

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD BARRY RANDOLPH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

**REPLY TO BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI
CAPITAL CASE**

SET FOR EXECUTION ON NOVEMBER 20TH AT 6:00PM

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Barry Randolph respectfully files this Reply to the State of Florida's brief in opposition to Mr. Randolph's petition for a writ of certiorari. No claims or argument not addressed in this Reply are waived. The State's arguments are unavailing and disputed below.

REPLY TO ARGUMENT

- 1. Randolph's As-applied Challenge to Florida's Method of Execution Was Raised Within One Year of the Discovery of the Basis for the Claim Which Meets Applicable Timing Requirements Under Florida Law.**

The State asserts that the Florida Supreme Court's ruling denying Mr. Randolph evidentiary development on his as-applied challenge to Florida's lethal injection procedures rests on an independent and adequate state ground. (BIO, p. 9) The State's argument must fail. In order for a procedural bar to serve as an independent and adequate state ground, the bar must be consistently applied. Such is not the case here.

No independent and adequate state law grounds foreclose this Court's review. This Court has jurisdiction to hear a question of federal law where the state court decision does not "rest [] on a state law ground that is independent of the federal question and adequate to support the judgment." *Cruz v. Arizona*, 598 U.S. 17, 25 (2023). The presumption is that the state court relied on applicable federal law, i.e. that the state court ruling does not rely on independent and adequate state grounds. *Coleman v. Thompson*, 501 U.S. 722, 732-35 (1991). A state law ground is independent where it does not depend on a federal holding and "is not intertwined

with questions of federal law.” *Glossip v. Oklahoma*, 604 U.S.145 S. Ct. 612, 624 (2025) (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) and *Foster v. Chatman*, 578 U.S. 488, 498 (2016)).

Adequacy requires consistency. *See Walker v. Martin*, 562 U.S. 307, 320 (2011) (finding “[a] state ground ‘applied infrequently, unexpectedly, or freakishly’ may ‘discriminat[e] against the federal rights asserted’ and therefore rank as ‘inadequate’”) (quoting *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990)). As the petition demonstrates, (1) that newly-invented barrier to the merits review of a federal constitutional claim is inefficacious here, or (2) renders Florida’s post-conviction review system invalid under the Supremacy Clause.

The State argues that because Randolph did not raise the Supremacy Clause issue below, this Court is precluded from reviewing the claim. BIO, p. 16 However, the newly-invented barrier to merits review of a constitutional claim rendering Florida’s post-conviction review system invalid arose only when the Florida Supreme Court issued its opinion. Randolph has thus raised his federal constitutional claim at the earliest opportunity. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86, n.9 (1980) (internal parallel citations omitted) (“[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677–678, (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320, (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)”).

Here, the Florida Supreme Court imposed a procedural bar based on a lack of timeliness, interpreting Fla. R. Crim. P. 3.851 in a manner inconsistent with its plain language and inconsistent with its previous practice and decisions.¹ As the current Florida Supreme Court would have it, a litigant with a deteriorating medical condition must raise the claim before it ripens. Inevitably, the claim would be denied and further review would be precluded as successive. Under the Florida Supreme Court's timeliness requirements, the claims will never be heard when the claim is ripe unless a horrific botch occurs.

Such is not the review that state-federal comity entrusts with the state courts and is a clear violation of the Supremacy Clause. Purposely avoiding the deciding claims based on maudalin procedural timing rules is not what the independent and adequate state ground rule is designed to protect. The Florida Supreme Court's newly-constructed timeliness analysis does not preclude this Court's intervention, it is a significant reason why this Court must intervene. The Due Process Clause of the Fourteenth Amendment prohibits state "procedures for postconviction relief [that] 'offend [] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress any recognized principle of fundamental fairness in operation.'" *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S.52, 69 (2009) (quoting *Medina v. California*, 505 U.S. 437, 448

¹ The alternative ruling of a procedural bar is without distinction from the timeliness ruling in that the Florida Supreme Court is essentially holding that Mr. Randolph would have had to raise the claim when it was not ripe. Both rulings are arbitrary and inconsistent.

(1992)).

In finding Mr. Randolph's claim untimely, the Florida Supreme Court relied on three recent warrant litigation decisions, stating::

Randolph's current claim was raised eight years later and is thus untimely. *See Tanzi v. State*, 407 So. 3d 385, 392 (Fla.), *cert. denied*, 145 S. Ct. 1914 (2025); *Rogers v. State*, 409 So. 3d 1257, 1267-68 (Fla.), *cert. denied*, 145 S. Ct. 2695 (2025); *Cole v. State*, 392 So. 3d 1054, 1064 (Fla.), *cert. denied*, 145 S. Ct. 109 (2024).

App., 10a. Superficially, the state court's ruling appears to be premised on an independent and adequate state procedural ground, but a review of those cases demonstrates that the state court's denial of Mr. Randolph's claim was arbitrary, freakish and inconsistent with Florida law.

As the State concedes, Florida law provides that a capital defendant may raise a claim outside the one-year time frame if he demonstrates an exception to the rule's one-year limitation.(BIO, p. 10) The State then argues that, as to Mr. Randolph's as-applied method of execution challenge, failure to file by 2017 (the year the current protocol went into effect) is a regularly applied rule: "This rule is well established in Florida and routinely followed." (BIO, p. 10) The State then cites *Tanzi*, *Rogers* and *Cole*, (BIO, p. 10), as did the Florida Supreme Court in its opinion, as examples of a regularly applied rule as to timeliness of method of execution challenges.

However, these cases demonstrate that neither *Tanzi*, *Rogers* or *Cole* argued an exception to the one-year time frame when raising their as-applied method of execution challenges, unlike Mr. Randolph who plainly plead that *the progression of his lupus within the last year* formed the basis of his claim. The Florida Supreme

Court faulted Tanzi for failing to even offer an exception: “Tanzi does not suggest any exceptions apply in this case.” *Tanzi*, at 392. Likewise, the Florida Supreme Court in *Cole* stated: “Identifying this potentially dispositive issue at the *Huff* hearing, the postconviction court questioned defense counsel as to the reason for the delay in Cole's claim. In response, counsel argued only that lethal injection protocols have changed, but counsel could not cite a specific change that would justify the delay.” *Cole*, at 1054. The same happened in *Rogers*. Rogers argued: “that he could not raise this claim sooner because he could not know what execution procedures would be in place until his death warrant was signed.” *Rogers* at 1267. None of these cases support the holding in Randolph’s case, where Randolph clearly stated the basis for the timing of the filing of his claim, placing the claim squarely within the one-year exception.

In further support of their ill-founded argument, the State mischaracterizes Randolph’s claim knowing, as they must, that the Florida Supreme Court’s denial was arbitrary. The State criticizes Randolph for asserting that the Florida Supreme Court’s ruling amounts to the court requiring Randolph to “have anticipated the progression of his disease in 1990 or 2017.” BIO, p. 11, n. 2. Yet, ironically, the State asserts that it “is the disease itself that is the triggering event.” BIO, p. 11, n. 2. The State ties itself in knots trying to justify the Florida Supreme Court’s arbitrary ruling on timeliness and procedural bar.

Mr. Randolph should not be held to anticipate that the Florida Supreme Court would ignore the plain language of its own rules of criminal procedure and

hold that when a capital defendant asserts a basis for the one-year exception – a fact which must be accepted as true under Florida law - that the defendant is still precluded from evidentiary development.

2. The State's Reliance on 28 U.S.C. § 1983 is unavailing.

The State's reliance on 28 U.S.C. § 1983 is unavailing and a red-herring. BIO, p. 13. Randolph did not raise his claim premised on 28 U.S.C. § 1983. The State's argument warrants no further discussion here.

3. The Florida Supreme Court's alternative ruling is a merits ruling obtained without evidentiary development and is in conflict with this Court's precedent.

The circuit court and the Florida Supreme Court denied Mr. Randolph evidentiary development. Instead, the Florida courts filled in the gaps and made factual findings without allowing Mr. Randolph to present any evidence. Mr. Randolph had a right to present evidence to support his federal constitutional claim. *Cash v. Culver*, 358 U.S. 633 (1959); *McNeal v. Culver*, 365 U.S. 109 (1961); *Carnley v. Cochran*, 369 U.S. 506 (1962). The Florida courts made their own findings of fact that Mr. Randolph was denied the opportunity to refute through truthful evidence. The courts, of which, no judge or justice had a medical degree, not only determined facts, but determined medical facts. This would be wrong in a run of the mine case, and is clearly inappropriate here. There can be no meaningful merits ruling absent evidentiary development. Randolph asserted the necessary fact under this court's precedent to establish the right to a hearing on his as-applied method-of-execution challenge.

4. The Florida Court's Merits Ruling Violates This Court's Precedent and Florida Law Requiring a Court to Accept a Prisoner's Allegations as True Unless Refuted by the Record

The State argues that Randolph's "method-of-execution claim fails in its entirety on the merits." BIO, p. 18. The State's argument is itself meritless and misleading because the State argues this Claim as if Randolph had been given an evidentiary hearing and failed to meet his burden of proof. But of course, Randolph had no such opportunity and was arbitrarily denied his due process right to present evidence in support of his claim.

The State criticizes Dr. Zivot's "generalized" affidavit, and focuses on "positioning" as the substance of Randolph's claim. BIO, p. 18. In so doing, the State presents factual arguments about the adequacy of etomidate, BIO, p. 19, n.5, and argues that, "Even if his claim was timely raised, Randolph was in no way entitled to an evidentiary hearing so he could relitigate whether etomidate functions properly under the State's protocol." BIO, p. 20. But Randolph never sought to relitigate the use of etomidate, and nowhere in his pleading did he make such an argument. He focused on the progression of Mr. Randolph's disease as the basis for his as-applied challenge.

The State also misleadingly criticizes Mr. Randolph for failing to establish that his alternative methods would result in a "clear and considerable" difference in pain, "given that his chief concern was positioning." BIO, p. 20. The State improperly mischaracterizes Mr. Randolph's claim as one of "positioning," as has been the practice of the State in many recent warrant cases. It should not be countenanced here.

Randolph was precluded from presenting testimony from Dr. Zivot regarding Mr. Randolph's unique and high risk in facing Florida's lethal injection protocol with his lupus. Dr. Zivot was prevented from explaining the progression of Mr. Randolph's lupus and how it had worsened over time to the point that Mr. Randolph was at high risk of a torturous death now. Instead, the case was decided on the non-medical assumptions and conjecture of the courts.

The Florida Supreme Court affirmed the denial of a hearing which violated Mr. Randolph's due process rights. Mr. Randolph was barred despite any particulars of his case. This course of judicial decision making is troubling. The Florida Supreme Court has dealt with a spate of warrants, especially over the last year. In response to the warrants, there has not been one stay granted and there has only been one evidentiary hearing. This is no way to do justice. Judicial expediency during a warrant should not overcome the need to do justice in an individual case.

Mr. Randolph was denied the opportunity to prove the method of execution would cause a level of suffering that is prohibited by the U.S. Constitution. This Court's decisions and the U.S. Constitution hold supremacy over any state law, and the state courts like the Florida Supreme Court are bound to enforce these laws. Here Florida has disregarded the Supremacy Clause and prevented Mr. Randolph from presenting his federal constitutional claim.

The State's is attempting to overcome the constitutional violations it is committing against Mr. Randolph by rote application of inapplicable legal technicalities. This attempt to avoid constitutional accountability should not lead this

Court to evade the constitutional issues now before this Court. Rather than fully engage with Mr. Randolph's well-pleaded claims under the U.S. Constitution the State relies on mischaracterization of Mr. Randolph's claim to defeat review of his due process and Eighth Amendment rights

CONCLUSION

For the above reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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