

**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**

REPLY BRIEF OF THE APPELLANT
DEATH WARRANT SIGNED

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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 date 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.

References to Appellant’s Initial Brief is references to as “IB” followed by the page number.

References to the Respondent’s Answer Brief is referenced as “AB” followed by the page the number.

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 Appellant, Samuel Lee Smithers, Jr., relies on the arguments presented in the Initial Brief of Appellant, filed on September 29, 2025, and offers the following Reply to the Answer Brief of Appellee filed on September 30, 2025. Any arguments not contained herein are not to be taken as waived and Smithers relies on the merits of his Initial Brief.

- I. **REVIEW OF DATA, WHICH REFLECTS THAT 41 OF THE 50 STATES HAVE NEVER EXECUTED SOMEONE OVER THE AGE OF 70, SUPPORTS A FINDING THAT EXECUTING THE ELDERLY OFFENDS THE EIGHTH AMENDMENT’S “EVOLVING STANDARDS OF DECENCY”**

The objective data reveals and establishes that of the states that have executed the elderly, four of the thirteen states cited, have *never* executed someone 70 years of age or older. Twenty-three states have

abolished the death penalty all together.¹ Four states have a gubernatorial hold on executions.² Therefore, there are 27 states that prohibit the execution of the elderly by virtue of abolishing or having a gubernatorial hold on executions. With the addition of the four states (excluding Ohio) which have never executed someone 70 years of age and older, 30 states in total do not execute the elderly. Even of the states that do execute the elderly, it is a rare occurrence. Only nine states *have ever* executed someone over 70 years of age, meaning **41 of the 50 states, have never executed someone over the age of 70.**

This is significant and establishes that there is in fact a national consensus against executing the elderly seen in state practice. This is not a mere *statistical artifact*. This analysis is directly in line with the analysis done by the Supreme Court in *Roper*³ and *Atkins*.⁴ The

¹ “The Death Penalty Information Center,” *State by State*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last accessed Sept. 29, 2025).

² Id. Includes: California, Pennsylvania, Oregon, and Ohio.

³ 543 U.S. 551 (2005).

⁴ 536 U.S. 304 (2002).

reason *why* states are not executing the elderly is inconsequential. The simple fact is that the majority of states do not. Even more significant, even of the state's that *have* executed the elderly, it is rare. This is significant for this Court's consideration regarding both the evolving standards of decency analysis and the unusualness of implementing such a punishment.

The objective data cited in Appellant's Initial Brief is not merely a "statistical artifact" as suggested by the State. [AB/p.30]. Although the State does not contest the data presented by Appellant as incorrect, the State uses the term "statistical artifact," to disparage the objective data presented by the Appellant in support of the rarity in which the elderly are executed. The State fails to show any objective support for its accusation that the observed facts are an error or distortion caused by the method used to collect, analyze and interpret the data from the "Death Penalty Information Center." "The Death Penalty Information Center" gathers its data from state

agencies, departments of corrections, county courts, legal defense organizations and prosecutors' offices.⁵

The State further mocks the empirical data and argues that the data is an “unsophisticated numerical reference[], stripped of any meaningful context...” [AB/p.29]. The State’s pronouncement is unpersuasive. Nowhere in their brief does the State articulate what “meaningful context is missing.” However, the State’s argument regarding the “rarity of females executed” would be an example of “unsophisticated numerical reference stripped of any meaningful context.” There are far less women on death row than people that are elderly. The State’s hypothesis about the reason people reach an advanced age while on death row is less relevant than the fact that once they do - *they are rarely executed.*

The State’s assertion that age at the time of execution was merely an arbitrary characteristic that was selected by Appellant, is preposterous. Age can hardly be seen as a mere arbitrary characteristic. Florida legislation specifically identifies protections

⁵ “The Death Penalty Information Center,” *About DPI*, <https://deathpenaltyinfo.org/about> (Last Accessed Sept. 30, 2025).

based on the characteristic of *age*. Even separate from legislative enactments, *we as society* recognize the care and vulnerability of those that are elderly both through government programs and private programs which aid the elderly. Classification and special treatment can be seen from business' "senior days" which provide discounts to the elderly based on age, all the way to government programs which aid the elderly. Appellant's review of historical data and presentation of the information organized by age at the time of execution can hardly be seen as a random choice rather than based on reason.

The State's arguments attempt to sweep under the rug the obvious fact, **elderly have been rarely executed in the United States.**

II. SMITHERS' CLAIM FOR RELIEF IS DISTINGUISHABLE FROM CASES WHICH ARGUED FOR EXTENSIONS OF ROPER AND ATKINS.

Smithers does not ask this Court to extend already established categorical bars to execution. Smithers asks this Court to consider the evolved standards of decency as discussed in Appellant's Initial Brief.

While the Supreme Court's decisions involving bars to execution such as *Ford v. Wainwright*,⁶ *Atkins v. Virginia*,⁷ and *Roper v. Simmons*⁸ provide the framework for this Court's review of the evolved standards of decency and cruel and unusual punishment analyses, the cases do not foreclose Smithers' claim for relief. They provide this Court the basis in which the Supreme Court has interpreted the Eighth Amendment of the United States Constitution.

The State argues and cites cases in which this Court has declined to extend *Roper*'s holding to those older than eighteen at the time of their capital offense. These cases have no bearing on the issue presented by Smithers. Smithers' claim for relief is distinguishable in that it argues the evolved standards of decency establish that executing the elderly is cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution and the corresponding provision of the Florida Constitution.

⁶ 477 U.S. 399 (1986).

⁷ 536 U.S. 304 (2002).

⁸ 543 U.S. 551 (2005).

The holding in *Barwick* has little, if any, application to this Court's consideration of Smithers' claim for relief. *Barwick* sought an extension of *Roper* to the age of twenty-one based on newly discovered evidence in which *Barwick's* claim argues evolved standards of decency, which this Court rejected and held that "resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence..." *Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023). This Court also held that it lacked authority to extend *Roper* and thus the claim for relief was meritless. *Id.* at 794.

Unlike *Barwick*, the Supreme Court has not decided that protection may not be afforded to the elderly. In other words, the Supreme Court has not prohibited the protection of the elderly or indicated it would not be appropriate to limit their execution as a protected class. This Court should look at the way the Missouri Supreme Court and the Supreme Court analyzed *Roper* to find that the rarity of the occurrence (executing juveniles) is considered evidence of the evolving standard. *Roper* informs this Court how the Supreme Court arrives at an evolving standard.

In *Roper*, the Missouri Supreme Court recognized the exemption and then the Supreme Court affirmed *and adopted it*. The State is incorrect to insist the Supreme Court has to be the first to make the finding. [AB/p. 19]. It is for this purpose that Appellant mentions *Roper* in his Initial Brief.

Additionally, this Court's holding in *Ford v. State* is distinguishable. 402 So. 3d 973 (Fla. 2025). In *Ford*, this Court declined to extend *Roper* to mental and emotional age, rather than chronological age. The State's argument fails to articulate why the cases cited oppose Smithers' claim. Smithers does not seek an extension of *Roper* and presents no such claim.

The State quibbles at Appellant's mention of ADEPA in its citation to *Andrew v. White* which the Supreme Court clearly articulated that when the Supreme Court "relies on a legal rule or principle to decide a case, that principle is a holding..." and is "clearly established federal law." 604 U.S. 86, 83-94 (2025). Just as the State cited to *Texas v. United States*, 523 U.S. 296, 300 (1998) for the holding as to ripeness. The ripeness holding is applicable even though the State's case cited is completely unrelated to capital

punishment or the Eighth Amendment of the United States Constitution. Holdings announced by the Supreme Court are equally binding upon this Court in its interpretations of constitutional rights.

III. SMITHERS' CLAIM FOR RELIEF COULD NOT HAVE BEEN PLED IN EARLIER PROCEEDINGS BECAUSE HIS CLAIM FOR RELIEF IS CONTINGENT UPON A DEATH WARRANT BEING SIGNED BY THE GOVERNOR.

The State incorrectly states in their Answer Brief that Smithers failed to identify any timeliness exception and that 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.” [AB/p. 15]. Smithers did identify the timeliness of his motion. Specifically, in section “C” titled “Reason Claim Raised in Present Motion was Not Raised in Former Motion.” [PC ROA/P174]. Smithers specifically identified on page 8 of Appellant’s Initial Brief what facts were unknown to Appellant and could not have been known through due diligence. Specifically, Smithers identified that it could not have been known when and at what age he would be at the time his warrant is signed. [IB/p. 8].

The State argues that competency for execution claims are distinguishable from the claim asserted by Smithers because competency at the time of execution is malleable. The State's argument overlooks the fact that while competency to be executed involves the person's mental state at the time the execution is scheduled, *it is also dependent upon a death warrant being signed*. While competency is fluid, competency to be executed is still contingent on the future event, that being – a death warrant is signed for the person's execution.

In comparison, claims under *Atkins* and *Roper* are not contingent upon a death warrant being signed. The State's reliance is misplaced on this Court's precedents regarding timeliness of post-warrant litigation asserting extensions of *Atkins* and *Roper*.

Smithers' claim for relief is contingent upon a future event, that event being the governor in fact signing his death warrant. Smithers' claim could not have been ripe as it "may not occur as anticipated or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

IV. SMITHERS' CLAIM FOR RELIEF IS DISTINGUISHABLE FROM CLAIMS WHICH ARGUED THE LENGTH OF TIME ON DEATH ROW WAS UNCONSTITUTIONAL.

The State's Answer brief confuses Smithers' claim for relief with the argument that the length of time on death row constitutes cruel and unusual punishment. The State cites to *Allen v. Ornoski*, 435 F.3d 946, 951–55 (9th Cir. 2006) and *Carpenter v. Martel*, No. C 00-3706 MMC, 2011 WL 5444165, at *8 (N.D. Cal. Nov. 9, 2011), both of which assert a claim for relief under *Lackey v. Texas*. The district court in *Carpenter v. Martel*, No. C 00-3706 MMC, 2011 WL 5444165, at *8 (N.D. Cal. Nov. 9, 2011), found “petitioner overlooks the applicable standard for review for federal habeas petitions” and did not directly address petitioner's argument that “executing a person of advanced age will not serve any legitimate penological interest, in particular, deterrence or retribution.” As for *Allen v. Ornoski*, 435 F.3d 946, 951–55 (9th Cir. 2006) the circuit court found that it was Allen's *petition* which “woeful[ly] lack[ed] [] support for the proposition that the Eighth Amendment prohibits execution of the elderly and the infirm.” Allen's petition did not contain any supporting legislation or data to support his claim, as Smithers' claim does.

The evolved standards of decency analysis for the prohibition of executing the elderly is a distinct analysis from length of time on death row arguments. This Court's opinions in cases which decline to find extended time on death row until a warrant is signed do not include the same principals and analysis as that which asserts that executing elderly is a violation of the Eighth Amendment.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and legal arguments presented above and in Appellant's Initial Brief, Mr. Smithers contends that his constitutional right against cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States, and corresponding provisions of the Florida Constitution, will be violated upon his execution. Mr. Smithers respectfully requests that his death sentence be vacated.

Respectfully submitted,

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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 2,255 words.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 1st day of October, 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.

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