No. _____

IN THE

Supreme Court of the United States

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

PETITION FOR A WRIT OF CERTIORARI

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

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a standardless clemency process, one that affords no meaningful opportunity to be shown mercy, satisfies this Court's mandate in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (O'Connor, J., concurring), or is merely the flip of a same sided coin reflecting "denied"?

2. Whether a clemency scheme preoccupied solely with the guilt of the applicant provides the "fail safe in our criminal justice system" that this Court championed in *Herrera v. Collins*, 506 U.S. 390 (1993), and *Harbison v. Bell*, 556 U.S. 180 (2009)

PARTIES TO THE PROCEEDINGS

Petitioner Darryl Bryan Barwick, a death-sentenced Florida prisoner scheduled for execution on May 3, 2023, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Florida State officials involved in Mr. Barwick's executive clemency proceedings, were the appellees in that court.

RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Proceedings Under 42 U.S.C. § 1983:
District Court for the Northern District of Florida (No. 4:23-cv-146-RH)
Barwick v. DeSantis, et al., No. 4:23-cv-146-RH
Judgment Entered: April 18, 2023 (denying a stay of execution)

Eleventh Circuit Court of Appeals
Barwick v. Governor of Florida, et al., No. 23-11277
Judgment Entered: April 26, 2023 (denying a stay of execution)

Underlying Criminal Trial:
Circuit Court of Bay County, Florida
State of Florida v. Darryl Barwick, Case No. 1986 CF 940
Judgment Entered: January 30, 1987

Direct Appeal:
Florida Supreme Court (No. 70997)
Darryl Barwick v. State, 547 So. 2d 612 (Fla. 1989)
Judgment Entered: June 15, 1989 (reversing and remanding for retrial)

Re-trial:
Circuit Court of Bay County, Florida
State of Florida v. Darryl Barwick, Case No. 1986 CF 940
Judgment Entered: August 11, 1992

Direct Appeal:
Florida Supreme Court (No. 80446)
Darryl Barwick v. State, 660 So. 2d 685 (Fla. 1995)
Judgment Entered: July 20, 1995 (affirming)
Rehearing Denied: September 19, 1995

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 95-6964)
Darryl Barwick v. Florida, 516 U.S. 1097 (1996)
Judgment Entered: January 22, 1996

Postconviction Proceedings:
Circuit Court of Bay County, Florida
Barwick v. State, 1986 CF 940
Judgment Entered: August 28, 2007 (denying motion for postconviction relief)

Florida Supreme Court (Nos. SC07-1831; SC08-1377)
Barwick v. State, 88 So. 3d 85 (Fla. 2011)
Judgment Entered: June 30, 2011 (affirming)
Rehearing Denied: May 7, 2012

Federal Habeas Proceedings:
District Court for the Northern District of Florida (No. 5:12-cv-159-RH)
Barwick v. Tucker, No. 5:12-cv-159-RH
Judgment Entered: March 19, 2014 (denying federal habeas relief and partially granting a certificate of appealability)
Reconsideration Denied: April 14, 2014

Eleventh Circuit Court of Appeals
Barwick v. Sec'y, Fla. Dep't of Corr., No. 14-11711
Judgment Entered: July 21, 2015 (affirming denial of habeas relief)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 15-8213)
Darryl Brian Barwick v. Julie L. Jones, 578 U.S. 947 (2016)
Judgment Entered: April 25, 2016

First Successive Postconviction Proceedings:
Circuit Court of Bay County, Florida
Barwick v. State, 1986 CF 940
Judgment Entered: October 16, 2017 (denying motion for postconviction relief)

Florida Supreme Court (No. SC17-2057)
Barwick v. State, 237 So. 3d 927 (Fla. 2018)
Judgment Entered: February 28, 2018

Petition for Writ of Certiorari Denied
Supreme Court of the United States (No. 18-5354)
Darryl Brian Barwick v. Florida, 139 S. Ct. 258 (2018)
Judgment Entered: October 1, 2018

Second Successive Postconviction Proceedings:
Circuit Court of Bay County, Florida
Barwick v. State, 1986 CF 940
Judgment Entered: April 13, 2023 (denying postconviction relief and stay of execution)

Florida Supreme Court (No. SC23-531) (appealing denial of postconviction relief)
Judgment Entered: Currently Pending

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TABLE OF AUTHORITIES

Cases:

DECISION BELOW

The Eleventh Circuit's decision is not yet reported but is available at __ F.3d __, 2023 WL 3089873, and is reprinted in the Appendix (App.) A.

JURISDICTION

The Eleventh Circuit's opinion was entered on April 26, 2023. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. Introduction

For 40 years, the chances of obtaining clemency or commutation of a death sentence in Florida is 0%. Not since 1983 has any death-sentenced individual in Florida been granted executive clemency. In that same time, 99 executions have

occurred.[1] Darryl Bryan Barwick—an individual with a severe neuropsychological disorder, lifelong cognitive impairments, and low mental age—is now slated to be the 100th, facing execution on May 3, 2023, for a crime he committed at only 19 years old.

This Court has recognized that the importance of the clemency process in a capital case cannot be understated: "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)). Indeed, "[c]lemency is deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." *Herrera*, 506 U.S. at 390; *see also Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider."). Where the clemency

[1] In addition to the 99 executions, 5 other individuals' clemency have been denied and execution dates scheduled: James Dailey's death warrant was signed on September 25, 2019. After receiving a stay of execution, his execution has not been rescheduled. Paul Beasley Johnson's death warrant was signed on October 7, 2009. The Florida Supreme Court granted him a new penalty phase. *Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010); David Eugene Johnston's death warrant was signed on April 20, 2009. After obtaining a stay of execution, he died while litigating an intellectual disability claim before the Florida Supreme Court. *Johnston v. State*, Florida Supreme Court Case No. SC10-0356, November 16, 2010 (Order dismissing case due to Appellant's death). Gregory Mills' death warrant was signed on March 23, 2001. The state circuit court granted him a new penalty phase and the Florida Supreme Court affirmed. *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001). Robert Trease's death warrant was signed on November 19, 2001. After receiving a stay of execution, his execution has not been rescheduled.

process is rendered meaningless and/or reduced to that of a mile marker on the road to an execution, Florida's death penalty scheme is rendered constitutionally defective.

Mr. Barwick's clemency proceedings illustrate the constitutional deficiencies in this critical aspect of Florida's death sentencing scheme. His clemency process was meaningless, equaling nothing more than a coin-flip where both sides of the coin reflected: "denied". This standardless process, taken with the circumstances in Mr. Barwick's case, establish a due process violation that cannot be tolerated. *See Ohio Adult Parole Authority, et. al v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., concurring).

II. Procedural History

A. Proceedings Before the Courts

On April 28, 1986, Mr. Barwick was indicted for first degree murder and related offenses. R. 241-42.[2] Mr. Barwick was tried and found guilty as charged. R. 652-53. The trial court, following the jury's 9-3 recommendation, sentenced Mr. Barwick to death. R. 654. On direct appeal, the Florida Supreme Court reversed and remanded for a new trial. *Barwick v. State*, 547 So. 2d 612 (Fla. 1989).

Mr. Barwick's second trial resulted in a mistrial. R. 1183. A new trial commenced on July 6, 1992. The jury found Mr. Barwick guilty as charged and

[2] Citations to Mr. Barwick's underlying capital case record are as follows: References to the record on direct appeal of Mr. Barwick's capital case are designated as "R. __" for the record, and "TR. __" for the trial transcript. References to the record of Mr. Barwick's evidentiary hearing related to his initial postconviction proceeding are designated as "EH. __". Other references are self-explanatory or otherwise explained herewith.

recommended a sentence of death by a vote of 12-0. R. 1236-38.[3] The trial court sentenced Mr. Barwick to death. R. 1293-99.

On direct appeal, the Florida Supreme Court affirmed. *Barwick v. State*, 660 So. 2d 685 (Fla. 1995). Certiorari was denied on January 22, 1996. *Barwick v. Florida*, 516 U.S. 1097 (1996).

On March 17, 1997, Mr. Barwick filed a postconviction motion. The state circuit court denied relief on August 28, 2007. Mr. Barwick appealed, and filed a petition for writ of habeas corpus. This Florida Supreme Court denied all relief. *Barwick v. State*, 88 So. 3d 85 (Fla. 2011).

On May 25, 2012, Mr. Barwick filed a federal habeas petition in the Northern District of Florida. The petition was denied. After an appeal, the Eleventh Circuit affirmed. *Barwick v. Sec'y*, 794 F.3d 1239 (11th 2015).

On December 15, 2016, Mr. Barwick filed a successive motion for relief based on *Hurst v. Florida*, 577 U.S. 92 (2016). The circuit court denied the motion and the Florida Supreme Court affirmed. *Barwick v. State,* 237 So. 3d 927 (Fla. 2018). Certiorari was denied on October 1, 2018. *Barwick v. Florida*, 139 S. Ct. 258 (2018).

On April 3, 2023, Mr. Barwick's death warrant was signed and his execution was scheduled for May 3, 2023. Mr. Barwick's appeal from the denial of his postconviction motion to vacate his death sentence is currently pending.

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[3] The trial court found the following aggravating circumstances: prior violent felony based on a 1983 conviction for sexual battery and burglary; attempted sexual battery; avoiding arrest; pecuniary gain; heinous, atrocious or cruel (HAC); and cold, calculated and premeditated (CCP). R. 1281-86.

B. Mr. Barwick's Childhood and Mental Health

Darryl Barwick was physically abused before he left his mother's womb. EH. 53-54. Transparent about wishing to abort the unborn Mr. Barwick, Ima Jean Barwick was on birth control pills for the duration of Mr. Barwick's gestation, received no prenatal care, and experienced a late-term fall down the stairs that was believed to be an intentional attempt to terminate her pregnancy. *Id*. The legacy of being an unwanted child would psychologically damage Mr. Barwick in years to come, but the physical *in utero* trauma severely damaged Mr. Barwick's brain even before he took his first breath. *See id.*; *see also* App. B at 1. That physical damage caused a serious mental illness that has pervaded the remainder of Mr. Barwick's life, and was exacerbated by his immaturity, and exposure to trauma and abuse.

Early in Mr. Barwick's life, a neurodevelopmental disorder manifested. *See* App. B at 2; App. C at 1-3. Neurodevelopmental disorders occur during the developmental period—often manifesting by the time a child reaches school age—and are characterized by developmental deficits or differenced in brain processes that produce impairments of personal, social, academic, or occupational functioning" ranging from "limitations of learning or control of executive functions to global impairments of social skills or intellectual ability." DSM-5-TR at 35.

In Mr. Barwick's case, the disorder had already manifested by the age of four. He was deemed to have a significant speech and language delay, which led to academic and social difficulties from the age of 4, and was so profound that his believed IQ at that age was a mere 16. By the time of his pretrial evaluations at the

chronological age of 19, he had a mental age between 11 and 13. Summing this up, Dr. Heather Holmes explained that:

> Each psychologist that evaluated him, pre-trial as well as post-conviction, obtained test scores that were commensurate from early childhood until 2006 when he was last tested. They all show a statistically and clinically significant difference between Mr. Barwick's intelligence (ability) and his achievement (learning). In fact, the difference was 2 standard deviations, which is clinically quite substantial.

See App. C at 1.

These early manifestations of Mr. Barwick's disorder led to his further abuse. Although Ira Barwick was abusive to his wife and all of his children, Darryl Barwick was especially victimized. He "received beatings because of his own deficiencies…because of all of his limitations." EH. 64. As Dr. Hyman Eisenstein explained in 2006:

> [T]here was so severe emotional abuse that Darryl received. If it wasn't the sexual abuse and physical abuse, the emotional abuse is finally the third prong that really just set him off. He was called stupid, idiot, illiterate dummy, jack ass, son of a bitch, the milkman's son, because Darryl has blonde hair, ass hole…

EH. 65. This was of significant impact to Mr. Barwick, as opposed to others who are called similar names, because of the constancy and because:

> [S]ome of it has a kernel of truth, which makes it even more hurtful. He was illiterate until the tenth grade, he was stupid…[T]had certainly addresses some huge issues in terms of his academic failings, in terms of his language failings, in terms of the organic problems that I mentioned earlier…so when you zero in on, and you depict someone's failings and they are actually true, to a certain extent the level of humiliation and degradation is even greater, so that was unique to Darryl.

EH. 65-66. This resulted in Mr. Barwick becoming like "a shell" and exacerbated his neurodevelopmental disorder by also stunting his psychological development. EH. 66; *see also* Att. B. "T]here was nothing that was held back from dehumanizing and the vulgar insulting and the entire psychological fabric of what we refer to as self-esteem, one's make-up in terms of feeling self-worth, confidence, it was all shattered. It was all knocked out." EH 65.

Mr. Barwick's psychological functioning was not all that was knocked out. Throughout his childhood, he received such intense beatings from his father that he lost consciousness on "at least" several occasions. EH. 54; *see also* TR. 727-28 (Ira Barwick acknowledging "tearing" Mr. Barwick up with two-by-fours or anything he could get his hands on, to the point of knocking Mr. Barwick unconscious). One of those occasions occurred while Mr. Barwick was assisting his father at a job site but proved less capable than his brothers due to his cognitive and developmental deficits. EH. 67-68. Mr. Barwick's father—wielding a three-foot piece of lumber with protruding rebar—initially struck Mr. Barwick on the left side of his head, then after Mr. Barwick fell to the ground unconscious, struck him again in the back of his head. *See, e.g.*, EH 52-55; TR. 653. On another occasion, Mr. Barwick was knocked unconscious when his father punched him, knocking him down into a rocking chair as he fell to the floor. TR. 653. On still another occasion, Mr. Barwick's skull was so badly bruised that his father took him on vacation for several days to recover from the infliction. EH. 55.

Adding to Mr. Barwick's head trauma, he suffered additional head injuries and apparent concussions as a wrestler and football player throughout middle and high school. This coincided with the onset of puberty, at which point the tertiary area of the brain (the frontal lobe nearest the forehead, and most susceptible portion of the brain to injury) begins to develop. Due to Mr. Barwick's organic damage and lifelong history of severe head wounds, this portion of Mr. Barwick's brain did not develop, leading to an additional neuropsychological deficit: clinical impulsivity. *See* App. B. at 2.

These physical insults to Mr. Barwick's brain further impacted his adaptive functioning:

> Well, he's considered to be odd. He was considered to be somewhat asocial. He had difficulties relating to others. He was considered to be a little different. Um, again the words that the father depict showed off all of these deficiencies, again with that kernel of truth, are indicative of the difficulties that he had socially relating, vocationally being able to function, and academically and intellectually being able to either process or deal with information in a different manner.

EH. 74-75. And again, his intellectual deficiencies, brain damage, and adaptive impairments circularly led to heightened abuse as compared to his siblings:

> It may have explained why he was not able to fight. I am not sure what comes, you know, the chicken or the egg, but it certainly, he, he was hiding emotionally, physically, intellectually, which was limited because of the brain damage, the response, and there was, there was no other option, there was no option B for him.

EH. 102.

Because the science regarding neuropsychological conditions was comparatively nascent at the time of Mr. Barwick's childhood, adolescence, and prior

litigation, his neurocognitive disorder was not diagnosed prior to the conclusion of the developmental period (recognized as occurring sometime in the 20s). Thus, although it is clear Mr. Barwick's symptoms began in the developmental period, the most proper diagnosis to attach at age 56 is a cognitive disorder rather than a developmental disorder. *See* App. B at 2. Whereas "dementia is the customary term for disorders [in this realm] that usually affect older adults, the term *neurocognitive disorder* is widely used and often preferred for conditions affecting younger individuals, such as impairment secondary to traumatic brain injury[.]" DSM-5-TR at 667 (emphasis in original). As with Mr. Barwick's corollary childhood/adolescent condition (neurodevelopmental disorder), neurocognitive disorders impair functioning across multiple realms, including attention; executive function (planning, decision-making, responding to feedback, error correction, overriding habits, inhibition, and mental flexibility), learning; memory; language; perception; and social cognition (recognition of emotions and ability to consider another person's mental state). *Id*. at 669-71.

Further contributing to Mr. Barwick's organic functioning at the time of the crime, he was just nineteen years old. In 2005, this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), holding that the Eighth Amendment to the United States Constitution categorically prohibited the execution of individuals who were juveniles under the age of eighteen when they committed their capital crimes. In so doing, this Court found that juveniles differed from adults in three critical respects that rendered them categorically less culpable than adults. First, juveniles tend to be immature and

have "an underdeveloped sense of responsibility, . . . result[ing] in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569 (quotation marks omitted). Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* Third, "the character of a juvenile is not as well formed as that of an adult" and is "more transitory, less fixed." *Id.* at 570. The Court concluded that these three developmental differences "render suspect any conclusion that a juvenile falls among the worst offenders" meriting a death sentence, and as a result "the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults." *Id.* at 570-71.

Since *Roper*, research has continued to accrue indicating that many aspects of psychological and neurobiological immaturity that typify early adolescents and middle adolescents are also characteristic of late adolescents between the ages of 18 to 21. App. D at 4. Scientific evidence demonstrates that, compared to adults, adolescents are more impulsive, prone to engage in risky behavior, and motivated more by perceived present rewards than by future negative consequences. App. D at 3. Such characteristics in adolescents, including those who are between ages 18 to 21, are now viewed as commonplace and widespread, driven by processes of brain maturation that are not under the adolescent's control. They typically persist throughout adolescence in normally developing individuals between the ages of 10 to 20. App. D at 3-4. This indicates that the rationale behind this Court's decision in *Roper* equally applies to late adolescents—between the ages of 18 to 21—including Mr. Barwick, who was 19 when he committed his offense. App. D at 4.

C. Clemency Proceedings

On February 21, 2020, Richard Greenberg entered an agreement with the Florida Commission on Offender Review (FCOR) to provide legal services on Mr. Barwick's behalf. The agreement was amended on May 28, 2020. Thereafter, Mr. Barwick was notified that Greenberg was representing him in his clemency proceedings and his interview was scheduled for September 23, 2020. Greenberg had never previously represented Mr. Barwick, had no familiarity with his case, and had no particular qualifications to represent a death-sentenced individual beyond good standing with the Florida Bar.

Due to the Covid-19 pandemic, the clemency proceedings were delayed and the interview was rescheduled for April 29, 2021.

At the clemency interview, Commissioner Richard Davison told Mr. Barwick: "The commission is not here to review what happened during your court proceedings or to determine your innocence or guilt. The purpose of this interview is to give you an opportunity to make any statements or comments concerning commutation to life of the death sentence imposed." App. E at 4-5. After making some remarks about his family, correctional record, and remorse for the crime, Mr. Barwick was interrogated—contrary to what he had been told—about his guilt for the crime. Specifically, he was asked: if he knew the victim? When he first saw her? Why he killed her? What triggered the crime? What happened prior to the crime? Whether he killed her because she could identify him? If he intended to kill her? How many times he stabbed her? Whether he obtained a knife from his house? Why he carried a knife

to her apartment? Whether he wore a mask? Gloves? Why? If he intended to rape her? Whether she cooperated? Why there was biological evidence on the blanket? Whether he masturbated at the scene? Why he used a knife from the apartment, not the one he brought? How she fought him? How long they fought? Why had he previously committed a rape? Where that crime occurred? How had he accessed his previous victim's apartment? What other crimes he had committed? Whether he knew the murder and crimes were wrong? When he knew they were wrong? Whether his parents taught him right from wrong? How had he decided not to abide by the law and do wrong?[4]

> At the conclusion of questioning Commissioner David Wyant commented:
>
> So it seems to me, and I'm not trying to be controversial, but when we come to the hard questions of why, you don't have an answer for any of this. Why did you do it? Why did you wear gloves? Why did you do this? Why did you do that? You don't have an answer for why.

App. E at 46.

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[4] This singular focus on the crime without consideration to whether the individual being interviewed deserves mercy is a pattern in Florida. *See, e.g.*, App. F. In Gary Bowles' clemency interview, Commissioner Davison stated: "The commission is not here to review what happened at your trial nor to determine your guilt or innocence" and that the purpose of the interview was to give Mr. Bowles "the opportunity to make any statements or comments concerning commutation to life of the death sentence that was imposed." *Id.* at 3. However, Commissioners Davison and Wyant immediately dismissed information regarding Mr. Bowles' intellectual disability, stating, "[W]hat I'd like to get a better idea of is the crimes, and specifically the crime that we're dealing with today." (*id.* at 12); asking detailed questions about the motives/mechanisms of Mr. Bowles' crimes (*id.* at 12-46); asking whether Mr. Bowles knew right from wrong or had regard for human life (*id.* at 46-52, 54-46); and comparing Mr. Bowles to his sibling (*id.* at 52-53).

Mr. Barwick was asked if he was a "sexual deviant" and whether that was "past or current". App. E at 46. He was also asked why he had committed crimes but his siblings had not. App. E at 24-26, 37-38.

Near the conclusion of the interview, Commissioner Davison asked: "Has anyone ever diagnosed you with any type of brain injury?" Mr. Barwick did not know. *See* App. A at 55-56.

Three weeks after Mr. Barwick's interview, on May 19, 2021, Greenberg provided FCOR with an application for commutation of Mr. Barwick's death sentence. It was limited to a couple of reports and letters on Mr. Barwick's behalf. One letter from Dr. Eisenstein, dated April 20, 2021, outlined Mr. Barwick's deficits:

> …Mr. Barwick has great difficulty expressing himself verbally. His disabilities would make it very difficult for him to answer questions and elaborate verbally in a clemency hearing where he is being asked questions. I would recommend that Mr. Barwick be permitted to prepare a statement to read and that any follow up questions be provided in writing for him.
>
> ***
>
> Mr. Barwick accepts full responsibility for the crime and is extremely remorseful. However, he does not remember details or the sequence of events from the crime. He cannot differentiate what he recalls independently versus what has been told to him over the years. I believe Mr. Barwick's faulty memory also complicates his ability to communicate much about the crime for which he is convicted. I do believe that his inability to remember the specifics about the crime and why it occurred are genuine and a product of the brain injuries and trauma he suffered as a child and not a way to avoid accepting responsibility or answering for his crime.

See App. G.

Other than obtaining the transcript of Mr. Barwick's clemency interview, no further communications or submissions occurred.

On April 3, 2023, by signing Mr. Barwick's death warrant, Governor DeSantis concluded the clemency process, denied clemency, and scheduled the May 3, 2023, execution.

D. Mr. Barwick's § 1983 Action

After clemency was denied and a death warrant was signed, Mr. Barwick filed a 42 U.S.C. § 1983 action in the Northern District of Florida, based on the violation of the minimal due process to which he was entitled when he was subjected to a standardless clemency process, in which the commissioners shifted the only standard FCOR provided—that it was not concerned with Mr. Barwick's guilt of the crime–by singularly focusing on the circumstances of the crime and Mr. Barwick's prior criminal conduct. That focus nullified the purpose of executive clemency: to determine whether an individual, notwithstanding their conviction, deserves mercy.

On April 18, 2023, the district court denied Mr. Barwick's stay motion. While the district court affirmed that Barwick's § 1983 action stated a claim for relief: his right to due process in clemency, it found that Mr. Barwick had been provided "an opportunity to present any information he wished to present" to the clemency board. And, though the district court recognized that implementing standards would "serve a purpose" in "helping to avoid arbitrariness and unwarranted disparity" in the clemency process, it held that the current clemency standards are sufficient. Appendix H at 5.

E. The Eleventh Circuit's Decision

On April 19, 2023, Mr. Barwick appealed the district court's ruling to the United States Court of Appeals for the Eleventh Circuit, and on April 20, 2023, he filed a motion for a stay of his execution pending the appeal. App. A.

On April 26, 2023, the Eleventh Circuit denied Mr. Barwick's stay motion, finding that he could not demonstrate a substantial likelihood of success on the merits. The Court stated:

> We agree with the district court that "[a] more detailed set of criteria would serve a purpose, helping to avoid arbitrariness and unwarranted disparity." But under current existing precedent, we cannot conclude that the Constitution requires the State to provide such criteria.

App A at 14.

REASONS FOR GRANTING THE WRIT

Because Clemency is a Vital Component of the Death Penalty Scheme, Death-Sentenced Individuals Must Be Provided Notice of the Standards and Issues that Will Be Considered By the Clemency Board In Determining Whether Clemency Is Appropriate.

Due process requires notice and the opportunity to be meaningfully heard. In *Lankford v. Idaho*, this Court held that notice is the "bedrock of any constitutionally fair procedure." 500 U.S. 110, 126 (1991). Further, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Id.* (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951)). In *Lankford*, the trial court imposed a death sentence without notifying the defendant in advance that the court was contemplating such a penalty. In finding a violation of due process, this

Court explained that where no notice of the factors was provided, critical evidence may be omitted because arguments that would have addressed concerns related to a death sentence were inappropriate in a discussion about length of incarceration. *Lankford*, 500 U.S. at 122. The same defect occurred in Mr. Barwick's clemency process. Not only did Mr. Barwick not have any notice of the factors relevant to the clemency commission's determinations, the only guidance he received (that the commission was not interested in guilt of the offense) was false.

In addition, in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998), Justice O'Connor, in a plurality opinion, reasoned that as long as the condemned person is alive, he has an interest in his life that the Due Process Clause protects. Justice O'Connor found that the specific procedural flaws Woodard cited did not rise to the level which would trigger a cognizable due process challenge, i.e., that he did not have enough days' notice of his interview after the setting of his warrant; and that he did not have enough time to prepare a clemency petition. *Id.* at 289-90. Each of these criticisms dealt with discrete aspects of the internal structuring of a clemency hearing and are minor in comparison to the problems presented in Mr. Barwick's situation.

Unlike *Woodard*, the deficiency in Mr. Barwick's clemency proceedings occurred on the macrolevel. He was subjected to a standardless process, in which the only guidance FCOR provided was that it was not concerned with Mr. Barwick's guilt of the crime. However, during the clemency interview, the commissioners shifted the standard by becoming singularly focused on the facts and circumstances of the crime

and Mr. Barwick's prior criminal conduct. That focus nullified the purpose of executive clemency—to determine whether an individual, notwithstanding their conviction, deserves mercy.

Due process requires that Mr. Barwick be provided a proceeding where the standards are clear and include considerations beyond the condemned's guilt. Clemency is a critical stage of the death penalty scheme. It is the only stage at which factors like remorse, rehabilitation, racial and geographic influences, and other factors that the legal system does not correct can be considered. *See Herrera v. Collins*, 506 U.S. at 412. Mr. Barwick was denied due process and his clemency proceeding was arbitrary because (1) the Florida clemency scheme provides no standards; and (2) the clemency commission provided false guidance when it stated it was not concerned with Mr. Barwick's guilt but then myopically focused on the crime for which Mr. Barwick was convicted and sentenced to death. *See Furman v. Georgia*, 408 U.S 238, 253 (1972) (Douglas, J., concurring) ("Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or 12."). Considering the fact that no death sentenced individual in Florida has obtained clemency in 40 years and that the process is shrouded in secrecy with no standards and no notice of the factors that are relevant to the determination, it is clearly not functioning in the manner that is suggested in *Herrera*. And, in Mr. Barwick's case, there was no exploration of individual characteristics to assist in determining whether clemency was warranted. A review of the clemency interview illustrates that—despite stating at the outset that "[t]he commission is not here to

review what happened during your court proceedings or to determine your innocence or guilt", the commission's singular focus was on the crime for which Mr. Barwick was convicted and sentenced to death. With that being the yardstick for clemency, the process becomes the flip of coin where both sides of the coin reflect: "denied". *See also* App. F.

FCOR was required to complete an investigation and report to the Clemency Board on "the circumstances, the criminal records, and the social, physical, mental, and psychiatric conditions and histories of persons under consideration [for clemency]." Fla. Stat. § 947 (13)(e). Here, the clemency interview was presented as the opportunity for Mr. Barwick to make any statements or comments concerning commutation to life of the death sentence imposed." However, the commissioners quickly dismissed Mr. Barwick's comments to ask dozens of questions about the crime and why it occurred. *See* App. E. The lack of notice or opportunity to meaningfully address the criteria for clemency resulted in a deprivation of due process in Mr. Barwick's case.

Furthermore, as was predicted by Dr. Eisenstein, Mr. Barwick did not have the mental capacity to adequately answer the commissioners' questions. Indeed, had FCOR conducted an adequate investigation, the questions relating to Mr. Barwick's brain functioning at the time of the crime could have been directly answered: Mr. Barwick suffers from a neurocognitive disorder which substantially impacts his functioning, including his impulse control. FCOR needed to look no further than Mr. Barwick's institutional record to see that when in a highly structured setting, Mr.

Barwick poses no risk to anyone and can actually be trusted to assist in the care of other inmates, as he did for several years with James Rose. *See* App. E. Likewise, the commissioners' misgivings about Mr. Barwick's and his siblings distinctions with their conduct was also easily addressed by a mental health expert, like Dr. Eisenstein. *See* App. I .

The harm from this breakdown of the clemency process is especially pronounced in Mr. Barwick's case, where the issue of his mental health and individual vulnerabilities is interwoven with breakdowns in his legal process. Even a cursory review of Mr. Barwick's litigation would reveal that the mental health information presented at Mr. Barwick's sentencing is antiquated. Indeed, much of that testimony has been refuted by new developments in the field of neuropsychology—but has garnered no remedy in the criminal courts due to strict statutory rules. The existence of clemency as a "fail safe" has been used to justify decisions declining to provide certain forms of equitable relief via the traditional court process. *See, e.g., Herrera*, 506 U.S. at 411-17 (discussing, at length, the role of clemency—as opposed to habeas corpus—in remedying the "unalterable fact that our judicial system, like the human beings who administrate it, is fallible"). It is therefore perverse for that "fail safe" to refuse to consider individualized information because it is only focused on what is solely in the courts' province: guilt of the offense.

In light of the standardless process, and the recognition that "a more detailed set of criteria would serve a purpose, helping to avoid arbitrariness and unwarranted disparity" App A at 14, and App. H at 5, the federal district court and the Eleventh

Circuit erred in determining that Mr. Barwick's clemency complied with due process. Both the district court and the Eleventh Circuit believed that the Mr. Barwick had an opportunity to discuss and present potentially mitigating circumstances with the commissioners during his interview. App A at 12, and App. H at 4. However, the courts' characterization misses the point. Mr. Barwick had no idea of the standards governing the types of information that were relevant to the Board's clemency determination. Because of the lack of standards, the opportunity he was provided was meaningless. And, what was presented barely scratched the surface of his background and impairments.

Compounding the lack of due process and unfairness is the fact that *nothing* Mr. Barwick presented was considered because the singular focus of the clemency proceeding concerned the crime itself. Since Mr. Barwick never disputed that he committed the crime and expressed sincere remorse for his actions, he had *no* opportunity to establish reasons for the Board to grant him mercy.

Specifically, as to the focus on Mr. Barwick's crime, the district court and Eleventh Circuit suggest that the Board's focus on the details of the crime did not preclude other evidence that would be considered, and the commissioners even asked about mitigation. However, a review of Mr. Barwick and Mr. Bowles' clemency interviews illustrate a process whereby the commissioners demonstrated a complete bias toward Mr. Barwick and his mitigation. *Compare* E and F.

For instance, after Mr. Barwick explained how abusive his father was and the efforts made to stop the abuse, he was asked: "Name an instance where police have

seen the abusiveness?" App E at 21. And, after identifying each of Mr. Barwick's six siblings and asking if they had ever been incarcerated, after Mr. Barwick had already stated that none of his siblings had been in trouble with the law, Commissioner Davison asked:

> COMMISSIONER DAVISON: So, you were the only one of the seven who has been incarcerated?
>
> MR. BARWICK: Correct.
>
> COMMISSIONER DAVISON: But all of the seven of you were all beaten by your father?
>
> MR. BARWICK: Absolutely, yeah.
>
> COMMISSIONER DAVISON: and so is there anything particular about your beatings that would cause you to go down a path of criminal activity and not your brothers and sisters?
>
> MR. BARWICK: Not that I'm aware of. I always kind of thought it was the same as the rest of them. I just, I guess, took it different from what they did is what I can think of. I really couldn't say.

App. E at 26-27. But, of course, Mr. Barwick's files and records resolve any question about the credibility and character of his father's abuse and also address why Mr. Barwick's outcome was entirely different than that of his siblings. Further, the transcript from Mr. Bowles' clemency interview illustrates an equally dishonest proceeding with an intense and disturbing interest in the details of a crime for which the applicant has taken responsibility. *See* App. E

In Florida, the Board's considerations and deliberations are shrouded in secrecy. Its pattern and practice of singularly focusing and fixating on the guilt of the

applicant and 99 denials of clemency illustrates an arbitrary and unfair process that cannot be constitutionally tolerated.

CONCLUSION

This Court should grant a stay of Mr. Barwick's execution, and grant a writ of certiorari to review the decision below.

Respectfully submitted,

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APRIL 28, 2023