

No. 22-7412

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IN THE  
**Supreme Court of the United States**

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DARRYL BRYAN BARWICK,

Petitioner,

v.

RON DESANTIS, ET AL.,

Respondents.

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

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**REPLY TO BRIEF IN OPPOSITION**

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

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## Mr. Barwick Was Denied Due Process In His Clemency Proceeding

Respondent misunderstands Mr. Barwick's cause of action. *See* Brief in Opposition at 4, hereinafter "BIO at \_\_\_". Mr. Barwick contends that the standardless clemency process to which he was subjected violated his minimal right to due process. Mr. Barwick's clemency process became solely focused on his guilt of the crime for which he was convicted and prior criminal conduct, creating a meaningless process for an individual who admits his guilt. Thus, contrary to Respondent's argument, Mr. Barwick was neither insisting on detailed standards nor attacking settled precedent. BIO at 7. Rather, he was only asking that that the minimal due process recognized in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998), be applied to his clemency proceedings.

Indeed, the cases cited by Respondent support Mr. Barwick's argument. BIO at 10. Specifically, this Court has recognized that: "[a] fundamental requirement of due process is 'the opportunity to be heard.' **It is an opportunity which must be granted at a meaningful time and in a meaningful manner.**" *Armstrong v Manzo*, 380 U.S. 545, 552 (1965) (citation omitted) (emphasis added). This is precisely Mr. Barwick's point. Overlooked by Respondent is the fact that Mr. Barwick's clemency process lacked any meaning without standards and due to the commissioners' singular focus on his guilt.<sup>1</sup>

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<sup>1</sup> Due process requires that Mr. Barwick be provided a proceeding where the standards are clear and include considerations beyond the condemned's guilt. However, in arguing that the fail safe concept of clemency is not an issue because Mr. Barwick is not innocent, Respondent reads *Herrera v. Collins*, 506 U.S. 390 (1993), too narrowly. BIO at 11. In *Herrera*, this Court recognized the historic concept of

Additionally, Respondent attempts to recharacterize Mr. Barwick's claim, asserting that he is challenging the impartiality of the clemency commissioners. BIO at 10. But that is not the case. Mr. Barwick's clemency interview illustrates a myopic inquiry into the details of the crime, not his motive as Respondent suggests. BIO at 11. Further, if the clemency commissioners were concerned with Mr. Barwick's future dangerousness or rehabilitation, they needed look no further than Mr. Barwick's prison file or ask a question of any of the correctional officers who oversaw his incarceration, including those who charged him to assist a fellow death row inmate who is blind. *See* App. E at 11-13, G and I.

When Respondent does engage with the actual argument posited by Mr. Barwick, he argues that Mr. Barwick's claim lacks merit because the clemency process provided to him exceeded the process provided to *Woodard*. BIO at 9. This argument is misleading. The clemency process in Ohio and the facts at issue in *Woodard* do not resemble what occurred in Mr. Barwick's case. As Justice O'Connor set forth in her opinion, Ohio's clemency scheme required that "the parole board must schedule a clemency hearing 45 days before an execution for a date approximately 21 days in advance of the execution. The board must also advise the prisoner that he is entitled to a prehearing interview with one or more parole board members." *Woodard*,

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clemency was extended "wherever ... it [was] deserved", which might certainly include remorse, rehabilitation, age and other factors the legal system does not correct. *See* 506 U.S. at 412; *see also* *See* Clemency, Death Penalty Information Center, *available at* <https://deathpenaltyinfo.org/facts-and-research/clemency> (last visited April 30, 2023) (listing examples of executive clemency grants for issues not relating to innocence, including mental health, intellectual disability, proportionality concerns, and redemption while incarcerated).

523 U.S. at 289 (O'Connor, J. concurring). Thus, the scheme and proceedings Woodard was provided were more fulsome than that which Respondent portrays. *See* BIO at 9 (“Ohio only gave a capital inmate a few days’ notice of the clemency hearing; excluded his counsel from the clemency interview; and did not allow Woodard to testify or submit documentary evidence at the hearing.”). Further, the alleged defects in *Woodard* were discrete issues related to the internal structuring of a clemency hearing, as opposed to the more significant, macrolevel flaws in Mr. Barwick’s proceedings—namely, an utter lack of guidance related to the clemency consideration, and the specific actions in his interview that indicated no meaningful consideration occurred.

Finally, Respondent repeatedly avers that Mr. Barwick’s cause of action is frivolous and asserted for the purpose of delay. BIO at 7, 13. However, neither the district court nor the Eleventh Circuit found that to be the case. Rather, the district court specifically found that Mr. Barwick complaint stated a claim for relief. App. H at 3 (“It is clear that a death-sentenced person has a right to due process in connection with a state-authorized clemency application.”). Likewise, the Eleventh Circuit squarely rejected the State’s argument that Mr. Barwick was dilatory in seeking relief: “The State first contends that we should not consider the substance of Barwick’s claim and that his motion ‘should be denied based on delay alone.’ We disagree. . . . The only reason for the timing of Barwick’s lawsuit in relation to the scheduled execution is the Governor’s decision to simultaneously deny clemency and issue the death warrant.” App. A at 9.

The district court and Eleventh Circuit similarly rejected Respondent's attempts to draw additional support for his arguments that Mr. Barwick was dilatory, relying on *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). BIO at 12-13, 14. This is because Respondent's argument is not supported by the facts at hand. First, Respondent argues that "the State and the victims have an important interest in the timely enforcement of a sentence." BIO at 12. But, Respondent neglects to point out that any delay in Mr. Barwick's execution was solely caused by Respondent. Pursuant to the Timely Justice Act, the Florida Legislature requires that the Governor issue a death warrant within thirty days after receiving notification that a defendant sentenced to death has exhausted his allowed state and federal collateral challenges, provided that the executive clemency process has concluded at the time of such notification. Fla. Stat. § 922.052(2)(b). Thereafter, the Governor must "direct[] the warden to execute the sentence within 180 days." *Id.* However, under the clemency rules, the clemency proceeding begins "at such time as designated by the Governor" or if there has been "no such designation . . . immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals . . . ." Rules of Executive Clemency 15(C).

Thus, under the Timely Justice Act and Rules of Executive Clemency, Mr. Barwick has been eligible for clemency since the exhaustion of his initial appeals, when his conviction and sentence were upheld by the Eleventh Circuit in 2016. Defendants, who solely controlled the timing of the issuance of Mr. Barwick's death

warrant, waited more than four years after such time to initiate clemency proceedings for Mr. Barwick and then almost another three years for Mr. Barwick's death warrant to be signed. Under these circumstances, Respondent's comparison to *Bucklew* falls short.

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

Likewise, this Court in *Bucklew* cites to its opinion in *Hill v. McDonough*, 547 U.S. 573, 584. (2006), which clearly states: "Thus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." Moreover, in positing the concern expressed by this Court in *Bucklew* related to method of execution challenges, Respondent misunderstands when Mr. Barwick's instant action accrued for the purposes of timeliness. The Eleventh Circuit addressed Respondent's argument and determined that Mr. Barwick's cause of action was timely. App. A at 9. Mr. Barwick diligently sought review of his cause of action.



Finally, contrary to Respondent's argument, Mr. Barwick does not seek to attack controlling precedent. BIO at 13. Rather, he seeks to demonstrate that this Court's controlling precedent dictates that his right to due process was violated by the failure to provide any standards for the considerations by the commissioners and/or clemency board, *coupled with* an absence of actual consideration. Although the clemency process is discretionary, it must still be meaningful. And, what became apparent at Mr. Barwick's clemency interview was that the sole consideration concerned his guilt for the crime. As Mr. Barwick never challenged his guilt, his clemency proceedings were doomed from the outset. The determination in his case was equivalent to a coin flip with "denied" on each side of the coin. There was no notice of the standards by which clemency would be determined, nor was there any meaningful opportunity to be heard.

### 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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