No. 22-7424

IN THE

Supreme Court of the United States

DARRYL BRYAN BARWICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY TO BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR WEDNESDAY, MAY 3, 2023, AT 6:00 P.M.

KARIN L. MOORE
Counsel of Record
DREW A. SENA
Office of the Capital Collateral Regional Counsel—North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
karin.moore@ccrc-north.org
drew.sena@ccrc-north.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

ARGUMENT

Respondent's Brief in Opposition (hereinafter "BIO") hurls accusations at Petitioner while misrepresenting the questions presented by his petition. This Court should not allow Respondent to obfuscate the important constitutional issues before it. Certiorari review is appropriate here.

I. THE CONFORMITY CLAUSE

a. Respondent has fundamentally mischaracterized Mr. Barwick's conformity clause argument

Rather than engage with the merits of Mr. Barwick's claim that Florida's use of its conformity clause to opt out of critical Eighth Amendment analysis—including the evolving standards of decency analysis espoused by this Court—is unconstitutional, Respondents distort the claim in an attempt to manufacture a straw man argument.

Respondents wish this Court to believe that Mr. Barwick is asking it to "force[] state courts to…expand this Court's Eighth Amendment jurisprudence into areas where this Court has not." BIO at 26. But this is untrue. Mr. Barwick has repeatedly made clear that the issue before this Court is not whether a Florida *must* extend protections that this Court has not, but whether Florida can blanketly opt out of any and all consideration of evolving standards of decency in violation of this Court's longstanding Eighth Amendment jurisprudence. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Hall v. Florida*, 572 U.S. 701, 708 (2014).

Mr. Barwick was perfectly clear on this point. *See* Petition at 14 ("Florida does not merely treat this Court's holdings as both the 'floor' and 'ceiling' of protections…it

also falls below the 'floor' established by this Court's jurisprudence by failing to adhere to this Court's minimum prescribed standards for evaluating the applicability of Eighth Amendment protections"); *id.* at 22 ("although the federal constitution does not *require* a state court to offer more protection in a particular case than this Court's jurisprudence has established, a state cannot *prohibit* itself wholesale from independently considering evolving standards of decency.") (emphases in original); *see also id.* at 24-25 ("Florida is not simply declining to extend particular protections" but rather "wholly ignor[ing] legitimate Eighth Amendment claims."). Respondent's numerous assertions that Mr. Barwick is arguing state courts *must* categorically extend greater protections[1] are intellectually dishonest and should not be credited.

This alone makes Respondent's contention that "this Court is often prompted to remind lower courts that they are bound to adhere to its jurisprudence[,]" BIO at 26, unhelpful to Respondent.[2] Even more unhelpful is the fact that the cases cited by Respondent are taken out of context, and simply make clear that this Court will not *sub silentio* overrule its own precedent or be overruled by lower courts. As nothing in

[1] *See, e.g.,* BIO at 19-20 ("It does not appear any court has ever held the Eighth Amendment…requires state courts to expand the exemptions recognized by this Court"); *id.* at 21 ("This Court should not decide whether the Eighth Amendment requires state courts bound by a conformity clause to extend exemption-from-execution categories beyond this Court's holdings"); *id.* at 21-22 ("The issue of whether the Eighth Amendment requires states bound by a conformity clause to extend exemption-from-execution claims beyond this Court's holding"); *id.* at 26 ("Nothing in the Eighth Amendment forces state courts to…expand this Court's Eighth Amendment jurisprudence into areas where this Court has not"); *id.* at 27 ("It simply cannot violate the Eighth Amendment to refuse to expand this Court's Eighth Amendment exemption-from-execution categories in violation of the rules this Court issued").
[2] In fact, this is akin to a concession to Mr. Barwick's argument that this Court is authorized to intervene in this case. *See* Petition at 24-26 (arguing that this Court should intervene to bring Florida's actions in line with its Eighth Amendment jurisprudence).

Mr. Barwick's conformity clause argument has insinuated that this has occurred, Respondent's argument warrants no attention.

b. Respondent's contention of dilatoriness is baseless

Respondent lobs accusations that Mr. Barwick has been dilatory. *See, e.g.*, BIO at 18-19 (characterizing certiorari as "a penultimate attempt to deprive his victims of justice" and Mr. Barwick's claims as "long-deferred"); *id*. at 20 (characterizing Mr. Barwick's conformity clause issue as "a delay tactic" that "should not be rewarded"). These contentions are not in good faith. It was *Respondent* who brought up the conformity clause in response to Mr. Barwick's state-court claim that current standards of decency merited his exemption from execution. *See* PCR3. 586, 601-02. At Respondent's behest, and over Mr. Barwick's strong objection in briefing, the Florida Supreme Court applied the conformity clause to foreclose relief to Mr. Barwick without any consideration of his arguments regarding evolving standards of decency. Petition App. A at 18-19, 23-24. The Florida Supreme Court's opinion was released on the afternoon of April 28, 2023. Three days later, Mr. Barwick filed the underlying petition for writ of certiorari. The idea that he was dilatory in raising a federal question that did not ripen in his case until five days before his scheduled execution defies belief.

c. Respondent's portrayal of this claim as "uncertworthy" further demonstrates why this Court should intervene

Respondent portrays Mr. Barwick's conformity clause issue as "uncertworthy" because it "presents no unsettled, divisive issue of federal law[.]" BIO at 19.

Respondent brazenly claims: "It does not appear that any court has ever held the Eighth Amendment precludes conformity clauses and requires state courts to expand the exemptions recognized by this Court." *Id*. at 19-20. This not only mischaracterizes the nature of Mr. Barwick's conformity clause issue, but also attempts to use the egregiousness of Florida's actions as insulation from review.

First, as Mr. Barwick expressly stated in his petition for writ of certiorari and above, *supra*, at 1-2, the conformity clause issue he has presented in no way claims that state courts are *required* to extend protections not mandated by this Court.

Second, Respondent's argument that it is "absurd to suggest" that a lower court could extend Eighth Amendment protections flies in the face of this Court's previous jurisprudence. *Roper* itself began with a successive state post-conviction motion arguing for an extension of *Atkins*. *Roper v. Simmons*, 543 U.S. 551, 559 (2005) (noting that after Simmons was denied federal habeas relief, he "filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed."). The Missouri Supreme Court, conducting a prototypical evolving standards of decency analysis, concluded that—notwithstanding then-existing United States Supreme Court precedent drawing the line of categorical exemption at those who were under 16 at the time of their crimes—current standards of decency justified extending the line to 18. This Court agreed and affirmed.

To the extent Respondent's suggestion of absurdity is based on Florida's conformity clause, this underscores, rather than lessens, the need for this Court's

review. That state courts must have room to expand constitutional protections is a central feature of our federalist system. Florida—while not required under the federal constitution to extend protections this Court has not recognized—is still bound by the Eighth Amendment's mandate that courts of first impression at least consider evolving standards of decency when faced with Eighth Amendment claims. Florida's unconstitutional use of its Eighth Amendment conformity clause to wholly opt out of evolving standards of decency analyses (such as the one Missouri conducted in *Roper*) denies vital constitutional protections to death-sentenced individuals, such as Mr. Barwick, and will continue to do so without this Court's intervention.

Third, Respondent urges this Court not to review Mr. Barwick's conformity clause issue because "it does not have the benefit of a deep conflict in the lower courts." BIO at 21. But as Respondent admitted below, Florida is an outlier in its use of the Eighth Amendment conformity clause. *See* PCR3. 601-02. In fact, Florida is the *only* state with a sweeping constitutional provision of this kind. There can be no circuit split when Florida is the only state in which this issue will arise. Further, the Florida Supreme Court—whose precedent binds all other courts in the state—has made clear it is constrained by the Eighth Amendment conformity clause. This means there cannot only be no "deep conflict" in the lower courts, there can be no conflict at all. Thus, absent this Court's intervention, there is no judicial mechanism by which this unconstitutionality can be remedied. It would be Kafkaesque for Florida to evade this Court's review by virtue of the unique harm it effectuates.

Finally, Respondent's allegation that this Court should decline to review the conformity clause issue because "[a]ny decision from this Court invalidating Florida's conformity clause would not be retroactive[,]" BIO at 23, is a red herring. Many of this Court's seminal decisions involving Eighth Amendment protections or the unconstitutionality of a state punishment practice involved certiorari and an ultimate grant of relief on the underlying constitutional merits, with no discussion of retroactivity. *See generally, e.g.*, *Hurst v. Florida*, 577 U.S. 92 (2016) (finding Florida's death penalty scheme unconstitutional without any discussion of retroactivity); *Hall v. Florida*, 572 U.S. 701 (2014) (finding Florida's practice violative of the Eighth Amendment without any discussion of retroactivity). It is within this Court's discretion to review the constitutionality of Florida's use of the conformity clause, regardless of whether it makes a determination regarding retroactivity. Further, Mr. Barwick's case is the vehicle in which the novel conformity clause issue comes before this Court. Whatever decision this Court would render on certiorari review would apply to Mr. Barwick, and retroactivity determinations would only apply to future litigants. *See Teague v. Lane*, 489 U.S. 288, 315 (1989).

II. ROPER

a. There now exists an established scientific consensus that *Roper*'s protections should equally apply to late adolescents under age 21

Respondent does not contest Mr. Barwick's argument that the August 2022 resolution adopted by the APA established a scientific consensus against the late-adolescent death penalty; nor does it dispute the science behind the APA's conclusion

that late adolescents are neurobiologically indistinguishable from juveniles. Instead, Respondent downplays the significance of the APA's conclusion and claims that "[t]hings have not sufficiently changed since *Roper* to warrant overruling it." BIO at 29. This statement ignores the evidence showing that, in the eighteen years since *Roper* was decided in 2005, society has evolved to the point that standards of decency now require shifting the line of death eligibility from 18 to 21.

For example, in the past several years, states have begun passing legislation restricting those under 21 from engaging in activities that frequently lead to "highly stressful and extremely arousing circumstances," including "operating a fireworks display" or "to obtain a license to carry a concealed handgun." PCR3. 428; *see also, e.g.*, *National Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1320 (11th Cir. 2023) (upholding state law restricting individuals under 21 from purchasing firearms). This is consistent with the neurological and psychological research showing that "during emotionally arousing situations, [the] late adolescent class responds more like younger adolescents than like adults," but "show cognitive capacity similar to adults when not under pressure or heightened emotional arousal." PCR3. 427.

Rather than contesting the APA's scientific analysis, Respondent attempts to downplay its conclusions because "[t]he views of the scientific and medical community" are improper sources for this Court to draw from in determining the contours of the Eighth Amendment. But this ignores the many cases where this Court has referred to the APA's expertise in answering complex psychological questions. *See* Petition at 29-30 (collecting cases where this Court has cited the APA's *amicus*

briefs). Respondent's inability to squarely engage with the merits of Mr. Barwick's claim simply emphasizes the true universality of the consensus that the APA resolution engendered.

III. JURISDICTION (CONFORMITY CLAUSE AND *ROPER*)

a. Respondent's jurisdictional arguments misstate the facts and miss the overall point

Respondent falsely claims that this Court "lacks jurisdiction over the questions Barwick presented" because "[t]he Florida Supreme Court decided his exemption-from-execution claims on state-law grounds that Barwick has failed to challenge in any question." BIO at 5; *see also id*. at 1. To the contrary, Mr. Barwick's petition specifically challenged the adequacy and independence of the Florida Supreme Court's opinion. *See, e.g.*, Petition at 17 (explaining that the procedural bars related to Mr. Barwick's Eighth Amendment exemption claims were incorrect, and the merits rulings were inextricable from the federal question); see id. at 28, 32-33 (explaining that Mr. Barwick's *Roper* claim was timely and not simple relitigation).[3]

Respondent further claims that the Court lacks jurisdiction over both questions presented because "Barwick's first question presented [regarding the conformity clause] cannot stand alone[,]" BIO at 22, and the Florida Supreme Court used "a state-law relitigation bar and a time-bar" to deny Mr. Barwick's claim that he should be exempt from execution due to his young age at the time of the crime.

[3] Respondent's reference to this Court's opinion in *Stewart v. LaGrand*, 526 U.S. 115 (1999), is entirely misplaced. *Stewart* dealt with a method of execution challenge in which the petitioner *explicitly elected* to be executed by lethal gas as opposed to lethal injection, thereby, as this Court found, waiving his right to claim lethal gas was unconstitutional. The circumstances are wholly inapposite to Mr. Barwick's exemption claim.

BIO at 3. But Mr. Barwick's conformity clause does not need to stand alone, because the underlying Eighth Amendment exemption claim cannot be dispensed with on adequate or independent state law grounds.

As Mr. Barwick laid out in detail in the lower courts, his underlying *Roper* claim is based on evidence of a newly obtained scientific consensus. So, neither of the procedural bars Respondent advances apply to the claim. Troublingly, the effect of these procedural hurdles working in tandem would be to entirely preclude litigants from raising science-based claims under the Eighth Amendment's analysis of evolving standards of decency. This Court should not allow Respondent's Kafkaesque attempts to evade review.

b. Mr. Barwick's *Roper* claim is based on evidence of a newly obtained scientific consensus and, as such, is not procedurally barred

The Florida Supreme Court found that Mr. Barwick's claim was procedurally barred because it was "a variation of claims that were raised in prior proceedings." Yet, while Mr. Barwick has previously raised claims that cited *Roper v. Simmons*, 543 U.S. 551 (2005), they were qualitatively distinct from his current claim, which is based on the APA's August 2022 resolution that called for an end to the adolescent death penalty. His argument is that there is now an established scientific consensus that, as a categorical matter, society's standards of decency have evolved to recognize that late adolescents under age 21 warrant the same constitutional protections as juveniles in the context of criminal sentencing. This conclusion hinges on what neurobiologists and psychologists now widely recognize: that "there is no

neuroscientific bright line regarding brain development that indicates the brains of 18-to-20-year-olds differ in any substantive way from those of 17-year olds" (PCR3. 427).

By contrast, the claim Mr. Barwick raised in 2005 argued that as a "brain damaged youthful offender" with "neuropsychological handicaps," his "mental and emotional age" were under eighteen and therefore, he lacked the "highly culpable mental state" required to impose a death sentence. *See Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011); *see also Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1257-58 (11th Cir. 2015). It was, in essence, an as-applied argument that the proportionality principle underpinning *Roper*—and the Eighth Amendment generally—should be extended to someone with Mr. Barwick's neurocognitive and neurodevelopmental issues, particularly in light of his young age at the time of the offense. The claim did not rely on newly emerging scientific research, much less a definitive consensus—nor could it, because no such consensus yet existed.

The 2005 claim and the 2023 claim rely on entirely separate factual bases and, although both cite *Roper*, it is used to support very different legal arguments. The Florida Supreme Court's erroneous determination that these claims are functionally identical could, if left unchallenged, potentially render *any* claim that uses previously cited cases to make new arguments procedurally barred. The sweeping implications of such a ruling cannot stand.

For a similar reason, the Florida Supreme Court's imposition of a time-bar was also incorrect. The court ruled that the claim was untimely because it "is based on a

compilation of studies . . . published between 1992 and 2022 and relying on data from as early as 1977." *Barwick v. State*, __ So. 3d __, 2023 WL 3151079 at *5 (Fla. Apr. 28, 2023). As Mr. Barwick explained in his petition, while underlying pieces of data may have been previously available in isolation, each statement standing alone is insufficient to show that late adolescents are indistinguishable from juveniles. Collectively, they led the APA to conclude that late adolescents are categorically indistinguishable from juveniles and should be afforded the same constitutional protections. That consensus only crystallized, after years of scientific research, in August 2022, which is within Florida courts' one-year time limitation for filing postconviction claims. *See* Fla. R. Crim. P. 3.851(d)(1); Fla. R. Crim. P. 3.851(d)(2)(A). Therefore, the Florida Supreme Court's imposition of a time-bar was erroneous here.

Perversely, the application of both procedural bars to this claim effectively blocks Mr. Barwick and other litigants from ever successfully raising a claim under the Eighth Amendment's evolving-decency standard. That is because litigants would likely file claims every time there was an insignificant development in order to protect their claim against a time-bar, which would likely be rejected as unreliable due to a lack of evidentiary foundation. But later, once the science behind the claim became firmly established and a consensus was reached on its conclusions—thereby making the claim's evidentiary basis reliable—the claim would be denied as procedurally barred because it had been previously raised. These rules would short-circuit Eighth Amendment claims in their infancy and freeze the development of what are meant to be evolving standards of decency.

Finally, contrary to Respondent's assertion, the Florida Supreme Court's decision did not rest on an independent state-law ground. Although the court noted that the circuit court had rejected the claim as untimely and procedurally barred, the Florida Supreme Court did not clearly rest its decision on those grounds. *See Harris v. Reed*, 489 U.S. 255, 261-62 ("'The state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'") (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)). Instead, the court concluded that it "simply does not have the authority to extend *Roper*" because it is "bound by" this Court's Eighth Amendment precedent and lacks authority to extend it under the "conformity clause," Article I, § 17 of the Florida Constitution. *Barwick v. State*, 2023 WL 3151079 at *6. As Mr. Barwick separately discussed, that constitutional provision raises significant questions that are bound up in this Court's interpretation of federal law. But even setting aside these constitutional problems with the conformity clause, the Florida Supreme Court's understanding that it is "bound by" this Court's Eighth Amendment jurisprudence renders this state-law ground inextricably intertwined with this Court's interpretation of the Eighth Amendment. Therefore, it is not an independent state-law ground that precludes review by this Court.

CONCLUSION

The Eighth Amendment makes clear that consideration of evolving standards of decency equates to "nothing less than the dignity of man." *Trop*, 356 U.S. at 100. This Court should not allow the State of Florida to flout that basic precept of our humanity. This Court should grant certiorari review.

Respectfully submitted,

/s/ Karin L. Moore
KARIN L. MOORE
Counsel of Record
DREW A. SENA
Office of the Capital Collateral
Regional Counsel—North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
karin.moore@ccrc-north.org
drew.sena@ccrc-north.org

MAY 1, 2023