

No. SC2026-1042

Lower Court No. 1986-CF-001355

In the Supreme Court of Florida

DOMINICK A. OCCHICONE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ANSWER BRIEF ON THE MERITS

On Appeal from the Circuit Court of the Sixth Judicial
Circuit in and for Pasco County, Florida

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PRELIMINARY STATEMENT

Citations in this brief to Occhicone’s direct appeal record will be cited as “DROA” followed by the volume and page number. Citations to Occhicone’s second successive postconviction record on appeal will be cited as “” followed by the volume and page number.

ORAL ARGUMENT OBJECTION

The State opposes Occhicone’s request for oral argument. The issues on appeal are straightforward, and it is against this Court’s policy to grant oral argument in successive capital appeal cases. *See* Fla. S. Ct. Internal Op. Proc. II.A.3(a) (Successive capital postconviction appeals are treated “in the same manner as” cases “in which review is granted without oral argument.”).

STATEMENT OF THE CASE AND FACTS

Appellant, Dominick A. Occhicone, received a death sentence for the murder of his girlfriend's parents.

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. 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 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 pursuant to 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 different items, including confidential public records that are exempt from disclosure pursuant to Section 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*¹ 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. 306-08; 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. 315-19. As to Occhicone's second claim, the trial court found it was untimely, procedurally barred, and meritless. 322-24. And as to Occhicone's third claim, the court correctly found that he lacked standing to raise any claim on

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

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. 326-27.

SUMMARY OF THE ARGUMENT

Issue 1: Occhicone advances a single Eighth Amendment method-of-execution theory under multiple constitutional, statutory, and equitable labels. He asks this Court to infer that the FDOC will disregard its lethal injection protocol during his execution based on heavily redacted historical inventory records and reports of temporary commercial shortages affecting certain etomidate products. But those allegations establish nothing about FDOC's current inventory, procurement practices, or intended conduct and therefore do not establish the substantial and imminent risk of severe pain required by the Eighth Amendment. Nor does he identify a feasible and readily implemented alternative method of execution as required under controlling Eighth Amendment precedent.

Because every remaining theory depends upon the same unsupported premise that the FDOC will not comply with its execution protocol, each fails for the same reason. Courts evaluate

claims according to their substance rather than the labels attached to them, so recasting the same speculative allegations as due process, equal protection, access-to-courts, public records, or manifest injustice claims does not overcome this Court's binding precedent. Likewise, Rule 3.852 does not authorize discovery to determine whether a postconviction claim might exist. Additional public records are available only when they are relevant to a colorable postconviction claim. Because Occhicone failed to allege such a claim, the circuit court correctly denied both his successive postconviction motion and his post-warrant public records demand.

Issue 2: Occhicone has failed to establish that evolving standards of decency prohibit his execution because he is elderly. First, the claim is untimely and procedurally barred. But it is also proscribed by the Florida Constitution's Conformity Clause, which this Court has repeatedly stated requires that the U.S. Supreme Court's decisions set both the floor and the ceiling on Eighth Amendment challenges. Additionally, Occhicone has failed to establish that a national consensus exists concerning prohibiting the execution of anyone elderly. Finally, he has failed to demonstrate that his execution serves no retributive value and no deterrent effect.

Issue 3: This claim is not cognizable under Rule 3.851 because it does not attack the judgment and sentence. Also, nothing Occhicone argues would permit a “pause” in executions, other than a legal basis for a stay, which he cannot demonstrate. Finally, he has failed to demonstrate that his execution is manifestly unjust because of either his religious beliefs or the religious beliefs of others. He is procedurally barred from raising the jury recommendation issue because he raised his jury vote as an issue in his postconviction motion for relief based on *Hurst*.

STANDARD OF REVIEW

Trial courts are authorized to summarily deny postconviction claims that are untimely, procedurally barred, legally insufficient, or meritless as a matter of law under controlling United States and Florida Supreme Court precedent. *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).

With respect to timeliness, “postconviction claims in capital cases must generally be filed within one year after the judgment and sentence become final.” *Cole v. State*, 392 So. 3d 1054, 1061 (Fla.

2024) (*citing* Fla. R. Crim. P. 3.851(e)(2)). A claim filed outside the one-year period is untimely unless one of the following circumstances exists:

(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). "It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim." *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020).

In the post-warrant context, claims are procedurally barred when the same or similar claim was raised in a previous proceeding, or the claim could have been raised before the signing of the death warrant. *Gudinas v. State*, 412 So. 3d 701, 714 (Fla. 2025) (holding that "[p]ost-warrant claims that could have been raised in a prior proceeding are procedurally barred"); *see also Kearse v. State*, 428 So. 3d 75, 81 (Fla.) (finding that a post-warrant claim was procedurally barred because it had previously raised a similar claim

in the initial postconviction motion), *cert. denied*, 146 S. Ct. 1786 (2026).

“In reviewing a trial court’s summary denial, ‘this Court must accept the defendant’s allegations as true to the extent that they are not conclusively refuted by the record.’” *Id.* (quoting *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008)). “However, mere conclusory allegations do not warrant an evidentiary hearing.” *Id.* (citing *Anderson v. State*, 220 So. 3d 1133, 1142 (Fla. 2017); *LeCroy v. Dugger*, 727 So. 2d 236, 238 (Fla. 1998)). On appeal from the summary denial of a successive postconviction motion, this Court “review[s] the postconviction court’s decision de novo.” *Id.* (citing *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009)).

ARGUMENT

In recent death warrants, previous defendants have raised—and this Court has rejected—claims that bear a striking resemblance to at least two of the issues that defendant raises in this case. *See Trotter v. State*, 428 So. 3d 68, 72 (Fla.) (raising both a lethal injection challenge premised on Walls’ records and an elderly execution bar), *cert. denied*, 146 S. Ct. 755 (2026); *Heath v. State*, 426 So. 3d 1253, 1261 (Fla.) (raising a lethal injection challenge premised on Walls’ records), *cert. denied*, 515 U.S. 1162 (2026); *Smithers v. State*, 420 So. 3d 460 (Fla. 2025) (raising an elderly execution bar). Because Occhicone is unable to materially distinguish his claims from those, this Court should affirm the postconviction court’s summary denial of this claim.

ISSUE ONE

The circuit court properly denied claim one because Occhicone failed to allege a colorable Eighth Amendment method-of-execution claim, and his remaining theories depend on the same legally insufficient speculation.

Although styled as due process, equal protection, public records, and manifest injustice arguments, Claim One advances the same Eighth Amendment method-of-execution theory this Court first

rejected in *Heath v. State*, 426 So. 3d 1253 (Fla.), *cert. denied*, 223 L. Ed. 2d 587 (2026). Like Heath, Occhicone unpersuasively speculates that heavily redacted Florida Department of Corrections' ("FDOC") inventory records demonstrate that FDOC cannot be trusted to comply with Florida's lethal injection protocol during his execution. And in an apparent attempt to distinguish this case from binding precedent, he also alleges that temporary shortages affecting certain commercially available etomidate products increase the likelihood that FDOC will deviate from its protocol and its use of etomidate for executions diverts a scarce medication from critically ill patients.

These additional assertions do not warrant a different result than that reached in *Heath*. Reports of commercial shortages establish nothing about FDOC's inventory, procurement practices, or intended conduct. They do not show that FDOC lacks protocol compliant etomidate, intends to depart from its protocol, or that Occhicone's execution would deprive patients of medically necessary medication. His theory instead depends on unsupported inference that commercial shortages have affected FDOC's supply, that it therefore lacks suitable etomidate or will disregard its protocol, and that any resulting deviation will expose him to unconstitutional pain.

Neither his successive motion nor his initial brief alleges the necessary facts to support those inferences. As in *Heath*, this sort of speculation cannot establish a colorable Eighth Amendment method-of-execution claim.

Unable to distinguish *Heath* on the merits, Occhicone argues that the State and the circuit court misunderstood his claim by analyzing it under the Eighth Amendment rather than the Due Process and Equal Protection Clauses. IB at 6. The record refutes that contention. His successive motion expressly alleged that FDOC's purported "reckless maladministration" of the lethal injection protocol violated both the Eighth and Fourteenth Amendments. (PCR 124). More importantly, this Court looks to the substance, or "gist," of a claim rather than its label. *Trotter v. State*, 428 So. 3d 68, 72 (Fla.), *cert. denied*, 146 S. Ct. 755 (2026). Because every theory in Claim One rests on the premise that FDOC's alleged past deviations from the lethal-injection protocol establish that it will again depart from the protocol during Occhicone's execution, creating a substantial risk of unconstitutional pain, the circuit court correctly analyzed that premise under the governing Eighth Amendment standards before rejecting his remaining theories.

A. Occhicone's allegations do not state a colorable Eighth Amendment method-of-execution claim.

To state a colorable Eighth Amendment method-of-execution claim, a defendant must “(1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain.” *Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). Occhicone satisfies neither requirement. He alleges no facts establishing that FDOC will depart from the lethal injection protocol during his execution or that any such departure would expose him to a substantial and imminent risk of severe pain. Nor does he identify a feasible, readily implemented alternative method of execution that would significantly reduce the alleged risk. Occhicone's speculation satisfies neither requirement. *See Heath*, 426 So. 3d at 1261–62.

1. Heath controls.

Heath resolves the constitutional theory underlying Occhicone's claims. There, the defendant argued that FDOC's alleged historical

maladministration of Florida's lethal injection protocol created an unconstitutional risk that it would again fail to follow the protocol during his execution. To support that theory, he relied on the same heavily redacted FDOC inventory records purportedly identifying delayed inventory entries, dosage discrepancies, the administration of lidocaine not identified in the written protocol, expired drugs, and other asserted execution irregularities. *Heath*, 426 So. 3d at 1260–62. This Court rejected Heath’s argument because speculative allegations concerning prior executions did not establish that FDOC would depart from its protocol during Heath's execution or expose him to a substantial and imminent risk of unconstitutional pain. *Id.* at 1262.

Occhicone’s argument is no more convincing. His only new allegation is that temporary shortages have affected certain commercially available etomidate products. But those allegations do not bridge the gap identified in *Heath*. They establish nothing about FDOC's inventory, procurement practices, or intended conduct and do not show that the Department lacks protocol-compliant etomidate or intends to depart from its execution protocol during Occhicone's execution. Instead, he asks this Court to infer future constitutional

violations from generalized reports concerning the commercial pharmaceutical market. Neither his successive motion nor his initial brief alleges facts supporting that inference. Accordingly, *Heath* controls.

Indeed, Occhicone's own filings demonstrate why his claim fails. Counsel acknowledged below that discovery was necessary to determine whether FDOC possessed sufficient protocol-compliant etomidate and whether the drug intended for Occhicone's execution was suitable for use. (PCR 285). His initial brief likewise requests a "full investigation into the drugs to be used for his lethal injection." IB at 7. But postconviction proceedings do not authorize discovery or an evidentiary hearing so that a defendant may determine whether a constitutional claim exists. *See Heath*, 426 So. 3d at 1261; *Jimenez v. State*, 265 So. 3d 462, 474-75 (Fla. 2018). Instead, a defendant must first allege a legally sufficient claim before he is entitled to discovery or further proceedings.

Occhicone's reliance on *Arthur v. Thomas*, 674 F.3d 1257 (11th Cir. 2012), does not alter that conclusion. *Arthur* arose in a fundamentally different procedural posture. There, the Eleventh Circuit reviewed the dismissal of a federal § 1983 complaint

challenging Alabama's execution procedures under Rule 12(b)(6), where the well-pleaded factual allegations were accepted as true. *Id.* at 1261–63. More importantly, the complaint was supported by expert affidavits identifying specific deficiencies in Alabama's execution procedures and eyewitness evidence from a recent execution. *Id.* Occhicone presents no comparable evidence. He identifies no recent departure from Florida's lethal injection protocol, no witness with personal knowledge that FDOC intends to deviate from that protocol during his execution, and no expert testimony linking reported commercial shortages to FDOC's execution drugs. Indeed, unlike the plaintiff in *Arthur*, Occhicone seeks additional public records because he cannot allege those essential facts. *Arthur* therefore does not undermine *Heath* or support relief here.

Nor has Occhicone rebutted the settled presumption that the FDOC will comply with its lethal injection protocol. *See Cole v. State*, 392 So. 3d 1054, 1065 (Fla. 2024). Having already rejected materially similar allegations in *Heath*, this Court should again decline to presume that FDOC will disregard its protocol based on speculative interpretations of historical records and generalized reports concerning the commercial pharmaceutical market. Because

Occhicone has not established that FDOC will depart from its execution protocol during his execution, he has failed to establish that his execution presents a substantial and imminent risk of severe pain that is sure or very likely to occur.

2. *Occhicone also fails to identify a feasible alternative method of execution.*

Occhicone's claim independently fails because he identifies no feasible and readily implemented alternative method of execution that would significantly reduce the alleged risk. Instead, he seeks additional public records, a further investigation into FDOC's etomidate supply and execution practices, and a suspension of executions until FDOC completes additional review and reforms. IB at 26–27. Those requests do not identify an alternative method of execution; they seek to postpone the execution while Occhicone investigates whether he can establish a constitutional claim. That is insufficient. *See Heath*, 426 So. 3d at 1262. Because Occhicone has not established either a substantial and imminent risk of severe pain or a feasible alternative method of execution, he has failed to state a colorable Eighth Amendment method-of-execution claim.

B. Occhicone's Fourteenth Amendment theories do not provide an independent basis for relief.

Seemingly recognizing that his Eighth Amendment claim cannot survive this Court's precedent, Occhicone argues that the circuit court denied him due process, equal protection, and meaningful access to the courts by refusing to order additional public records. Those constitutional labels do not change the analysis, because each theory depends on the same speculation that FDOC will not comply with its execution protocol during Occhicone's execution.

1. Due process and the right of access to the courts do not entitle Occhicone to discover whether a constitutional claim exists.

Occhicone relies primarily on *Armstrong v. Manzo*, 380 U.S. 545 (1965), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). None holds that due process requires the State to provide discovery so that a defendant may determine whether an Eighth Amendment claim exists.

On the contrary, the Supreme Court has repeatedly rejected that proposition. The Due Process Clause does not create a general constitutional right to discovery. *Gray v. Netherland*, 518 U.S. 152, 168 (1996). Likewise, the constitutional right of access to the courts

guarantees a reasonably adequate opportunity to present a nonfrivolous legal claim; it does not require the State to provide discovery so a litigant can create one. *Lewis v. Casey*, 518 U.S. 343, 354–56 (1996). Courts have applied those same principles in the execution context, holding that due process does not require disclosure of execution-related information based on speculation that it might support a method-of-execution claim. See *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1266–67 (11th Cir. 2014); *Zink v. Lombardi*, 783 F.3d 1089, 1108 (8th Cir. 2015) (en banc).

That is precisely what Occhicone seeks. His public records demand, successive motion, and initial brief all acknowledge that additional records are necessary to determine whether FDOC possesses sufficient protocol-compliant etomidate and whether the Department intends to comply with its execution protocol. (PCR 53–61; PCR 124; PCR 285; IB at 7). Due process guarantees an opportunity to litigate a legally sufficient claim. It does not require the State to furnish discovery so that a defendant may investigate whether such a claim exists.

Nor was Occhicone denied constitutionally adequate process. He submitted a post-warrant public records demand, received

written objections, participated in a hearing, filed a successive Rule 3.851 motion, and fully litigated Claim One before the circuit court. His claim failed because it was speculative and legally insufficient, not because he lacked notice or an opportunity to be heard.

2. *Occhicone fails to allege a viable equal protection violation.*

Occhicone's equal protection claim fares no better. The Equal Protection Clause protects against intentional disparate treatment of similarly situated persons. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *DeYoung v. Owens*, 646 F.3d 1319, 1327 (11th Cir. 2011). Even a “class of one” claim requires proof that the plaintiff was intentionally treated differently from similarly situated persons without a rational basis. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Occhicone alleges neither. He identifies no similarly situated inmate who received different treatment, alleges no intentional discrimination, and identifies no facts suggesting that FDOC intends to administer its execution protocol differently during his execution than during any other execution. Instead, he speculates that alleged historical irregularities and reports of commercial drug shortages

may result in disparate treatment. Speculation cannot establish an equal protection violation. *See DeYoung*, 646 F.3d at 1327–28.

Nor does Rule 3.852 violate equal protection by requiring that requested public records relate to a legally sufficient postconviction claim. That requirement applies equally to every capital defendant seeking post-warrant discovery and reflects the rule's claim-driven purpose rather than any discriminatory classification. *See Willacy v. State*, 431 So. 3d 254, 262–64 (Fla. 2026); *King v. State*, No. SC2026-0336, 2026 WL 672101, at *3–6 (Fla.), *cert. denied*, 146 S. Ct. 1802 (2026).

The same deficiency that defeats Occhicone's Eighth Amendment claim also defeats his Fourteenth Amendment theories. Because each rests on the unsupported premise that FDOC will not lawfully carry out his execution, none provides an independent basis for the additional public records or postconviction relief he seeks.

C. Because Occhicone failed to allege a colorable postconviction claim, Rule 3.852 did not entitle him to additional public records.

Occhicone's request for additional public records fails for the same reason as his constitutional claims. He seeks discovery not to prove an adequately pleaded postconviction claim, but to determine

whether one exists. Rule 3.852 does not authorize discovery for that purpose.

His own filings confirm as much. Occhicone seeks records concerning FDOC's procurement, inventory, testing, storage, chain of custody, and administration of etomidate to determine whether the Department possesses sufficient protocol-compliant etomidate, whether the drugs intended for his execution are suitable for use, and whether FDOC intends to comply with its execution protocol. (PCR 51–61; PCR 214–18; PCR 285). His initial brief likewise requests a “full investigation into the drugs to be used for his lethal injection.” IB at 7. Those requests do not seek evidence supporting an existing constitutional claim; they seek information necessary to determine whether such a claim can be asserted.

Occhicone nevertheless argues that the circuit court imposed a “colorable claim” requirement not required by the rule. IB at 25–26. That argument is foreclosed by *Willacy*. There, this Court rejected as “a non-starter” the contention that the requirement of a colorable claim is a judicially imposed limitation not found in Rule 3.852. Instead, the Court explained that the requirement follows directly from the rule's express relevance standard because the relevance of

requested records “is directly measured by their connection to a colorable claim for relief.” *Willacy*, 431 So. 3d at 262. The circuit court therefore imposed no new pleading requirement; it simply applied Rule 3.852 as this Court has construed it.

That conclusion is consistent with this Court's longstanding precedent. Rule 3.852 authorizes additional public records only when the requested materials are relevant to a pending Rule 3.851 proceeding or reasonably calculated to lead to admissible evidence. Fla. R. Crim. P. 3.852(i)(2). As *Willacy* makes clear, the rule is intended to facilitate the litigation of existing postconviction claims, not fishing expeditions undertaken to discover new ones. Because Occhicone failed to allege a legally sufficient Eighth Amendment claim, the requested records were not relevant within the meaning of Rule 3.852.

Nor does narrowing the request cure that defect. Occhicone argues that he seeks only records relating to the etomidate intended for his execution. IB at 12–13. But the scope of the request does not change its purpose. Whether he seeks thirteen categories of records or only records concerning FDOC's current etomidate inventory, he seeks them for the same reason—to determine whether commercial

shortages have affected the Department's execution drugs and whether he can establish a constitutional violation. Rule 3.852 does not authorize discovery for that investigative purpose. Because Occhicone never established an entitlement to additional public records, his arguments concerning redaction, exemptions, and the scope of production are immaterial.

Occhicone's contrary interpretation would fundamentally alter Rule 3.852. Any defendant could obtain extensive execution-related discovery simply by speculating that additional records might reveal a constitutional violation. That is precisely the type of fishing expedition this Court has repeatedly rejected. Because Occhicone sought records to investigate whether he had a claim rather than to litigate one already adequately alleged, the circuit court properly denied his public records demand.

D. Neither Chapter 119 nor Occhicone's equitable arguments provide an independent basis for relief.

Unable to satisfy Rule 3.852, Occhicone alternatively relies on Florida's Public Records Act, article I, section 24 of the Florida Constitution, and generalized principles of fundamental fairness and

manifest injustice. None independently entitles him to additional public records or postconviction relief.

Occhicone's reliance on Chapter 119 and article I, section 24 conflates the public's general right to inspect nonexempt government records with a capital defendant's entitlement to obtain additional public records in postconviction litigation. The latter is governed by Rule 3.852 and section 27.7081, Florida Statutes which establish the procedures governing public records requests in capital postconviction proceedings. *See Randolph v. State*, 422 So. 3d 166, 172 (Fla. 2025); *Willacy*, 431 So. 3d at 262–64. Because Occhicone sought additional records to support a pending Rule 3.851 proceeding, Rule 3.852 supplies the governing standard. Having failed to satisfy that rule, he cannot obtain the same discovery simply by invoking Chapter 119 or article I, section 24.

Occhicone's remaining equitable arguments likewise fail. He argues that continuing executions during the alleged commercial shortage of etomidate is contrary to the public interest because the drug should instead be reserved for critically ill patients and because FDOC should first investigate alleged deficiencies in its execution practices. Those policy arguments do not establish a constitutional

violation or an entitlement to postconviction relief. Occhicone alleges no facts establishing that FDOC's use of etomidate has deprived any medical provider or patient of access to the drug or that the Department's execution drug supply comes at the expense of the commercial medical market. Nor do generalized concerns regarding pharmaceutical shortages establish that FDOC intends to depart from its execution protocol during Occhicone's execution.

Finally, labeling the claim as one involving “manifest injustice” or “fundamental fairness” does not alter the analysis. Courts evaluate claims according to their substance rather than the labels attached to them. *Trotter*, 428 So. 3d at 72. Occhicone's equitable theories rest on the same unsupported factual premise as his Eighth Amendment and public records claim that alleged historical execution irregularities and reports of commercial etomidate shortages justify additional investigation into whether FDOC will comply with its execution protocol. Because that premise is speculative, the equitable labels add nothing.

Claim One ultimately advances a single theory under multiple constitutional, statutory, and equitable labels. This Court rejected that theory in *Heath*, and *Willacy* confirms that Rule 3.852 does not

authorize discovery to determine whether a constitutional claim might exist. Because Occhicone failed to allege a colorable method-of-execution claim or establish any entitlement to additional public records, the circuit court properly denied both his successive motion and his post-warrant public records demand.

ISSUE TWO

The postconviction court's summary denial of this claim correctly found that Occhicone failed to establish that evolving standards of decency prohibit the execution of "an elderly person" as cruel and unusual punishment under the Eighth Amendment.

Occhicone contends that the Eighth Amendment to the U.S. Constitution prohibits his execution because it would constitute cruel and unusual punishment to execute him after he spent such an extended period of time on death row and that he has become "elderly." IB at 28-30. In support of this contention, he argues that "evolving standards of decency" prohibit his execution because: (1) federal law provides protections to elderly citizens and others who are members of a vulnerable population; (2) Florida law considers the elderly especially vulnerable and affords them additional protection as a result; (3) of the states that permit execution, few have executed someone over the age of 65 in the last ten years and only has executed someone 75 or older; (4) twenty-four states and the District of Colombia provide "some form of age-related compassionate release" program to reduce the length of an imposed sentence; (5) he

displays signs of being “elderly”²; and (6) it would be a manifest injustice to execute him because doing so serves no retributive or deterrent value.

But this claim is both untimely and procedurally barred. Because Occhicone argues that his aging operates as a categorical bar to execution, the claim became ripe years ago when he first began to demonstrate the signs of aging about which he is complaining. At 80 years old, Occhicone hardly began aging in the past year, and his failure to raise this claim within one year of when he began showing the infirmities of aging—or failing to identify when this began and his claim first arose—results in a time bar to him proceeding. Additionally, the claim is procedurally barred because he could have previously brought this claim at any time over the past many years but failed to do so.

Occhicone’s aging-based categorical exemption claim is also meritless. This Court’s precedents clearly hold that the Florida Constitution’s conformity clause prevents the claim. Nor can

² Occhicone attempts to distinguish his case from earlier cases seeking to void executions based on a categorical bar due to a particular age. IB at 42.

Occhicone point to any state legislature or court that has ever recognized advanced age, and the infirmities it brings, as a bar to execution.

This Court should affirm the postconviction court's ruling summarily denying this claim because it is untimely, procedurally barred, and meritless.

A. Occhicone's claim is untimely and procedurally barred because the judgment and sentence became final in 1991 and the claim does not qualify for any exception to the one-year time limitation provided in Rule 3.851(d)(2).

Occhicone's judgment and sentence became final on May 20, 1991, when the Supreme Court of the United States denied his petition for certiorari. *Occhicone v. Florida*, 500 U.S. 938 (1991); see Fla. R. Crim. P. 3.851(d)(1)(B) ("For the purposes of this rule, a judgment is final . . . on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). But Rule 3.851 requires that "[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.*" As a result, his claim is untimely unless it qualifies as one of the exceptions listed in Fla. R. Crim. P. 3.851(d)(2) and is filed within one year of when it became

discoverable with the exercise of due diligence. *See Lukehart v. State*, 51 Fla. L. Weekly S139 (Fla. May 27, 2026) (“[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.”) (alteration in original), *cert. denied*, No. 25-7491, 2026 WL 1530138 (U.S. June 1, 2026) (quoting *Mungin v. State*, 320 So. 3d 624, 625-26 (Fla. 2020) (citing *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013))).

Here, Occhicone’s claim fails to satisfy any of the Rule 3.851(d)(2) exceptions to the one-year filing requirement: (1) the claim is one of newly discovered evidence; (2) the claim asserts a fundamental constitutional right not established within the period provided for in subdivision 3.851 (d)(1) and has been held to apply retroactively; or (3) postconviction counsel, through neglect, failed to file the motion. Fla. R. Crim. P. 3.851(d)(2).

First, Occhicone does not assert in his motion that this claim is based on any newly discovered evidence or argue that he is seeking retroactive application of an already recognized constitutional right. Therefore, these exceptions do not apply.

At the *Huff* hearing, postconviction counsel responded to the State's argument that all three claims were untimely, stating that he was relying on the newly discovered evidence exception to establish timeliness when he filed his motion:

Regarding the newly discovered evidence aspect of our argument, at the beginning of our motion on page one, we do discuss the timeliness issue, *which a newly discovered evidence concept.* (sic)

We're discussing why the issue could not have been raised in prior litigation, it's because *we are using information and evidence that's been obtained within the last year.* Ultimately, really within the last few months when we take into account *the website article from the pharmacists.*

(PCR:303) (emphasis added).

But the pharmacists' article is about the alleged *shortage of etomidate*. And while this *may* have some application to the timeliness of his first claim—that allegedly it would be manifestly unjust to use etomidate for executions when there is a commercial shortage—it does not apply to *this* claim, which concerns the propriety of executing an elderly man. Occhicone has certainly not made any attempt to explain what possible connection exists between the two.

Instead, Occhicone specified in his motion that the commercial etomidate shortage related to his *first* claim but offered a separate basis for why the second claim was timely:

The colorable grounds for relief which form the basis for Occhicone's *records demand* are based on evidence of a shortage of etomidate . . . only discovered following the publication of this information on April 7, 2026, raising concerns regarding the negative effects to Occhicone's 14th Amendment *equal protection rights*.

123. (emphasis added). On the other hand, as he resumed, he argued:

The claim based on Occhicone's *advanced age and health conditions was not ripe until the Governor signed the execution warrant* on June 26, 2026.

Id. (emphasis added). Thus, he did not raise newly discovered evidence in his motion as a basis for demonstrating timeliness of *this* claim, but rather, Occhicone acknowledged in his motion he relied upon a ripeness argument to justify the timeliness of his motion.

This is, at least, consistent with the argument he now raises in his initial brief, that his claim is timely “because [he] had no way of knowing at what age and in what condition he would be at the time his execution warrant was signed.” IB at 43. But he is mistaken. This claim ripened long before one year ago.

Florida law defines an “elderly person” as one who is 60 years of age or older who suffers from the infirmities of aging. § 825.101(4), Fla. Stat. (2026). Thus, to the extent Occhicone contends that getting older and suffering the infirmities of aging qualifies as a bar to execution, that claim became ripe as soon as he first began suffering from the infirmities of aging after becoming 60 years old. He never precisely specifies when this process began but based on the allegations in his motion that he suffers from “the general deterioration of old age” and that “old age comes early to prisoners,” this Court may conclude—and should conclude—that it certainly ripened more than one year ago. *See Sparre v. State*, 391 So. 3d 404, 406 (Fla. 2024) (summary denial appropriate where allegations fail to establish timeliness). As a result, Occhicone’s lack of diligence in raising this claim, by waiting until his warrant issued, renders the claim both untimely and dilatory.

This Court rejected this same “ripeness” argument in *Smithers v. State*, 420 So. 3d 460, 465 (Fla.), *cert. denied*, 146 S. Ct. 323 (2025). Smithers, like Occhicone in this claim, argued that his claim was neither untimely nor barred because it did not ripen until his execution warrant was signed. But as this Court found:

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).

Id. (internal quotation marks omitted).

Occhicone, like Smithers before him, has known for many years that upon the signing of his death warrant he would fall within the class of individuals he now seeks to exempt from execution due to "advanced age." As a result, his claim should have been filed within one year of him becoming "eligible" for this alleged exemption from execution, and his failure to do so renders this claim untimely. Thus, the postconviction court's summary denial of the claim was proper because the court correctly found that the claim was barred as untimely. See Fla. R. Crim. P. 3.851(5) ("If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing.").

Occhicone attempts to distinguish his case from the *Smithers*, *Trotter*, and *Spencer*³ cases by arguing that the defendants in *Smithers* and *Trotter* attempted to create a categorical exemption based on a specific age, and the defendant in *Spencer* sought one based on “advanced age,” while Occhicone avoids requesting an exemption based on a specific age. IB at 40-43. But there is no material difference between an exemption based on being a person of “advanced” age and being “elderly.” And this Court in *Smithers* and *Trotter* described the claims as alleging cruel and unusual punishment because of “advanced age” and status as “an elderly person.” *Trotter*, 428 So. 3d at 71; *Smithers*, 420 So. 3d at 463. Thus, the cases are indistinguishable.

Also, because this claim could have been raised in pre-warrant proceedings, but was not, it is procedurally barred. *See 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.”). Occhicone could have raised this claim at any time once he began to demonstrate the results of aging. As a result, he was

³ *Spencer v. State*, SC2026-0880, 2026 WL 1757938 (Fla. June 18, 2026).

required to do so prior to his warrant being issued, and his failure to do so bars him from raising it now.

B. Occhicone's claim is meritless because (1) Florida's constitutional Conformity Clause prohibits interpreting the U.S. and Florida constitutional prohibitions against cruel and/or unusual punishment to modify the Supreme Court's Eighth Amendment rulings; (2) Occhicone has failed to demonstrate any national consensus against executing the elderly; and (3) because executing Occhicone serves both a retributive and a deterrent effect, he has failed to demonstrate that his execution would result in a manifest injustice.

The United States Supreme Court has recognized only three categorical exemptions from execution under the Eighth Amendment: (1) individuals who are mentally incompetent at the time of execution, *Ford v. Wainright*, 477 U.S. 399, 405 (1986); (2) individuals who are intellectually disabled, *Atkins v. Virginia*, 536 U.S. 304, 317 (2002); and (3) individuals who were under the age of 18 at the time of their capital offense, *Roper v. Simmons*, 543 U.S. 551, 578 (2005). Occhicone does not qualify for any of these categories nor contend that he does.

Instead, he urges this Court to recognize a new fourth category exempting elderly offenders from execution. No decision of the United

States Supreme Court recognizes such an exemption. Nor has Occhicone identified any other court authority supporting his position.

1. *Florida's Conformity Clause prohibits this Court from exempting the elderly from execution unless the Supreme Court reaches this holding.*

Under Florida's Conformity Clause, Florida courts are bound by the United States Supreme Court's interpretation of the Eighth Amendment. Art. I, § 17, Fla. Const. This Court has repeatedly held that the Supreme Court's Eighth Amendment jurisprudence establishes both the floor and the ceiling for protection against cruel and unusual punishment in Florida. *Barwick v. State*, 361 So. 3d 785, 794 (Fla. 2023); *Gudinas*, 412 So. 3d at 714 (holding that the Conformity Clause does not permit the Court to expand *Atkins*).

Consistent with that principle, the Florida Supreme Court has expressly rejected the claim that advanced age renders an execution unconstitutional. In *Smithers*, 420 So. 3d 460, the defendant argued that his execution at age 72 would violate the Eighth Amendment and article I, section 17 of the Florida Constitution. But this Court rejected that claim, holding that the only age-based exemption recognized by the United States Supreme Court is the exemption

against executing individuals who were under 18 at the time of the offense. *Id.* at 465 (citing *Roper*). Because the Supreme Court has not extended age-based exemptions beyond that brightline rule, Florida courts are constitutionally precluded from doing so. *Id.* at 466.

Smithers is consistent with longstanding Florida precedent declining to expand *Roper* beyond its expressed holding. See, e.g., *Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011) (rejecting claim that *Roper* should extend to *Barwick*, who was 19 when he committed the crimes, because his mental age was less than 18); *Stephens v. State*, 975 So. 2d 405, 427 (Fla. 2007) (rejecting claim that *Roper* and the Eighth Amendment barred execution of defendant who had a mental and emotional age of less than 18 years because his chronological age at the time of his crimes was 23); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (rejecting an extension of *Roper* claim and holding *Roper* only prohibits the execution of those defendants whose chronological age is below 18).

2. *Occhicone has failed to demonstrate any national consensus against executing the elderly.*

Even if this Court were free to consider Occhicone's claim on the merits, it would fail because he has not demonstrated any

national consensus against the execution of elderly offenders. To establish that evolving standards of decency prohibit a particular punishment, courts examine legislative enactments and state practice. *Atkins*, 536 U.S. at 316; *Roper*, 543 U.S. at 563.

Occhicone has not identified any jurisdiction that prohibits execution based on advanced age. His reliance on statutes protecting elderly individuals in noncapital contexts is misplaced and irrelevant. Such legislation says nothing about societal views regarding capital punishment for elderly offenders. If anything, the fact that the Florida Legislature has not prohibited the execution of individuals of advanced age illustrates that such a punishment does not offend any evolving standard of decency. In fact, a Highlands County jury recently made a unanimous recommendation of a death sentence for 75-year-old defendant, Joseph Ables, which the trial judge followed, and whose direct appeal is currently pending before this Court. See *Ables v. State*, No. SC2025-0576 (on Appeal from the Circuit Court of the Tenth Judicial Circuit in and for Highlands County, Florida; L.T. No. 2018-CF-0478). Thus, contrary to Occhicone's, assertion, evolving standards of decency do not embrace the argument that executing an elderly man is a form of cruel and unusual punishment.

Additionally, his argument that *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), *abrogated by Ryan v. Gonzales*, 568 U.S. 57 (2013)⁴, provides relief is mistaken. The court provided a stay because the prisoner was found incompetent and a prior Ninth Circuit ruling required a stay until competency could be restored. *Ryan*, 568 U.S. 57 at 61-62. Occhicone has failed to explain how *Ryan* applies to his case.

Nor does the alleged relative infrequency of executions of elderly offenders demonstrate any national consensus. Such statistics may reflect a variety of factors unrelated to constitutional norms, including lengthy appellate review and natural mortality. Importantly, states continue to execute individuals of advanced age, which directly undermines Occhicone's assertion of a national consensus against the practice.

Occhicone attempts to distinguish his current claim from those brought in *Smithers*, 420 So. 3d 460 and *Trotter v. State*, 428 So. 3d 68 (Fla. 2026), *cert. denied*, 146 S. Ct. 755 (2026) by suggesting that

⁴ The United States Supreme Court abrogated the ruling that stayed the case because the Court determined that the defendant's competency was not required during the habeas proceedings. *Id.* at 74.

the claims in those cases expressly sought exemption for those 65 *years or older*. But that is not how this Court considered the claims in *Smithers* and *Trotter*. This Court designated the claims as alleging cruel and unusual punishment because of *advanced age and status as an elderly person*. *Trotter* at 71; *Smithers* at 463. This Court should decline to now draw a distinction that has previously been ignored as immaterial. Moreover, any finding that Occhicone is too elderly to be executed would be inconsistent with the postconviction court's comments in the initial case management conference at which Occhicone appeared that he appeared "virile." (PCR:71)

3. Occhicone has failed to establish that his execution is manifestly unjust as serving neither a retributive nor deterrent effect.

In *Atkins*, the Supreme Court concluded that the impairments of "mental retardation" make 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 (citing *Atkins*, 536 U.S. at 319–320). This is because intellectual disability "diminishes personal culpability even if the offender can distinguish right from wrong." *Id.* The same diminished culpability was applied to juveniles in *Roper*. *Id.* at 569.

In *Ford v. Wainwright*, 477 U.S. 399, 409 (1986), the Supreme Court reasoned that there was no “retributive value” to executing someone “who has no comprehension of why he has been singled out and stripped of his fundamental right to life.” But Occhicone’s advanced age is not remotely comparable to the mental acuity of juveniles or the intellectually disabled. The rationale upon which the Supreme Court relied in these cases simply does not apply to all “elderly” capital offenders generally, or Occhicone, personally.

And as the judge noted at the initial hearing, Occhicone did not, in the court’s opinion, appear physically worn out, stating:

THE COURT: Okay. All right. And they keep calling you old. You look young and virile to me. I think you're doing okay. So don't worry about that stuff.

(PCR:71). Thus, the postconviction court’s observations belie Occhicone’s claims about his physical appearance and strength and any claims that his mental sharpness may have dulled with time. And it is arguable that Occhicone’s execution remains a stronger deterrent to murder than he argues and provides a *much* greater retributive value than he will admit because it aptly demonstrates that regardless of the time one spends on death row, the punishment

to which the murderer was sentenced remains viable as long as the murderer continues to live.

The postconviction court's summary denial of Occhicone's motion was proper because his motion was untimely, procedurally barred, and meritless as a matter of law.

ISSUE THREE

The postconviction court properly entered a summary denial of Occhicone's request for a six-month "pause" in executions because the prison staff's allegedly suffering "psychological damage and moral injury" is not cognizable as a 3.851 claim; Occhicone failed to demonstrate that executing him is a manifest injustice because of either (1) his or others' religious beliefs, or (2) a 7-5 jury recommendation for a death sentence when current law requires at least eight jurors recommend death.

Occhicone asks this Court to "pause" executions for six months due to "psychological damage and moral injury." IB at 54. He purports to raise this claim on behalf of "himself and for the members of death-watch, including Warden Polk, with whom he has bonded." IB at 57. But Occhicone does not cite any case that either permits a defendant to raise this as a postconviction claim or seek an end to executions for a period based on a complaint raised on behalf of others, in this case, the prison staff. He attempts to analogize his case to those involving standing to raise a *Batson*⁵ claim, but he fails to cite any case that agrees with this. Nor has he established that his execution is manifestly unjust because of anybody's religious beliefs or a jury recommendation of 7-5.

⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

A. Occhicone's request is not cognizable under Rule 3.851 as a claim because it does not seek to vacate his judgment and sentence.

Occhicone's request does not attack the lawfulness of his judgment and sentence, but instead, it seeks a court order discontinuing his and others' executions for six months. In essence, he raises an additional argument to support his stay motion. This request suffers from the same defect as his stay motion. It is not related to any colorable claim because it does not challenge the validity of his judgment or death sentence. Instead, it appears to be a variation of "a conditions of confinement" claim, but one he raises on behalf of the prison staff as well as himself. As such, it is meritless.

In *Cole v. State*, 392 So. 3d 1054 (Fla.), *cert. denied* 145 S. Ct. 109 (2024), the defendant filed a "claim" that resembled one concerning a civil complaint about his conditions of confinement. The claim alleged that he was mistreated by the prison staff. But this Court determined that Cole's claim would not provide a basis for relief under Rule 3.851. It found that there was no authority presented to support the proposition that the claim, which would typically be presented in an action pursuant to 42 U.S.C. § 1983, served as a valid basis to vacate a death sentence. *Cole*, 392 So. 2d at 1063–64.

Likewise, Occhicone makes no attempt to explain how this claim would be cognizable under Rule 3.851.

And to the extent what he asserts is a *Lackey*⁶ claim, this Court has rejected such claims based on established precedent. *Orme v. State*, 361 So. 3d 842, 845 (Fla. 2023) (rejecting an argument that 37 years on death row rendered the defendant's death sentence a violation of the Eighth Amendment); *Owen v. State*, 364 So. 3d 1017, 1027 (Fla. 2023) (“[T]his Court has consistently rejected such claims as ‘facially invalid.’” (quoting *Orme*, 361 So. 3d at 845)).

B. Occhicone has failed to establish that executing him is manifestly unjust.

Occhicone has the burden to prove manifest injustice. See *James v. State*, 404 So. 3d 317, 328 (Fla.), *cert. denied*, 145 S. Ct. 1351 (2025) (stating that it’s defendant’s burden to prove manifest injustice and “clear prejudice must be shown”), (quoting *Williams v. State*, 316 So. 2d 267, 274 (Fla. 1975)). He is unable to do so, here.

⁶ *Lackey v. Texas*, 514 U.S. 1045 (1995).

1. Neither Occhicone's religious convictions nor the religious beliefs of others make his execution manifestly unjust.

Occhicone alleges that his execution would be manifestly unjust in part because of his Catholic faith. His reliance on *Farina v. Sec'y, Fla. Dep't of Corr.*, 536 Fed. Appx. 966 (11th Cir. 2013) and *Franklin v. Lynaugh*, 487 U.S. 164 (1988) to support this claim is misguided. These cases are about mitigation. Neither of these cases addresses manifest injustice, let alone whether executing an elderly person is manifestly unjust. Similarly, Occhicone's argument that the request of some faith leaders to stop executions, or the current pace of them, does not demonstrate that his execution would be manifestly unjust.

2. It is not manifestly unjust to execute Occhicone because the law has changed and now requires eight jurors recommend death; and Occhicone is procedurally barred from raising this repackaged Hurst claim.

Occhicone argues that the jury's 7-5 recommendation in favor of a death sentence, makes it manifestly unjust to put him to death because this vote would not be sufficient to presently sentence him to death. See § 921.141, Fla. Stat. (2026).

But Occhicone's current challenge to the jury's 7-5 recommendation is both untimely and procedurally barred.

Occhicone attempts here to relitigate his *Hurst* claim. See *Occhicone v. State*, 235 So. 3d 299, 300 (Fla. 2018) (denying relief on a *Hurst* claim based upon the jury’s 7-5 recommendation); see also *Sireci v. State*, 773 So. 2d 34, 40 & n.10 (Fla. 2000) (finding claims barred and observing that even if a defendant “uses a different argument to relitigate the same issue, the claims remain procedurally barred.”). Moreover, with the benefit of later developments in the law, it has become clear that there was no factfinding *Hurst* error in Occhicone’s case. *State v. Poole*, 297 So. 3d 487, 507-08 (Fla. 2020).

He also argues that the jury would never have sentenced him to death if they knew he would sit on death row for so many years. But again, he cannot point to any case that lends support for the review of this proposition. Regardless, this is pure speculation.

To the extent that a jury may have relied on its belief that Occhicone would be executed prior to aging, their belief was clearly not reasonable. See *Qwest Services Corp. v. F.C.C.*, 509 F.3d 531, 540 (D.C. Cir. 2007) (“But for reliance to establish manifest injustice, it must be reasonable—reasonably based on settled law contrary to the rule established in the adjudication.”). The public understands that executing a convicted murderer is an arduous process. There are

years of appeals—sometimes decades—before the execution can occur. There is no reasonable basis for the jury to have believed otherwise. And even if they did, clearly there is no settled law upon which this Court can conclude that Occhicone would suffer manifest injustice because he has aged while on death row.

Besides, there is no reason to believe that the jury would have voted any differently if they had known how long Occhicone would spend on death row prior to being executed. In this case, the State relied upon three aggravators to support Occhicone’s execution: (1) a prior conviction for a violent felony; (2) committing the murder during the course of a burglary; and (3) committing the murder in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. The last of these, according to this Court, is among the weightiest of the aggravators in Florida. *See Jones v. State*, 415 So. 3d 113, 120 (Fla. 2025), (citing *Santiago-Gonzalez v. State*, 301 So. 3d 157, 176 (Fla. 2020) (characterizing CCP and HAC as the weightiest aggravators)).

The jury chose not to spare Occhicone’s life, and even recommended a death sentence on each murder, although the trial court found insufficient aggravation to sentence him to death for the

murder of his girlfriend's father. There is no reason to believe that the jury would vote differently today.

Because Occhicone failed to demonstrate that his execution would be a manifest injustice, the postconviction court's summary denial of this claim was proper.

CONCLUSION

This Court should affirm the summary denial of Occhicone's second successive motion for postconviction relief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2026, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Eric Pinkard, Chief Assistant CCRC-M, Ali A. Shakoor, Debra Roganne Bell, Mahham Syed, Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **pinkard@ccmr.state.fl.us**, **shakoor@ccmr.state.fl.us**, **bell@ccmr.state.fl.us**, **syed@ccmr.state.fl.us**, **support@ccmr.state.fl.us**, and the Florida Supreme Court, **warrant@flcourts.org**, **canovak@flcourts.org**.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Florida Rule of Appellate Procedure 9.045(b). This brief contains 9,498 words, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2)(D).

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