IN THE SUPREME COURT OF FLORIDA
CASE NO: SC2025-1507

SAMUEL LEE SMITHERS, JR.,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
Lower Tribunal No. 1996-CF-008093A

INITIAL BRIEF OF THE APPELLANT

DEATH WARRANT SIGNED

MELODY JACQUAY-ACOSTA
Florida Bar No. 1010248
Jacquay@ccmr.state.fl.us

ANN MARIE MIRIALAKIS
Florida Bar No. 658308
Mirialakis@ccmr.state.fl.us

MAHHAM SYED
Florida Bar No. 1049535
Syed@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE REGION
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
813-558-1600
813-558-1601 (Facsimile)
Support@ccmr.state.fl.us
Counsels for the Appellant

REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, which presents a novel issue on constitutional significance and the resolution of the issues presented will determine whether Samuel Lee Smithers, Jr. (Mr. Smithers) will live or die, and a complete understanding of the complex factual, legal and procedural history and the arguments presented are critical to the proper disposition of this appeal.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying a successive motion for postconviction relief from a sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. art. V, § 3(b)(1); *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record are designated as follows:

> "ROA" followed by "Vol" followed by the volume number followed by "R" for the page number for the bate stamp from the Clerk found at the bottom right-hand corner of the trial transcript.

The transcript of the penalty phase consists of one volume, designated Vol. 19.

The supplemental record on appeal consists of seven volumes and is referenced to as “Supp. Record on Appeal” followed by the volume I-VII and “R” followed by the page number.

The postconviction record on appeal consists of one volume and is referenced to as “PC ROA” followed by “P” and the page number.

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STATEMENT OF PROCEDURAL HISTORY AND FACTS

Samuel Smithers was found guilty of two counts of murder in the first-degree by a jury on December 18, 1998. Jurors unanimously voted in favor of the death penalty and the trial court imposed a death sentence on both counts of first-degree murder.

This court affirmed Mr. Smithers' judgments and sentences in *Smithers v. State*, 826 So. 2d 916 (Fla. 2002); mandate issued on September 13, 2002. A petition for certiorari was filed with the United States Supreme Court and denied on February 24, 2003, *Smithers v. Florida*, 537 U.S. 1201 (2003).

Post-Conviction

Mr. Smithers filed a rule 3.851 motion for postconviction relief on December 22, 2003. After an evidentiary hearing, the court denied his postconviction motion. The Florida Supreme Court affirmed the postconviction court's denial and also denied Mr. Smithers' accompanying State Habeas petition, *Smithers v. State*, 18 So. 3d 460, 463 (Fla. 2009).

Federal Habeas Litigation

Mr. Smithers then filed a petition for writ of habeas corpus, accompanied by a memorandum of law in support, in the Middle District

of Florida. This petition included a *Ring* claim. The Petition for Writ of Habeas Corpus was denied by the district court on June 15, 2011, *Smithers v. Sec'y, Dept. of Corr.*, 2011 WL 2446576 (M.D. Fla. June 15, 2011). Judgment was entered on June 16, 2011. An order denying a motion to alter or amend was entered on November 23, 2011. The Eleventh Circuit affirmed this denial. *Smithers v. Sec'y*, *Fla. Dept. of Corr.*, 501 F.App'x 906 (11th Cir. 2012). The United States Supreme Court then denied Mr. Smithers' petition for writ of certiorari on April 15, 2013, *Smithers v. Crews,* 569 U.S. 935 (2013).

Relevant Successive Motions

Mr. Smithers filed a successive motion to vacate death sentence on January 9, 2017 under rule 3.851, asserting various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 577 U.S. 92 (2016). The motion was denied and the Florida Supreme Court affirmed the denial. *Smithers v. State*, 244 So. 3d 152 (Fla. 2018). Smithers did not seek certiorari review in the United States Supreme Court.

On September 12, 2025, Governor DeSantis signed Mr. Smithers' death warrant scheduling Mr. Smithers' execution for October 14, 2025, at 6:00 pm. Subsequently, Mr. Smithers filed

Defendant's Successive Motion to Vacate Defendant's Sentence of Death on September 19, 2025. The trial court entered its order denying Defendant's successive motion on September 26, 2025.

STANDARD OF REVIEW

This is an appeal from a Successive Motion under Fla. R. Crim. P. 3.851. The Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. *See, Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

SUMMARY OF THE ARGUMENTS

The Appellant presents one claim to this Court seeking his sentence of death be vacated and this Court find that executing the elderly offends the evolving standards of decency of the Eighth Amendment of the United States Constitution and Article I, § 17 of the Florida Constitution. Florida legislation offers protections and special considerations for the elderly with the State recognizing their fragility, is a relevant basis for considering them as a class which a civilized society is not comfortable executing.

The execution of the elderly serves neither a deterrent nor a retributive purpose and therefore the execution of Mr. Smithers will be cruel and unusual punishment forbidden by the constitution.

CLAIM ONE

THE EXECUTION OF MR. SMITHERS IS CRUEL AND UNUSUAL PUNISHMENT BECAUSE OF HIS ADVANCED AGE AND STATUS AS ELDERLY, IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION.

The execution of our society's most vulnerable persons, such as the elderly, serves no deterrent or retributive effect. Smithers' prayer for relief under this claim is not addressing an argument that the sentence of death is prohibited by the Eighth Amendment, but rather whether the implementation and carrying out of his sentence of death, triggered by the signing of his death warrant, would *now* constitute cruel and unusual punishment. Using the framework and analysis of analogous cases shows the execution of Samuel Smithers on October 14, 2025, violates the Eighth Amendment of the United States Constitution and corresponding Florida Constitution provisions.

The execution of Mr. Smithers no longer serves the intended and stated purposes of the death sentence. Executing Mr. Smithers, a 72-year-old person, offends the evolving standards of decency and is cruel and unusual punishment. The Florida legislature has offered special considerations and protection to the elderly due to their fragility as a class.

I. THE TRIAL COURT ERRED BY SUMMARILY DENYING MR. SMITHERS CLAIM FOR RELIEF PRESENTED IN SMITHERS' "SUCCESSIVE MOTION TO VACATE DEFENDANT'S SENTENCE OF DEATH" AS "UNTIMELY AND PROCEDURALLY BARRED."

Florida Rules of Criminal Procedure Rule 3.851(d)(2)(A) provides an exception to the one year time limitation found in subsection (d)(1) permitting a successive postconviction motion to be considered timely when the motion alleges "…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…" Smithers' claim is not that his initial sentence of death is unconstitutional but rather that the implementation and carrying out of his sentence is unconstitutional due to him being now elderly at the time of his execution.

This claim is not procedurally barred as untimely because it could not have been raised prior to the governor signing the warrant for Smithers' execution. Smithers' claim for relief asserts that due to his age at the time of his execution, his execution violates the Eighth Amendment of the United States Constitution.

This is consistent with the precedent of this Court regarding the ripeness of claims asserting the defendant's incompetence to be executed. This Court has held that claims regarding incompetency at the time of execution raised in a postconviction motion *prior* to the signing of a death warrant, were not ripe for review. *See*, *Barnes v. State*, 124 So. 3d 904, 918 (Fla. 2013) (holding, "Barnes claims that his death sentence violates the Eighth Amendment prohibition against cruel and unusual punishment because he may be incompetent at the time of execution [...] is not ripe for review. We have repeatedly held that this claim may not be asserted until a death warrant has been issued.") (citing, *Johnson v. State*, 104 So. 3d 1010, 1029 (Fla. 2012)); *Israel v. State*, 985 So. 2d 510, 521–22 (Fla. 2008) (holding that defendant's claim that he was insane and, therefore, ineligible for execution was not ripe for review because "a death

warrant ha[d] not yet been signed"); *Phillips v. State*, 894 So. 2d 28, 36 (Fla. 2004) ("However, this claim cannot be raised until an execution is imminent."); *Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003) ("[C]laim is not ripe for review because Jones has not yet been found incompetent and a death warrant has not yet been signed.") *c.f. Gudinas v. State*, 412 So. 3d 701 (Fla. 2025) (post-warrant claim that "is a 'purely legal claim'" asserting newly discovered evidence and an extension of *Atkins* and *Roper,* is procedurally barred as untimely and "should have been raised in a prior proceeding."); *Rogers v. State*, 409 So. 3d 1257, 1263 (Fla. 2025) (finding postconviction counsel's motion to withdraw and postconviction claims asserting newly discovered evidence are procedurally barred as untimely and "could have been raised in a prior proceeding.").

Violations of the Eighth Amendment predicated upon facts that only exist or become relevant upon the signing of a death warrant are distinguishable from other claims that assert the defendant's execution violates the constitution, such as claims under *Atkins*[1] and *Roper*.[2] Claims under *Atkins* concerning the defendant's

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[2] *Roper v. Simmons*, 543 U.S. 551 (2005).

intellectual disability and *Roper* concerning the defendant's age at the time of the offense, are grounded upon facts that existed at the time of sentencing. This is a significant distinction from Smithers' claim.

The facts which Smithers relies upon were unknown and could not have been ascertained by the exercise of due diligence due to the lack of transparency and nature of the death warrant signing procedure of the governor of Florida. Smithers could not have known when his death warrant would be signed, much less what age he would be at the time of the signing. Therefore, Smithers has sufficiently pled facts which support the timeliness of his Successive Postconviction Motion to Vacate Defendant's Sentence of Death and claim for relief presented below.

II. SMITHERS' CLAIM FOR RELIEF SEEKING AN AGE-BASED CATEGORICAL BAR TO EXECUTION OF THE ELDERLY IS NOT FORECLOSED BY APPLICATION OF THE CONFORMITY CLAUSE AND BINDING PRECEDENT.

The trial court erred when it "agreed with the State's assertion that Defendant is not entitled to relief because his claim seeking an age-based categorical bar to execution of the elderly is foreclosed by

application of the conformity clause and binding precedent." [PC ROA/P262]. The State's conformity argument is declaring a narrow application of the United States Supreme Court's (hereinafter "the Supreme Court") holdings that limits the binding effect of holdings to precise facts. That is not how judicial review works.

A similar argument was addressed and rejected by the Supreme Court in *Andrew v. White* 604 U.S. 86 (2025).

In *Andrew v. White*, Andrew argued in federal court that "the admission of this evidence rendered the guilt and penalty phases of her trial fundamentally unfair, in violation of due process." *Andrew*, 604 U.S., at 91. The federal district court denied relief and the Tenth Circuit Court affirmed, finding that Andrew had cited precedent by the Supreme Court which "provides a mechanism for relief" when the introduction of unduly prejudicial evidence "renders [a] trial fundamentally unfair." *Id.* (internal citation omitted). However, the Tenth Circuit majority found the case law cited was a "pronouncement," not a "holding," of the Supreme Court. *Id.* (internal citation omitted). The Tenth Circuit, "therefore concluded Andrew had failed to identify 'clearly established federal law governing her

claim,' as required under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." *Id.*

The Supreme Court held:

> A legal principle is clearly established for purposes of AEDPA if it is a holding of this Court. (internal citation omitted) [...] When this Court relies on a legal rule or principle to decide a case, that principle is a "holding" of the Court for purposes of AEDPA. *Lockyer v. Andrade*, 538 U.S. 63, (2003) ("[C]learly established Federal law ... is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision" (internal quotation marks omitted)). Following these principles, it is clear that Andrew properly identified clearly established federal law.

Andrew, 604 U.S., at 83-92. Even in the restrictive federal habeas context, such as ADEPA, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* 604 U.S., at 94 (quoting, *Taylor v. Riojas*, 592 U.S. 7, 9 (2020)).

Although the present case before this Court is an issue of first impression, holdings of the Supreme Court are applicable to this Court's decision to the issue presented by Smithers. The Supreme Court has addressed several claims regarding capital punishment and cruel and unusual punishment. While the Supreme Court has

not addressed whether executing the elderly is cruel and unusual punishment, the Supreme Court's precedent informs this Court's interpretation and application of the cruel and unusual punishment analysis, as it has already been decided by the Supreme Court.

The conformity clause of Fla. Const. Art. I, § 17, does not foreclose Smithers' claim for relief. Smithers' claim and argument for relief is based on the Supreme Court precedent interpreting the protections of the Eighth Amendment. The conformity clause of the Florida Constitution does not require an explicit finding by the Supreme Court that the Eighth Amendment has been explicitly found to prohibit the execution of a specific class before this Court may make its finding.

> The Florida Constitution states:
>
> "… [C]ruel and unusual punishment… [is] forbidden … The prohibition against cruel or unusual punishment, and the 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."

Fla. Const. Art. I, § 17 (emphasis added). Similarly, Florida Constitution Article I, § 12, relating to search and seizures, provides:

"This right *shall be construed in conformity* with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." (emphasis added).

In the absence of specific controlling Supreme Court precedent, the conformity clause does not prohibit this Court from deciding the issue presented by Smithers. The State argued in Circuit Court that the absence of Supreme Court precedent on the issue presented necessarily precludes the finding that the execution of Smithers, an elderly man, is cruel and unusual punishment. [PC ROA/P232-234]. This Court has found in search and seizure cases that "However, in the absence of a controlling U.S. Supreme Court decision, Florida courts are still "free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution." *Socca v. State*, 673 So. 2d 24, 26 (Fla. 1996). Additionally, the conformity clause binds this Court to "follow the interpretations of the United States Supreme Court." *Id.* at 27 (discussing Fourth Amendment of the United States Constitution.).

This Court is bound by the precedent established by the Supreme Court in its interpretation of the Eighth Amendment of the

United States Constitution. It is well established that the Eighth Amendment of the Federal Constitution is informed by the "evolving standards of decency." The conformity clause requires this Court to interpret § 17 of the Florida Constitution consistently with the Eighth Amendment precedent of the Supreme Court.

This Court has interpreted whether capital punishment comports with the protections of the Eighth Amendment under the evolving standards of decency analysis as interpreted by the Supreme Court. See, *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) ("'[T]his Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court.'") (citing, *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015); *Hurst v. State*, 202 So. 3d 40 (2016))).

Additionally, even the Supreme Court has recognized that interpretations of the Eighth Amendment established by the Supreme Court, provide state courts guidance in their interpretation of the Eighth Amendment. In *Roper v. Simmons*, the United States Supreme Court recognized and adopted the Missouri Supreme

Court's interpretation of the Eighth Amendment and Fourteenth Amendment in finding the Eighth Amendment of the United States Constitution prohibited the execution of those that were children at the time of the offense using the "the reasoning of *Atkins*." 543 U.S. at 559-560.

The State's argument that the conformity clause of Art. I, § 17 of the Florida Constitution *precludes* this Honorable Court from finding the execution of the elderly violates the Eighth Amendment of the United States Constitution, is without any merit and defies precedent of this Court and the Supreme Court. Furthermore, the trial court erred in ruling that Smithers' claim for relief lacks merit and is not entitled to relief because his claim is "foreclosed by application of the conformity clause and binding precedent." [PC ROA/P. 262].

III. EXECUTING THE ELDERLY DEFIES OUR EVOLVING STANDARDS OF DECENCY

In 1910, in *Weems v. United States*, the Supreme Court found that a constitution "must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 US 349, 373 (1910). The Supreme Court further developed this principle over

the following decades. In *Trop v. Dulles*, citing *Weems*'s, the Court recognized, "…the words of the [Eighth] Amendment are not precise and their scope is not static." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The Court further found, "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*

Our contemporary standards and values provide objective evidence that the execution of the elderly[3] would not comport with fundamental human dignity the Eighth Amendment of the United States Constitution demands.

Analysis of the evolving standards of decency provides the framework for the analysis of the Eighth Amendment's prohibition against cruel and unusual punishment. *Roper*, 543 U.S. at 560-561 (*citing*, *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). The evolving standards dictate when a punishment has become cruel and unusual punishment. *Id.* The analysis is *not* confined to the method in which a death sentence is ultimately carried out *but rather the contemporary values*. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (emphasis

[3] "Elderly" is defined in accordance with the Legislature's protections of those 65 years of age and older as discussed below.

added). Contemporary values determine "whether a particular punishment comports with the fundamental human dignity that the [Eighth] Amendment protects." *Id*.

Review of the evolving standards ensures that "the State's power to punish is exercised *within the limits of civilized standards.*" *Hurst v. State*, 202 So. 3d 40, 61 (Fla. 2016) (quoting, *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (quoting *Trop*, 356 U.S. at 100, 78 S.Ct. 590)) (emphasis added).

The State's power to inflict punishment is not without restriction. The Supreme Court has stated:

> While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. […] [T]he words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop, 356 U.S. at 10 (footnote omitted). Analysis of the Eighth Amendment's prohibition against cruel and unusual punishment begins with "evolving standards of decency" analysis consistent with the Supreme Court's interpretation of the Eighth Amendment of the United States Constitution.

The evolving standards of decency analysis is informed by both legislative enactments and state practices when determining whether the infliction of the capital punishment offends the evolving standards of decency and thus violates the Eighth Amendment.

In *Ford v. Wainwright*, the Supreme Court determined an important issue, in which they had not previously addressed: "whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner." 477 U.S. at 405. The Supreme Court found that the Eighth Amendment prohibition against cruel and unusual punishment included *at minimum* the protections proscribed by common law at the time of the amendment's adoption. *Id.* at 405-406. The Supreme Court also acknowledged that their interpretations of the Eighth Amendment are "[n]ot bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 406. (citing, *Trop,* 356 U.S. at 101).

a. Florida's standards and values are reflected through legislation, which seeks to protect and give elderly special consideration.

Our society's most vulnerable persons are children and elderly. Numerous Florida statutes have been enacted to give both children and elderly special considerations and protections Florida Legislation reflects that evolving standards of decency reject the execution of the elderly. The execution of Samuel Smithers, who is 72 years of age, violates the evolving standards of decency of the Eighth Amendment.

"[W]hile the underlying social values encompassed by the Eighth Amendment are rooted in historical traditions, the manner in which our judicial system protects those values is purely a matter of contemporary law." *Ford*, 477 U.S. at 410. The "evolving standards of decency" analysis is informed and fashioned by objective indicia of society's standards as they are expressed in legislative enactments and state practices. *Roper*, 543 U.S. at 563. *See also*, *Atkins v. Virginia*, 536 U.S. at 312 (quoting, *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Legislative enactments provide "the 'clearest and most reliable objective evidence of contemporary values…'" *Atkins*, 536 U.S. at 312 (quoting, *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

Florida's stance on protecting the elderly is replete with evidence of a clear and expressed consensus of protecting the elderly, especially those 65 years of age and older. This consensus evidences the evolved standards of protecting the vulnerable and provides objective evidence of contemporary values. Florida's standards and contemporary values are reflected in many statutes that reclassify criminal offenses and provide for enhanced punishment when the victim is 65 years of age and older. The Florida Legislature's recognition of the need for extra protections and special considerations for those over 65 years of age is evidenced by the legislature's enactment of criminal statutes which enhance criminal sanctions and reclassify criminal offenses based on the victim's age.

Special considerations through the enactment of legislation are seen in Chapter 430 of Florida Statutes, also known as the "Department of Elderly Affairs Act" or the "Pepper Act." Fla. Stat. § 430.01 (2025). The legislative intent is clear, "it is the intent of the Legislature to:… advise, assist, and protect the state's elderly citizens to the fullest extent." Fla. Stat. § 430.02(1) (2025). Additionally, just this year protections for specified adults were enacted as part of

Chapter 517, Securities Transactions chapter of the Florida Statute. Florida Statute § 517.34 "Protection of specified adults," states "'specified adult' means a natural person 65 years of age or older, or a vulnerable adult as defined in s. 415.102." Fla. Stat. § 517.34(1)(b) (2025). The Florida Legislature expressly stated that "The Legislature finds that many persons in this state, because of age or disability, are at increased risk of financial exploitation…" Fla. Stat. § 517.34(2) (2025).

Florida Statue § 784.08(1) imposes a minimum term of prison for the offense of aggravated assault or aggravated battery upon a person 65 years of age or older. Florida legislature also included the reclassification of misdemeanor battery, making the offense a third-degree felony based on the victim being 65 years of age or older rather than a first-degree misdemeanor. Fla. Stat. § 784.08(2)(c) (2025). Additionally, Florida legislature requires adjudication of guilt for this crime which presents significant collateral consequences such as no longer being able to own or possess a firearm and voting right restrictions. Fla. Stat. §§ 784.08(3) (2025); 790.23 (2025); 98.0751 (2025).

Florida seeks to protect the elderly not just in violent crime. Florida law also reclassifies theft offenses, creating enhanced criminal penalties. Fla. Stat. § 812.0145. (2025). Florida also enacted legislation which protects those 65 years or older from exploitation. Fla. Stat. 817.5695(2) (2025). The fragility and cognitive decline in older adults is also recognized by Florida as a significant factor in their vulnerability. *See*, "Florida's Elder Abuse Benchbook," (2025).[4]

A distinction between adults and older adults can also be seen in the enactment of statutes that allow a person 70 years or older to request excusal from jury service, even permanently. 28 U.S.C. § 1863(b)(5)(A). Florida Statute § 40.013(2)(8) states that a "person 70 years of age or older shall be excused from jury service upon request." (2025). The Statute goes further even making it permissible for a person 70 years or older to request permanent excusal from jury service. Fla. Stat. § 40.013(2)(8) (2025). This is evidence that Florida also recognizes a distinction between adults and adults 70 years or

[4] "Protecting the Vulnerable; Florida's Elder Abuse Benchbook," (2025) https://www.flcourts.gov/content/download/2456475/file/FINAL%20Elder%20Abuse%20Benchbook%20(with%20cover)%20(0826).pdf (Last Accessed Sept. 19, 2025).

older, even in areas of civil obligations. Florida allowing the request for permanent excusal is even more significant upon consideration that Florida Statute allows the same excusal request, both temporary and permanent, for those with mental illness and intellectual disability. Fla. Stat. § 40.013(2)(9) (2025).

The Florida Legislature's special considerations and protections are entirely predicated upon the person's age, 65 years or older in most circumstances. The special considerations for those 65 years of age or older are based entirely on chronological age and notwithstanding of the person's cognitive and physical well-being or functioning. The evolving standards of decency as clearly expressed in Florida enactments which provide the most reliable and objective evidence that society recognizes the fragility and vulnerability of the elderly which naturally comes with age.

The trial court found "persuasive the State's argument that the enactment of Florida legislation providing 'additional protection for law-abiding individuals of advanced age says nothing' about how societies view the appropriateness of executing defendants of advanced age." [PC ROA/P262]. This finding and argument by the

State of Florida ignores the fact that *none* of the Florida Statutes providing for special considerations or protections of the elderly require that the elderly person be a "law-abiding individual." In fact, the Florida Legislature has expressed that even incarcerated elderly individuals, therefore not "law-abiding," are in need of special considerations. *See*, Fla. Stat. § 944.804 (2025). *See also*, Fla. Stat. § 944.8041 (2025).

Additionally, while Florida Statute does not speak directly to the appropriateness of executing the elderly, Florida Statutes speak loudly of how our State finds that elderly adults are a distinct and distinguishable group of adults in need of protection. The special considerations and protections for the elderly reflect the evolved standards of decency of our State. The special considerations must be applied when infliction of punishment, especially the death penalty, is being enforced against the elderly.

Florida is explicit in its protection, special considerations, and distinguishment of the elderly, through the enactment of statutes acknowledging the vulnerability and fragility of those 65 years of age and older. These protections, special considerations, and enhanced

criminal sanctions for crimes against the elderly, are irrespective of physical ability or cognitive function. This stance on elderly people establishes that evolving standards support a finding that the elderly are a distinct and distinguishable class of adults in need of protections due to their fragility and vulnerability. Samuel Smithers, who is 72 years old, falls squarely within this class of people Florida legislation recognizes as elderly persons it seeks to protect by numerous Florida statutes.

b. Evolved standards of decency, as expressed in state practices, establish that most states do not execute the elderly.

Society's standards are not only seen in legislative enactments but are also reflected in how rare capital punishment is being implemented in particular incidences. In *Roper* the Supreme Court wrote, "the indicia the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" 543 U.S. at 563

In *Atkins*, the Supreme Court looked to legislation of states and state practice in its evolving standards of decency analysis when it determined that the execution of the intellectually disabled violates

the Eighth Amendment. 536 U.S. at 313-316. Significantly, the Supreme Court looked to

> […] those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry.* The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

536 U.S. at 316. (footnotes omitted). Similarly, in *Roper*, the Supreme Court, relying on their precedent in *Atkins*, found:

> […] objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, […] as "categorically less culpable than the average criminal."

Roper, 543 U.S. at 568 (citing, *Atkins*, 536 U.S. at 316). In both *Roper* and *Atkins*, the Supreme Court reviewed the practices of each state and found:

> When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U.S., at 313–315, 122 S.Ct. 2242. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but,

> by express provision or judicial interpretation, exclude juveniles from its reach. [...] *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.

Roper, 543 U.S., at 564.

Since executions resumed post-*Furman*, only 41 people of the total 1,638 people have been 65 years of age and older.[5,6] [PC ROA/P221-223]. Furthermore, of the 41 people 65 years of age and older, only 16 people have been over the age of 70 years of age at the

[5] Data collected from "Death Penalty Information Center," *Execution Database*, Data as of Sept. 25, 2025. https://deathpenaltyinfo.org/facts-and-research/data/executions (*last accessed* Sept. 25, 2025.) The data and totals do not reflect executions that occurred after Sept. 24, 2025.

[6] Data collected from "Death Penalty Information Center," *Execution Database*, filtered for "age," 65 years and older, Data as of Sept. 25, 2025. https://deathpenaltyinfo.org/facts-and-research/data/executions (*last accessed* Sept. 25, 2025).

time of their execution.[7] Id. This amounts to only 1% of people executed are over the age of 70.[8] Id.

The rarity of executing the elderly is further seen when broken down by State. Of the 50 states, only 13 states have executed people 65 years and older. The 13 states include: Alabama, Arizona, California, Florida, Georgia, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, and Texas.[9] The rarity becomes even more startling when looking at those 13 states, how many had executed someone 70 years of age and older. Florida has *never* executed a person over the age of 70. Samuel Smithers will be

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[7] Data collected from "Death Penalty Information Center," *Execution Database*, filtered for "age," 70 years and older, Data as of Sept. 25, 2025.
https://deathpenaltyinfo.org/facts-and-research/data/executions (*last accessed* Sept. 25, 2025).

[8] Data collected from "Death Penalty Information Center," *Execution Database*, filtered for "age," 70 years and older, Data as of Sept. 25, 2025.
https://deathpenaltyinfo.org/facts-and-research/data/executions (*last accessed* Sept. 25, 2025).

[9] Data collected from "Death Penalty Information Center," *Execution Database*, filtered for "age," 65 years and older and by state, Data as of Sept. 25, 2025.
https://deathpenaltyinfo.org/facts-and-research/data/executions (*last accessed* Sept. 25, 2025).

the first. Florida is not alone in that it has historically never executed a person over the age of 70. Neither Ohio, North Carolina, nor South Carolina have ever executed a person over the age of 70, and each had only executed one person 65 years or older.

[INTENTIONALLY LEFT BLANK]

Number of Elderly Executed by State[10]		
STATE	**People Executed 65-69 Years of Age or Older**	**People Executed 70 Years of Age or Older**
Alabama	0	3
Arizona	2	2
California	0	1
Florida	6	0
Georgia	4	1
Mississippi	0	3
Missouri	3	1
North Carolina	1	0
Ohio	1	0
Oklahoma	1	2
South Carolina	1	0
Tennessee	2	1
Texas	4	2
TOTAL	41	16

The Supreme Court's national consensus analysis of the execution of juvenile offenders in *Roper* looked at similar information regarding state practices. In *Roper*, the Supreme Court took into consideration the states that had outright prohibited the execution of juvenile offenders. The Supreme Court also considered the

[10] The information and data was gather from "Death Penalty Information Center," *Execution Database*, https://deathpenaltyinfo.org/facts-and-research/data/executions (*last accessed* Sept. 25, 2025) The data and totals do not reflect executions that occurred after Sept. 24, 2025.

infrequency occurring in states without a formal prohibition on executing juveniles, executed juvenile offenders.

Similarly, the objective data presented above showing that only 13 states have executed at least one person 65 years of age and older, displays the infrequency the elderly are executed. The Supreme Court made a similar analysis in *Atkins* when looking at frequency of state practice. The infrequency of executing those 70 years of age and older is even more startling. Of the thirteen states that have executed people 65 years or older, only nine have executed someone 70 years of age and older, with Florida *never* having executed a person 70 years of age or older. These objective numbers of infrequency go directly to the societal aversion to executing the elderly, especially when considered with the indicia of consensus seen through legislative enactments which directly express society's position on protecting and giving special considerations to the elderly, even those incarcerated.

IV. EXECUTING THE ELDERLY IS BOTH CRUEL AND UNUSUAL PUNISHMENT THEREFORE VIOLATING THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA CONSTITUTIONAL PROVISIONS.

The execution of Mr. Smithers on October 14, 2025, would be cruel and unusual punishment in violation and forbidden by the Eighth Amendment. The deterrent and retributive purposes of the death penalty are no longer accomplished by executing the elderly.

a. The Supreme Court's precedent establishes a punishment is cruel and unusual when the punishment serves neither a deterrent nor retributive purpose.

The Supreme Court has recognized that the death penalty serves two purposes: retribution and deterrence. *Lackey v. Texas*, 514 U.S. 1045, 1421 (1995). However, the imposition of punishment is not without limitation. It has been established that:

> [A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

Coker v. Georgia, 433 U.S. 584, 592 (1977) (emphasis added); See also, *Roper*, 543 U.S. at 559.

The Supreme Court's opinions in cases of the insane, intellectually disabled, and children, are analogous to the issue presented before this Honorable Court, in respect to review of whether the execution of Mr. Smithers makes any measurable contribution to the intended "goals" of his death sentence. *See*, *Ford*, 477 U.S. 399 (1986) (holding, the Eighth Amendment prohibits states from inflicting the penalty of death upon a prisoner who is insane); *Atkins*, 536 U.S. 304 (2002) (holding, executions of the intellectually disabled is cruel and unusual punishment prohibited by the Eighth Amendment); *Roper*, 543 U.S. 551 (2005) (holding, the execution of individuals who are juveniles at the time of their capital offense is prohibited by the Eighth and Fourteenth Amendment).

In *Ford*, the Supreme Court was asked to resolve "whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner." 477 U.S. at 405. The Court looked to common law principles barring the execution of the insane and noted "the practice consistently has been branded 'savage and inhuman.'" *Id.* at 406. (internal citation omitted). The Court noted there are two possible explanations for the common-law principle

prohibiting the execution of the insane, "[o]ne explanation is that the execution of an insane person simply offends humanity, … another [is] that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment." *Id.* at 407; *See also*, *Atkins*, 536 U.S. 304 (2002) ("Unless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.'"). In respect to executing the "insane," the Supreme Court has "seriously question[ed] the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Ford*, 477 U.S. at 409. Similarly, the Supreme Court was guided by the penal goals of capital punishment in its decision in *Roper v. Simmons*. Although, in *Roper* the Court's analysis was largely focused on the goal of deterrence on the juveniles themselves, the analysis was on penal goal of deterrence, nonetheless.

When a person's execution no longer has a retributive value, the Supreme Court has said the execution amounts to nothing more than exacting mindless vengeance, offending the dignity of society. *See*, *Ford*, 477 U.S. at 410 ("this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear … or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."). It is illogical to conclude that the execution of a prisoner who is elderly and has been incarcerated for more than 26 years serves either a deterrent or retributive purpose.

The State's interest in punishment has been and will continue to be satisfied by the continued incarceration of Mr. Smithers, absent his execution being carried out in violation of the United States Constitution. See, *Lackey*, 514 U.S. at 1421. (Memorandum Justice Stevens, respecting the denial of certiorari) ("…prisoners who have spent some 17 years under a sentence of death… [before his death warrant had been signed] … after such an extended time, the

acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted."). Thus, the execution amounts to a violation of the Eighth Amendment. "A sanction is… beyond the State's authority to inflict if it makes 'no measurable contribution' to acceptable penal goals." *Roper*, 543 U.S. at 589.

The rarity in which a punishment is inflicted is of important consideration in this Court's analysis. Capital punishment amounts to unusual punishment when it is rarely inflicted. 1,538 executions have occurred post-*Furman*. Of the 1,538 executions that have occurred post-*Furman*, only 41 of them have been of people 65 years or older. [PC ROA/P222]. It is clear that the rarity in which the government implements the sentence of death establishes that it is unusual. It is not difficult to conclude that if juries knew that the person they were sentencing to death would ultimately be executed when the person is at their most vulnerable, juries would reconsider their finding of death.

b. *Executing the elderly is cruel and unusual punishment because it serves neither a deterrent nor retributive purpose.*

The prohibition against the execution of people who are insane at the time of execution, does not consider culpability at the time of the offense. The prohibition only focuses on the person's state at the time of the execution. This should be applied analogously to those that have reached the age for consideration as being elderly. The execution of the elderly should similarly be void of consideration of culpability at the time of the offense, with the focus of the analysis on the person's age at the time of the execution. Just as it has been recognized as cruel and unusual punishment to the insane, the same principals and protections of the Eighth Amendment must be applied to prohibit the execution of the elderly. Executing the elderly serves neither the purpose of deterrence nor retribution.

Mr. Smithers exercise of postconviction review can hardly be seen as the cause for the delay in his execution. Smithers was sentenced in 1999, and his last filing was in 2017 under *Hurst*. Prior to his *Hurst* review, Smithers had not filed a postconviction pleading since 2006. The State of Florida has had decades to end Mr. Smithers'

life. Executing the elderly who have been serving their punishment, living in near complete isolation in a small six foot by nine-foot cell for a significant number of years is a forfeiture of their life satisfying the State's interest in deterrence and retribution.

The execution of Mr. Smithers would amount to cruel and unusual punishment. The penal goals of capital punishment are not served by the execution of the elderly. Just as the execution of the insane serves no deterrent effect, the execution of the elderly no longer serves as a deterrent or retributive effect that has not already been satisfied by his 26 years of incarceration. The execution of Mr. Smithers would not further the State's interest in deterrence or retribution. The retributive purpose of Smithers' 1999 death sentence being carried out in 2025 is even further diminished by the fact that at least one of the victim's family members expressly stated that he does not seek retribution.

In 1999, the father of Christie Cowan spoke out at the sentencing, proclaiming that his daughter's memory is not served by the violence of execution. On April 15, 1999, John G. Cowan, father of victim Christie Cowan testified at the *Spencer* hearing before

Samuel Smither's sentencing. He told the trial court (in part): [Supp. Record on Appeal, Vol. VI, R766-69]

> The last time I heard her voice was May 21, 1996, a week before she was murdered. She was in and out of prison a lot, both in Connecticut and late in Florida. She used to tell me about other women in with her what they had done and what they were like. She saw them as troubled souls, not as worthless people. Of course, she didn't see herself in the same way.
>
> Your honor, I know my daughter and in her natural state without the influence of crack she would not want Mr. Smithers to be executed. My opposition to Mr. Smither's execution comes partly for a need to honor the memory of my beloved daughter, Christie. And not to subject with more violence done in her name. Like it or not Mr. Smithers is one of us and like us he is also a child of God. I know it is not my place to decide when any person should die, and I don't believe it's the States place to do that either. That kind of judgment is something that only God is qualified to make.
>
> I was here during the punishment phase of the trial. I saw Mr. Schmoll graphically describe my daughter's murder. I saw from a distance the pictures of Christie that Mr. Schmoll held up to the jury. I realize that after Mr. Smithers left her for dead she was probably still alive. And after – and that after being brutalized with an ax she probably still had to suffer through a death of drowning. It was almost like being murdered twice.
>
> Your Honor, I have not had an uninterrupted night of sleep in almost three years. Her memory, the knowledge of Mr. Smithers did this to her is also with me. If Mr. Smithers is sentenced to death I will spend many more years without any resolution to this tragedy. And if he is actually

> executed after all the appeals are over it will be for me the worse and most brutal possible kind of closure. Something that will make me sick and ashamed for the rest of my life whenever I think of my beloved daughter, Christie.
>
> Your Honor, I have to see this through to the end for Christie's memory's sake. If Mr. Smithers is executed I will have to be there, and I will have to watch, and then I'll have to live with the memory of what I saw. And I will also have to live with the knowledge that great harm has been done to Jonathan Smithers and Jonathan's mother in my daughter's memory – in my daughter's, Christie's, name.
>
> Your Honor, I hope that Mr. Smithers will spend the rest of his life in prison.

Additionally, Mr. Cowan wrote in a letter to the judge, dated January 27, 1999, "We are all victims in this case, and I don't see what possible good purpose can be served by inflicting additional pain on all of us." [Supp. Record on Appeal, Vol. VII/R854]

It bears importance to note that there seems to be an indica of consensus evolving in "real time" as more and more families of murder victims are speaking out against capital punishment being imposed. This evolution is significant for the constitutional analysis and consideration of whether capital punishment continues to serve the stated purpose of retribution and whether the retributive purpose is diminishing. Precedent established by the Supreme Court provides

clear direction that when the infliction of capital punishment no longer serves as a deterrent or retribution it is prohibited by the Eighth Amendment.

Furthermore, the execution of Mr. Smithers would be unusual. Since 1977, only 16 of the 1,538 people executed have been over the age of 70 years of age at the time of their execution. [PC ROA/P222] The objective evidence would suggest and support that rarity of the execution of the elderly reflects the evolved standards and supports the finding of the unusual nature of executing the elderly. Further development and support of this conclusion would lend itself to support an evidentiary hearing to allow Smithers to present objective evidence for this Court's consideration.

The gradual decline in cognitive function and the brain is recognized by the Florida Courts. In "Protecting the Vulnerable; Florida's Elder Abuse Benchbook" published by the Office of the State Courts Administrator, Office of Family Courts, and Florida Institute on Interpersonal Violence, the vulnerability caused by cognitive

decline is explicitly recognized in Florida.[11] There are numerous areas of the brain that are affected by aging which "make it harder to process new information and react quickly to complex situations, which can be particularly concerning when making legal or financial decisions." Id.

The effect of aging on Mr. Smithers is especially underscored given the mental health and brain damage testimony presented during the penalty phase of his trial. Trial counsel presented testimony and evidence that Mr. Smithers' PET scan was "clearly and strikingly abnormal" and showed brain damage. [ROA, Vol. 15/R1880;1883.] Mental health evaluations indicated impairment from brain injury on both the left and right hemisphere. [ROA, Vol. 14/R1735.] Additionally, evaluations indicated "psychotic disturbance" and "delusional paranoid thinking." [ROA, Vol.14/R1723.]

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[11] "Protecting the Vulnerable; Florida's Elder Abuse Benchbook," *Changes in Brain Chemistry as We Age*, p. 13 of PDF (2025) https://www.flcourts.gov/content/download/2456475/file/FINAL%20Elder%20Abuse%20Benchbook%20(with%20cover)%20(0826).pdf (Last Accessed Sept. 19, 2025).

Dr. Hyman Eisenstein evaluated Mr. Smithers on September 18, 2025, and found evidence of cognitive decline. [PC ROA/P224-225]. Dr. Eisenstein's initial findings revealed that Mr. Smithers Full Scale I.Q. score had dropped since his initial IQ score in 1997 which he considered both clinically and statistically significant.

Most significantly, Dr. Eisenstein's evaluation revealed Mr. Smithers' current verbal comprehension score is 89 (low average) which is a significant drop from his prior verbal score of 102 in 1997. Dr. Eisenstein opined that the comparison of the present-day scores to the scores in 1997 are "significant and indicative of cognitive decline." [PC ROA/P224-225]. Dr. Eisenstein further opined that: "Mr. Samuel Smithers is currently presenting with an insidious decline of mental function which will progress to a state of dementia." [PC ROA/P224-225].

The evaluation and objective data Dr. Eisenstein gathered in a short amount of time provide relevant evidence for consideration of cognitive decline. The information supports that Smithers falls within the bounds of those that are elderly that Florida identifies as

vulnerable and are given special consideration through Florida Statutes, as discussed above.

CONCLUSION AND RELIEF SOUGHT

We diminish our human dignity and what it means to be a civilized society when we the people of Florida resort to the execution of the most vulnerable.

"By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560 (emphasis added). Executing Samuel Smithers, who is elderly, defies human dignity and the evolving standards and serves neither a deterrent nor retributive purpose.

In light of the facts and legal arguments presented above, Mr. Smithers contends that his constitutional right against cruel and unusual punishment under the Eight Amendment of the Constitution of the United States, and corresponding provisions of the Florida Constitution, has been violated. Mr. Smithers respectfully requests that his death sentence be vacated.

Respectfully submitted,

/s/ Melody Jacquay
MELODY JACQUAY-ACOSTA
Florida Bar No. 1010248
Assistant CCRC-M
Jacquay@ccmr.state.fl.us

/s/ Ann Marie Mirialakis
ANN MARIE MIRIALAKIS
Florida Bar No. 658308
Assistant CCRC-M
Mirialakis@ccmr.state.fl.us

/s/ Mahham Syed
MAHHAM SYED
Florida Bar No. 1049535
Assistant CCRC-M
Syed@ccmr.state.fl.us
support@ccmr.state.fl.us
Capital Collateral Regional
Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 3637
Phone: 813-558-1600
Fax: 813-558-1601

Counsel for Samuel Smithers

CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Initial Brief is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.100.

Counsel further certifies that this entire Brief contains 8,010 words.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 29th day of September, 2025, the foregoing Initial Brief has been electronically filed with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: The Honorable Christopher C. Sabella, Chief Circuit Judge, 800 Twiggs Street, Tampa, Florida 33602, cornelcm@fljud13.org; The Honorable Michelle Sisco, Circuit Judge, 401 N. Jefferson St., Room 102, Tampa, Florida 33602 diazcra@fljud13.org; the Office of the Attorney General, capapp@myfloridalegal.com; Joshua E. Schow, Asst. Attorney General, joshua.schow@myfloridalegal.com; Rick A. Buchwalter, Sr. Asst. Attorney General, rick.buchwalter@myfloridalegal.com, Paula.montlary@myfloridalegal.com,

arianna.balda@myfloridalegal.com, elizabeth.bueter@myfloridalegal.com; and the Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399, warrant@flcourts.org, canovak@flcourts.org.

/s/ Melody Jacquay
MELODY JACQUAY-ACOSTA
Florida Bar No. 1010248
Assistant CCRC -M
Jacquay@ccmr.state.fl.us

/s/ Ann Marie Mirialakis
ANN MARIE MIRIALAKIS
Florida Bar No. 658308
Assistant CCRC-M
Mirialakis@ccmr.state.fl.us

/s/ Mahham Syed
MAHHAM SYED
Florida Bar No. 1049535
Assistant CCRC-M
Syed@ccmr.state.fl.us

support@ccmr.state.fl.us

Capital Collateral Regional
Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 3637
Phone: 813-558-1600
Fax: 813-558-1601