

No. 26-5158

IN THE
SUPREME COURT OF THE UNITED STATES

DOMINICK OCCHICONE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF IN OPPOSITION
EXECUTION SCHEDULED FOR JULY 28, 2026, AT 6:00 P.M.

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment requires a State to provide postconviction public records discovery to a defendant who seeks the requested materials not to litigate an existing constitutional claim, but to determine whether one might exist.

2. Whether the State of Florida's interpretation of the Eighth Amendment and reliance on its Conformity Clause violate Occhicone's right to be free from cruel and/or unusual punishment and right to due process under the Fourteenth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE AND FACTS	1
REASONS FOR DENYING THE PETITION	5
I. Occhicone’s Federal Constitutional Challenge to the Florida Constitution’s Conformity Clause Does Not Warrant This Court’s Review Because the Question Was Not Presented Below.....	18
II. The Florida Supreme Court’s denial of Occhicone’s motion for postconviction relief was based on adequate and independent state grounds.....	20
CONCLUSION.....	34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. Ornoski</i> , 435 F.3d 946 (9th Cir. 2006).....	27, 28
<i>Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.</i> , 585 U.S. 33 (2018).....	23
<i>Asay v. State</i> , 224 So. 3d 695 (Fla. 2017)	8, 12
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	30, 31, 32
<i>Barwick v. State</i> , 361 So. 3d 785 (Fla. 2023)	24
<i>Bowles v. State</i> , 276 So. 3d 791 (Fla. 2019)	25
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	14
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	16
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	23
<i>Correll v. State</i> , 184 So. 3d 478 (Fla. 2015)	25
<i>Dailey v. State</i> , 283 So. 3d 782 (Fla. 2019)	8
<i>Engquist v. Oregon Dep’t of Agric.</i> , 553 U.S. 591 (2008).....	17
<i>Flynt v. Ohio</i> , 451 U.S. 619 (1981).....	12
<i>Foster v. Chatman</i> , 578 U.S. 488 (2016).....	21
<i>Gray v. Netherland</i> , 518 U.S. 152 (1996).....	11, 14
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).....	32

<i>Gudinas v. State</i> , 412 So. 3d 701 (Fla. 2025)	24
<i>Heath v. State</i> , 648 So. 2d 660 (Fla.)	23
<i>Hill v. California</i> , 401 U.S. 797 (1971).....	19
<i>Huff v. State</i> , 622 So. 2d 982 (Fla. 1993)	4
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016).....	3
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016)	3
<i>Johnson v. Lee</i> , 578 U.S. 605 (2016).....	21
<i>King v. State</i> , No. SC2026-0336, 2026 WL 672101 (Fla. Mar. 10)	8
<i>Lawrence v. State</i> , 308 So. 3d 544 (Fla. 2020)	25
<i>Lewis v. Casey</i> , 518 U.S. 343, 354-56 (1996).....	15, 16
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987).....	17
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	7, 9
<i>Montana v. Wyoming</i> , 563 U.S. 368 (2011).....	21
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975).....	24
<i>Mungin v. State</i> , 320 So. 3d 624 (Fla. 2020)	22
<i>Murray v. Giarratano</i> , 492 U.S. 1 (1989).....	13, 14
<i>Occhicone v. Singletary</i> , 618 So. 2d 730 (Fla. 1993)	3
<i>Occhicone v. State</i> , 235 So. 3d 299 (Fla.)	3

<i>Occhicone v. State</i> , 570 So. 2d 902 (Fla. 1990)	1, 2
<i>Occhicone v. State</i> , 768 So. 2d 1037 (Fla. 2000)	3
<i>Occhicone v. State</i> , No. SC2026-1042, 2026 WL 2097359 (Fla. July 21, 2026)	1, 5, 6, 8, 21
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987)	11, 13, 14
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	31
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	25, 30, 31, 32
<i>Sims v. State</i> , 753 So. 2d 66 (Fla. 2000)	8, 12
<i>Smithers v. State</i> , 420 So. 3d 460 (Fla. 2025)	24, 25, 26
<i>Spencer v. State</i> , 2026 WL 1757938	23, 25, 26
<i>Street v. New York</i> , 394 U.S. 576 (1969)	19, 20
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988)	30
<i>Trotter v. State</i> , 428 So. 3d 68 (Fla. 2026)	25, 26
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000)	17
<i>Wainwright v. Goode</i> , 464 U.S. 78 (1983)	9, 23
<i>Walker v. Martin</i> , 562 U.S. 307 (2011)	22
<i>Wardius v. Oregon</i> , 412 U.S. 470 (1973)	14
<i>Weatherford v. Bursey</i> , 429 U.S. 545 (1977)	11, 14
<i>Wellons v. Comm’r, Ga. Dep’t of Corr.</i> , 754 F.3d 1260 (11th Cir. 2014)	11

<i>West v. Am. Telephone & Telegraph Co.</i> , 311 U.S. 223 (1940)	21
<i>Willacy v. State</i> , 431 So. 3d 254 (Fla. Apr. 15)	8, 12
<i>Williams v. Hobbs</i> , 658 F.3d 842 (8th Cir. 2011)	11
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	30
<i>Zink v. Lombardi</i> , 783 F.3d 1089 (8th Cir. 2015)	11

Statutes

28 U.S.C. § 1257(a)	1, 12
Art. I, § 17, Fla. Const	24, 25
§ 825.101(4), Fla. Stat. (2026)	32
§ 921.141, Florida Statutes	5
§ 945.10, Florida Statutes	4

Rules

Fla. R. Crim. P. 3.850	3
Fla. R. Crim. P. 3.851	23, 29
Fla. R. Crim. P. 3.851(d)	21, 29
Fla. R. Crim. P. 3.851(d)(1)	22
Fla. R. Crim. P. 3.851(d)(2)	22
Fla. R. Crim. P. 3.851(e)	22
Fla. R. Crim. P. 3.852	5, 6, 7, 8, 9, 10, 11, 16

OPINION BELOW

Occhicone v. State, No. SC2026-1042, 2026 WL 2097359 (Fla. July 21, 2026).

JURISDICTION

This Court has jurisdiction over Occhicone’s questions presented. *See* 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The State accepts the constitutional provision set forth by Petitioner as set forth in the Eighth and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction over Occhicone’s questions. *See* 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE AND FACTS

In the early morning hours of June 10, 1986, Occhicone went to the home of the parents of his former fiancé, Anita Gerrity, where she lived with her parents and daughter. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990); DROA:1388-91.¹ He knocked on the sliding glass door of Anita’s bedroom and woke her up, but she would not speak to him, so he left. *Id.* at 904; DROA:1391. Occhicone returned about an hour later with a handgun and cut the phone lines to the house. *Id.*; DROA:1390-91, 1395-96. Gerrity’s father, Raymond Artzner, went outside and confronted Occhicone. *Id.*; DROA:1392, 1397. Occhicone pointed a gun at Artzner, turned to Anita, and

¹ References to the direct record on appeal will be designated as “DROA:” followed by the applicable page number(s). References to the postconviction record will be designated as “PCR:” followed directly by the applicable page number(s).

grinned as he shot Artzner in his neck. Gerrity then fled the home with her daughter as Occhicone broke into the house, and shot her mother four times, killing her. *Id.*; DROA:1394-95.

A jury found Occhicone guilty of two counts of first-degree murder and recommended death for each count. *Id.* at 904. The trial court, finding that the State established three aggravating factors for Occhicone's murder of his girlfriend's mother, sentenced him to death for her murder but sentenced Occhicone to life imprisonment for the murder of his girlfriend's father. *Id.* at 905.

Following his convictions and sentence of death, Occhicone filed his direct appeal to the Florida Supreme Court and raised eleven claims. *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990). On October 11, 1990, the Florida Supreme Court issued its opinion affirming Occhicone's convictions and death sentence. *Id.* The United States Supreme Court denied certiorari review on May 20, 1991. *Occhicone v. Florida*, 500 U.S. 938 (1991).

On July 7, 1992, Occhicone filed a petition for writ of habeas corpus in the Florida Supreme Court, raising a single claim that his jury was presented with invalid and unconstitutionally vague aggravating circumstances depriving him of an individualized and constitutionally firm sentencing proceeding in violation of the Eighth and Fourteenth Amendments. The Florida Supreme Court denied the petition on April 8, 1993. *Occhicone v. Singletary*, 618 So. 2d 730 (Fla. 1993).

On May 20, 1993, Occhicone filed in the circuit court his initial motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Occhicone raised seven claims in his motion. After conducting an evidentiary hearing on Occhicone's ineffective assistance of counsel claims, the circuit court issued a final order denying postconviction relief. Occhicone filed an appeal to the Florida Supreme Court, and the court affirmed the denial of relief. *Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000).

On January 9, 2017, Occhicone filed a successive motion for postconviction relief raising claims related to *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). This Court summarily denied Occhicone's motion, and the Florida Supreme Court affirmed. *Occhicone v. State*, 235 So. 3d 299 (Fla.), *cert. denied*, 586 U.S. 863 (2018).

On June 26, 2026, Governor Ron DeSantis signed a warrant for Occhicone's execution, which is scheduled for July 28, 2026, at 6:00 p.m. After the warrant was signed, Occhicone sought to obtain public records from the Florida Department of Corrections (FDOC). The records demand included sweeping requests for 13 items, including confidential public records that are exempt from disclosure under § 945.10, Florida Statutes and despite Occhicone failing to provide good cause as to why the public records request was not made until after the death warrant was signed. The trial court denied the demand, finding

it was unrelated to a colorable claim, overbroad, and there was no good cause to excuse Occhicone's delay in seeking the records.

On July 6, 2026, Occhicone filed his second successive postconviction motion. During the *Huff*² hearing held on July 8, 2026, the postconviction court informed the parties that he intended to enter an order denying postconviction relief, and on July 10, 2026, the trial court entered its written order summarily denying Occhicone's second successive postconviction motion. PCR:P306-08; 576.

As to Occhicone's first claim, the postconviction court found that the claim was untimely, speculative, improperly pleaded, and meritless. The court also concluded that Occhicone's records request was merely an attempt to reargue the court's prior denial of his request for additional public records. PCR:315-19. As to Occhicone's second claim, the trial court found it was untimely, procedurally barred, and meritless. PCR:322-24. And as to Occhicone's third claim, the court correctly found that he lacked standing to raise any claim on behalf of the prison's death-watch staff, his manifest injustice argument based on religious beliefs was meritless, and his manifest injustice argument based on current Florida law § 921.141, Florida Statutes, was both untimely and meritless. PCR:326-27.

On Appeal to the Florida Supreme Court, raised three issues: (1) whether denying Occhicone's request for additional public records violated his rights to equal

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

protection and due process; whether his execution violates the Eighth Amendment because he is elderly; and (3) whether the court should pause executions because of the number and pace of them. The Florida Supreme Court rejected all three claims. *Occhicone v. State*, No. SC2026-1042, 2026 WL 2097359, at *1 (Fla. July 21, 2026).

On July 24, 2026, Occhicone filed a petition for certiorari in this Court to which the State now responds.

REASONS FOR DENYING THE PETITION

CLAIM I

Occhicone first asks this Court to constitutionalize Florida’s postconviction public records procedures by holding that the Fourteenth Amendment requires a State to provide discovery whenever a defendant seeks records to determine whether a constitutional claim might exist. The Florida Supreme Court rejected that theory, concluding that Florida Rule of Criminal Procedure 3.852 authorizes additional public records discovery only when the requested materials bear a sufficient relationship to an existing colorable postconviction claim and that Occhicone sought records merely to investigate whether one could be developed. *Occhicone v. State*, No. SC2026-1042, 2026 WL 2097359, at *2-4 (Fla. July 21, 2026).

The Florida Supreme Court’s decision presents no basis for this Court’s review. First, the judgment rests on the Florida Supreme Court’s settled interpretation of Rule 3.852, an independent and adequate state law ground that fully supports the result. Occhicone’s disagreement is therefore with Florida’s collateral review

procedures, not with any unsettled question of federal constitutional law. Second, the petition identifies no compelling reason for review under Rule 10. It presents no conflict among the lower courts, no departure from this Court's precedents, and no important unsettled question of federal law warranting this Court's intervention. Instead, the decision below applies this Court's settled jurisprudence governing criminal discovery, collateral review, and access to the courts. Finally, this case is an exceptionally poor vehicle for review because, even if Occhicone prevailed, the only consequence would be additional state collateral discovery proceedings rather than resolution of any constitutional challenge to his conviction, sentence, or method of execution.

Even setting aside these threshold obstacles to review, Occhicone's constitutional theories independently fail on the merits. This Court's precedents recognize that States retain broad authority to structure collateral review and foreclose the novel constitutional entitlement to exploratory postconviction discovery that Occhicone asks this Court to create. His due process, access-to-courts, and equal protection theories provide no basis for a different result. Neither Rule 10 nor this Court's precedents provides any basis for granting review or recognizing the novel constitutional rule Occhicone asks this Court to adopt.

I. Occhicone Presents No Basis for this Court's Review.

The petition presents no compelling reason for review. The judgment rests on an independent and adequate state-law ground, presents no conflict or other Rule 10

justification for certiorari, and, in any event, this case is an exceptionally poor vehicle for resolving the constitutional question Occhicone seeks to present.

A. The Decision Rests on Independent and Adequate State Law.

This Court should deny review because the decision below independently rests on the Florida Supreme Court's interpretation of Florida Rule of Criminal Procedure 3.852. Where the judgment of the state court rests upon an adequate and independent state ground, this Court lacks authority to disturb that judgment even when a federal issue is also presented. *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

Applying Rule 3.852, the Florida Supreme Court held that Occhicone was not entitled to additional public records because he sought discovery to conduct “a full investigation” into Florida's execution procedures rather than to litigate an existing colorable postconviction claim. Reaffirming its settled interpretation of Rule 3.852, the court explained that additional public records discovery is available only when the requested records bear a sufficient relationship to a colorable claim for postconviction relief and that the rule is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief. Because Occhicone's request sought records to determine whether a constitutional claim might exist, rather than to support one already grounded in non-speculative allegations, the court concluded that Rule 3.852 afforded him no entitlement to the requested discovery. *Occhicone*, 2026 WL 2097359, at *2-*4.

The decision below thus applied settled Florida law, not a novel procedural limitation. For years, the Florida Supreme Court has consistently held that Rule 3.852 authorizes additional discovery only upon a demonstrated nexus between the requested records and a colorable postconviction claim. *See Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000); *Asay v. State*, 224 So. 3d 695, 699-700 (Fla. 2017); *Dailey v. State*, 283 So. 3d 782, 792-93 (Fla. 2019). The court recently reaffirmed those same principles in materially similar litigation involving requests for execution-related records. *See Willacy v. State*, 431 So. 3d 254, 261-65 (Fla. Apr. 15), *cert. denied*, No. 25-7220 (U.S. Apr. 21, 2026); *King v. State*, No. SC2026-0336, 2026 WL 672101, at *3-*6 (Fla. Mar. 10), *cert. denied*, 146 S. Ct. 1802 (2026). Occhicone’s disagreement is ultimately with the Florida Supreme Court’s construction of Rule 3.852 itself.

Occhicone attempts to distinguish his case by alleging a nationwide shortage of etomidate and speculating that the Florida Department of Corrections therefore may possess or use different execution drugs or expired supplies. Even assuming the reported shortage exists, it does not follow that Florida is violating its protocol, intends to violate its protocol, or is constitutionally required to disclose additional records. The Constitution does not require discovery merely because a litigant believes additional information might support a future claim. Those allegations merely explain why Occhicone seeks additional discovery; they do not alter the Florida Supreme Court’s state law

conclusion that Rule 3.852 authorizes additional public records discovery only upon a sufficient showing of a colorable claim.

Nor can Occhicone avoid that independent state law ground by recasting his disagreement as one of due process or equal protection. State courts are the final arbiters of state law, and federal courts are bound by a state supreme court's construction of its own statutes and procedural rules. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Because the Florida Supreme Court's interpretation of Rule 3.852 independently supports the decision, review is foreclosed regardless of Occhicone's constitutional characterization of that state law determination. *Michigan v. Long*, 463 U.S. at 1041-42.

B. The Petition Presents No Conflict or Important Federal Question.

Even apart from the independent state ground, the petition independently fails to satisfy Rule 10 because it presents no conflict, no unsettled question of federal law, and is an exceptionally poor vehicle.

1. The Petition Identifies No Conflict Among the Courts.

Certiorari is reserved for “compelling reasons,” such as conflicts among the federal courts of appeals, disagreements among state courts of last resort on important federal questions, or decisions departing from this Court’s precedents. Sup. Ct. R. 10. This case presents none of those circumstances.

Rather than identifying a conflict, Occhicone asks this Court to create a constitutional right that no court has recognized. He cites no decision of this Court holding that the Due Process Clause or Equal Protection Clause entitles a defendant to obtain postconviction public records merely to investigate whether a constitutional claim might exist. Nor does he identify any state court of last resort invalidating a collateral discovery rule comparable to Florida Rule of Criminal Procedure 3.852 because it limits discovery to requests bearing a sufficient relationship to an existing colorable postconviction claim. Occhicone’s first question therefore seeks creation of a new constitutional rule, not resolution of a disagreement over an existing one. That circumstance strongly weighs against review.

2. The Decision Correctly Applies This Court's Settled Precedents.

Nor does Occhicone identify any disagreement concerning this Court's precedents governing criminal discovery and collateral review. To the contrary, the decision below is consistent with settled law recognizing that the Constitution creates no general right to criminal discovery, *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); that due process imposes only limited disclosure obligations, *Gray v. Netherland*, 518 U.S. 152, 168 (1996); and that States retain broad authority to structure collateral review because postconviction proceedings are not constitutionally required. *Pennsylvania v. Finley*, 481 U.S. 551, 557-59 (1987).

The lower courts likewise have rejected efforts to transform requests for execution-related information into constitutional entitlements. The Eleventh Circuit has held that a defendant possesses no constitutional right to obtain execution-related information merely because it might assist in developing an Eighth Amendment challenge. *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014). The Eighth Circuit has reached the same conclusion. *Zink v. Lombardi*, 783 F.3d 1089, 1108 (8th Cir. 2015); *Williams v. Hobbs*, 658 F.3d 842, 851-52 (8th Cir. 2011). The Florida Supreme Court's decision is entirely consistent with those authorities. It simply applied the same Rule 3.852 principles it has consistently enforced for years in concluding that Occhicone's speculative allegations failed to establish the required nexus between the requested records and a colorable

postconviction claim. *See Sims*, 753 So. 2d at 70-71; *Asay*, 224 So. 3d at 699-700; *Willacy*, 431 So. 3d at 261-65.

3. This Case Is an Exceptionally Poor Vehicle.

This case is also an exceptionally poor vehicle for resolving the constitutional questions Occhicone attempts to present. Occhicone does not contend that Florida's execution protocol is unconstitutional or that the Florida Department of Corrections intends to depart from it. Instead, he seeks only additional public records in hopes they might reveal facts supporting future constitutional litigation. Even if Occhicone prevailed, the only consequence would be a remand for additional collateral discovery proceedings. Any constitutional claim arising from newly produced records would still have to be litigated in the Florida courts before any federal issue could properly be presented to this Court.

That posture underscores why this Court ordinarily declines to review preliminary procedural disputes before the underlying questions have been resolved. *See Flynt v. Ohio*, 451 U.S. 619, 620 (1981); 28 U.S.C. § 1257(a). Because reversal would merely reopen collateral discovery proceedings, this case presents an exceptionally poor vehicle for this Court's review.

In short, Occhicone's first question presents no basis for this Court's review. The decision below rests on an independent and adequate state law ground, creates no conflict among this Court, the federal courts of appeals, or the state courts of last resort, and correctly applies this Court's settled precedents governing criminal

discovery, collateral review, and access to the courts. Nor does this case provide an appropriate vehicle for addressing the constitutional question Occhicone seeks to raise because, even if he prevailed, the only result would be additional state collateral discovery proceedings rather than resolution of any constitutional challenge to his conviction, sentence, or method of execution. The petition therefore presents no compelling reason for review.

II. Occhicone's Constitutional Theories Are Foreclosed by This Court's Precedent.

Even apart from the Rule 10 defects that Occhicone's first question presents, review would remain unwarranted because his constitutional theories are inconsistent with this Court's precedents. Ultimately, Occhicone contends that the Fourteenth Amendment requires a State to provide broad postconviction public records discovery whenever a defendant seeks to determine whether a constitutional claim might exist. This Court has rejected analogous attempts to constitutionalize state collateral review procedures.

Because postconviction proceedings are not constitutionally required, States possess broad authority to define the procedures governing them. *Finley*, 481 U.S. at 557-59; *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). Exercising that authority, Florida permits additional public records discovery only when the requested materials bear a sufficient relationship to an existing colorable claim for collateral relief. Applying that settled rule, the Florida Supreme Court concluded that Occhicone sought records not to litigate an existing constitutional claim, but to

determine whether one might exist. Nothing in the Due Process Clause, the Equal Protection Clause, or this Court’s access-to-courts jurisprudence requires a State to provide discovery for that purpose.

A. The Due Process Clause Does Not Require States to Provide Exploratory Postconviction Discovery.

Occhicone’s due process theory begins from a premise this Court has consistently rejected, i.e., that the Constitution guarantees discovery whenever additional information might assist a litigant in developing constitutional claims.

This Court has long held that there is no general constitutional right to discovery in a criminal case. *Weatherford*, 429 U.S. at 559. Consistent with that principle, the Court explained that “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.” *Gray*, 518 U.S. at 168 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). Except for specific constitutional disclosure obligations, such as those imposed by *Brady v. Maryland*, 373 U.S. 83 (1963), the Constitution generally leaves questions concerning discovery to the jurisdictions administering criminal proceedings.

That principle applies with even greater force in collateral review. Because States are not constitutionally required to provide postconviction proceedings, they retain broad authority to define the procedures governing them, including reasonable limitations on discovery. *See Finley*, 481 U.S. at 557-59; *Giarratano*, 492 U.S. at 10. Florida exercised that authority by limiting postconviction public records discovery to requests bearing a sufficient relationship to an existing colorable claim. Applying

that settled rule, the Florida Supreme Court concluded that Occhicone sought discovery not to litigate an existing claim, but to determine whether one might exist.

Occhicone identifies no decision of this Court holding that due process requires States to provide discovery for such exploratory purposes. To recognize the constitutional entitlement, he proposes would transform speculative allegations into a federal right to broad collateral discovery, notwithstanding a State's reasonable procedural limitations on postconviction litigation. This Court's due process jurisprudence provides no support for that result.

B. Florida's Discovery Rule Does Not Deny Meaningful Access to the Courts.

Occhicone alternatively contends that Florida denied him meaningful access to the courts by refusing to compel additional public records discovery. That argument rests on the mistaken premise that the constitutional right of access includes a right to obtain information in the hope of discovering future claims. This Court's precedents foreclose that proposition.

In *Lewis v. Casey*, this Court explained that the constitutional right of access guarantees prisoners only the capability of presenting nonfrivolous claims to a court of competent jurisdiction. 518 U.S. 343, 354-56 (1996). It does not require States to "enable the prisoner to discover grievances, and to litigate effectively once in court." *Id.* at 354 (emphasis omitted). Rather, the Constitution requires only a reasonably adequate opportunity to present existing claims. *Id.* at 351.

Florida afforded Occhicone precisely that opportunity. Occhicone filed a demand for additional public records, litigated the demand in circuit court, and received appellate review in the Florida Supreme Court. The only limitation imposed was Florida's determination that Rule 3.852 did not authorize additional public records discovery because Occhicone failed to demonstrate that the requested records bore a sufficient relationship to an existing colorable postconviction claim.

That determination did not deny Occhicone access to the courts. His asserted injury is not the inability to present an existing constitutional claim, but the inability to search for facts that might support future ones. *Lewis* expressly rejected the notion that the Constitution requires States to furnish prisoners the means to investigate or discover potential causes of action. 518 U.S. at 354-55. Occhicone's theory therefore seeks precisely the expansion of the right of access that *Lewis* refused to recognize.

Accepting Occhicone's theory would fundamentally alter the constitutional right of access by transforming ordinary disputes over the scope of state collateral discovery into federal constitutional controversies. This Court has never recognized such a right, and *Lewis* squarely forecloses it.

C. Florida's Application of Rule 3.852 Does Not Violate Equal Protection.

Occhicone's equal protection claim fails for an independent reason: he does not allege that Florida treated him differently from any similarly situated capital defendant. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*,

473 U.S. 432, 439 (1985). Accordingly, a plaintiff ordinarily must identify similarly situated persons who received more favorable treatment and demonstrate that the differential treatment lacks a constitutionally sufficient justification. *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601-02 (2008); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Occhicone makes no such showing. The Florida Supreme Court applied the same Rule 3.852 standards it has consistently applied to all capital defendants seeking postconviction public records. Applying those settled standards, the court concluded that Occhicone failed to demonstrate the requisite connection between the requested records and an existing colorable postconviction claim because his allegations remained speculative. Nothing in the decision below suggests that Occhicone received treatment different from any similarly situated litigant.

Nor does Occhicone plausibly allege unequal treatment in the administration of Florida's execution protocol. His theory rests entirely on speculation that the Florida Department of Corrections might someday depart from its written procedures or use different execution drugs because of a reported nationwide shortage. Such conjecture does not establish that Florida has treated or intends to treat Occhicone differently from any other defendant. *See McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987).

Ultimately, Occhicone's equal protection claim is simply another attempt to constitutionalize Florida's collateral discovery procedures. He does not contend that

Rule 3.852 discriminates among capital defendants or that Florida affords similarly situated prisoners' broader discovery. Instead, he argues that the Constitution required Florida to provide additional public records so he could investigate whether an equal protection claim might exist. But because the Constitution does not require States to provide exploratory postconviction discovery, Occhicone cannot transform the denial of that discovery into an equal protection violation. The Florida Supreme Court therefore correctly rejected his equal protection claim.

In sum, Occhicone identifies no compelling reason for this Court's review. The decision below rests on an independent and adequate state law ground, presents no conflict warranting review under Rule 10, and applies this Court's settled precedents governing criminal discovery, collateral review, and access to the courts. The petition ultimately asks this Court to recognize a novel constitutional right to exploratory postconviction discovery that neither the Fourteenth Amendment nor this Court's precedents has ever recognized. This Court should decline that invitation.

CLAIM 2

I. Occhicone's Federal Constitutional Challenge to the Florida Constitution's Conformity Clause Does Not Warrant This Court's Review Because the Question Was Not Presented Below.

Occhicone presents to this Court a question on whether the Florida Constitution's conformity clause—which requires that interpretation of what entails cruel and unusual punishment conforms to this Court's Eighth Amendment jurisprudence—is a violation of his rights under the Eighth and Fourteenth Amendments. But Occhicone never presented this claim below. Rather, the claim he

presented was a reverse *Roper*³ claim arguing he is too old to be executed. The State argued in its answer brief that Florida’s conformity clause prohibited extending *Roper* beyond the parameters of this Court’s opinion. Yet Occhicone did not make this argument even then. It was not until filing his brief that he first makes any argument that Florida’s conformity clause denies him access to the courts or violates the due process clause.

This Court’s jurisdiction to review a case from a state court of last resort is premised on the state court deciding an important federal question. Sup. Ct. R. 10(b)(c). If a federal question has not first been presented to a state court, this Court has “no power to consider it.” *Street v. New York*, 394 U.S. 576, 581–82 (1969); *see also Hill v. California*, 401 U.S. 797, 805 (1971) (finding an issue was not properly before this Court when it was never raised, briefed, or argued in the state appellate court).

Here, Occhicone never raised any constitutional challenge to Florida’s conformity clause, and the Florida Supreme Court did not consider or resolve the issue. This Court has recognized that when “the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved

³ *Roper v. Simmons*, 543 U.S.551, 578 (2005).

party in this Court can affirmatively show the contrary.” *Street*, 394 U.S. at 582.

The petition is silent about the Florida Supreme Court’s failure to address his constitutional challenge to the use of the state’s conformity clause. Indeed, Occhicone makes no effort to show that this federal issue was properly raised, nor does he address whether the Florida Supreme Court’s failure to consider it was for a reason other than lack of presentation. Because Occhicone failed to raise in state court any federal question challenging Florida’s conformity clause, this Court lacks jurisdiction to review the question, and certiorari must be denied.

II. The Florida Supreme Court’s denial of Occhicone’s motion for postconviction relief was based on adequate and independent state grounds.

Occhicone seeks this Court’s review of the Florida Supreme Court’s decision rejecting his claim that was found both time-barred and meritless. But the Florida Supreme Court’s ruling rejecting Occhicone’s claim was based on the court’s prior precedents under state law. The court determined that Occhicone’s attempt to expand this Court’s decision in *Roper*, to include “the elderly” among those who are constitutionally exempt from executions, was time barred by Florida Rule of Procedure 3.851 and prevented by the “conformity clause” of the Florida Constitution, which prohibits Florida courts from interpreting the Eighth Amendment

in any manner that does not conform with this Court’s holdings at the time of the lower court’s review.

As this Court held in *Foster v. Chatman*, 578 U.S. 488, 497 (2016), it “lacks jurisdiction to entertain a federal claim on review of a state court judgment if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court’s decision.” (citation and internal quotations omitted). Because the Florida Supreme Court’s decision affirming the postconviction court’s summary denial of this claim rests on adequate and independent state law grounds, this Court’s own precedents prohibit its review of Occhicone’s claim. *See Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) (“This Court is the highest authority on the interpretation of federal law, however, “[t]he highest court of each State . . . remains ‘the final arbiter of what is state law.’” (quoting *West v. Am. Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940))). But to “qualify as an adequate procedural ground, capable of barring federal habeas review, a state rule must be firmly established and regularly followed.” *Johnson v. Lee*, 578 U.S. 605, 608 (2016) (internal quotations omitted). As explained below, the Florida Supreme Court’s rulings are both firmly established and regularly followed.

A. Occhicone’s claim was untimely under the Florida rules of criminal procedure.

The Florida Supreme Court determined that this claim was untimely according to the Florida Rules of Criminal Procedure. *Occhicone v. State*, No. SC2026-1042, 2026 WL 2097359, at *5 (Fla. July 21, 2026) Florida Rule of Criminal Procedure

3.851(d) provides that any motion to vacate a judgment of conviction and sentence of death must be filed no later than one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). This one-year limitation period is subject to only three exceptions:

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

Fla. R. Crim. P. 3.851(d)(2).

In addition, “[f]or an otherwise untimely claim to be considered timely as newly discovered evidence, it must be filed within a year of the date the claim became discoverable through due diligence.” *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020). Further, “[i]t is incumbent upon the defendant to establish the timeliness of a successive postconviction claim.” *Id.* And finally, if the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2), dismissal of a successive motion for postconviction relief is *required*.” Fla. R. Crim. P. 3.851(e) (emphasis added). Because Occhicone failed “to establish the timeliness of his successive postconviction claim,” any Florida court reviewing his claim was lawfully required by the rule to dismiss Occhicone’s successive motion for postconviction relief.

This Court has recognized that when a state court relies on time or procedural bars, those decisions rest on independent and adequate state law grounds. *Walker v. Martin*, 562 U.S. 307, 316–17 (2011) (finding California’s time bar qualified as an adequate state procedural ground); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (noting that independent and adequate state grounds exist where a state court finds “the petitioner had failed to meet a state procedural requirement”). Here, the Florida Supreme Court found Occhicone’s motion untimely because despite the 35-year hiatus since his judgment and sentence became final, he failed to allege either an exception to the one-year time limit or that the facts and circumstances supporting his claim only occurred or became known to him within the last year. *See Spencer v. State*, 2026 WL 1757938, at *6 (holding defendant’s claim untimely because it failed to identify any meaningful circumstances arising within the year preceding his successive postconviction claim and the mere progression from one year in age to the next does not create under rule 3.851 a new factual predicate every year).

As a result, the summary denial by the postconviction court was required by Florida procedural law. And Florida has routinely applied the procedural bars present in Rule 3.851 to summarily deny a claim that is untimely, *see Heath v. State*, 648 So. 2d 660 (Fla.) (holding that because the postconviction claims were untimely, procedurally barred, meritless, and legally insufficient, summary denial was proper), *cert. denied*, 515 U.S. 1162 (1995). Thus, the Florida Supreme Court’s views on state law regarding procedural bars to postconviction motions, including time bars, are

binding on the federal courts. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *see also Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 44 (2018); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Because the motion’s untimeliness results from *state* law, this Court lacks the jurisdiction to review the Florida Supreme Court decision affirming summary denial of the claim.

B. Occhicone’s motion is meritless under Florida law because Florida Supreme Court precedent holds that the Florida Constitution’s conformity clause precludes the court from interpreting the Eighth Amendment in the manner sought by him.

The Florida Constitution contains a provision, referred to as a “conformity clause,” that expressly limits how the prohibition against “cruel or unusual punishment” (per the Florida Constitution) and “cruel and unusual punishment” may be construed”:

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; *see also, Smithers v. State*, 420 So. 3d 460 (Fla. 2025). The Florida Supreme Court has consistently interpreted this provision of the Florida Constitution to mean that Florida courts must treat this Court’s jurisprudence as both the floor and the ceiling of any protection the Florida Constitution provides against cruel and unusual punishment. *Id.* at 465-66; *see also Gudinas v. State*, 412 So. 3d 701, 713 (Fla. 2025) (describing Florida’s conformity clause as precluding any

interpretation of cruel and unusual punishment that is “more expansive . . . than the Supreme Court has interpreted the federal prohibition”); *Barwick v. State*, 361 So. 3d 785, 794 (Fla. 2023) (noting that the conformity clause means the Supreme Court of the United States’ “interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida”); *Lawrence v. State*, 308 So. 3d 544, 551 (Fla. 2020) (holding that “the conformity clause expressly forecloses this Court’s imposition of a comparative proportionality review requirement”); *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (holding that the conformity clause prohibited the Court from considering whether “national trends” warranted reviewing whether imposing the death penalty constituted cruel and unusual punishment); *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015) (citing the conformity clause in declining to criticize the constitutional soundness of federal precedent for proving a lethal injection challenge).

The Florida Supreme Court, in the past 12 months, has rejected on multiple occasions the argument that Occhicone raised. *See Smithers v. State*, 420 So. 3d 460 (Fla.2025); *Trotter v. State*, 428 So. 3d 68 (Fla. 2026); *Spencer v. State*, 2026 WL 1757938 (Fla.), *cert. denied*, *Spencer v. Florida*, No. 25-7648, 2026 WL 1827690 (U.S. June 25, 2026). In *Smithers*, the defendant argued that his execution at age 72 would violate the Eighth Amendment and article I, section 17 of the Florida Constitution. But the court rejected that claim, holding that the only age-based exemption against executing individuals who were under 18 at the time of the offense. *Smithers*, 420 So.

3d at 465 (citing *Roper v. Simmons*, 543 U.S. 551, 578, (2005)). In *Trotter*, the Florida Supreme Court rejected the argument that because this Court has not expressly addressed whether the elderly are categorically exempt from execution, the Florida Supreme Court was not bound by the conformity clause. *Id.* at 74 (citing *Smithers* and *Guidinas*). In *Spencer*, the court again refused to recognize “a categorical exemption from execution based on advanced age.” *Spencer*, 2026 WL 1757938 (“The only age-based exemption from execution recognized by the United States Supreme Court is for individuals under the chronological age of eighteen when they committed the offense”) (citing *Smithers*; *Trotter*, and *Roper*).

Occhicone attempts to distinguish his claim from those raised in *Smithers*, *Trotter*, and *Spencer* by contending that he is not seeking a “categorical bar” from execution for “the elderly,” but one based on “his individual age and condition.” IB at 42. He also claims that the court failed to distinguish between categorical and as-applied challenges. But as the court explained, with regard to the application of Florida’s conformity clause, this is a distinction without any difference. Florida’s conformity clause prohibits *any* expansion of the bar against executions beyond what this Court has presently authorized. Because this Court has not extended age-based exemptions beyond *Roper*’s brightline rule, Florida courts are precluded from doing so by the Florida Constitution.

Thus, the Florida Supreme Court’s interpretation of its constitutional authority to create an exemption from execution for “cruel or unusual punishment”

and “cruel and unusual punishment” is limited to only the exemptions from execution that this Court has expressly recognized. As a result, because Occhicone seeks to create an exemption from execution for the elderly not currently expressly recognized by this Court, Occhicone’s motion was meritless under Florida law.

This Court should deny the petition for certiorari because the Florida Supreme Court determined that state law procedurally barred his claim as untimely and the Florida Constitution prohibited the expansion of execution exemptions beyond those already approved by this Court.

III. The Florida Supreme Court’s decision that being elderly does not exempt Occhicone from execution does not conflict with any decision of this Court, any circuit court of appeals, or any state court of last resort.

Throughout the proceedings below, and in his petition to this Court, Occhicone has failed to cite a single court which has held that the elderly should be exempt from execution. Although he contends that this Court’s precedent should be expanded to include executing the elderly as cruel and unusual punishment, he does not claim that the decision of the Florida Supreme Court conflicts with any holding of this Court.

Nor does he claim that the Florida Supreme Court’s decision conflicts with the holding of any federal court of appeals. In fact, it appears that the Ninth Circuit is the only federal appellate court that has directly addressed this issue found the argument lacking any support. *See Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006). In *Allen*, the defendant argued that it would be cruel and unusual punishment to execute him due to his “old age and physical infirmities.” *Id.* at 951. The district court

rejected this claim, but the Ninth Circuit refused to issue a certificate of appealability (“COA”). *Id.* at 948. Allen challenged both the circuit court’s refusal to issue the COA and the district court’s order denying his petition for writ of habeas corpus and motion for stay. *Id.* at 948-51. But the circuit court of appeals concluded that reasonable jurists would not find debatable the district court’s ruling. *Id.* at 951 (“Allen’s petition, however, displays a woeful lack of support for the proposition that the Eighth Amendment prohibits execution of the elderly and the infirm.”).

Similarly, Occhicone has failed to identify any state court of last resort which has held that executing the elderly would constitute cruel and unusual punishment. Because he cannot claim that the Florida Supreme Court’s decision conflicts with any of this Court’s decisions, or those of the circuit courts of appeal, or a state court of last resort, his petition does not merit this Court’s attention.

III. This case is a poor vehicle for deciding any important questions of federal law.

Occhicone’s case presents multiple problems for determining whether aging on death row prevents one’s execution under the Eighth Amendment. In addition to the claimed unconstitutionality of the conformity clause not being presented to or passed upon by the Florida Supreme Court, the court’s determination that there is no Eighth Amendment violation creates no conflict with any other court. And because the Florida Supreme Court made no decision regarding the constitutionality of the conformity clause, its opinion does not conflict with the decision of another state court of last resort, United States court of appeals, or this Court. The Florida Supreme

Court rejected this claim based both *on state law* and the substantive merits of the claim. This Court would have to first determine that the Florida Supreme Court's interpretation of rule 3.851, Florida Rules of Criminal Procedure and the Florida Supreme Court's interpretation of its state constitution's conformity clause were improper. Additionally, even if this Court could reach beyond the state law determinations, Occhicone cannot meet the test implemented by this Court requiring that the defendant establish a national consensus exists supporting his position and demonstrate the execution lacks a penological purpose.

A. The question was never presented to nor passed upon by the Florida Supreme Court.

This case is a poor vehicle for resolving the question presented, because Occhicone failed to present it to the court below. Thus, the court below failed to respond to any argument that he now raises. This Court is not a court of first resort. This Court is a court of review, and here, Occhicone presents this Court with no opinion on the issue for this Court to review.

B. The Florida Supreme Court based its decision on state law.

Florida Supreme Court affirmed the postconviction court's summary denial because of Occhicone's failure to comply with Florida procedural law that requires an untimely motion to be dismissed. *See* Fla. R. Crim. P. 3.851(d). And though the court also rejected the claim because it lacked merit, that decision was partly based on state law, as well, because the state constitution prohibits Florida's courts from going beyond this Court's existing holdings interpreting the Eight Amendment.

As a result, even if this Court concluded that Occhicone's claim possessed some degree of merit, a reversal and remand of the state court decision based on the claim being meritorious, would not necessarily result in the Florida Supreme Court reversing its decision. Because the state courts ruled on alternative grounds that the claim is time barred and prohibited by the state constitution, the claim will still be denied. Thus, even if this Court agreed with the substance of Occhicone's claim, Florida's law still requires the denial of his motion based on state procedural and constitutional law because his motion was not filed timely and the result sought is prohibited by the state constitution's conformity clause.

C. Occhicone's claim that the Eighth Amendment prevents his execution is meritless because he has failed to demonstrate a national consensus exists against execution of the elderly.

This Court, in determining whether a particular punishment violates the "cruel or unusual punishment clause" of the Eighth Amendment, applies what it has referred to as "society's evolving standards of decency" to resolve the inquiry. *See Roper v. Simmons*, 543 U.S. 551 (2005). It looks to "objective indicia" from "legislative enactments and state practice with respect to executions" to decide whether there is a national consensus against the practice. *Id.* at 563 (examining the number of states with legislative prohibitions against executing individuals under the age of eighteen and the frequencies of such executions where there was no formal legislative prohibition); *see also Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (considering the same for intellectually disabled individuals); *Thompson v. Oklahoma*, 487 U.S. 815, 822 (1988) (stating that this Court determines what the evolving standards of decency

are by evaluating the “work product of state legislatures and sentencing juries”); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (saying that “two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society” are found by evaluating “jury determinations and legislative enactments”). Legislative enactments, unlike jury decisions or state practices, are “[t]he clearest and most reliable objective evidence of contemporary values.” *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (overturned on other grounds).

Here, Occhicone points to no state legislature which has determined that a person is exempt from execution merely because he has aged while on death row. But when evaluating whether there is a national consensus against executing a certain group, this Court looks to “legislative enactments . . . with respect to *executions*.” *Roper*, 543 U.S. at 563 (emphasis added). Occhicone cannot provide one court that has done so.

Occhicone’s failure to cite a single state legislature which has forbidden the practice of executing the elderly is fatal to his argument. Because Occhicone has failed to establish anything approaching a national consensus against executing the elderly, this Court need not inquire further about the penological purpose of the death penalty before it can comfortably reject his petition. *See Atkins*, 536 U.S. at 312-13 (determining that *a defendant must first establish there is a national consensus against the practice* before the court will consider whether there is a penological rationale for agreeing or disagreeing with the national consensus) (emphasis added).

D. Occhicone’s claim is meritless because he did not establish that his execution was inconsistent with the penological purpose of the death penalty.

Occhicone has asserted that his execution would serve no deterrent or retributive purpose because he is elderly. But his contention ignores the reason this Court has exempted from execution particular classes of individuals. The Court has determined that the individuals who make up these classes are less culpable of the murders they committed. *See, e.g., Roper*, 543 U.S. at 571 (finding juveniles are less culpable for their criminal conduct); *Atkins*, 536 U.S. at 319 (finding the intellectually disabled are less culpable for their criminal conduct); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (explaining the penological purpose of the death penalty is linked to the culpability of the individual for their criminal conduct). By contrast, the elderly do not have diminished culpability as a class. While the elderly may have a greater risk of developing cognitive issues which diminish their culpability, they are not, as a class, similar in any respect to juveniles or the intellectually disabled. And to the extent that Occhicone argues that he is not seeking a categorical exemption for the elderly, but a decision based on the totality of his circumstances alone, he ignores the fact that what he describes as an older person suffering from the infirmities of age is no different than the broad class comprising “the elderly.” *See* § 825.101(4), Fla. Stat. (2026) (defining an “elderly person” as one who is 60 years of age or older who suffers from the infirmities of aging). In fact, Occhicone’s own framing of the argument demonstrates that he is seeking the equivalent of categorical exemption for those who

are elderly, despite how many times he also denies this is what he seeks. He summarized it as follows:

Occhicone argues that *the execution of the elderly defies the evolving standards of decency of the Eighth Amendment* and seeks exemption based on a totality of the circumstances manifest at the time of execution, arguing the determination of age is not based on class, but is a fact specific analysis of the vulnerability of the individual at the time of injury.

IB at 27.

Regardless of Occhicone's contention that he seeks exemption base on a totality of the circumstances; one cannot ignore that he concedes that he seeks this court find that executing "the elderly" "defies the evolving standards of decency of the Eight Amendment." "The elderly" is a class – not an individual.

Nor has Occhicone demonstrated that he, himself, suffers from any diminished capacity which would reduce his culpability. Instead, as the Florida Supreme Court noted, his argument that he suffers from infirmities related to aging appears more a plea for clemency than a legal argument attacking the lawfulness of his execution. This appears especially circumspect when he "has identified no authority that would allow [the Florida Supreme Court] to vacate his death sentence based on the combination of his age and the litany of infirmities from which he allegedly suffers. Regardless, he cannot demonstrate that either "the elderly" or he, himself, is less culpable for any murder.

This Court should deny the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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