No. 24-6510

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

REPLY TO BRIEF IN OPPOSITION

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

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PRELIMINARY STATEMENT

Petitioner, James D. Ford ("Ford"), offers the following Reply to the Brief in Opposition from the Respondent ("BIO"). Ford will not reply to every issue and argument raised by Florida and will only address specific points. Ford expressly does not abandon any issue not specifically replied to herein and relies upon his Petition for a Writ of Certiorari ("Petition") in reply to any argument or authority not specifically addressed.

REPLY REGARDING STAY

On page 7 of the BIO, the State reminds this Court that Ford seeks a stay of execution. Ford's execution is currently scheduled for February 13, 2025, only two days from the date of the filing of this Reply. Filed contemporaneously with the BIO on February 10, 2025, the State also submitted a Response to Application for Stay of Execution. This Court should grant Ford a stay.

Florida's compressed 33-day death warrant litigation schedule is completely insufficient to protect Ford's constitutional rights. The standards for granting a stay of execution are well-established. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). There "must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Id*. (internal quotations omitted).

There is indeed a reasonable probability that four justices would consider

Florida's use of its unique and obstructive "conformity clause" to be a meritorious issue for this Court's analysis, and there is also a significant possibility of reversal of the Florida Supreme Court's ("FSC") opinion. Florida's use of the conformity clause precludes litigants like Ford from challenging precedent, violating his Fourteenth Amendment due process rights and Eighth Amendment rights under the United States Constitution.

Ford's *Roper v. Simmons,* 543 U.S. 551 (2005) claim similarly warrants this Court's consideration, considering there has been twenty years of evolving standards regarding the science of what constitutes "age" since this Court rendered the *Roper* opinion in 2005. Regarding age, 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,* which, again, is based on over 20-year-old data and analysis.

Ford will be irreparably harmed if a stay is not granted. If this Court does not intervene by pausing Ford's unnecessarily expedited warrant schedule, he faces the ultimate and final sanction of death when Florida executes him via lethal injection at 6:00pm on February 13, 2025. Both Florida and this Court have 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)); *see also Ocha v. State*, 826 So. 2d 956, 964 (Fla. 2002) ("This Court has long adhered to the idea that [i]n the field of criminal law, there is no doubt that 'death is different.' "); *Swafford v. State*, 679 So. 2d 736, 740 (Fla. 1996) ("[O]ur jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings."). Ford's unnecessarily expedited warrant schedule simply does not honor our justice system's acknowledgement that "death is different." A stay is appropriate and necessary.

RESPONSE TO STATE'S REASONS FOR DENYING THE WRIT

Conformity Clause

The BIO attempts to argue that this issue was not presented in state court. BIO at 7-8. The relevant point is that the issue is properly before this Court, because both the state circuit court and the FSC cited to Art. I, § 17 of the Florida Constitution, otherwise known as "the conformity clause," which 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.

Particularly, the FSC's citation of the conformity clause triggers this Court's authority. Appendix A at 12.[1] Ford is not required to predict how and under what authority a court may rule at the state level. Once the FSC relied on the unique, obstructive, and unconstitutional conformity clause to deny his Fourteenth Amendment due process right and Eighth Amendment right to challenge the limitations of *Roper*, this Court's authority has been properly invoked.

Further, regarding this Court's authority, by finding that it had no authorization 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.").

[1] This Reply cites the Appendix to Ford's Petition for a Writ of Certiorari filed on February 8, 2025.

This Court must intervene in this case. Sadly, Florida's use of the conformity clause to abdicate all responsibility for considering and perpetuating evolving standards of decency undermines bedrock principles of federalism and state autonomy dating as far back as the Founding. *See, e.g., Alden v. Maine*, 527 U.S. 706, 748 (1999) (referring back to "the founding generation" in declaring that "our federalism" requires states to be treated consistently "with their status as…joint participants in the governance of the Nation.").

It is virtually unquestioned among states and lower circuits that precepts of federalism empower states to provide higher "ceilings" of individual rights than the "floor" provided by the U.S. Constitution. *See, e.g.*, *State v. Griffin*, 339 Conn. 631, 690 (Conn. 2021) (discussing the "settled proposition that 'the federal constitution sets the floor, not the ceiling, on individual rights'") (quoting *State v. Purcell*, 331 Conn. 318, 341 (Conn. 2019)); *Brown v. State*, 62 N.E.3d 1232, 1236-37 (Ind. 2016) (referencing the federal constitution as "the floor, not the ceiling, of individual rights" and stating that where "the protections of the federal and state constitutions are not co-extensive" the more protective standard must apply"); *Ark Encounter, LLC v. Parkinson*, 152 F.Supp.3d 880, 927 (E.D. Ky 2016) ("The federal Constitution may only be a floor and not a ceiling, but it is a floor nonetheless."); *Downey v. State*, 144 So.3d 146, 151 (Miss. 2014) ("[Supreme Court precedent] does not require Mississippi to follow the minimum standard that the federal government has set for itself…However, we are not allowed to abrogate or diminish clearly-articulated federal rights[.]"); *State v. Baldon*, 829 N.W.2d 785, 791 & n.1 (Iowa 2013) (The anited

States Supreme Court's jurisprudence "makes for an admirable floor, but it is certainly not a ceiling….The incorporation doctrine commands that we no longer use independent state grounds to sink below the federal floor."); *GE Commercial Finance Business Property Corp. v. Heard*, 621 F.Supp.2d 1305, 1309 (M.D. Ga. 2009) ("it is abundantly clear that states 'are free to extend more sweeping constitutional guarantees to their citizens than does federal law as federal constitutional law constitutes the floor, not the ceiling, of constitutional protection.'" (citing *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 (3d Cir. 1992))).

At the bottom of page 10 of the BIO, Florida uses the word "absurd" to basically explain the nature of a state being bound by the "conformity clause," to overrule or extend *Roper*. Yes, the absurd "conformity clause" itself, is the problem, as it prevents Ford from exercising his Fourteenth Amendment due process right and Eighth Amendment right to challenge precedent. Florida's conformity clause prevents the nation from evolving. This Court's intervention is required.

Roper v. Simmons

As argued above, the "conformity clause" prevents Florida's defendants from challenging the limitations of *Roper*. In addition to its reliance on the obstructive "conformity clause," the FSC further obstructed a complete merits-based review and evidentiary hearing on Ford's claim by relying on Florida's unyielding Florida Rule of Criminal Procedure 3.851(d)(2). The State argues that the FSC's reliance on Fla. R. Crim. P. 3.851(d)(2) to find that Ford's *Roper* claim was untimely during his active death warrant constitutes an independent and adequate state law ground that

forecloses this Court from having jurisdiction to consider Ford's petition. BIO at 11-14. In all candor to this Court, undersigned counsel acknowledges that federal jurisprudence appears to support the argument that the FSC's partial reliance on Rule 3.851(d)'s stringent procedural bar could be considered an independent and adequate state law ground. With that being acknowledged, the FSC did not solely rely on Rule 3.851(d) to dispose of Ford's *Roper* claim. The FSC also partially disposed of Ford's *Roper* claim on federal grounds. While the FSC's opinion is brief it its merits analysis, it states that the FSC "has repeatedly rejected the argument that *Roper's* holding that the execution of an individual who was younger than eighteen years at the time of the murder(s) violates the Eighth Amendment should be extended to defendants whose mental or developmental age was less than eighteen at the time of their offenses." Appendix A at 11. In support of its conclusion that Ford "is not entitled to relief on this claim," the FSC goes on to cite its reasoning in *Barwick v. State*, 361 So. 3d 785 (Fla. 2023), stating:

> 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.
>
> ***Because the Supreme Court has interpreted the Eighth Amendment to limit the exemption from execution to those whose chronological age was less than eighteen years at the time of***

> ***their crimes, this Court is bound by that interpretation and is precluded from interpreting Florida's prohibition against cruel and unusual punishment to exempt individuals eighteen or more years old from execution on the basis of their age at the time of their crimes.***

Appendix A at 11-12 (citing *Barwick*, 361 So. 3d at 794) (emphasis added). It is clear from the language that the FSC cites in its opinion that the FSC was deciding the merits of Ford's *Roper* claim on a federal ground by plainly stating that the FSC was "bound by" this Court's interpretation of the federal Eighth Amendment.

Further, while Rule 3.851(d) may function as an independent and adequate state law ground, it would be blatantly unfair and a denial of due process to allow the FSC's reliance on the rule to foreclose this Court from considering Ford's petition because Rule 3.851(d) itself is unconstitutional when applied to Ford's case in the active warrant context. This Court has explained that "'[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Osborne v. Ohio*, 495 U.S. 103, 125 (1990) (quoting *Davis v. Wechsler,* 263 U.S. 22, 24 (1923)). Florida's unnecessarily stringent procedural rule should not defeat Ford's assertion of his most fundamental constitutional rights.

As was argued to the FSC during Ford's appeal, Florida's current interpretation of Fla. R. Crim. P. 3.851(d)(2) violates the federal constitution when applied to successive motions like Ford's filed in the active warrant context because the rule's restrictive text enumerating only three narrow circumstances where a

successive motion may be considered effectively cuts off substantial avenues for relief that a capital defendant facing an actual execution date could attempt to raise. *See* Appendix C at 14-24. The rule, when applied during an active warrant like Ford's current case, effectively violates Ford's federal Fourteenth Amendment Due Process rights, federal Eighth Amendment right to a narrowly tailored individualized sentencing determination, and federal Sixth Amendment right to effective assistance of counsel. *See* Appendix C at 14-24. Florida's Rule 3.851(d) arbitrarily interferes with Ford's ability to raise claims for relief at the death warrant stage of his postconviction proceedings. This Court should not allow Florida to prevent the consideration of Ford's petition by relying on an unconstitutional state procedural rule to find that his assertion of his federal constitutional rights is untimely.

The fact that Ford's *Roper* claim was partially disposed of on a state procedural ground should not preclude this Court's certiorari review, because the failure to consider Ford's *Roper* claim will result in a fundamental miscarriage of justice. *Cf. Coleman v. Thompson,* 501 U.S. 722 (1991) (explaining in the federal habeas context that where a state prisoner has defaulted his federal claim in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice). The undisputed evidence in Ford's case establishes that he had a mental and developmental age no greater than that of a fourteen-year-old at the time of the offense for which he was convicted and sentenced to death. A fundamental miscarriage of justice will occur if this Court

forgoes considering the merits of Ford's argument that he should be categorially excluded from execution under *Roper* based on Florida's application of an unconstitutionally stringent state procedural rule.

Ford had a mind similar to that of a fourteen-year-old in 1997 when the capital offense was committed. Florida is not disputing that point. As thoroughly argued in Ford's petition, evolving standards of decency dictate that this Court's reasoning in *Roper* should and must be extended to categorically exclude individuals with a mental and developmental age less than age eighteen from the death penalty. Petition at 14-28. "[T]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (internal quotation omitted). Our nation's dignity is not served by Florida executing a man who had the mind of a fourteen-year-old at the time of the offense for which he is scheduled to die in two days' time. This practice can be described as nothing less than barbaric. This Court's authority to grant Ford's petition for a writ of certiorari provides the judicial mechanism by which to prevent this indignity. This Court has the duty and the authority to determine whether we are a nation that should execute individuals with the minds of children. Relief is proper.

CONCLUSION

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 11, 2025
Dated