

No. _____

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*

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:

The State of Florida has scheduled the execution of Petitioner Darryl Bryan Barwick for **May 3, 2023, at 6:00 p.m.** Mr. Barwick requests a stay of execution pending the consideration and disposition of the petition for a writ of certiorari that he is filing simultaneously with this application.

STANDARDS FOR A STAY OF EXECUTION

The standards for granting a stay of execution are well-established. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). There “must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court’s decision (here, the denial of Mr. Barwick’s motion to stay his execution); and there must be a likelihood that irreparable harm will result if that decision is not stayed.” *Id.* (internal quotations omitted).

PETITIONER SHOULD BE GRANTED A STAY OF EXECUTION

The underlying issue is sufficiently meritorious

The questions raised in Mr. Barwick’s petition are sufficiently meritorious for a grant of certiorari. The underlying issue—whether Florida’s standardless clemency procedures satisfy this Court’s mandate in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring)—presents a significant question of constitutional law and is not subject to any procedural impediments.

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.”).

As explained in Mr. Barwick’s underlying petition, Mr. Barwick was subjected to a standardless process, in which the commissioners shifted the only purported standard FCOR provided—that it was not concerned with his guilt of the crime—by singularly focusing on the circumstances of the crime and his prior criminal conduct. That focus nullified the purpose of executive clemency: to determine whether an individual, notwithstanding their conviction, deserves mercy.

The lack of standards and the false guidance provided to Mr. Barwick during the clemency process deprived him of the limited due process to which he was entitled. That deprivation rendered Mr. Barwick’s clemency process meaningless and reduced the proceedings to a mile marker on the road to his execution. It also illustrates the constitutionally defective nature of a critical aspect of Florida’s death penalty scheme. Mr. Barwick’s clemency proceedings equaled nothing more than a coin-flip where both sides of the coin reflected: “denied”. This standardless process, taken with the circumstances in 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). This Court now has the opportunity to enforce its holding in *Woodard*, and to ensure that death-sentenced individuals have meaningful access to the “fail safe” of clemency.

There is a significant likelihood of the lower court's reversal

Should this Court grant Mr. Barwick's request for a stay and grant review of the underlying petition, there is a significant possibility of the lower court's reversal. The Eleventh Circuit denied Mr. Barwick's motion to stay solely based upon their finding that he could not demonstrate a substantial likelihood of success on the merits of his due process claim under existing precedent. As Mr. Barwick's case presents a pristine opportunity for this Court to enforce its mandate in *Woodard* that clemency proceedings afford a level of due process, and because Mr. Barwick's claim is free of procedural impediments, there is a substantial likelihood that this Court will reverse the lower court's denial of a stay.

This Court has repeatedly recognized clemency's importance in the death penalty scheme. In *Woodard*, the legal underpinning—a violation of due process in clemency proceedings—was cognizable. Although the specific procedure at issue in *Woodard* was not held to violate due process, the Court only ruled after careful consideration of the clemency process and alleged deficiencies.

Mr. Barwick, like *Woodard*, has identified several specific deficiencies in his clemency process. But unlike in *Woodard*, the deficiencies here deprived Mr. Barwick of a meaningful process because he had no idea what standards governed the review. Rather, contrary to the commissioners' own statements, what appeared to guide Mr. Barwick's clemency review was whether he was guilty of the crime for which he was convicted. Thus, there was no opportunity for him to obtain a different result, regardless of his evidence or argument. Such a system cannot be tolerated at the

critical and last juncture of whether Mr. Barwick lives or dies. As the denial of a stay deprives Mr. Barwick of even the opportunity to fully litigate this important issue, and because Mr. Barwick's petition makes out a cognizable claim for relief, there is a substantial likelihood that this Court, upon granting certiorari review, would reverse the lower court's denial of a stay to more fully litigate the due process issue.

Furthermore, Mr. Barwick's claim is not subject to any procedural impediment. After clemency was denied and a death warrant was signed, Mr. Barwick sought injunctive relief under 42 U.S.C. § 1983 based on the denial of due process that occurred during his clemency proceedings. Both the district court and the Eleventh Circuit recognized that death-sentenced individuals have a limited right to due process during clemency proceedings. The Eleventh Circuit recognized that vindication of this right is proper in § 1983 proceedings. And, the Eleventh Circuit found that Mr. Barwick was sufficiently diligent in raising this claim.

Accordingly, this Court has the ability to address the substantial due process issue presented by Mr. Barwick's petition, and is unencumbered by any procedural impediment.

Irreparable harm will occur absent a stay

The irreparable harm to Mr. Barwick is clear: without a stay, he will be put to death. *Wainwright v. Booker*, 473 U.S. 935, 937 n.1 (1985) (Powell, J., concurring) (finding the requirement of irreparable harm as "necessarily present in capital cases"). Mr. Barwick faces imminent execution, having never had a clemency proceeding where he was given notice of any standards regarding which factors

governed the clemency consideration. In fact, the sole guidance Mr. Barwick received—that his guilt was not relevant to the consideration—was false guidance. As such, Mr. Barwick had no meaningful opportunity to present critical information that would have been relevant to a determination of whether, notwithstanding his crime, he deserved mercy. This is particularly impactful because Mr. Barwick had a wealth of mental health evidence that diminished his moral culpability and which has separately been barred from review in the Florida courts due to strict procedural rules.

Additionally, public interest will be harmed absent a stay. Clemency has long been regarded as the “safeguard” of our death penalty system. *See, e.g., Herrera*, 506 U.S. at 411-12 (“Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”) The public and judiciary have a heightened interest in ensuring that the unfairness of Mr. Barwick’s death sentence was adequately addressed in clemency. As the long-held maxim goes, death is different. *See Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (“[D]eath is a punishment different from all other sanctions in kind rather than degree.”). The public interest is best served by ensuring that the State of Florida maintains clemency’s important safeguard function, and all death-sentenced individuals have meaningful access, in line with their federal rights, to that safeguard.

CONCLUSION

The Court should stay Mr. Barwick's execution and grant his petition for a writ of certiorari to address the important constitutional questions raised in this case.

Respectfully submitted,

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