Capital Case No. 22A949

In The

Supreme Court of the United States

DARRYL BARWICK,

Petitioner,

v.

GOVERNOR OF FLORIDA ET. AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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

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INTRODUCTION

Barwick brutally killed Rebecca Wendt by stabbing her thirty-seven times in 1986, just seventy-eight days after he was released from prison for raping another woman (who lived to identify him) at knifepoint in 1983. He told his family he killed Rebecca because she saw his face and he did not want to go back to prison. Barwick received a death sentence that finalized in 1996 when this Court denied certiorari. Florida Governor Ron DeSantis denied Barwick's clemency application and signed his death warrant on April 3, 2023. Barwick's execution is scheduled for May 3, 2023.

On April 13, 2023, Barwick filed a 42 U.S.C. § 1983 suit alleging the State of Florida violated his due process rights during the clemency process. He also sought to stay his execution. Florida argued it had not violated Barwick's minimal, clemency-related due process rights, opposed the stay, and moved to dismiss. The district court refused to stay Barwick's execution after finding his clemency proceedings satisfied due process. Barwick appealed the denial to the Eleventh Circuit and moved to stay his execution pending appeal. The Eleventh Circuit held Barwick's clemency proceedings satisfied due process and declined to stay his execution.

Now, five days before his execution, Barwick asks this Court to stay the execution of his long-final death sentence so he can attack this Court's settled, nearly three-decade-old precedent in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). This Court should decline. Barwick's § 1983 suit rests exclusively on speculative theories about his due process rights and fails this Court's stay-of-execution standard.

RELEVANT FACTS

1983 Violent Rape and Armed Burglary

In 1983, M.D. lived in an apartment complex. (DA22:610.) She was hanging her clothes outside around noon, and, when she went back inside, she saw a man in a ski mask, with ski gloves, holding a butcher knife. (DA22:611-12.) He put the knife to her throat, ordered her to "cooperate," and said he would not "hurt her." (DA22:612.) He led her to the bedroom, got on top of her, and tried to kiss her. (DA22:613.) M.D. got him to remove his mask, and Barwick initially asked for oral sex but later vaginally raped her twice. (DA22:614-15, 619.)

When they got up, M.D. noticed the knife Barwick was using was hers and that he had brought his own too. (DA22:615, 619.) Barwick admitted he brought his own knife, but then explained "it's better to use the other person's." (DA22:615.) Barwick then said, "we have a problem, you've seen my face." (DA22:616, 619.) M.D. said she had not and promised she would not go to the police. (DA22:616-17.) Barwick said he would find and kill her if she did and left shortly after. (DA22:616, 619.)

Despite Barwick's threat, M.D. went to the police and picked Barwick out of a lineup. (DA22:618-19.) As a result, Barwick pled guilty to sexual battery with a deadly weapon/great physical force and burglary with an assault for this incident. (DA22:621-22.) He was sentenced on 12/2/1983. (DA22:622.)

1986 Release from Custody and Rebecca Wendt's Murder

Barwick was released from prison on 1/13/1986. (DA24:806-08.) Rebecca

Wendt lived in an apartment near where Barwick raped M.D in 1983. (DA18:203-05; DA22:610.)

On 3/31/1986, seventy-eight days after Barwick's release from prison, Rebecca went sunbathing outside her apartment while some of her family went to the beach. (DA18:206, 209-11, 213.) Barwick drove past her apartment around 12:00 p.m. (DASupp6:312.) Later, he passed by the apartment again and saw Rebecca "out on the front of the driveway, sunbathing" in a "bikini." (DASupp6:313.) He went home, got a knife and some gloves, and walked back to the apartment wearing Nike sneakers, a tank top, jeans, and baseball "batting gloves." (DASupp6:313-15, 327-29.) He brought the knife so Rebecca "wouldn't mess with" him and would "let" him "go on about what" he's "doing" and "let him get out." (DASupp6:328.) Rebecca was still outside when Barwick returned. (DASupp6:333.) He walked around the apartment complex and Rebecca twice, but on the third time around she had gone inside her apartment and left the door open. (DASupp6:313-14, 333; DA18:219.)

Barwick walked through the door and found Rebecca "sitting on in the couch, watching TV." (DASupp6:314, 334.) She immediately "jumped and hollered 'get out, get out.'" (DASupp6:315.) Barwick pushed her down and refused to leave because he was going to "burglarize" her home first. (DASupp6:315.) He began going through her purse contents when she struck him. (DASupp6:319, 334.) In response, he "threw her down" and "stabbed her" "on the chest." (DASupp6:315, 319-320.) He "stabbed her once" and, when she continued to resist, he "stabbed her" some "more times."

(DASupp6:316.)

Barwick stabbed Rebecca at least thirty-seven times and left an additional eighteen defensive wounds on her hands. (DA20:447-48, 450-57.) Barwick stabbed Rebecca: (1) five times in her neck (one stab cut her carotid artery); (2) eight times in her left chest (five of which cut into her left lung and would have caused her to suck "air through" her "chest instead of through" her "windpipe"); (3) eight times in her left breast; (4) six times on her right chest; (5) four times on her arms; (6) once below her breastbone (which cut her pulmonary artery); (7) twice on her upper left abdomen (which punctured her liver and stomach); and (8) once on her back (the deepest wound which penetrated five-and-a-half-inches into her and cut her aorta). (DA20:450-57.) Rebecca bled to death anywhere from one-and-a-half to ten minutes after the stabbing began. (DA20:458-59, 461-63.)

Barwick wrapped Rebecca in a comforter, put her in the bathroom, and then left her apartment and headed for the nearby woods. (DA18:233, 235-36; DASupp6:317-19, 337.) He threw the knife into a nearby lake. (DASupp6:320.) Then he went back to his house, stripped, put his bloody clothes, gloves, and Nike shoes in a paper grocery bag, put the grocery bag in his car trunk, and took a shower. (DASupp6:321, 323-24, 326, 330.) He disposed of his clothes, gloves, and shoes in a dumpster behind a store later that day. (DASupp6:323, 330.)

Rebecca's family returned to the apartment around 8:00 p.m. and found her in the bathroom where Barwick left her. (DA18:214-15.) Under the blanket, the bottoms

of Rebecca's bikini were pulled down in the back. (DA18:256.)

Rebecca's sister identified five white-handled, serrated steak knives as knives from Rebecca's apartment, but said there were originally six when the knives were purchased a month before the murder. (DA18:215-16, 308-09.) These knives matched the description of the knife Barwick said he brought from his house and threw in the lake. (DASupp6:320, 327-28; DA18:308-13.)

Barwick's Confessions (April 15, 1986)

After initially lying about his involvement (DASupp6:304-09; DA18:287-291), Barwick gave a post-*Miranda*,[1] recorded confession on 4/15/1986, (DASupp6:310-38; DA18:291, 294-99, 303-05.) He said he "couldn't control" himself after he "saw her" and "when" he "caught control of" himself "it was too late" she "was dead." (DASupp6:318.) Barwick admitted he confessed to his family too. (DASupp6:329-30.)

Serological Testing of the Semen-Stained Comforter

An FDLE serologist examined the comforter Barwick wrapped Rebecca in along with samples from Barwick. (DA19:402-03, 407-09, 413.) She determined Barwick was a type O secretor and identified semen stains on the comforter. (DA19:413-18.) 2% of the US population—one in every 2 million males—including Barwick could have left the semen stain. (DA19:418-20.)

Operative Capital Trial and Penalty Phase

A grand jury indicted Barwick for first-degree murder, burglary while

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

armed/with battery, attempted sexual battery, and armed robbery. (DA11:241-42.) The jury convicted Barwick as charged in 65 minutes. (DA21:602-04.)

At the penalty-phase, the State presented M.D.'s testimony in support of the prior violent felony aggravator, and Barwick's family in support of the avoid-arrest aggravator, while resting on the guilt-phase evidence for the remaining aggravators. (DA22:609-634.) Barwick's brother and sister testified he confessed to the murder. (DA22:622-23.) Barwick's brother testified Barwick said he "had to kill Rebecca because when "he was struggling with her and she took his mask off, when he seen her, when she seen his identity, he didn't want to go back to where he came from, from prison." (DA22:630, 634.)

The jury unanimously recommended death after deliberating for 15 minutes. (DA25:960-63.) The sentencing judge followed the jury's recommendation after finding six aggravators: (1) prior violent felony (proven by the sexual assault and burglary convictions related to M.D); (2) murder committed during the course of a felony (proven by the jury's verdict convicting Barwick of attempted sexual battery); (3) avoid arrest (proven by the defendant's confession that he killed the victim because she saw his face and he did not want to go back to prison); (4) murder committed for pecuniary gain (proven by defendant's confession that he was trying to rob the victim and went through her wallet); (5) heinous, atrocious, or cruel (HAC) (proven by the number of stab wounds, defensive wounds, and evidence Rebecca

fought for her life); (6) cold, calculated, and premeditated (CCP).[2] (DA16:1281-86, 1306-07.) The court found the mitigation did not outweigh the aggravation. (DA16:1287-92.)

Barwick's Clemency Proceedings and Clemency Denial.

Barwick was appointed clemency counsel on February 21, 2020. *Barwick v. Governor of Florida et. al.*, 4:23-cv-00146-RH, Doc. 2 at 19 (N.D. FL).

Dr. Eisenstein, after being contacted by clemency counsel, sent a letter to the clemency board on April 20, 2021 stating Barwick: (1) was not malingering and easy to interact with; (2) read at a fourth grade level and had a major reading disability; (3) had great difficulty expressing himself verbally; (4) was extremely remorseful but genuinely did not remember the details of the crime and was unable to distinguish between what he had been told over the years and what actually happened; (5) had memory issues as a result of his trauma and brain injuries; (6) had a long history of physical, emotional, and sexual abuse and was never treated; (7) had post-traumatic stress disorder. *Barwick v. Governor of Florida et. al.*, 4:23-cv-00146-RH, Doc. 2-1 at 63-64 (N.D. FL). Dr. Eisenstein opined that Barwick's violence was caused by the trauma he suffered up until his arrest. Id. at 64.

Barwick appeared at an hour-long clemency interview with his appointed clemency counsel on April 29, 2021. Id at 4-5. The interviewers informed Barwick the

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[2] The Florida Supreme Court later struck the CCP aggravator while leaving all others intact. *Barwick v. State*, 660 So. 2d 685, 696-97 (Fla. 1995)

Governor and cabinet members who served on the executive clemency board requested Barwick's testimony to determine whether the board should hear his case. Id. at 7. The interviewers informed Barwick that he would not be permitted to relitigate his guilt or innocence or the legal issues in his case. Id. Instead, the interview was an opportunity for Barwick to make "any statements or comments concerning commutation to life of the death sentence imposed." Id. They also told him that he would have the opportunity to provide additional information in support of clemency after the interview. Id. at 8. One interviewer told Barwick that "the whys" of what happened are "important" to his portion of the interview. Id. at 23.

Barwick's clemency counsel asked Barwick about his background and Barwick spoke about his history, abusive childhood, prior time in prison as a fifteen-year-old, and the prior crime against M.D. Id. at 8-13. Barwick also stated he was "guilty" of murdering Rebecca Wendt, regretted killing her, sympathized with her family and friends, had no excuse for the killing, and tried to redeem himself as best he could while in prison. Id. at 13-14. He stated he did not have many disciplinary infractions while in prison, always tried to help people, and had been, for years, helping a blind inmate who had been unsuccessfully paired with several inmate-helpers before Barwick. Id. at 14-16. Barwick also spoke about writing to a variety of friends while in prison, the Bible studies he'd done, and other classes and work he participated in while incarcerated as a juvenile. Id. at 17-18. Barwick ended by emphasizing he took full responsibility for his crimes, knew what he did was wrong, would accept a life

sentence if offered, and was not the same person he was at nineteen. Id. at 18-19.

The interviewers began by thanking Barwick for coming to the interview and giving them the opportunity to ask him questions. Id. at 19. They asked him: (1) how long he'd been out of prison from the rape and burglary charges when he murdered Rebecca (Barwick estimated 90 days); (2) how many women he had victimized prior to being sentenced to death (Barwick estimated fifteen to twenty); whether he had a relationship with his family (Barwick said he corresponded with his sisters); (3) who Barwick's last visitor was and when did the visit occur (Barwick replied a friend visited him a week ago); (4) why Barwick killed Rebecca (Barwick responded he did not know); (5) how many times he stabbed/slashed Rebecca (Barwick responded he thought it was 37 times); (6) whether he stabbed her with the knife he brought from his house (Barwick replied he brought a knife from his house but actually stabbed Rebecca with a knife from her house); (7) how police knew his father was abusive (Barwick responded the abuse was seen and reported by police); (8) whether he could name an instance where police saw the abuse (Barwick said an officer was present one time when his father was beating him and his brother with a broken axe at a worksite); (9) whether he suffered injuries after that beating and returned to work (Barwick said no injuries and that he did return to work); (10) whether Barwick received abuse from his father often (Barwick replied yes and explained he was the scapegoat that took most of the beatings as the youngest); (11) whether Barwick was ever hospitalized (Barwick said no); (12) whether he ever received injuries that

required medical treatment (Barwick said no, but that he probably should have); (13) whether Barwick's beatings were about the same as those suffered by his siblings (Barwick said it depended on the particular beating, but he was beaten more frequently); (14) whether his siblings had ever been incarcerated (Barwick said no); (15) whether there was anything specific about the difference in beatings that explained why he ended up incarcerated while his siblings did not (Barwick said no, but that he just took the beatings differently than they did); (16) what was going on in his head when he raped M.D. in 1983 (Barwick said he did not know, did not know the victim, and did not know why he decided to rape her); (17) where did he rape M.D. and how did he get there (Barwick said her apartment and that he broke in); (18) whether he had seen M.D. again (Barwick replied only in court); (19) whether he knew Rebecca Wendt's name (he did); (20) when the first time he saw Rebecca Wendt was (Barwick replied the day of the offense and he only saw her once before he decided to commit the offense); (21) what happened just prior to deciding to commit the offense (Barwick said he was getting off work and there was no reason for it); (22) whether Barwick went into Rebecca's apartment with the intent to kill her (Barwick said no); (23) why he got the knife from his house if not to kill (Barwick said "because it worked the first time" to accomplish the rape); (24) whether Barwick intended to rape Rebecca the way he raped M.D. (Barwick said yes); (25) why he did not use the knife he brought (Barwick said it got lost as the victim fought him); (26) what Barwick meant by the fifteen or twenty instances where he victimized women by "cop[ping] a

feel" (Barwick said he would walk down the street, grab a "woman's behind or touch her breast"); (27) why he would inappropriately touch women (Barwick said he did not know); (28) whether he knew it was wrong to inappropriately touch these women (Barwick said yes but that he did it anyway time and time again); (29) what was so horrible about Rebecca's murder (Barwick replied that he intended to rape her and killed her during the attempt); whether he knew killing her was wrong (Barwick said he either knew before he killed her or later that day); (30) whether his parents taught him and his siblings right from wrong (Barwick said technically yes); (31) what he wrote to his pen pals about (Barwick said family, work, and prison life); (32) whether he'd discussed his crimes with his pen pals, parents, or two of the sisters he spoke regularly with (Barwick said no); (33) why he believed a life sentence would be more appropriate than the death sentence he was under (Barwick said it would be wrong for him to say it would be more appropriate because of the crimes he'd committed); (34) whether he was successful in raping Rebecca and why his semen was at the scene (Barwick said he was not successful, did not know why his semen was there, did not masturbate after the murder, but that he must have ejaculated); (35) whether he wore a face covering during the murder (Barwick said no); (36) why he wore gloves (Barwick said he did not know); (37) whether Barwick could explain why he wore gloves and why he killed Rebecca (Barwick said he could not); (38) whether he recalled prior exposure charges in 1979 and 1980, and the M.D. sexual battery charge (Barwick said he remembered one exposure charge and the charge related to M.D.);

(39) whether he considered himself a sexual deviant currently and in the past (Barwick said he knew he was in the past and that he probably still was); (40) whether he saw Michael Ann Wendt—Rebecca's sister—on the day he killed Rebecca (Barwick said no); (41) whether he discussed the details of Rebecca's murder with his family at any time (Barwick said he had with his father and brother but they did not talk about why he committed the murder). Id. at 19-51.

The interviewers then invited Barwick's clemency counsel to ask any additional questions. Id. at 51. Clemency counsel brought out additional testimony from Barwick that he heard his father rape his mother, saw his father physically abuse his mother, could not read or spell until the tenth grade, and received minimal counseling. Id. at 51-53. Barwick confirmed he did not intend to kill Rebecca when he entered her apartment, brought the knife so she would comply with the intended rape, and confessed to law enforcement. Id. at 53-54. Barwick stated he did not have the insight into himself to know why he committed crimes. Id. at 55. He never had any homicidal thoughts, only suicidal ones. Id.

The interviewers then asked about Barwick's medical and mental condition, Id. at 56-58. Barwick said he was in good physical health, had never been diagnosed with schizophrenia, bipolar disorder, paranoia, or brain damage, but that his brain was "slow," and it took him a long time to think through things. Id. at 56-59. Barwick closed by emphasizing his regret for his crime, empathy for the victim's family, and his regret for his inability to explain why he killed Rebecca but just could not. Id. at

59-60.

Florida Governor DeSantis denied Barwick's clemency application on April 3, 2023, and scheduled Barwick's execution for May 3, 2023. *Barwick v. Governor of Florida et. al.*, 4:23-cv-00146-RH, Doc. 2 at 19 (N.D. FL).

Barwick's 42 U.S.C. 1983 Suit and Stay Request Denial

Barwick filed a § 1983 suit alleging Florida violated his clemency-related due process rights. *Barwick v. Governor of Florida et. al.*, 4:23-cv-00146-RH, Doc. 2 at 1-23 (N.D. FL). His complaint alleged the following facts: (1) Florida has not granted clemency to any death-sentenced individual since 1983 while carrying out 99 executions; (2) Florida's clemency rules permit comments from the victims, require an investigation into all factors relevant to clemency, and require the preparation of a report with all the details of the investigation including statements from the defendant and his counsel; (3) capital defendants are not entitled to see the materials generated in the clemency process apart from a transcript of the clemency interview and statements by their attorneys, the prosecutor, the trial judge, their family members, and the victim's family members; (4) Florida law provides for clemency counsel but only requires counsel to be a member of the bar and compensates clemency counsel at $10,000 for attorney's fees and any costs incurred during clemency; (5) there is no statutory right to clemency counsel; (6) clemency counsel must be a member of the Florida Bar, cannot solicit compensation from the inmate, must notify the coordinator of any formal Florida Bar complaint, non-confidential

agreements with the Florida Bar, and any pending ineffective assistance of counsel claims, must be readily accessible to the inmate, meet him in person, and attend the clemency interview, must file a clemency petition and attend the hearing before the Governor and Cabinet if one is scheduled, and cooperate and abide by the contract between counsel and the Florida Parole Commission; (7) no other qualifications exist for clemency counsel; (8) Florida law prohibits state postconviction counsel from participating in clemency proceedings; (9) Florida law prohibits the execution of a death sentence while clemency is pending; (10) Richard Greenburg represented Barwick in clemency proceedings; (11) Mr. Greenburg filed a clemency petition limited to some reports and letters on Barwick's behalf; (12) Barwick was provided a clemency interview where he was told that the interview was not a place to relitigate his guilt or innocence, but instead to make any statements or comments concerning his sentence; (13) Barwick made comments about his correctional record, family, and expressed remorse; (14) Barwick was asked numerous questions about the facts surrounding his crime; (15) a commissioner made a comment that Barwick had no answers for why he committed the murder; (16) Barwick was asked whether he was a sexual deviant; (17) Barwick was asked why he committed crimes but his siblings did not; (18) Barwick was asked whether he was ever diagnosed with a brain injury and stated he did not know; (19) a request to commute Barwick's sentence was provided that contained Dr. Eisenstein's review outlining Barwick's deficits and his belief Barwick suffered from brain injuries and trauma; (20) the Governor denied

clemency and scheduled Barwick's execution. Id. at 4, 10-19.

Barwick also sought a stay of execution. *Barwick v. Governor of Florida et. al.*, 4:23-cv-00146-RH, Doc. 5 (N.D. FL). The State opposed Barwick's motion to stay and moved to dismiss the suit, arguing that Barwick's clemency-related due process rights were not violated. Id., Docs. 12 & 13.

The district court denied Barwick's motion to stay his execution. Id., Doc. 21. The court found that Florida provided Barwick all the clemency-related process he was due and that additional standards governing clemency "set out in advance would not likely have made a difference." Id., Doc. 21 at 5.

Barwick appealed to the Eleventh Circuit. Id., Doc. 22.

Eleventh Circuit Appeal and Stay Request Denial

Barwick filed a motion to stay his execution pending appeal in the Eleventh Circuit. *Barwick v. Governor of Florida et. al.*, 23-11277-P, Doc. 4 (11th Cir.). The State opposed the stay. Id., Doc. 8. The Eleventh Circuit issued a detailed opinion denying Barwick's motion to stay and finding his clemency-related due process rights were not violated and denying his motion to stay his execution. *Barwick v. Governor of Florida*, No. 23-11277-P, 2023 WL 3089873, at *3-7 (11th Cir. Apr. 26, 2023). The Eleventh Circuit also echoed the district court's observation that additional clemency criteria were unlikely "to change the result here." *Id.* at *7.

Barwick's Current Stay Application

On April 28, 2023, five days before his scheduled execution, Barwick filed an

emergency motion application to stay his execution pending this Court's certiorari decision. His stay application argues that Florida's "standardless" clemency system violates due process, that the issue is important and meritorious, that there is a significant chance of reversal, and this Court should therefore grant a stay.

This is the State's response in opposition to Barwick's request to prolong the execution of his nearly three-decade-long-finalized capital sentence.

ARGUMENT IN OPPOSITION TO STAY OF EXECUTION

A stay of execution is not granted as "a matter of course." *Hill v. McDonough,* 547 U.S. 573, 583-84 (2006). It 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)). Equity requires this Court to 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 Court recently highlighted the State's and victims' "important interest" in the timely enforcement of a death sentence. *Bucklew v. Precythe,* 139 S. Ct. 1112, 1133-34 (2019). The people of Florida, as well as the surviving victims, "deserve

better" than the "excessive" delays that now typically occur in capital cases, including this one. *Id.* at 1134. Courts should "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Id* at 1134. Last-minute stays of execution should be "the extreme exception, not the norm." *Id*

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 and requires 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).

This Court should refuse to stay execution of Barwick's long-finalized death sentence for four[3] independent reasons. First, his § 1983 suit is based on a speculative

[3] Since there is a question about whether Barwick needed to await the Governor's clemency denial before filing a § 1983 suit challenging his clemency proceedings on due process grounds, the State does not address the fourth element of whether the suit could have been brought earlier. But the State notes the possibility that a *facial* challenge to Florida's clemency proceedings as standardless and resting on the

theory exclusively designed as a delay tactic. Second, there is no reasonable probability four Justices would vote to grant certiorari. Third, there is no significant possibility of reversal. Fourth, there is no likelihood of irreparable injury in the absence of a stay.

A. Barwick's § 1983 Suit Is a Delay Tactic Based on a Speculative Theory.

Barwick fails the *Bucklew*-added element of whether his § 1983 suit is merely a delay tactic based on a speculative theory. *See Bucklew*, 139 S. Ct. at 1134 (bemoaning the delay achieved by a capital defendant whose suit was "little more than an attack on settled precedent" and urging courts to curtail suits pursued based on "speculative theories."). Barwick's suit is nothing more than an attempt to broaden the minimal clemency-related due process rights he has under this Court's long-settled precedent of *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Conner, J., concurring). *See Barwick v. Governor of Florida, et. al.*, No. 23-11277-P, 2023 WL 3089873, at *5 (11th Cir. Apr. 26, 2023) ("Justice O'Connor's concurring opinion provides the holding in *Woodard*.").

Justice O'Conner's opinion in *Woodard* agreed that Ohio's system comported with due process but noted that a system where "a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied

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Governor's unbridled discretion—Barwick's core claim—may have been pursued earlier. *Cf. Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) (holding a *facial* regulatory taking claim was ripe for review and distinguishing *facial* claims from *as applied* claims). The State takes no formal position now.

a prisoner any access to its clemency process," *might* offend due process. *Woodard*, 523 U.S. at 289 (O'Conner, J., concurring). This Court has "never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process." *Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013). With two isolated exceptions from decades ago,[4] neither have the federal appellate courts applying *Woodard*'s holding to clemency-related due process claims over the past twenty-five years.[5]

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[4] *Young v. Hayes*, 218 F.3d 850, 852-54 (8th Cir. 2000); *Wilson v. U.S. Dist. Ct. for N. Dist. of California*, 161 F.3d 1185, 1186 (9th Cir. 1998).

[5] *Saunders v. Hall-Long*, No. 20-1957, 2021 WL 5755080, at *1 (3d Cir. Dec. 3, 2021); *Garcia v. Jones*, 910 F.3d 188, 190-91 (5th Cir. 2018); *Tamayo v. Perry*, 553 F. App'x 395, 400-02 (5th Cir. 2014); *Turner v. Epps*, 460 F. App'x 322, 330-31 (5th Cir. 2012); *Roach v. Quarterman*, 220 F. App'x 270, 274-75 (5th Cir. 2007); *Sepulvado v. Louisiana Bd. of Pardons & Parole*, 171 F. App'x 470, 471-73 (5th Cir. 2006); *Lagrone v. Cockrell*, No. 02-10976, 2003 WL 22327519, at *13 (5th Cir. Sept. 2, 2003); *McCowin v. Kent*, 32 F. App'x 126 (5th Cir. 2002); *Moody v. Rodriguez*, 164 F.3d 893, 894 (5th Cir. 1999); *Faulder v. Texas Board of Pardons and Paroles*, 178 F.3d 343, 344-45 (5th Cir. 1999); *Bolton v. Dep't of the Navy Bd. for Correction of Naval Recs.*, 914 F.3d 401, 413 (6th Cir. 2019); *Fautenberry v. Mitchell*, 572 F.3d 267, 271 (6th Cir. 2009); *Workman v. Summers*, 111 F. App'x 369, 370-72 (6th Cir. 2004); *Workman v. Bell*, 245 F.3d 849, 852-83 (6th Cir. 2001); *Bowens v. Quinn*, 561 F.3d 671, 673-76 (7th Cir. 2009); *Lee v. Hutchinson*, 854 F.3d 978, 981-82 (8th Cir. 2017); *Winfield v. Steele*, 755 F.3d 629, 630-31 (8th Cir. 2014) (en banc); *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003); *Roll v. Carnahan*, 225 F.3d 1016, 1017-1018 (8th Cir. 2000); *Schad v. Brewer*, 732 F.3d 946, 947-48 (9th Cir. 2013); *Wright v. McCurdy*, 299 F. App'x 738, 738-39 (9th Cir. 2008); *Anderson v. Davis*, 279 F.3d 674, 676-77 (9th Cir. 2002); *Gardner v. Garner*, 383 F. App'x 722, 724-28 (10th Cir. 2010); *Duvall v. Keating*, 162 F.3d 1058, 1060-62 (10th Cir. 1998); *Barwick v. Governor of Florida et al.*, No. 23-11277-P, 2023 WL 3089873, at *7 (11th Cir. Apr. 26, 2023); *Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 794 F.3d 1327, 1330-33 (11th Cir. 2015); *Banks v. Sec'y, Fla. Dep't of Corr.*, 592 F. App'x 771, 773-74 (11th Cir. 2014); *Wellons v. Comm'r, Georgia Dep't of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014); *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013); *Valle v. Sec'y, Fla. Dep't of Corr.*, 654 F.3d 1266, 1267-68 (11th Cir. 2011); *Parker v. State Bd. of Pardons & Paroles*,

The speculative nature of Barwick's due process claim reveals it is nothing more than an attack on long-settled precedent designed to delay execution of his long-final sentence rather than a true attempt to safeguard his due process rights. *See Bucklew*, 139 S. Ct. at 1134. The central allegation in Barwick's § 1983 suit was that his clemency proceedings were standardless in violation of due process. That allegation does not come remotely close to either of the two situations Justice O'Conner stated "might" violate minimal clemency-related due process. *See Woodard*, 523 U.S. at 289 (O'Conner, J., concurring). Since Barwick's allegations about standardlessness do not amount to either coin flipping or not allowing him *any* participation in clemency, his clemency-related due process claim pursued on the eve of his execution is nothing more than an "attack on settled precedent" based on a "speculative" theory that should be curtailed by this Court. *Cf. Bucklew*, 139 S. Ct. at 1134.

As recognized by every court to analyze Barwick's clemency-related § 1983 claim before now, his due process arguments simply seeks to contort *Woodard* beyond recognition and significantly expand the meaning of "minimal" due process. Florida's Rules of Executive Clemency—which are freely available on the internet[6]—make clear that the Governor has unfettered discretion to "deny clemency at any time, for any reason." Fla. R. Exec. Clemency 4. Similarly, the "Governor, with the approval of

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275 F.3d 1032, 1033-37 (11th Cir. 2001); *Gilreath v. State Bd. of Pardons & Paroles*, 273 F.3d 932, 933-34 (11th Cir. 2001); *Hall v. Barr*, 830 F. App'x 8, 10 (D.C. Cir. 2020).

[6] https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf.

at least two members of the Clemency Board, has the unfettered discretion to grant, at any time, for any reason," a sentence commutation. Fla. R. Exec. Clemency 4.I.D. It is simply impossible for Barwick or his counsel to have been misled about the types of information they could present in clemency in light of the unbridled discretion to grant a sentence commutation for any time and any reason. That is particularly true since Barwick's guilt is indisputable given his confessions and the evidence presented against him.

Barwick's myopic focus on a statement by a clemency interviewer that the interview's purpose was not to determine his "innocence or guilt" does not change the fact that he was afforded due process. This statement simply reflects the simple truth that Barwick would not be allowed to protest his innocence of the crime at the interview, not that the interviewers were uninterested in determining why he committed his past crimes. The comments by another interviewer that "the whys" of his crimes were "important" to the interview clearly demonstrate that Barwick has overread and myopically focused on the "guilt or innocence" statement. *See Barwick v. Governor of Florida et. al.*, 4:23-cv-00146-RH, Doc. 2-1 at 23 (N.D. FL). In any event, Barwick could not have been misled by this statement into *not* providing evidence of his innocence because innocence was never on the table in his case.

Barwick's skewed reading of the interviewer's statement is quite puzzling since—before the interview—he tried to persuade the board that his violent crimes were *explained* by the fact he was subjected to "violent and relentless trauma from

pre-birth until he was arrested for this crime . . . . Mr. Barwick's already damaged brain simply could not process or cope with the trauma and the result was his crime." *Id.* at 64. It is entirely unsurprising that the clemency interviewers would want to probe that conclusion with Barwick himself, or themselves be concerned about *why* Barwick committed his crimes. Far from myopically focusing on Barwick's guilt, the interviewers asked him many questions about his abusive upbringing and mitigation.

Barwick's case does not reach the level any court has held violates due process under *Woodard*. This Court should deny Barwick's motion to stay because it is nothing more than an attack on this Court's settled precedent in *Woodard* based on a speculative theory.

B. No Reasonable Probability Four Justices Would Vote for Certiorari.

Barwick also fails the first *Barefoot* element because there is no reasonable probability four Justices would vote to grant certiorari on Barwick's clemency-related due process claim. "A petition for a writ of certiorari will be granted only for compelling reasons." *See* Sup. Ct. R. 10.

Barwick's clemency-related due process claim presents no important or unsettled question of federal law because it is directly settled by this Court's nearly thirty-year-old precedent in *Woodard*. Barwick has failed to identify any split between federal appellate courts, or state supreme courts, on clemency-related due process rights in similar circumstances either. Based on the State's review, any proffered conflict would be beyond illusory. The lack of a deep conflict in the lower

courts reveals how unlikely it is that Barwick would receive four votes for certiorari. *See California v. Carney*, 471 U.S. 386, 400 & n.11 (1985) (Stevens, J., dissenting with JJs. Brennan and Marshall).

Barwick effectively argues this Court should set aside its normal certiorari standard because, he maintains, the issue he presents is significant and uniquely important due to clemency's position as a failsafe. But his arguments ring hollow in this case where there is absolutely no dispute (including from Barwick himself) that he killed Rebecca Wendt by stabbing her about thirty-seven times a mere seventy-eight days after being released from prison for a violent, knifepoint rape and armed burglary. *Barwick v. Governor of Florida et. al.*, 4:23-cv-00146-RH, Doc. 2-1 at 13-14, 59-60 (N.D. FL). To the extent Barwick's question is certworthy at all, a case where the clemency fail-safe *actually* failed due to a lack of process *and* an innocent man may be put to death is a far better vehicle than this one where Barwick's guilt is indisputable.

Indeed, Barwick's case is a uniquely poor vehicle to address clemency-related due process because every federal court to look at his pleadings before now agrees that he would not likely receive clemency even if due process required the standards he seeks to impose. *See Barwick*, 2023 WL 3089873, at *3, 7 ("The district court also noted" that "more detailed standards governing clemency claims are unlikely to have made a difference. . . . Nor can we conclude that additional criteria were likely to change the result here."). That assessment is backed by the horrific, escalating nature

of Barwick's crimes from burglary and sexual battery at knifepoint in 1983 to burglary, attempted sexual battery, and murder by stabbing in 1986 less than three months after his release from prison. It is unlikely four justices of this Court would grant certiorari in a case where its ultimate ruling would almost certainly have no impact on Barwick's capital sentence at all (other than delaying the state from executing it of course). The lack of relief Barwick will almost certainly receive reveals what his stay application truly is: a bald attempt to delay his execution with no real, articulable benefit to him in the end.

C. No Significant Possibility of Reversal.

Barwick fails the second *Barefoot* element because there is no significant possibility this Court would reverse a holding that Barwick's clemency-related due process rights were not violated. The likely result of any certiorari grant would be to either reaffirm Justice O'Conner's decision about minimal clemency-related due process rights or hold that due process is inapplicable to clemency proceedings.

Barwick would not achieve reversal in either case. In the first scenario, this Court would affirm because the process Barwick received is not remotely close to flipping a coin and leaving the clemency decision completely to chance or denying him *any* opportunity to participate in clemency.

In the second, Barwick would not even have a claim, and there is good reason to think that due process rights should not extend to clemency proceedings at all. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) ("Unlike probation,

pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."); *id.* at 467 (Brennan, J., concurring) (explaining there is no liberty interest when the decisionmaker may deny clemency for any constitutionally permissible reason or no reason at all); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 279-285 (1998) (plurality opinion) (explaining due process is "inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations" and that *Dumschat*'s reasoning applies equally in capital cases). *Cf. Cavazos v. Smith*, 565 U.S. 1, 8-9 (2011) ("These or other considerations perhaps would be grounds to seek clemency, a prerogative granted to executive authorities to help ensure that justice is tempered by mercy" but it "is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention.").

The possibility that Barwick convinces this Court to recede from *Woodard*, hold full due process protections apply to non-judicial clemency proceedings designed in support of a state executive's absolute, unfettered discretion to deny clemency, *and* hold Barwick's proceedings violated that newly created rule, is not significant. Barwick's stay request should be denied on that basis.

D. No Irreparable Injury.

Finally—as strange as it may sound in a capital case with an execution looming—Barwick has failed to establish the third *Barefoot* element of irreparable injury because he would almost certainly not receive clemency under *whatever* process he was due.

Barwick's irreparable injury argument misguidedly focuses solely on the fact that he will soon be executed. But it is critical to keep in mind that Barwick's underlying clemency-related due process claim would only forestall (not prevent) his execution. The irreparable *injury* analysis should therefore focus instead on the likelihood the clemency process Barwick envisions would actually grant him relief. Barwick's alleged due process violation does not truly constitute irreparable injury because the net result of any decision granting relief would only delay execution of his capital sentence. *See In re Lewis*, 212 F.3d 980, 983 (7th Cir. 2000) (Easterbrook, J.) ("[W]e do not see why the *absence* of injury (that's what a finding of harmless error means) should equate to *irreparable* injury.") (Emphasis in original.) A technical error in clemency that had no effect on the ultimate clemency determination is more akin to harmless error than anything else, and harmless errors are simply not irreparable injuries. *Cf. id.*

On this record, it is clear beyond reasonable doubt that Barwick would be denied clemency by any thoughtful decisionmaker under any standard as both the district court and Eleventh Circuit recognized. *See Barwick*, 2023 WL 3089873, at *3, 7 ("The district court also noted" that "more detailed standards governing clemency

claims are unlikely to have made a difference. . . . Nor can we conclude that additional criteria were likely to change the result here."). Barwick committed a string of escalating, horrific crimes that culminated in killing Rebecca Wendt with the knife he brought to force her to submit to rape because he did not want to go back to prison. It is beyond reasonable doubt that Barwick would be denied clemency no matter what process was due. Therefore, any assumed clemency-related due process error would have made no difference in the outcome of Barwick's clemency proceedings and cannot constitute irreparable harm. *Cf. In re Lewis*, 212 F.3d at 983. This Court should deny Barwick's motion to stay his execution.

CONCLUSION

This Court should deny Barwick's motion for stay of execution and bring true finality to the victims, the State of Florida, and Darryl Barwick.

Respectfully submitted,

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