No. _____

IN THE

Supreme Court of the United States

JEREMIAH RODGERS,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

This Court in *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016), declared Florida's capital sentencing scheme unconstitutional because it did not require the jury to make all the necessary findings to impose the death penalty, and instead provided only for an advisory "jury recommendation." The Florida Supreme Court has deemed that decision retroactive, affording relief to 130 death-row prisoners sentenced to death under the invalid Florida capital sentencing procedure. But the court has denied relief to all death-row defendants, including petitioner, who, prior to *Hurst*, waived the *statutory* right to a jury's advisory sentencing recommendation. It did so even though the statutory right is materially different from the *constitutional* right recognized in *Hurst*. And it did so even though at the time of their waivers, binding precedent from this Court and the Florida Supreme Court had held that the constitutional right later recognized in *Hurst* did not exist. This petition raises the following question:

> Does waiving a state-law right to have a jury make an advisory sentencing recommendation constitute a knowing and intelligent waiver of the federal constitutional right to have a jury make all requisite findings for the imposition of death, particularly when the latter right did not exist at the time of the waiver?

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STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a). The Florida Supreme Court entered its opinion denying Petitioner's motion to set aside her death sentence on February 8, 2018, and denied rehearing on April 24, 2018.

CONSTIUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

STATUTORY PROVISIONS INVOLVED

Section 921.141, Florida Statutes (2010), entitled, "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence," provides in relevant part:

> (2) Advisory sentence by the jury. — After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating

circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s, 775.082.

STATEMENT OF THE CASE

1. Jenna Rodgers[1] and her codefendant Jonathan Lawrence were convicted and sentenced to death in separate trials in 2000 for the 1998 capital murder of Jennifer Robinson. *See Rodgers v. State*, 3 So. 3d 1127, 1129 (Fla. 2009). Rodgers and Lawrence had met in a state psychiatric hospital, and had each been released shortly before Robinson's murder. *Rodgers v. State*, 934 So. 2d 1207, 1209 (Fla. 2006). They took Robinson to a wooded area, shot her, and mutilated her body. *Id.* at 1209-10.

At Rodgers' 2000 trial, her counsel introduced a wealth of mitigation evidence concerning the severe trauma she had experienced throughout her life and her mental health conditions. Pet. App. 5a, 26a. Her parents repeatedly physically and sexually abused her. *Id.* She was first given alcohol at age 2, and her own mother sexually abused her, beginning at age 3. *Id.* Her mother forced her to have sex with her on multiple occasions, one time while drugged with

[1] Undersigned counsel refer to Rodgers as Jenna and "she" consistent with her female gender identity and the female name she uses. Rodgers has gender dysphoria, a medical condition in which one's gender identity does not align with the gender assigned at birth. Pet. App. 80a-83a. As Rodgers has explained: "My entire life I've felt compelled to wear a mask to hide the fact that everything below the surface is female. I feel like a woman." Pet. App. 78a. Referring to a transgender person with gender-appropriate pronouns is consistent with prevailing medical standards and case law. *See, e.g.*, *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017) (using name and pronoun consistent with transgender student's gender), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018).

marijuana laced with formaldehyde. Pet. App. 5a. Her father was violent and homophobic. Rodgers spent her childhood in fear for her life. Pet. App. 5a, 26a, 79-81a.

Rodgers was institutionalized for juvenile offenses for most of her adolescent and young adult life. Pet. App. 25a-26a, 78a-79a. For years while in state custody, Rodgers suffered from manifest and untreated gender dysphoria. Pet. App. 82a-85a. Rodgers was designated male at birth, but her gender identity is female and she suffers clinically significant distress as a result. State doctors diagnosed these problems as early as 1995. Pet. App. 78a. During her early years of confinement, in 1991 at the age of 14, and again in 1995 at age 18, she attempted to cut off her penis. Pet. App. 25a, 78a. She was repeatedly hospitalized for self-harm, including attempts at suicide by slitting her wrists. Pet. App. 5a. Mental health providers consistently connected Rodgers' suicidality and self-harm to her gender dysphoria. Pet. App. 78a-79a. Yet at no point did state authorities offer her any treatment. *Id*. In addition to the unrelenting pain of her gender dysphoria, Rodgers suffered serious trauma as a result of her upbringing. Pet. App. 26a, 79a-80a.

At her initial trial, the court precluded Rodgers from introducing evidence supporting her claim that her codefendant Lawrence was the driving force behind the crime, sustaining the State's relevance objection. *Rodgers*, 934 So. 2d at 1218. The jury weighed the evidence and, by a vote of 9-3, recommended a death sentence. *Id.* at 1213. The trial judge then made the necessary findings for a death sentence under Florida law, accepted the

recommendation, and sentenced Rodgers to death. *Id.* at 1214.

On June 26, 2006, the Florida Supreme Court upheld Rodgers' conviction, but reversed her death sentence, finding that the trial court had erred in excluding evidence supporting the theory of her codefendant's greater culpability. *Id.* at 1219. Meanwhile, Lawrence's conviction and death sentence were upheld on direct appeal. *See Lawrence v. State,* 846 So. 2d 440, 448-49 (Fla. 2003).

2. At her 2007 resentencing, Rodgers despaired of what life would be like without receiving care for her gender dysphoria. *Rodgers*, 3 So. 3d at 1130. As a result, Rodgers expressed a desire to die, and sought to waive her right to an advisory jury recommendation. *Rodgers*, 3 So. 3d at 1130.[2]

Under then-controlling Florida law, "the jury [would] render[] an 'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Hurst*, 136 S. Ct. at 620. The trial judge "alone" was required to make the findings necessary for a death sentence, including "'that sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* at 622 (quoting Fla. Stat. § 921.141 (3) (2010)). Consistent with this law, the

[2] Rodgers no longer seeks death as a relief from her distress. Although Rodgers has still not been afforded hormone treatment for gender dysphoria, she has been diagnosed with the condition, has begun to live consistently with her gender through use of a feminine name and pronouns. Now that she knows that medical treatment exists, she can envision a way forward even in the difficult circumstances of imprisonment.

trial court and attorneys described the right Rodgers was seeking to waive as a "recommendation" nearly 50 times throughout the resentencing proceedings. Transcript of Penalty Phase Hearing at 11, 16-17, 20-25, 43, 58, 69-70, 74-75, 79-83, 95, *Rodgers v. State*, 3 So. 3d 1127, 1129 (Fla. 2009) (No SC07-1652).

Rodgers was not advised of her right to have a jury find all facts necessary to her death sentence, because at that time, this Court and the Florida Supreme Court had expressly rejected the existence of such a right. The right was first recognized in 2016, in *Hurst*, which overruled precedent to the contrary. *See Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989) ("[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."); and *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (rejecting claim that the Sixth Amendment requires a jury trial on sentencing issues of life and death).

The trial court found that "Rodgers understood the consequences and the seriousness of waiving [her] right to a *jury recommendation* and that the decision was freely, voluntarily, and intelligently made." *Rodgers,* 3 So. 3d at 1130 (emphasis added).

Rodgers also sought to waive her right to present mitigation in the same proceeding. *Rodgers,* 3 So. 3d at 1129. The sentencing judge nonetheless considered the mitigation that had been presented at the first trial and found the following mitigating circumstances: "(1) Rodgers' mother sexually abused [her, her] father physically abused [her, her] parents abandoned [her] and were addicted to drugs and alcohol, and [her] family had a significant history of suicide (given considerable weight); (2) Rodgers was

incarcerated at an early age and sexually abused while in prison (given some weight); (3) Rodgers had an extensive history of mental illness (given considerable and substantial weight); (4) Rodgers had a positive impact on other inmates (given little weight); (5) Rodgers had genuine remorse (given some weight); and (6) Rodgers helped in the investigation of [her] other crimes (given some weight)." *Rodgers,* 3 So. 3d at 1131. On direct appeal of this death sentence, the Florida Supreme Court affirmed. *Id.* at 1135.[3]

4. In 2016, this Court in *Hurst* declared unconstitutional Florida's capital sentencing procedures. The Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619 (emphasis added). Applying this precept, the Court noted:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.

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[3] In 2010, Rodgers discharged her appointed counsel and waived her right to file a state post-conviction writ under Florida Rule of Criminal Procedure 3.851. *See Rodgers v. State*, 104 So. 3d 1087 (Table), 2012 WL 5381782, at *1 (2012). Shortly before this waiver, she wrote to her lawyer stating that "'gender dysphoria and the trauma and excruciating pain of [her] life ha[d] caused [her] to lose [the] will to live and to choose death over life.'" Pet. App. 8a (quoting Amici Curiae Br. of Am. Civil Liberties Union (quoting letter to counsel in record)). In 2012, the Florida Supreme Court affirmed the circuit court's order, finding Rodgers "competent to discharge post-conviction counsel and waive post-conviction proceedings." *Rodgers*, 2012 WL 5381782, at *2.

> Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Id. at 622 (quoting Fla. Stat. § 921.141(3) (2010)). *Hurst* therefore held that Florida's statutory right to an advisory jury recommendation was insufficient to satisfy the Sixth Amendment right to a jury decision on every fact needed for a death sentence. *Id.*

On remand of *Hurst* to the Florida Supreme Court for harmless error review, that court found the constitutional error not harmless beyond a reasonable doubt, and reversed Hurst's death sentence. *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016). The court also found that this Court's decision in *Hurst* had "abrogated . . .*Tedder v. State*, 322 So. 2d 908 (Fla. 1975), *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *Blackwelder v. State*, 851 So. 2d 650 (Fla. 2003), and *State v. Steele*, 921 So. 2d 538 (Fla. 2005), precedent upon which [the court] has . . . relied in the past to uphold Florida's capital sentencing statute." *Hurst*, 202 So. 3d at 44.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), the Florida Supreme Court applied state-retroactivity rules, as permitted by *Danforth v. Minnesota*, 552 U.S. 264 (2008), and held that *Hurst* was retroactive to June 24, 2002, the day that *Ring v. Arizona*, 536 U.S. 584 (2002), was decided. *Mosley*, 209 So. 3d at 1281. Since then, the Florida courts have set aside 130 death sentences because the defendants were denied the jury trial right

recognized in *Hurst*. *See* Death Penalty Information Center, *Florida Death-Penalty Appeals Decided in Light of Hurst* (Last updated: July 19, 2018) (identifying each case in which *Hurst* claims were granted or denied), https://deathpenaltyinfo.org/Hurst_Cases_Reviewed. Among those granted *Hurst* relief were Rodgers' codefendant Lawrence. *State v. Lawrence,* Case No. 1998-CF-270, No. 783 (Santa Rosa Cty., Fla. Mar. 27, 2017).[4]

5. On January 11, 2017, Rodgers, through new counsel, filed a timely post-conviction motion, under Florida Rule of Criminal Procedure 3.851, seeking relief under *Hurst*. Pet. App. 40a-72a.[5] By that time, however, the Florida Supreme Court had already decided *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), *cert. denied,* 137 S. Ct. 672 (2017), which also

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[4] The Florida Supreme Court has denied relief to prisoners whose jury recommendations for death were unanimous, on a theory of harmless error. *See, e.g.*, *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016). As noted above, the jury in Rodgers' first capital trial split 9 to 3 on whether to recommend a death sentence.

[5] Rule 3.851 has a one-year period of limitations, running from the time a conviction becomes final, Fla. R. Crim. P. 3.851 (d)(1), but contains an exception for claims in which "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively[.]" Fla. R. Crim. P. 3.851 (d)(2)(B). "The relevant time in which to file a claim based on a new fundamental constitutional right is one year from the date of the decision announcing that the right applies retroactively." *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018). *Mosley*, in which the Florida Supreme Court ruled that *Hurst* relief would be afforded retroactively, was announced on December 22, 2016. 209 So. 3d at 1283. Rodgers filed her petition less than one month later. Pet. App. 12a, 40a.

involved a death-row prisoner who had waived his right to an advisory jury recommendation before *Hurst* was decided, but sought relief after *Hurst v. Florida* was decided. Applying this Court's waiver jurisprudence, the Florida Supreme Court in *Mullens* held the right to a jury fact finding was waivable, so long as the waiver was "knowing, intelligent, and voluntary," as required by *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *Mullens,* 197 So. 3d at 38-40. The court then treated Mullens' knowing, intelligent, and voluntary waiver of the prior statutory right to an advisory jury recommendation as a constructive waiver of his right under *Hurst*. *Id.* The court did not address the fact that the jury recommendation right Mullens had actually waived was different from, and materially less protective than, the right announced in *Hurst*, nor that Mullens had not been informed of his rights under *Hurst* at the time of the waiver.

In her petition seeking *Hurst* relief, Rodgers argued that because a capital defendant cannot knowingly and intelligently waive a right the courts have repeatedly held does not exist. Pet. App. 49a (initial petition, making this argument); Rodgers Rule 3.851 Petition Reply Br. 3 (arguing that "[d]efendant could not waive *Hurst* relief because [she] did not have knowledge of *Hurst* at the time of the waivers"). The Florida Supreme Court rejected Rodgers' claim by simply citing its decision in *Mullens* treating waivers of Florida's statutory "jury recommendation" right adequate to constructively waive the distinct constitutional right recognized in *Hurst*. Pet. App. 1a-2a.[6]

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[6] The State also argued that Rodgers should be denied *Hurst* relief because she had waived post-conviction review in 2010,

Justice Pariente concurred "to emphasize the troubling history of Rodgers' mental illness." Pet. App. 4a. She then reviewed some of Rodgers' history, including her two attempts at "self-castration[,]" Pet. App. 8a, and the debilitating depression and severe pain caused by her untreated gender-dysphoria. Pet. App. 8a-9a.

Rodgers filed a timely motion for rehearing in the Florida Supreme Court. Pet. App. 11a. On April 24, 2018, the Florida Supreme Court denied rehearing. *Id.*

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six years before the *Hurst* claim even became available. Appellee Br. 11, *Rodgers v. State*, 242 So. 3d 276 (Fla. 2018) (No. SC 17-1050). Rodgers in turn argued that her 2010 waiver, like her 2007 waiver, could not have encompassed a future claim based on an unforeseen constitutional decision of this Court, and in any event was involuntary because of her untreated gender dysphoria. Appellant Reply Br. 3, 7-8, *Rodgers*, *supra*. *See also* Pet. App. 70a-71a (same argument in initial post-conviction motion). The Florida Supreme Court did not adopt the State's waiver of post-conviction argument, and instead based its decision solely on Rodgers' 2007 waiver of her right to a jury recommendation. Pet. App. 1a-3a.

Rodgers separately argued that her 2007 waiver was not voluntary, because her untreated gender dysphoria had rendered her suicidal, and she presented abundant evidence showing that, at the time of the 2007 waiver, she was suffering from untreated gender dysphoria resulting in her strong desire to die. *Id.* 21a-27a. The Florida Supreme Court concluded that this claim was time-barred, because the Florida courts had previously considered and rejected Rodgers' contention that she was not competent to stand trial. Pet. App. 2a. The court did not address the fact that competence to stand trial and whether a waiver is knowing, intelligent, and voluntary are very different inquiries.

REASONS FOR GRANTING THE PETITION

I. THE FLORIDA SUPREME COURT'S CONCLUSION THAT RODGERS KNOWINGLY WAIVED HER JURY RIGHTS UNDER *HURST* WHEN THOSE RIGHTS DID NOT EVEN EXIST, BASED ON HER WAIVER OF A DISTINCT AND LESSER STATE-JURY RIGHT, CONFLICTS WITH DECISIONS OF THIS COURT, FEDERAL COURTS OF APPEALS, AND STATE SUPREME COURTS.

Rodgers was sentenced to death without a jury having made the necessary findings for a death sentence under then-extant Florida law. *See Hurst*, 136 S. Ct. at 621; *Hurst*, 202 So. 3d at 53. Her claim for *Hurst* relief was timely under Florida law, Fla. R. Crim. P. 3.851 (d)(2)(B), and retroactively available because her death sentence became final after this Court's 2002 decision in *Ring v. Arizona,* 536 U.S. 584 (2002). *See Mosley*, 209 So. 3d at 1283. The court below nevertheless denied *Hurst* relief on the ground that she had waived her constitutional right under *Hurst* because—long before *Hurst* was even decided—she waived a materially different and less-protective state-law right to a jury recommendation. That conclusion conflicts with this Court's well-established waiver jurisprudence, which requires the government to bear the burden of demonstrating that a waiver of constitutional rights is "knowing, intelligent, and voluntary." *Zerbst,* 304 U.S. at 464. It also conflicts with decisions of this Court holding that waivers are right-specific, and that one cannot knowingly waive a right that does not exist.

A. Rodgers' Waiver of Her State-Law Right to a Jury Recommendation Was Not a Knowing Waiver of the Sixth Amendment Jury Right this Court Recognized for the First Time in *Hurst*.

As this Court stated in *Zerbst*, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights[,] and . . . [the Court does] 'not presume acquiescence in the loss of fundamental rights.'" 304 U.S. at 464 & nn.12 -13 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)); *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). A waiver requires "an intentional relinquishment or abandonment of a *known* right or privilege." *Zerbst*, 304 U.S. at 464 (emphasis added). To be valid, a waiver "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Applying these principles, this Court has squarely rejected the argument that a litigant knowingly and intelligently waived a right not yet recognized to exist. In *Halbert v. Michigan*, 545 U.S. 605 (2005), for example, this Court addressed, for the first time, whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment "require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier" appellate review of their convictions. 545 U.S. at 609-10. After holding that the Fourteenth Amendment

requires such appointment, the Court considered the state's argument that, regardless of the constitutional claim, the petitioner himself was not entitled to relief because he had waived the "constitutionally-guaranteed right to appointed counsel . . . by entering a plea of *nolo contendere*." *Id.* at 623. This Court rejected that argument, reasoning that "[a]t the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo." *Id.*

Similarly, in *Smith v. Yeager*, 393 U.S. 122 (1968), a state prisoner attacking his conviction via federal habeas was denied an evidentiary hearing in the district court. The denial was based on a finding that his counsel had previously waived any right to a hearing in the course of a prior habeas petition attacking the same conviction. The prior waiver, however, occurred *before* this Court had issued a decision expanding "the availability of evidentiary hearings in habeas corpus proceedings, and ma[king] mandatory much of what had previously been within the broad discretion of the District Court." *Id.* at 125 (citing *Townsend v. Sain*, 372 U.S. 293, 310, 312 (1963)). Citing *Zerbst*, the Court held that it would not presume that counsel "intentionally relinquished a known right or privilege . . . when the right or privilege was of doubtful existence at the time of the supposed waiver." *Id.* at 126.

The Florida Supreme Court's decision conflicts with both of these decisions, because it ruled that Rodgers had waived her *Hurst* right when that right did not exist. As in *Halbert,* 545 U.S. at 623, Rodgers "had no recognized right … [s]he could elect to forgo."

If anything, the principle of both *Halbert* and *Yeager* should apply with even greater force here, where not only was the Sixth Amendment jury right at issue not recognized until *Hurst*, but at the time of Rodgers' resentencing, that right had been explicitly *rejected* both by this Court and the Florida Supreme Court.

The Florida Supreme Court's decision also conflicts with the decisions of other courts holding that defendants cannot knowing waive rights that do not exist at the time they execute a waiver. *See Malvo v. Mathena*, 254 F. Supp. 3d 820, 833-834 (E.D. Va. 2017) (holding that because *Miller v. Alabama*, 567 U.S. 460 (2012), had not yet been decided at time of petitioner's guilty plea, he would not have received notice of his Eighth Amendment right announced in *Miller*, and therefore he could not possibly have knowingly waived this right), *aff'd* 893 F.3d 265 (4th Cir. 2018); *People v. Billings*, 770 N.W.3d 893 (Mich. App. 2009) (holding indigent defendants could not have knowingly and intelligently waived their *Halbert* rights because they could not have clearly understood they had the *Halbert* rights before that decision).[7]

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[7] The decision below is also in tension with decisions of federal courts of appeals and state high courts that have held that *Miranda* waivers are insufficiently knowing where police have failed to provide the standard *Miranda* warning. *See, e.g.*, *United States v. Wysinger*, 683 F.3d 784, 793-805 (7th Cir. 2012); *Hart v. Attorney Gen. of State of Fla.*, 323 F.3d 884, 894 (11th Cir. 2003). Rodgers' waiver was similarly not knowing because she did not have accurate information about the right she was purportedly waiving.

B. A Knowing and Intelligent Waiver of a Limited State Statutory Right Does Not Constitute a Knowing and Intelligent Waiver of A Related Constitutional Right.

The Florida Supreme Court's decision also conflicts with this Court's decisions holding that the waiver of one right does not somehow implicitly waive a distinct right. In *Blackledge v. Perry*, 417 U.S. 21 (1974), for example, the defendant pleaded guilty to a felony assault indictment, and then pursued habeas relief from that conviction, arguing that the State had vindictively increased his original misdemeanor assault charge to a felony assault indictment. This Court rejected the State's argument that the guilty plea waived this claim. It held that a vindictive prosecution claim implicates the "very power of the State" to prosecute, stating a due process claim against being "haled into court." *Id.* at 30-31. The right against vindictive prosecution, the Court reasoned, is therefore distinct from the trial and related rights that one waives as part of a guilty plea. *Id.*

Similarly, in *Menna v. New York*, 423 U.S. 61, 63 & n.2 (1975) (per curiam), the Court held that the rights waived as part of a guilty plea did not include the right protected by the Double Jeopardy Clause not to be charged twice. The latter guarantee, the Court reasoned, is distinct from the rights a person waives by agreeing he committed the illegal acts the prosecution has charged. And most recently, in *Class v. United States*, __ U.S. __, 138 S. Ct. 798, 804-805 (2018), this Court held that the waiver of rights that are part of a guilty plea do not amount to a valid

waiver of the distinct right to challenge the constitutionality of the statute of conviction. *See also Sause v. Bauer*, __ U.S. __, 138 S. Ct. 2561, 2563 (2018) (finding "petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address" her First Amendment claim).

In all of these cases, the Court rejected claims that the waiver of some rights implied a waiver of a distinct constitutional right. The Florida Supreme Court's conflation of Rodgers' waiver of her statutory right to an advisory jury recommendation with a constructive advance waiver of the distinct federal constitutional right announced in *Hurst* conflicts with these decisions. *See also Tisnado v. United States*, 547 F.2d 452, 460 (9th Cir. 1976) (stating in dicta: "[I]t does not necessarily follow that petitioner's waiver of a known state [constitutional] right in 1954 can be said to constitute a knowing waiver of a similar, but then as yet unknown, federal right.") (citing *Zerbst*, 304 U.S. at 464).[8]

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[8] In the speedy-trial context in particular, appellate courts finding waiver of statutory trial rights routinely review their non-waived federal constitutional counterparts. *See, e.g.*, *United States v. Tigano*, 880 F.3d 602, 617 (2d Cir. 2018) (holding that "a defendant may waive his statutory right to a speedy trial by failing to formally raise it, but not his constitutional right") (citing *Barker v. Wingo*, 407 U.S. 514, 529–30 (1972)); *State v. O'Neal*, 203 P.3d 135, 140 (N.M.App. 2008) (finding waiver of statutory six-month speedy-trial clock did not amount to knowing, voluntary, and intelligent waiver of constitutional speedy trial right, and reviewing constitutional claim on merits); *State v. Bridgeford*, 903 N.W.2d 22, 28 (Neb. 2017) (finding both defendants "permanently waived their statutory right to a speedy trial" but addressing federal speedy trial claim on the merits); *McGhee v. State*, 657 So. 2d 799, 805 (Miss.

The flip side of the rule that the waiver of one right (be it state-based or constitutional) does not constitute the waiver of a distinct constitutional right is the rule that assertion of state-law claims in state courts, even if related to federal constitutional claims, does not preserve the federal claims for review. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment."). If a state-law objection is insufficient to afford a court an opportunity to pass upon and correct a federal error, then a state-law waiver surely must be insufficient evidence under *Zerbst* on which to find a defendant's knowing and intelligent waiver of a distinct federal constitutional right.[9]

1995) (finding waiver in part of statutory speedy trial claim, but addressing merits of constitutional speedy trial claim).

[9] State high courts similarly reject state-law trial objections as sufficient to preserve federal constitutional claims for appellate review. *See, e.g.*, *People v. Valdez*, 281 P.3d 924, 966 (Ca. 2012) ("Defendant argues the prosecution's use of the challenged gang-related evidence violated not only his statutory rights, but also his constitutional rights to due process, a fair trial, and a reliable determination of guilt and penalty. He failed to assert these constitutional objections at trial."); *Brown v. State*, 755 So. 2d 616, 622-23 (Fla. 2000) (holding appellant's claim that jury instruction was unconstitutionally vague was not preserved for appellate review by counsel's state-law objections); *Lucio v. State*, 351 S.W.3d 878, 909 (Tex. Crim. App. 2011) (finding defendant's "objections in no way alerted the trial court to any claim that the State's use of this information violated her Sixth Amendment right to counsel, her Sixth

The statutory right to a jury recommendation that Rodgers waived in 2007 is not the functional equivalent of the Sixth Amendment right recognized in *Hurst*. To have a jury find all the facts necessary to impose the death sentence is critically different from having a jury make an advisory recommendation. At the time of Rodgers' 2007 trial, both this Court and the Florida Supreme Court had repeatedly denied the claims of Florida capital defendants asserting a Sixth or Eighth Amendment right to have a jury find the facts necessary to impose a death sentence. *Hildwin*, 490 U.S. at 640-41; *Spaziano*, 468 U.S. at 459; *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002). At the time of her resentencing, therefore, the only jury right Rodgers was aware of was the right to an advisory recommendation set out in Fla. Stat. § 921.141 (2), (3) (2010). Accordingly, the only jury right that the trial judge and all parties discussed at Rodgers' capital sentencing proceedings, including when accepting her purported waiver, was the right to an advisory jury *recommendation*. Transcript of Penalty Phase Hearing at 11, 16-17, 20-25, 43, 58, 69-70, 74-75, 79-83, 95, *Rodgers v. State*, 3 So. 3d 1127, 1129 (Fla. 2009) (No SC07-1652). No one even mentioned a right to have the jury find all the facts necessary to impose the death sentence—understandably, since the right did not exist at the time.[10]

Amendment right to confront the witnesses against her or any other of her constitutional rights").

[10] In *Mullens*, on which the court below relied, Pet. App. 1a-2a, the Florida Supreme Court reasoned that considering a *Hurst* claim by a defendant who had previously waived a statutory right to an advisory jury recommendation on the merits "would

As the Court held in *Hurst*, having a jury offer an advisory recommendation is not the same as having the jury find each of the elements necessary to one's death sentence. Rodgers may have knowingly waived the former. But she did not knowingly waive, and could not have knowingly waived, the latter.[11]

II. THE CONFLICT BETWEEN THE DECISION BELOW AND WAIVER JURISPRUDENCE OF THIS COURT, THE FEDERAL COURTS OF APPEALS, AND STATE SUPREME COURTS POSES A FEDERAL QUESTION OF EXTRAORDINARY CONSEQUENCE.

The question whether a party can constructively waive a right that does not yet exist, and that both the federal and state courts have expressly rejected at the time of the waiver, is a question of extraordinary importance for two reasons. First, waiver is an integral part of the civil

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encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death." *Mullens*, 197 So. 3d at 40. But at the time of Rodgers' 2007 waiver of the statutory right to an advisory jury recommendation, this Court and the Florida Supreme Court had repeatedly upheld the Florida capital sentencing scheme, including the role of judge and jury. There is no reason to believe that she, or any other prisoner waiving the statutory right pre-*Hurst*, had in mind abusing the process based on a prediction of a future successful constitutional challenge against the death sentence, requiring the overruling of multiple U.S. and Florida Supreme Court decisions.

[11] For all the same reasons, Rodgers' 2010 waiver of state post-conviction review at that time could not constitute a knowing waiver of the *Hurst* right, which did not exist as of 2010.

and criminal legal system, and questions of whether a waiver is knowing arise in thousands of cases every year. Second, the question arises here in the context of the death penalty, and could be the difference between life and death for Rodgers and several other Florida death row prisoners.

The very concept of waiver requires that an individual make an informed, autonomous, and free choice to surrender a right. A waiver is a choice, and this Court has long held that the validity of this choice turns on the exercise of an informed and free judgment. That is why the Court has long required that waivers of constitutional rights must be knowing, intelligent and voluntary, and will not be presumed. If the courts have held that the right does not exist, the individual cannot be assumed to "know" that it does. And absent knowledge that the right exists, a waiver cannot be a truly informed and autonomous decision.

The petition also presents a question of extraordinary importance because the lives of at least nine individuals hang on its resolution. For Rodgers and eight other Florida death row prisoners, it is a question of life and death. Florida has provided relief to 130 prisoners sentenced to death under the constitutionally defective "jury recommendation" system that Florida employed. *See* Statement *supra.* But it has denied relief to Rodgers and eight other similarly situated prisoners, also sentenced to death under Florida's unconstitutional system. In each case, the court has treated a pre-*Hurst* waiver of a different and lesser statutory right as a constructive advance waiver of the federal constitutional right recognized in *Hurst*. *See Hutchinson v. State*, 243 So.

3d 880, 2018 WL 1324791 (Fla. Mar. 15, 2018); *Allred v. State*, 230 So. 3d 412 (Fla. 2017); *Dessaure v. State*, 230 So. 3d 411 (Fla. 2017); *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017); *Covington v. State*, 228 So. 3d 49 (Fla. 2017); *Davis v. State*, 207 So. 3d 177 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051 (Fla. 2016); *Mullens v. State*, 197 So. 3d 16 (Fla. 2016).[12]

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION.

This case presents an ideal opportunity to decide the question presented here. First, the facts are clear—Rodgers waived only a state statutory right to an advisory jury recommendation, not a federal constitutional right to have the jury decide all the facts necessary to the imposition of a death sentence. The proceeding in which Rodgers waived her statutory right to an advisory jury recommendation leaves no doubt about that. As noted above, both the judge and defense counsel repeatedly described the right Rodgers would have at

[12] Notably, while the Florida courts have denied relief to those who waived an advisory jury recommendation, it has granted relief to defendants who failed *to* object at trial. For example, in *Evans v. State*, 946 So. 2d 1, 15 (Fla. 2006), the Florida Supreme Court found the prisoner's *Ring* claim "procedurally barred because Evans did not preserve this claim by challenging the constitutionality of Florida's sentencing scheme both at trial and on direct appeal"). But after *Hurst* was decided, Evans was afforded *Hurst* relief. *See State v. Evans*, No. 05-1998-CF-25245-AXXX-XX Order (Brevard Co. Cir. Ct. March 24, 2017) (granting *Hurst* relief). *See also State v. Doty*, 04-2011-CF-000498-A (Bradford Co. Cir. Ct. Aug 7, 2017) (granting *Hurst* relief to prisoner who at trial had appeared *pro se*, not raising any Sixth Amendment objection).

the resentencing as "a right to a jury recommendation." Transcript of Penalty Phase Hearing at 11, 16-17, 20-25, 43, 58, 69-70, 74-75, 79-83, 95. At no time was Rodgers told that she had a right to have the jury find all the requisite elements for her death sentence.

This Court denied certiorari in *Mullens v. Florida*, 137 S. Ct. 672 (2017), but that case had vehicle problems not present here. Mullens did not argue that he could not have knowingly and intelligently waived his constitutional jury right before *Hurst* was decided until seeking rehearing of the Florida Supreme Court's denial of his claim for *Hurst* relief. *See Mullens v. Florida*, No. 16-6773, Br. in Opp. 11 ("It was in the rehearing motion that Mullens, for the first time, raised the argument . . . ."). Replying to the State's opposition, Mullens then appears to have retreated from the argument presented here, stating "the question presented is not whether or not the purported waiver was 'knowing and voluntarily,' because there was no waiver." *Id.* at Pet. Reply Br. 3.

Rodgers, by contrast, consistently and promptly pursued her claim, presenting it squarely to the Florida courts, including the Florida Supreme Court. Less than one month after the Florida Supreme Court established that *Hurst* was retroactive, Rodgers brought a post-conviction challenge, raising her claim that her prior waiver could not have been a knowing and intelligent waiver of the right established years later in *Hurst*. Pet. App. 44a ("Defendant could not have anticipated at the time of the waiver that Florida's capital sentencing scheme would be ruled unconstitutional

years later in the *Hurst* decisions, and therefore could not have knowingly waived his right to ever vindicate his Sixth and Eighth Amendment rights under *Hurst*."). On appeal from that denial, she pursued her claim, arguing once again that *Mullens* was wrongly decided because a capital defendant cannot knowingly and intelligently waive a right that does not yet exist. Pet. App. 34a-37a (citing, inter alia, *Halbert v. Michigan*, 545 U.S. 605 (2005)).

The question presented is not only outcome-determinative of this appeal, but there is strong reason to believe that a jury at a new sentencing proceeding would not make the findings necessary to sentence Rodgers to death. Under current Florida law, Rodgers could only be sentenced to death if a unanimous jury made the necessary findings, including whether "aggravating factors exist which outweigh the mitigating circumstances found to exist." Fla. Stat. § 921.141 (2)(b)(2)(b) (2017). Rodgers suffered unspeakable abuse and trauma as a child, and lived her adolescent life in institutions before being released from a psychiatric hospital and shortly thereafter committing this crime. She has since remained incarcerated while enduring a painful life of untreated gender dysphoria. The mitigation in this case is significant, and indeed led in her first trial to three votes for life. A new sentencing would afford her the chance to present these facts to a jury required to find all the facts necessary to impose the death penalty.

Accordingly, this case squarely and cleanly presents a critically important question: can the waiver of a distinct statutory right constitute a knowing and intelligent waiver of a distinct

constitutional right that had not yet been recognized at the time of the waiver?

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: July 23, 2018

APPENDIX

SUPREME COURT OF FLORIDA

No. SC17-1050

JEREMIAH M. RODGERS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[February 8, 2018]

PER CURIAM.

Jeremiah M. Rodgers, a prisoner under sentence of death who waived a penalty phase jury, appeals the circuit court's summary denial of a postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851 seeking sentencing relief pursuant to *Hurst v. Florida,* 136 S. Ct. 616 (2016), and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016), *cert. denied,* 137 S. Ct. 2161 (2017). We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. [1]

We have consistently held that the *Hurst* decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury. *See, e.g., Mullens v. State,* 197 So. 3d 16, 40 (Fla. 2016) (affirming the death sentence of a defendant who waived a penalty phase jury and explaining that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent

[1] We review the summary denial of a postconviction motion de novo. *Barnes v. State*, 124 So. 3d 904, 911 (Fla. 2013).

development in the law has fundamentally undermined his sentence"), *cert. denied,* 137 S. Ct. 672 (2017); *Brant v. State,* 197 So. 3d 1051, 1079 (Fla. 2016) (concluding that the *Mullens* Court's holding in the context of a direct appeal "necessarily preclude[s]" a defendant who waived a penalty phase jury from raising a *Hurst* claim on postconviction).

Rodgers, however, seeks to avoid this result by attacking the waiver itself, arguing that an evidentiary hearing is required to determine if a recently diagnosed condition of gender dysphoria, which Rodgers contends existed at the time of the waiver, but went undiagnosed by prior evaluators, rendered Rodgers incompetent. We agree with the circuit court that the time for Rodgers to contest the prior competency determination has passed. *See* Fla. R. Crim. P. 3.851(d)(l). This Court has long since affirmed Rodgers' waiver of a penalty phase jury, *see Rodgers v. State,* 3 So. 3d 1 127, 1131-33 (Fla. 2009), and Rodgers has not proffered any newly discovered evidence that would warrant revisiting the validity of this waiver. *Cf. Raleigh v. State,* 932 So. 2d 1054, 1060 (Fla. 2006) (recognizing a "narrow exception to th[e] general procedural bar" of allowing an *Ake v. Oklahoma,* 470 U.S. 68 (1985)-type claim of inadequate mental health assistance that should have been raised on direct appeal to instead be raised on postconviction for only those cases involving "psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage") (quoting *State v. Sireci,* 502 So. 2d 1221, 1224 (Fla. 1987)).

Accordingly, we affirm the circuit court's summary denial.

It is so ordered.

LABARGA, C.J., and LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

PARIENTE, J., concurring in result.

The issue in this case is whether Rodgers' waivers of the right to a penalty phase jury and the right to postconviction proceedings and counsel should be rendered invalid because Rodgers was suffering from undiagnosed and untreated gender dysphoria[2] when he made the waivers. *See Rodgers v. State (Rodgers III),* No. SC11-1401, 104 So. 3d 1087, 2012 WL 5381782, *1-2 (Fla. Oct. 17, 2012)(unpublished); *Rodgers v. State (Rodgers II),* 3 So. 3d 1127, 1130 (Fla. 2009). Because both the trial court and this Court were aware of Rodgers' long history of mental illness in determining Rodgers' competency to make the waivers and in reviewing Rodgers' waivers, respectively, I agree that Rodgers' waivers remain valid and, therefore, he is not

[2] The American Psychiatric Association defines "gender dysphoria "as "a conflict between a person's physical or assigned gender and the gender with which he/she/they identify." *What is Gender Dysphoria?,* Am. Psychiatric Ass'n, https//www. psychiatry.org/patients-families/gender-dysphoria/what-is-gender- dysphoria (last visited Nov. 8, 2017).

entitled to *Hurst*[3] relief. *See Silvia v. State,* No. SC 17-337 (Fla. Feb. 1, 2018); *Mullens v. State,* 197 So. 3d 16, 38-40 (Fla. 2016). I write separately to emphasize the troubling history of Rodgers' mental illness.

Direct Appeal in 2006

Rodgers pleaded guilty as a principal to the first-degree murder at issue in this case. *Rodgers v. State (Rodgers I*), 934 So. 2d 1207, 1210 (Fla. 2006). Rodgers then attempted to withdraw his plea and later waived his right to a guilt phase jury trial, again entering a plea. *Id.* at 1214. After pleading guilty, Rodgers was sentenced to death following the jury's 9-3 recommendation for death. *Id.* at 1213.

On direct appeal, this Court affirmed the trial court's decision prohibiting Rodgers from withdrawing his plea, finding that Rodgers understood at the time of his plea that his attorneys disagreed on whether he should enter the plea. *Id.* at 1216. As to Rodgers' sentence of death, this Court reversed and remanded for a new penalty phase after determining that the trial court erred in excluding evidence related to two potential mitigating circumstances regarding domination by the codefendant. *Id.* at 1219-20. As to the mitigation, including Rodgers' difficult childhood and his long history of suicide attempts, this Court explained:

> Angela Mason, a social worker, reviewed a variety of records from schools, institutions, hospitals, and law

[3] *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017); *see Hurst v. Florida*, 136 S. Ct. 616 (2016).

enforcement agencies. The records contained reports that Rodgers was given his first beer at two years of age and that he reported sexual abuse by his mother numerous times, starting at age three. At fourteen, Rodgers reported that his mother had full sexual intercourse with him on multiple occasions, first getting him high on marijuana that was laced with formaldehyde. Although Child Protection Services was called about the abuse, Mason was unable to find any investigative report. Another report stated that Rodgers' father threatened to shoot him and put an unloaded gun to Rodgers' head. At school, Rodgers was placed in a class for severely emotionally disturbed children. Rodgers attempted suicide five times by the age of thirteen, including slitting his wrists in a bathtub which left physical evidence.

David Foy, a professor of psychology at Pepperdine University, reviewed Rodgers' medical records and testified that six out of the six classic risk factors for mental illness existed in Rodgers' childhood home life. Rodgers was diagnosed with post-traumatic stress disorder. Dr. Sarah Deland, a psychiatrist, testified as an expert regarding Rodgers' mental health. Dr. Deland stated that Rodgers' diagnoses were post-traumatic stress disorder,

> dissociative disorder, substance abuse in remission, and borderline personality disorder. She testified in depth about these particular diagnoses and how Rodgers' life events shaped his development.

Id. at 1213. The Court concluded: "Given the extensive mitigation which was presented in the case, including Rodgers' *significant mental health history,* we cannot say that the State has shown that there is no reasonable possibility that the error in excluding this evidence did not contribute to the sentence of death." *Id.* at 1219-20 (emphasis added).

Direct Appeal from Resentencing in 2009

On remand for resentencing, Rodgers waived his right to a penalty phase jury. *Rodgers II,* 3 So. 3d at 1130. Rodgers also waived his right and did not allow his attorneys to present evidence of mitigation other than his own testimony. *Id.* The trial court again imposed a sentence of death. *Id.* at 1128.

On appeal, this Court determined that Rodgers "clearly showed the capacity to appreciate the proceedings and the nature of possible penalties; he showed that he understood the adversarial nature of the legal process; he manifested appropriate courtroom behavior; and he was able to testify in a relevant manner." *Id.* at 1132-33. Accordingly, this Court affirmed Rodgers' sentence of death. *Id.* at 1135.

Postconviction

After this Court affirmed his sentence of death following resentencing, Rodgers waived the right to postconviction proceedings and counsel. *Rodgers III,*

2012 WL 5381782, at *1. Following a *Durocher*[4] hearing, the trial court "found Rodgers competent and issued an order discharging counsel and dismissing the proceedings." *Rodgers III,* 2012 WL 5381782, at *1.

Rodgers' discharged counsel appealed to this Court, challenging the trial court's competency finding. *Id.* at *1-2. Reviewing the record, which contained evidence of severe mental illness, this Court denied counsel's claim, stating that Rodgers had previously been found "competent to: (I) plead guilty to the crime for which [Rodgers] was convicted and sentenced to death, and (2) waive [the] right to a penalty phase jury during [the] second penalty phase, and this Court affirmed on direct appeal." *Id.* Also, the Court noted that "two mental health experts examined Rodgers in preparation for the *Durocher* hearing, and both determined that Rodgers was competent." *Id.* at 2.

This Case

Rodgers now asserts that, for most of his life, he has suffered from undiagnosed and untreated gender dysphoria, which undermines the trial court's and this Court's former findings of competency in determining that his waivers were valid. However, Rodgers does not raise his condition of gender dysphoria as a claim of newly discovered evidence or ineffective assistance of counsel. *See* per curiam op. at 2.

From the age of 14, Rodgers spent most of his life incarcerated with mental illness. In fact, Rodgers

[4] *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993).

and his codefendant, Lawrence, who Rodgers testified "appealed to [his] angry side," *Rodgers II,* 3 So. 3d at 1130, met in a mental hospital in Chattahoochee, Florida. *Rodgers I,* 934 So. 2d at 1209.

While in State custody, at the age of 14 and again at the age of 18, Rodgers attempted self-castration. Amici Curiae Br. of Am. Civil Liberties Union Foundation & Am. Civil Liberties Union of Fla.(ACLU Br.) at 5. Shortly before waiving the right to postconviction proceedings and counsel, Rodgers wrote letters to defense counsel stating that Rodgers' gender identity disorder was the driving force behind Rodgers' desire to die, stating that "gender dysphoria and the trauma and excruciating pain of [Rodgers'] life ha[d] caused [Rodgers] to lose [the] will to live and to choose death over life." *Id.* at 8. In other words, Rodgers waived both the right to a penalty phase jury and the right to postconviction while struggling with the effects of his untreated gender dysphoria. *Id.* at 6-7.

According to the record, untreated gender dysphoria can cause severe harm and lead to suicidality and debilitating depression. ACLU Br. at 4; *see* Appellant's Initial Br. at 10. In fact, when Rodgers pleaded guilty, Dr. Fredderic J. Sautter, Ph.D. (a psychologist), opined in his report that Rodgers' plea may have been influenced by his mental illness and "wish to die." Appellant's Second Resp. to State's Mot. Suppl. R. & Withdrawal Req. for Protective Order at 12, *Rodgers v. State,* No. SCOl-185 (Fla. July 12, 2004). Likewise, the ACLU suggests that Rodgers may have waived the penalty phase in an effort to commit suicide by execution to

escape the pain of the untreated condition. ACLU Br. at 2. Therefore, Rodgers' reported suicidality, self-mutilations, and severe depression are consistent with the severe symptoms of untreated gender dysphoria.

CONCLUSION

While it appears that untreated gender dysphoria has been a factor in Rodgers' mental health issues, this Court has already considered and affirmed Rodgers' waivers of a penalty phase jury, as well as postconviction proceedings and counsel, with a record indicating severe mental illness. Thus, the recent specific diagnosis of gender dysphoria, not raised as a newly discovered evidence claim, does not invalidate Rodgers' waivers. Therefore, I agree with the majority that Rodgers is not entitled to have his waivers set aside.

An Appeal from the Circuit Court in and for Santa Rosa County,

John F. Simon, Jr., Judge - Case No. 571998CF000274XXAXMX

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for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee

Nancy G. Abudu, Daniel B. Tilley, and Jacqueline Nicole Azis of ACLU Foundation of Florida, Inc., Miami, Florida,

Amicus Curiae American Civil Liberties Union Foundation of Florida, Inc.

SUPREME COURT OF FLORIDA
TUESDAY, APRIL 24, 2018

CASE NO.: SC17-1050
Lower Tribunal No(s).:
571998CF000274XXAXMX

JEREMIAH M. RODGERS vs. STATE OF FLORIDA
Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

JACQUELINE N. AZIS
DANIEL BOAZ TILLEY
BILLY H. NOLAS
CHARMAINE M. MILLSAPS
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HON. DONALD C. SPENCER, CLERK
HON. JOHN FRANKLIN SIMON, JR., JUDGE
HON. LINDA LEE NOBLES, CHIEF JUDGE
CHASE STRANGIO
CLIFTON DRAKE

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR SANTA ROSE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff**,**

v. **Case No: 1998-CF-0274**

JEREMIAH MARTEL RODGERS,
Defendant**.**

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE is before this Court after a case management conference held on April 21, 2017, on "Defendant's Rule 3.851 Motion for Post-Conviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*" filed by and through counsel on January 11, 2017, the "State's Answer to Successive 3.851 Postconviction Motion" filed on February 14, 2017, and "Defendant's Reply" filed by and through counsel on February 27, 2017, all pursuant to Florida Rule of Criminal Procedure 3.851. Having carefully considered Defendant's motion, the State's answer, Defendant's reply, the arguments presented at the case management conference, the record, and applicable law, the Court finds that Defendant's motion should be denied without an evidentiary hearing.

Defendant waived his second penalty phase jury. He also discharged postconviction counsel and waived postconviction proceedings. *See* Fla. R. Crim. P. 3.850(i). This Court and the Florida Supreme

Court found the waivers to be valid. *See Rodgers v. State*, 3 So. 3d 1127, 1132-33 (Fla. 2009); *Rodgers v. State*, 104 So. 3d 1087 (Fla. 2012) (Table). Although Defendant is now claiming that the waivers were not valid, such claims are not properly before this Court because the instant motion (1) was filed beyond the time limitation provided in rule 3.851(d)(1) and (2) does not allege that the claims are predicated on facts that were unknown to Defendant or his counsel and could not have been ascertained by the exercise of due diligence. *See* Fla. R. Crim. P. 3.85l(d)(2)(A). Consequently, the waivers stand, and Defendant is not entitled to relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), or *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Wright v. State*, 2017 WL 1064515, *17 (Fla. Mar. 16, 2017); *Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016); *Knight v. State*, 211 So. 3d 1, 4 n.2 (Fla. 2016). *Robertson v. State*, 2016 WL 7043020, *1 n.l, *2-3 (Fla. Dec. 1, 2016); *Davis v. State*, 207 So. 3d 177,212 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016); *Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016).

Accordingly, it is **ORDERED AND ADJUDGED** that "Defendant's Rule 3.851 Motion for Post-Conviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*" is DENIED. Defendant has the right to appeal within 30 days of the rendition of this order.

DONE AND ORDERED in Chambers at the Santa Rosa County Courthouse, Milton, Florida.

JFS/cl

JOHN F. SIMON, JR.
CIRCUIT JUDGE

IN THE
SUPREME COURT OF FLORIDA

No. SC17-1050

JEREMIAH RODGERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

APPELLANT'S BRIEF IN RESPONSE TO SHOW CAUSE ORDER

INTRODUCTION[1]

This appeal asks the Court to review the circuit court's failure to hold an evidentiary hearing and summary denial of relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), on the basis of invalid jury sentencing and post-conviction waivers. The circuit court erred in denying *Hurst* relief without a hearing because, unlike in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), Appellant Jeremiah Rodgers proffered evidence indicating that his waivers were invalid due to an undiscovered mental condition, gender dysphoria, that prevented him from knowingly and voluntarily

[1] Appellant has provided a condensed brief here per this Court's order, but requests the opportunity to provide the Court with a full appellate brief consistent with Fla. R. App. P. 9.210, allowing the opportunity to fully present all of his issues on appeal.

surrendering his rights.[2]

Appellant proffered two expert opinions from highly-qualified psychiatrists indicating that gender dysphoria rendered his waivers involuntary. The proffered evidence showed that prior examiners who found Appellant competent at the time of his waivers performed grossly insufficient evaluations, ignoring clear signs of gender dysphoria. Those flawed evaluations cannot support the circuit court's summary denial of *Hurst* relief. This is a case where an evidentiary hearing is necessary. A hearing will establish that the waivers were not knowing and voluntary. Because his waivers were invalid, Appellant should be afforded the same *Hurst* relief this Court has extended to dozens of individuals whose death sentences, like Appellant's, became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (holding that *Hurst* is retroactive to all post-*Ring* death sentences). Appellant's first sentencing jury recommended the death penalty by a 9-3 vote, thus

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[2] Assistant Attorney General Charmaine Millsaps, representing the State, acknowledged at an April 2017 hearing that "I don't dispute this diagnosis," and that "some diagnosis like this is in the record." ROA at 151. The majority of Appellant's life has been spent in horrific environments with extensive sexual, physical, and emotional abuse, in civil confinement facilities, or in prison. In all of these circumstances, Appellant learned that suppression of the truth of his gender was necessary for his survival even though he has known since childhood that his true gender is female. Appellant uses the male pronouns of "he" and "him" in this brief for consistency with the record, though in the future it will be more appropriate and consistent with prevailing medical standards and legal norms to refer to Appellant by the pronouns of "she" and "her".

obviating potential harmless-error concerns under this Court's harmless error precedent.[3]

Even if this Court does not agree that the circuit court should have held a hearing to allow Appellant to present evidence regarding the validity of his waivers, the present appeal should not be summarily rejected. For instance, even if Appellant validly waived his right to a second penalty jury, he could not have anticipated at the time of the waiver that Florida's capital sentencing statute would be ruled unconstitutional years later in the *Hurst* decisions, and therefore could not have knowingly waived his Sixth and Eighth Amendment arguments under *Hurst*. In addition, Appellant has arguments to present that *Mullens* itself contravenes federal law. In particular, under *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), Appellant could not have waived his rights to jury factfinding and juror unanimity because those rights were not recognized by Florida courts at the time he entered his waivers.

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

REQUEST FOR ORAL ARGUMENT

This appeal presents important issues regarding the intersection of *Hurst* and Appellant's right to a hearing on credible new evidence

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[3] Of note, Appellant's co-defendant, whose jury recommended death by an 11-1 vote, was granted *Hurst* relief. *State v. Lawrence*, Case No. 1998-CF-270, No. 783 (Santa Rosa Cty., Fla. Mar. 27, 2017).

indicating that his jury and post-conviction waivers were invalid due to an undiscovered mental condition. Accordingly, Appellant respectfully requests the opportunity for his counsel to present oral argument on these issues pursuant to Fla. R. App. P. 9.320.

BACKGROUND

In 1998, Appellant pleaded guilty to murder. *Rodgers v. State,* 934 So. 2d 1207, 1210 (Fla. 2006). An advisory jury recommended a death sentence by a vote of 9 to 3. *Id.* The court, not the jury, then made the critical findings of fact required to impose a sentence of death. *Id.* The court, not the jury, made findings of fact that aggravating factors had been proven beyond a reasonable doubt, that the aggravators were sufficient to justify the imposition of the death penalty, and that the aggravators were not outweighed by the mitigation.[4]

On direct appeal, Appellant challenged Florida's capital sentencing scheme under *Ring*.

[4] The court found two aggravators: (1) Appellant was previously convicted of a violent felony; and (2) the offense was cold, calculated, and premeditated. *Rodgers*, 3 So. 3d at 1131. The court found multiple mitigators: (1) Appellant's youth; (2) Appellant was sexually abused by his mother; he was physically abused by his father; Appellant's parents abandoned him; his parents abused drugs and alcohol; his family had a legacy of domestic violence; and there was a history of suicide among Appellant's relatives; (2) at the age of sixteen, Appellant was incarcerated as an adult and was sexually abused in prison; (3) Appellant suffered from mental illness; (4) Appellant had a positive impact on the inmate population; (5) Appellant expressed genuine remorse for the murder; and (6) Appellant provided assistance to officers in solving prior crimes. *Id.*

Initial Br. at 99 ("*Ring* applies to Florida's capital sentencing scheme."). This Court affirmed Appellant's conviction but reversed his death sentence and remanded for a new penalty phase, concluding that the trial court had improperly excluded mitigation showing that Appellant had been under the substantial domination of his more culpable co-defendant. *Rodgers,* 934 So. 2d at 1220 ("Given the extensive mitigation which was presented in the case, including Rodgers' significant mental health history, we cannot say that the State has shown that there is no reasonable possibility that the error in excluding this evidence did not contribute to the sentence of death."). The Court did not address the *Ring* claim.

Shortly after jury selection for the second penalty phase, Appellant stated to the judge: "I can count on a death sentence with you I feel, but with this jury, I mean, it could go six/six or I don't know how it's going to go; but I say go without the jury." *Rodgers v. State*, 3 So. 3d 1127, 1130 (Fla. 2009). The court again made the findings necessary to impose a death sentence. The court found that the same aggravating factors that it found at the first sentencing, that those aggravators were sufficient for the death penalty, and that those aggravators were not outweighed by the same mitigating circumstances found at the first sentencing. *Id.* at 1131. This Court affirmed. *Id.* at 1135.

On July 5, 2010, after post-conviction counsel had been appointed, Appellant wrote the circuit court a letter, seeking to end further appeals and to expedite the execution process. In 2011, the circuit court ruled that Appellant had competently

discharged his appointed counsel and waived post-conviction proceedings. Appellant's discharged counsel unsuccessfully appealed that ruling. *Rodgers v. State,* 104 So. 3d 1087 (2012).

On January 11, 2017, Appellant filed a Rule 3.851 motion in the circuit court seeking relief under *Hurst v. Florida* and *Hurst v. State*. In his motion, Appellant proffered evidence, in the form of two expert opinions from highly-qualified psychiatrists, indicating that previous mental health examiners had overlooked evidence of gender dysphoria, a condition that prevented him from knowingly and voluntarily waiving his rights. Appellant requested an evidentiary hearing regarding the validity of his waivers. On May 27, 2017, the circuit court summarily denied *Hurst* relief without a hearing, ruling that Appellant's waivers barred *Hurst* relief regardless of questions as to their validity. This appeal followed.

ARGUMENT

I. Appellant, who proffered evidence to the circuit court that previous mental-health examiners overlooked Appellant's severe mental illness that rendered his waivers invalid, is not precluded from *Hurst* relief and should be afforded an evidentiary hearing

A. Under *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), and *Wright v. State,* 213 So. 3d 881 (Fla. 2017), only valid waivers preclude *Hurst* relief

Appellant should have been afforded an

evidentiary hearing after he proffered evidence challenging the validity of his waivers because, under this Court's decisions in *Mullens* and *Wright v. State*, 213 So. 3d 881 (Fla. 2017), only valid waivers preclude *Hurst* relief. This Court denies *Hurst* relief based on waivers only after the defendant is afforded the opportunity to present evidence in the circuit court showing that a waiver was not knowing and voluntary, and only after this Court concludes based on the record that the waivers were knowing and voluntary.

In *Wright*, the defendant alleged he was entitled to *Hurst* relief because his intellectual disability rendered his jury waiver invalid. *See Wright*, 213 So. 3d at 902-03. This Court did not summarily reject Wright's claim. *Id.* at 903. Rather, the Court denied relief only after concluding that Wright "was not intellectually disabled under Florida law." *Id.* The Court relied, in part, on *two evidentiary hearings* that the circuit court afforded Wright to present evidence of his intellectual disability. *Id.* at 896. In *Mullens*, the Court noted that "neither party dispute[d] his competency." 197 So. 3d at 38. Further, the circuit court "conducted a thorough colloquy" prior to accepting his waiver and "was fully cognizant of Mullens's status and his background." *Id.* at 39. Based on the parties' concessions and the evidentiary record created below, this Court "conclude[d] that Mullens's waiver was knowing, voluntary, and intelligent." *Id.*

Here, unlike in *Wright* or *Mullens*, Appellant proffered evidence to the circuit court that his waivers were not knowing, voluntary, and intelligent, but Appellant was not afforded a hearing.

B. Appellant's gender dysphoria rendered his waivers invalid

Appellant proffered the following evidence to the circuit court in support of his argument that his waivers were not a valid basis to deny *Hurst* relief. This proffer shows that Appellant's gender dysphoria rendered his waivers invalid. Appellant should be afforded a hearing.

Gender dysphoria, previously known as gender identity disorder,[5] is a serious medical condition that requires medical care and causes an individual severe distress and, as with Appellant's "waivers", self-destructive actions.[6] *See Meriwether v. Faulkner*,

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[5] Gender dysphoria was previously known as "Gender Identity Disorder" in the earlier Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), which was published in 1994, but was overlooked by the earlier psychologists who assessed competency. The DSM-IV noted that cross-gender identification for males could be shown by a marked preoccupation with "traditionally feminine activities," including a preference for dressing in women's clothing, a strong attraction for the stereotypical games and activities of women, and pretending the individual does not have a penis, often finding "their penis or testes disgusting, that they want to remove them, or that they have, or wish to have a vagina." DSM-IV at 533. Additionally, the DSM-IV noted that the diagnosis of gender identity disorder may be difficult because of the individual's guardedness, and that the individual will often be fearful of social isolation and rejection.

[6] In recent years, more attention has been given to gender dysphoria, particularly in notable cases like that of Chelsea Elizabeth Manning. Manning, who was a United States Army soldier convicted of various violations of the Espionage Act, was diagnosed with and later provided medical treatment for gender dysphoria. Such treatment included hormone therapy, the ability to wear female undergarments, use cosmetics in her daily life, and speech therapy. *See, e.g.*, Charlie Savage, *Chelsea*

821 F.2d 408, 413 (7th Cir. 1987) (explaining that gender dysphoria is a serious medical condition and noting that "[t]here is no reason to treat transsexualism differently than any other psychiatric disorder"); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) ("psychological disorders may constitute a serious medical need . . . [w]e have also recognized that transsexualism is a very complex medical and psychological problem."). People with gender dysphoria typically suffer persistent anxiety, intense discomfort, and overwhelming depression over their assigned sex.[7] Abuse and mistreatment makes the condition exponentially worse, leading to self- destructive behaviors.[8]

Manning Describes Bleak Life in a Men's Prison, The New York Times, https://www.nytimes.com/2017/01/13/us/chelsea-manning-sentence-obama.html?mcubz=2.

[7] A diagnosis of gender dysphoria under the DSM-V requires at least one of the following: (1) a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics; (2) a strong desire to be rid of one's primary and/or secondary sex characteristics; (3) a strong desire for the primary and/or secondary sex characteristics of the other gender; (4) a strong desire to be of the other gender; (5) a strong desire to be treated as the other gender; (6) a strong conviction that one has the typical feelings and reactions of the other gender.

[8] Numerous surveys and studies show that gender non-conforming individuals experience a significantly elevated risk of suicide attempts. *See* Ann P. Haas et al., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults*, American Foundation for Suicide Prevention (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf; *see also* Ann Hendershott, *Chelsea Manning and Transgender Suicide Rates*, The Washington Times, http://www.washingtontimes.com/news/2016/jul/12/chelsea-manning-and-transgender-suicide-rates/.

As was proffered in the circuit court, Appellant's medical history was recently assessed by two experts, Dr. George Brown, one of the foremost gender dysphoria experts in the country, and Dr. Julie Kessel, a medical doctor certified in psychiatry and neurology, who diagnosed Appellant with gender dysphoria. Dr. Kessel noted that Appellant's lifelong gender dysphoria has considerably impacted his mental state, including his thinking at the time of his waivers. Specifically, she concluded that there is "substantial doubt as to whether his waiver of his right to a jury at his second penalty phase" and "waiver of his right to seek initial post-conviction review" were "knowing and voluntary." ROA at 58. Dr. Kessel noted that Appellant has long been preoccupied by his desire to be a girl, a preoccupation that started in his preadolescent years and became more pronounced during his teenage years. ROA at 58. Dr. Kessel noted that Appellant's correctional institutional records reflect that Appellant previously *attempted to cut off his penis at the age of 14*; that a mental health worker, during prior incarceration, diagnosed Appellant with "Gender Disorder NOS"; and that Appellant often attempted to commit suicide and self-mutilate. ROA at 59-60. It was Dr. Kessel who, for the first time in Appellant's life, actually gathered the information about Appellant's sexual identity and gender issues and diagnosed him with severe gender dysphoria.

Dr. Brown also noted the documentation of Appellant's sexual identity and gender issues, self-mutilation, suicidal actions, and horrific upbringing. Dr. Brown noted that it was not until Dr. Kessel's 2016 evaluation that Appellant was actually diagnosed with this detrimental psychiatric condition

that occurs in people suffering from untreated gender dysphoria. Dr. Brown explained: "In spite of the documentation going back to at least 1995, the evaluators for competency at all stages of his case through 2011 do not appear to explore or consider the diagnosis of gender identity disorder as an important and relevant psychiatric disorder than can impact competent decision-making." ROA at 68

Dr. Brown agreed with Dr. Kessel that it is clear that there is a "high likelihood that [Appellant] has been suffering from, and has been deeply influenced by gender dysphoria, and associate life-permeating symptoms and relational problems emanating from this psychiatric diagnosis." ROA at 69-70. Further, Dr. Brown stated: "It is clear to me that Gender Identity Disorder should have been a consideration" in the earlier proceedings "but it is not until 2016 that Dr. Kessel . . . reached the conclusion that the presence of previously undiagnosed, and untreated, gender identity disorder calls into question the voluntary and knowing nature of [Appellant]'s decision to waive his rights to further appeals." ROA at 70.

Dr. Brown explained that the environments that Appellant grew up in would be "expected to support nothing but shame, a sense of disgust and self-loathing, and self-destructive behaviors." ROA at 69. He noted that such environments and experiences would "in no way facilitate his ability to share, discuss, or act upon any transgender feelings without fear for his life." *Id.* As such, Dr. Brown explained that Appellant's internalized shame and self-destructiveness in the form of suicidal self-harming behaviors was consistent with the research

about gender dysphoria. *Id.* Dr. Brown explained that the phenomena of "suicide by cop"-whereby individuals attempt to "make" the law enforcement officers engage in lethal force against them-applies here. It is the reason Appellant attempted to obtain a death sentence and waive his rights. ROA at 70. Dr. Brown noted that the presence of untreated gender dysphoria was associated with shame, self-hatred, and self-destructiveness that cumulated in waivers at the penalty phase and in post-conviction review. Dr. Brown highlighted that there is substantial doubt as to whether either of these waivers were voluntary or knowing on Appellant's behalf. ROA at 70-71.

Extensive documentation pre-dating the offense shows that Appellant has suffered significant gender issues. In 1995, Laura A. Parado, M.D., documented Appellant's widespread self-mutilating behaviors, cutting behaviors, self-harm behaviors, his suicidal ideation, and his improper psychotic functioning as all "related to sexual identity/guilt issues." Dr. Parado also noted that, at the age of 18, Appellant attempted an autopenectomy (cutting off his penis) which required additional extensive medical and psychiatric care. This was not the first time Appellant had attempted an autopenectomy-he previously attempted one at the age of 14.

In 1996, J. Brennan, MS, noted that Appellant was suffering from gender identity disorder, impulse control, and borderline personality disorders. That same year, Dr. Valero noted that "[inmate] tends to self-lacerate over his sexual/gender identity issue." Again that year, another state-employed clinician, Dr. Norma Torres, a senior psychologist at

Corrections Mental Health Institution, noted that Appellant brought up issues regarding his sexual and gender identity, which was likely to be the root of all his problems. The psychologists who evaluated Appellant for competency, Dr. Harry McClaren and Dr. Greg Pritchard, did not describe this evidence for the court at the time of the waivers.

In addition to such entries from mental health practitioners predating the offense in Appellant's case, all of which demonstrate that Appellant has historically suffered from severe gender and sexual issues, there is additional documentation regarding his immensely violent, impoverished, and abusive upbringing. Appellant spent his developing years being beaten and raped by his mentally disturbed mother. At her behest, he was often emotionally debased, and lived in constant fear for his life. Appellant later went to live with his father, who was, like Appellant's mother, severely emotionally and physically abusive. He often berated Appellant, making him fearful of ever sharing his desires to be a girl and how out of place he felt in his own body. Appellant's later adolescent years were characterized by similar cruelty and violence as he spent many years in correctional institutions where he was raped and brutalized. Appellant's horrendous background created immense mental and emotional issues, leading to time spent in mental institutions. It was at one such state mental hospital, the Florida State Hospital, in Chattahoochee where Appellant became acquainted with his co-defendant in this case.

The entirety of Appellant's history, including the documentation of his gender and sexual issues, was never analyzed or adequately diagnosed prior to

Dr. Kessel's diagnosis in 2016. As such, the underlying gender dysphoria diagnosis that has greatly affected Appellant throughout his life, and has thus impacted his competency and the validity of his "waivers," has never been presented to any court in the past.

C. The prior mental-health examiners rendered insufficient competency evaluations, in violation of Appellant's rights to equal protection and due process, and the substantial doubts about the validity of Appellant's waivers necessitate a hearing

In order to be afforded a post-conviction hearing on prior competency and whether waivers were knowing, intelligent, and voluntary, the defendant must proffer that there is a substantial doubt about the prior determinations. *See, e.g.*, *Barnes v. State*, 124 So. 3d 904, 916 (Fla. 2013) ("real, substantial, and legitimate doubt"); *Nelson v. State*, 43 So. 3d 20, 33 (Fla. 2010) ("real, substantial and legitimate doubt"); *see also Drope v. Missouri*, 420 U.S. 162, 173 (1975) ("bona fide doubt"); *Wright v. Sec'y Dept. of Corrs.*, 278 F.3d 1245, 1259 (11th Cir. 2002) ("real, substantial, and legitimate doubt"); *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995) ("substantial doubt," "bona fide doubt," or "legitimate doubt"); *James v. Singletary*, 957 F.2d 1562, 1575 (11th Cir. 1992) ("substantial doubt"); *Bundy v. Dugger*, 816 F. 2d 564, 566 (11th Cir. 1987) ("real, substantial and legitimate doubt"). Appellant has proffered two psychiatric reports that provide conclusions establishing such a substantial doubt

and has proffered evidence about a medical history consistent with the post-conviction diagnosis.

The prior mental health examiners, whose evaluations were considered in determining Appellant's competency, rendered insufficient evaluations in violations of Appellant's due process and equal protection rights. Under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), defendants have due process and equal protection rights to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Mann v. State*, 770 So. 2d 1158, 1164 (Fla. 2000) (internal quotation marks omitted). An exception was carved out by this Court in *State v. Sireci*, 502 So. 2d 1221, 1223-24 (Fla. 1987), where this Court recognized that a defendant can litigate a claim in post-conviction that a previous mental-health examiner rendered a grossly insufficient evaluation. Here, Appellant did not discover that an underlying serious medical condition rendering him incompetent was overlooked by previous medical professionals until he was evaluated by Dr. Kessel. His claim, which challenged the validity of the prior "waiver" evaluations, is properly raised in his motion for post-conviction relief.

The reasoning in *Mullens* and *Wright* that only valid waivers preclude *Hurst* relief is consistent with this Court's precedent in *Sireci* and *Mason v. State*, 489 So. 2d 734 (1986). According to *Sireci* and *Mason*, Appellant is entitled to an evidentiary hearing to present his claim that his prior competency evaluations were inadequate and in violation of his rights to due process and equal

protection, and that he did not voluntarily "waive."

In *Mason*, this Court stayed the defendant's death warrant to consider whether the circuit court erred in refusing to grant him an evidentiary hearing on his claim that previous mental-health experts, on which the court relied to conclude that he was competent, rendered inadequate evaluations. *Mason*, 489 So. 2d at 735. Two previous mental-health examiners found Mason competent during proceedings on a prior charge. *Id.* Then, at his murder trial, one of the aforementioned psychiatrists and a third psychiatrist again found Mason competent. *Id.* at 736. In his post- conviction proceeding, Mason proffered evidence of a "history of mental retardation, drug abuse and psychotic behavior" which were not previously uncovered. *Id.* The circuit court summarily denied Mason's motion for post-conviction relief.

Subsequently, this Court unanimously remanded for an evidentiary history stating that "too great a risk exist[ed] that these determinations of competency were flawed as neglecting a history indicative of organic brain damage." *Id.* at 736-37.

> Because Mason has since proffered significant evidence of an extensive history of mental retardation, drug abuse and psychotic behavior which were not uncovered by defense counsel, and because a possibility exists that this evidence was not considered by the evaluating psychiatrists, however, we must remand for a hearing on whether or not the examining psychiatrists would have reached the same conclusion

> as to competency had they been fully aware of Mason's history.
>
> *Id.* at 736.

In *Sireci*, after issuance of his death warrant, the defendant argued in his successive Rule 3.850 motion that two court-appointed mental-health examiners at trial failed to conduct adequate and competent evaluations. 502 So. 2d at 1223. During a subsequent post-conviction proceeding, another mental-health examiner considered Sireci's past medical history and reached "a vastly different conclusion" as to his competency. *Id.* In particular, "[t]he third psychiatrist concluded that Sireci suffered from a form of organic brain damage and paranoid psychosis." *Id.* Based on this evidence, the circuit court granted Sireci's application for a hearing to determine whether Sireci was competent to enter a waiver. *Id.* The state argued on appeal that Sireci's claim was not cognizable in post-conviction review. *Id.* This Court concluded that "Sireci's claim regarding incompetent psychiatric evaluations is cognizable under a successive motion for post-conviction relief," and affirmed the trial court's order granting an evidentiary hearing. *Id.* at 1224.

Appellant, like Mason and Sireci, proffered significant evidence that his previous mental-health examiners rendered grossly insufficient evaluations. In particular, he proffered the expert reports of Drs. Kessel and Brown. Those reports conclude that Appellant suffered from severe gender dysphoria at the time of his "waivers," that Appellant's previous mental-health examiners overlooked clear signs of his severe gender dysphoria, and that Appellant was

not competent at the time of his waivers-a conclusion vastly different than the previous examiners who found Appellant competent. In his filings and at oral argument in the circuit court, Appellant pointed to these expert reports and evidence of his gender dysphoria that the previous examiners did not consider. Given this evidence, the circuit court should have granted Appellant a hearing.

D. Even if Appellant's "waivers" were valid, his "waivers" do not preclude relief

Even if Appellant had validly waived, he could not have anticipated that Florida's capital sentencing statute would be ruled unconstitutional years later in the *Hurst* decisions, and therefore could not have knowingly waived his right to ever vindicate his Sixth and Eighth Amendment rights. Moreover, absent the trial court's unrelated constitutional errors during the first penalty phase, which obligated this Court to order re-sentencing, there never would have been a second penalty phase, and Appellant would be entitled to seek *Hurst* relief today. It would be fundamentally unfair to deny Appellant the benefit of *Hurst* for this reason as well.

This Court has explained that fundamental fairness is a consideration in *Hurst* cases. *See Mosley*, 209 So. 3d at 1274-75. Fundamental fairness favors relief under the *Hurst* decisions in Appellant's case.

II. In light of the invalidity of his waivers to bar *Hurst* relief, Appellant, whose first jury recommended death by a 9-3 vote and whose death sentence became final after *Ring*, should be granted *Hurst* relief

In light of the invalidity of his waivers, *Hurst* relief is appropriate under this Court's precedent, which establishes that a new penalty phase should be ordered where the defendant's death sentence became final after *Ring* and the State cannot establish harmlessness beyond a reasonable doubt. Appellant's death sentence became final in 2009, after *Ring*, and the State cannot establish harmlessness in his case became multiple jurors during Appellant's first penalty phase recommended that the death penalty not be imposed.

Appellant's death sentence became final in 2009. This Court's precedent establishes that *Hurst* applies retroactively to death sentences that became "final" after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) ("We have also determined that most defendants sentenced to death after the *Ring* decision should receive the benefit of *Hurst*.").

This Court has uniformly held that *Hurst* errors are not harmless where the jury recommended the death penalty by a non-unanimous vote. Petitioner's first jury voted for death by a non-unanimous vote of 9-3. In numerous other cases with non- unanimous votes, this Court has granted relief, vacated the death sentence, and remanded for a new penalty phase that complies with the *Hurst*

decisions.[9]

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[9] *See, e.g.*, *Johnson v. State,* 205 So. 3d 1285, 1288 (11-1 jury vote); *McGirth v. State,* 209 So. 3d 1146, 1164 (Fla. 2017) (11-1); *Durousseau v. State,* 218 So. 3d 405, 409 (Fla. 2017) (10-2); *Kopsho v. State*, 209 So. 3d 568, 569 (Fla. 2017) (10-2); *Hodges v. State,* 213 So. 3d 863, 868 (Fla. 2017) (10-2); *Smith v. State,* 213 So. 3d 722, 744 (Fla. 2017) (10-2 and 9-3); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (9-3); *Hojan v. State*, 212 So. 3d 982, 987 (Fla. 2017) (9-3); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2016) (9-3); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2017) (9-3); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (8-4); *Mosley*, 209 So. 3d at 1283-84 (8-4); *Dubose v. State,* 210 So. 3d 641, 657 (Fla. 2017) (8-4); *Anderson v. State*, No. SC14-881, 2017 WL 930924, at *12 (Fla. Mar. 9, 2017) (8-4); *Calloway v. State*, 210 So. 3d 1160, 1166 (Fla. 2017) (7-5); *Hurst v. State*, 202 So. 3d at 69 (7-5); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235 (Fla. Mar. 10, 2017) (9-3 and 11-1); *Ault* v. *State*, 213 So. 3d 670, 680 (Fla. 2017) (9-3 and 10-2); *Jackson v. State,* 213 So. 3d 754, 768 (Fla. 2017) (11-1); *Baker v. State*, 214 So. 3d 530, 534 (Fla. 2017) (9-3); *Deviney v. State*, 213 So. 3d 794, 795 (Fla. 2017) (8-4); *Orme v. State*, Nos. SC13-819, SC14-22, 2017 WL 1177611 (Fla. Mar. 30, 2017) (11-1); *Bradley v. State*, 214 So. 3d 648, 657 (Fla. 2017) (10-2); *White v. State*, 214 So. 3d 541, 543 (Fla. 2017) (8-4); *Guzman v. State*, 214 So. 3d 625, 628 (Fla. 2017) (7-5); *Abdool v. State*, Nos. SC14-582, SC14-2039, 2017 WL 1282105, at *8 (Fla. April 6, 2017) (10-2); *Newberry v. State*, 214 So. 3d 562, 567 (Fla. 2017) (8-4); *Heyne v. State*, 214 So. 3d 640, 647 (Fla. 2017) (10-2); *Robards v. State*, 214 So. 3d 568, 571 (Fla. 2017) (7-5 and 7-5); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2); *Brookins v. State*, No. SC14-418, 2017 WL 1409664, at *7 (Fla. April 20, 2017) (10-2); *Banks v. Jones*, Nos. SC14-979, SC15-297, 2017 WL 1409666, at *9 (Fla. April 20, 2017) (10-2); *Altersberger v. State*, Nos. SC15-628, SC15-1612, 2017 WL 1506855, at *7 (Fla. April 27, 2017) (9-3); *Hampton v. State*, Nos. SC15-1360, SC-16-6, 2017 WL 1739237, at *3 (Fla. May 4, 2017) (9-3); *Card v. Jones*, No. SC17-453, 2017 WL 1743835, at *1 (Fla. May 4, 2017) (11-1); *Pasha v. State*, No. SC13-1551, 2017 WL 1954975, at *3 (Fla. May 11, 2017) (11-1 and 11-1); *Serrano v. State*, Nos. SC15-258, SC15-2005, 2017 WL 1954980, at *15 (Fla. May 11, 2017) (9-3);

III. Even if Appellant's waivers were valid, *Hurst* relief is appropriate under *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), a case not considered in *Mullens*, that holds a defendant cannot waive a right not yet recognized by the courts

Even if Appellant's waivers were valid from a mental health perspective, the present appeal should not be summarily rejected. Appellant has arguments not presented in *Mullens* that demonstrate that *Mullens* should not control here. Given that Appellant could not have anticipated at the time of the waivers that Florida's capital sentencing statute would be ruled unconstitutional years later in the *Hurst* decisions, he could not have knowingly waived his Sixth and Eighth Amendment arguments under *Hurst*.

In particular, United States Supreme Court precedent establishes that Appellant could not have waived his right to jury factfinding or a unanimous penalty-phase jury because those rights were not yet recognized by the courts. Under *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), a defendant cannot waive a

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Snelgrove v. State, Nos. SC15-1659, SC16-124, 2017 WL 1954978, at *3 (Fla. May 11, 2017) (8-4 and 8-4); *Davis v. State*, No. SC15-1794, 2017 WL 1954979, at *11 (Fla. May 11, 2017) (9-3 and 10-2); *Hernandez v. Jones*, No. SC17-440, 2017 WL 1954985, at *1 (Fla. May 11, 2017) (nonunanimous) *Caylor v. State*, Nos. SC15-1823, SC16-399, 2017 WL 2210386, at *1 (Fla. May 18, 2017) (8-4); *Hertz v. Jones*, No. SC17-456, 2017 WL 2210402, at *3 (Fla. May 18, 2017) (10-2); *Okafor v. State,* No. SC15-2136, 2017 WL 2481266, at *3 (Fla. June 8, 2017) (11-1); *Belcher v. Jones*, SC17-1144 (Fla. Jun 22, 2017) (9-3); *Taylor v. Jones*, SC17-1145 (Fla. Jun. 22, 2017) (10-2); *Bailey v. Jones*, SC17-433, 2017 WL 2874121, at *1 (Fla. Jul. 6, 2017) (11-1).

right not yet recognized by the courts. *See also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or privilege." (emphasis added)). Indeed, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and [] do not presume acquiescence in the loss of fundamental rights." *Johnson*, 304 U.S. at 464 (internal quotation marks omitted). This Court did not discuss, or even cite, *Halbert* in *Mullens*.

In *Halbert*, the United States Supreme Court recognized that where the Michigan appellate courts considered the merits of the claim in ruling on a motion for leave to appeal, a defendant has a constitutional right to appointed counsel in filing the motion for leave to appeal. 545 U.S. at 618-19. Relevant here, Michigan argued that even if the defendant had a constitutional right to appointed counsel he had waived that right when he pleaded *nolo contendere*. *Id.* at 623. The Supreme Court disagreed, holding that the defendant did not waive his right to counsel because at the time he entered the plea he "had no recognized right to appointed appellate counsel he could elect to forgo." *Id.*

Under the reasoning of *Halbert*, a case not considered by this Court in *Mullens* or in *Wright*, Appellant is not precluded from *Hurst* relief. At the time Appellant entered his waivers, Florida courts could impose a death sentence without jury factfinding and without a unanimous jury vote. Appellant, therefore, could have waived only the right to a jury recommendation of life or death and a non-unanimous jury recommendation-not his later-

recognized constitutional rights to jury factfinding and a unanimous jury.

Not only does *Mullens* not consider the reasoning of *Halbert*, it also cites to waiver cases that are inapposite to waivers in Florida's *Hurst* setting. For instance, the *Mullens* court noted that in *Blakely v. Washington*, 542 U.S. 296, 310 (2004), the United States Supreme Court stated that after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a defendant could still waive his rights to jury factfinding-a right recognized first in *Apprendi*-and consent to judicial factfinding. *Blakely* does not hold, as suggested in *Mullens*, that a defendant could waive jury factfinding before that right was recognized by the courts. To interpret *Blakely's dicta* otherwise would be contrary to the clear holding of *Halbert*.

Mullens then cites to cases from other jurisdictions as persuasive, stating that "[o]ther states have reached similar conclusions in the context of capital sentencing. In states where defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing, courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding." *Mullens*, 197 So. 3d at 38. But, in most of those cases, the defendants, unlike Appellant, already had state statutory rights to jury factfinding at sentencing that they explicitly waived.

For instance, the defendant in *State ex rel. Taylor v. Steele*, 341 S. W. 3d 634 (Mo. 2011), who waived jury sentencing before *Ring*, argued he was now entitled to relief under *Ring*. Taylor, however, already had a *statutory* right under Missouri law to jury factfinding at sentencing. The Missouri

Supreme Court found Taylor's jury- sentencing waiver valid because "courts do not require a defendant to know if the source of the right being waived is the constitution or a statute." *Id.* at 647. The court then distinguished *Halbert*: "Unlike the defendant in *Halbert*, who was alleged to have impliedly waived a right to his detriment, Taylor clearly and unequivocally rejected his opportunity to have his case heard by a jury to obtain his desired judge sentencing." *Id.* at 648. Indeed, the court noted that the record demonstrated Taylor understood that "his guilty plea would lead to him being sentenced by a judge, whereas a not-guilty plea would lead to him being sentenced by a jury." *Id.* at 641.

Four other cases cited for support in *Mullens*- *State v. Piper*, 709 N.W. 2d 783, 805 (S.D. 2006); *State v. Downs*, 604 S.E.2d 377, 380 (2004); *Lewis v. Wheeler*, 609 F.3d 291 (4th Cir. 2010); and *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002)- similarly presented situations where the pre-*Ring* defendants already had a state statutory right to penalty-phase jury sentencing that they explicitly waived. *Mullens* then cites to *State v. Murdaugh*, 97 P. 3d 844, 851 (Ariz. 2004), and *Moore v. State*, 771 N.E. 2d 46 (Ind. 2002)-cases involving fundamentally different circumstances than a waiver in Florida's pre-*Hurst* capital sentencing scheme. First, in *Murdaugh*, the defendant did not raise the *Halbert* argument. Second, in *Moore* the Indiana Supreme Court concluded that the defendant's guilty plea waived his right to a jury *recommendation* of life or death and did not consider whether his plea waived his right to jury factfinding or to juror unanimity. 771 N.E. 2d at 49. In fact, *Moore* considered neither the impact of *Apprendi* nor *Ring* on Indiana's death- sentencing

scheme. *Id.* at 49 n.1 (the court did not even cite to *Ring*, decided two days before it issued *Moore*, and denied the defendant's request "to supplement his brief to further address the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to an Indiana death sentence").

IV. Under fundamental fairness considerations, this Court should grant Appellant *Hurst* relief.

In this particular case, this Court should grant Appellant *Hurst* relief under fundamental fairness principles. *See James*, 615 So. 2d at 669 (noting that the Court can afford relief where otherwise "it would not be fair"). At Appellant's first penalty-phase, three jurors voted for life. Under that vote, Appellant, like his co- defendant with an 11-1 jury vote, *Lawrence*, Case No. 1998-CF-270, No. 783 (Mar. 27, 2017), would be entitled to *Hurst* relief. The only reason Appellant proceeded to a second penalty-phase proceeding is because the trial court erred when it failed to consider certain mitigation. *Rodgers*, 934 So. 2d at 1219-22. It would be fundamentally unfair to penalize Appellant by denying him relief that he otherwise would be entitled to absent the trial court's error and that his co-defendant with only one jury vote for life has already received.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court schedule full briefing, grant oral argument, and thereafter remand for an evidentiary hearing and/or grant relief under the *Hurst* decisions.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff**,**

v. **Case No: 1998-CF-0274**

JEREMIAH MARTEL RODGERS,
Defendant**.**
_____/

DEFENDANT' S RULE 3.851MOTION FOR POST-CONVICTION RELIEF IN LIGHT OF *HURST v. FLORIDA* AND *HURST v. STATE*

Defendant, through counsel, respectfully moves for post-conviction relief from his sentence of death under the Sixth and Eighth Amendments in light of *Hurst v. Florida,* 136 S. Ct. 616 (2016), and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). *See* Fla. R. Crim. P. 3.851(e)(2).[1]

I. Background

In 1998, Defendant pleaded guilty to murder in the First Judicial Circuit, in and for Santa Rosa County. After hearing "([e]xtensive testimony and evidence" at the penalty phase, the advisory jury recommended a death sentence by a vote of 9-3. *Rodgers v. State,* 934 So. 2d 1207, 1210 (Fla. 2006). The trial court, not the jury, then made findings of

[1] In compliance with Rule 3.851(e)(2), this motion is limited to 25 pages and should not be considered a complete briefing of the complex issues presented herein. Defendant respectfully requests leave to submit further briefing as may be necessary.

fact that two aggravating circumstances had been proven beyond a reasonable doubt: (1) Defendant was previously convicted of a violent felony; and (2) the offense was cold, calculated, and premeditated. *Id.*

The court found a total of seven mitigating circumstances. The court found one statutory mitigator: Defendant was at a young age at the time of the offense. The court also considered three non-specified statutory mitigators: (1) Defendant "was sexually abused by his mother; he was physically abused by his father; [his] parents abandoned him; his parents abused drugs and alcohol; his family had a legacy of domestic violence; and there was a history of suicide among [his] relatives"; (2) "at the age of sixteen, [Defendant] was incarcerated as an adult and was sexually abused in prison"; and (3) Defendant "suffered from mental illness." In addition, the court considered three non-statutory mitigators: (1) Defendant "had a positive impact on the inmate population"; (2) Defendant "expressed remorse for the murder"; and (3) Defendant "provided assistance to officers in solving prior crimes." *Id.* at 1214 & nn.4-5.

The trial court, not the jury , then made the statutorily-required findings of fact that the aggravators were sufficient to justify imposition of the death penalty and were not outweighed by the mitigating circumstances. In light of its fact-finding, the court sentenced Defendant to death.

On direct appeal, Defendant challenged Florida's capital sentencing scheme under *Ring v. Arizona,* 536 U.S. 584 (2002). Defendant argued that *"Ring* applies to Florida's capital sentencing scheme." Initial Br. at 99. The Florida Supreme Court

affirmed Defendant' s conviction based on his guilty plea, but reversed his death sentence and remanded for a new penalty phase, concluding that the trial court had improperly excluded certain mitigation showing that Defendant had been under the substantial domination of his more culpable co-defendant during the offense. *Id.* at 1219-20, 1221-22. The Court did not address Defendant's *Ring* claim.

Shortly after the start of the second penalty phase, Defendant informed the court that he did not wish to present any mitigation or witnesses other than himself. *Rodgers v. State,* 3 So. 3 1127, 1129 (Fla. 2009). Defendant also decided to waive his right to a second advisory jury recommendation. *Rodgers v. State,* 3 So. 3d 1127, 1130 (Fla. 2009).

Following the second penalty-phase, where no mitigation was presented, the trial court made findings of fact regarding the same to aggravating factors that were found at the first penalty phase. *Id.* at 1131. The court also again considered a total of seven mitigating circumstances. The court considered one statutory mitigator: Defendant was at a young age at the time of the offense. The court considered six non-statutory mitigators: (J) Defendant's "mother sexually abused him, his father physically abused him, his parents abandoned him and were addicted to drugs and alcohol, and his family had a significant history of suicide"; (2) Defendant "was incarcerated at an early age and sexually abused while in prison";(3) Defendant "had an extensive history of mental illness"; (4) Defendant "had a positive impact on other inmates"; (5) Defendant "had genuine remorse"; and (6)

Defendant "helped in the investigation of his other crimes." *Id.* The trial court again sentenced Defendant. The Florida Supreme Court affirmed. *Id.* at 1135.[2]

In 2011, the circuit court ruled that Defendant had competently discharged his appointed post-conviction counsel and waived his pending state post-conviction proceedings. Defendant's discharged counsel appealed that ruling. *See* Fla. R. Crim. P. 3.851(i)(8)(B). The Florida Supreme Court affirmed. *Rodgers v. State,* 104 So. 3d 1087 (2012).

In 2015, the United States District Court for the Northern District of Florida appointed undersigned counsel from the Capital Habeas Unit ("CHU") of the Office of the Federal Public Defender to represent Defendant. The district court thereafter granted the CHU's motion for permission to exhaust Defendant 's *Hurst* arguments in state court, explaining that *Hurst* exhaustion was appropriate despite Defendant 's waiver of state post-conviction review because that waiver "was made before *Hurst* was decided" and the waiver "did not explicitly address *Hurst* or the possibility that the entire Florida sentencing scheme would be held unconstitutional." *Rodgers v. Jones,* 3:15-cv-507, ECF No. 15 (N.D. Fla. Aug. 24, 2016). The district court noted that "[i]t will be the province of the state courts, at least in the first instance, to decide

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[2] In his second direct appeal, Defendant argued: (1) "fundamental errors occurred when neither the trial court nor his counsel requested a competency hearing after [Defendant] waived his right to a jury recommendation for the penalty phase and waived his right to present mitigation"; and (2) his death sentence is disproportionate. *Id.* at 1131-32.

whether Mr. Rodgers's waiver deprives him of the benefit of any favorable ruling the Florida Supreme Court may issue on *Hurst' s* retroactive effect under Florida law." *Id.* at 2. In the federal court's opinion, "[t]his is not an issue whose proper resolution is clear beyond dispute." *Id.*

II. Grounds for relief

CLAIM 1: DEFENDANT'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *HURST V. FLORIDA AND HURST V. STATE*

Defendant's death sentence is unconstitutional under the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State.* As explained below, this Court should grant relief based on Defendant's first unconstitutional penalty phase, notwithstanding his waiver of a jury recommendation at his second penalty phase, because (I) Defendant 's waiver of a second jury was invalid; and (2) Defendant could not have anticipated that Florida's capital sentencing scheme would be ruled unconstitutional in the *Hurst* decisions at the time of the waiver. Both *Hurst* decisions apply retroactively to Defendant under the Florida Supreme Court's decision in *Mosley v. State,* Nos. SC14-436 and SC14-2108, 2016 WL 7406506 (Fla. Dec. 22, 2016). The State cannot meet its burden of proving beyond a reasonable doubt that the *Hurst* errors in Defendant's case were harmless. This Court may grant *Hurst* relief, notwithstanding Defendant's waiver of initial post-conviction review, because (1) Defendant's initial post-conviction waiver was invalid; and (2) the waiver was limited to the pending proceeding and does not extend to future

Hurst claims that Defendant could not have foreseen. Accordingly, for the reasons below, Defendant respectfully requests that this Court vacate his death sentence and order a new penalty phase.

A. Defendant should be granted *Hurst* relief notwithstanding his waiver of a jury recommendation at his second penalty phase

This Court should grant relief based on the *Hurst* errors that occurred during Defendant's first unconstitutional penalty phase, notwithstanding his waiver of a jury recommendation at his second penalty phase, because (1) Defendant's waiver of a second penalty-phase jury was not knowing voluntary and was therefore invalid and (2) even if the waiver was valid, Defendant could not have anticipated at the time of the waiver that Florida's capital sentencing scheme would be ruled unconstitutional years later in the *Hurst* decisions, and therefore could not have knowingly waived his right to ever vindicate his Sixth and Eighth Amendment rights under *Hurst*.

1. Defendant's waiver of a second penalty-phase jury was invalid

Defendant's waiver of a second penalty-phase jury was invalid because it was not knowing and voluntary. *See Mullens v. State,* 197 So. 3d 16 (Fla. 2016) (explaining that waiving constitutional right to jury must be knowing and voluntary). Although the trial court ruled that Defendant had validly waived a second penalty jury, and the Florida Supreme Court later upheld that ruling, the courts based their decisions on Defendant's statements to the trial court

and did not consider the effect of previously undiagnosed mental conditions that likely animated his decision-making. *See Rodgers,* 3 So. 3d at 1132 ("Rodgers's *statements to the court* showed that he understood the consequences of his decisions . . . .") (emphasis added). Now, counsel has evidence that was not previously available to the courts indicating that Defendant was suffering from a range of mental-health conditions that prevented him from knowingly and voluntarily waiving a jury.

At an evidentiary hearing on this motion, counsel can present evidence that, at the time of the waiver, Defendant suffered from a lifelong condition known as Gender Dysphoria, which existed contemporaneously with other mental disorders, including Post-Traumatic Stress Disorder, Major Depressive Disorder, and Borderline/Antisocial Personality Disorder. This new evidence includes the forthcoming report of Dr. Julie B. Kessel, M.D., a board-certified medical doctor in psychiatry and neurology who is licensed in Florida and has personally evaluated Defendant. Dr. Kessel diagnosed Defendant with Gender Dysphoria which, broadly speaking, is a condition that can lead to intense feelings of depression, discontent, and in some cases indifference to the world at large, based an individual' s feelings that they are not the gender they physically appear to be. These feelings, Dr. Kessel concluded, played a major role in Defendant's decision to give up on a second penalty jury – despite the fact that his first jury had split on whether the death penalty was warranted. Among other things, Dr. Kessel's report also explains the following.

Defendant's Gender Dysphoria and other conditions, and their effect on his decision to waive, are best understood in the context of his traumatic upbringing. Growing up, Defendant suffered repeated rapes, other physical violence, emotional debasement, and frank humiliation, at the hands of both his mother and his father and their associates. Defendant feared for his life, had constant nightmares, stole food to survive, and dissociated emotionally to escape the terror of his actual life. Defendant became aware of his feelings that he wanted to be a girl and felt out of place in his own body. He was terrified that if he acted on, expressed, or realized any of these feelings he would be killed, so he did not express himself in this way. His unstable early life, both with his mother and father, led to the development of an insecure sense of self, extreme shame, anger, anxiety, depression, despair, little capacity to protect himself or judge the intentions of others, and no direction for his future. Defendant' s response to a life characterized by brutality and violence has been sheer terror of ongoing harm, a sense of terrible danger lurking, and the belief that his life is focused on survival. Eventually, his fear turned to depression and anger, and he developed dysphoria accompanied by worsening energy, sleep, and anxiety. He also developed preoccupation with images of being harmed. As Defendant got older, so did his preoccupation with wanting to be female. But he knew that others would not accept those thoughts as anything other than perverse, that he would be ostracized and judged, and that his life would be threatened. The emotional pain and shame of living with this inner turmoil fueled his self-destructiveness, depression, suicidality, self-

mutilation, sense of isolation, fear of harm, and anger.

Those mental conditions were present at the time of Defendant 's decision to waive a second penalty-phase jury, and were critical factors in his decision to waive in spite of the fact that several members of his first penalty jury had recommended that he receive a life sentence. As a result of Defendant's mental disorders, the presence of Gender Dysphoria, and the lack of awareness of the impact of those conditions on Defendant's emotional development and mental state, Dr. Kessel has substantial doubts that Defendant's waiver was knowing or willful. Dr. Kessel's findings and conclusions will be set forth in a forthcoming report, which counsel will provide to the Court. These findings and conclusions, which were not previously available to the trial cou1t or the Florida Supreme Court on direct appeal,[3] will establish that Defendant's waiver of a second jury was not valid, and therefore the second penalty phase is not the relevant proceeding for this Court's *Hurst* analysis.

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[3] Gender Dysphoria was not clinically recognized until publication of the DSM-V in 2013 and thus could not have been considered by the trial court or the Florida Supreme Court in evaluating the validity of Defendant's jury waiver. Although there was an earlier disorder entitled "Gender Identity Disorder," it had different criteria than the "Gender Dysphoria" with which Defendant is diagnosed and clinicians were reluctant to diagnose "Gender Identity Disorder" because "one of the most drastic medical treatments, sex reassignment surgery, may ensue from this diagnosis." Peggy T. Cohen-Kettenis & Friedemann Pfafflin, *The DSM Diagnostic Criteria for Gender Identity Disorder in Adolescents and Adults,* Archives of Sexual Behavior, Oct. 17, 2009, at 2.

Instead, this Court must look to the *Hurst* errors at the first penalty phase.

2. Even if Defendant's waiver of a second penalty jury was valid, Defendant could not have anticipated that Florida's capital sentencing scheme would be ruled unconstitutional in the *Hurst* decisions

Even if Defendant validly waived his right to a second penalty jury, he could not have anticipated at the time of the waiver that Florida's capital sentencing statute would be ruled unconstitutional years later in the *Hurst* decisions, and therefore could not have knowingly waived his right to ever vindicate his Sixth and Eighth Amendment rights under *Hurst*. It would be fundamentally unfair to deny Defendant *Hurst* relief based on the waiver, effectively punishing him for not predicting the *Hurst* decisions years in advance. Moreover, absent the trial court's unrelated constitutional errors during the first penalty phase, which obligated the Florida Supreme Court to order re-sentencing, there never would have been a second penalty phase, and Defendant would be entitled to seek *Hurst* relief today. It would be fundamentally unfair to deny Defendant the benefit of *Hurst* based on the trial court 's reversible errors during the first penalty phase.

Accordingly, even if Defendant's waiver of a second penalty-phase jury is considered valid, this Court should still look to the *Hurst* errors at the first penalty phase for purposes of this motion. For the reasons below, Petitioner is entitled to relief under

both the Sixth and Eighth Amendments based on the constitutional *Hurst* errors that infected his first penalty phase.

B. In light of the errors at the first penalty phase, Defendant's death sentence is unconstitutional under *Hurst v. Florida* and *Hurst v. State*

In *Hurst v. Florida,* the United States Supreme Court invalidated Florida 's capital sentencing statute, which provided that a defendant who had been convicted of a capital felony may be sentenced to death only after (1) a penalty phase jury renders an advisory verdict, without specifying the factual basis for its recommendation, and (2) notwithstanding the recommendation of a majority of the jury, the court finds as fact that aggravating circumstances were proven beyond a reasonable doubt, the aggravating circumstances were sufficient to impose the death penalty, and the aggravating circumstances are not outweighed by the mitigating circumstances. 136 S. Ct. at 620-21. The Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because "Florida does not require the jury to make critical findings necessary to impose the death penalty, "but rather, "requires a judge to find these facts." *Id.* at 622.

In *Hurst v. State,* the Florida Supreme Court ruled that, in addition to the federal constitutional requirements set forth in *Hurst v. Florida,* the Florida constitution required that capital defendants be afforded additional protections. First, the Florida Supreme Court ruled that the Eighth Amendment's evolving standards of decency requires *unanimous* jury fact-finding that specific aggravating

circumstances were proven, that the aggravating circumstances are sufficient to impose the death penalty, and that the aggravating circumstances outweigh the mitigating circumstances. Each of those findings, the Court held, must be made by all of the jurors beyond a reasonable doubt. *Hurst v. State,* 202 So. 3d at 53-59.

Second, the Florida Supreme Court ruled that claims by Florida prisoners under *Hurst* must be subjected to individualized harmless error review, and that such review places the burden on the state to prove beyond a reasonable doubt, and not based on pure speculation, that the *Hurst* error did not affect the jury's recommendation. *Id.* at 67-68. The Florida Supreme Court found that the *Hurst* error in Mr. Hurst's case was not harmless, explaining that "after a detailed review of the evidence presented as proof of the aggravating factors and evidence of substantial mitigation, we are not so sanguine as to conclude that Hurst's jury would without a doubt have found both aggravating factors-and, as importantly, that the jury would have found the aggravators sufficient to impose death and that the aggravating factors outweighed the mitigation." *Id.* at 68. The Florida Supreme Court, articulating principles similar to those embodied in the United States Supreme Court's decision in *Caldwell,* emphasized that "we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt," that "[w]e cannot determine how many jurors have found the aggravation sufficient for death," and that "[w]e cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." *Id.* The Florida Supreme Court "decline[d] to

speculate as to why seven jurors in *[Hurst]* recommended death and why five jurors were persuaded that death was not the appropriate penalty." *Id.*

In expanding the protections set forth by the United States Supreme Court in *Hurst v. Florida,* the Florida Supreme Court noted that "this Court, in interpreting the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded to criminal defendants than that mandated by the federal Constitution." *Id.* at 57.

Here, Defendant's death sentence is clearly in violation of both the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State.* Defendant's death sentence violates the Sixth Amendment in light of *Hurst v. Florida* and *Hurst v. State* because the trial judge, not the jury, made the findings of fact necessary for imposition of a death sentence (a sentence that was not authorized by Defendant's murder conviction alone). After the jury made a general recommendation to impose the death penalty without specifying the basis for its recommendation, the trial judge found as fact that (1) specific aggravating circumstances had been proven beyond a reasonable doubt, (2) those particular aggravating circumstances were sufficient in the context of Defendant's case to impose the death penalty, and (3) the aggravating circumstances were not outweighed by the mitigating circumstances. Defendant's death sentence also violates the Eighth Amendment in light of both *Hurst v. State' s* clear edict that a jury must vote unanimously for the death penalty (Defendant 's jury

voted by a margin of 9-3), and the "evolving standards of decency," *see Atkins v. Virginia,* 536 U.S. 304, 312 (2002), that have led to a national consensus that death sentences should only be imposed after a penalty -phase jury votes unanimously to impose death. Accordingly, relief is warranted here under both state and federal law.

C. Both *Hurst v. Florida* and *Hurst v. State* apply retroactively to Defendant's case

1. Under *Mosley,* the *Hurst* decisions are categorically retroactive under the *Witt* doctrine to those, like Defendant, whose sentences became final after *Ring*

Under Florida's traditional retroactivity analysis, which was first announced in *Witt v. State,* 387 So. 2d 922 (1980), both *Hurst* decisions are retroactively applicable to Defendant's case. In *Mosley,* the Florida Supreme Court held that, "under a standard *Witt* analysis, *Hurst* should be applied to Mosley and *other defendants* whose sentences became final after the United States Supreme Court issued its opinion in *Ring." Mosley,* 2016 WL 7406506, at *19 (emphasis added). The *Mosley* Court's *Witt* holding applied to claims under both *Hurst v. Florida* and *Hurst v. State, see id.* at *20-25, and was categorical in nature, meaning that the *Hurst* decisions are retroactive to *all* defendants whose sentences became final after *Ring, see id.* at *25 ("Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida. . . . Thus, Mosley, whose

sentence was final in 2009, falls into the *category of defendants* who should receive the benefit of *Hurst.")*(emphasis added).[4]

Here, Defendant's first direct appeal was not decided until 2006, years after the Supreme Court decided *Ring*. Under *Mosley,* that is the end of the retroactivity analysis because satisfaction of the *Witt* test is an independent basis to hold the *Hurst* decisions retroactive. Because the Florida Supreme Court determined in *Mosley* that *all post-Ring* defendants categorically satisfy the *Witt* retroactivity test,[5] this Court should apply the *Hurst* decisions

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[4] Although not directly at issue here, it does *not* follow that all defendants whose sentences became final before *Ring* are categorically excluded from retroactive application or the *Hurst* decisions under a *Witt* analysis. The decisions in *Mosley* and *Asay v. State,* Nos. SC16-223, SC16-102, SC16-628, 2016 WL 7406538 (Fla. Dec. 22, 2016), together establish that *Witt* retroactivity is also subject to an individualized analysis, and that *pre-Ring* defendants may be entitled to *Witt* retroactivity depending on the individualized circumstances of their case. Moreover, as explained in Section II(C)(2), *infra,* a *Witt* analysis is not the only manner by which the *Hurst* decisions may be held to apply retroactively in a pa1iicular case. In addition to or instead of *Witt,* courts may apply the *Hurst* decisions retroactively under the Florida Supreme Court's "fundamental fairness" doctrine, which applies to both *pre-Ring* and *post-Ring* death sentences.

[5] Even if Defendant's death sentence were subjected to an individualized *Witt* analysis, he would be entitled to *Hurst* retroactivity. As to the dispositive third *Witt* prong, Defendant's case satisfies all three factors borrowed from the United States Supreme Court's decisions in *Stovall v. Denno,* 388 U.S. 293 (1967), and *Linkletter v. Walker,* 381 U.S. 618 (1965). As to the first factor, the Florida Supreme Court has held, even in a case where retroactivity was ultimately denied, that the purpose of *Hurst v. Florida* and *Hurst v. State*-protecting the constitutional right to unanimous jury verdicts on any facts necessary for

retroactively to Defendant's case.

2. Under *Mosley,* the *Hurst* decisions are also retroactive in Defendant's case under the separate fundamental fairness doctrine

The *Hurst* decisions are also retroactively applicable to Defendant under the fundamental fairness doctrine, which is an independent basis for retroactivity that does not rely on *Witt.* In *Mosley,* the Florida Supreme Court explained that, although *Witt* is the "standard" retroactivity test in Florida, defendants may also be entitled to *Hurst* retroactivity by virtue of the fundamental fairness doctrine, which the Court previously applied in cases like *James v. State,* 615 So. 2d 668 (Fla. 1993). *See Mosley,* 2016 WL 7406506, at *19 ("This Court has previously held that fundamental fairness alone may require the retroactive application of certain

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imposition of a death sentence-weighs in favor of retroactivity. *See Asay,* 2016 WL 7406538, at *l0; *Mosley,* 2016 WL 7406506, at *21. The second factor-extent of reliance on Florida's unconstitutional scheme-also weighs in favor of retroactivity because the Florida Supreme Court's repeated holdings that *Ring* did not apply in Florida uniformly "infect[ed] the integrity of the truth-determining process," *Stovall,* 388 U.S. at 297, in all of those cases, including Defendant's. The third factor-effect on administration of justice-also favors retroactivity because, as the Florida Supreme Court held, applying the *Hurst* decisions to *every post-Ring defendant* would not "destroy the stability of the law, render punishments uncertain and therefore ineffectual , and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt,* 387 So.2d at 929-30. Accordingly, even if Defendant was not categorically entitled to *Witt* retroactivity by *Mosley* as a *post-Ring* defendant, he would still be entitled to *Witt* retroactivity as a matter of individualized analysis.

decisions involving the death penalty"). Fundamental fairness retroactivity analysis differs from *Witt* analysis and focuses on whether it would be unfair to bar the defendant from seeking *Hurst* relief in light of the fact that, before the *Hurst* decisions issued, he or she challenged Florida's unconstitutional capital sentencing scheme at the earliest opportunity and was "rejected at every turn" under the Florida Supreme Court's faulty *pre-Hurst* law. *See id.* at *18-19 & n.13 ("The difference between a retroactivity approach under *James* and a retroactivity approach under a standard *Witt* analysis is that under *James,* a defendant or his lawyer would have had to timely raise a constitutional argument, in this case a Sixth Amendment argument, before this Court would grant relief. However, using a *Witt* analysis, any defendant who falls within the ambit of the retroactivity period would be entitled to relief regardless of whether the defendant or his or her lawyer had raised the Sixth Amendment argument."). The *Mosley* Court emphasized that ensuring fundamental fairness in assessing retroactivity outweighed any State interest in the finality of death sentences. *Id.* at *19 ("In this instance . . . the interests of finality must yield to fundamental fairness.").

To illustrate why the *Hurst* decisions should apply to Mosley as a matter of fundamental fairness, the Florida Supreme Court drew an historical analogy to *James's* retroactive application of the United States Supreme Court's decision in *Espinosa. Id.* In *James,* the Court concluded "that defendants who had raised a claim at trial or on direct appeal that the jury instruction pertaining to the HAC aggravating factor was unconstitutionally vague

were entitled to the retroactive application of *Espinosa." Id.* The *Mosley* Court held that "[t]he situation presented by the United States Supreme Court's holding in *Hurst* is not only analogous to the situation presented by *James,* but also concerns a decision of greater fundamental importance than was at issue in *James." Id.* The Court was correct because, under *Hurst* v. *Florida* and *Hurst* v. *State,* "the fundamental right to a trial by jury under both the United States and Florida Constitutions is implicated, and Florida's death penalty sentencing procedure has been held unconstitutional, thereby making the machinery of post-conviction relief . . . necessary to avoid individual instances of obvious injustice." *Id.* (internal quotation omitted). The application of the fundamental fairness retroactivity doctrine thus makes as much sense for *Hurst* claims as *Espinosa* claims.

Here, as explained above, *Mosley's* categorical holding that the *Hurst* decisions are retroactive to all post-*Ring* cases under *Witt* is by itself a sufficient basis to find *Hurst* retroactivity in Defendant's case. However, the fundamental fairness doctrine provides a separate compelling reason for *Hurst* retroactivity in Defendant's case. Defendant is entitled to retroactive application of the *Hurst* decisions because he raised a challenge to Florida's unconstitutional capital sentencing statute in his first direct appeal. ln "Argument VII," Defendant argued that *"Ring* applies to Florida's capital sentencing scheme." Initial Br. at 99. The Florida Supreme Court did not address Defendant's *Ring* claim.

In addition, it should be considered in the fundamental fairness context that Defendant's

advisory jury recommended a death sentence in his first penalty phase by a non-unanimous vote of 9 to 3. That is important not only because such a vote would not result in a death sentence today under *Hurst v. State,* but also because it reflects that Defendant presented substantial mitigation to the jury. The trial court found a total of seven statutory and non-statutory mitigating circumstances were established from Defendant's evidence, including that (1) Defendant was at a young age at the time of the offense, (2) Defendant "was sexually abused by his mother; he was physically abused by his father; [his] parents abandoned him; his parents abused drugs and alcohol; his family had a legacy of domestic violence; and there was a history of suicide among [his relatives";(3) "at the age of sixteen, [Defendant] was incarcerated as an adult and was sexually abused in prison"; (4) Defendant "suffered from mental illness";(5) Defendant "had a positive impact on the inmate population"; (6) Defendant "expressed remorse for the murder"; and (7) Defendant "provided assistance to officers in solving prior crimes." *Rodgers,* 934 So. 2d at 1214 & nn.4-5.

Under *Mosley,* these circumstances provide a sufficient basis to apply the *Hurst* decisions retroactively to Defendant. In Defendant' s case, as the Florida Supreme Court found in *Mosley,* the interests of finality must yield to fundamental fairness. Defendant, who anticipated the defects in Florida's capital sentencing scheme that were later articulated in *Hurst v. Florida* and *Hurst v. State*, and who raised a *Ring* claim at the earliest opportunity on direct appeal, cannot now be denied the chance for relief under the *Hurst* decisions as a matter of fairness. Applying the *Hurst* decisions

retroactively to Defendant "in light of the rights guaranteed by the United States and Florida Constitutions, supports basic tenets of fundamental fairness," and "it is fundamental fairness that underlies the reasons for retroactivity of certain constitutional decisions, especially those involving the death penalty." *Mosley,* 2016 WL 7406506, at *25. Accordingly, in addition to ruling that Defendant is categorically entitled to retroactivity under *Witt,* this Court should hold that fundamental fairness requires *Hurst* retroactivity here.

3. Defendant also has a federal right to retroactive application of the *Hurst* decisions as highlighted by the recent decision in *Montgomery*

In analyzing the retroactivity of the *Hurst* decisions under this state's retroactivity doctrines, this Court should also recognize that Defendant has a federal right to retroactivity as highlighted by the United States Supreme Court's recent decision in *Montgomery*. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery,* 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). In *Montgomery,* the Defendant initiated a slate post-conviction proceeding seeking retroactive application of *Miller v. Alabama,* 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates

Eighth Amendment). The Louisiana Supreme Court (in contrast to what this Court did in *Falcon)* held that *Miller* was not retroactive under its state retroactivity doctrines. The United States Supreme Court reversed, holding that Louisiana could not bar retroactivity under its state doctrines because the *Miller* rule was substantive and therefore Louisiana was obligated under the federal Constitution to apply it retroactively on state post-conviction review.

The *Hurst* decisions announced substantive rules that under the federal Constitution may not be denied to Florida defendants on state retroactivity grounds. In *Hurst v. State,* the Court announced two substantive rules. First, the Court held that the Sixth Amendment requires that a jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty, and whether they are outweighed by the mitigating factors. Such findings are manifestly substantive.[6] *See*

[6] 6 The Supreme Court's decision in *Schriro v. Summerlin,* 542 U.S. 348, 364 (2004) is distinguishable. In *Summerlin,* the Supreme Court applied the federal retroactivity test in *Teague v. Lane,* 489 U.S. 288 (1989), and determined that *Ring* was not retroactive on federal habeas review because the requirement that the jury rather than the judge make findings as to whether the defendant had a prior violent felony aggravator was procedural rather than substantive. But *Summerlin* did not review a capital sentencing statute like Florida's that required the jury not only to make the fact-finding regarding the applicable aggravators, but also required the jury to make the finding as to whether the aggravators were *sufficient* to impose the death penalty. Moreover, *Hurst,* unlike *Ring,* addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See Powell v. Delaware,* 2016 WL 7243546, at *3 (Del. Dec. 15, 2016) (holding that *Hurst v.*

Montgomery, 136 S. Ct. at 734 (holding that the decision whether a particular juvenile is or is not a person "whose crimes reflect the transient immaturity of youth" is substantive, not procedural).

Second, the Court held that the Eighth Amendment requires the jury's fact-finding during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State,* 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.") *see also Perry v. State,* No. SC16-547, 2016 WL 6036982, at *7 (Fla. Oct. 14, 2016)("We also held [in *Hurst*] that, based on Florida's requirement for unanimity in jury verdicts and on the Eighth Amendment to the United States Constitution, a jury 's ultimate recommendation of the death sentence must be unanimous."). As the Court made clear, the function of the unanimity rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See Hurst v. State,* 202 So. 3d at 60-61. That makes the rule

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Florida is retroactively applicable under the state's *Teague*-like retroactivity doctrine and distinguishing *Summerlin* because it "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof ").

substantive, *see Welch v. United States,* 136 S. Ct 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), even though its subject has to do with the method by which a jury makes decisions. *See Montgomery,* 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule into a procedural one).

Because the rules announced in the *Hurst* decisions are substantive within the meaning of federal law, this Court has a duty under the federal Constitution to apply them retroactively to Defendant under Florida's retroactivity doctrines.

D. The State cannot establish that the *Hurst* errors in Defendant's first penalty phase were harmless beyond a reasonable doubt

1. The State bears the burden of establishing harmlessness

The Florida Supreme Court held in *Hurst v. State* that claims by Florida prisoners under *Hurst* must be subjected to individualized harmless error review, and that such review places the burden on the state to prove beyond a reasonable doubt, and not based on pure speculation, that the *Hurst* error did not affect the jury 's recommendation. *Hurst v. State,* 202 So. 3d at 67-68. The Court has reiterated that holding in numerous other cases, including *Mosley. Mosley,* 20 16 W L 7406506, at *25-26; *see also Simmons v. State,* No. SC14-2314, 2016 WL 7406514 , at *6-7 (Dec. 22, 2016); *Johnson v. State,* No. SC14-l

175, 2016 WL 7013856, at *3-4 (Dec. 1, 2016)(explaining burden is on State to show *Hurst* error harmless beyond a reasonable doubt). Here, the State cannot establish that the *Hurst* errors in Defendant's sentencing were harmless beyond a reasonable doubt.

2. The *Hurst* errors in Defendant's first penalty phase were not harmless

The jury in Defendant's case voted by a non-unanimous margin of 9-3 in recommending a death sentence, without specifying the factual bases for its recommendation. Under *Hurst v. State,* this Court may not speculate that, absent the *Hurst* error, the jury would have unanimously found that the aggravating factors were proven beyond a reasonable doubt, that the aggravating circumstances were sufficient to impose the death penalty under the circumstances, and that the aggravating circumstances were not outweighed by the mitigation. The Florida Supreme Court cautioned that it would be impermissible to engage in such speculation. *Hurst v. State,* 202 So. 3d at 69 ("We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty. To do so would be contrary to our clear precedent governing harmless error review."); *see also Mosley,* 2016 WL 7406506, at *26. The reasoning the Florida Supreme Court supplied in *Hurst v. State* applies equally here:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury

> unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 68.

Indeed, the jury 's consideration of the evidence in Defendant 's case may have been different if the jury had been required to conduct the fact finding, instead of making only an advisory recommendation for a sentence of death or life imprisonment. *See Caldwell,* 472 U.S. at 328-29 (1985) (recognizing the significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). The Supreme Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury [should] recognize[] the gravity of its task and procced with the appropriate awareness of its truly awesome responsibility." *Id.* at 341 (internal quotation marks omitted).

Substantial mitigation was presented to the jury. As noted above, sufficient mitigation was presented for the trial court to find a total of seven mitigating circumstances, including that the trial court found a total of seven statutory and non-statutory mitigating circumstances were established from Defendant's penalty-phase evidence, including that (l) Defendant was at a young age at the time of the offense, (2) Defendant "was sexually abused by

his mother; he was physically abused by his father;[his] parents abandoned him; his parents abused drugs and alcohol; his family had a legacy of domestic violence; and there was a history of suicide among [his relatives";(3) "at the age of sixteen, [Defendant] was incarcerated as an adult and was sexually abused in prison"; (4) Defendant "suffered from mental illness"; (5) Defendant "had a positive impact on the inmate population"; (6) Defendant "expressed remorse for the murder"; and (7) Defendant "provided assistance to officers in solving prior crimes." *Rodgers,* 934 So. 2d at 1214 & nn.4-5.

In *Hurst v. State,* the Court emphasized that mitigation is an important consideration in assessing harmless error because it undem1lines any speculation that the jury would have voted unanimously to find each aggravating factor, voted unanimously to decide that the aggravating factors were sufficient to impose the death penalty, and voted unanimously that the aggravation outweighed the mitigation. *See* 202 So. 3d at 68-69 ("Because we do not have an interrogatory verdict commemorating the findings of the jury, we cannot say with any certainty how the jury viewed th[e] mitigation, although we do know that the jury recommended death by only a bare majo1ity . . .we cannot find beyond a reasonable doubt that no rational jury, as trier of fact, would detem1line that the mitigation was 'sufficiently substantial' to call for a life sentence.").

Moreover, if Defendant's counsel's thinking had not been influenced by the statutory framework struck down by *Hurst,* Defendant and counsel would have pursued a different approach than the one

taken with the advisory jury and judge-sentencing, including broader challenges to aggravation and a broader presentation of mitigation. A jury properly instructed that it, not the judge, was to make the ultimate sentencing decision could find that any one of the aggravating circumstances in Defendant's case was *not,* as fact, sufficient to justify a death sentence. As such, it cannot be concluded that the jury unanimously found any specific aggravator in this case before making an advisory death recommendation. *Cf. Mills v. Maryland,* 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina,* 494 U.S. 433, 444 (1990) (both holding, in the mitigation context, that the Eighth Amendment is violated when there is uncertainty about the jury's vote).

To the extent the State may argue that the *Hurst* error is rendered harmless by the fact that one of the aggravators applied to Defendant was based on a prior felony conviction, the Florida Supreme Court has rejected the idea that a judge 's finding of such an aggravating factor is relevant in the harmless-error analysis of *Hurst* claims. *See Franklin v. State,* No. SC13-1632, 2016 WL 6901498, at *6 (Fla. Nov. 23, 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida.")*. The Court found the *Hurst* error *not* harmless in *Mosley* despite the fact that Mosley's judge had found a prior felony aggravator. *Mosley,* 2016 WL 7406506, at *3.

3. A hearing is appropriate to probe the impact of the *Hurst* errors on defense counsel's strategy and presentation

For the reasons above, this Court should not rule that the *Hurst* errors in Defendant's case were harmless beyond a reasonable doubt, because any such ruling on the present record would be based on impermissible speculation. To the extent this Court needs further evidence that the errors were not harmless, a hearing is appropriate to probe the impact of the *Hurst* errors on defense counsel's strategy and presentation. This Florida Supreme Court has approved of such hearings in similar contexts. *See Meeks v. Dugger,* 576 So. 2d 713, 716 (Fla. 1991) (remanding for an evidentiary hearing to determine whether the *Hitchcock* error in the case was harmless). In *Meeks,* the Court, while considering a habeas petition raising a claim under *Hitchcock v. Duggar,* 481 U.S. 393 (1987), determined that the Defendant was entitled to an evidentiary hearing on the issue of harmless error, and it remanded the case to the trial court to conduct such a hearing. *See Meeks,* 576 So. 2d at 716. Here, as in *Meeks,* this Court should allow a hearing so that it can make findings of fact regarding harmlessness. At a hearing on whether the *Hurst* error in his penalty phase was harmless beyond a reasonable doubt, Defendant could present evidence, among other things, that defense counsel's approach to diminishing the weight of the aggravating factors would have been different had counsel known that the jury, not the judge, would make the critical findings of fact.

For instance, a defense counsel's entire approach would have been different had the jury, as opposed to the judge, been required to make the "sufficiency" and "insufficiency" findings. Counsel would have given different advice to Defendant, and the decision-making in this case would have been different. This is especially true in light of the fact that the jury's consideration of the evidence is different if the jury is required to make the sentencing findings, instead of making only an advisory recommendation. *See Caldwell,* 472 U.S. at 328-29 (recognizing significant impact of a jury's belief that the ultimate responsibility for determining whether a defendant will be sentenced to death lies elsewhere). A hearing is therefore appropriate to evaluate the effect of the statute invalidated by *Hurst* on counsel's development of challenges to aggravation, mitigation, and defense penalty-phase theories at the sentencing and resentencing; counsel 's advice to the client; investigation; and the decisions of counsel and the client.

E. Defendant's initial post-conviction waiver does not preclude granting *Hurst* relief in this successive proceeding

This Court may grant *Hurst* relief, notwithstanding Defendant 's waiver of initial post-conviction review, because (1) Defendant's initial post-conviction waiver was invalid; and (2) the waiver was limited to the pending proceeding and does not extend to future *Hurst* claims that Defendant could not have foreseen.

1. Defendant's initial post-conviction waiver was invalid

Defendant's waiver of his initial post-conviction proceedings was invalid. As explained in Section II(A)(l), Defendant suffers from a lifelong condition of Gender Dysphoria, in addition to other mental conditions, that existed at the time and prevented him from knowingly and voluntarily waiving his right to post-conviction review. *See Trease v. State,* 41 So. 3d 119, 123 (Fla. 2010) (waiver of post-conviction counsel and post-conviction proceedings must be "knowing, intelligent, and voluntary"). Although the trial court ruled that Defendant had validly waived his post-conviction proceedings and discharged counsel, and the Florida Supreme Court later upheld that ruling, the courts did not consider the effect of Defendant 's previously-undiagnosed mental conditions that likely played a significant role in his decision-making.

At an evidentiary hearing on this motion, counsel can present evidence that, at the time of the post-conviction waiver, Defendant suffered from a lifelong condition known as Gender Dysphoria, which existed contemporaneously with other mental disorders, including Post-Traumatic Stress Disorder, Major Depressive Disorder, and Borderline/ Antisocial Personality Disorder. This new evidence includes the forthcoming report of Dr. Kessel, who has concluded that Defendant' s conditions played a major role in his decision to give up on his post-conviction proceedings. As a result of Defendant' s mental disorders, the presence of Gender Dysphoria, and the lack of awareness of the impact of those conditions on Defendant's emotional development

and mental state, Dr. Kessel has substantial doubts that Defendant's post-conviction waiver was knowing or willful. Dr. Kessel's findings and conclusion will be set forth in a forthcoming report, which counsel will provide to the Court. These findings and conclusions, which were not previously available, will establish that Defendant's waiver of his post-conviction proceedings was not valid, and therefore this Court may grant post-conviction *Hurst* relief in this proceeding.

2. Even if Defendant's waiver of initial post-conviction review was invalid, the waiver was limited to the proceeding pending at that time and does not extend to *Hurst* claims that could not have been foreseen

Even if Defendant's waiver of initial post-conviction proceedings was valid, this Court may still grant *Hurst* relief in this proceeding. Defendant's initial post-conviction waiver applied only to his pending proceedings and does prevent him from raising *Hurst* claims that he could not have been foreseen at the time of the initial waiver. A defendant 's waiver of his post-conviction proceeding is governed by Florida Rule of Criminal Procedure 3.851 (i), which addresses circumstances where "a defendant seeks to dismiss *pending postconviction proceedings* and to discharge collateral counsel." Fla. R. Crim. P. 3.851(i)(1) (emphasis added). lf a defendant's request to waive post-conviction proceedings is granted, the Rules provide that "the court shall enter an order dismissing all *pending postconviction proceedings* and discharging collateral counsel." Rule 3.85

1(i)(7) (emphasis added). The Rules do not contain any indication that a defendant's waiver of a pending post-conviction proceeding forever waives his right to subsequently seek post-conviction review, particularly where new, unforeseen constitutional decisions of the United States Supreme Court and Florida Supreme Court open avenues for relief.

Although the Florida Supreme Court has approved of waivers in cases where the circuit court warned the defendant that his right to post-conviction review would be "forever lost," *see Trease,* 41 So. 3d at 125, the Court has never held that a waiver of pending post-conviction proceedings waives *any* future post-conviction claims, regardless of unforeseen developments in the law. Indeed, any such requirement would result in a due process violation under both the United States and Florida Constitutions. Although "a mere change of mind" is not itself a basis to pursue further post-conviction review after waiving, *see id.* at 12, courts cannot deny a defendant the opportunity to seek post-conviction relief, even after waiving initial post-conviction proceedings, based on unforeseen constitutional developments. This is true as both a matter of due process and fundamental fairness. It would be fundamentally unfair to deny Defendant the opportunity to seek *Hurst* relief due to his waiver of pending proceedings years earlier.

III. Conclusion

For the foregoing reasons, this Court should vacate Defendant's death sentence and either impose a life sentence or conduct a new penalty phase that complies with the *Hurst* decisions.

Respectfully submitted,

/s/ Billy H. Nolas
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CERTIFICATION OF COUNSEL

Pursuant to Fla. R. Crim. P. 3.85.1 (e)(1)(f), counsel certifies that the motion for post- conviction relief, filed pursuant to *Hurst v. Florida* and *Hurst v. State,* has been discussed with Defendant and that counsel has complied with Rule 4-1.4 of the Rules of Professional Conduct, and counsel certifies that the motion for post-conviction relief is filed in good faith.

/s/ Billy H. Nolas
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Re: State of Florida v. Jeremiah Martel Rodgers,
Case #1998CF274

February 9, 2017

Purpose of Report:

I was asked to review the records for the above cited case and to render an opinion as to whether or not Jeremiah Rodgers (JR) had any psychiatric diagnoses/conditions that may have interfered with his ability to competently and voluntarily waive his penalty phase jury and rights to any further appeals related to his death penalty sentence.

Qualifications:

I am a Professor of Psychiatry and the Associate Chairman for Veterans Affairs at the East Tennessee State University Quillen College of Medicine Department of Psychiatry. I also hold a teaching appointment related to my expertise with transgender healthcare and research at the University of North Texas, Fort Worth, and I have

current privileges to provide transgender health care (psychiatric and endocrine) and training at two Federal Bureau of Prison facilities in the Dallas-Fort Worth area. I am licensed to practice medicine in Ohio, Tennessee, and Texas. For three decades, my research has focused principally on the study of transgender health, particularly with gender nonconforming adults with a diagnosis of Gender Dysphoria (GD), previously known as Gender Identity Disorder (GID). I have done research with, taught on, and published peer- reviewed professional publications specifically addressing incarcerated persons with GD. I have been involved in the clinical evaluation of patients with GD for approximately thirty years and I have evaluated and/or treated more than 500 patients with gender identity disorders, including approximately 10 individuals with GD who were, at the time of my evaluations, incarcerated. I have served for more than fifteen years on the Board of Directors of the World Professional Association for Transgender Health (WPATH), and was a member of the WPATH committee that authored Version 7 of the Standards of Care, published in 2011, which is the current version used worldwide. I personally authored the section addressing the treatment of incarcerated persons suffering from GO in Versions 5, 6, and 7. I have been an active member of WPATH since 1986 without interruption and I have presented original research work on GO topics nationally and internationally in eight countries. I have been accepted as an expert on transgender health issues by numerous federal district courts, federal tax court, and Canadian courts. I provide national training on transgender health issues, to include psychiatric,

hormonal, and surgical treatments, for the Veterans Health Administration and the Department of Defense.

Records reviewed:

Report of Dr. Kessel, 1/31/17

Psychiatric/Mental Health records during incarceration through 2016

Disciplinary reports/grievances

Letters written to Robert Harper by Mr. Rodgers

Transcripts of testimony from penalty phase

Transcript of testimony from Mr. Rodgers

Reports from Dr. Harry McClaren (2000, 2010), Dr. Greg Prichard (2010), Dr. Lawrence Gilgun (1999)

Records from Dr. Richard Greer, Dr. David Foy, Dr. Sarah Deland, Dr. Scott Benson

Letter written to court by Mr. Rodgers

Creekside Psychiatric Center records

Court records, to include sentencing order, resentencing opinion, post-conviction waiver opinion

Transcript of 2011 Durocher Hearing

Literature Reviewed:

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Mohandie et al: Suicide by Cop Among Officer-Involved Shooting Cases. Journal of Forensic Sciences, DOI: 10. 1111/j. 1556-4029.2008.00981.x, 2009.

Past History:

For the purposes of this report, I will not summarize the lengthy past history of psychiatric evaluations and treatments received by Jeremiah Rodgers (JR), as these details are well documented in his extensive records and do not appear to be in dispute. JR has had multiple competency evaluations, not all of which have been in agreement in the past, and has had his IQ

assessed multiple times, with conflicting results (he is stated by Dr. McClaren to have "low average range of intelligence" in his 1999 report, but later evaluations show JR to have at least normal intelligence). There is documentation of cutting behaviors, which Dr. Pardo noted to be "related to sexual identity/guilt issues" in June, 1995, including what is documented to be an attempt at autopenectomy, causing JR to be transferred for extensive medical and psychiatric care. JR was reported to have "many unresolved sexual identity issues" by clinicians who evaluated him in 1995. A year later in 1996, a clinician in the employ of the State of Florida, J. Brennan, MS, diagnosed JR as suffering from "Gender identity disorder, Impulse control disorder, borderline personality disorder." A progress note from 2/21/96 recorded "l/M has a sexual/gender identity disorder problem and doesn't know his sexual preference." JR was 18 years old at that time. Joseph Valero, MA, another employee of the State of Florida, documented in 1996 that "l/M tends to self-lacerate when frustrated over his sexual/gender identity issue." Yet another State-employed clinician, Dr. Norma Torres, Senior Psychologist, signed a note that indicated JR "brought up issue of sexual/gender identity ...the root of his problems" (5/13/96). There is also documentation of another attempt at autopenectomy in his teens, at about age 14.

In a letter to his attorney, Mr. Harper, dated 10/14/10, JR discusses why he is refusing to appeal his death penalty sentence, stating he has "gender identity disorder. My entire life I've felt compelled to wear a mask to hide the fact that everything below the surface is female. I feel like a woman."

He went on to discuss that dying would be the escape from his gender dysphoric feelings. He further wrote about his disgust with his male body and secondary sexual characteristics. In a second letter to Mr. Harper (who I am told is now deceased), dated 2/20/11, JR describes in detail his long-standing gender dysphoria and his attempts to "suppress it." "I've become adept at pretending to be a regular guy-- it's a huge act!" Finally, he wrote that if he had not been imprisoned, he would have tried to get "a sex-change operation and made a life for myself."

In spite of the documentation going back to at least 1995, the evaluators for competency at all stages of his case through 2011 do not appear to explore or consider the diagnosis of Gender Identity Disorder as an important and relevant psychiatric disorder that can impact competent decision-making. Dr. Kessel, in her 2016 evaluation, is the first to gather what is in the record regarding JR's identity issues and to assess JR for the presence of this serious psychiatric condition. She concludes, among other things, that JR is now, and has been, suffering from untreated Gender Identity Disorder, now referred to as Gender Dysphoria.

JR's past history of a violent, impoverished, and extremely abusive upbringing at the hands of multiple adults is well documented in the reports listed above and in sworn testimony from family members as well. It is clear that the violently homophobic environment that JR was faced with as a child and adolescent would in no way facilitate his ability to share, discuss, or act upon

any transgender feelings without fear for his life. As noted by McDermott et al (2008), this environment would be expected to result in substantial internalized transphobia and homophobia, with associated shame for having such feelings and, indeed, existing with an identity that is anything other than heterosexual and masculine.

Other researchers on gender and sexual minorities have also linked internalized transphobia/ homophobia, shame, and self-destructiveness in the form of suicidal and non-suicidal self-harm behaviors (McDermott et al, 2008; Fulligar 2003; 2005; Arnold and D'augelli, 2006), consistent with what is well-documented in JR's case. "Shame is very much connected to the embodied performance of identity in relation to cultural norms, as it produces feelings of self-hatred, disgust and loathing that are not easily detached from the self as 'cognitions'. (Fullagar, 2003, p. 299). Again, this description is quite consistent with what is readily observed in JR's records. In a study of youth with gender and sexual identity issues, the participants connected the distress "arising from homophobia to suicide attempts, self-harm practices, risky sexual practices and excessive drinking and drug-taking" (McDermott, 2008).

Discussion:

Although I cannot render any definitive psychiatric diagnosis without a personal interview with JR, it is clear to me that there is a high likelihood that JR has been suffering from, and has been deeply influenced by, gender dysphoria and associated

life-permeating symptoms and relational problems emanating from this psychiatric diagnosis. Gender Dysphoria (DSM-5, 302.85) is a significant psychiatric disorder that is commonly present with a variety of other psychiatric diagnoses, chief among them depressive disorders and post-traumatic stress disorder (two other diagnoses highlighted in Dr. Kessel's report), and mentioned by other evaluators in the past. I recently published the largest study to date of medical and mental health diagnoses in people with gender identity disorders, and found that gender dysphoric people are over four times more likely to have depressive disorders and nearly three times more likely to have PTSD in addition to gender dysphoria (Brown and Jones, 2016). The constellation of these three diagnoses co-occurring is not uncommon.

Dr. Kessel, in her recently submitted report, mentions "shame" no less than four times in her report. Evaluators have described in detail the horrific, violent setting that JR encountered as a young person struggling with gender and sexuality 1detity issues associated with nondisclosure and denial of such feelings. The environments that JR has been in his whole life would be expected to support nothing but shame, a sense of disgust and self-loathing, and self-destructive behaviors. Self-destructive behaviors took the extreme form of an autopenectomy attempt at age 14, and again while incarcerated. This is a rare symptom that is more closely associated with untreated gender dysphoria than any other diagnosis (Brown, 2010), especially in the absence of a psychotic disorder at the time of the attempts. There is no evidence in the

extensive medical records that JR was experiencing any psychotic symptoms at the time of his attempts.

"Suicide by cop" is a well-known phenomenon wherein individuals will engage in behaviors that essentially "make" law enforcement officers engage in lethal force against them, often with the intent to be killed. I have personally interviewed such individuals who survived "suicide by cop" incidents. In a large study of police shootings between 1998 - 2006, 36% of the 707 shootings were deemed to be suicide by cop scenarios. In the setting of the death sentence, there is an expectation that one will be executed unless the condemned mounts some type of defense to delay or terminate this outcome using the appeals process. The psychiatric equivalent of suicide by cop, in the setting of death row, would be "state-assisted suicide' to hasten death simply by allowing or encouraging the state to carry out its sentence without doing anything proactively to delay or stop execution. 106 of the first 822 executions since 1976 involved inmates who waived their rights to appeal the penalty (Blume, 2005). What is at issue in this case, from my perspective as a psychiatrist, is whether or not JR's decisions to waive his rights to appeal his death penalty sentence were decisions made in the absence of mental disorder(s) that could impact the voluntary, informed nature of these decisions. In the case of the most recent waiver in 2010, two evaluators concluded that his decision was made competently, however neither of the clinicians involved documented any reasons for not considering the psychiatric diagnosis of Gender Identity Disorder. It is not at all uncommon for otherwise competently

trained, experienced clinicians to miss this diagnosis, especially in the context of an evaluation where the evaluee is impaired by shame, guilt, and fear about expressing severe gender dysphoric feelings.

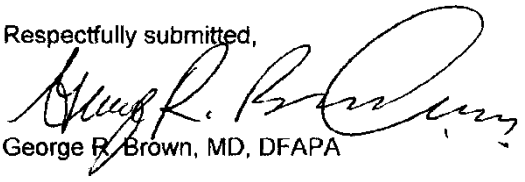
It is clear to me that Gender Identity Disorder should have been a consideration in JR's 2010 waiver proceedings but it is not until 2016 that Dr. Kessel, who had benefit of additional information not available to either Drs. McClaren or Prichard, reached the conclusion that the presence of previously undiagnosed, and untreated, gender identity disorder calls into question the voluntary and knowing nature of JR's decision to waiving his rights to further appeals.

Conclusions:

Based on all of the documentation available to me, it is my professional opinion that Dr. Kessel's diagnosis of Gender Dysphoria (previously known as Gender Identity Disorder, DSM-IV-TR, 302.85) in Jeremiah Rodgers' case is highly likely to be correct. I further concur with her opinion that prior evaluators did not make this diagnosis largely because the defendant did not, or could not share the information necessary to assist them in a more complete understanding of JR's conditions, coupled with the fact that this is an uncommon diagnosis with which few experienced clinicians have any expertise. It is further my opinion that the presence of untreated gender dysphoria was, and is, associated with shame, self-hatred, and self-destructiveness up to and including suicidality expressed as a waiver of jury trial in the second

penalty phase and in an additional waiver of rights to a post-conviction review of JR's death penalty sentence. As such, there is substantial doubt as to whether either of these waivers on the part of JR were fully voluntary or knowing.

Respectfully submitted,



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