for not filing a notice of appeal, despite the defendant telling counsel that he wanted to appeal, and that prejudice from that failure would be presumed. *Id.* at 742. *Garza* was an ineffective assistance of counsel case, not a voluntariness of a waiver case, much less a timeliness of a successive state postconviction motion case. Indeed, the main issue in *Garza* was whether prejudice would be presumed pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), in spite of the generic appellate waiver in Garza's written plea agreement.

Federal habeas counsel focuses on the statements in *Garza* concerning appellate waivers. Pet. at 37. The *Garza* Court stated that "no appeal waiver serves as an absolute bar to all appellate claims" and then explained that the scope of the waiver

depends on the exact language of the waiver which often leaves "many types of claims unwaived." *Garza*, 139 S.Ct. at 744. The waivers at issue in this case were not generic waivers. Both the waiver of the penalty phase jury and the waiver of postconviction proceedings in this case were entered into after on-the-record colloquies and both waivers were then affirmed as voluntarily by the Florida Supreme Court. *Rodgers v. State*, 3 So.3d 1127, 1131-33 (Fla. 2009) (affirming the waiver of the penalty phase jury); *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (SC11-1401) (affirming the waiver of postconviction proceeding as voluntary). The *Garza* Court also stated that "all jurisdictions appear to treat at least some claims as unwaivable" and then gave as an example the issue of the voluntariness of the waiver itself. *Id.* at 745. But that language is not a constitutional holding; rather, it is merely an observation about standard practice in courts. And Florida follows that standard practice regarding allowing appeals of the voluntariness of the waiver itself and did so in this case. Florida's rules of court provide for a mandatory, automatic, and fast-track appeal of any waiver of state postconviction proceedings. Fla. R. Crim. P. 3.851(i)(8); *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (SC11-1401) (affirming the waiver of postconviciton proceedings as voluntary in the mandatory appeal). What federal habeas counsel is seeking is not the right to attack the voluntariness of a waiver once but the right to repeatedly attack the voluntariness of a waiver but *Garza* has nothing to say on that subject. *Garza* simply has nothing to say regarding the validity of either of the waivers at issue in this case and even less to say regarding timeliness of a state successive postconviction motion. There is no conflict with *Garza*.

Federal habeas counsel seems to be reading *Garza* as an implied constitutional prohibition on waivers of future claims. Pet. at 37-39 (citing *Halbert v. Michigan*, 545 U.S. 605 (2005)). But this Court has repeatedly observed that a criminal defendant may waive even the most fundamental of constitutional rights. *Peretz v. United States*,

501 U.S. 923, 936 (1991) (stating the "most basic rights" of criminal defendants are subject to waiver citing cases). And, as this Court has explained, subsequent developments in the law, that modify or expand an established right, such as the established state statutory right to a penalty phase jury and established right to state postconviction proceedings, do not render prior waivers of those rights involuntary. *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970) (explaining that when a defendant waives a right he does so under the law that exists at the time of the waiver). Additionally, the *Halbert* attack on the waivers is the same attack that federal habeas counsel raised in their prior petition filed in this Court, which this Court denied. *Rodgers v. Florida*, 139 S.Ct. 592 (2018) (No. 18-113). There is no conflict with this Court's statements in *Garza* regarding waivers and the Florida Supreme Court's decision in this case.[5]

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[5] Federal habeas counsel also invokes *Garza* to attack the Florida Supreme Court's ruling regarding the waiver of state postconviction proceedings precluding any future filings in state court. The Florida Supreme Court noted that because Rodgers waived postconviction proceedings as well as state postconviction counsel, no further pleadings should be filed in the state trial 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." *Rodgers*, 288 So.3d at 1040.

But such a claim is not ripe. Federal habeas counsel has not been prevented from filing anything in state court yet. The State filed a motion to dismiss the entire appeal in this case due to the waiver of postconviction proceedings but the Florida Supreme Court denied that motion. In fact, opposing counsel has been allowed to file two successive postconviction motions in state court and appeal both of those motions to the Florida Supreme Court and then seek review of both those motions in this Court, despite the 2012 waiver of postconviction proceedings.

Furthermore, federal habeas counsel should not be appearing in state court at all. The federal statute that provides federal habeas counsel to state capital defendants, 18 U.S.C. § 3599, should not be used to undermine a valid waiver of state postconviction counsel and state postconviction proceedings, as it is being used by federal habeas counsel to do in this case. *Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261,1278 (11th Cir. 2012) (denying § 3599 funding for state court postconviction DNA litigation and noting the "sound policy reasons" why federal habeas counsel should not appear in state court litigation including the "troubling federalism concerns" raised by such "federal interference" with state criminal prosecutions).

There is no conflict between this Court's jurisprudence regarding time limitations in the postconviction setting or this Court's jurisprudence regarding waivers and the Florida Supreme Court's decision in this case.

No conflict with the federal circuit courts or state courts of last resort

There is also no conflict between the decision of any federal appellate court or any state supreme court and the Florida Supreme Court decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

Rodgers cites to no decision of any federal circuit court or state court of last resort that has held that time limitations on successive postconviction motions filed in state court violate the Eighth Amendment, which is the provision federal habeas counsel relies upon in the petition. Nor has Rodgers cited to any case holding that gender dysphoria necessarily renders pleas or any other type of waivers involuntary. Gender dysphoria and its related depression do not automatically render a person

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Federal habeas counsel, despite being appointed nearly five years ago by the federal district court, has yet to file a federal habeas petition. Instead, federal habeas counsel has repeatedly appeared in state court in violation of the waiver. Federal habeas counsel should not be permitted to appear in state court at all, much less to file what would be a third successive postconviction motion in state court. Indeed, this Court should also prohibit federal habeas counsel from filing any future petitions seeking review of state postconviction proceedings in this Court. Two petitions attacking the same waivers is enough.

incompetent to stand trial, to enter a plea, or to waive rights. Rodgers' own expert in the 2017 and 2018 successive postconviction motions, Dr. Kessel, explained that gender dysphoria leads to depression. But even major depression does not necessarily invalidate a waiver. *Garcia v. Bravo*, 181 Fed. Appx. 725, 730 n.2 (10th Cir. 2006) (observing that major depression does not show that a plea was involuntary citing *Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995)). There is no conflict with the Tenth Circuit's caselaw. Moreover, the Florida Supreme Court's decision in this case focused on the untimeliness of the claim, not its merits. The Florida Supreme Court found the claim was untimely and that the diagnosis was not new, so, the Florida Supreme Court never reached the issue of the effect of the diagnosis.

Additionally, Rodgers has repeatedly been found to be competent in both state and federal court. The federal court found Rodgers to be competent to enter a plea to the federal murder charges. Rodgers was also found competent to plead guilty in state court and the Florida Supreme Court affirmed that finding in the first appeal. *Rodgers*, 934 So.2d at 1210. Years later, Rodgers was again found competent to waive the right to a penalty phase jury at the second penalty phase in state court. *Rodgers*, 3 So.3d at 1132-33. And then, years after that, Rodgers was found competent a third time in state court during the waiver of postconviction proceedings. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012). Rodgers was examined many times over the years by numerous different mental health experts and not one of them found Rodgers to be incompetent.

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, review in this Court should be denied.

Misapplication of a proper rule of law

This Court's rules state that a petition for a writ of certiorari is only rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10; *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (explaining that error correction is outside the mainstream of the Court's functions and is not among the compelling reasons for granting certiorari review). Federal habeas counsel seems to be attempting to establish misapplication review by asserting in the petition that the Florida Supreme Court's application of a time bar was "incorrect" and "inappropriate." Pet. at 25, 28. Federal habeas counsel asserts that the Florida Supreme Court's starting date of the time calculations was incorrect and insists that the correct starting date should be the date of the last expert's written report.

In this case, the Florida Supreme Court noted that, under state law, a claim of newly discovered evidence must be filed within one year of the date the claim became discoverable. *Rodgers*, 288 So.3d at 1039. The Florida Supreme Court then timed that one year as starting from some point between the date of the first psychiatrist's evaluation in 2016 and the filing of the prior postconviction motion early in 2017. *Id.* The Florida Supreme Court noted that the current successive postconviction motion had not been filed until December 4, 2018, which was over one year later and therefore, concluded that the successive postconviction claim was untimely and Rodgers had not been diligent.

But, contrary to federal habeas counsel's assertion, the Florida Supreme Court starting date was correct. Actually, its starting date was quite generous because there is a good argument that the most appropriate starting date for the one year is one year from the date of the publication of the new diagnosis of gender dysphoria in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) in 2013. *Johnson v.*

United States, 544 U.S. 295, 307 (2005) (noting the problem with starting a limitations period based on the petitioner's own conduct of raising the claim regardless of "how long he may have slumbered" before bringing the claim).

And regardless of one's view of the correct starting date, this Court's rare misapplication review still requires that the misapplication be a misapplication of federal law but the issue of the timeliness of a successive postconviction claim filed in state court is not. This Court should not grant review on the basis of a claim of misapplication of a properly stated rule of law and certainly not grant review on the basis of a claim of misapplication of a properly stated rule of ***state*** law. Misapplication review is not warranted.

Poor vehicle/advisory opinion

This Court does not normally grant review of a case were the legal issue being raised in the petition would not result in any actual relief because, in such cases, the issue becomes merely a theoretical exercise resulting in an advisory opinion. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (explaining that this Court does not review cases where the judgment would be the same after this Court corrected the lower court's views of federal laws based, in part, on this Court concern's that review in those cases "could amount to nothing more than an advisory opinion" citing *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). In other words, this Court does not review cases where the bottom line would remain the same, regardless of this Court's opinion. In this case, the death sentence remains valid regardless of the voluntariness of the waivers, and therefore, any opinion from this Court would be akin to an advisory opinion.

Rodgers seeks to invalidate both the waiver of the penalty phase jury and the waiver of postconviction proceedings in order to litigate a Sixth Amendment right to a jury trial claim, which in federal court would be limited to a claim based on *Hurst v.*

Florida, 136 S.Ct. 616 (2016). But *Hurst v. Florida* does not apply to Rodgers for two separate reasons.

First, Rodgers is not entitled to retroactive application of *Hurst v. Florida* under this Court's recent decision in *McKinney v. Arizona*, 140 S.Ct. 702 (2020). The *McKinney* Court stated that *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida* "do not apply retroactively on collateral review" citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), and explained that *Hurst v. Florida* does not apply to any case that "comes to us on state collateral review." *McKinney*, 140 S.Ct. at 708. Rodgers' death sentence became final in 2009, which was years before this Court decided *Hurst v. Florida* in 2016. This case comes to this Court on state collateral review and therefore, *Hurst v. Florida* does not apply retroactively to this case. So, *Hurst v. Florida* does not apply to Rodgers. Even if both waivers were invalidated, *Hurst v. Florida* would still not apply to this case. Rodgers is not entitled to any relief, regardless of the waivers.

Second, even if *Hurst v. Florida* applied retroactively, Rodgers would still not be entitled to any relief due to the exception to *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), for prior convictions established by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In 1999, before the penalty phase in this capital case was held in state court, Rodgers entered a plea to the murder of Justin Livingston in federal court, which was then used as an aggravator in this capital case. *United States v. Rodgers*, No. 3:98CR00073-002 (N.D. Fla. order filed June 29, 1999). The prior federal conviction was one of the two prior convictions used to establish the prior violent felony aggravating factor in this capital case. *Rodgers*, 3 So.3d at 1130, 1133. One of the prior convictions was a state conviction for attempted murder and the other prior conviction was the federal murder conviction. But Rodgers has not challenged the plea to the federal murder conviction in federal court. Rodgers, despite having federal habeas counsel, has not filed a claim that gender dysphoria rendered the federal plea

involuntary.[6]

The federal conviction remains unchallenged and is an independent basis for the death penalty in this case unrelated to the waivers in state court. This Court recently clarified that the federal constitutional right to a jury determination in a capital case was limited to the finding of one aggravating factor. *McKinney v. Arizona*, 140 S.Ct. 702, 705 (2020) (noting under the Supreme Court's precedents, a defendant convicted of murder "is eligible for a death sentence if at least ***one*** aggravating circumstance is found" citing cases) (emphasis added); *McKinney*, 140 S.Ct. at 707 (explaining that, under *Ring* and *Hurst v. Florida*, "a jury must find the aggravating circumstance that makes the defendant death eligible"). The prior violent felony aggravating factor, however, is a recidivist aggravator that does not have to be found by the jury under this Court's decision in *Almendarez-Torres*. The prior violent felony aggravator is exempt from *Hurst v. Florida*. Rodgers has no federal constitutional right to a jury finding regarding that type of aggravating factor, or, more exactly, Rodgers waived any

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[6] Nor is any challenge to the federal plea based on the "new" diagnosis of gender dysphoria likely to be entertained by the federal courts at this late date. Rodgers has actually known about the new diagnosis, at least, since 2016. Yet, as of this date, Rodgers has not raised a claim that gender dysphoria rendered the federal plea involuntary in a 28 U.S.C. § 2255 habeas petition. Regardless which date one considers to be the proper starting date for a claim under § 2255(f)(4), whether from the date of the publication of the DSM-V in 2013, which is the correct starting date in the State's view, or from the date of the first examination by the defense mental health expert in 2016 or even, as federal habeas counsel would have it, from the date of the last written report in 2018, the "new" diagnosis of gender dysphoria is no longer new. Rather, it is many years old at this point in time. Federal habeas counsel would have to explain to the federal court why they waited years to file any such claim in federal court. The claim would be even more untimely in federal court than it was in state court. *Cf. Johnson v. United States*, 544 U.S. 295, 311 (2005) (concluding that a habeas petitioner was not diligent because he waited over 21 months to assert the new claim without any explanation for the delay).

Sixth Amendment right by entering a guilty plea to the prior murder conviction.[7]

For Rodgers to be entitled to any relief in federal court under *Hurst v. Florida*, the federal murder conviction would have to be vacated and it has not even been challenged. Regardless of the waivers, Rodgers is not entitled to any relief due to the unchallenged federal murder conviction and the *Almendarez-Torres* exception. Rodgers is not entitled to a new penalty phase due to the prior federal conviction, regardless of the waivers in state court.

Rodgers is not entitled to a third penalty phase on two separate grounds. Rodgers' death sentence remains valid regardless of the waivers. So, the issue of the waivers is merely a theoretical exercise that would not result in any relief. Therefore,

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[7] While the *Almendarez-Torres* exception has been questioned by some Justices, *Almendarez-Torres* is a valid exception, at least, in plea cases. *Apprendi v. New Jersey*, 530 U.S. 466, 501-02, 520-21 (2000) (Thomas, J., concurring); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1253-54 (2018) (Thomas, J., dissenting) (referring to the *Almendarez-Torres* exception as an "aberration" that should be reconsidered and stating that, in his view, "if the Government wants to enhance a defendant's sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt"). Justice Thomas' objection to the *Almendarez-Torres* exception is based on common law practice. *Apprendi*, 530 U.S. at 520-21. But common law is a poor guide to the modern practice of plea bargaining. Not only was recidivism itself a rather rare phenomena at common law but the modern practice of plea bargaining was essentially unknown at common law and at the time of the founding. Plea bargaining started in the late nineteenth century and became prevalent during the twentieth century. *Cf. The Whiskey Cases*, 99 U.S. 594 (1878); *Brady v. United States*, 397 U.S. 742, 752 (1970) (upholding the constitutionality of plea bargaining and noting some of their advantages to both the prosecution and criminal defendants). A defendant who enters a plea has waived the right to a jury trial and should not be permitted to resurrect that right by committing another crime. Courts should not contemplate creating a doctrine of unwaiver by subsequent criminal conduct which would be the effect of overruling *Almendarez-Torres* in plea cases. And requiring the prosecution to prove the earlier crime at a later date, such as at a penalty phase, strips the State of some of the benefit of its bargain regarding the original plea bargain which included not having to prove the crime and strips that benefit on the basis of the defendant's unilateral action of committing a subsequent crime. For those reasons, regardless of common law, *Almendarez-Torres* is a valid exception as applied to plea bargain cases.

this Court should not grant review of this case.

In sum, the petition presents issues of state law over which this Court lacks jurisdiction. Moreover, there is no conflict with this Court's jurisprudence and the Florida Supreme Court's decision regarding the untimeliness of the state successive postconviction motion. Nor is there any conflict with that of any federal circuit court or state court of last resort. And this case is a poor vehicle to address the issue of the voluntariness of the waivers because regardless of the waivers, Rodgers' death sentence remains valid under both *McKinney* and *Almendarez-Torres*.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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