Capital Case No. 22A952

In The
Supreme Court of the United States

DARRYL BARWICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

RESPONSE TO APPLICATION FOR STAY OF EXECUTION EXECUTION SCHEDULED FOR MAY 3, 2023, AT 6:00 P.M.

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RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION

On May 1, 2023, Barwick, represented by state postconviction counsel Ms. Karin Moore, Esquire, and Ms. Drew Sena, Esquire, of the Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N), filed, in this Court, a petition for writ of certiorari seeking review of the decision from the Florida Supreme Court in this active warrant case. *Barwick v. State*, No. SC2023-0531, 2023 WL 3151079 (Fla. Apr. 28, 2023). The petition raised two issues:

i. a claim that Florida's Conformity Clause violates the Eighth Amendment; and

ii. a claim that, in light of the American Psychological Association's 2022 resolution calling for an end to the death penalty for late-adolescents, this Court should overrule *Roper v. Simmons*, 543 U.S. 551 (2005) by holding that no first-degree murderer under 21 at the time of the offense may be executed.

In addition to the petition for writ of certiorari, Barwick filed an application to stay his execution, which, he maintains, should be granted so that this Honorable Court may consider his petition. For the reasons below, however, this Court should deny Barwick's petition and his application for stay.

Stays of Execution

Stays of executions are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584. There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits

without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). Further, equity requires that this Court consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992).

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). This Honorable Court has repeatedly emphasized that surviving victims and the State have an "important interest" in the timely enforcement of the death sentence. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019). The people of Florida and the surviving victims "deserve better" than the "excessive" delays that now typify capital cases. *Id.* at 1134.

Courts should "police carefully" against last-minute claims being used "as tools to interpose unjustified delay" in executions. *Id.* Eleventh-hour stays of execution "should be the extreme exception, not the norm." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). A stay in a capital case results in a "commutation" of the death sentence into a life sentence for the duration of the stay. *Bowles v. DeSantis*, 934 F.3d 1230, 1248 (11th Cir. 2019) (noting the Eleventh Circuit has stated many times, "each delay, for its span, is a commutation of a death sentence to one of imprisonment" citing cases).

Allowing suits filed shortly before a scheduled execution to be the basis for a stay of execution results in the capital defense bar filing frivolous suits at the last minute just to obtain a stay of the execution. As Justice Thomas observed, granting a stay of execution in the face of unexplained delays "only encourages the

proliferation of dilatory litigation strategies" that the Supreme Court has "repeatedly sought to discourage." *Price v. Dunn*, 139 S. Ct. 1533, 1538 (2019) (Thomas, J., concurring in the denial of certiorari with Alito, J., and Gorsuch, J., joining).

Moreover, there is a "strong equitable presumption" against granting a stay of an execution where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004); *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Additionally, there are comity concerns that flow from federal courts ordering the delay of state court criminal judgments that are not present in typical civil litigation. *McFarland v. Scott*, 512 U.S. 849, 872–73 (1994) (pointing out that federal habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."

All that said, Barwick must establish *at least* three elements to receive a stay of execution on his long-finalized sentence from this Court: (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal; and (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle,* 463 U.S. 880, 895 (1983). This Court's opinion in *Bucklew* effectively modified this test to require Barwick to show an additional two elements: (4) that he has not pursued this suit in dilatory fashion and (5) his

underlying suit is not based on a speculative theory and simply designed to stall for time. *Bucklew*, 139 S. Ct. at 1134 ("Federal courts can and should" protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion *or* based on speculative theories.") (Cleaned up; emphases added).

Barwick must establish *each* element above. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (holding that an inmate seeking a stay of execution "must satisfy *all* of the requirements for a stay, including a showing of a significant possibility of success on the merits") (emphasis added).

I. Barwick's Claim that the Conformity Clause is Unconstitutional

In the first underlying issue, Barwick contends that the conformity clause is unconstitutional because it requires that Florida's interpretation of its cruel-and-unusual-punishment prohibition conform to this Court's Eighth Amendment jurisprudence. A stay should not be granted on this basis.

As a preliminary matter, this Court, for the reasons fully stated in the brief in opposition, lacks jurisdiction. The Florida Supreme Court decided Barwick's claims on independent and adequate state-law grounds that Barwick has failed to challenge in any question presented. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). This Court has explicitly recognized Florida's re-litigation bar is an adequate state-law ground that deprives this Court of jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 281, 283–285 (1956). This Court should reject Barwick's stay request on that basis alone.

Barwick has also failed to establish the elements needed to obtain a stay. First, there is no reasonable probability that this Court would vote to grant certiorari because Barwick could have raised this question long before now. The proper time for Barwick to have raised this claim was well over a decade ago when the Florida Supreme Court rejected his *Roper*-extension claim. *Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011). Now, approximately forty-eight hours away from execution, Barwick complains of a state constitutional provision adopted over two decades ago. This Court should not reward Barwick for belatedly asking it to declare Florida's conformity clause unconstitutional. Barwick could have raised this question long ago; his failure to do so is reason enough to deny the stay.

Apart from Barwick's prolonged and inexcusable delay, he has not presented a consequential, unsettled question of federal law that is worthy of certiorari review. Nor does Barwick cite any case holding that a conformity-clause type provision is unconstitutional.

Further, this Court would not grant certiorari on this claim because it is meritless. Barwick has not presented a coherent claim, much less has he presented one worthy of certiorari. According to Barwick, the conformity clause violates the United States Constitution by providing him with exactly the rights to which he is entitled thereunder.

At its core, Barwick's argument is that the conformity clause violates the United States Constitution on account of its perfect alignment therewith. In Barwick's view, the people of Florida adopted an unconstitutional provision when

they voted to conform Florida's cruel-and-unusual-punishment jurisprudence to that of this Court, which has the final word on what is constitutional.

Taking issue with Florida's failure to add protections in addition to those afforded by the United States Constitution, Barwick complains that the conformity clause too closely —indeed, perfectly— matches its federal analogue. Of course, a state *may* exceed the protections afforded by the United States Constitution; however, contrary to Barwick's position, a state is, of course not required to do so.

As is their prerogative, the people of Florida voted not to expand upon the protections of the Eighth Amendment. *See New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that "one of the happy incidents of the federal system is 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") (emphasis added). The conformity clause cannot be rendered unconstitutional by the fact that it provides neither more nor less protection than the United States Constitution.

In Barwick's view, a state can adhere to the Constitution only by expanding upon the protections provided therein. Further, under Barwick's reasoning, Florida's conformity clause so precisely matches the Constitution that it is therefore unconstitutional. This argument does not merit discussion of any sort, much less does it merit certiorari review.

In any case, there is no authority for this Court to intervene; it may do so only where a state constitutional provision conflicts with federal constitutional rights.

And Barwick has presented no conflicting provision. The conformity clause requires that Florida's cruel-and-unusual-punishment jurisprudence perfectly mirror that of this Honorable Court. As such, the constitutional provision in question is the opposite of a conflicting provision. Accordingly, there is no authority on which this Court may intervene, and Barwick fails the first element.

Second, this Court should deny the stay because there is no significant possibility of reversal. As a preliminary matter, the exemption-from-execution claim that Barwick argues the Florida Supreme Court improperly denied under the conformity clause is procedurally barred. Again, Barwick could have raised his challenge to Florida's conformity clause long before now. On the eve of his execution, Barwick complains of a state constitutional provision adopted over two decades ago. This Court should not reward Barwick for belatedly asking it to declare Florida's conformity clause unconstitutional.

Even if this Honorable Court were to reach the merits, Barwick still could not prevail since the claim is meritless. As a matter of logical necessity, the conformity clause cannot be unconstitutional for requiring exactly what is constitutional.

The State of Florida is not, of course, required to exceed what is constitutionally required. The conformity clause cannot violate the United States Constitution on account of its perfect alignment therewith. Nor can the people of Florida have adopted an unconstitutional provision when they voted to conform Florida's jurisprudence to that of this Court, which has the final word on what is constitutional.

The requirement that Florida's prohibition on cruel and unusual punishment be construed in conformity with the relevant decisions of this Court is—of logical necessity—constitutional.

Third, as to the irreparable-injury requirement, such is usually inherent in a death sentence. However, Barwick does not advance his cause by arguing the rather obvious point that death causes irreparable injury. Since Barwick cannot meet any other element, the irreparable-injury element does not benefit him. Irreparable injury cannot be a significant element in a capital case because the irreparability of death is a truth too obvious to mention. Notably, the irreparable-injury requirement is derived from case law in which the issue was whether a stay should be granted in a civil case. *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983) (citing *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974)). Though irreparable injury may be a key consideration in a civil matter, it cannot hold the same weight in a criminal case since it requires litigants to address a question that usually admits of no reasonable dispute. Unsurprisingly, Barwick does not provide any unique or special argument in support of this factor.

Fourth, Barwick has pursued this claim in a dilatory fashion. He presents no justification for his present-day litigation of a state constitutional provision that was adopted over two decades ago. Barwick waited until the eve of his execution even though the constitutional provision in question was added in 2002. Barwick's lack of an excuse for his delay is by itself sufficient to deny his motion for a stay.

Fifth, Barwick's claim is solely for purposes of delay. The Florida Supreme

Court rejected Barwick's underlying exemption-from-execution claims on procedural bars having nothing to do with the conformity clause before rejecting them under the conformity clause. At the last second, Barwick entirely ignores the procedural bars invoked by the Florida Supreme Court and attempts to litigate a state constitutional provision adopted over two decades ago. Further, Barwick argues about the constitutionality of a provision mandating conformity with the constitutional law emanating from this Court. Barwick's conformity-clause claim can hardly be stated with a straight face; it is nothing more than an attempt to delay execution of sentence.

II. Barwick's *Roper*-Extension Claim

In the second underlying issue, Barwick contends that, in light of the 2022 American Psychological Association (APA) resolution calling for an end to the death penalty for late-adolescents, this Court should overrule *Roper v. Simmons*, 543 U.S. 551 (2005) by holding that no first-degree murderer under 21 at the time of the offense may be executed.

As a preliminary matter, this Court, for the reasons stated both in the conformity clause claim and in the brief in opposition, lacks jurisdiction. That is reason enough to deny Barwick a stay on this issue.

Barwick also fails to establish the elements required for a stay. First, there is no reasonable probability that the Court would vote to grant certiorari because Barwick could have raised this question long before now. This Court should not reward Barwick for belatedly asking to overturn *Roper* and exempt all first-degree

murderers under 21 from execution when he previously had the opportunity to raise that issue and did not.

The Florida Supreme Court rejected an extremely similar claim on the merits in 2011 but Barwick never sought certiorari from that decision. *See Barwick*, 88 So. 3d at 106 (rejecting Barwick's claim that "*Roper* extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment."). Barwick's decision to await a warrant before raising this exact iteration of his claim before this Court is particularly inexcusable because *Roper* and the Florida courts already long ago already addressed the assertion that the brains of juveniles do not suddenly alter when they turn eighteen. *E.g.*, *Roper*, 543 U.S. at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18."); *Branch v. State*, 236 So. 3d 981, 985 (Fla. 2018) (rejecting an argument based on scientific research, state, and international law that "individuals who committed murder in their late teens and early twenties be treated like juveniles."); *Morton v. State*, 995 So. 2d 233, 245-46 (Fla. 2008) (relying on brain mapping studies to urge the extension of *Roper*). Barwick's failure to seek certiorari on this question long before now is an independent reason not to grant certiorari. *Cf. Bucklew*, 139 S. Ct. at 1134.

In addition to the delay, this Court should not grant certiorari on this claim because it is substantively meritless. Barwick effectively argues that the brains of juveniles are not all that different from adults under 21 and therefore *Roper*'s

exemption should apply at least to those under 21.

Things have not sufficiently changed since *Roper* to warrant overruling it and extending its protections to young adults under 21. *Roper* itself recognized the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. at 574. All of the twenty-eight death penalty jurisdictions in this country, along with the U.S. military, set the age of death-eligibility at eighteen.

Second, there is no significant possibility of reversal. Preliminarily, the issue is procedurally barred on state-law grounds. As the Florida Supreme Court observed, this claim is procedurally barred because it is a variation on claims previously raised. *Barwick v. State*, 2023 WL 3151079, at *14 (Fla. Apr. 28, 2023). Specifically, in Claim 22 of Barwick's initial postconviction proceeding, he raised a variation of his *Roper*-extension claim: because he suffers from brain damage and a mental and emotional age of less than eighteen years, his execution would offend the evolving standards of decency, serve no legitimate penological goal, and violate the Eighth and Fourteenth Amendments under *Roper*. *Id.*

As the Florida Supreme Court noted, the trial court properly declined to "extend the holding in Roper." *Id.* Further, as the Florida Supreme Court noted, Barwick's *Roper*-extension claim is procedurally barred for an additional reason: in his state petition for writ of habeas corpus, Barwick maintained that due to his brain damage, mental impairment, and mental and emotional age of less than eighteen years, his execution would offend the evolving standards of decency of a civilized

society, serve no legitimate penological goal, and violate the Eighth and Fourteenth Amendments under *Roper*. *Barwick v. State*, 2023 WL 3151079, at *14-15 (Fla. Apr. 28, 2023).

Thus, Barwick has —multiple times— previously argued the *Roper*-extension claim. As the Florida Supreme Court observed, Barwick's instant claim does not differ materially from his previous *Roper*-extension claims. *Id.* The instant claim is, as the Florida Supreme Court stated, "no doubt" merely an "attempt[] to relitigate the same issue." *Id.* at 16.

Even if a variation on this claim had not been previously raised, it would still be procedurally barred since the claim could have been previously raised to this Court. In 2011, the Florida Supreme Court rejected an extremely similar claim on the merits. At that time, however, Barwick did not seek certiorari. *See Barwick*, 88 So. 3d at 106 (rejecting Barwick's claim that "*Roper* extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment.").

Indisputably, this claim could have been previously raised, and multiple different versions of the claim were raised; as such, it is procedurally barred under Florida law. Accordingly, Barwick cannot argue the merits of this claim, if any.

Even if this Honorable Court were to reach the merits, Barwick still could not prevail. The claim is meritless. *Roper* itself recognized the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. at 574. All of the twenty-eight death penalty jurisdictions in this country, along with

the U.S. military, set the age of death-eligibility at eighteen.

Other indicia of societal values indicate eighteen is the appropriate age for death eligibility. eighteen is the age when an individual may voluntarily join the military and when males must register to be drafted if necessary. 10 U.S.C. § 505(a); 50 U.S.C. § 3803. It is the age of voting eligibility, the age one may be summoned to sit on a jury and decide whether to impose death on a defendant, and the age one acquires the unrestricted right to marry. Where abortion is legal, women of eighteen (and in some circumstances younger) are deemed sufficiently mature to decide to terminate an unborn child. Since eighteen is the age at which our society deems an adult capable of making these decisions, it is the highest age at which death-eligibility for the much simpler decision not to kill someone should rest. *See Roper*, 543 U.S. at 619 (Scalia, J., dissenting with Rehnquist, C.J., and Thomas., J.) ("Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.").

Third, as to the irreparable-injury requirement, such is usually inherent in a death sentence. Unsurprisingly, Barwick does not provide any unique or special argument in support of this factor.

Fourth, Barwick has pursued this claim in a dilatory fashion. He presents no viable justification for his present-day litigation of a claim based on a 2005 case. Barwick waited until the eve of his execution even though this claim could have been raised well over a decade ago. Barwick's lack of a viable excuse for his delay is by itself sufficient to deny his motion to stay.

As the Florida Supreme Court correctly concluded, Barwick's *Roper*-extension claim is untimely as it does not constitute newly discovered evidence. *Barwick v. State*, 2023 WL 3151079, at *17 (Fla. Apr. 28, 2023). The APA resolution on which Barwick relies is based on a compilation of studies, reports, and data —none of which constitute newly discovered evidence. *Barwick v. State*, 2023 WL 3151079, at *17 (Fla. Apr. 28, 2023) (citing to *Foster v. State*, 258 So. 3d 1248, 1253 (Fla. 2018). Further, as the Florida Supreme Court noted, the APA resolution relies on 1977 data and on 1992 reports. *Id.* (citing to Fla. R. Crim. P. 3.851, which, with the exception of newly-discovered-evidence claims, requires a defendant to file a motion for postconviction relief within one year of the date on which the judgment and sentence become final).

Given the foregoing, Barwick's claim is untimely, and he should not be rewarded for waiting until a warrant to raise this exact iteration of his claim. Because this Honorable Court does not grant review of untimely claims, Barwick is not entitled to a stay.

Fifth, Barwick's claim is solely for purposes of delay, As established above, this claim is untimely, procedurally barred, and meritless. Barwick presents no newly discovered evidence and bases his claim on a case that is nearly two decades old. Further, the claim is merely a variation on one twice previously raised, and no post-2005 development justifies reexamining *Roper*, much less overturning it. The *Roper*-extension claim is nothing more than an attempt to delay execution of sentence.

CONCLUSION

This Court should deny certiorari and allow true finality for the State of Florida, victims, and Darryl Barwick.

Respectfully submitted,

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