No. _____

IN THE

Supreme Court of the United States

JAMES D. FORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, FEBRUARY 13, 2025, AT 6:00 P.M.

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CAPITAL CASE

QUESTIONS PRESENTED

Question One

Whether Florida's use of the "conformity clause" in the Florida constitution improperly violates Ford's Fourteenth Amendment Due Process rights and his Eighth Amendment right to a true merits-based evaluation of his claims, premised on the evolving standards of decency that mark the progress of a maturing society?

Question Two

Whether *Roper v. Simmons*, 443 U.S. 551 (2005) should be extended to include defendants who have a mental and developmental age of less than eighteen years old at the time of the offense in the class of offenders who are ineligible for the death penalty?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, James D. Ford, a death-sentenced Florida prisoner, was the appellant in the Supreme Court of Florida. Respondent, State of Florida, was the appellee in the Supreme Court of Florida.

LIST OF RELATED CASES

Trial
Circuit Court of the Twentieth Judicial Circuit, in and for Charlotte County, Florida
State of Florida v. James Dennis Ford; Case No. 97-000-351-CF
Judgment entered: Verdict on March 8, 1999. Guilty as charged for 2 counts of First-Degree Murder, Armed Sexual Battery (w/ firearm.), Child Abuse. Death sentence imposed on June 3, 1999.

Direct Appeal
Florida Supreme Court Case No. SC95972
Ford v. State, 802 So. 2d 1121 (Fla. 2001).
Judgment Entered: September 13, 2001; Rehearing Denied: December 13, 2001.

Denial of Certiorari
United States Supreme Court Case No. 01-9298
Ford v. Florida, 535 U.S. 1103 (2002), Judgment Entered: May 28, 2002.

Denial of 3.851 Motion for Postconviction Relief
Charlotte County Circuit Court Case No. 97-CF-351
Order Denying Motion for Postconviction Relief filed by
Judge Cynthia A. Ellis on July 12, 2004

Appeal of Denial of Postconviction Relief
Florida Supreme Court Case No. SC04-1611
Ford v. State, 955 So. 2d 550 (Fla. 2007)
Judgment entered: April 12, 2007

Dismissal of Federal Habeas Corpus Petition as Untimely
U.S.D.C.- Middle District Case No. 2:07-cv-333-FtM-99SPC
Ford v. Secretary, Fla. Dep't of Corr., 2009 WL 3028886 (M.D. Fla. Sept. 17, 2009)

Eleventh Circuit Denial of Certificate of Appealability
11th Circuit USCA Case No. 09-14820, slip opinion.
Ford v. Sec'y, Dep't of Corr., (11th Cir. Oct. 27, 2009)

Grant of Certiorari and Remand from United States Supreme Court of Eleventh Circuit's Denial of Certificate of Appealability
United States Supreme Court Case No. 09-7493
Ford v. McNeil, 561 U.S. 1002 (2010)
Judgment Entered: June 21, 2010

Eleventh Circuit Remand to the District Court
11th Circuit USCA Case No. 09-14820
Ford v. Secretary, Fla. Dep't of Corr., 614 F.3d 1241 (11th Cir. 2010). Judgement Entered: April 18, 2010

On Remand-Denial of Equitable Tolling
U.S.D.C.- Middle District Case No. 2:07-cv-333-FtM-99SPC
Ford v. Secretary, Fla. Dep't of Corr., 2012 WL 113523 (M.D. Fla. Jan. 13, 2012)

Eleventh Circuit Denial of Certificate of Appealability
11th Circuit USCA Case No. 09-14820, slip opinion.
Ford v. Sec'y, Dep't of Corr., (11th Cir. Mar. 14, 2012)

Denial of First Successive Postconviction Motion-*Martinez*
Charlotte County Circuit Court Case No. 97-CF-351
Order Granting Motion to Amend and Denying Defendant's Successive 3.851 Motion signed by Judge Nicholas R. Thompson on December 17, 2013

Appeal of Denial of First Successive Postconviction Motion-*Martinez* and Denial of State Habeas Corpus Relief
Florida Supreme Court Case Nos. SC14-1011, SC14-2040
Ford v. State/Julie L. Jones, 168 So. 3d 224 (Table) (Fla. 2015)
Judgment Entered: April 15, 2015

Denial of Certiorari-*Martinez*
United States Supreme Court Case No. 15-6117
Ford v. Florida, 577 U.S. 1010 (2015)
Judgment Entered: November 30, 2015

Denial of Second Successive Postconviction Motion-*Hurst*
Charlotte County Circuit Court Case No. 97-CF-351

Final Order Denying Defendant's Successive 3.851 Motion filed
by Judge Donald H. Mason on March 9, 2017

Appeal of Denial of Second Successive Postconviction Motion and Denial of State Habeas Corpus Relief
Florida Supreme Court Case Nos. SC17-859, SC16-706
Ford v. State/Julie L. Jones, 237 So. 3d 904 (Fla. 2018)
Judgment entered: January 23, 2018

United State Supreme Court Untimely Petition for Writ of Certiorari
United States Supreme Court Case No. 15A57

Sexual Predator Designation
Charlotte County Circuit Court Case No. 97-CF-351
Order Designating James D. Ford a Sexual Predator pursuant to § 775.21, Fla. Stat. signed by Judge Donald H. Mason on March 6, 2023.

Denial of Defendant's Successive Postconviction Motion – After Signed Death Warrant
Charlotte County Circuit Court Case No. 97-CF-351
Order Denying Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 after a Signed Death Warrant. Honorable Lisa S. Porter, Circuit Judge.
Judgment entered: January 23, 2025

Denial of Appellant's Motion for Stay of Execution and Relinquishment of Jurisdiction to State Circuit Court
Florida Supreme Court
Ford v. State, ---So. 3d ---(Fla. 2025); Case Number: SC2025-0110
Judgment entered: February 3, 2025

Appeal from denial of postconviction motion
Florida Supreme Court
Ford v. State, ---So. 3d ---(Fla. 2025); Case Number: SC2025-0110
Judgment entered: February 7, 2025

TABLE OF CONTENTS

CONTENTS **PAGE**

INDEX TO APPENDICES

[IN SEPARATE VOLUME]

TABLE OF AUTHORITIES

Statutes

Rules

Articles

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

James D. Ford respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

This is a petition regarding the errors of the Supreme Court of Florida in affirming the Circuit Court of the Twentieth Judicial Circuit, in and for Charlotte County, Florida's ("state circuit court") Order Denying Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After a Signed Death Warrant. The opinion at issue is unreported and reproduced at Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was entered on February 7, 2025. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides: No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Following a capital trial which occurred from February 22 to March 8 of 1999, James D. Ford, ("Ford") was convicted of two counts of first-degree murder, one count of sexual battery with a firearm and one count of child abuse in Charlotte County, Florida. From April 19 to 23, 1999, the trial court conducted a penalty phase proceeding before the same jury which had convicted Ford. That jury recommended death by an 11 to 1 vote on both counts of first-degree murder. R51/4692.[1] The trial court followed the jury's recommendation and imposed a death sentence on both counts. R53/4746-66.

The trial court found the following aggravators at trial:

> (1) the murder was committed in an especially heinous, atrocious, or cruel manner (HAC) (great weight)
> (2) the murder was committed in a cold, calculated, and premeditated fashion (CCP) (great weight)
> (3) the murder took place during the commission of a sexual battery (great weight)
> (4) Ford was previously convicted of another capital felony, i.e., the contemporaneous murder (great weight)

Some statutory mitigation was found by the trial court:

> (1) no significant history of prior criminal activity (proven, some weight)
> (2) extreme mental or emotional disturbance (not proven, no weight)
> (3) extreme duress (not proven, no weight)
> (4) impaired capacity (not proven, no weight)
> (5) the young mental age of the defendant (proven, very little weight).

[1] Record citations in this petition site to the record on appeal for Ford's direct appeal in Florida Supreme Court Case No: SC-95972, *Ford v. State*, 802 So. 2d 1121 (Fla. 2001).

As nonstatutory mitigation, the trial court found 17 points of mitigation.[2]

On direct appeal, Ford raised six issues:

> (1) Whether the prosecutor made improper comments during closing argument in the guilt phase
> (2) whether the prosecutor asked an improper question concerning "flesh" on the defendant's knife
> (3) whether the indictment adequately charged Ford with child abuse
> (4) whether the prosecutor made improper comments during closing argument in the penalty phase
> (5) whether the evidence of CCP was sufficient to submit this aggravator to the jury and to support the finding of this aggravator
> (6) whether the trial court properly considered all the mitigating evidence

On appeal, the Florida Supreme Court ("FSC) affirmed Ford's convictions and sentences, despite finding that the trial judge erroneously refused to recognize and weigh a number of mitigating circumstances which were in fact established by Ford. *Ford v. State,* 802 So. 2d 1121, 1135-36 (Fla. 2001). This Court denied certiorari review on May 28, 2002. *Ford v. Florida,* 535 U.S. 1103 (2002). Ford filed a motion with the state circuit court under Florida Rule of Criminal Procedure 3.851. The court

[2] The trial court addressed the following nonstatutory mitigating circumstances as they related to both murders and assigned each a degree of weight: (1) Ford was a devoted son (proven, very little weight); (2) Ford was a loyal friend (proven, very little weight); (3) Ford is learning disabled (proven, no weight); (4) mild organic brain impairment (not proven, no weight); (5) developmental age of fourteen (proven, no weight); (6) family history of alcoholism (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (7) chronic alcoholic (proven, very little weight); (8) diabetic (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (9) excellent jail record (proven, some weight); (10) engaged in self-improvement while in jail (proven, some weight); (11) the school system failed to help (proven, very little weight); (12) emotional impairment (not proven, no weight); (13) mentally impaired (not proven, no weight); (14) impaired capacity (not proven, no weight); (15) not a sociopath or a psychopath (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (16) not antisocial (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (17) the alternative sentence is life without parole (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight).

summarily denied the motion, and the FSC affirmed the denial. *Ford v. State,* 955 So. 2d 550 (Fla. 2007). Next, Ford filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida ("district court"). The district court dismissed the petition as untimely filed, and did not permit equitable tolling. *Ford v. Sec'y Department of Corrections,* 2009 WL 3028886 (M.D. Fla. 2009). The Eleventh Circuit Court of Appeals ("Eleventh Circuit") denied a certificate of appealability. *Ford v. Sec'y, Dep't of Corr.*, No. 09-14820, slip op. at *1 (11th Cir. Oct. 27, 2009); *see* 28 U.S.C. § 2253(c).

On November 4, 2009, Ford filed a petition for a writ of certiorari in this Court challenging the Eleventh Circuit's denial of a certificate of appealability. This Court granted the petition, vacated the judgment, and remanded the case for further consideration in light of *Holland v. Florida*, 560 U.S. 631 (2010). *Ford v. McNeil*, 561 U.S. 1002 (2010). Once the case was remanded to the Eleventh Circuit, it was then remanded further back to the district court for the limited purpose of conducting proceedings and analysis consistent with *Holland*. *Ford v. Sec'y, Dep't of Corr.*, 614 F.3d 1241 (11th Cir. 2010). The district court ultimately determined that Ford was not entitled to equitable tolling. *Ford v. Sec'y, Dep't of Corr.*, No. 2:07- cv-333, 2012 WL 113523, at *10 (M.D. Fla. Jan. 13, 2012). On March 14, 2012, the Eleventh Circuit denied a certificate of appealability. *Ford v. Sec'y, Dep't of Corr.*, No. 09-14820, slip op. at *17 (11th Cir. Mar. 14, 2012).

Ford filed a successive Fla. R. Crim. P. 3.851 motion in the state circuit court on March 20, 2013, arguing ineffective assistance of postconviction counsel pursuant

to *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), and challenging the lethal injection protocol as well as non-unanimous jury recommendations. The state circuit court summarily denied relief on December 20, 2013. The FSC affirmed the denial of relief. *Ford v. State*, 168 So.3d 224 (Fla. 2015). Ford's subsequent petition to this Court was denied on November 30, 2015. *Ford v. Florida*, 577 U.S. 1010 (2015).

The state circuit court denied Ford's second successive Fla. R. Crim. P. 3.851 motion on March 9, 2017, which argued that Ford was entitled to relief pursuant to *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). The FSC affirmed the denial of relief, *Ford v. State*, 237 So. 3d 904 (Fla. 2018), and a subsequent petition to this Court was rejected as untimely.

The governor of Florida signed Ford's death warrant on Friday, January 10, 2025. Ford's execution is scheduled for Thursday, February 13, 2025. On January 18, 2025, Ford filed a Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After a Signed Death Warrant. In that motion, Ford raised a claim that he should be categorically excluded from the death penalty under *Roper v. Simmons*, 543 U.S. 551 (2005) because he has a mental and developmental age less than eighteen years old. Ford requested that the state circuit court hold an evidentiary hearing on his *Roper* claim. The state circuit court summarily denied Ford's entire January 18, 2025 Fla. R. Crim. P. 3.851 motion on January 23, 2025. Ford filed a timely appeal to the Florida Supreme Court, immediately followed by a Motion for Stay of Execution and Relinquishment of

Jurisdiction to State Circuit Court.[3] The stay was denied by the FSC on February 3, 2025. The FSC denied all relief, with an opinion rendered on February 7, 2025. This petition follows.

REASONS FOR GRANTING THE PETITION

I. Ford should be categorically excluded from execution under *Roper v. Simmons*, 543 U.S. 551 (2005) and the Eighth and Fourteenth Amendments to the United States Constitution because his mental and developmental age is less than eighteen years old.

Ford had a mental and developmental age of no more than fourteen years old at the time of the homicides for which he was convicted and sentenced to death. This unconverted fact has been established in the Florida courts, and the state circuit court even acknowledged in its most recent January 23, 2025 denial order that "this is an undisputed fact going back to 1999." Appendix B at 11. Despite the troubling Eighth Amendment questions raised by executing an individual whose mental and developmental age was no greater than the chronological age of a typical ninth-grade student at the time of offense, the State of Florida seeks to execute Ford in five days on February 13, 2025. The Florida Supreme Court refused to consider the constitutional questions raised by Ford's pending execution based on its adherence to a unique Florida constitutional amendment that effectively shuts off Florida courts from conducting an Eighth Amendment analysis based on evolving standards of decency. This Court should intervene to prevent Ford and other capital defendants from being executed because Florida refuses to conduct an Eighth Amendment

[3] Ford's January 29, 2025 Initial Brief of the Appellant filed in his appeal to the FSC is included as Appendix C.

analysis based on an obstructive state constitutional amendment.

A. Florida's use of its unique and obstructive "conformity clause" is unconstitutional. The conformity clause improperly violates Ford's Fourteenth Amendment Due Process rights and his Eighth Amendment right to a true merits-based evaluation of his claims, premised on the evolving standards of decency that mark the progress of a maturing society.

By refusing to permit Ford an evidentiary hearing and a full merits-based determination of his Eighth Amendment claim under *Roper v. Simmons*, 543 U.S. 551 (2005), Florida is foreclosing Ford's access to the courts and his ability to make new law. Ford raises a valid and substantial argument that his execution should be categorically excluded by this Court's opinion in *Roper v. Simmons*, 543 U.S. 551 (2005) because he had a mental and developmental age of no more than fourteen years old at the time of the offense for which he was convicted. Ford raised his *Roper* claim at both the state circuit court and again at the FSC. The state circuit court denied the *Roper* claim without first holding an evidentiary hearing or considering the actual merits of Ford's argument that this Court's reasoning for the *Roper* exclusion should be extended to include individuals with a mental and developmental age of less than eighteen years old. The FSC refused a merits-based determination on this issue and found as follows:

> Such claims are without merit because this Court lacks the authority to extend *Roper*. The conformity clause of article I, section 17 of the Florida Constitution provides that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." This means that the Supreme Court's interpretation of the Eighth Amendment is both the floor and the ceiling

> for protection from cruel and unusual punishment in Florida, and this Court cannot interpret Florida's prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment. *Barwick v. State*, 361 So.3d 785, 794 (Fla. 2023).

Appendix A at 12. Art. I, § 17 of the Florida State Constitution, otherwise known as "the conformity clause," states:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution….This Section shall apply retroactively.

Strict adherence to the clause has proven to be unconstitutional in application, and this honorable Court must intervene. Since the Eighth Amendment conformity clause—the only one of its kind—became part of the Florida constitution, the Florida courts have cited its purported restriction, and have increasingly relied upon it to opt out of critical Eighth Amendment analyses, including judicial determinations related to evolving standards of decency. *See, e.g.*, *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (Florida Supreme Court relying on the conformity clause to refuse any consideration of whether national death penalty trends warranted exemption from execution under the Eighth Amendment); *Lawrence v. State*, 308 So. 3d 544, 545 (Fla. 2020) (Florida Supreme Court relying on the conformity clause to eliminate Eighth Amendment proportionality review); *Hart v. State*, 246 So. 3d 417, 420-21 (Fla. 4th DCA 2018) (Florida appellate court relying on the conformity clause in a non-capital context to refuse to consider whether a juvenile sentence violated *Graham v. Florida*, 560 U.S. 48 (2010)); *see also Covington v. State,* 348 So. 3d 456, 479-480 (Fla. 2022)

(relying in part on conformity clause to refuse to consider whether defendant's alleged insanity at the time of the crime rendered his death sentence cruel and unusual); *Allen v. State*, 322 So. 3d 589, 602 (Fla. 2021) (seemingly implying that the conformity clause may justify limiting a mitigation presentation in certain cases involving waiver). This Court's intervention is required to end this practice, and to protect the due process and Eighth Amendment rights of Florida's defendants.

Right to Due Process

Florida litigants like Ford must be provided the opportunity to challenge the state of the law. Indeed, Florida's misguided self-limitation forestalls "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Florida is preventing capital litigants from moving as Donald P. Roper once did in Missouri's state court system. The reason *Roper v. Simmons* exists, is because one courageous capital defendant decided to be unburdened by the state of capital jurisprudence at that time as applied to juveniles, and he moved to formally challenge the precedent of *Stanford v. Kentucky*, 492 U.S. 361 (1989) in Missouri state courts. If Missouri had a "conformity clause" similar to Florida's in place, this country could still be executing people who committed their crimes while under eighteen years of age. Fortunately, Missouri protected the due process and Eighth Amendment rights of its citizens by not hiding behind a "conformity clause." Currently, there is

no state-recognized avenue to effect Eighth Amendment progress in the Florida state courts.

The opportunity to be heard is a fundamental requirement of due process. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal citation omitted). This is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong*, 380 U.S. at 552. At a minimum, due process requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case**.** *Id.* at 550. This Court has recognized that "execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976)). Florida must not be permitted to foreclose Ford the opportunity to fully prove his Eighth Amendment challenge at an evidentiary hearing, by relying on an arbitrary and unconstitutional "conformity clause."

This Court has long supported the use of state action to provide greater protection than the federal constitution. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free *as a matter of its own law* to impose [greater protections for individual citizens] than those this Court holds to be necessary upon federal constitutional standards") (emphasis in original); *Cooper v. State of Cal.*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose [greater protections on individual rights] than required by the Federal Constitution if it chooses to do so"); *Brigham City v. Stuart*, 547 U.S. 398, 409 (2006) (Stevens, J.,

concurring) ("Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.").

This issue is properly before this Court. The FSC did not rely on any adequate or independent state ground. Rather, it engaged in a ruling which is wholly inextricable from the federal question. In finding that it "lacks the authority" to extend Eighth Amendment protections due to this Court's precedent, the FSC necessarily found that federal law required denial of Ford's claims. *See Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016) ("[W]hether a state law determination is characterized as entirely dependent on, resting primarily on, or influenced by a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction.") (cleaned up); *see also Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (even when adequacy and independence of possible state law grounds are not clear from the opinion, "this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."). That is what occurred in Ford's state proceedings. Ford has properly exhausted this claim in state court. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This Court is the final authority to correct Florida's errors.

Evolving Standards of Decency

The Eighth Amendment is unique among constitutional principles, in that it inherently "draw[s] its meaning" through active state participation as it pertains to evolving standards of decency. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Its basic

concept is "nothing less than the dignity of man[,]" standing to assure that a state's "power to punish…be exercised within the limits of civilized standards." *Id.* at 100.

In accordance with its lofty purpose, Eighth Amendment principles as articulated through this Court's jurisprudence presuppose that states will actively work to bring society closer to "the Nation we aspire to be[,]" *Hall v. Florida*, 572 U.S. 701, 708 (2014), by reflecting and advancing "the evolving standards of decency to mark the progress of a maturing society." *Trop*, 356 U.S. at 101; *see also id.* at 100 (this Court remarking that the reason it had not previously defined "cruel and unusual" or given "precise content to the Eighth Amendment" was that the United States functioned as an "enlightened democracy"). State participation in facilitating evolving standards of decency ensures that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910).

Florida's self-imposed prohibition against even the slightest consideration of whether Eighth Amendment protections should be extended to an individual not already exempted from execution under this Court's precedent violates *Trop* and its Eighth Amendment progeny. *See, e.g., Hall*, 572 U.S. at 708 ("The Eighth Amendment's protection of dignity…[affirms] that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force"); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule"); *Gregg v.*

Georgia, 428 U.S. 153, 171 (1976) ("the [Eighth] Amendment has been interpreted in a flexible and dynamic manner"); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("Central to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment"); *see also Weems v. United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore [a constitutional principle], to be vital, must be capable of wider application than the mischief which gave it birth.").

Florida's practice of abdication obstructs important aspects of this Court's judicial function as it pertains to Eighth Amendment determinations, and hinders national progress related to evolving standards of decency. When this Court is faced with determinations regarding whether societal standards of decency have evolved to the point of warranting additional Eighth Amendment protections, it looks to the actions of individual states, including their judicial practice. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002); *Roper v. Simmons*, 543 U.S. 551, 559-60, 565-66 (2005) (tallying, as part of evolving standards analysis, the number of states that have embraced or abandoned a particular death penalty practice). Thus, 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. By declaring itself unauthorized to engage in this independent action, Florida has abdicated its "critical role in advancing protections and providing [this] Court with information that contributes to an understanding" of how Eighth

Amendment protections should be applied. *Hall v. Florida*, 572 U.S. 701, 719 (2014). This Court should grant Ford's petition, so that Florida is forced to correct its abdication of responsibility.

B. Evolving standards of decency require that *Roper v. Simmons*, 443 U.S. 551 (2005) be extended to include defendants who have a mental and developmental age of less than eighteen years old at the time of the offense in the class of offenders who are ineligible for the death penalty.

It is beyond dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. *See Roper v. Simmons*, 543 U.S. 551, 589 (2005). Rather, because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 589 (internal citation omitted). "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force," and this Court has relied on the evolving standards of decency within our society to slowly narrow the class of offenders who may be subject to the death penalty consistent with society's evolving understanding of human mental functioning and culpability. *See Roper*, 543 U.S. at 568 (2005); *see also Ford v. Wainwright*, 477 U.S. 399 (1986) (the Eighth Amendment prohibits the execution of the insane); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (the Eighth Amendment prohibits the execution of a person who was under 16 years of age at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (the Eighth Amendment prohibits the execution of intellectually disabled individuals); *Roper v. Simmons*, 543

U.S. 551 (2005) (the Eighth Amendment prohibits the execution of juvenile offenders under age 18).

The class of offenders subject to the death penalty should be narrowed again to preclude the execution of individuals with a mental and developmental age less than age eighteen. James Ford's mental and developmental age was less than age eighteen at the time of the capital offense he was convicted of, and his execution should therefore be prohibited as cruel and unusual punishment under the federal Eighth Amendment, as applied to the states through the federal Fourteenth Amendment.

In *Roper v. Simmons,* this Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders under the age of eighteen at the time of the crime. 543 U.S. 551 (2005). The *Roper* court discussed what it considered "three general differences between juveniles under 18 and adults" that diminish the culpability of juveniles and preclude classifying them among the worst offenders subject to the death penalty. *Id.* at 569. These three differences are: (1) they have a "'lack of maturity and an underdeveloped sense of responsibility'" that "'often result in impetuous and ill-considered actions and decisions'"; (2) they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) their characters are "not as well formed" and their personalities "more transitory, less fixed" than those of adults. *Id.* at 570–71. As a result of these differences, the behavior of juveniles cannot be considered as morally reprehensible as that of adults for the same actions. *Id.* at 570. *Roper* concluded that

"once the diminished culpability of juveniles is recognized," it is evident that the two penological justifications for the death penalty- retribution for and deterrence of capital crimes- applies to juveniles with lesser force than adults. *See id* at 571; *see also Atkins*, 536 U.S. at 319 (explaining that retribution and deterrence of capital crimes by prospective offenders are the two social purposes served by the death penalty).

It is clear from the *Roper* opinion that this Court excluded juveniles from the death penalty based, at least in part, on the lesser mental and emotional functioning that often corresponds with youth, and not only because they chronologically fall below age eighteen. The *Roper* exclusion was based on an analysis of the mental, developmental, and emotional attributes of juveniles as compared to adults, not a math equation calculating their years lived. *Roper's* reasons for the exclusion referred to juveniles' lack of maturity, vulnerability to peer pressure, and underdeveloped characters. The *Roper* court selected the chronological age of eighteen years old as the cut-off age at which a person could be eligible for the death penalty, because "a line must be drawn," and explained that "age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Id.* at 574. However, the *Roper* court also appeared to recognize that an individual's chronological age will not always correspond with their level of functioning, stating that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." *Id.* at 574. Chronological age should not be the only question asked

when determining exclusion from the death penalty under *Roper*, and Ford should fall under the *Roper* exclusion because his mental and developmental age was at most fourteen years old at the time of the offense.

Ford was thirty-six years old at the time the homicides occurred on April 6, 1997. However, his developmental age was much lower. Expert trial testimony from psychologist Dr. William Mosman, who evaluated Ford in 1999, indicated that Ford's mental and developmental age would have been closer to age fourteen when the homicides occurred. Dr. Mosman interviewed, observed, and evaluated Ford on two occasions and administered a variety of tests. R48/4282. There was no suggestion that Ford was malingering. R48/4285. Dr. Mosman also reviewed numerous records for his evaluation, including jail and medical records, school records, trial transcripts, crime scene photos, and autopsy photos. R48/4282-83. Dr. Mosman also reviewed the interview summaries of about twenty lay witnesses, including schoolteachers, principals, friends, and family members of Ford, but did not specifically interview these individuals. R48/4284. Dr. Mosman opined that it was well within a reasonable doubt of clinical certainty that at the time the crime happened Ford was under the influence of extreme mental and also extreme emotional disturbance. R48/4286. Ford's capacity to appreciate the criminality of his conduct or conform his conduct was also substantially impaired when the crimes were committed. R48/4287.

Dr. Mosman opined that, based on Dr. Mosman's testing, Ford's mental and developmental age was about 14 years old. R48/4287. The testing has been consistent that Ford mentally functions from about 11 to 14 years of age. R48/4288. There is no

clinical doubt that Ford has a history of being abused and neglected as a child. R48/4288. Dr. Mosman explained that there's clear evidence of a deprived and disadvantaged childhood, which can help us to understand Ford's emotional impairment. R48/4289. Dr. Mosman explained that Ford has a mental intellectual age of 11 to 14. R48/4289. Ford's emotional impairment is a different factor, and emotionally and developmentally Ford is probably in the area of about 9 years old. R48/4289. Dr. Mosman explained that when we look at Ford's entire history, there were systems that knew there were problems. R48/4290. Ford was known to be having troubles for years in school. R48/4290. Ford dealt with withdrawal, embarrassment, humiliation, depression, and drinking. R48/4290. None of the systems jumped in and helped Ford. R48/4290

Dr. Mosman explained that there are indicators for Ford of an inability to plan ahead because of his low intellectual functioning ("IQ"). R48/4295. Dr. Mosman said that in some areas Ford's scores reach into the mentally retarded area, and other areas are borderline. R48/4295. There were some indicators of financial irresponsibility in Ford not following through on his child support payments for two reasons- lack of income to some extent and an inability to handle checking accounts and checkbooks. R48/4296. The women in Ford's life managed the money and the finances because Ford could not add. R48/4296. Dr. Mosman administered the Wechsler Adult Intelligence Scale- Revised Edition ("WAIS-R"), which Ford received a verbal IQ score of 87. R48/4300-01. That score is made up of about six or seven other scores within that, and there are scores that reach much lower than that. R48/4301.

Dr. Mosman explained that although he was not opining that Ford was mentally retarded, his ability to reason sequentially, and organize and work things through methodically was at the "retarded level." R48/4301. Ford has learned through repetition, but he has rarely learned verbally. R48/4301. Ford's performance score on the WAIS-R was 94, which is the lower area of average. R48/4302. Ford has impairments and problems in all areas, with the verbal area being the most deficit. R48/4302.

Dr. Mosman also administered the Slosson Intelligence Test-Revised ("SIT-R"), which rendered a score of 94. R48/4302. Dr. Mosman explained that he liked to use this test because it can be used to measure how old the person is that he is working with, which explained Ford's developmental age of 14 years. R48/4302-03. Dr. Mosman explained that he could bring in a 14-year-old kid in seventh grade, and that person would get along, communication-wise, very well with Ford. R48/4303. There would be a pretty close match between the two, everything else being equal. R48/4303. Dr. Mosman also gave the Wide Range Achievement Test-Revised ("WRAT-R2") to Ford on January 18, 1999, which indicates Ford could read at about the fifth-grade level, which was the age equivalent to about an 11-year-old child. R48/4303. The WRAT-R2 also indicated that Ford's ability to spell in 1999 was the age equivalent of about a 10-year-old child and his ability to do mathematics was the age equivalent of about a 12-year-old child. R48/4303.

Dr. Mosman also gave the Bender Gestault test, which indicates that Ford has some collateral damage in some areas of the brain, which could be an explanation for

why Ford has learning disabilities. R48/4304. Ford is also seriously learning disabled and has been all his life. R48/4305. Dr. Mosman also gave the Denman Verbal Memory Scale, and Ford came up with scores that he is seriously disabled in that area. R48/4305. He had scores of three and scores of six. R48/4305. The explanation for Ford's memory issues is that "he's got some minimal brain damage." R48/4306.

Dr. Mosman also administered the Tremel 18A and Tremel 18B- a connect-the-dot processing test, and Ford's scores on that test showed he was impaired, meaning he has very slow processing speed. R48/4306. Dr. Mosman explained that based on his review of Ford's DeSoto County public school records, Ford had school testing on IQ at age seven with a score of 65. R48/4309. However, Dr. Mosman explained that he did not think Ford was retarded, but that important areas of his brain functioning since age seven have been in the mentally retarded area. R48/4309. Ford was deeply embarrassed, humiliated, wanted to avoid school, and was not getting adequate support at home from his parents. R48/4310. Ford was a kid with brain damage and functioning in the retarded area who did not get the understanding he needed for academic development from home or school, which resulted in him dropping out. R48/4310.

Even at the age of 65, Ford's impairments in mental functioning persist, and an evidentiary hearing was needed in the state circuit court to put forth expert testimony concerning Ford's current mental impairments. Neuropsychologist Dr. Hyman Eisenstein conducted neuropsychological testing of Ford on January 16 and 27, 2025, and he is available to testify to the results of his testing and evaluation of

Ford. Due to the extreme time constraints caused by the arbitrary warrant timeframe set by the governor of Florida, the state circuit court could only consider the results of Dr. Eisenstein's preliminary evaluation of Ford on January 16th, and was not apprised of the full evaluation results because the court denied Ford's request for a stay.

In his January 18, 2025 Rule 3.851 motion, Ford alleged the following from Dr. Eisenstein's preliminary evaluation. Dr. Eisenstein administered the Delis Kaplan Executive Function System ("D-KEFS"), which is a neuropsychological test used to measure a variety of verbal and nonverbal executive functions for both children and adults. The D-KEFS consists of nine subtests, which includes the Trail Making Test. On the Visual Scanning portion of the Trail Making Test, Ford had a standard score of 4, which is the equivalent of an IQ of 70, placing Ford in the borderline range for intellectual functioning for that section. On the Letter Sequencing portion of the Trail Making Test, Ford had a standard score of 3, which is the equivalent of an IQ of 65, placing Ford in the intellectually disabled range for that section.

As another example of Ford's current impairments, Dr. Eisenstein administered the Wide Range Achievement Test- 5th Edition, the current version of the same test administered by Dr. Mosman in 1999. The Wide Range Achievement Test measures an individual's ability to read, comprehend sentences, spell, and solve math problems. While some of Ford's results showed improvement, he still scored at grade equivalents corresponding with individuals in elementary or high school. Ford's word reading on the test corresponded with a grade equivalent to tenth

grade. Ford's spelling on the test corresponded with a grade equivalent to third grade. Ford's solving of math problems on the test corresponded with a grade equivalent to fourth grade. Ford's sentence comprehension on the test corresponded with a grade equivalent to tenth grade.

After the filing of Ford's January 18, 2025 Rule 3.851 motion, Dr. Eisenstein was able to conduct further evaluation of Ford's mental impairments by evaluating him a second time, administering additional tests, and interviewing members of Ford's family. This additional testing provides both corroborating and completely new evidence than the trial court heard at Ford's 1999 trial. Based on his further evaluation, Dr. Eisenstein can opine to the fact that Ford's performance on the Shipley Institute of Living Scale, which measured Ford's language and abstraction skills, rendered results showing that his age-equivalent is far lower than his chronological age. Ford scored the age-equivalent of 15.1 years on the vocabulary section and 12 years on the abstraction section. Ford's total on the test rendered an age-equivalent of 13.3 years. Ford is currently 65 years old.

Dr. Eisenstein is further available to opine that additional neuropsychological testing he was able to administer indicates Ford has organic brain impairment/ brain damage based on his impaired test performance. Ford performed in the moderately to severely impaired range on the Tactual Performance Test, a sub-test of the Halstead–Reitan Neuropsychological Test, which assesses the condition and functioning of the brain. Ford also performed in the moderately impaired range on the Wisconsin Card Sorting Test and the mildly to moderately impaired range on the

Texas Functional Living Scale. All of these tests indicate that Ford has some level of organic brain impairment, and Dr. Eisenstein suggests that imaging be conducted of Ford's brain to confirm the brain damage he likely suffers.

Finally, Dr. Eisenstein is available to opine that Ford meets the diagnostic criteria for Autism Spectrum Disorder based on Dr. Eisenstein's evaluation of Ford and his interviews with Ford's family members. The diagnostic understanding of Autism has evolved over the past twenty-six years since Dr. Mosman first evaluated Ford in 1999. As argued in the concurrently filed Application for Stay of Execution, Ford's current diagnosis of Autism Spectrum Disorder therefore also qualifies as a new diagnosis that could have qualified as a claim of newly discovered evidence that the Florida courts could have considered if a stay had appropriately been granted by the lower courts.

This Court's jurisprudence following the decisions in *Atkins* and *Roper* dictates that courts may not ignore the standards and practices of the relevant scientific and medical community in interpreting the contours of the Eighth Amendment, since the Amendment "'is not fastened to the obsolete.'" *See Hall v. Florida,* 572 U.S. 701, 708 (2014) (internal quotation omitted). In *Hall v. Florida*, this Court relied heavily on the medical community's diagnostic standards for intellectual disability when the court rejected Florida's bright line rule that a person with an IQ score above 70 did not have an intellectual disability and was barred from presenting other related evidence. *See* 572 U.S. at 710-14. The *Hall* court explained that when determining who is intellectually disabled and therefore ineligible for execution

under the Eighth Amendment, it is proper for courts to consult the medical community's opinions and found that Florida's bright line rule disregarded established medical practice. *Id.* at 710, 712.

Similarly, in *Moore v. Texas*, 581 U.S. 1 (2017), this Court concluded that the Texas Court of Criminal Appeals erred when it rejected a finding that the defendant was intellectually disabled by applying judicially created non-clinical standards rather than medical diagnostic standards. This Court then vacated the lower court's judgment, noting *Hall's* instruction that adjudications of intellectual disability should be "informed by the views of medical experts." *Moore*, 581 U.S at 5 (internal citations omitted). Similar to *Hall* and *Moore's* reliance on medical and scientific standards when determining which defendants were excluded from the death penalty under the Eighth Amendment by intellectual disability, courts should also look to the relevant scientific standards when determining whether defendants may be excluded from the death penalty under the Eighth Amendment due to their mental and developmental age.

Evidence from the practice of psychology lends support to the argument that courts should consider defendants' mental and developmental age when determining their level of culpability. Several modern psychological tests which are administered by experts in the field of psychology generate "age equivalency" scores, indicating that psychologists recognize that an individual's level of functioning may render an age equivalent that is less than their chronological age in years. For example, the Second Edition of the Vineland Adaptive Behavioral Scales (Vineland II) assesses the social

adaptive functioning of people with intellectual disabilities and measures their performance along a spectrum of ages. *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2799 (2015) (citing Sara S. Sparrow, *Vineland Adaptive Behavior Scales*, *in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY 2618, 2618-20 (Jeffrey S. Kreutzer et al. eds., 2011)). Similarly, the Fourth Edition of the Peabody Picture Vocabulary Test (PPVT-4), which measures listening and understanding of single-word vocabulary, provides age-based and grade-based standard scores. *See* Michael Clemente*, A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2799 (2015) (citing Nathan Henninger, *Peabody Picture Vocabulary Test*, *in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY, 1889, 1889 (Jeffrey S. Kreutzer et al. eds., 2011)).

Further, the Shipley Institute of Living Scale, which Dr. Eisenstein administered to Ford during his active death warrant, provides age-equivalent scores based on testing of an individual's language and abstraction skills. *See supra* at p. 22. All of these psychological tests may render an age-equivalence score that is different than the individual's chronological age, and Ford's performance on the Shipley Institute of Living Scale rendered age equivalents far lower than his actual chronological age. *See supra* at p. 22. The psychological testing performed on Ford demonstrates that he suffers from diminished mental capacity that places his mental age much lower than his chronological age. Ford's mental age is a far better indicator of his maturity – and his related moral culpability – than his chronological age, since

it represents a more thorough understanding of his mental functioning:

> 'Mental age' as commonly understood is the chronological age equivalent of the person's highest level of mental capacity. That is, judging only from the person's cognitive and behavioral capacities, what age would we typically associate with this level of functioning? It is an incapacity to think or act on a higher level of functioning, not merely a failure to do so … Those whose mental age places them in the same cognitive-functional categories as minors may also be deemed simply morally lax, but to the extent their condition is shown to be a result of objective causes (such as organic condition, developmental deficits, and substance abuse), their non-compliance with adult norms is no more voluntary than the juvenile's. Thus, mental age is a condition which shares the identical incapacity for higher-level functioning as the other excuses: it is an involuntary (objective) condition deviating from the adult norm.

James Fife, *Mental Capacity, Minority, and Mental Age in Capital Sentencing: A Unified Theory of Culpability,* 28 Hamline L. Rev. 239, 261 (2005). This Court should consider that Ford's mental and developmental age at the time of the homicides was less than age eighteen when determining if he is excluded from execution under *Roper v. Simmons.*

Finally, when discerning our society's evolving standards of decency, laws enacted by state legislatures provide the "clearest and most reliable objective evidence of contemporary values." *Roper*, 543 U.S. at 589 (internal quotation omitted). Statutes in at least four states- Florida, California, Texas, and Illinois- codify the need for protective services for adults who are chronologically age eighteen or older, but their mental functioning renders them disabled or vulnerable. These statutes evidence our society's acknowledgment that an adult who is chronologically older than age eighteen may need special consideration under the law due to mental conditions that affect how they function and further show our acknowledgment that

not all chronological-age adults function as adults. For example, the intent of Florida's Adult Protective Services Act is "to establish a program of protective services for all vulnerable adults in need of them." Fla. Stat. § 415.101(2). The statute defines a "vulnerable adult" as "a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." Fla. Stat. § 415.102(28). California, Texas, and Illinois also have state statutes that establish the need for protective services for dependent or disabled adults who are age eighteen or older but have limitations in their mental functioning. *See* Cal. Welf. & Inst. Code § 15600 and 15610.23; TX HUM RES § 48.001 and 48.002; 320 Ill. Comp. Stat. Ann. 20/3 and 20/2.

Ford is not alleging that he qualifies as a vulnerable or disabled adult under these specific statutes. However, these statues are important evidence of our society's acceptance that chronological age is not the only indication of human functioning, and certain adults will need special protection or consideration under the law because their mental impairments render their functioning less than what we expect of an adult. Although Ford's chronological age is above eighteen years old, his mental impairments render his functioning less than an adult, and he should therefore be provided special protection against the death penalty in the same way that individuals under age eighteen are pursuant to *Roper v. Simmons*.

At the time of the offense for which Ford has been convicted and sentenced to

death, his mental and developmental age was closer to that of a fourteen-year-old than a thirty-six-year-old. Ford's execution must therefore be barred as cruel and unusual punishment under the federal Eighth Amendment, federal Fourteenth Amendment, and *Roper v. Simmons*. Ford's execution is set for February 13, 2025, only **five days** away from the date of the filing of this brief. Under our society's evolving standards of decency, his execution must not take place. This Court should grant Ford's petition.

CONCLUSION

For all of these reasons, this Court should grant the petition for a writ of certiorari; stay the execution and order further briefing; and/or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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February 8, 2025
Dated