No. 22A949

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

DARRYL BRYAN BARWICK,

Petitioner,

v.

RON DESANTIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY TO RESPONSE TO APPLICATION FOR STAY OF EXECUTION

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

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Respondent's position that this Court should deny Mr. Barwick a stay of execution is premised upon an interpretation of facts not supported by the record and a distortion of Mr. Barwick's claim and the applicable law. Mr. Barwick submits that he has shown that a stay of his execution is appropriate.

I. Standards for Granting a Stay

Respondent asserts that Mr. Barwick fails to establish that four members of the Court "would vote to grant certiorari on Mr. Barwick's claim. Response at 22. This is because, according to Respondent, Mr. Barwick's claim "presents no important or unsettled question of federal law because it is directly settled by this Court's nearly thirty-year-old precedent." *Id.*

However, Mr. Barwick's claim concerned the fact that Florida's clemency scheme provides no standards as to what information will be considered in determining whether mercy is warranted and where the singular focus on the circumstances of the crime and his prior criminal conduct deprived Mr. Barwick of due process. Contrary to Respondent's argument, Mr. Barwick recognized the constitutional requirement that minimal due process applies to his clemency proceeding as recognized in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring). Thus, the relevant question is whether a clemency scheme designed to provide a 0% chance that an applicant, like Mr. Barwick, can avail himself to the mercy of the Clemency Board suffices to provide minimal due process. Respondent's very argument, that clemency is inappropriate in Mr. Barwick's case because his "guilt is indisputable", demonstrates that the fail safe of clemency does not work in Florida. Contrary to what the commissioners told Mr. Barwick, Respondent acknowledges that the only standard is one where an applicant proves he is "an innocent man". Respondent's current position, which was not presented to the lower courts, is equally violative of due process.

Due to procedural bars and the increasing complexity of litigation as time goes on, clemency is sometimes the only way to have other unfairness or injustices in the application of the death penalty addressed. *See, e.g.*, *Matthews v. White*, 807 F.3d 756, 763 (6th Cir. 2015) ("But clemency is different than litigation, even if similar issues are raised . . . [the Governor] may decide that clemency is warranted even if [the applicant] could not meet a particular legal standard for mitigation in court."); *Sanborn v. Parker*, No. 99-678-C, 2011 WL 6152849, at *1 (W.D. Ky. Dec. 12, 2011) (noting that because "a bid for clemency is not reliant upon or restricted to matters argued before the courts and is not restricted to cases where the guilt of the petitioner is in doubt," evidence of a petitioner's "neuropsychological state, including whether or not he has some sort of brain damage or abnormality, is indeed relevant to his clemency petition, even though [he] was twice judged competent to stand trial."). There are many examples of clemency being used to correct injustices not relating to innocence. *See* Clemency, Death Penalty Information Center, *available at* https://deathpenaltyinfo.org/facts-and-research/clemency (last visited April 30, 2023).[1] Florida's standardless clemency scheme, and singular focus on guilt, violates *Woodard*.

[1] A few examples of a state using its clemency power to correct procedural or other unfairness include: Governor Richard Celeste of Ohio, who selected eight death row inmates for clemency based on factors such as mental health and intellectual disability; Virginia Governor Terry McAuliffe, who in 2017 granted clemency to death-sentenced inmate William Burns due to his pervasive mental illness and incompetence; Ohio Governor John Kasich, who in 2018 granted clemency to death-sentenced Raymond Tibbetts on the basis of his powerful mitigation and "fundamental flaws in the sentencing phase of his trial" that prevented his jury from "making an informed decision about whether Tibbetts deserved the death penalty.";

Respondent also argues that there is no possibility that Mr. Barwick would achieve a reversal. Response at 24. However, Respondent's argument tethers itself to a specific interpretation of facts in Mr. Barwick's case, and where Mr. Barwick had no opportunity to engage in discovery or present evidence in support of his claim. Further, Respondent's factual recitation of the clemency process is based upon selective facts, conjecture, and misguided interpretation of the clemency interview. Specifically, Respondent states several erroneous facts, including that Dr. Hyman Eisenstein was contacted by clemency counsel, Response at 7, and that Mr. Barwick was entitled to obtain any of the materials generated by FCOR apart from a copy of the transcript of the interview with the commission. Response at 13 (stating that Mr. Barwick has access to clemency statements by his attorneys, the prosecutor, the trial judge, their family members, and the victim's family members), *but see* Rule 15 (b), Rules of Executive Clemency (2011). Further, Respondent ignores a critical exchange about Mr. Barwick's neurocognitive functioning:

> COMMISSIONER DAVISON: Has anybody ever diagnosed you with any type of brain injury?
>
> MR. BARWICK: Not that I'm aware of. I've been tested for a couple things, but I don't know what the results were.
>
> COMMISSIONER DAVISON: Have you ever heard the term "organic brain injury" before?

Texas Governor Greg Abbott, who commuted Thomas Whitaker's death sentence due in part to proportionality concerns, since the triggerman had not received the death penalty; and Kentucky Governor Matt Bevin, who in 2019 commuted Leif Halvorsen's death sentences, stating simply that "Leif has a powerful voice that needs to be heard by more people."

MR. BARWICK: I've heard the term. But do I know what it is? No.

COMMISSIONER DAVISON: But has that ever been applied to you?

MR. BARWICK: Not in the front of me if it has, that I'm aware of.

App. E at 55-56.

Most importantly, contrary to Respondent's interpretation of the comments and questions posed during his clemency interview, they clearly demonstrate a singular focus and fixation on the crime with no concern relating to the "substantial mitigating circumstances" that would support clemency. *Compare* App. E with App. F (demonstrating the clemency commission's pattern of singularly focusing on the crime to the exclusion of considering individual factors warranting mercy).

Likewise, the cases upon which Respondent relies are equally unhelpful. Justice O'Connor specifically addressed Respondent's argument (citing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981)), that clemency is not the business of the courts. Response at 25. Justice O'Connor stated:

> Thus, although it is true that "pardon and commutation decisions have not traditionally been the business of courts," *Dumschat*, *supra*, at 464, 101 S.Ct. at 2462, and that the decision whether to grant clemency is entrusted to the Governor under Ohio law, I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings.

523 U.S. at 289.

Finally, as to whether an irreparable injury will occur without a stay, Mr. Barwick's imminent execution, having never had a clemency proceeding where he was given notice of any standards regarding which factors governed the clemency

consideration, or any meaningful opportunity to demonstrate that he deserved mercy, certainly establishes this factor.

II. *Bucklew v. Precythe*

Respondent attempts to draw additional support for his arguments that a stay is not warranted, relying on *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). Respondent's attempt to cast Mr. Barwick's cause of action and circumstances as similar to Bucklew's fails.

First, Respondent argues that "[t]he people of Florida as well as the surviving victims, 'deserve better' than the 'excessive' delays that now typically occur in capital cases". Response at 16-17. But, Respondent neglects to point out that any delay in Mr, Barwick's execution was solely caused by Respondent. Pursuant to the Timely Justice Act, the Florida Legislature requires that the Governor issue a death warrant within thirty days after receiving notification that a defendant sentenced to death has exhausted his allowed state and federal collateral challenge, provided that the executive clemency process has concluded at the time of such notification. Fla. Stat. § 922.052(2)(b). Thereafter, the Governor must "direct[] the warden to execute the sentence within 180 days." *Id*. However, under the clemency rules, the clemency proceeding begins "at such time as designated by the Governor" or if there has been "no such designation . . . immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals . . . ." Rules of Executive Clemency 15(C).

Thus, under the Timely Justice Act and Rules of Executive Clemency, Mr. Barwick has been eligible for clemency since the exhaustion of his initial appeals, when his conviction and sentence were upheld by the Eleventh Circuit in 2016. Defendants, who solely controlled the timing of the issuance of Mr. Barwick's death warrant, waited more than four years after such time to initiate clemency proceedings for Mr. Barwick and then almost another three years for Mr. Barwick's death warrant to be signed. Under these circumstances, Respondent's comparison to *Bucklew* falls short.

Furthermore, this Court in *Bucklew* described the protracted proceedings that occurred after an execution date had been scheduled, including five years of litigation on Bucklew's cause of action, and two eleventh hour stays of execution. *Bucklew*, 139 S.Ct. at 1134. Also, not mentioned by Respondent, this Court's remarks specifically concerned stays related to method of execution claims. *Id*. ("The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay.").

Likewise, this Court in *Bucklew* cites to its opinion in *Hill v. McDonough*, 547 U.S. 573, 584 (2006), which clearly states: "Thus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." Contrary to Respondent's argument, nowhere in *Bucklew* did this Court create an additional stay requirement. Response at 17.

Moreover, even if this Court had a timing concern similar to the one it expressed in *Bucklew* related to method of execution challenges, Respondent misunderstands when this action accrued for the purposes of timeliness. The Eleventh Circuit squarely determined that Mr. Barwick's cause of action was timely. App. A at 9. Mr. Barwick diligently sought review of his cause of action.

Finally, contrary to Respondent's argument, Mr. Barwick does not seek to attack controlling precedent. Response at 18, 20. Rather, he seeks to demonstrate that this Court's controlling precedent dictates that his right to due process was violated by the failure to provide any standards for the considerations by the commissioners and/or clemency board, *coupled with* an absence of actual consideration. Although the clemency process is discretionary, it must still be meaningful. And, what became apparent at Mr. Barwick's clemency interview was that the sole consideration concerned his guilt for the crime. As Mr. Barwick never challenged his guilt, his clemency proceedings were doomed from the outset. The determination in his case was equivalent to a coin flip with "denied" on each side of the coin. There was no notice of the standards by which clemency would be determined, nor was there any meaningful opportunity to be heard.

Respectfully submitted,

/s/ LINDA McDERMOTT
LINDA McDERMOTT
Counsel of Record
KATHERINE BLAIR
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida

227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
linda_mcdermott@fd.org
katherine_blair@fd.org