CAPITAL CASE

No. 23-6046

In the

Supreme Court of the United States

ANTONIO LEBARON MELTON, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent.*

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a successive postconviction claim that *Roper v. Simmons*, 543 U.S. 551 (2005), which prohibits the execution of minors, should be expanded to include capital defendants who are 18 years and 25 days old on the day of the crime.

II. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting an untimely successive postconviction claim of newly discovered evidence of mitigation based on a new scientific consensus that the human brain does not fully develop until a person is, at least, 21 years old.

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The Florida Supreme Court's opinion is reported at *Melton v. State*, 367 So.3d 1175 (Fla. 2023) (SC2022-1394).[1]

JURISDICTION

On May 4, 2023, the Florida Supreme Court affirmed the state postconviction court's summary denial of the sixth successive postconviction motion. *Melton*, 367 So.3d at 1177. On May 19, 2023, Melton, represented by Capital Collateral Regional Counsel–North (CCRC–N), filed a motion for rehearing in the Florida Supreme Court. On July 13, 2023, the Florida Supreme Court denied rehearing. On November 9, 2023, following an extension, Melton, represented by CCRC–N, filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth Amendment, the Eighth Amendment and the Fourteenth Amendment.

The Fifth Amendment to the United States Constitution, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. V.

The Eighth Amendment to the United States Constitution, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor

[1] The pleadings filed in this case are available online on the Florida Supreme Court's website under the heading "Online Docket" which will default to the "Florida Appellate Case Information System." In the left column, under the search icon, the option "Case Search" will appear as the first choice. Clicking on case search yields several boxes including the "Court" box which includes, in the drop downs, the "Supreme Court of Florida" as an option. Select the Supreme Court of Florida option. Then, in the "Case Number" box, enter the case number SC2022-1394, which will lead to the full docket of the case including a link in the right column, under view, to the briefs filed in the case.

cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This petition involves two questions regarding a successive postconviction motion filed in the state court in a Florida capital case.

Facts of the case

On November 17, 1990, Melton and two co-perpetrators robbed and then shot a taxi-cab driver. Melton was later convicted of armed robbery and felony murder for the murder of the taxi-cab driver. *Melton v. State*, 304 So.3d 375 (Fla. 1st DCA 2020). Then, less than two months later, on January 23, 1991, Melton and Lewis robbed a pawn shop and Melton shot the owner of the shop to death. *Melton v. State*, 638 So.2d 927 (Fla. 1994). Both Melton and Lewis were caught leaving the shop because the victim had managed to trigger the silent alarm before being shot to death. Melton had the murder weapon on him when he was arrested as he was coming out of the store.

Procedural history

Melton was convicted for the first-degree murder of the pawn shop owner and

for armed robbery of the pawn shop. *Melton v. State,* 638 So.2d 927 (Fla. 1994). Melton was sentenced to death for the murder and to a life sentence for the robbery. The convictions for felony murder and armed robbery in the non-capital case were used as an aggravating factor in the capital case. *Melton,* 638 So.2d at 929 (noting the trial court found two aggravating factors including the prior violent felony aggravator based on the convictions for the first-degree murder and robbery of the taxi-cab driver); *Melton v. Att'y Gen. of Fla,* 769 Fed. Appx. 803, 805, n.1 (11th Cir. 2019) (noting that the judge in the capital case relied in part on Melton's conviction for the murder of taxi-cab driver Saylor to impose the death sentence for the murder of pawn-shop owner Carter), *cert. denied, Melton v. Inch,* 140 S. Ct. 885 (2020). Melton was 17 years-old when they robbed and shot the taxi-cab driver in the non-capital case but he was 18 years-old when he shot the pawn shop owner. *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1235 (11th Cir. 2015), *cert. denied, Melton v. Jones,* 577 U.S. 926 (2015) (No. 15-5522).

The Florida Supreme Court affirmed the convictions and the death sentence in the capital case in the direct appeal; in the initial postconviction appeal; and in several successive postconviction appeals. *Melton v. State,* 638 So.2d 927, 930-31 (Fla. 1994) (direct appeal), *cert denied, Melton v. Florida,* 513 U.S. 971 (1994) (No. 94-5940); *Melton v. State,* 949 So.2d 994 (Fla. 2006) (affirming the denial of the initial postconviction motion), *cert. denied, Melton v. Florida,* 552 U.S. 843 (2007) (No. 06-11339); *Melton v. State,* 88 So.3d 146 (Fla. 2012) (No. SC11-973) (affirming the denial of a successive postconviction motion raising a claim of ineffectiveness for failing to present general background as mitigation based on *Porter v. McCollum,* 558 U.S. 30 (2009)); *Melton v. State,* 193 So.3d 881 (Fla. 2016) (affirming the denial of a successive postconviction motion raising a claim of newly discovered evidence; a claim based on *Giglio v. United States,* 405 U.S. 150 (1972); and a claim based on *Brady v. Maryland,*

373 U.S. 83 (1963)).

The Florida Supreme Court also denied Melton a new penalty phase based on *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *See Melton v. State*, 236 So.3d 234, 235 (Fla. 2018) (holding *Hurst v. State* did not apply retroactively to Melton), *cert. denied, Melton v. Florida*, 139 S. Ct. 192 (2018) (No. 17-9555).[2]

In 2018, the Florida Supreme Court denied his successive state habeas petition raising a claim of relative culpability based on *McCloud v. State*, 208 So.3d 668 (Fla. 2016), in *Melton v. Jones*, 2018 WL 566451 (Fla. Jan. 26, 2018) (SC17-2032), *cert. denied, Melton v. Florida*, 139 S. Ct. 154 (2018) (No. 17-9330).

Federal habeas review

On May 31, 2013, the federal district court denied habeas relief in the capital case. *Melton v. Tucker*, 2013 WL 11326076 (N.D. Fla. May 31, 2013) (No. 1:08-cv-34). The district court also denied a certificate of appealability (COA). *Melton v. Crews*, 2013 WL 11326077 (N.D. Fla. July 15, 2013). The Eleventh Circuit also denied a certificate of appealability from the district court's denial of federal habeas relief. *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (denying any appeal), *cert. denied, Melton v. Jones*, 577 U.S. 926 (2015) (No. 15-5522).[3]

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[2] The Florida Supreme Court later partially receded from *Hurst v. State* in *State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. denied, Poole v. Florida*, 141 S. Ct. 1051 (2021) (No. 20-250). So, not only is any *Hurst v. State* claim not retroactive but any such claim would fail under the current law of *Poole*. *Smith v. State*, 310 So.3d 366, 374 (Fla. 2020) (rejecting a *Hurst v. State* claim on the merits, explaining the prior violent felony aggravating factor rendered Smith eligible for the death penalty thereby satisfying "the mandates of the United States and Florida Constitutions" citing *Poole*). And any claim based on *Hurst v. Florida*, 577 U.S. 92 (2016), would be rejected in federal court on non-retroactivity grounds. *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) (stating that *Hurst v. Florida* does "not apply retroactively" citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)); *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322 (11th Cir. 2019) (holding *Hurst v. Florida* is not retroactive). Melton will not receive a new penalty phase based on *Hurst* in either state or federal court.

[3] The Eleventh Circuit has also affirmed the denial of federal habeas relief in the non-

Procedural history of the current state successive postconviction motion

On June 29, 2022, Melton, represented by Capital Collateral Regional Counsel - North (CCRC-N), filed a sixth successive postconviction motion in the state trial court raising a claim of newly discovered evidence regarding a new consensus among the neuroscientific community that the human brain is not fully developed until, at least, 21 years of age. Melton argued, based on these new studies, that the prohibition on executing defendants under 18 years old, established in *Roper v. Simmons*, 543 U.S. 551 (2005), be expanded to include all capital defendants under 21 years old.

On July 19, 2022, the State filed an answer to the sixth successive postconviction motion asserting the claim was not cognizable, was untimely, as well as meritless, as a matter of law, under the Florida Supreme Court's controlling precedent of *Branch v. State*, 236 So.3d 981 (Fla. 2018), and *Foster v. State*, 258 So.3d 1248 (Fla. 2018). (2022 Succ. PCA 99-114). On August 4, 2022, CCRC-N filed supplemental authority of American Psychological Association's adoption of a resolution on August 3, 2022, advocating the prohibition on executing minors be extended to defendants under 21 years old. (2022 Succ. PCA 141-198).[4]

On August 17, 2022, the state postconviction court summarily denied the sixth successive postconviction motion. (2022 Succ. PCA 213-19). The postconviction court described the claim as a claim of newly discovered evidence demonstrating "that the death penalty is a categorically unconstitutional punishment for individuals who committed offenses when they were between the ages of 18 to 21" based on the "study of brain maturation over the past decade" showing "several aspects of brain development, including the brain regions that determine character, judgment, and

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capital case. *Melton v. Att'y. Gen. of Fla.*, 769 Fed.Appx. 803 (11th Cir. 2019), *cert. denied*, *Melton v. Inch*, 140 S. Ct. 885 (2020) (No. 19-6558).

[4] The APA resolution is available at: https://www.apa.org/about/policy/resolution-death-penalty.pdf

decision-making, continue to develop until at least the age of 21 and that this view is now widely accepted among neuroscientists and the legal community." (2022 Succ. PCR 215). The postconviction court explained the claim was based on *Roper v. Simmons*, 543 U.S. 551 (2005), and was supported by a June 30, 2021 report from Dr. Laurence Steinberg, Ph.D., "summarizing the current scientific understanding of the brain development of individuals between the ages of 18 to 21." *Id.* at 215-16. The Steinberg report described a "growing consensus" based on studies of brain maturation conducted during the past decade concluding "that brain maturation continues into late adolescence." *Id.* at 216.

The postconviction court, however, observed that many of the studies in the report predated 2020 and went as far back as 2003. (2022 Succ. PCR 216). The postconviction court noted that the Florida Supreme Court had "routinely rejected" new opinions and studies as being "newly discovered evidence" citing *Asay v. State*, 210 So.3d 1, 22-23 (Fla. 2016). *Id.* at 216. The postconviction court also concluded that obtaining a new expert and report based on information that has been available for years is not a proper basis for a claim of newly discovered evidence citing *Booker v. State*, 336 So.3d 1177, 1181-82 (Fla. 2022), and *Howell v. State*, 145 So.3d 774, 775 (Fla. 2013). *Id.* at 216, 218. The postconviction court also found the claim to be untimely because it was not filed "within one year of the date upon which the claim became discoverable through due diligence" citing *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020). (2022 Succ. PCR 216); *Id.* at 218.

The postconviction court noted the American Psychological Association's recent resolution supporting a prohibition on the execution of defendants under 21 at the time of the offense. (2022 Succ. PCR 217). The postconviction court noted, however, that the Florida Supreme Court had rejected a similar claim based on a similar resolution adopted by the American Bar Association in 2018 in the cases of *Foster v. State*, 258 So.3d 1248, 1253 (Fla. 2018), and *Branch v. State*, 236 So.3d 981, 986 n.5 (Fla. 2018).

Id. at 217.

The state postconviction court also addressed the merits. (2022 Succ. PCR 218). The postconviction court concluded, regardless of whether the Steinberg report counted as newly discovered evidence and regardless of the untimeliness of the motion, the claim failed under *Roper*. (2022 Succ. PCR 218). *Id.* at 218. The postconviction court reasoned that *Roper* "establishes a bright line rule that the age of 18 is the age at which the individual is eligible for the death penalty." *Id.* at 218 citing *Roper*, 543 U.S. at 574. The postconviction court observed that arguments seeking the extension of *Roper* to those capital defendants over 17 had been "repeatedly rejected by the Florida Supreme Court." *Id.* citing *Foster*, 258 So.3d at 1254 and *Branch*, 236 So.3d at 987. The postconviction court noted that Florida courts "must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court." *Id.* at 218 citing *Correll v. State*, 184 So.3d 478, 489 (Fla. 2015), and *Farmer v. State*, 268 So.3d 1009, 1010 (Fla. 1st DCA 2019)). The postconviction court summarily denied the successive postconviction motion. (2022 Succ. PCR 218).

On September 1, 2022, CCRC-N filed a motion for rehearing arguing the claim should be considered timely and the line should be expanded to include those capital defendants under 21 years-old at the time of the murder citing *Matter of Monschke*, 482 P.3d 276, 325-26 (Wash. 2021). (2022 Succ. PCA 220-230). On September 16, 2022, the postconviction court denied rehearing. (2022 Succ. PCA 231-232).

Melton appealed the summary denial of his sixth successive postconviction motion to the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's summary denial of the successive motion. *Melton v. State*, 367 So.3d 1175 (Fla. 2023).

On November 9, 2023, Melton, represented by CCRC-N, filed a petition for a

writ of certiorari in this Court raising two questions.

REASONS FOR DENYING THE WRIT

QUESTION I

Whether this Court Should Grant Review of a Decision of the Florida Supreme Court Rejecting Successive Postconviction Claim that *Roper v. Simmons*, 543 U.S. 551 (2005), which Prohibits the Execution of Minors, should be Expanded to Include Capital Defendants who are 18 Years and 25 Days Old on the Day of the Crime.

Petitioner Melton seeks review of the Florida Supreme Court's decision rejecting his successive postconviction claim arguing that *Roper v. Simmons*, 543 U.S. 551 (2005), should be expanded to include a capital defendant who was 18 years and 25 days old. Pet. at 6. Melton argues, based on scientific articles and studies regarding human brain development, as well as a 2022 resolution from the American Psychological Association, that the prohibition on the execution of capital defendants should be expanded to include defendants who are only a few days over 18 years old. He claims that these studies and the resolution reflect the current standards of decency under *Trop v. Dulles*, 356 U.S. 86 (1958). But the Florida Supreme Court held, in the alternative, that the sixth successive postconviction motion was untimely and that determination is a matter of state law. Furthermore, there is no conflict between this Court's holding in *Roper* and the Florida Supreme Court's decision in this case. This Court in *Roper* drew the line for eligibility for the death penalty at 18 years old and the Florida Supreme Court followed this Court's categorical rule established in *Roper*. Nor is there any conflict with this Court's decision in *Trop* and the Florida Supreme Court's decision in this case. The evolving standards of decency are properly derived from legislation enacted by elected representatives, not from studies, experts' opinions, or resolutions from professional organizations. Melton points to no legislation, state or

federal, increasing the age of eligibility for the death penalty beyond 18 years old, much less to a majority of legislatures enacting such legislation. Additionally, there is no conflict between the Florida Supreme Court's decision in this case and the lower appellate courts. The federal circuit courts that have addressed this exact issue have all refused to expand *Roper*. Review of this question should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court affirmed the trial court's summary denial of the sixth successive postconviction motion. *Melton v. State*, 367 So.3d 1175 (Fla. 2023). On appeal, Melton argued, based on a consensus among the neuroscientific community regarding human brain development, that the prohibition established in *Roper* on the execution of defendant under 18 years old should be expanded to include all capital defendants under 22 years old. *Melton*, 367 So.3d at 1176.[5] The Florida Supreme Court rejected the claim both as untimely and on the merits. *Id.* at 1176 (agreeing with the trial court that the claim was "untimely" and "meritless"). The Florida Supreme Court rejected the invitation to expand *Roper* on the merits. *Id.* at 1176, 1177. The State's highest court relied on their prior precedent in which the same argument based on the same consensus had been rejected. *Id.* at 1177 (citing *Branch v. State*, 236 So.3d

[5] The exact question being raised in the petition in this Court is not the same question that was raised in the state courts. The question raised in the petition is whether *Roper* should be expanded to include capital defendants that are just a few weeks over 18 years old but the issue raised in the state courts was whether *Roper* should be expanded to capital defendants under 22 years old. Moreover, none of the materials relied on to support the claim in state court drew the age limit in the same manner as the question in the petition does. None of the studies or resolutions relied to support the claim advocate drawing the line at 18 years and 25 days. Rather, the studies and resolution advocate expanding *Roper* to include all capital defendants under 22 years old. Normally, this Court does not address arguments that were "neither pressed nor passed upon below." *Babcock v. Kijakazi*, 595 U.S. 77, 82, n.3 (2022) (citing *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)).

981 (Fla. 2018), and *Foster v. State*, 258 So.3d 1248, 1253 (Fla. 2018)). The Florida Supreme Court concluded "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*." *Id.* (quoting *Branch*, 236 So.3d at 987).

Matter of state law

The issue of the timeliness of a successive postconviction motion is a matter of state law. *cf. Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (concluding that when a state postconviction claim is untimely under state law, that is the "end of the matter" for purposes of federal habeas review under § 2244(d)(2)). The Florida Supreme Court rejected the claim, alternatively, based on a finding that the sixth successive postconviction motion was untimely. The Florida Supreme Court was interpreting a Florida rule of court to determine if the successive postconviction claim was untimely. Fla. R. Crim. P. 3.851(d)(2)(A). The Florida Supreme Court alone determines whether a successive postconviction motion filed in state court under a state rule of criminal procedure is timely. There is no federal constitutional aspect to such a timeliness determination. This Court lacks jurisdiction to review a state court judgment if that judgment rests on state law. *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

No conflict with this Court's jurisprudence

There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). There certainly is no conflict with this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005). In *Roper*, this Court drew a bright line at the age of 18. This Court reasoned that the "age of 18 is the point where society draws the line for many purposes between childhood and

adulthood" and therefore, it is also "the age at which the line for death eligibility ought to rest." *Roper*, 543 U.S. at 574. The *Roper* majority noted that "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent" as support for its holding. *Id.* at 569; *id.* at 619 (Scalia, J., dissenting) (observing that serving on a jury or entering into marriage involve decisions that are "far more sophisticated than the simple decision not to take another's life). All of the parallels to other areas of the law, such as the voting age, drawn by this Court in *Roper* are equally true today. In short, not much has changed legally since *Roper* was decided. There is no conflict with this Court's current jurisprudence drawing the line of eligibility for the death penalty at 18 years of age and the Florida Supreme Court's decision.

Furthermore, there is no conflict with this Court's "evolving standards of decency" jurisprudence established in *Trop v. Dulles*, 356 U.S. 86 (1958), and the Florida Supreme Court's decision in this case. The evolving standards of decency are properly only derived from legislation enacted by elected representatives, not from studies, experts' opinions, or resolutions from professional organizations. *cf. Miller v. Alabama*, 567 U.S. 460, 510-12 (2012) (Alito, J., dissenting) (observing that while the "evolving standards of decency" test of *Trop* was "problematic from the start," at least, when the standard is based on the positions taken by state legislatures, it may be characterized as reflecting a national consensus). Indeed, this Court in *Roper* itself, as well as in *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), relied on legislation to establish the national consensus. *Roper*, 543 U.S. at 564 (noting that 18 States with the death penalty prohibited the death penalty for juveniles). Currently, all of the jurisdictions that authorize the death penalty, as well as the U.S. military, set the age of death-eligibility at 18 years old. Petitioner cites not a single statute, state or federal, increasing the age of eligibility for the death penalty beyond 18 years old, much less pointing to a trend of legislatures enacting such statutes, as required by a

Trop analysis. The Florida Supreme Court's decision refusing to expand *Roper* does not conflict with this Court's decision in *Trop*.

Additionally, this Court has denied review of petitions seeking to expand *Roper* based on similar arguments relying on studies of brain development or resolutions from professional organizations in numerous other Florida capital cases. *Branch v. State*, 236 So.3d 981 (Fla. 2018), *cert. denied, Branch v. Florida*, 583 U.S. 1153 (2018) (No. 17-7825); *Deviney v. State*, 322 So.3d 563 (Fla. 2021), *cert. denied, Deviney v. Florida*, 142 S. Ct. 908 (2022) (No. 21-6429); *Barwick v. State*, 361 So.3d 785 (Fla. 2023), *cert. denied, Barwick v. Florida*, 143 S. Ct. 2452 (2023) (No. 22-7424); *Sliney v. State*, 362 So.3d 186 (Fla. 2023), *cert. denied, Sliney v. Florida*, 2023 WL 8531966 (U.S. Dec. 11, 2023) (No. 23-5630). And this Court should do likewise in this case.

No conflict with the lower appellate courts

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

There is no conflict between the Florida Supreme Court's decision in this case and that of any federal circuit court of appeals or that of any state court of last resort. There is no conflict with the federal appellate courts and the Florida Supreme Court's decision in this case. The federal circuit courts, of course, follow the line drawn by this

Court in *Roper*. *United States v. Tsarnaev*, 968 F.3d 24, 96-97 (1st Cir. 2020) (rejecting a claim that *Roper* should be expanded based on recent studies showing the human brain continues to develop beyond 18 years of age and a 2018 resolution from the American Bar Association); *United States v. Roof*, 10 F.4th 314, 378-80 (4th Cir. 2021) (rejecting a claim that *Roper* should be expanded based on recent studies showing the human brain continues to develop), *cert. denied*, 143 S. Ct. 303 (2022) (No. 21-7234). As the Eleventh Circuit has explained, moving the age line established in *Roper*, "even a few months," would violate the categorical rule regarding age established by this Court in *Roper*. *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *26-*27 (11th Cir. Aug. 25, 2022) (relying on *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239 (11th Cir. 2015)), *cert. denied, Kearse v. Dixon*, 143 S. Ct. 2439 (2023). The petition does not cite any federal circuit court case expanding *Roper* to include capital defendants over 18 years old. There is no conflict between the federal circuit courts and the Florida Supreme Court's decision in this case.

Nor is there any conflict between the Florida Supreme Court's decision in this case and any decision of any state court of last resort. The petition does not cite any case from any state supreme court that expands *Roper* to include capital defendants over 18 years old based on recent scientific studies or resolutions from professional organizations using an Eighth Amendment analysis. While the petition points to cases that have expanded *Miller v. Alabama*, 567 U.S. 460 (2012), to include defendants over 18 years old, those cases were decided as a matter of state constitutional law. Pet. at 13 (citing *Matter of Monschke*, 482 P.3d 276, 277 (Wash. 2021), etc.). Cases that employ state law as a basis for a decision rather than employing the *Trop* standard cannot establish conflict for purposes of Rule 10(b). There is no conflict among the lower appellate courts and the Florida Supreme Court.

Because the timeliness of the successive postconviction motion is a matter of state law and there is no conflict with this Court's jurisprudence or among the lower appellate courts, review of this question should be denied.

QUESTION II

Whether this Court Should Grant Review of a Decision of the Florida Supreme Court Rejecting an Untimely Successive Postconviction Claim of Newly Discovered Evidence of Mitigation Based on a New Scientific Consensus that the Human Brain does not Fully Develop until a Person is, at Least, 21 Years Old.

Petitioner Melton seeks review of a Florida Supreme Court's decision rejecting a claim of newly discovered evidence of mitigation. Pet. at 14. The claim of new mitigation was based on a recent consensus regarding human brain development continuing beyond 18 years of age. Melton relied on a neurodevelopmental psychologist's declaration summarizing recent scientific articles and studies regarding human brain development, as well as a 2022 resolution from the American Psychological Association (APA), to assert that the prohibition on the execution of capital defendants should be expanded to include all defendants under 21 years old. The Florida Supreme Court rejected the claim as untimely as well as meritless. Both of those determinations were solely matters of state law. The timeliness of a successive postconviction motion filed in state court is a matter of state law. And the entire concept of newly discovered evidence of mitigation is also a matter of state law. Moreover, there is no conflict with this Court's jurisprudence and the Florida Supreme Court's decision in this case. Nor is there any conflict between the lower appellate courts and the Florida Supreme Court's decision in this case. Review of this state law question should be denied.

The Florida Supreme Court's decision in this case

Melton, in the alternative, argued that the newly discovered evidence of mitigation, based on the studies and the APA resolution, negated both of the two aggravating factors supporting his death sentence which would result in a life sentence at a new resentencing. *Melton*, 367 So.3d at 1176. The two aggravators were: (1) the prior violent felony aggravator based on a prior first-degree murder and robbery

conviction committed a few months before the capital murder; and (2) the pecuniary gain aggravator for the contemporaneous armed robbery. *Id.* at 1176, n.3. The Florida Supreme Court rejected the claim both as untimely and on the merits. *Id.* at 1176 (agreeing with the trial court that the claim was "untimely" and "meritless"). The Florida Supreme Court explained that the postconviction claim was untimely because it was not filed within one year of the date upon which the claim became discoverable through due diligence. *Id.* at 1176-77. The Court found the consensus Melton relied on to establish the newly discovered evidence had, in fact, existed since 2015, according to his own expert. *Id.* at 1177. The Court also noted that, under its precedent, new studies are "not recognized as newly discovered evidence." *Id.* at 1177 (quoting *Foster v. State*, 132 So.3d 40, 72 (Fla. 2013)). The Court concluded that Melton was not diligent in discovering the claim and therefore, the claim was untimely. The Florida Supreme Court affirmed the trial court's summary denial of the sixth successive postconviction motion. *Id.* at 1177.[6]

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[6] The Florida Supreme Court did not address the negation of the aggravator's aspect of the claim on the merits in its opinion in this case. But even an expansion of *Roper* could not possibly operate to negate both of the aggravators. *Roper* is a limitation on a defendant's eligibility for a death sentence based on age. It does not, and cannot, operate to negate convictions or prior convictions. Melton was contemporaneously convicted of armed robbery of the pawn shop in the capital case. *Roper* has nothing to say about such a conviction or the use of that conviction to establish the pecuniary gain aggravator. *Roper*, regardless of its breath, does not negate the pecuniary gain aggravator. Melton was previously convicted of an earlier murder and robbery of a taxi-cab driver which was used to establish the prior violent felony aggravator. Again, *Roper* has nothing to say regarding the validity of those prior convictions. Melton, however, was 17 years old when he committed the prior murder. While the issue of whether the reasoning of *Roper* should also prohibit the use of juvenile convictions as aggravators could be raised, that issue was not, in fact, in the sixth successive postconviction motion filed in state court or as a question in the petition filed in this Court. And the new studies regarding human brain development do not advance such an argument anyway. Such an argument can be raised based on *Roper* itself and was, in fact, raised previously in this case. The Florida Supreme Court previously rejected a claim that *Roper* should preclude the use of juvenile convictions as the basis for a capital aggravator, as has the Eleventh Circuit, in this case. *Melton v. State*, 949 So.2d

Solely a matter of state law

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). This Court lacks jurisdiction to review a state court judgment if that judgment rests on state law. *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

The Florida Supreme Court rejected the claim of newly discovered evidence of mitigation, in part, based on a finding that the sixth successive postconviction motion was untimely. The issue of the timeliness of a successive postconviction claim is solely a matter of state law. *cf. Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (concluding that when a state postconviction claim is untimely under state law, that is the "end of the matter" for purposes of federal habeas review under § 2244(d)(2)). The Florida Supreme Court was interpreting a Florida rule of court to determine if the successive postconviction motion was untimely. Fla. R. Crim. P. 3.851(d)(2)(A). The Florida Supreme Court does not permit new studies, new manuals, or new resolutions to restart the clock for purposes of timely filing a successive postconviction claim under rule 3.851(d)(2)(A). *Barwick v. State*, 361 So.3d 785, 793 (Fla. 2023) (noting the Florida Supreme Court has "routinely held that resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence"), *cert. denied, Barwick v. Florida*, 143 S. Ct. 2452 (2023); *Sliney v. State*, 362 So.3d 186, 189 (Fla. 2023) (concluding that an expansion of *Roper* claim, raised in a second successive postconviction motion, was untimely and observing that if the court were to accept such

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994, 1020 (Fla. 2006), *cert. denied, Melton v. Florida*, 552 U.S. 843 (2007) (No. 06-11339); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234 (11th Cir. 2015) (denying a motion to reconsider the denial of a certificate of appealability on the issue of whether *Roper* precludes the use of prior juveniles convictions as the basis for a capital aggravator), *cert. denied, Melton v. Jones*, 577 U.S. 926 (2015) (No. 15-5522).

a timeliness argument, every new study or publication related to brain development in young adults could be invoked to restart the clock for filing a successive postconviction claim which would "be at odds with the finality interests" served by rule 3.851); *cert. denied, Sliney v. Florida*, 2023 WL 8531966 (U.S. Dec. 11, 2023) (No. 23-5630). The Florida Supreme Court alone determines whether a successive postconviction motion filed in state court under a state rule of criminal procedure is timely. There is no federal constitutional aspect to such a timeliness determination. Petitioner attempts to assert that Florida's time limitations on claims of newly discovered evidence violate the federal due process clause. Pet. at 15, 18. But this Court does not permit petitioners to turn state law claims into federal constitutional claims merely by wrapping the claim in due process cloth. *Gryger v. Burke*, 334 U.S. 728, 731 (1948) (explaining that "we cannot treat a mere error of state law" as being "a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."); *cf. Webb v. Wyo. Dep't of Corr.*, 849 Fed. Appx. 729, 737 (10th Cir. 2021) (classifying a claim regarding a state speedy trial rule as violating federal due process as being a state law claim and observing that a habeas petitioner "cannot transform a state law claim into a federal one merely by attaching a due process label"), *cert. denied, Webb v. Pacheco*, 142 S. Ct. 184 (2021) (No. 20-8323).

Alternatively, the merits are also a matter of state law. The entire concept of newly discovered evidence is solely a matter of state law. *Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1148 (11th Cir. 2022) (concluding a claim of newly discovered evidence was a "pure state law claim" that was not cognizable in federal habeas), *cert. denied, Green v. Dixon*, 143 S. Ct. 982 (2023) (No. 22-686); *Baker v. Att'y Gen. of Fla.*, 2019 WL 3216850, at *1 (11th Cir. Feb. 13, 2019) (stating that a postconviction claim of newly discovered evidence "is not cognizable in a § 2254 proceeding" because a federal habeas court "may not reexamine state court determinations on issues of state law" citing

Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). Under Florida law, the test for claims of newly discovered evidence was established in *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). A claim of newly discovered evidence of mitigation requires that the new mitigation would probably result in a life sentence at a new penalty phase. *Damren v. State*, 2023 WL 5968167, at *2 (Fla. Sept. 14, 2023) (explaining to vacate a death sentence based on a claim of newly discovered evidence, the second prong of *Jones* requires a showing that the newly discovered mitigation would probably result in a life sentence at a resentencing citing *Walton v. State*, 246 So.3d 246, 249 (Fla. 2018), and *Swafford v. State*, 125 So.3d 760, 767 (Fla. 2013)). But there is no federal constitutional equivalent to the concept of newly discovered evidence of mitigation requiring a new penalty phase. Nor is there any case from this Court that is equivalent to the Florida Supreme Court's *Jones* test for newly discovered evidence of mitigation.

The second question is purely a matter of state law both as to the timing and the merits of the claim over which this Court lacks jurisdiction. This Court lacks jurisdiction twice over. There is no federal issue being raised in this question and therefore, this Court lacks jurisdiction.

No conflict with this Court's jurisprudence

There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court's current Eighth Amendment jurisprudence does not include the concept of newly discovered evidence of mitigation. There is no case from this Court extending its Eighth Amendment caselaw regarding mitigation, such as *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), to new evidence of mitigation discovered years after the death sentence was imposed. There is no case from this Court even

hinting in any manner that the Eighth Amendment requires state courts to reconsider a death sentence that was final many years ago, any time new evidence of mitigation arises. Indeed, this Court has repeatedly declined to formally recognize freestanding claims of innocence in capital cases based on new evidence regarding guilt. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (noting it is an "open question" whether there is a federal constitutional right to be released upon proof of actual innocence); *House v. Bell*, 547 U.S. 518, 553-55 (2006) (declining to resolve the issue of whether a freestanding innocence claim exists as a matter of federal constitutional law but noting that if such a claim existed it would require an "extraordinarily high" showing of innocence amounting to a case of "conclusive exoneration"); *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming, in a capital case, a "truly persuasive demonstration" of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief "if there were no state avenue open to process such a claim.").[7]

This Court considers new compelling evidence of mitigation, discovered after the death sentence was imposed, to be a matter for executive clemency. *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (observing that historically clemency provided the principal avenue of relief after conviction in capital cases because there was no right of appeal until 1907); *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (noting clemency's role as a "fail safe in our criminal justice system" quoting *Herrera*, 506 U.S. at 415); *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) (observing that clemency is "a prerogative granted to

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[7] Florida has avenues open. Florida allows both claims of newly discovered evidence regarding the conviction and claims of newly discovered evidence regarding the sentence. And such claims can be raised decades after the conviction was entered or the sentence was imposed. There are no time limitations on claims of newly discovered evidence provided such claims are raised within one-year of being discovered. Jimenez v. State, 997 So.2d 1056 (Fla. 2008). So, even if this Court ultimately recognizes freestanding claims of innocence or freestanding claims of innocence of the death penalty, that new rule would not apply to Florida capital cases.

executive authorities" and "is not for the Judicial Branch to determine the standards for discretion in clemency" and if the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention). The newly discovered evidence of mitigation regarding recent scientific studies of human brain development should be presented in Melton's clemency proceedings, not to the courts.

There is also no conflict with this Court's due process jurisprudence governing state postconviction proceedings and the Florida Supreme Court's decision in this case. As this Court explained in *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), it is the standard of *Medina v. California*, 505 U.S. 437, 446 (1992), that governs due process challenges to state postconviction proceedings. Under the *Medina* standard, the state's postconviction procedures must offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 557 U.S. at 69. There is nothing fundamentally unfair about a state court having time limitations on bringing postconviction claims and successive postconviction claims, much less on bringing sixth successive postconviction claims. Congress, for example, has time limitations on filing federal habeas petitions. 28 U.S.C. § 2244(d); *Christeson v. Roper*, 574 U.S. 373, 381-82 (2015) (Alito, J., dissenting) (explaining Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, which included a "strict" one year time limitation on filing federal habeas petitions with the goal of ending the "seemingly interminable" delays associated with federal habeas review). Congress also enacted severe restrictions on filing successive habeas petitions. 28 U.S.C. § 2244(b); *Banister v. Davis*, 140 S. Ct. 1698, 1704 (2020) (explaining that, while a state prisoner always gets one chance to file a federal habeas petition, to file a second habeas petition, any successive claim must fall within one of "two narrow categories").

There is no conflict with this Court's jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the lower appellate courts

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

There is no conflict between the Florida Supreme Court's decision in this case and that of any federal circuit court of appeals or that of any state court of last resort. Petitioner cites no case from any court, federal or state, holding that time limitations on successive postconviction claims raising claims of newly discovered evidence violate the federal due process clause under *Medina*. Petitioner also does not cite any federal circuit court case recognizing the concept of newly discovered mitigation.

Instead, Petitioner attempts to rely on a district court's order granting habeas relief from a Pennsylvania conviction for arson based on new scientific evidence. *Han Tak Lee v. Tennis*, 2014 WL 3894306 (M.D. Pa. June 13, 2014), report and recommendation adopted, *Lee v. Tennis*, 2014 WL 3900230 (M.D. Pa. Aug. 8, 2014), aff'd, *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159 (3d Cir. 2015). Pet. at 15. But *Han Tak Lee* concerned new studies regarding arson, not new studies regarding human

brain development. And the opinion concerned new evidence regarding the conviction, not new evidence regarding mitigation of a sentence. Furthermore, *Han Tak Lee* did not involve a timeliness issue, as this case does. Petitioner cites no case from any federal circuit court holding that a state court's time limitations on successive postconviction claims violate the federal due process clause under *Medina*. There is no conflict between the Third Circuit and the Florida Supreme Court.

Petitioner cites *Smith v. State*, 882 S.E.2d 300 (Ga. 2022), to establish conflict between the Georgia Supreme Court and the Florida Supreme Court. Pet. at 16. The Georgia Supreme Court in *Smith* held a defendant was entitled to an evidentiary hearing on a motion for new trial. Many years after his conviction for the felony murder of his infant son, Smith filed a motion for new trial based on recent developments regarding shaken baby syndrome. But there is no conflict between Georgia Supreme Court's decision in *Smith* and the Florida Supreme Court's decision in this case. *Smith* was decided as a matter of state law, not as a matter of federal due process law. The Georgia Supreme Court was interpreting state statutes that allowed a motion for new trial to be filed beyond the normal 30-day time limitation on such motions for "extraordinary cases." *Smith*, 882 S.E.2d at 305 (citing Ga. Code § 5-5-41(a) and Ga. Code § 5-5-23). Because there is no conflict among the lower appellate courts, review of the second question should be denied.

In sum, the petition presents one question that is solely a matter of state law and neither of the two questions raised in the petition involve any conflict with this Court's jurisprudence or any conflict among the lower appellate courts.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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