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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2025-0794

ACTIVE WARRANT CAPITAL CASE
EXECUTION SCHEDULED FOR
TUESDAY, JUNE 24, 2025

THOMAS LEE GUDINAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Thomas Gudinas, was the defendant at trial and will be referred to as the "Appellant" or "Gudinas." Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the records will be:

> **Direct Appeal** – R for the records, T for guilt phase transcripts, and T-PP for penalty phase transcripts in case number SC1960-86070; *Gudinas v. State* (*Gudinas I*), 693 So. 2d 953 (Fla. 1997);
>
> **Original Postconviction Appea**l – 1PCR for case number SC00-954 *Gudinas v. State* (*Gudinas II*), 816 So. 2d 1095 (Fla. 2002);
>
> **First Successive Postconviction Appeal** – 2PCR for case number SC03-416 *Gudinas v. State* (*Gudinas III*), 879 So. 2d 61 (Fla. 2004);
>
> **Second Successive Postconviction Appeal** – 3PCR case number SC17-919 *Gudinas v. State* (*Gudinas IV*), 235 So. 3d 303 (Fla. 2018);
>
> **Third Successive Postconviction Appeal** – 4PCR case number 2025-0794

A "S" preceding the record type indicates a supplemental record. Gudinas's initial brief will be referenced as "IB." Each will be followed by the appropriate page number(s).

FACTS AND PROCEDURAL HISTORY OF THE CASE

This is an appeal of a summary denial of a third successive post-conviction motion in a capital case with an active warrant.

Trial Facts

An arrest warrant issued on June 18, 1994, charging Thomas Gudinas with First Degree Murder, Aggravated Sexual Battery, and Grand Theft Auto. (R 199-205) Gudinas was taken into custody in North Carolina and waived extradition on those charges on June 21, 1994. (R 206) Gudinas was then arrested in Orange County on June 30, 1994. (R 207-208) On July 15, 1995, the Orange County Grand Jury returned a five-count indictment charging Gudinas with Attempted Burglary with an Assault, Attempted Sexual Battery, two counts of Sexual Battery, and First Degree Murder. (R 209-11)

The trial commenced on May 1, 1995, and the jury returned guilty verdicts on all counts on May 4, 1995. (R 497, 538-42) The penalty phase began on May 9, 1995, and on that day the jury returned a death recommendation by a 10-2 vote. (R 562) On June 16, 1995, the court sentenced Gudinas to death for the First Degree Murder of M.M. (R 611-23)

Guilt and Penalty Phase Evidence

Between 8:30 and 9:00 p.m. on May 23, 1994, Gudinas, wearing jeans and a T-shirt, arrived at Barbarella's, an Orlando bar, with three of his roommates. They had been drinking beer and

smoking marijuana before going to Barbarella's and periodically left the bar to smoke more marijuana in their car. When the bar closed at 3:00 a.m. the following morning, the roommates could not find Gudinas. Todd Gates stated he last saw Gudinas at 1:00 a.m. on May 24, 1994. Gates did not see Gudinas before he went to bed around 4:00 a.m. However, when the bar closed at 3:00 a.m., two of the other roommates, Frank Wrigley ("Wrigley") and Fred Harris ("Harris"), could not find Gudinas even though they drove around the area looking for him. Wrigley next saw Gudinas on the afternoon of May 24, 1994. Gudinas explained the blood on his underwear and scratches on his knuckles as the result of a fight with two black men who had tried to rob him. Gudinas showed Gates his boxer shorts which had blood all over the front of them. (T 570-73, 575-68, 611-15)

Harris, Gudinas's first cousin, could not find Gudinas while at Barbarella's, so went back to their apartment, believing Gudinas had just gone off on his own. (T 637-40) Finding Gudinas not home, Harris and Gates returned downtown to look for him, without success. They returned home between 4:30 and 5:00 a.m. (T 641-42) Harris next saw Gudinas between 8:30 and 9:00 a.m. when he

woke. (T 642) Gudinas told Harris and Wrigley that he had been robbed by two black men and showed them his boxer shorts, which had blood in the crotch area. Gudinas explained that the robbers made him take off his pants and his scratched knuckles had bled on his shorts. (T 642-45) Harris learned of the murder later that day and, while with Gudinas, saw composite sketches of the suspect at an area store. Gudinas volunteered that "none of [the sketches] look like me." (T 646) One of Gudinas's roommates asked him if the victim was "a good f*ck", to which he replied "Yes, and I f*cked her while she was dead." (T 654)[1] A day or two after the murder, Gudinas showed Harris a scrape or cut on his penis. (T 654-56)

Dwayne Harris ("Dwayne"), Harris's brother, was another of Gudinas's roommates who accompanied the others to Barbarella's on May 24, 1994. Dwayne saw Gudinas several times during that evening, the last being shortly before 3:00 a.m. He confirmed that the group tried to find Gudinas before they returned home, with Gates and Harris going out to look for him when they discovered he

[1] Inspector Griffin authenticated a tape-recorded interview of Fred Harris during which Harris related Gudinas's statements about killing and having sex with M.M. During that interview, Harris reported that he thought Gudinas was serious. (T 712-13)

was not at home. (T 674-79, 682-83) Dwayne went to bed at about 5:30 a.m. and Gudinas was not yet home. Gudinas returned about 7:30 a.m. and woke up Dwayne. Gudinas looked like he had been in a fight; he had cuts on his knuckles and blood on his shirt. Dwayne heard Gudinas say "I killed her then I f*cked her." (T 684-91)

On May 23, 1994, R.S. and her fiancé arrived at Barbarella's between 11:00 and 11:30 p.m., remaining until about 2:00 a.m. (T 252-53). When R.S. left the bar and went to her car, her fiancé stayed inside saying goodbye to friends. (T 254) S.R. mistakenly went to the wrong parking lot and, while looking for her car, saw a man crouched down behind a car watching her. R.S. later identified him as Gudinas. (T 255-56, 263) Realizing she was in in the wrong lot, R.S. headed to the correct lot but felt someone following her. She got into her car and locked the door. When she looked in the mirror, she saw Gudinas behind her car. (T 256-57)

When the car parked next to hers left, Gudinas approached R.S.'s passenger door and tried to open it without success. (T 258) Gudinas next crouched down, moved behind her car to the driver's side, and tried to open that door. He also screamed "I want to f*ck you," covered his hand with his shirt-tail, and tried to smash her

driver's side window. R.S. "laid on the horn," scaring Gudinas away. (T 258-60) Upon her fiancé's arrival about five minutes later, they tried to find Gudinas but failed. However, after learning about the murder in the same area that night, R.S. called law enforcement and gave a description of Gudinas as her attacker. (T 260-63)

Kevin Kelley ("Kelley"), the operator of the parking lot at Scruffy Murphy's, another bar near Barbarella's, reported that M.M., a regular customer, parked her car in his lot between 10:30 and 11:00 p.m. on May 23, 1994. She was alone when she arrived and did not appear to be intoxicated. (T 272-75) Kelley identified M.M.'s car and testified he did not see her again that evening, nor did he see her leave. (T 275-77, 280)

Troy Anderson ("Anderson") knew M.M. for 11 years by the time of this crime. He averred that he saw her at different bars that evening, but he could not decern whether she was with anyone. However, each time he saw her, she was alone. (T 281-85)

M.M. was last seen at Barbarella's about 2:45 a.m. and had apparently left her car in the same lot where R.S. first spotted Gudinas crouching behind a vehicle. Culbert Pressley ("Pressley") found M.M.'s keys and a bundle of clothes next to her car (T 310-

13, 508-09) as it was his habit to search the downtown area for lost items in the hope of receiving reward money. He waited about two hours for the car's owner to appear. Later, a man Pressley identified as Gudinas, arrived and said the keys looked like his. Gudinas offered a $50 reward, took the keys, and drove off in M.M.'s red GEO. When Pressley looked for the clothes, he found those gone as well. Pressley wrote down the GEO's license plate and gave it to the police. (T 309, 316-18, 320-21)

In May 1994, Jane Brand ("Brand") worked at the Pace School for Girls, located in downtown Orlando. On May 24, 1994, she arrived at work around 7:00 a.m. and, as she was opening the school gate, she saw a man sitting on the steps leading to the school's door, inside the gate. He was "just sitting there" with his back to Brand. (T 289, 291, 293) When she asked how he got onto school property, the man admitted he had jumped the fence. He remained seated during his conversation. Brand saw he had short brown hair and looked about 18 years old. When he stood up to leave, he seemed to be either fastening his shorts or tucking in the tail of his loose-fitting shirt. As Brand went up the steps to the building, the man hopped the fence instead of exiting through the

open gate. (T 293-95) By jumping the fence, the man ended up in the alley where M.M.'s body was later discovered that day. (T 296) Brand continued to her office. Shortly thereafter, she heard someone walking in the alley and thought it might have been the man she saw earlier. (T 297)

About 10 minutes later, around 7:30 a.m., Brand heard a loud crash from the alley and looked outside. (T 299-300) There, she saw a woman's body lying in the alley. She then called law enforcement and flagged down Officer John Chisari ("Chisari") of the Orlando Police Department bicycle patrol. (T 300-02). Brand identified Gudinas as the man that she saw that morning. (T 303, 343-34)

Shortly after coming on duty on the morning of May 24, 1994, Chisari followed up with Pressley about the "lost keys." Chisari knew Pressley. (T 336-39) Pressley informed Chisari that he had found some keys and had given them to "that guy," indicating Gudinas. (T 340-42) As Chisari moved toward Gudinas, he heard a scream from the alley. When he opened the gate he saw M.M.'s body. (T 343-44) Realizing what he was confronted with, Chisari looked for Gudinas and saw a red GEO leaving the parking lot. (T 345) Chisari then heard another scream, saw Brand, and went to

her. He also asked Pressley to get the tag number of the GEO while he called the Fire Department personnel who were in the area on another call. (T 346-48) Chisari identified Gudinas as the person he saw that morning driving the red GEO from the parking lot where M.M. had parked her car. (T 349-50) The tag number belonged to M.M.'s car which was found at 7:00 p.m. later that day at the Holiday Club Apartments, which were about a half mile from Gudinas's apartment. (T 513)

Mary Rutherford was in the downtown Orlando area on her way to work on the morning of May 24, 1994. She saw Pressley with Gudinas and thought the situation looked odd. When she stopped her car, Gudinas looked over and grinned at her before walking with Pressley toward the Scruffy Murphy bar lot where M.M.'s car had been parked. (T 361-65)

Dr. Thomas Hegert, the Medical Examiner, went to the scene of M.M.'s death and later conducted her autopsy. (T 402, 404) He testified that he observed low angle blood spatter patterns and that sticks had been inserted into the victim's vagina and the area near her rectum. Later examination determined that the sticks were originally one piece which had been broken. (T 411) The doctor

observed injuries to the left side of M.M.'s forehead, as well as a number of blunt force trauma injuries to her head, neck, and ear. All of the injuries were about the same age and had substantial hemorrhaging associated with them. (T 412-15)

The doctor found severe cerebral edema, indicating that death was not immediate. However, because M.M.'s lungs were not severely congested, Dr. Hegert was able to determine M.M. died within 30 to 60 minutes of the infliction of the fatal injury, which was a forceful blow to the head. (T 415-16; 443) According to Dr. Hegert, that injury probably was inflicted by a stomping-type blow to the head by a person wearing boots. The doctor saw at least three separate injuries, but the injury patterns were so large that it was difficult to identify individual injuries. (T 416, 418) However, Dr. Hegert found the following injuries on M.M.: (1) her earrings had been ripped out; (2) she had abrasions to her neck, some of which came from fingernails; (3) that she sustained a laceration and associated hemorrhage around her eye; (4) that she had blunt force trauma to her neck; (5) she had bite marks and sucking-type marks on her breasts; (6) she had multiple contusions and abrasions to her vaginal area; (7) she had a contusion to her left

arm; (8) she had a scrape-like injury consistent with the surface of the alley just below the small of her back;[2] (9) she had defensive wounds to her hand; and (10) a stick had been inserted about two inches into her vagina, and another stick had been inserted some three inches into the area near her rectum (producing a stab wound). All of those injuries were inflicted while the victim was alive, as demonstrated by the associated hemorrhaging. (T 418-38)

Also, the doctor found that M.M. had been penetrated vaginally and anally by something other than the sticks that were found in her body and, in fact, trauma to her cervix was present. (T 439-40, 458-59) The bite marks were inflicted by a person who was located at the victim's head. (T 429) The blood spatter patterns found at the scene were consistent with M.M. being kicked or stomped while lying on the ground after her face was already bloody.[3] (T 443) Only one of M.M.'s head injuries would have caused loss of consciousness, and that blow was the fatal one as it caused a massive brain hemorrhage. (T 443-4)

Dr. Hegert placed the time of death between at 3:00 and 5:00

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[2] This part of the victim's back would only be in contact with the ground if her legs had been raised.

a.m. When M.M. died, her blood alcohol content was 0.17 percent. While Dr. Hegert opined M.M. may have lived longer had her blood alcohol been lower, he affirmed that the head injury would have killed her anyway. (T 444, 449, 456) Finally, Dr. Hegert testified that he saw no drag marks at the scene to indicate M.M.'s body had been dragged into the alley. (T 459)

Evidence technician Jose Martinez ("Martinez"), with the Orlando Police Department, processed the scene. (T 474-75) In doing this, Martinez found a purse strap in the parking lot and a small amount of blood on one of the parking stops. (T 474-75, 479-82) The purse matching the strap was found in the alley. No drag marks were seen in that area near the body. (T 485, 487, 490) A pair of blue jeans, size 29/34, were found at the scene and had blood on the thigh, crotch, upper knee, and cuff areas. (T 498-501) Martinez also processed the burglar bars and windows for fingerprints and removed the push bar from the gate (which had blood on it) for processing. (T 502-03)

David Griffin ("Griffin") was the lead investigator on this case for the Orlando Police Department. (T 507) After a BOLO was issued

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[3] M.M.'s mouth and facial injuries bled heavily. (T 460)

for M.M.'s car, it was found between 7:00 and 7:30 p.m. on May 25, 1994. (T 508) Gudinas had been identified as a suspect by that time, and the car was kept under surveillance overnight to see if he returned. The police impounded it the next day. (T 508-09)

Griffin conducted a photographic line up with the various witnesses. R.S., Pressley, and Rutherford identified Gudinas from the lineup. (T 510-11) Griffin also interviewed Dewayne and Fred Harris, Gudinas's roommates. They showed Griffin Gudinas's clothes, including a pair of jeans sized 29/34. Their apartment was four-tenths of a mile from where M.M.'s car was found. (T 513) When Griffin interviewed Gudinas in North Carolina, Gudinas said that he did not know M.M. and had never been in her car. (T 709)

Latent fingerprint examiner, Amanda Taylor, compared latent fingerprints found on the alley gate push-bar and on the car loan payment book found in M.M.'s car to known exemplars taken from Gudinas. (T 551-53, 556-60) The print on the push-bar was from Gudinas's right palm and the payment book had both of his thumbprints on it. (T 562)

Timothy Petrie, a serologist with the Florida Department of Law Enforcement, analyzed the swabs taken from M.M.'s body and

found that semen was present on the vaginal swab as well as on a swab of the victim's thigh. He testified that saliva was possibly present on swabs taken from M.M.'s breasts. (T 721, 726-28; 730)

Upon this evidence, the jury found Gudinas guilty of all five counts contained in the indictment. (T 883)

Penalty Phase Evidence

The State introduced certified copies of the following Massachusetts convictions: burglary of an automobile; assault; theft; assault with intent to rape; indecent assault and battery; and assault and battery. (T-PP 43-9)

Gudinas presented Dr. Upson, a clinical neuropsychologist. He testified that Gudinas has no neuropsychological impairment and that persons with his personality type usually exhibit a higher degree of impulsivity, sexual confusion and conflict, bizarre ideation, and are manipulative. (T-PP 50, 66) Such people tend to be physically abusive and possess the capacity and ability to be violent. Dr. Upson related two reported instances of child abuse against Gudinas when he was very young. (T-PP 67, 76) The doctor thought that Gudinas was seriously emotionally disturbed at the time of the crime, and that the "symbolism" of the crime indicates

that he is "quite pathological in his psychological dysfunction." (T-PP 77-78) However, he admitted that Gudinas's problems have always been behavioral and he has no real desire to control his behavior, as evidenced by, among other things, his disruptive behavior while in jail awaiting trial. (T-PP 84; 93-96)

Dr. O'Brian, a pharmacologist, testified that Gudinas is unable to control his impulses in an unstructured environment, and opined that the instant killing was impulsive.[4] (T-PP 111-16) Dr. O'Brian based his opinions about Gudinas's level of intoxication upon reports of what other witnesses said. He offered that Gudinas was increasingly unable to control his impulses as his alcohol consumption increased, and that his ability to conform his behavior to the requirements of law was substantially impaired by alcohol and his psychological makeup. (T-PP 118-19)

Michelle Gudinas ("Michelle") is Gudinas's younger sister. She testified that when Gudinas was four-years old, his father put his hand on the stove because he was playing with matches. She also testified that, on one occasion, Gudinas's father made him stand in

[4] Although Dr. O'Brian admitted he was not a psychiatrist, he offered the psychiatric opinion about impulsivity. (T-PP 114)

front of the house in his underwear wearing a sign that said, "I will not wet the bed." (T-PP 146-47, 149) Michelle related that she and Gudinas lived with their father for about two and a half years after their parents divorced, then lived with their mother when Gudinas was seven or eight-years old. Gudinas had a good relationship with his stepfather. (T-PP158) She also denied that any sexual contact occurred with her brother and denied telling any investigator that it did. (T-PP 152, 158) Orlando Police Investigator, Emmitt Browning, testified in rebuttal that Michelle stated that when she and her brother went into a bedroom while at a party, he laid on top of her and tore off her swimsuit. Some of their cousins came in and pulled Gudinas off her. (T-PP166-67)

Karen Goldthwaite ("Goldthwaite"), Gudinas's mother, testified that she married Gudinas's father in 1972, and Gudinas was born in 1974. (T-PP 70) They divorced in 1977 or 1978, and she had since remarried. (T-PP 170-71) She reported that she had a difficult pregnancy and delivery with Gudinas, and he had some health problems during the first six months of his life. (T-PP 173-75) Goldthwaite testified that she first noticed her son's violent behavior when he was nine-years-old, and that she constantly tried to get

help for him from the State of Massachusetts. (T-PP 187; 216) However, she also claimed that she never saw Gudinas act aggressively toward her, his father (or stepfather), or anyone else. Goldthwaite also testified that Gudinas knew the woman he tried to rape in Massachusetts. (T 208-10) Finally, she offered that every time Gudinas got into trouble, he promised he would behave himself from then on. (T-PP 220-21)

The jury recommended that Gudinas be sentenced to death by a vote of 10-2. (T-PP 341) The court found three aggravating circumstances: (1) prior violent felony; (2) murder was committed during the commission of a sexual battery; and (3) the murder was especially heinous, atrocious, or cruel ("HAC"). The court found the statutory mitigator of extreme mental or emotional disturbance and twelve non-statutory mitigators.[5] (R 611-23) The court also

[5] (1) defendant had consumed cannabis and alcohol the evening of the homicide; (2) defendant has the capacity to be rehabilitated; (3) defendant's behavior at trial was acceptable; (4) defendant has an IQ of 85; (5) The defendant is religious and believes in God; (6) defendant's father dressed as a transvestite; (7) defendant suffers from personality disorders; (8) defendant was developmentally impaired as a child; (9) defendant was a caring son to his mother; (10) defendant was an abused child; (11) defendant suffered from attention deficit disorders as a child; and (12) defendant was diagnosed as sexually disturbed as a child.

sentenced Gudinas to 30 years for attempted burglary with an assault of R.S. (count I), 30 years for attempted sexual battery of R.S. (count II), and life imprisonment for each count of sexual battery of M.M. (counts III and IV). (R 611-23)

Direct Appeal

Gudinas appealed, raising twelve issues.[6] On April 10, 1997, this Court affirmed the convictions and sentence. *Gudinas v. State,* 693 So. 2d 953 (Fla. 1997), *rehearing denied*, May 20, 1997. Gudinas filed a petition for certiorari which the United States Supreme Court denied on October 20, 1997. *Gudinas v. Florida*, 522 U.S. 936 (1997).

Original Post-conviction Litigation

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[6] (1) the court erred in denying the Motion to Sever; (2) Gudinas was improperly excluded from pre-trial proceedings; (3) there was insufficient evidence to support the conviction for attempted sexual battery; (4) the court improperly denied counsel's motion to withdraw; (5) the court erred in admitting gruesome photographs; (6) the court erred in allowing impeachment by an inconsistent statement; (7) the court erred in denying a motion for mistrial; (8) the court erred in allowing the State to argue on both felony and premeditated murder; (9) the court erred by restricting the presentation of the defense; (10) in the penalty phase, the court improperly instructed the jury and denied the defense's requested instructions and the State committed reversible error in its closing argument; (11) there was insufficient error to support HAC; and (12) the court improperly weighed the aggravation and mitigation.

Gudinas filed his Motion for Postconviction Relief, pursuant to Rule 3.850 Fla. R. Crim. P., on June 5, 1998, an amended motion in July 1999, and a second amended motion on September 30, 1999, raising fifteen claims. The court held a *Huff v. State,* 622 So. 2d 982 (Fla. 1993) hearing on October 15, 1999, and granted an evidentiary hearing on several claims. The evidentiary hearing was held on December 17, 1999. The post-conviction court denied relief in a written order on March 20, 1999.

Fred Harris ("Harris"), Gudinas's first cousin, knew Gudinas all his life. (1PCR 133-34) Harris testified about ***one*** incident, when Gudinas was fourteen, where he took LSD. (1PCR 135) Harris testified that Gudinas's mother was present when Gudinas was under the influence of LSD and could have provided information about that incident. (1PCR 140) Harris only knew of the one instance of Gudinas taking LSD. Harris did not recall talking to Gudinas's trial counsel or to any investigators, nor did he recall whether Gudinas's attorneys asked him about the LSD use but would have testified about it had he been asked. (1PCR 140-42)

Ellen Evans ("Evans") is Gudinas's maternal aunt. Evans lived close to Gudinas's parents for much of Gudinas's early life. (R143-

46) She testified about his upbringing, background, and early life, including his mother's alcohol and drug use during her pregnancy. (1PCR 146-53) Evans testified that Gudinas was placed in the Department of Youth Services but was not treated by them. (1PCR 180) She testified that trial counsel had not contacted her and that she would have testified if asked. (1PCR 177)

James Upson, a clinical neuropsychologist, was retained in 1995 for Gudinas's case and testified as an expert in the field of forensic neuropsychology. (1PCR 181-82) Dr. Upson was provided with materials when he was originally hired in 1995, and, at that time, he conducted an evaluation of Gudinas. (1PCR 183) Since then, he was given additional background information for the post-conviction litigation and spoke with a clinical social worker and a neuropharmacologist. (1PCR 183-84) Dr. Upson testified that, at the time of the 1995 trial, the additional information, consultations, and additional background witnesses would have been helpful to him at trial to give more weight to his conclusions. (1PCR 184) However, Dr. Upson emphasized that the additional information did not change his opinions about Gudinas. (1PCR 185)

Specifically, Dr. Upson testified, both at the trial and the collateral proceedings, that his opinion was consistent that Gudinas has no significant cognitive dysfunction, and that he never received any significant long-term treatment for his emotional and behavioral problems. (1PCR 191) Furthermore, Dr. Upson knew that Gudinas had been subjected to "severe child abuse" and had a "disruptive childhood." (1PCR 192) Gudinas's trial counsel provided Dr. Upson with everything he asked for and that information gave Dr. Upson a good picture of Gudinas. (1PCR 192-93) Post-conviction counsel gave Dr. Upson a document reflecting alcohol abuse treatment he had not previously seen but emphasized that he was aware of Gudinas's alcohol use from the defendant. (1PCR 195)

Dr. Upson agreed with Dr. Danziger's mental status report. He emphasized that he has not seen any information from anyone who actually observed Gudinas being abused. (1PCR 197) The doctor emphasized that the selection of data upon which he relies in formulating his opinion is his responsibility, and that defense counsel does not tell him how to do his job. (1PCR 201) Dr. Upson was retained well in advance of trial and felt he had adequate time to complete his work. (1PCR 202) Specifically, Dr. Upson testified

that he took into consideration the lack of mental health treatment for Gudinas and the custodial nature of the placements within the Massachusetts Department of Youth Services, including the inadequacy of any treatment while there. Dr. Upson's professional opinion that Gudinas is emotionally disturbed was not "watered down" because of insufficient information. (1PCR 203-05)

Michael Irwin ("Irwin") and Robert Leblanc ("Leblanc") represented Gudinas in his murder case. They worked the case together in an effort to be familiar with both phases of the proceedings. (1PCR 207-208, 211-12) Irwin testified that Gudinas specifically rejected an insanity defense, but that counsel followed up on the insanity defense anyway; no expert ever "came close" to saying that Gudinas was insane. (1PCR 213-214) Given Gudinas's rejection of an insanity defense and, in light of the evidence and the statements available to law enforcement, the only theory possible for the defense was that "someone else did it." Irwin said that theory was the only one available, although it was not a strong defense much. In Irwin's estimation, any forensic evidence was potentially a double-edged sword and he did not want to bring out any more evidence of guilt. (1PCR 216)

Irwin explained that he found a potential neuropharmacologist expert, but the Orange County Attorney objected to the expert's requested retainer. Irwin was unable to find another such expert who would work for the funds available. (1PCR 217-20) Irwin testified that he was satisfied with the medical examiner's testimony at trial and emphasized that he had strategic reasons to avoid any DNA evidence. (1PCR 221)[7] Irwin testified that Gudinas's sister wanted very badly to testify. (1PCR 232) Also, Irwin testified he filed no motion to interview jurors regarding media exposure because he was unaware of any such exposure in the first place.[8]

At the time of trial, Irwin had conducted some 50 felony jury trials, observed other death penalty trials, attended at least four death penalty seminars, and had available to him the materials from the public defender seminars regarding capital defense. (1PCR 237-39) Irwin elucidated that, in reaching his strategic decision on the DNA, it was important to assess whether or not Gudinas was

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[7] As Irwin pointed out, it would have been difficult for him to withhold unfavorable DNA results since a notice of intent to participate in discovery had been filed. (1PCR 221)

[8] The trial was held in Naples, Collier County, Florida, not in Orlando, Orange County, Florida where the crime occurred.

guilty. In so doing, he considered the evidence against Gudinas, giving considerable weight to Gudinas's admissions to him. (1PCR 243-44) This influenced Irwin's decision not to seek DNA typing. Gudinas also confessed to Dr. Danziger. In Irwin's estimation, any DNA evidence could be devastating and, moreover, he knew that the State had no DNA evidence of value. (1PCR 245-246; 248) Irwin concluded that insanity was the best defense available, but Gudinas rejected it. (1PCR 248) Moreover, Dr. Danziger informed Irwin that Gudinas was the most evil person Dr. Danziger had met and commented that "I hope there aren't any other shallow graves out there." (1PCR 256) After receiving that information from Dr. Danziger, Irwin decided not to call him as a witness.

In preparing the case, Irwin attempted to verify Gudinas's use of LSD but was unable to do so. Irwin felt strongly that it would have been unwise to call Gudinas to testify about having taken LSD on the night of the murder. In any event, Gudinas's story changed throughout the course of Irwin's representation. (1PCR 259-60)

The defense team had substantial background information about Gudinas and much of it was a double-edged sword. (1PCR 261). Specifically, Gudinas had been in almost every institution in

Massachusetts, and none of those institutions had been able to help him. (1PCR 262) Irwin believed, as a practical matter, that Gudinas's history was a double-edged sword and he did not want to dwell on it. (T 262)

According to Irwin, Gudinas's inculpatory statements were consistent with the forensic evidence and there was nothing available that would support an insanity defense. (1PCR 272, 278) Moreover, a social worker would not have been of much help; much of such testimony would dwell unnecessarily on Gudinas's past. Moreover, Irwin testified that he attempted to present Gudinas's placement history in a limited fashion because none of it had done his client any good. (1PCR 288-89) Regarding Fred Harris, Irwin felt that he was a hostile witness. Irwin testified that he vigorously pursued Gudinas's background as potential mitigation and settled on the best available strategy given the facts. (1PCR 291-92)

Dr. Jonathan Lipman, a neuropharmacologist was not a medical doctor nor licensed to treat patients. (1PCR 296-99). He testified that, in his opinion, Gudinas suffers from Attention Deficit Disorder ("ADD"), which was what Dr. Upson testified about before the jury. (1PCR 304, 308). Dr. Lipman testified that drug abuse is

common among children with untreated ADD. (1PCR 315). He offered that Gudinas might have been "turned around" with treatment and that the crime might not have occurred had he been treated. (1PCR 331-32). However, Dr. Lipman admitted that he relied upon Gudinas as his main source of information and that Gudinas was not completely cooperative and would not discuss the offense. (1PCR 335).

Co-counsel LeBlanc testified that he spoke with Fred Harris and Ellen Evans, and that Fred Harris did not want to help because he was afraid of somehow being implicated in the offense. (1PCF 343-44, 346) LeBlanc testified that counsel knew significant information about Gudinas; they had the Department of Youth Services records and that, at the time of the trial, he thought that the record of placements spoke for itself. (1PCR 347, 349) Counsel had obtained background information about Gudinas and knew about his alcohol and drug use. Moreover, Gudinas's statements to LeBlanc concerning the crime were weighed in determining what direction to follow with the mental health experts. Gudinas wanted the defense theory to be that he was not there. However, based

upon what Gudinas had told his counsel, they could not ethically pursue that theory. (1PCR 351, 353, 357)

Janet Vogelsang ("Vogelsang"), a clinical social worker with a master's degree in social work, testified that psychologists are not trained to do "psychosocial assessments" and that "good" psychologists rely on social workers for those. (1PCR 378-79, 388) In her final analysis, Vogelsang testified that Gudinas has a personality disorder, was developmentally impaired or abused as a child, suffers from ADD, was a sexually disturbed child, and is "seriously emotionally disturbed." (1PCR 434-3 6)[9]

Upon this evidence, the post-conviction court denied relief and Gudinas appealed, raising multiple claims.[10] Concurrently, he filed

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[9] The testimony directly tracks the nonstatutory mitigation found by the sentencing court. (R 454-55)

[10] The claims are: (1) Gudinas was denied a full and fair evidentiary hearing: (a) the trial court erred by denying Gudinas's motions to continue; (b) the trial court erred by denying Gudinas's motion to release physical evidence; (2) the trial court erred by denying guilt phase ineffective assistance of counsel claims: (a) trial counsel was ineffective for failing to subject samples of semen and saliva to DNA testing; (b) trial counsel was ineffective for failing to adequately cross-examine two witnesses; (c) trial counsel was ineffective for failing to object to the introduction of a bloody T-shirt; (3) the trial court erred by denying penalty phase ineffective assistance of counsel claims: (a) trial counsel was ineffective for

a petition for habeas corpus, raising six issues.[11] On March 28, 2002, this Court affirmed the denial of post-conviction relief and

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failing to contemporaneously object to prosecutorial misconduct; (b) trial counsel was ineffective for failing to call Ellen Evans as a witness; (c) trial counsel was ineffective for failing to investigate Gudinas's institutional background; (d) trial counsel was ineffective for failing to present a ten-year history of drug and alcohol abuse and for failing to hire a neuropharmacologist; (e) trial counsel was ineffective for failing to hire a social worker; (f) trial counsel was ineffective for failing to present evidence of mental and emotional immaturity; (g) trial counsel was ineffective for failing to provide Dr. O'Brian with necessary testimony; (h) trial counsel was ineffective for calling Gudinas's sister to testify; (i) trial counsel was ineffective for failing to contemporaneously object to the jury instruction about the "during the commission of a felony" instruction; (j) trial counsel was ineffective for not objecting to the impermissible burden shift to Gudinas; (k) trial counsel was ineffective for failing to object to the jury instruction involving the heinous, atrocious, or cruel aggravator; (4) the trial court erred in summarily denying the claim that Rule Regulating the Florida Bar 4–3.5(d)(4) is unconstitutional; (5) the trial court erred in summarily denying the claim that Gudinas was deprived of a fair trial due to a combination of substantive and procedural errors.

[11] (1) Appellate counsel performed deficiently by failing to raise the majority of the prosecutor's improper comments during closing argument; (2) appellate counsel was ineffective for failing to raise the trial court's errors in rejecting the statutory mitigator that Gudinas's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired; (3) appellate counsel was ineffective for failing to raise the issue of the trial court's refusal to sever counts I and II from the remaining charges; (4) Florida's capital felony sentencing statute as applied is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution; (5) appellate counsel was ineffective for failing to effectively litigate the

denied the petition for habeas corpus. *Gudinas v. State,* 816 So. 2d 1095 (Fla. 2002) (*Gudinas II*), rehearing denied May 7, 2002.

On October 18, 2002, Gudinas filed a Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, pursuant to Florida Rule of Criminal Procedure 3.851, raising a *Ring v. Arizona,* 536 U.S. 584 (2002) claim. The court summarily denied the *Ring* claim on January 13, 2003. Gudinas appealed and this Court affirmed the denial of relief May 13, 2004. *Gudinas v. State,* 879 So.2d 61 (Fla. 2004), rehearing denied July 29, 2004.

On October 15, 2002, Gudinas filed his initial federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Middle District of Florida, Orlando Division. On October 26, 2004, Petitioner was granted leave to amend his petition, raising 18 issues. On September 30, 2010, the federal district court denied relief on all the issues and refused to grant a certificate of

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combination of procedural and substantive errors that deprived Gudinas of a fair trial; and (6) Gudinas's Eighth Amendment right against cruel and unusual punishment will be violated because he may be incompetent at the time of execution.

appealability ("COA"). *Gudinas v. Sec'y, Fla. Dep't of Corr*, Case No. 2:06-CV-357, 2010 WL 3835776, (M. D. Fla. Sept. 30, 2010).

Gudinas appealed the denial of his federal petition. The Eleventh Circuit Court of Appeals considered the sole issue of whether trial counsel was ineffective in the penalty phase trial. That court affirmed the denial of habeas relief on July 28, 2011. *Gudinas v. Sec'y, Fla. Dep't of Corr*, 436 Fed. Appx. 895 (11th Cir. 2011). Gudinas then filed a petition for a writ of certiorari which the United States Supreme Court denied on March 5, 2012. *Gudinas v. Florida*, 565 U.S. 1247 (2012).

On January 9, 2017, Gudinas filed his Second Successive Motion to Vacate Death Sentence based on *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) and *Hurst v. Florida,* 577 U.S. 9 (2016). The post-conviction court summarily denied the motion on March 29, 2017. Gudinas appealed and this Court affirmed the denial on January 30, 2018. *Gudinas v. State,* 235 So.3d 303 (Fla. 2018).

On May 23, 2025, Governor DeSantis signed Gudinas's death warrant. This Court as well as the trial court set scheduling orders. On May 31, 2025, Gudinas filed his third successive motion for post-conviction relief, fourth overall. (4PCR 217-43) In it he raised

three claims, and the state responded. (4PCR 250-71) Following a Case Management Hearing (4PCR 291-319), the lower court summarily denied relief. (4PCR 320-83) This appeal followed.

SUMMARY OF THE ARGUMENT

Argument I – Gudinas's successive postconviction motion, filed after his death warrant was signed, is time-barred as he has failed to show a basis for overcoming the bar. The presentation of a new doctor's report based on new testing following the review of records produced at trial and in the original postconviction proceeding does not show due diligence to overcome the bar. Moreover, the issue of Gudinas's mental health has been at issue and litigated since his trial. *See Gudinas I and Gudinas II*. More important, the basis of the claim, a new mental health opinion based on new studies/research and an expansion of *Atkins/Roper* to bar the mentally ill from execution are not a valid avenue to challenge the death sentence in this case. See *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023); *Dillbeck v. State,* 357 So. 3d 94, 100 (Fla. 2023); *Lawrence v. State*, 308 So. 3d 544 548 (Fla. 2020); *Simmons v. State*, 105 So. 3d 475, 511 (Fla. 2012); *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022); *Barwick v. Sec'y, Fla.*

Dep't of Corr., 794 F.3d 1239, 1257-59 (11th Cir. 2015) The summary denial was proper.

Argument II – The challenge to Florida Constitution's conformity clause is both time and procedurally barred since Gudinas should have raised the issue earlier, certainly within a year of the passing of the amendment in 2002. Further, the claim is without merit since this Court has repeatedly found the clause constitutional.

Argument III – This Court has found Rule 3.851(d)(2) constitutional. *Ford v. State*, 402 So. 3d 973, 977 (Fla. 2025). The claim is also time and procedurally barred since Gudinas could have raised it in one of his previous successive motions. The summary denial of relief was proper.

Argument IV – The lower court properly denied Gudinas's demand for public records from the Governor's Office relating to the clemency process, how the Governor chose Gudinas for the warrant, and the timing of his signing of this warrant where Gudinas had not previously requested the documents, as required by the rule, and the granting of such a request would violate the separation of powers.

ARGUMENT

Argument I

The summary denial of Gudinas's claim that newly discovered evidence of brain dysfunction required review of his capital sentence under an expansion of *Atkin/Roper* was proper. (restated)

Gudinas claims he is entitled to an evidentiary hearing to prove that his mental condition would support his exclusion from the death penalty should this Court, under evolving standard of decency, decide to bar the execution of the mentally ill, thereby expanding *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of the intellectually disabled) and *Roper v. Simons*, 543 U.S. 551 (2002) (barring execution of those who were under eighteen years of age at time they committed murder). This Court has previously rejected the expansion of *Atkins*/*Roper*, thereby precluding this claim on the merits. Furthermore, the claim was some 30-years after Gudinas's case became final and pointing to Dr. Eisenstein's preliminary report and a requested expansion of *Atkins*/*Roper* does not overcome the time-bar. Additionally, the issue of Gudinas's mental health was raised and rejected at trial and in the original postconviction litigation rendering the instant attempt procedurally

barred. Merely because Gudinas found a new doctor to give a more favorable opinion on the eve of his execution does not establish that there is a reasonable probability for a lesser sentence, especially where the sentencing calculus rests on the meritless claim that *Atkins/Roper* should be expanded. The lower court properly denied an evidentiary hearing and relief. This Court should affirm.

A. Proceedings Below

The lower court noted that Gudinas's mental health was raised at trial and in the original postconviction motion. It found that Gudinas failed to explain how Dr. Eisenstein's May 30, 2025, report was newly discovered evidence. The trial court determined: "[i]t is not alleged, for example, that Dr. Eisenstein's diagnosis revealed heretofore unknown objective brain trauma or that the subjective brain trauma diagnosis was not discoverable at an earlier time." (4PCR 328) Additionally, the trial court concluded that Gudinas's claim for relief was based on his desire for a reevaluation of his psychological mitigation "in light of modern science to ensure that Florida's capital punishment scheme reflects 'evolving standards of decency.'" The court found Gudinas's claim untimely in light of *Ford v. State*, 402 So. 3d 973, 983 n. 6 (Fla. 2025) where a similar

argument was rejected and found untimely. (4PCR 329)

The court also found the claim to be procedurally barred and meritless given Dr. Upson's testimony in the original postconviction litigation and the fact that Gudinas's "mental disorders and culpability were litigated" *Gudinas II*, 816 So. 2d at 1103-04, 1107. That court also found that the instant claim of a "future diagnosis of brain impairment would result in a different outcome is conclusory." (4PCR 329) Gudinas failed to allege that Dr. Eisenstein's testimony would result in new mitigation which would show a reasonable probability of a life sentence and the court cited this pleading deficiency as further support for the summary denial of relief under *Damren v. State*, 397 So. 3d 607, 610-11 (Fla. 2023). (4PCR 330) Continuing, the court reasoned that even assuming the claim was plead properly, "the fact that Dr. Eisenstein diagnosed Defendant with brain impairment does not mean that Dr. Upson was wrong. Defendant also fails to explain how a diagnosis of brain impairment would, with reasonable probability, secure him an additional mitigator and a life sentence on retrial." (4PCR 330)

Additionally, the lower court concluded that the claim was foreclosed by precedent, citing *Barwick v. State*, 361 So. 3d 785,

794 (Fla. 2023) and *Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013) where this Court rejected the contention that *Atkins*/*Roper* should be extended to preclude execution of a mentally ill person. This Court also determined that such a claim was "untimely, procedurally barred, and not cognizable as a new constitutional right," as did the lower court here. (4PCR 330-31)

Finally, the lower court rejected the argument that every death warrant case requires a second evidentiary hearing on psychological mitigation. Such a requirement was contrary to United States Supreme Court precedent and Florida law under "*Dillbeck v. Sate*, 357 So. 3d 94 (Fla. 2023) (New opinions or research predicated on previously existing data are generally not newly discovered evidence)" and Florida's conformity clause barring expansion of Supreme Court Eighth Amendment precedent citing *Lawrence v. State*, 308 So. 3d 544, 548-50 (Fla. 2020). (4PCF 331-32)

B. Standard of Review

This Court has stated: "Summary denial of a successive postconviction motion is appropriate '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.'" *Owen v. State*, 364 So. 3d 1017, 1022 (Fla. 2023)

(quoting *Bogle v. State*, 322 So. 3d 44, 46 (Fla. 2021) (alteration in original)). The Standard of review is "de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Owen*, 364 So. 3d at 1022–23. This Court has found it appropriate to "summarily dismiss claims raised in a successive postconviction motion that are untimely or procedurally barred." *Zack v. State*, 371 So. 3d 335, 344–45 (Fla. 2023). *See also Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021).

C. Argument

Gudinas asserts that Dr. Eisenstein was hired after the signing of the death warrant to evaluate his mental health. That assessment, applying modern standards, shows brain impairment and other mitigation that he was "mentally ill his entire life." (IB 9-10) He claims that under an expansion of *Atkins*/*Roper* and "evolving standards of decency" his mental health bars him from execution as "deterrence and retribution are not served with Gudinas's execution." (IB 19-20) This claim is time-barred, procedurally barred, and meritless.

1. The claim is time-bared

The successive postconviction motion was filed well beyond the one-year time limit for filing such motions under Florida Rule of Criminal Procedure 3.851(d)(2). As a result, Gudinas must show that he exercised due diligence in bringing his claim. As noted in *Hunter v. State*, 29 So. 3d 256, 267 (Fla. 2008):

> Rule 3.851 requires motions filed beyond the time limitations to specifically allege that the facts on which the claim is predicated were unknown or could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.851(d)(2)(A). Furthermore, the rule requires successive motions to articulate the reasons why a claim was not raised previously and why the evidence used in support of the claim was not previously available. Fla. R. Crim. P. 3.851(e)(2)(B), (e)(2)(C)(iv).

Gudinas's judgement and sentence were final on October 20, 1997, when the United States Supreme Court denied certiorari. *Gudinas v. Florida*, 522 U.S. 936 (1997). Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Rule 3.851 does provide an exception to the one-year limitation when 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 diligence. Fla. R. Crim. P. 3.851(d)(2).

However, the burden is on Gudinas to demonstrate that any of the evidence he references qualifies for this exception. Fla. R. Crim. P. 3.851(d)(2)(A); *See Dillbec*k, 357 So. 3d at 100. Gudinas admits that his alleged brain dysfunction and mitigation existed since childhood. (IB 19-20) Furthermore, Gudinas presented substantially the same evidence both at trial and in postconviction, demonstrating that nothing new was put forward in his motion. In fact, Dr. Eisenstein reviewed Gudinas's childhood mental health records and spoke to Gudinas's mother. This is the same witness and the same materials presented at trial and/or original postconviction case. He has not explained why this doctor could not have been presented earlier or how the information is new.

Gudinas's argument is not furthered by his assertion that he could not have brought this claim earlier because the information and understanding on when the brain matures have only recently come to be known. To the contrary, studies, reports, and cases discussing maturity, age, and the extension of *Roper* have been well known in the public domain for years. *See Morton v. State*, 995 So. 2d 233, 245–46 (Fla. 2008). This claim is clearly untimely. *See Dillbeck v. State*, 304 So. 3d 286, 288 (Fla. 2020) (rejecting newly

discovered evidence claim as untimely which was based upon retention of a new defense expert citing a revision in the Diagnostic and Statistic Manual of Mental Disorders and administration of a quantitative electroencephalogram to the defendant), *cert. denied,* 141 S. Ct. 2733 (2021). "To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence." *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008) (emphasis added) (citations omitted).

To the extent that Gudinas asserts that he could not raise the matter on direct appeal because Florida's conformity clause was not enacted or that *Atkins* and *Roper* were not issued until 2002, he certainly could have raised it within a year of 2002 as he was represented continuously by counsel. Such is evident by Gudinas raising *Ring* and *Hurst* claims once those United States Supreme Court cases were issued. *See Gudinas III,* 879 So. 2d at 61 (raising *Ring* claim); *Gudinas IV,* 235 So. 3d at 303 (raising *Hurst* claim).

Gudinas has fallen far short of establishing any diligence in bringing this claim, much less the due diligence that Rule 3.851 requires. Simply retaining a new expert under an active warrant

does not circumvent the procedural bars or constitute "newly discovered" evidence. *See Grossman v. State*, 29 So. 3d 1034, 1041 (Fla. 2010). Since there are no exceptions to the time limits of Rule 3.851 which apply in this case, the trial court's summary denial was proper. *See Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021) (holding that a motion can be "summarily denied if a timeliness exception does not apply")

2. The motion is procedurally barred.

Gudinas's mental condition at the time of the murder in this case was found as a statutory mitigator by the trial court. (RR 611-23) Gudinas also raised it in his initial postconviction motion. Gudinas could have and should have raised this Eighth Amendment challenge due to his mental condition on direct appeal. *Gordon v. State*, 350 So. 3d 25, 37 (Fla. 2022); *Johnston v. State*, 27 So. 3d 11, 26 (Fla. 2010). The lower court properly summarily denied the claim. *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021) (stating a court may summarily deny a postconviction claim which is procedurally barred, citing *Matthews v. State*, 288 So. 3d 1050, 1060 (Fla. 2019)); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (noting because the claims were purely legal claims that have been

rejected by the Florida Supreme Court, the circuit court properly summarily denied relief).

3. This Court has previously rejected similar claims seeking the expansion of *Atkins*/*Roper*.

Gudinas argues that this Court should extend the Eighth Amendment reasoning in *Atkins*, based on his long-standing mental infirmities. *Atkins*, however, is limited to claims of intellectual disability. Florida courts are prohibited from expanding *Atkins* to include other mental conditions, under the State constitution's conformity clause regarding Eighth Amendment claims. Florida courts are required to follow United States Supreme Court Eighth Amendment jurisprudence and may not expand those holdings. Fla. Const. art. 1, §17. This Court must follow *Atkins* and *Roper* and may not expand on Supreme Court precedent, which is both the floor and ceiling in Eighth Amendment jurisprudence under Florida's conformity clause; this Court may not institute a variation of it. *Lawrence v. State*, 308 So. 3d 544 548 (Fla. 2020) (discussing Florida's conformity clause regarding the Eighth Amendment). *See also Dillbeck,* 357 So. 3d at 100 (stating "categorical bar of *Atkins* that shields the intellectually disabled from execution does not

apply to individuals with other forms of mental illness or brain damage."); *Simmons*, 105 So. 3d at 511 (finding meritless claim that persons with mental illness must be treated similarly to those with intellectual disability due to reduced culpability); *Dorsey v. State*, 315 So. 3d 18, 19 (Fla. 4th DCA 2021) (refusing to expand the holdings of *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460(2012), from 17 year-olds to 21 year-olds citing Florida's state conformity clause).

Further, when the United States Supreme Court establishes a categorical rule, expanding the category violates that rule. *Barwick v. Sec'y, Fla. Dep't of Corr.,* 794 F.3d 1239, 1257-59 (11th Cir. 2015); *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022). A Florida court may not expand *Atkins* beyond intellectual disability under the state constitution. When the Supreme Court establishes a categorical rule, any expansion of that category violates that rule. *See Kearse; Barwick*. Consequently, Gudinas may not rely on his mental condition to support his *Atkins*/*Roper* expansion related claim. *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023) (rejecting claim that Atkins should be expanded to bar execution of the mentally ill); *Dillbeck v. State*, 357

So. 3d 94, 100 (stating "the categorical bar of *Atkins* that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or brain damage.")

Furthermore, this Court has repeatedly and consistently refused to expand *Atkins* to other types of mental illnesses or conditions. *See Dillbeck*, 357 So. 3d at 100; *Gordon v. State*, 350 So. 3d 25, 37 (Fla. 2022) (rejecting an argument that *Atkins* should be expanded to include schizoaffective disorder and PTSD from severe childhood abuse); *McCoy v. State*, 132 So. 3d 756, 775 (Fla. 2013) (Eighth Amendment's prohibition of cruel and unusual punishment does not require a categorical bar against the execution of persons who suffer from any form of mental illness or brain damage.).[12]

[12] *Newberry v. State*, 288 So. 3d 1040, 1050 (Fla. 2019) (rejecting an argument that *Atkins* should be expanded to include other intellectual impairments); *Muhammad v. State*, 132 So. 3d 176, 207 & n.21 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include schizophrenia and paranoia); *Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include severe brain damage and mental limitations); *Simmons v. State*, 105 So. 3d 475, 510-11 (Fla. 2012) (rejecting an argument that *Atkins* should be expanded to include mental illness and neuropsychological deficits); *Johnston v. State*, 27 So. 3d 11, 26-27 (Fla. 2010) (rejecting an argument that Atkins should be expanded to include traumatic brain injury); *Lawrence v. State*, 969 So. 2d 294, 300 n.9 (Fla. 2007) (rejecting claim that defendants with mental illness must be treated similarly

Under this Court's unbroken precedent, *Atkins* is limited to claims of intellectual disability. Gudinas' *Atkins*/*Roper* type claim based on severe mental illness is not a valid Eighth Amendment claim.

4. The claim is meritless.

Gudinas's mental health has been an issue since his trial where the trial court found the statutory mitigator of "under the influence of extreme emotional disturbance at the time of the crime" and several non-statutory mitigators. He also litigated it in his original postconviction litigation. *See Gudinas I,* 693 So. 2d at 953; *Gudinas II,* 816 So. 2d at 1095. Here, Gudinas simply presents a new expert to possibly render a more favorable opinion. While Gudinas asserts that Dr. Eisenstein has reached some conclusions (IB 24-26), he maintains that more testing/investigation is required. For the reasons stated above, that is insufficient to overcome the time and procedural bars. However, review of what was presented in

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to those with mental retardation because both conditions result in reduced culpability); *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to include paranoid schizophrenia, organic brain damage, and frontal lobe damage); *Diaz v. State*, 945 So. 2d 1136, 1151 (Fla. 2006) (mental illness not a bar to execution but can be considered as either a statutory mental mitigating circumstance or a nonstatutory mitigating circumstance).

the earlier litigation and what is suggested here established that the claim is meritless.

At trial, Gudinas called Dr. James Upson, who was accepted as an expert in clinical neuropsychology. He explained that he reviewed numerous materials covering ten years of Gudinas life starting when he was seven years old. Of the reports reviewed, "30 of which" spoke "directly to the mental status" of Gudinas and were authored by other mental health professionals. While at least 15 reports recommended Gudinas be placed in "long-term treatment" programs, Dr. Upson saw no indication that Gudinas ever received that type of treatment. The records, from a neuropsychological standpoint, indicated the existence of "significant emotional disturbances" but gave "no indication of brain impairment." Gudinas's problems have always been behavioral; he has no thought disorders. As Gudinas aged, he showed more of an "emotional disturbance." (RT-PP 54-55, 84, 88) In 1995, a few months after the murder, Dr. Upson conducted a neuropsychological assessment of Gudinas which included "administering a number of psychological instruments; interview and consultation with [Gudinas], review of the history, and then

compilation of summary statements to indicate" Gudinas's psychological condition. (RT-PP 53-54, 68) Also, Dr. Upson gave Gudinas multiple tests screening for neuropsychological and personality factors. He evaluated Gudinas's intellectual abilities and academic achievement while screening for organic brain problems and personality characteristics. (RT-PP 55-68)

Dr. Upson noted Gudinas had seven other intellectual assessments over the years, and his testing showed Gudinas had a full-scale IQ score of 85 which is in the low-average intellectual ability range. (RT-PP 56-57) The neuropsychological tests showed Gudinas displayed impulsivity, some "attention-type difficulties," and "difficulty in judgments, concentration, and higher mental processing." The tests showed that both sides of Gudinas's brain and his frontal lobe appeared to be functioning within normal limits, with no neuropsychological impairment. Again, Dr. Upson ruled out any neuropsychological impairment. (RT-PP 58-66)

With respect to personality characteristics, Gudinas had an elevated Minnesota Multiphasic Personality Inventory scale ("MMPI") which showed he had: (1) a higher degree of impulsivity; (2) sexual confusion; (3) was manipulative; (4) had sexual conflict;

and (5) had at times, bizarre ideations, but not necessarily psychotic ones. Such people will tend to be physically abusive, have the capacity and ability to be violent, and use rationalization. Individuals with Gudinas's MMPI score will show regressive tendencies and have "very strong underlying emotional difficulties." (RT-PP 66-67)

In his evaluation of Gudinas, Dr. Upson relied upon what other mental health professionals found when they evaluated Gudinas over the years. Of significance to Dr. Upson were such findings as Gudinas:

1. had "significant amount of anger, fear, anxiety" especially toward his mother;
2. had "difficulty getting along with everybody;"
3. was a constant behavior problem; he was hostile and aggressive;
4. was "severely anxious, hyper-active and destructible, non-psychotic youth of at least average intelligence;"
5. had no organic brain damage dysfunction; his academic achievement was below his intellectual abilities;
6. was impulsive, rejected authority and social norms;
7. was "severely disturbed," "extremely frightened," and impulsive;
8. "seriously disturbed and frightened impulsive youngster;" and
9. "serious psychological problems."

(RT-PP 69-75) The doctor also noted two instances of physical child abuse – father burned Gudinas's hand and made him stand on his

head as punishment. (RT-PP 76-77)

Ultimately, Dr. Upson found Gudinas was under the influence of extreme emotional disturbance at the time of the crime and that Gudinas is, "and was, at the time of the crime, a very seriously and emotionally disturbed young man." This opinion was reached based on his review of other professionals who had a consistent view of Gudinas which was provided in a "very thorough set of documents," Dr. Upson's own testing, and some of the symbolism at the time of the crime. Together, Dr. Upson opined "the crime was conducted by someone who was quite pathological in terms of psychological dysfunction." (RT-PP 77-78).

In his original postconviction litigation, Gudinas alleged ineffective assistance of counsel for not providing Dr. Upson with additional background materials and information to support mental health mitigation. He also claimed his aunt, Ellen Evans ("Evans"), had additional mitigation to offer, including a claim of sexual abuse. After the hearing, the court denied all relief which this Court affirmed on appeal. *Gudinas II,* 816 So. 3d at 1095.

Dr. Upson was hired in postconviction and reviewed the additional materials postconviction counsel provided. Dr. Upson

reviewed those new materials and agreed that they may have been helpful to have had them for the penalty phase and may have given his testimony more weight; however, even with them Dr. Upton did not change his opinion of Gudinas's condition. Again, Dr. Upson confirmed that he did not find any cognitive dysfunction, but continued to believe Gudinas was severely disturbed and reconfirmed his penalty phase testimony and conclusions. (1PCR-T 55, 57-58, 63)

With respect to the assertion that Gudinas was sexually abused, Evans testified to hearing of one instance. She responded that she knew that Gudinas has been raped in prison, "[o]nly because we talked about that when [Gudinas] was on leave once." (1PCR-T 45). Again, no relief was granted on the suggestion of sexual abuse.

A review of the above shows that counsel conducted a reasonable mitigation investigation and essentially presented what is being offered in the instant motion. Gudinas's trial attorney was entitled to rely on his expert's opinion in determining what conditions and problems Gudinas may have had. *See State v. Mullens*, 352 So. 3d 1229 (Fla. 2022); *Wyatt v. State*, 71 So. 3d 86,

110 (Fla. 2011); *Reese v. State*, 14 So. 3d 913, 917-18 (Fla. 2009). The only difference is that he has a new expert to give a "possibly more favorable" opinion based on later studies.[13] Such does not establish entitlement to relief.

In *Damren v. State*, 838 So.2d 512, 517 (Fla. 2003), this Court reviewed the defendant's recent discovery of an expert to testify about "potential brain damage" and reasoned that the finding of a new doctor "does not equate to a finding that the initial investigation was insufficient." *See Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000) (finding defense counsel's investigation of mental health mitigation was reasonable and counsel could not be declared incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert."); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir.1995) (holding that defense counsel gathered sufficient evidence to make a reasonable tactical decision not to conduct further investigations into his client's mental health

[13] Gudinas asserts that if he were granted a stay of execution, Dr. Eisenstein could pursue brain imaging and request further analysis. For the reasons stated above, any testing at this point in time is time-barred and would not lead to a colorable claim given the binding precedent that *Atkins*/*Roper* claims are not cognizable. *Carroll v. State*, 114 So. 3d 883, 886 (Fla. 2013)

when psychiatric experts interviewed the defendant for more than twenty hours and informed defense counsel that they could not find any basis for a mental defense); *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), *modified on other grounds*, 833 F.2d 250 (11th Cir. 1987). The lower court's summary denial of relief was proper, especially in light of Gudinas's assertion that he needed an evidentiary hearing to revisit mitigation in hopes this Court would expand *Atkins* and *Roper* to bar execution of the mentally ill. This Court should affirm the denial of postconviction relief.

Argument II

Florida's conformity clause is constitutional. (restated)

Here, Gudinas claims that Florida is withdrawing from its duty to interpret the United States Constitution in a manner to protect

its citizens and litigants. Further, he argues that the conformity clause of the Florida constitution, requiring the Florida Supreme Court's interpretation of cruel and unusual punishment to conform to the United States Supreme Court's Eighth Amendment jurisprudence, is unconstitutional in its application, resulting in violations of Gudinas's rights under the Eighth and Fourteenth Amendments and of due process. He also asserts that this Court's strict adherence to it has proven to be unconstitutional in its application. Gudinas not only fails to give examples of how the conformity clause is unconstitutional, but he cites no precedent supporting his claim. This Court has rejected similar claims and Gudinas has not offered a basis for this Court to deviate from its well-reasoned precedent. *See Wells v. State*, 364 So. 3d 1005, 1016 (Fla. 2023); *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (noting the court was bound by the "conformity clause of the Florida Constitution to construe the state court prohibition against cruel and unusual punishment consistently with the United States Supreme Court); *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015) . See also Fla. Const. art. I, § 17. This Court should affirm the summary denial of relief.

A. Proceedings Below.

In denying the claim, the trial court found that its analysis and case law summarily denying Claim 1 applied equally to its analysis in denying the constitutional challenge to the conformity clause and that this Court had rejected other challenges to the conformity clause. (4PCR 332) The court also determined that the claim "should have been raised on appeal or in the initial Rule 3.851 motion." (4PCR 332-33)

B. Standard of Review.

Pure questions of law are reviewed de novo. *See State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review.")

C. Argument.

The State relies on and incorporates here its analysis presented in Argument I supporting its position that the expansion of *Atkins*/*Rope*r is not appropriate under United States Supreme Court precedent. Here, Gudinas fails to show how this Court's reliance on Florida's conformity clause violates his federal

constitutional rights. Nor could he—the conformity clause dictates how Florida courts interpret Florida's state constitutional protection against cruel and unusual punishments; it says nothing about how Florida courts interpret federal constitutional rights such as the Eighth Amendment. But Gudinas isn't making an argument about his state constitutional rights, he's raising an Eighth Amendment claim. The conformity clause simply doesn't affect his claim, so this argument fails.

Nothing in the Eighth Amendment forces state courts to expand the Supreme Court's Eighth Amendment jurisprudence into areas where the Supreme Court has not ventured. Simply because other states have opted to allow their courts to expand the definition of cruel or unusual punishment does not make Florida's choice to do otherwise unconstitutional.

Gudinas does not establish how this Court's adoption of the Supreme Court's Eighth Amendment jurisprudence violates his rights in any way. What is more, lower courts are required to follow the Supreme Court's precedents. The United States Constitution mandates that "the Laws of the United States . . . shall be the supreme Law of the Land" that judges in every state are bound by.

See U.S. Const. art. 6. Likewise, the Court has long acknowledged that lower courts are bound to adhere to its precedent. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("Needless to say, only this Court may overrule one of its precedents."); *see also Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts."). It is absurd to suggest that any lower court bound to the Supreme Court's interpretation of the Eighth Amendment by a conformity clause could be unconstitutional. It simply cannot violate the Eighth Amendment to refuse to expand the Supreme Court's Eighth Amendment jurisprudence. This issue is plainly meritless and Gudinas has failed to offer a basis for this Court to revisit its precedent.

Finally, Gudinas takes issue with the lower court's

determination that he should have raised this claim challenging the conformity clause either on direct appeal or in the initial postconviction motion. As noted earlier, the information about his mental and emotional maturity as well as his mental conditions were brought out both at the trial and during the postconviction litigation. As he concedes, this clause was in place between 1998 and 2002 so he could have amended his initial motion to include it. Further, it was reinstated in 2002 after this Court struck the original ballot measure. Gudinas could have raised this claim in a successive motion for post-conviction relief after the 2002 voter approval. Consequently, it is time-barred as the lower court found.

This Court should affirm the denial of relief.

Argument III

This Court has previously rejected all of Gudinas's post-warrant federal and state constitutional challenges to Rule 3.851(d)(2) (restated).

Gudinas claims that Rule 3.851(d)(2) is unconstitutional in the post-death-warrant context because applying a procedural bar in that context violates: (1) the Due Process Clause of the Fourteenth Amendment; (2) the Eighth Amendment right to a narrowly tailored individualized sentencing; (3) Sixth Amendment right to effective

assistance of counsel; and (4) the Florida constitutional rights to due process, freedom from cruel and unusual punishment, and access to the courts. He asks this Court to not apply Rule 3.851 time-limits and bars to a capital defendant under a death warrant. In denying the claim, the lower court found Gudinas "could have and should have raised this argument previously" and that this Court has previously and repeatedly rejected this claim. (4PCR 334) Such a constitutional challenge "is without any legal support." *Ford v. State*, 402 So. 3d 973, 977 (Fla. 2025), *cert. denied*, 145 S. Ct. 1161 (2025). This Court should affirm.

A. Proceedings Below.

After hearing argument on Gudinas's claim that once a death warrant is signed the limitations placed on successive postconviction motions renders Rule 3.851(d)(2) unconstitutional under the Florida and United States constitutions (2PCR 235-41), the lower court found Gudinas "could have and should have raised this argument previously" and that this Court previously rejected the claim. (4PCR 334)

B. Standard of Review

Pure questions of law are reviewed de novo. *See Glatzmayer*,

789 So. 2d at 301 n. 7.

C. Argument.

Gudinas's successive motion is time and procedurally barred and meritless.

1. Gudinas's claim is both time and procedurally barred.

Gudinas's case became final for postconviction litigation on October 20, 1997, with the denial of certiorari following affirmance of his direct appeal. *See Gudinas v. Florida*, 522 U.S. 936 (1997). Gudinas argues that he could not have previously raised this challenge prior to the signing of a death warrant because it would have been premature and there was no way for him to know if he would ever have one signed for him. While he later concedes that he may have been able to raise the claim earlier, he claims he should not be penalized now for raising it when the issue is truly ripe. His explanation for not raising it earlier fails and he has not met any of Rule 3.852(d)(2) pleading requirements for overcoming the time bar.

The issue is also procedurally barred as the constitutional challenge is a matter which could have been raised in an earlier postconviction motion, at a minimum when he filed his two prior successive postconviction motions. Again, Gudinas has not met any

of the three methods of overcoming the bar under Rule 3.851(d)(2). Furthermore, Gudinas knew he was under a sentence of death and at some point a warrant could be issued. By at least October 4, 2013, Gudinas was aware he had completed his direct appeal, initial state postconviction, and his federal habeas corpus, thus rendering him "death eligible" under section 922.052(2)(a), Fla. Stat. Yet he waited until a death warrant was actually signed to raise this constitutional challenge.

2. This Court has previously rejected Gudinas's constitutional challenges to Rule 3.851(d)(2) and he has not provided a basis to revisit that conclusion.

Gudinas has failed to show that Rule 3.852(d)(2) is unconstitutional under either the Federal or Florida constitutions. In *Ford*, this Court addressed the same constitutional challenges raised here. In *Ford*, this Court reasoned "[b]y asking this Court to find that this subdivision [Rule 3.851(d)(2)] is inapplicable to defendants under an active death warrant, Ford is asking this Court to allow defendants upon the scheduling of an execution date to be permitted to litigate anew any claim that was (and likely those that should have been) raised previously and to receive a ruling on the merits of those claims. Ford's position is without any legal

support." *Ford*, 402 So. 3d at 977. Due process "requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Barwick v. State*, 361 So. 3d 785, 790 (Fla. 2023) (quoting *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016)). Gudinas was provided with both notice and an opportunity to be heard in this case. Gudinas's counsel filed a third successive postconviction motion challenging the instant conviction and death sentence. A Case Management Conference/*Huff*[14] Hearing was held on June 2, 2025, where additional argument was permitted. See *Barwick*, 361 So. 3d at 790 (where Barwick failed to identify any matter on which he was denied notice or an opportunity to be heard before his postconviction motion was summarily denied by the circuit court). Gudinas was afforded his due process rights under the Fourteenth Amendment and the Florida Constitution. He has failed to establish a violation of those rights. *See e.g. McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (rejecting capital defendant's successive pleading, noting the importance of finality and the heavy burden that successive collateral review places on the system).

Furthermore, the victims' family members have a

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

constitutional right for the proceedings to be "free from unreasonable delay," and they have the right "to a prompt and final conclusion of" his "postjudgment proceedings." Art. 1 §16(b)(10), Fla. Const. These rights are to be "protected by law in a manner no less vigorous than the protections afforded to criminal defendants." Art. 1 § 16(b), Fla. Const. The granting of additional time to investigate a 30-year-old conviction and sentence or to relitigate claims previously raised and rejected will surely violate the victims' rights. Merely because a death warrant has been signed should not allow a capital defendant to reinvestigate and relitigate time-barred, procedurally barred, and meritless claims. Warrant litigation is not a wholesale invitation for death row defendants to reraise previously adjudicated claims or to raise frivolous or untimely claims.

The signing of a death warrant does not mean that the rules of criminal procedure are no longer applicable. By the same token, effective counsel is not transformed into ineffective counsel just by following the rules of criminal procedure applicable to successive postconviction proceedings. "It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim." *Dillbeck v. State*, 357 So. 3d 94, 101 (Fla. 2023) (quoting *Mungin v.*

State, 320 So. 3d 624, 626 (Fla. 2020)). This is true even after a death warrant is signed. *Id.*; *see also Barwick*, 361 So. 3d at 795 (rejecting argument that procedural bars do not apply to claims of categorical exemption from execution); *see also Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012) (rejecting an argument that a method-of execution claim is not ripe until a death warrant is signed). Furthermore, in the capital context, "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either a trial or appeal." *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). Any right Gudinas has to collaterally challenge his conviction and sentence comes from Rule 3.851, not the United States Constitution.

The balance of Gudinas's challenges to Rule 3.851(d)(2) were rejected by this Court in *Ford*, when the capital defendant was under an active death warrant. This Court addressed whether Rule 3.851(d)(2) denied the defendant: (1) access to the courts; (2) the right to counsel; and (3) the right to be free from cruel and unusual punishment. *Ford*, 402 So. 3d at 978. This Court found precluding a capital defendant from re-litigating "issues now does not violate

his access to the courts to litigate valid claims in accordance with the procedural rules of this state." *Id.* Merely because a capital defendant "cannot relitigate claims that have already been raised does not deprive him of the right to counsel, who was free to raise appropriate claims." *Id.* This Court found that the application of procedural bars following the Governor's signing of a death warrant does not prevent the defendant "from attempting to show that his case is not among the most aggravated and least mitigated at the appropriate time … and through the appropriate channels" and does not deprive a capital defendant "of an individualized sentencing or otherwise violate the Eighth Amendment or article 1, section 17 of the Florida Constitution." *Id.* Gudinas, like Ford, cannot show that Rule 3.851(d)(2) was unconstitutionally applied to a successive postconviction motion. *Id.*

Likewise, Rule 3.851(d)(2) is not unconstitutional under the Florida constitution. Florida's constitution provides that "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const. Gudinas had access to the Circuit Court in these postconviction proceedings; the court heard argument on his

request for public records and held a *Huff* hearing on his third successive postconviction motion where he argued for an evidentiary hearing and relief. The Rule and the schedule provided for the timely redress of Gudinas's claims. Rule 3.851(d)(2) is constitutional and Gudinas failed to prove otherwise. *See Ford*, 402 So. 3d at 978; *Mitchell v. Moore*, 786 So. 2d 521, 525 (Fla. 2001) (citing *Lewis v. Casey*, 518 U.S. 343, 355 (1996)) (noting "[s]tates must only provide a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement."). Finally, as Rule 3.851(d)(2) passes constitutional muster, so would Rule 3.851(e) if Gudinas had fully challenged and argued that issue. This Court should affirm.

Argument IV

The trial court properly denied Gudinas's request for public records from the Governor's Office related to clemency and how a capital defendant is selected for a death warrant. (restated)

Gudinas asserts that he should have been provided public records from the Governor's Office related to the clemency process and how the Governor selected Gudinas for a warrant. Following a hearing on Gudinas's demand, the trial court denied it citing four

grounds. (4PCR 188-90) A review of that reasoning comports with this Court's binding precedent. *Jimenez v. State*, 265 So. 3d 462, 472 (Fla. 2018); *Chavez v. State*, 132 So. 3d 826, 830-31 (Fla. 2014). This Court should affirm that denial.

A. Proceedings below.

Gudinas's public records demand sought records from the Office of the Governor under both Rule 3.852(h)(3) and 3.852(i). Rule 3.852(h)(3) permits a capital defendant, within ten days after a death warrant is signed, to request records from those persons and agencies from whom records were previously requested. Rule 3.852(i)(1) provides that collateral counsel may obtain public records "in addition to those provided under subdivisions (e), (f), (g), and (h) of this rule" if counsel files an affidavit in the trial court which:

> (A) attests that collateral counsel has made a timely and diligent search of the records repository; and
>
> (B) identifies with specificity those public records not at the records repository; and
>
> (C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and

(D) shall be served in accord with subdivision (c)(l) of this rule.

As the trial court found, Gudinas failed to satisfy either provision. The trial court concluded that: (1) the records were confidential and exempt from disclosure; (2) Gudinas offered nothing to suggest any violation of the law by the Governor; (3) the demand was overly broad, unduly burdensome, and not reasonably calculated to lead to a colorable claim; and (4) barred under Rule 3.852(h)(3) as Gudinas had not sought records from the Governor previously. (4PCR 188-90)

B. Standard of Review.

It is well settled that the denial of public records requests is reviewed for an abuse of discretion. *See Tanzi v. State*, No. SC2025-0371, 2025 WL 971568, at *2 (Fla. Apr. 1, 2025); *Cole v. State*, 392 So. 3d 1054, 1065 (Fla. 2024); *Muhammad v. State*, 132 So. 3d 176, 200 (Fla. 2013); *Dennis v. State*, 109 So. 3d 680, 698 (Fla. 2012). Further, "[d]iscretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *State v. Coney*, 845 So. 2d

120, 137 (Fla. 2003). The capital public records procedure under Florida Rule of Criminal Procedure 3.852 "is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief." *Valle v. State*, 70 So. 3d 530, 549 (Fla. 2011). *See also*, *Glock v. Moore*, 776 So.2d 243, 253 (Fla.2001). Post-warrant demands must "show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed." *Cole*, 392 So. 3d at 1066 (quoting *Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019)).

C. Argument.

Gudinas is not entitled to the records since they are exempt from disclosure under Florida law and the Rules of Executive Clemency. Section 14.28, Florida Statutes (2024) provides that "[a]ll records developed or received by any state entity pursuant to a Board of Executive Clemency investigation shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. l of the State Constitution." §14.28, Fla. Stat. These records may only "be released upon the approval of the Governor." *Id.* The Rules of Executive Clemency also provide that "***all records and documents***

generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection[.]" Rule 16, Rules of Executive Clemency (emphasis added). Recognizing this rule in *Chavez v. State*, 132 So. 3d 826, 830-31 (Fla. 2014), this Court found Rule 16 protects "***all records in the clemency process*** [as] confidential[,]" even non-investigatory records. (emphasis added). Thus, all clemency records that may be in the Governor's possession, which encompasses all of Gudinas's demand, would only exist if they were created as part of the Governor's consideration of whether to grant clemency or to sign a death warrant.

Under Rule 16, Rules of Executive Clemency, only the Governor "has the discretion to allow such records and documents to be inspected or copied." No individual or branch of government may disclose or order the production of these records. This Court held in *Parole Commission v. Lockett*, 620 So. 2d 153, 157-58 (Fla. 1993) that "the clemency investigative files and reports produced by the Parole Commission on behalf of the Governor and Cabinet relating to the granting of executive clemency are subject solely to the Rules of Executive Clemency[,]" and a "trial judge's order [to

disclose clemency records] would effectively overrule the rules of executive clemency, resulting in a violation of the separation of powers doctrine." Gudinas has not pointed to any case where clemency records were required to be produced. As this Court determined "[t]he clemency process in Florida derives solely from the Florida Constitution and we have recognized that the people of the State of Florida have vested 'sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace.'" *See Carroll v. State*, 114 So. 3d 883, 888 (Fla. 2013) (quoting *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977)). The trial court properly denied the demand as the entirety of the demand was for clemency records.

The lower court also found that the demand was "overly broad, unduly burdensome, and not related to a colorable claim for postconviction relief." (4PCR 189) It is well-settled that, to be entitled to records requested under Fla. R. Crim. P. 3.852(i), a defendant must "show how the requested records relate to a colorable claim for postconviction relief." *Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019); *Chavez*, 132 So. 3d at 829 (Fla. 2014) ("a defendant bears the burden of demonstrating that the records

sought relate to a colorable claim for postconviction relief.") Rule 3.852(i)(2)(c) expressly prohibits "overly broad or unduly burdensome" requests. The same requirements also apply to records sought under Rule 3.852(h)(3). *See Muhammad v. State*, 132 So. 3d 176, 201 (Fla. 2013) (noting "requests for records under rule 3.852(h)(3) may be denied as far exceeding the scope of subsection (h)(3) if they are overbroad, of questionable relevance, and unlikely to lead to discoverable evidence"); *see also Rutherford v. State*, 926 So. 2d 1100, 1117 (Fla. 2006) (affirming the denial of records requested under rule 3.852(h)(3) because the records were not related to a colorable claim for postconviction relief). Gudinas did not offer how his demand, which did not set a finite time limitation until the hearing on the demand, was not overly broad. In fact, the demand was overly broad and unduly burdensome because it sought a significant number of public records spanning nine separate categories and at least four different topics. (4PCR 139-41) This Court has held that Rule 3.852 does not permit similar substantial requests because they are overly broad and unduly burdensome. *See Mills v. State*, 786 So. 2d 547, 551-52 (Fla. 2001); *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000) (reasoning that

Rule 3.852 is not intended to authorize "a fishing expedition for records unrelated to a colorable claim for postconviction relief"); *Glock v. Moore*, 776 So. 2d 243, 253-54 (Fla. 2001).

Also, Gudinas's demand did not disclose a colorable claim for relief as it was addressed to the clemency process. The demand expressly stated that the records were sought in hopes of discovering evidence to investigate a potential constitutional challenge to Florida's clemency process.[15] This Court routinely finds such legal challenges rooted in clemency do not relate to a colorable claim. *Muhammad v. State*, 132 So. 3d 176, 203-04 (Fla. 2013) (finding "records would not relate to a colorable claim because we have held many times that claims challenging clemency proceedings are meritless"); *see also Pardo v. State*, 108 So. 3d 558, 568 (Fla. 2012) ("[W]e have consistently recognized that clemency is an

[15] Gudinas's demand alleged the materials were relevant or calculated to lead to evidence "Florida's clemency process, and the manner in which the Governor determined that Gudinas should receive a death warrant … was arbitrary and capricious" in violation of the Eighth Amendment. (4PCR 142-43) The other potential ground in the demand amounted to an inquiry into challenging the Governor's decision to deny clemency and sign the death warrant in that it is alleged that the records "***may contain***, or through further investigation ***may lead*** to the discovery of, evidence that Gudinas's death warrant was submitted in violation" of his constitutional

executive function and that, in accordance with the doctrine of separation of powers, we will not generally second-guess the executive's determination that clemency is not warranted."); *Valle v. Stale*, 70 So. 3d 530, 551-52 (Fla. 2011).

Likewise, to the extent Gudinas is seeking records from the Governor addressed to his selection of Gudinas for a death warrant, when he chose to sign that warrant, and whether the Governor considered which capital attorney was representing the defendant, this Court has recognized that it has always proceeded carefully in addressing challenges to the clemency process/records production as they trigger separation of powers concerns. *See Valle*, 70 So. 3d at 552 (citing *Johnston v. State*, 27 So.3d 11, 26 (Fla. 2010) (declining "to depart from the Court's precedent, based on the doctrine of separation of powers, in which we have held that it is not our prerogative to second-guess the executive on matters of clemency in capital cases."); *Marek v. State*, 8 So. 3d 1123, 1129 (Fla. 2009). *See also, In re Advisory Opinion of the Governor*, 334 So. 2d 561, 562–63 (Fla. 1976) (recognizing "[t]his Court has always viewed the pardon powers expressed in the Constitution as being

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rights. (4PCR 141) (emphasis added)

peculiarly within the domain of the executive branch of government."). Further, this Court has consistently held that the Governor's absolute discretion whether to sign a death warrant does not violate the Florida or United States Constitutions. *See Gore v. State*, 91 So. 3d 769, 780 (Fla. 2012) (rejecting constitutional challenge to clemency process and warrant selection because of Governor's absolute discretion to sign death warrants); *Ferguson v. State*, 101 So. 3d 362, 366 (Fla. 2012) (same). A demand seeking to challenge the constitutionality of Florida's clemency process and second-guessing the Governor's absolute discretion to sign a death warrant cannot relate to a colorable claim for postconviction relief. There is no basis to depart from such settled precedent. The records were denied properly.

Finally, Gudinas failed to show that he had requested public records from the Governor's Office previously, thus, under Rule 3.852(h)(3), he was not entitled to demand records after the death warrant was signed. (4PCR 190). *See Rutherford*, 926 So. 2d at 1117 (affirming denial of records requested under rule 3.852(h)(3) because no prior requests were made); *Sims*, 753 So. 2d at 70 ("The use [in Rule 3.852(h)(3)] of the past tense and such words and

phrases as 'requested,' 'previously,' 'received,' 'produced,' 'previous request,' and 'produced previously' are not happenstance."); *Jimenez*, 265 So. 3d at 472 (noting plain language of Rule 3.852(h)(3) limits requests to persons or agencies from which collateral counsel sought records previously). Gudinas failed to make that showing. His records request was denied properly. This Court should affirm.

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should affirm the denial of relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June 2025, I electronically filed the foregoing with the Clerk of the Florida Supreme Court using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Ali Andrew Shakoor, Assistant Capital Collateral Regional Counsel-Middle, 12973 N Telecom Pkwy, Temple Terrace, FL 33637-0907 shakoor@ccmr.state.fl.us; green@ccmr.state.fl.us; Adrienne Joy Shepherd, Assistant Capital Collateral Regional Counsel-Middle, 12973 N Telecom Pkwy, Temple Terrace, FL 33637-0907, shepherd@ccmr.state.fl.us; William Jay, Assistant State Attorney, Office of the State Attorney, Ninth Judicial Circuit, 415 North Orange Avenue Orlando, FL 32801, WJay@sao9.org; Kenneth Nunnelley, Assistant State Attorney, Fifth Judicial Circuit at Knunnelley@sao5.org; and the Florida Supreme Court, Kendall Canova, Capital Appeals Clerk, 500 South Duval Street,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Answer Brief is 14-point Bookman Old Style, in compliance with Rule 9.045, Fla. R. App. P. and Rule 9.210(a)(2)(c) Fla. R. App. P. I further certify that the document contains 15,489 words from the Preliminary Statement to the Conclusion.

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