No. _____

In the Supreme Court of the United States

SAMUEL LEE SMITHERS, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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

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JUDGEMENT SOUGHT TO BE REVIEWED

OPINIONS OF THE FLORIDA SUPREME COURT

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APPENDIX A

Opinion of the Florida Supreme Court

Smithers v. State, SC2025-1507, 2025 WL _____ (Fla. October 7, 2025)

Supreme Court of Florida

No. SC2025-1507

SAMUEL L. SMITHERS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

October 7, 2025

PER CURIAM.

Samuel L. Smithers, a prisoner under two sentences of death and an active death warrant, appeals the circuit court's summary denial of his successive motion to vacate his sentences of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. As we explain below, we affirm the summary denial of Smithers' postconviction motion.

I. FACTS AND PROCEDURAL BACKGROUND

The opinion on direct appeal, *Smithers v. State*, 826 So. 2d 916, 918 (Fla. 2002), explained the following. In 1995, Samuel

Smithers agreed to maintain the lawn at a vacant 27-acre property in Plant City. The property was also the site of three ponds. The property owner gave Smithers a key to the gate that enclosed the property but not to the house located on the property.

Smithers continued to do lawn maintenance on the property in 1996. He mowed the lawn during the week of May 20, 1996, after which the owner paid him on May 26. A couple of days later, the owner went to check on the property. Upon arrival, the owner found Smithers' truck parked outside of the carport and Smithers sitting on the carport cleaning an axe. Smithers explained that he had returned to the property to cut some tree limbs, but the owner also noticed a pool of blood on the carport. Smithers suggested that someone must have killed a small animal, and he promised to clean the carport.

Concerned about the pool of blood, the owner contacted the Sheriff's Department and later met a deputy at the property. At that point, although the blood had been cleaned up, marks in the grass that appeared to be drag marks led to one of the ponds where a dead woman, later identified as Cristy Cowan, was found floating

in the water. Further searching by a dive team led to the discovery of another body, later identified to be Denise Roach.

DNA evidence linked to Smithers was found on the property inside of the house, and a blood stain found on the carport was consistent with Roach's DNA. Additional evidence linking Smithers to the murders was found during a search of his home, and surveillance video from a local convenience store showed Smithers and Cowan together about one hour before the owner arrived at the property and discovered Smithers.

After the discovery of the bodies, Smithers agreed to submit to an interview at the Sheriff's Department and was questioned for almost three hours. In an interview the next day, Smithers provided inconsistent statements and eventually admitted to the murders of Cowan and Roach. He was arrested and charged with both murders. Smithers filed motions to sever the two charges for purposes of trial and to suppress his confession, both of which were denied by the trial court.

The medical examiner's trial testimony indicated that both victims were strangled and sustained chop or stab wounds:

> At trial, the medical examiner testified that at the time Cowan's body was discovered, she had not been dead for more than a couple of hours. There was a foam cone around her mouth which suggested that she might have drowned. Cowan had an injury to her eye, a laceration under her lip, a blunt impact injury to her jaw, a chop wound on the top of her head which penetrated her brain, and a chop wound behind her ear. She also had injuries consistent with manual strangulation. The medical examiner stated that death was caused by strangulation combined with the chop wounds.
>
> Regarding Roach, the medical examiner testified that the body had been in the pond seven to ten days and was therefore very decomposed. There were two slits in Roach's clothing which were caused by a sharp instrument. Her face and skull were fractured. There were also sixteen puncture wounds to her skull, several of which penetrated the skull. Finally, she had injuries consistent with manual strangulation (the hyoid bone was fractured). The medical examiner stated that death was caused by the combined effects of strangulation, stab wounds, and blunt impact to the head.

Id. at 920.

Smithers testified in his defense at trial and told a different version of events than he provided to the detectives, this time placing the blame for both murders on an unknown man. The jury ultimately convicted Smithers of both counts of first-degree murder and, at the conclusion of the penalty phase, the jury unanimously recommended death for both murders. *Id.* at 921-22. As to the murder of Cowan, the trial court found the following aggravating

factors: (1) prior violent felony (the contemporaneous murder of Roach), (2) the murder was especially heinous, atrocious, or cruel (HAC), and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). The trial court found two aggravating factors as to the murder of Roach: (1) prior violent felony (the contemporaneous murder of Cowan) and (2) HAC.[1] *Id.* at 922. The circuit court, concluding the aggravating factors outweighed the mitigating circumstances, sentenced Smithers to death for both murders.

Smithers' convictions and sentences were affirmed on direct appeal.[2] *Id.* at 931. His convictions and sentences became final

---

1. As statutory mitigation, the trial court found that (1) the murder was committed while Smithers was under the influence of extreme mental or emotional disturbance (moderate weight), and (2) Smithers' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (moderate weight). The trial court also found seven nonstatutory mitigators, each of which was assigned moderate weight, and the court gave great weight to a request made by Cowan's father that Smithers be sentenced to life imprisonment. *Id.* at 922.

2. This Court rejected six issues raised by Smithers on direct appeal: (1) the trial court erred in denying Smithers' motion to sever the two murder offenses; (2) the trial court erred in denying

when the United States Supreme Court denied certiorari review on February 24, 2003. *Smithers v. Florida*, 537 U.S. 1203 (2003).

This Court affirmed the denial of Smithers' initial motion for postconviction relief and denied his petition for writ of habeas corpus. *Smithers v. State*, 18 So. 3d 460, 463-73 (Fla. 2009).[3]

In 2017, Smithers filed a successive motion for postconviction relief based on the United States Supreme Court's decision in *Hurst*

Smithers' motion to suppress his confession; (3) the waiver of Smithers' presence at a pretrial hearing constituted fundamental error; (4) the trial court erred in finding HAC as to the murder of Roach; (5) the trial court erred in finding CCP as to the murder of Cowan; and (6) the trial court erred in denying defense counsel's motion for mistrial following an improper statement by a trial witness. *Id.* at 922 n.3.

3. In Smithers' initial postconviction appeal, he argued that counsel was ineffective for failing to (1) strike a prospective juror for cause; (2) seek exclusion of a portion of Smithers' statement to law enforcement; (3) adequately investigate mental health mitigation; and (4) call an independent medical examiner as a defense expert. *Id.* at 463.

Smithers raised five claims in his habeas petition: (1) the constitutionality of rules prohibiting counsel from interviewing jurors; (2) the jury was not adequately instructed on and counsel was ineffective for failing to litigate the sufficiency of the jury instructions; (3) Florida's capital sentencing scheme was unconstitutional as applied, and counsel was ineffective for failing to litigate the issue; (4) cumulative error; and (5) Smithers may be incompetent at the time of execution. *Id.* at 472-73.

v. Florida, 577 U.S. 92 (2016), and this Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So. 3d 487 (Fla. 2020). The circuit court denied the motion, and this Court affirmed the circuit court's denial of relief. *Smithers v. State*, 244 So. 3d 152, 153 (Fla. 2018).

Smithers filed a federal habeas petition raising multiple issues. *Smithers v. Sec'y, Dep't of Corr.*, No. 8:09-cv-2200-T-17EAJ, 2011 WL 2446576 (M.D. Fla. June 15, 2011).[4] The district court denied each of Smithers' claims and denied a certificate of appealability. Subsequently, the United States Court of Appeals for the Eleventh Circuit granted a limited certificate of appealability on the matter of penalty phase ineffective assistance of counsel. *Smithers v. Sec'y, Fla. Dep't of Corr.*, 501 F. App'x 906 (11th Cir.

4. Smithers' federal habeas petition raised the following issues: (1) erroneous denial of motion to sever; (2) erroneous denial of motion to suppress; (3) Smithers' improper absence from pretrial hearing; (4) HAC challenge; (5) CCP challenge; (6) erroneous denial of motion for mistrial; (7) guilt phase ineffective assistance of counsel; (8) penalty phase ineffective assistance of counsel; (9) challenge to validity of rules regarding juror interviews; (10) erroneous penalty phase jury instructions; (11) challenge to the constitutionality of Florida's death penalty scheme; (12) cumulative error; and (13) Smithers' competency to be executed. *Id.* at *11-51.

2012). The court considered two issues (failure to provide mental health expert with adequate background information and failure to consult independent expert to refute testimony of the medical examiner) and ultimately affirmed the denial of habeas relief. *Id.* at 909. The United States Supreme Court denied certiorari review. *Smithers v. Crews*, 569 U.S. 935 (2013).

Governor Ron DeSantis signed Smithers' death warrant on September 12, 2025. On September 19, 2025, Smithers filed his successive motion to vacate his sentences of death pursuant to Florida Rule of Criminal Procedure 3.851. The motion raised one claim, that at 72 years of age, his execution would constitute "cruel and unusual punishment because of his advanced age and status as elderly." The circuit court conducted a *Huff*[5] hearing on September 22, 2025, and summarily denied relief in an order dated September 26, 2025.

Smithers timely appealed to this Court the denial of postconviction relief. Here, his primary argument is that his execution constitutes cruel and unusual punishment because of his

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

advanced age and status as elderly, and he discusses four sub-issues: (1) the circuit court erroneously denied the motion as untimely and procedurally barred; (2) the circuit court erred in concluding that the conformity clause and binding precedent foreclose relief; (3) executing the elderly is inconsistent with our evolving standards of decency; and (4) executing the elderly violates federal and state constitutional prohibitions against cruel and unusual punishment because such executions do not have a deterrent or a retributive purpose.[6] However, we need not reach the latter two sub-issues because sub-issues (1) and (2) are determinative of Smithers' appeal. We agree with the circuit court's conclusions that (1) Smithers' claim is untimely and procedurally barred, and (2) Smithers' claim is foreclosed by Florida's conformity

6. Smithers argues that executing him runs afoul of evolving standards of decency that are relevant to an Eighth Amendment analysis. To that end, he argues that the majority of states (including Florida) have never executed a person 70 years of age or older, and he points to Florida statutes that reflect a policy of protecting the elderly. He also maintains that his execution, as an elderly person who has served more than 26 years in prison, neither serves as a deterrent nor has a retributive purpose. He argues that the State's interest in punishing him is satisfied by his continued incarceration.

clause. Thus, we affirm the circuit court's order summarily denying Smithers' successive motion seeking to vacate his sentences of death.

II. ANALYSIS

Smithers has claimed neither intellectual disability nor incompetency to be executed as bars to his execution. Rather, he argues that because of his advanced age of 72 years, executing him would constitute cruel and unusual punishment.

As is the case here, the "[s]ummary denial of a successive postconviction motion is appropriate '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' " *Owen v. State*, 364 So. 3d 1017, 1022 (Fla. 2023) (second alteration in original) (quoting *Bogle v. State*, 322 So. 3d 44, 46 (Fla. 2021)). We review the circuit court's decision de novo, "accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Id.* at 1022-23 (quoting *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009)). The circuit court did not err in summarily denying Smithers' claim.

1. Whether Smithers' Claim Is Untimely and Procedurally Barred

The circuit court correctly concluded that Smithers' postconviction claim is untimely and procedurally barred. Under rule 3.851(d)(1), "[a]ny motion to vacate judgment of conviction and sentence of death must be filed by the defendant within 1 year after the judgment and sentence become final." Fla. R. Crim. P. 3.851(d)(1). Rule 3.851(d)(2) provides three exceptions to raising postconviction claims outside of the one-year timeframe:

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

Fla. R. Crim. P. 3.851(d)(2)(A)-(C).

Smithers does not argue, nor do we conclude, that any of these exceptions apply to his postconviction claim. Instead, he argues that his postconviction claim only became ripe once the

Governor signed his death warrant on September 12, 2025. We reject this argument. As the circuit court concluded:

> Defendant's assertion that his claim is predicated upon his current age, and therefore could not have been previously raised and only became ripe after the signing of the death warrant, is unavailing. Defendant essentially seeks a categorial [sic] exemption to execution for the elderly, which he defines as those individuals age sixty-five years or older. By that definition, his claim became ripe when he turned sixty-five; therefore, he could have or should have raised his claim in prior proceedings rather than waiting until after the signing of his death warrant.

Smithers' argument that his claim is "predicated upon facts that only exist or become relevant upon the signing of a death warrant" is without merit. While Smithers is correct that he could not have known exactly when his death warrant would be signed, he has known for several years that upon the signing of his death warrant and the exhaustion of any related successive postconviction process, he would fall within the class of individuals that he now seeks to exempt from execution due to advanced age. Thus, his claim is untimely and fails to meet any exception provided in rule 3.851(d)(2). We affirm the circuit court's ruling.

2. Whether Smithers' Claim Is Precluded by Florida's Conformity Clause

Smithers argues that this Court should break new ground in concluding that his execution, at 72 years of age, would constitute cruel and unusual punishment in violation of the Eighth Amendment and Florida's corresponding constitutional provision, article I, section 17. No opinion of the United States Supreme Court or this Court has held that the elderly are categorically exempt from execution. Even if Smithers' claim was not untimely or procedurally barred, we decline to extend the relief requested.

Presently, the United States Supreme Court—and this Court—recognize only one age-based death penalty exemption, which prohibits the imposition of the death penalty on individuals who were under the chronological age of 18 at the time that their capital crimes were committed. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005).

Indeed, we recently stated:

> *Because the Supreme Court has interpreted the Eighth Amendment to limit the exemption from execution . . . based on age to those whose chronological age was less than eighteen years at the time of their capital crime(s), this Court is bound by those interpretations* and is precluded from interpreting Florida's prohibition against

> cruel and unusual punishment to exempt . . . *those whose chronological age was over eighteen years at the time of their capital crime(s).*

Gudinas v. State, 412 So. 3d 701, 713 (Fla.) (emphasis added), *cert. denied*, 145 S. Ct. 2833 (2025). Thus, to the extent we view Smithers' argument as precluded by United States Supreme Court precedent, we are bound by the conformity clause.[7] As we have explained:

> This means that the Supreme Court's interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida, and this Court cannot interpret Florida's prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment.

Ford v. State, 402 So. 3d 973, 979 (Fla.) (quoting *Barwick v. State*, 361 So. 3d 785, 794 (Fla. 2023)), *cert. denied*, 145 S. Ct. 1161 (2025).

For his part, Smithers argues that his case is distinguishable because the United States Supreme Court has not expressly

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7. "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." Art. I, § 17, Fla. Const.

addressed whether the elderly are exempt from execution and maintains that as such, this Court may expand Eighth Amendment protections to the execution of the elderly. However, we further observed in *Gudinas*:

> While the states are required to adhere to the Supreme Court's Eighth Amendment jurisprudence, *neither the Eighth nor Fourteenth Amendments require states to expand the protections afforded by the Eighth Amendment or to interpret their own corresponding state constitutional prohibitions against cruel and unusual punishment in a more expansive manner than the Supreme Court has interpreted the federal prohibition*.

412 So. 3d at 714 (emphasis added). Consistent with our analysis in *Gudinas*, we reject Smithers' invitation to expand the prohibition against cruel and unusual punishment to include individuals 65 years of age and older, and we affirm the circuit court's denial of relief.

III. CONCLUSION

For these reasons, we affirm the denial of Smithers' successive motion to vacate his sentences of death.

No oral argument is necessary, no motion for rehearing will be entertained by this Court, and the mandate shall issue immediately.

It is so ordered.

MUÑIZ, C.J., and COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.
LABARGA, J., concurs in result.
CANADY, J., recused.

An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge – Case No. 291996CF008093000AHC

Eric Pinkard, Capital Collateral Regional Counsel, Melody Jacquay-Acosta, Assistant Capital Collateral Regional Counsel, Ann Marie Mirialakis, Assistant Capital Collateral Regional Counsel, and Mahham Syed, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

James Uthmeier, Attorney General, Tallahassee, Florida, Rick A. Buchwalter, Senior Assistant Attorney General, and Joshua E. Schow, Assistant Attorney General, Tampa, Florida,

for Appellee

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APPENDIX B

Order of the Circuit Court for the Thirteenth Judicial Circuit,

Hillsborough County, Florida, denying postconviction relief (September 26, 2025)

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA	**CASE NO.: 96-CF-008093** **FSC NO.: SC1960-96690**
v.	**DIVISION: J**
SAMUEL LEE SMITHERS, **Defendant.** **_____/**	**DEATH WARRANT SIGNED** **EXECUTION SCHEDULED** **OCTOBER 14, 2025 AT** **6:00 P.M.**

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEFENDANT'S SENTENCE OF DEATH

THIS MATTER is before the Court on Defendant's Successive Motion to Vacate Sentence of Death, filed on September 19, 2025, pursuant to Florida Rule of Criminal Procedure 3.851. On September 22, 2025, the State filed its response. That same day, the Court also held a case management conference/Huff[1] hearing and determined an evidentiary hearing was not warranted on the allegations raised in Defendant's motion. After considering Defendant's motion, the State's response, the arguments of counsels presented during the September 22, 2025, case management conference, as well as the

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

court file, record, and applicable statutes, rules of criminal procedure, and case law, the Court finds as follows.

PROCEDURAL HISTORY

On December 18, 1998, a jury found Defendant guilty of two counts of first-degree murder; on January 24, 1999, the jury unanimously recommended a sentence of death on each count. On June 25, 1999, the Court imposed a death sentence on each count. The Florida Supreme Court affirmed Defendant's convictions and death sentences, and issued its mandate on September 13, 2002. *See Smithers v. State*, 826 So. 2d 916 (Fla. 2002). The United States Supreme Court denied certiorari on February 24, 2003. *Smithers v. Florida,* 537 U.S. 1203 (2003).

Defendant filed his initial motion for postconviction relief on December 22, 2003, and subsequently filed an amended motion on April 7, 2006. The postconviction court held an evidentiary hearing on certain claims, and rendered its final order denying relief on October 24, 2007. The Florida Supreme Court affirmed. *See Smithers v. State*, 18 So. 3d 460 (Fla. 2009).

Defendant then filed a federal petition for writ of habeas corpus, and his petition was denied on June 15, 2011. *See Smithers v. Sec'y*

Dep't of Corr., No. 8:09-CV-2200-T-17EAJ, 2011 WL 2446576 (M.D. Fla. June 15, 2011). Ultimately, the Eleventh Circuit Court of Appeals affirmed the denial of his federal habeas petition. *Smithers v. Sec'y, Fla. Dept. of Corr.*, 501 F. App'x. 906 (11th Cir. 2012). The United States Supreme Court denied certiorari on April 15, 2013. *See Smithers v. Crews*, 569 U.S. 935 (2013).

Defendant filed his first successive motion for postconviction relief on January 9, 2017, and the Court summarily denied his motion on June 15, 2017. The Florida Supreme Court again affirmed. *See Smithers v. State*, 244 So. 3d 152 (Fla. 2018).

On September 12, 2025, the Governor signed a death warrant for the execution of Defendant at 6:00 p.m. on Tuesday, October 14, 2025. The Florida Supreme Court issued a scheduling order directing the Court to complete all trial court proceedings by 11:00 a.m. on Friday, September 26, 2025. Defendant now files his second successive motion for postconviction relief.

SUCCESSIVE MOTION

In the instant successive motion, Defendant raises one claim. He also requests leave to amend his motion as necessary, a stay of execution, and that the Court vacate his death sentences.

CLAIM

THE EXECUTION OF 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 PROVISIONS OF THE FLORIDA CONSTITUTION.

Argument and Response

Defendant, who is seventy-two years old, alleges that execution of the elderly violates the Eighth Amendment of the United States and the corresponding provisions of the Florida Constitution. He contends his execution "offends the evolving standards of decency and is cruel and unusual punishment."

As "objective indicia of society's standards," Defendant cites to "legislative enactments and state practice." He argues that Florida laws evince a "clear and expressed consensus of protecting the elderly," which he defines as age sixty-five or older for purposes of the instant motion, and cites legislation that provides for enhanced punishment for offenders and reclassification of offenses when the victim is over age sixty-five, protects the elderly from exploitation, and allows those age seventy or older to be permanently excused from jury service. Defendant asserts he "falls squarely within this class of

people Florida legislation recognizes as elderly persons it seeks to protect" via such statutes. He posits that Florida legislation "reflects evolving standards of decency reject the execution of the elderly."

Defendant further contends his execution constitutes cruel and unusual punishment as the two stated purposes of the death penalty, retribution and deterrence, "are no longer accomplished by the execution of the elderly." He cites to the reasoning in *Ford v. Wainwright*, 477 U.S. 399 (1986), *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), and argues that an execution that has no deterrent or retributive value "amounts to nothing more than exacting mindless vengeance, offending the dignity of society." He argues, "It is illogical to conclude that the execution of a prisoner who is elderly and has been incarcerated for more than 26 years serves as either a deterrent or retributive purpose."

Defendant also notes the rarity of executions of the elderly. He cites to and attaches statistics from the Death Penalty Information Center, which reflect that of the 1,638 post-*Furman* executions, only forty-one (2.5%) of those executed prisoners were age sixty-five or older, and only sixteen (1%) were over the age of seventy. Defendant

concludes that "[t]he 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."

Finally, Defendant contends the effect that aging has had on him "is especially underscored given the mental health and brain damage testimony presented during the penalty phase," specifically, the abnormal findings of his PET scan which showed brain damage and other indications of impairment from brain injury. He asserts that on September 18, 2025, he was evaluated by Dr. Hyman Eisenstein, who opined he had further cognitive decline and that his full-scale IQ score dropped to 103 from his initial score of 111 in 1997. Dr. Eisenstein further opined, "Mr. Samuel Smithers is currently presenting with an insidious decline of mental function which will progress to a state of dementia."

Defendant asserts he is not alleging he is intellectually disabled, but argues that evidence of his cognitive decline due to advanced age should be weighed by this Court, and that such evidence "further supports the conclusion that his execution would amount to cruel and unusual punishment in violation of the Eighth Amendment."

In response, the State asserts Defendant's claim is untimely, procedurally barred, and without merit, and should be summarily denied. The State claims that based on Defendant's allegations, his claim became ripe when he turned sixty-five years old on January 30, 2018, but he did not raise his claim for another six years, until after the signing of the death warrant. The State contends Defendant does not allege and his claim does not fall within any of the exceptions to the time limitation set forth in rule 3.851(d).

The State further argues that the only new information alleged by Defendant is Dr. Eisenstein's September 18, 2025, evaluation, but Defendant does not claim it is newly discovered evidence, and Defendant has further "failed to demonstrate that he exercised any due diligence in procuring" such an evaluation or that the evaluation would probably produce an acquittal or lesser sentence on retrial.

The State also asserts Defendant's claim is "foreclosed by binding precedent" and cites the conformity clause of the Florida Constitution as well as the lack of any Supreme Court decision recognizing "that individuals over the age of sixty-five are categorically exempt from execution." The State contends Defendant

has further failed to demonstrate there is a "'national consensus' against executing individuals who are of advanced age."

Finally, the State contends Defendant's allegation regarding his cognitive decline has no "constitutional significance" and is conclusively refuted by the record. The State asserts Defendant's "cognitive capacity has remained relatively stable" over the past twenty-six years as Dr. Berland testified during the penalty phase that the WAIS test he administered overestimated Defendant's IQ score of 111 and, if he had administered the WAIS-III, Defendant's full-scale IQ would have been 103-104.

Analysis and Finding

The Court finds Defendant is not entitled to the relief he seeks, and agrees with the State's response.

First, Defendant's claim is untimely and procedurally barred. Defendant filed his claim more than one year after his judgment and sentence became final, and he does not allege or demonstrate that his claim falls within any of the exceptions to the time limitations as set forth in rule 3.851(d)(2). Although he cites to a neuropsychological evaluation conducted by Dr. Eisenstein on September 18, 2025, Defendant does not allege that the evaluation constitutes newly

discovered evidence, and he fails to demonstrate that he could not have previously obtained the evaluation through the exercise of due diligence or that Dr. Eisenstein's finding of cognitive decline would result in a less severe sentence on retrial. Defendant further does not seek application of a newly recognized fundamental right or allege any neglect on the part of counsel.

Defendant's assertion that his claim is predicated upon his current age, and therefore could not have been previously raised and only became ripe after the signing of the death warrant, is unavailing. Defendant essentially seeks a categorial exemption to execution for the elderly, which he defines as those individuals age sixty-five years or older. By that definition, his claim became ripe when he turned sixty-five; therefore, he could have or should have raised his claim in prior proceedings rather than waiting until after the signing of his death warrant. *See* Fla. R. Crim. P. 3.851(d); *Gudinas v. State*, 412 So. 3d 701, 714 (Fla. 2025) ("Post-warrant claims that could have been raised in a prior proceeding are procedurally barred."); *Rogers v. State*, 409 So. 3d 1257, 1263 (Fla. 2025) ("[I]n an active warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred.").

Second, Defendant's claim lacks merit. The Court agrees 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. *See e.g., Gudinas*, 412 So. 3d at 713; *Barwick v. State*, 361 So. 3d 785, 794 (Fla. 2023).

Even if his claim were not foreclosed, Defendant would not be entitled to relief. Defendant has not identified any opinion of the United States Supreme Court, a Florida court, or a court of any state or federal jurisdiction that holds the elderly are categorically exempt from execution. He also fails to cite to a single statute in any state which bars the execution of a defendant over the age of sixty-five or of any advanced age. As to Defendant's reliance on Florida's laws, the Court finds 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.

Defendant's assertion that the paucity of executions of persons over the age of sixty-five or seventy evinces evolving standards of decency is conclusory and, as the State notes, "fails to suggest, let

alone prove, that there is a national consensus against carrying out the death penalty due to the offenders' advanced age." Defendant has failed to allege any "direct evidence of a societal aversion to executing the elderly, such as evidence demonstrating that juries disproportionately elect not to impose the death penalty for elderly offenders, or that governors are more likely to commute death sentences of older prisoners or that any State has legislated against the execution of the elderly and infirm." *Allen v. Ornoski*, 435 F.3d 946, 954 (9th Cir. 2006) (addressing similar claim that due to defendant's age and infirmities, his execution would violate the Eighth Amendment). Defendant's conclusion also fails to take into account other reasons for the rarity of executions of the elderly, such as the possibility that "more elderly persons die on death row before their appeals are exhausted." *Id.* Accordingly, Defendant has failed to demonstrate that evolving standards of decency prohibit execution of the elderly.

The Court further notes Defendant's arguments are not supported by the Supreme Court's reasoning in *Roper*, *Atkins*, and *Ford*. In *Roper*, the Supreme Court explained that the "death penalty may not be imposed on certain classes of offenders, such as juveniles

. . ., the insane, and the [intellectually disabled], no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders." 543 U.S. at 551 (internal citations omitted) (citing *Ford*, 477 U.S. 399, and *Atkins*, 536 U.S. 304). In *Atkins*, the Supreme Court reasoned that intellectually disability "diminishes personal culpability even if the offender can distinguish right from wrong," which makes it "less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect." *Roper*, 543 U.S. at 563. Similarly, the Supreme Court concluded that there was no "retributive value" in allowing the execution of the insane, someone "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.

The classes of persons in those cases all had characteristics that rendered them less culpable and also undermined the death penalty's purposes of retribution and deterrence. For that reason, those classes of persons are exempt from execution. The fact that Defendant is of advanced age does not diminish the retributive value of the death penalty in his case, or undermine its deterrent effect, in

the same manner that a person's status as a juvenile or insane would.

As further support for his claim that he falls within a class of persons that should be shielded from execution, Defendant urges the Court to consider Dr. Eisenstein's recent findings. Although Defendant alleges Dr. Eisenstein found his cognitive abilities have declined, Dr. Eisenstein found his full-scale IQ score still placed Defendant within the average range of intellectual functioning. Significantly, Defendant does not allege he is intellectually disabled or incompetent to be executed. Therefore, his advanced age and purported cognitive decline do not place him in a class of persons less culpable at the time of the offenses and do not affect the death penalty's purposes of retribution and deterrence.[2]

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[2] Moreover, as the State notes in its response, during the penalty phase, Dr. Berland testified that he utilized the WAIS test as a measurement of brain impairment and noted, "WAIS relative to current standards overestimates" IQ and with "the WAIS3, he would be expected to probably come out with a full scale IQ of somewhere around 103, 104." DAT: 1732; 1778. Thus, Defendant's claim of cognitive decline based on the difference between his 1997 WAIS full-scale IQ score of 111 and his September 18, 2025, WAIS-III full-scale score of 103 is also refuted by the record.

Even if the Court considered Defendant's cognitive decline, the Court agrees with the State that such cognitive decline does not hold "constitutional significance." *See e.g., Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023) (noting the court has "long held that the categorical bar of *Atkins* that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or brain damage."); *James v. State*, 404 So. 3d 317, 325 (Fla. 2025) ("[W]ith respect to James's pattern of cognitive decline - a matter which the State generally does not dispute - we agree with the circuit court that James's cognitive issues do not shield him from execution...."); *Gudinas*, 412 So. 3d at 713 ("Because the Supreme Court has interpreted the Eighth Amendment to limit the exemption from execution based on mental functioning to those who are intellectually disabled or insane . . . this Court is bound by those interpretations and is precluded from interpreting Florida's prohibition against cruel and unusual punishment to exempt individuals from execution whose mental or cognitive issues do not rise to the level of intellectual disability....").

Defendant's claim that execution of the elderly, and his execution as a person of advanced age with cognitive decline,

constitute cruel and unusual punishment in violation of the Eighth Amendment is untimely, procedurally barred, and meritless. No relief is warranted on Defendant's successive motion.

ORDER

It is therefore **ORDERED AND ADJUDGED** that Defendant's Successive Motion to Vacate Defendant's Sentence of Death is hereby **DENIED**.

Pursuant to the Florida Supreme Court's September 12, 2025, scheduling order, Defendant's notice of appeal shall be filed by 1:00 p.m., Friday, September 26, 2025.

DONE AND ORDERED in Chambers at Tampa, in Hillsborough County, Florida, this 26th day of September, 2025.

MICHELLE SISCO
Circuit Judge

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