Case No. SC2025-1507
Lower Court No. 1996-CF-8093

In the Supreme Court of Florida

SAMUEL LEE SMITHERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

DEATH WARRANT SIGNED
Execution Scheduled for October 14, 2025 at 6:00 p.m.

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary on the appeal from the denial of Smithers' current successive motion to vacate. The claims raised in this successive motion were denied because they were untimely, procedurally barred, or meritless as a matter of established Florida law. Accordingly, oral argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS[1]

On June 12, 1996, a Hillsborough County grand jury indicted Samuel Lee Smithers on two counts of first-degree murder for the murders of Cristy Cowan and Denise Roach. The jury trial resulted in guilty verdicts on December 18, 1998. Following the penalty phase, the jury returned a unanimous death recommendation on both

[1] The State will use the following to identify the respective appellate records: the direct appeal (SC1960-96690, *Smithers v. State*, 826 So. 2d 916 (Fla. 2002)) will be cited as DAR:[Page Number] for Records; DAT:[Page Number] for Transcripts; the initial postconviction proceedings (SC07-2258, *Smithers v. State*, 18 So. 3d 460 (Fla. 2009)) will be cited as 1PCR:[Page Number]; the first successive postconviction proceedings (SC17-1283, *Smithers v. State*, 244 So. 3d 152 (Fla. 2018)) will be cited as 2PCR:[Page Number]; and the second successive postconviction proceedings under a death warrant (SC2025-1507) will be cited as 3PCR:[Page Number].

counts. The trial court sentenced Smithers to death for the murders of the two victims on June 25, 1999.

I. Facts of the Crimes

Beginning in 1995, Smithers agreed to mow the lawn of a property with a vacant house in Plant City owned by Marion Whitehurst. *Smithers v. State*, 826 So. 2d 916, 918 (Fla. 2002). Both Smithers and Whitehurst attended the same church. *Id.* On May 28, 1996 around 7:00 p.m., Whitehurst visited the property. *Id.* at 919. When she arrived, she spotted Smithers sitting in the carport cleaning an axe with a pool of blood nearby. *Id.* Smithers attempted to excuse the blood, saying it must have come from a small animal. *Id.* Whitehurst left the property but eventually contacted the sheriff's department. *Id.* Deputies eventually found the dead body of Cristy Cowan floating in one of the ponds on the property. *Id.* A dive team also discovered the body of Denise Roach in the same pond. *Id.*

The medical examiner established that Cowan had sustained injuries to her eye, lip, and jaw. *Id.* at 920. She also sustained chop wounds on the top of her head and behind her ear. *Id.* The wounds on the top of Cowan's head penetrated her brain. *Id.* She also had several wounds consistent with manual strangulation. *Id.* Cowan's

cause of death was strangulation combined with various chop wounds. *Id.* The medical examiner noted Roach's body had been submerged for anywhere between seven and ten days. *Id.* Roach had sustained multiple injuries including blunt force impact to her face causing bone fractures, sixteen puncture wounds in her skull, and injuries consistent with manual strangulation. *Id.* Roach's cause of death was a combination of the blunt force impact, stab wounds, and strangulation. *Id.*

After initially denying involvement, Smithers eventually confessed that he was involved with both murders. *Id.* at 919. In the version of the story he told to law enforcement officials, Smithers alleged that he drove Cowan to the Whitehurst property after she had attempted to extort him for money. *Id.* at 919–20. He claimed they had a verbal dispute on the property and eventually he struck her in the head with an axe. *Id.* at 920. Smithers also recounted he took steps to conceal her body in the pond before and after Whitehurst arrived on the property. *Id.* Smithers claimed that Roach mysteriously appeared on the Whitehurst property on May 7. *Id.* When she was still there on May 13, Smithers asserted he told her to leave, but she punched him in the arm. *Id.* Smithers alleged he

retaliated by punching her in the face. *Id.* He then claimed the physical altercation continued until he shoved Roach against the wall which then caused a piece of wood to strike her head. *Id.* Smithers stated this knocked Roach unconscious, so he fled the property only to return the next day and find her body was still there. *Id.* Smithers then admitted to taking steps to conceal her body in the pond and clean up the murder scene. *Id.* After this confession, Smithers was arrested. *Id.*

II. Conviction and Sentence

During the guilt-phase trial, the State presented evidence that both Cowan and Roach were prostitutes who worked at the same location and Smithers had been visiting prostitutes at that location for an extended period. *Id.* The State presented additional evidence that Smithers had been seen with Cowan shortly before her murder. *Id.* at 921. Smithers testified at trial to a completely different story from what he had told law enforcement. In this second version of the story, Smithers claimed he was blackmailed by an unnamed mystery man into using the Whitehurst property for drug transactions. *Id.* at 920–21. Smithers claimed that this mystery man was responsible for killing the victims and Smithers merely cleaned up the murder

scenes. *Id.* at 921. After hearing all the testimony, the jury quickly returned a guilty verdict. *Id.*

During the penalty phase, Smithers' counsel presented testimony from multiple witnesses including Dr. Frank Wood, Dr. Robert Berland, and Dr. Michael Maher. *Id.* at 921. These doctors collectively opined that Smithers had significant brain injuries. *Id.* In addition to the PET scans of Smithers' brain, Dr. Berland administered the first edition of the Wechsler Adult Intelligence Scale (WAIS) in 1997. DAT:1732–33. Although the third edition of the WAIS test had been published and provided a more accurate assessment of an individual's intelligence, Dr. Berland preferred the first edition of the test because he believed it was better at detecting brain injuries in subjects. DAT:1733-35; 1778. Thus, although Smithers attained a full-scale I.Q. of 111 on the WAIS test, Smithers' actual I.Q. was "somewhere around 103, 104." DAT:1778. Both Dr. Berland and Dr. Maher opined that Smithers suffered from debilitating mental illnesses that substantially impaired his ability to conform his conduct with the law. *Smithers*, 826 So. 2d at 921–22. After deliberating, the jury unanimously recommended a death sentence on both murders. *Id.* at 922.

On June 25, 1999, the trial court published its sentencing order and found three aggravators for Cowan's murder: (1) previous violent felony (contemporaneous murder), (2) the murder was especially heinous, atrocious, or cruel (HAC), and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); and two aggravators for Roach's murder: (1) previous violent felony (contemporaneous murder) and (2) HAC. DAR:246–253. The trial court found the following two statutory mitigators had been proved: (1) the murder was committed while Smithers was under the influence of extreme mental or emotional disturbance and (2) his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. DAR:256–57. The trial court also found Smithers had proved the following non-statutory mitigators: (1) Smithers was a good husband and father, (2) Smithers enjoyed a close relationship with his siblings, (3) Smithers was physically and emotionally abused by his mother as a child, (4) Smithers regularly attended church and was devoted religiously, (5) since being arrested, Smithers has been a model inmate and he would conduct himself appropriately in a prison setting, (6) Smithers

has made several contributions to the community, and (7) Smithers confessed to the crimes, even though his trial testimony was entirely at odds with the statements he made to law enforcement. DAR:257–58. The court gave all statutory and non-statutory mitigators moderate weight. DAR:256–58. John Cowan, Christy Cowan's father, also requested that Smithers be given a life sentence during the *Spencer* hearing. The court gave that request great weight. DAR:258 Ultimately, however, the trial court found the aggravators substantially outweighed the mitigators and sentenced Smithers to death for both murders. DAR:259–60.

III. Postconviction Proceedings

Smithers appealed his conviction and sentence, but this Court affirmed both. *Smithers v. State*, 826 So. 2d 916, 918–22 (Fla. 2002). The Supreme Court of the United States denied Smither's petition for a writ of certiorari on February 24, 2003. *Smithers v. Florida*, 537 U.S. 1201 (2003).

Smithers then filed his initial postconviction motion. After hearing evidence on some of Smithers' claims, the postconviction court denied postconviction relief. 1PCR:310–346. Smithers filed his appeal and filed a habeas petition, but this Court affirmed the denial

of postconviction relief and denied Smithers' habeas petition. *Smithers v. State*, 18 So. 3d 460, 473 (Fla. 2009). Smithers did not seek certiorari in the Supreme Court.

Next, Smithers filed a federal habeas petition. *Smithers v. Sec'y, Dep't of Corr.*, 2011 WL 2446576 (M.D. Fla. June 15, 2011). The district court issued an order denying Smithers' petition and also denied a certificate of appealability (COA). *Smithers v. Sec'y, Dep't of Corr.*, 2011 WL 2446576 (M.D. Fla. June 15, 2011). Smithers applied to the Eleventh Circuit Court of Appeals for a COA. The court granted the application in part but ultimately issued an opinion affirming the denial of Smithers' federal habeas petition. *Smithers v. Sec'y, Fla. Dep't of Corr.*, 501 F. App'x 906 (11th Cir. 2012). The Supreme Court denied Smithers' petition for writ of certiorari on April 15, 2013. *Smithers v. Crews,* 569 U.S. 935 (2013).

Smithers then filed his first successive postconviction motion. The postconviction court ultimately found Smithers was entitled to no relief. 2PCR:237–250. The Florida Supreme Court affirmed the lower court's summary denial of his claims on March 29, 2018. *Smithers v. State*, 244 So. 3d 152 (Fla. 2018). Smithers did not seek certiorari in the United States Supreme Court.

IV. Warrant Litigation

On September 12, 2025, Governor Ron DeSantis signed Smithers' death warrant. The execution is scheduled for October 14, 2025, at 6:00 p.m. An initial case management hearing was held on September 15, 2025, and the court entered its Order on Case Management Conference on that date.

Smithers filed his Successive Motion to Vacate Judgment of Conviction and Sentence on September 19, 2025. His motion raised a single claim alleging that the Eighth Amendment of the Constitution of the United States categorically bars his execution because he is older than sixty-five years of age. 3PCR:174–75; 183; 188. This novel claim had not been raised previously, despite Smithers attaining the age of sixty-five on January 30, 2018. Smithers also alleged that he had experienced cognitive decline, but these allegations were not pleaded as a separate claim. 3PCR:186–88; *cf.* Fla. R. Crim. P. 3.851(e)(1) (requiring every claim "must be separately pled and sequentially numbered beginning with claim number 1"). Rather, Smithers asserted his cognitive decline allegations supported his categorical age-exemption claim that Florida "seeks to protect" the elderly based on the "vulnerability" of

elderly adults as a class. 3PCR:188.

Following the State's response and a *Huff*[2] hearing, the lower court summarily denied Smithers' successive motion on September 26, 2025. The lower court found Smithers' claim was untimely and procedurally barred. 3PCR:260–61. Additionally, the lower court found his claim was foreclosed by the conformity clause and binding precedent. 3PCR:262. Even if the claim had not been foreclosed, the lower found his arguments unpersuasive because Smithers failed to identify any court or legislature which forbade the execution of the elderly and none of the logic underlying the precedent cited by Smithers justified applying those cases to his claim. 3PCR: 262–264. Finally, the lower court found that Smithers' allegation that he was experiencing cognitive decline was refuted by the record and had no constitutional significance. 3PCR:265–67.

Smithers timely filed the following appeal to this Court. 3PCR:247–48.

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

SUMMARY OF THE ARGUMENT

Smithers raises a single claim that all individuals who are sixty-five years or older (hereinafter "the elderly") should be categorically exempt from execution. This claim was untimely and procedurally barred because it could have been raised on January 30, 2018, the day he turned sixty-five years old. Yet, Smithers waited until the eve of his execution to raise the claim.

Likewise, the lower court properly found Smithers' claim was meritless because this Court has repeatedly held that the conformity clause of the Florida Constitution acts as both the floor and the ceiling for protection from cruel and unusual punishment. Smithers failed to demonstrate there is a national consensus against executing the elderly, Smithers' wrongly concluded that there is no penological purpose of applying the death penalty to the elderly, and Smithers' alleged cognitive decline was irrelevant and refuted by the record.

STANDARD OF REVIEW

Summary denial of a successive postconviction motion is appropriate where the claims raised are (1) untimely, (2) procedurally barred, (3) legally insufficient, or (4) refuted by the record. *Hutchinson v. State*, No. SC2025-0517, 2025 WL 1198037, at *3 (Fla. Apr. 25,

2025). "In reviewing a trial court's summary denial, 'this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record.'" *Cole v. State*, 392 So. 3d 1054, 1061 (Fla. 2024) (quoting *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008)). On appeal from the summary denial of a successive postconviction motion, this Court "review[s] the postconviction court's decision de novo." *Id.* (citing *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009)).

ARGUMENT

THE LOWER COURT'S SUMMARY DENIAL OF SMITHERS' CLAIM THAT THE ELDERLY SHOULD BE CATEGORICALLY EXEMPT FROM EXECUTION WAS PROPER

Smithers' sole claim is that he should be exempt from execution under the Eighth Amendment of the Constitution of the United States and Article One, Section Seventeen of the Constitution of Florida.[3] The lower court provided sound reasons why Smithers' claim was untimely, procedurally barred, and meritless. Smithers largely repeats the argument he presented below with only slight variations. None of Smithers' additional arguments are persuasive. This Court should affirm the lower courts summary denial of Smithers' claim.

A. The Lower Court Properly Found That Smithers' Claim Was Untimely and Procedurally Barred.

Florida Rule of Criminal Procedure 3.851 requires that defendants file timely petitions for relief. Smithers entirely failed to plead his claim was timely. Likewise, defendants are not permitted to

[3] Smithers does not identify any case law or independent arguments under the Florida Constitution for his claim. This omission is peculiar given that he is claiming that the Florida Constitution's conformity clause does not bar this Court from independently creating a novel protection against allegedly cruel and unusual punishment.

make claims that they should have raised earlier. Smithers claims that his claim was not ripe until his death warrant was signed. He does so by comparing his claim to a competency-for-execution claim. This comparison is ill-conceived and contradicted by this Court's precedent. Therefore, the lower court was correct to reject his claim.

i. Smithers' Claim is Untimely.

Florida Rule of Criminal Procedure 3.851 requires, with few exceptions, that any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). Smithers' judgment and sentence were final on February 24, 2003 when the Supreme Court of the United States denied his petition for certiorari. *Smithers v. Florida*, 537 U.S. 1201 (2003). A claim filed outside the one-year period is untimely unless one of the following circumstances exists:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

> (C) postconviction counsel, through neglect, failed to file the motion.
>
> Fla. R. Crim. P. 3.851(d)(2).

In the proceedings below Smithers identified no timeliness exception under Rule 3.851(d)(2) for his claim. Consequently, the lower court correctly determined that his claim was untimely. 3PCR:260–-261. In his present appeal, Smithers seems to suggest that Rule 3.851(d)(2)(A) provides him with an exception to the timeliness bar, but never explains what fact or facts were unknown to him that he could not ascertain with due diligence. IB at 5. *See Bates v. State*, No. SC2025-1127, 2025 WL 2319001, at *3 (Fla. Aug. 12, 2025) (rejecting a claim as untimely because the defendant "has not offered any persuasive reason why this evidence is newly discovered or timely now.")

The exception for newly discovered evidence under Rule 3.851(d)(2)(A) does not apply because the only new information that Smithers brought to the court below was an evaluation Dr. Eisenstein conducted on September 18, 2025. Smithers does not suggest, and did not suggest below, that this should be considered newly discovered evidence. *See* 3PCR:225. But even if he did, Smithers has

failed to demonstrate that he exercised any due diligence in procuring Dr. Eisenstein's evaluation and he has failed to explain why this evaluation would probably produce an acquittal or lesser sentence upon retrial. *Gudinas v. State*, 412 So. 3d 701, 710 (Fla. 2025) (holding that a failure to plead due diligence and probability of acquittal is "fatal to any argument that his claim may be timely under rule 3.851(d)(2)(A)").

The remaining exceptions also do not apply to Smithers' claim. Smithers seeks to have this Court recognize an entirely new constitutional right, not apply one that has been recently established and held to be retroactive. Therefore, he cannot claim the timeliness exception under Rule 3.851(d)(2)(B). *See Windom*, 2025 WL 2414205 at *3 (citing *Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013)). Finally, Smithers has not alleged that his counsel intended to file this motion within the acceptable timeframe, therefore, Rule 3.851(d)(2)(C) does not apply. Consequently, the lower court correctly found that Smithers' claim was untimely.

ii. Smithers' Claim is Procedurally Barred.

Smithers' claim is also procedurally barred because he could have raised it earlier. Smithers is seeking an extension of the legal

rights recognized in *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002); and *Roper v. Simmons*, 543 U.S. 551 (2005). IB at 15, 17–18, 24–26, 32–34. As a member of a distinct class—the elderly—Smithers could have raised his claim upon obtaining membership in that class. *See e.g. Wells v. State*, 364 So. 3d 1005, 1016 (Fla. 2023) (raising a categorical exemption-from-execution claim on direct appeal). The lower court recognized that Smithers' age-based claim would have been ripe when he attained the age of sixty-five. 3PCR:261. Smithers turned sixty-five on January 30, 2018. Yet Smithers waited until after Governor DeSantis signed his death warrant, six years after the claim had ripened, to raise this claim. Because Smithers could have raised his age-based categorical exemption claim in any of his pre-warrant proceedings, yet failed to do so, the lower court properly found that his claim was procedurally barred. *See Gudinas*, 412 So. 3d at 714 ("Post-warrant claims that could have been raised in a prior proceeding are procedurally barred.").

iii. Smithers' Ripeness Argument Does Not Exempt Him from the Timeliness and Procedural Requirements.

Smithers suggests that his claim is exempt from the timeliness and procedural requirements because, like a competence-to-be-executed claim, his age-based exemption claim was not ripe for review until his death warrant was signed. IB at 6–8. But Smithers' argument misapprehends why competency-to-be-executed claims are not ripe until a death warrant is signed. A claim is not ripe for review if it is premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation modified). Competency is malleable. An individual may be competent to be executed one month, but incompetent another month. Incompetent individuals may also be restored to competency through medical treatment. *See e.g.* § 922.07(4), Florida Statutes (providing a protocol for determining when an individual who had been deemed insane to be executed has been restored to sanity). Because a defendant's competency is malleable, a court analysis of their competency is dependent on the date that they are scheduled to be executed. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998). The age

of a defendant on the date of execution is no longer of any consequence once that defendant has attained a certain age. Therefore, this Court should not apply the ripeness logic of competency-to-be-executed claims to age-based claims.

Competency claims are also poor analogues to Smithers' age-based claim because he is arguing that all members of a specified class ought to be exempt from execution. This Court has consistently held that similar class-based exemptions should be raised when the exemption is recognized by the Supreme Court of the United States. *See Davis v. State*, 142 So. 3d 867, 875 (Fla. 2014) (noting that a *Rope*r extension claim was procedurally barred because "between the time of the *Roper* decision in 2005 and these post-warrant proceedings, Davis has never raised a claim based on *Roper*"); *Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013) (holding that a blended *Atkins/Roper* extension claim could have been raised when those cases were decided); *Farina v. State*, 937 So. 2d 612, 626 (Fla. 2006) (finding that a *Roper* extension claim was procedurally barred because it should have been raised on direct appeal). This Court has already determined that, whenever a defendant raises a claim premised on the defendant's age, the signing of a death warrant is

simply not relevant to deciding whether that individual is eligible for execution. *See Ford v. State*, 402 So. 3d 973, 978 n.5 (Fla. 2025) (finding that "[t]he signing of the warrant has nothing to do with whether Ford is eligible for execution based on his mental age"). Because the class that Smithers wishes to create is premised on his age, then the moment he attained membership in that class, the necessary contingencies would have been fulfilled. Therefore, the lower court properly held that Smithers' claim was ripe for review once Smithers turned sixty-five.

B. The Lower Court Properly Determined That Smithers' Claim was Meritless.

The Supreme Court has recognized the Eighth Amendment to the Constitution of the United States categorically exempts three classes of individuals from execution: (1) those who are insane at the time of their execution, *Ford,* 477 U.S. at 405; (2) individuals who are intellectually disabled *Atkins*, 536 U.S. at 317; and (3) juveniles under the age of eighteen, *Roper*, 543 U.S. at 317. Smithers is not claiming any of these three exceptions apply to him. Rather he is suggesting that this Court apply the Eighth Amendment to a novel fourth class: the elderly. IB at 5.

The lower court correctly pointed out that this Court has repeatedly held that the conformity clause of the Florida Constitution precludes relief for these types of claims. 3PCR:262. Even if Smithers' claim were not foreclosed by binding precedent, Smithers has entirely failed to prove there is a "national consensus" that has emerged against punishing individuals for their heinous crimes solely because they are elderly. The lower court was also entirely correct to find Smithers' execution was consistent with the penological purpose of the death penalty. Finally, Smithers has failed to identify any persuasive reason why the lower court erred in finding his allegations of cognitive decline were of no constitutional significance.

i. The Lower Court Correctly Held That Smithers' Advanced-Age Categorical Exemption Claim is Barred by the Conformity Clause.

Smithers asks this Court to recognize an entirely novel Constitutional right derived from the Eighth Amendment to the Constitution of the United States. The Florida Constitution, however, provides that any "prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment

to the United States Constitution." Art. I, § 17, Fla. Const. This Court has consistently held that the conformity clause means the Supreme Court of the United States' "interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida" *Barwick v. State*, 361 So. 3d 785, 794 (Fla. 2023); *see also Lawrence v. State*, 308 So. 3d 544, 551 (Fla. 2020) (holding that "the conformity clause expressly forecloses this Court's imposition of a comparative proportionality review requirement"); *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (holding that the conformity clause prohibited the Court from considering whether "national trends" warranted reviewing whether imposing the death penalty constituted cruel and unusual punishment); *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015) (citing the conformity clause in declining to criticize the constitutional soundness of federal precedent for proving a lethal injection challenge). When the Supreme Court of the United States announces a certain class of individuals are exempt from execution, the Florida Supreme Court will narrowly construe that class. *See e.g. Gudinas*, 412 So. 3d at 714 (holding the conformity clause does not permit the Court to expand the class established in *Atkins* to cover individuals with severe mental

disturbances); *Barwick*, 361 So. 3d at 794 (declining to expand the class identified in *Roper* to include twenty-one-year-olds).

Smithers attempts to elide this well-established body of case law by first trying to graft federal Anti-Terrorism and Death Penalty Effectiveness Act (AEDPA) jurisprudence onto Article I, Section 17 of the Florida Constitution. IB at 9–10. But Florida's conformity clause has nothing to do with how AEDPA defines "clearly established Federal law". *See e.g.* 28 U.S.C. § 2254(d)(1)–(2); *see also White v. Woodall*, 572 U.S. 415, 419 (2014) (noting that "clearly established federal law means "the holdings, as opposed to dicta of [the Supreme Court of the United States'] decisions) (citation modified). Thus, AEDPA provides no useful comparison.

Next, Smithers references an entirely different section of the Florida Constitution by noting Article One, Section Twelve has a similarly worded conformity clause related to the Fourth Amendment of the United States Constitution. IB at 11–12. This comparison fails for three reasons. First, it is questionable whether case law interpreting one Section of the Florida Constitution using similar, but not identical, wording is persuasive. *See e.g. Baxter v. State*, 389 So. 3d 803, 815 n.1 (Fla. 5th DCA 2024) (MacIver, J., concurring) (noting

that the Section Twelve conformity clause is "[n]ot to be confused" with the conformity clause in Section Seventeen). This is particularly true because Smithers has identified no situation where this Court has cross-applied Section Twelve to Section Seventeen or vice versa.

Second, Smithers entirely misreads the holding in *Soca*. Previously, the Court had clarified the meaning of the conformity clause in Section Twelve as follows:

> Prior to passage of this amendment, Florida courts "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution," [*State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983)]. With this amendment, however, we are bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment, and provide no greater protection than those interpretations. Indeed, an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.

Bernie v. State, 524 So. 2d 988, 990–91 (Fla. 1988) (brackets added). Even in *Soca*, this Court noted that where the Supreme Court of the United States addressed a "particular search and seizure issue" Florida's conformity clause means that courts are "bound to follow the interpretations of the United States Supreme Court with respect to the Fourth Amendment and provide to Florida citizens no greater

protection than those interpretations." *Soca v. State*, 673 So. 2d 24, 27 (Fla. 1996). This line became the enduring holding of *Soca*. *See e.g. Davis v. State*, 217 So. 3d 1006, 1015 (Fla. 2017). It is only "when the United States Supreme Court has not previously addressed a particular search and seizure issue" that Florida courts will resort to their "own precedent for guidance." *Soca,* 673 So. 2d at 27. Thus, even if this Court were to apply Section Twelve of Florida's Constitution, to Section Seventeen, there is a United States Supreme Court case that expressly addresses the issue of age-based execution exemptions: *Roper*. Yet there, the Court limited its findings to juveniles under the age of eighteen. *Roper*, 543 U.S. at 556.

Third, even if this Court were to look past *Roper*, Smithers points to no Florida court or even any court in this country which has recognized the elderly are exempt from execution.[4] This Court

[4] In courts outside of Florida, claims about the advanced age of a defendant rendering a sentence cruel and unusual have failed to garner any judicial endorsement. *See e.g. Allen v. Ornoski*, 435 F.3d 946, 951–55 (9th Cir. 2006) (holding that there is a "woeful lack of support for the proposition that the Eighth Amendment prohibits execution of the elderly and the infirm"); *Carpenter v. Martel*, No. C 00-3706 MMC, 2011 WL 5444165, at *8 (N.D. Cal. Nov. 9, 2011) (denying a claim wherein the defendant argued "executing a person of advanced age will not serve any legitimate penological interest, in particular, deterrence or retribution"); *Holliday v. New York*, No. 10-

has specifically and consistently declined invitations to expand *any* age-based execution exemptions beyond the bright-line rule established in *Roper*. *Ford*, 402 So. 3d at 979 ("[T]his Court has repeatedly rejected the argument that *Roper*'s holding . . . should be extended to defendants whose mental or developmental age was less than eighteen at the time of their offenses."); *Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018) ("Therefore, unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended, we will continue to adhere to *Roper*"). It was, therefore, entirely appropriate for the lower court to hold that Smithers' claim was foreclosed by binding precedent.

ii. The Lower Court Correctly Found That Smithers Failed to Establish There is Any National Consensus Against Executing the Elderly.

Smithers invokes the "evolving standard of decency" of society to argue the elderly should be categorically exempt from execution.

CV-0193 MAT, 2011 WL 2669615, at *4 (W.D.N.Y. July 7, 2011) (rejecting a claim that it would be cruel and unusual punishment to incarcerate an individual for fifteen years because of "his age and the fact that he suffers from a constellation of debilitating illnesses").

IB at 14–30.[5] The lower court found this argument unpersuasive because Smithers failed to show there is any "objective indicia" that there is any "national consensus" that administering the death penalty for elderly defendants is excessive. 3PCR:262–63. To establish that "standards of decency have evolved" such that it would be cruel and unusual to execute anyone who fell into a certain class, courts will first consider whether a "national consensus" has evolved to forego the practice of executing individuals within that specified class. *Atkins*, 536 U.S. at 316. These "objective indicia" primarily take on the form of "legislative enactments and state practice with respect to executions." *Roper*, 543 U.S. at 563 (examining the number of states with legislative prohibitions against executing individuals

[5] The State would also note that Supreme Court has recently returned to analyzing "cruel and unusual punishment" according to the original meaning of the term. *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 542–43 (2024) (considering history, and tradition to assess whether a city's ordinance constituted cruel and unusual punishment); *Bucklew v. Precythe*, 587 U.S. 119, 130 (2019) (evaluating the historical context of the term to assess whether lethal injections could be considered cruel and unusual punishment). But whether this rationale should be abandoned altogether is for another Court to decide. *See Glossip v. Gross*, 576 U.S. 863, 898–99 (2015) (Scalia, J, concurring) (explaining how the "evolving standards of decency" rationale has caused considerable "mischief to our jurisprudence, to our federal system, and to our society").

under the age of eighteen and the frequencies of such executions where there was no formal legislative prohibition); *see also Atkins*, 536 U.S. at 316 (considering the same with respect to intellectually disabled individuals). The Supreme Court has noted it is less the absolute number of legislatures who forbid the practice, but more "the consistent direction of the change" which would demonstrate that standards have evolved toward forbidding the practice. *Atkins*, 536 U.S. at 315.

Here, Smithers supports his argument by pointing to legislation adopted in Florida which protects the elderly. IB at 19–23. The lower court correctly found that laws pertaining to additional protection elderly citizens have no relevance for assessing whether society believes it is appropriate to execute people who also happen to be elderly. 3PCR:262.[6] Nor does Smithers even address the fact that, regardless of how "loudly" Florida Statutes proclaim a policy preference for protecting the elderly, his motion in the court below was silent as to what Florida or other states have done to limit

[6] Smithers quibbles with the State's argument about these laws applying to law-abiding citizens by suggesting these laws apply to non-law-abiding citizens too. IB at 22–23. His response is, at best, a red herring.

executions of the elderly. Smithers even concedes that none of the Statutes he cites "speak directly to the appropriateness of executing the elderly." IB at 23. The lower court correctly recognized Smithers' failure to name a *single* state which forbade the execution of the elderly is fatal to his "evolving standards of decency" claim.

Next, Smithers makes much of the fact that individuals over the age of sixty-five[7] are not frequently executed in the United States. IB at 24–30; 40–41. Smithers argues the infrequence of these executions means there must be a national consensus against carrying out death sentences if the defendant is elderly. IB at 30. But Smithers' unsophisticated numerical references, stripped of any meaningful context, do little to prove his point. Smithers' argument assumes the rarity of the event must be *because* those individuals are elderly. But selecting an arbitrary characteristic then pointing out how few people with that arbitrary characteristic are executed does little to establish that there is a causal significance to that statistical aberration. For

[7] Smithers includes figures about those over the age of seventy. IB at 26–29, Yet, he argues that this Court should recognize the elderly, defined as sixty-five and older, are exempt from execution. IB at 15 n.3. Therefore, any statistics about those seventy years or older would be another red herring.

example, according to the same database Smithers relies on, only eighteen females in the United States have been executed since 1975.[8] It would be unsound to conclude that the paucity of female executions compels the conclusion that there is a national consensus against executing females. There are rather obvious confounding variables which would explain why females are less frequently executed. Here too, it would be fallacious to conclude that the infrequency of executions must be attributed to a national consensus against executing elderly individuals.

When evaluating whether there is a causal connection between a defendant's advanced age and the frequency of executions, there is a plethora of confounding variables that Smithers must first consider. It could simply be a statistical artifact because most offenders are relatively young when they committed the murder and they are executed before they become elderly; it could be because that decisionmakers have decided to prioritize the execution of

[8] *Execution Database*, Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/data/executions?defendant-gender=Female (last visited Sept. 23, 2025).

individuals who have committed far more heinous crimes; it could be because death penalty appeals are quite lengthy and many offenders die before their appeals are exhausted; or it could be any other reason that has no connection to a national aversion to executing those who happen to be elderly. Smithers does not attempt to account for any confounding variables. Therefore, he cannot reliably suggest there is any causal significance to elderly individuals being infrequently executed.

Even if there was causal connection between the age of the defendants and their selection for execution, this hardly means there is a national consensus that such a practice is considered cruel and unusual. The fact that various states *are* executing the elderly suggests that there is no national consensus that carrying out a death sentence for the elderly is excessive. It is also worth noting that fifteen of the forty-one executions (37%) involving an individual age sixty-five or older happened within the past five years.[9] If Smithers

[9] *Execution Database*, Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/data/executions?age=83&age=79&age=78&age=77&age=76&age=75&age=74&age=72&age=71&age=70&age=69&age=68&age=67&age=66&age=65 (last visited September 23, 2025).

wishes to derive normative significance from these numbers, then the trend cut in the opposite direction of his claim. *See Atkins*, 536 U.S. at 315. The evidence Smithers' cited in the lower court falls woefully short of demonstrating a "national consensus" even remotely comparable to what was discussed in *Atkins* and *Roper*. Therefore, the lower court correctly found Smithers' claim was meritless.

iii. The Lower Court Correctly Determined That Smithers' Execution is Consistent with the Penological Purpose of the Death Penalty.

Smithers argues that this Court should dramatically expand the prohibitions of *Ford*, *Roper*, and *Atkins* to cover the elderly. IB at 31–35. He suggests principles of these decisions illustrates that executing the elderly serves no penological purpose. IB at 32–36. The lower court was unconvinced because nothing about the elderly indicates their culpability, as a class, is diminished to the point of undermining the retributive and deterrent effect of the death penalty. 3PCR:263–65.

The central theme of all the cases exempting certain classes of individuals from capital punishment is that those individuals are less culpable of the crimes they committed. As the plurality of justices recognized long ago:

> The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (footnotes omitted).

Drawing on this theme, the Supreme Court held in *Ford v. Wainwright*, that there is little retributive value in "executing a person who has no comprehension" of why he is being punished. 477 U.S. at 409. Similarly, in *Atkins*, the Supreme Court noted "the appropriate punishment necessarily depends on the culpability of the offender." 536 U.S. at 319. To that end, punishing the intellectually disabled served little penological purpose because: (1) their diminished culpability means society is not punishing a depraved mind and, (2) due to their limited capacity to "control their conduct," the intellectually disabled are not likely to be deterred from committing capital crimes. *Id.* at 319–20. The same justification was employed in *Roper*. There the Supreme Court determined juveniles under the age of eighteen were less culpable for their crimes because

their "blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

The elderly, by contrast, do not have diminished culpability as a class. While the elderly may have a greater *risk* of developing cognitive issues which diminish their culpability, they are not, as a class, similar in any respect to the intellectually disabled or juveniles. To the extent that the elderly are more prone to infirmity, the relevant constitutional test remains *Ford*'s competency evaluations. In those circumstances, the Supreme Court of the United States has eschewed the categorical approach Smithers advocates. In *Madison v. Alabama*, the Supreme Court of the United States recognized that defendants who have a debilitating cognitive disease such as dementia are not categorically-exempt from execution. 586 U.S. 265, 277 (2019). Rather, the Court opted for a more tailored approach, saying the relevant test is whether the defendant "may still be able to form a rational understanding of the reasons for his death sentence." *Id.* at 267. Smithers identifies no persuasive reason to depart from *Madison*'s tailored approach. In any event, the lower court correctly identified that the elderly, as a class, are not categorically less

culpable, thus, it is entirely consistent with the penological purpose of the death penalty to carry out their death sentences.

iv. The Lower Court Correctly Determined that Smithers Alleged Cognitive Decline Is Not Relevant to His Constitutional Claim.

Smithers continues to assert that his cognitive decline bears some relevance to these proceedings. IB at 42. The court below correctly found this claim lacked constitutional relevance and was refuted by the record. 3PCR:266. Smithers continues to raise this argument but addressed neither of the lower court's findings on appeal. Therefore, this Court should treat it the same as the lower court and reject it.

A defendant's cognitive state is only constitutionally relevant if the defendant is either (1) intellectually disabled, *Atkins*, 536 U.S. at 321, or (2) the defendant is experiencing a mental illness which renders him insane. *Madison*, 586 U.S. at 271 (*quoting Panetti v. Quarterman*, 551 U.S. 930, 954 (2007)). In the court below, Smithers expressly foreswore any claim that he was intellectually disable. 3PCR:188. Nor is Smithers claiming that his cognitive decline has advanced to the extent that he is insane. Instead, Smithers generally relates his cognitive condition to his advanced age. IB at 42–43. Yet,

Smithers argues that individuals who are elderly should be categorically exempt from execution. IB at 43. More specifically, this Court has expressly held that a defendant's "pattern of cognitive decline . . . do[es] not shield him from execution." *James v. State*, 404 So. 3d 317, 325 (Fla. 2025). His allegations about his cognitive condition have no bearing on whether this Court should create a categorical exemption from execution. Therefore, the lower court correctly recognized that Smithers allegation that he has experienced significant cognitive decline has no bearing on whether it is constitutionally permissible to carry out his sentence.[10]

CONCLUSION

The State of Florida respectfully requests that this Honorable Court affirm the lower court's order denying Smithers' successive motion for postconviction relief.

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[10] As the lower court recognized, the record also makes it clear that Smithers cognitive capacity has actually remained remarkably stable during his incarceration. *See* 3PCR:265. The supposed drop in I.Q. was because Smithers took the WAIS I in 1997, but if he took the WAIS-III test, his score would have been identical to the one Dr. Eisenstein obtained on September 18, 2025. DAT:1732;1778. Smithers conveniently ignores this point, instead merely recites the same suggestion he made to the lower court. IB at 42.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September 2025, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Honorable Michelle Sisco, Circuit Judge, Thirteenth Judicial Circuit, Hillsborough County Courthouse, 401 North Jefferson Street, Tampa, Florida 33602, **diazcra@fljud13.org**,; Eric C. Pinkard, Chief Assistant CCRC-M, Mahham Seyed, Ann Marie Mirialakis, and Melody Jacquay-Acosta, Assistants CCRC-M, Office of Capital Collateral Regional Counsel-Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **pinkard@ccmr.state.fl.us**, **syed@ccmr.state.fl.us**, **jacquay@ccmr.state.fl.us, mirialakis@ccmr.state.fl.us**, **support@ccmr.state.fl.us**;, and the Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399, **warrant@flcourts.org, canovak@flcourts.org**.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style in compliance with Fla. R. App. P. 9.045(b), and that the word count is 7,107 words in compliance with Fla. R. App. P. 9.100(j).

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