CAPITAL CASE NO. 22-7424

In The

Supreme Court of the United States

DARRYL BARWICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION TO CERTIORARI
EXECUTION SCHEDULED FOR MAY 3, 2023, AT 6:00 P.M.

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CAPITAL CASE
QUESTIONS PRESENTED

Darryl Barwick brutally murdered 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 recently signed a death warrant for Barwick and his execution is scheduled for May 3, 2023. Barwick asked Florida's courts to vacate and/or delay execution of his nearly three-decades-long-finalized sentence for a murder that occurred nearly forty years ago. The Florida Supreme Court refused on both procedural state law and substantive grounds. This Court therefore lacks jurisdiction over the following questions presented:

I. Does a State constitutional conformity clause requiring adherence to this Court's Eighth Amendment precedent exempting certain classes of individuals from execution while permitting the execution of all others violate the Eighth Amendment?

II. Should this Court overrule *Roper v. Simmons*, 543 U.S. 551 (2005) and hold first-degree murderers under twenty-one during the murder may not be executed?

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OPINION BELOW

The Florida Supreme Court's decision petitioned for review appears as *Barwick v. State*, No. SC2023-0531, 2023 WL 3151079 (Fla. Apr. 28, 2023).

JURISDICTION

This Court lacks jurisdiction over both of Barwick's questions presented because the Florida Supreme Court decided all of Barwick's claims on independent and adequate state-law grounds that Barwick has failed to challenge in any question presented. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); Sup. Ct. R. 14 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). This Court has explicitly recognized Florida's relitigation bar is an adequate state-law ground that deprives this Court of jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 281, 283-285 (1956) (dismissing for lack of jurisdiction where the Florida Supreme Court's decision below "might have rested"[1] on res judicata).

The fact that a state court addresses the federal merits of a claim after rejecting the claim on state-law grounds does not provide this Court with jurisdiction.

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[1] The State recognizes that this Court's jurisdictional test has changed since *Durley*. *See Long*, 463 U.S. at 1042. But that makes no difference here since this Court need not guess whether the Florida Supreme Court relied on a relitigation bar, the court below explicitly did so.

Carey v. Saffold, 536 U.S. 214, 225 (2002)[2] ("If the California Supreme Court had clearly ruled that Saffold's 4 ½—month delay was 'unreasonable,' that would be the end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was "entangled" with the merits."); *Sochor v. Florida*, 504 U.S. 527, 534 (1992) (holding this Court lacked jurisdiction to decide a federal claim that the Florida Supreme Court decided both on the merits and on preservation grounds); *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("Moreover, a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.").

Indeed, this Court has recognized there are many reasons a state court may choose to reject claims on both procedural and merits-based grounds. *See Carey*, 536 U.S. at 225 (explaining courts may address the merits in addition to alternatively rejecting claims on procedural grounds where the merits are not difficult, when it wants to give a reviewing court an alternative ground for decision, or to assure the prisoner that his claim was not rejected exclusively on a procedural technicality).

The Florida Supreme Court issued a plain statement deciding Barwick's exemption-from-execution claims on state-law grounds that no question presented by

[2] The rule applied in *Carey* and *Harris* utilized the *Long* test even though the circumstances were different. *See Coleman v. Thompson*, 501 U.S. 722, 734 (1991).

Barwick addresses. This Court therefore lacks jurisdiction over both of Barwick's questions presented for the reasons addressed below.

Barwick's first question presented asks this Court to decide whether the Eighth Amendment prohibits a state constitution from requiring its courts to adhere to this Court's Eighth Amendment precedent on who is exempt from execution and not expand those protections. His second asks this Court to extend *Roper v. Simmons,* 543 U.S. 551 (2005) to all first-degree murderers who killed while under twenty-one.

But the Florida Supreme Court decided Barwick's extension-of-*Roper* claim based on a state-law relitigation bar and a time-bar before alternatively reaching the merits. *Barwick v. State*, No. SC2023-0531, 2023 WL 3151079, at *5 (Fla. Apr. 28, 2023) ("The circuit court *was correct in denying this claim as procedurally barred because versions of it were raised in prior proceedings*. . . . Because the August 2022 APA resolution does not qualify as newly discovered evidence, *this claim was properly summarily denied as untimely*."). It was only after issuing both of these holdings that the Florida Supreme Court *alternatively* rejected Barwick's claim on the merits. *Id.* at *6 ("This claim is **also without merit** because this Court lacks the authority to extend *Roper*.") (Emphases added). The Florida Supreme Court's procedural bar and time-bar rulings took up seven paragraphs with exclusively state-specific procedural caselaw while its discussion of the merits and conclusion it lacked authority to extend *Roper* took up two paragraphs. *Id.* at *5-6.

Likewise, the Florida Supreme Court decided Barwick's extension-of-*Atkins*[3] claim on alternative state-law grounds (relitigation and time-bar) before reaching the merits. *Id.* at *6-7 (The "instant claim is a variation of claims that were raised in prior proceedings, and as such, is procedurally barred. . . . This claim was also properly denied as untimely.") And like the *Roper*-extension claim, the Florida Supreme Court denied Barwick's *Atkins*-extension claim on the merits as an alternative holding. *Id.* at 7 ("Finally, **even if it were not procedurally barred or untimely**, this claim is without merit.") (Emphasis added.)

This Court's decision in *Foster v. Chatman*, 578 U.S. 488, 497 (2016) does not alter the conclusion this Court lacks jurisdiction over Barwick's questions presented. In *Foster*, this Court determined it had jurisdiction over a federal question when: (1) the Georgia Supreme Court's unelaborated decision did not mention any procedural bar; (2) the Georgia trial court mentioned a relitigation bar but never actually applied it and instead rejected the defendant's claims solely on the merits. *Id.* at 497-99. It is nonsensical to suggest the Florida Supreme Court decided Barwick's exemption-from-execution claims solely on federal grounds when the majority of its discussion revolved around state-law procedural and time-bars. And it is disingenuous to think a busy state court deciding a post-warrant capital case a week after briefing finished would have wasted its time writing seven paragraphs about procedural and time bars when two paragraphs would have settled the issue. *Cf. Dunn v. Reeves*, 141 S. Ct.

[3] *Atkins v. Virginia*, 536 U.S. 304 (2002).

2405, 2412 (2021) (recognizing it would be a curious choice for a busy state court to devote the bulk of its opinion to an issue that did not matter unless the issue actually did matter).

Barwick's position is utterly incorrect and belied by this Court's longstanding promise that state courts "need not fear reaching the merits of a federal claim in an *alternative* holding." *Harris*, 489 U.S. at 264 n.10. (emphasis in original). The Florida Supreme Court decided his exemption-from-execution claims on state-law grounds that Barwick has failed to challenge in any question presented.[4] This Court therefore lacks jurisdiction over the questions Barwick presented and therefore should deny certiorari at the earliest opportunity.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI provides, in relevant part:

> The Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor

[4] No question presented arguing the Eighth Amendment precludes procedural bars for exemption-from-execution claims would have been viable anyway. This Court has explicitly held the Eighth Amendment's prohibition on cruel and unusual punishment may be procedurally barred. *Stewart v. LaGrand*, 526 U.S. 115, 118-120 (1999) (holding capital defendant's claim that execution by lethal gas violated the Eighth Amendment was waived *and* procedurally defaulted). Notably, in *LaGrand*, this Court reversed the Ninth Circuit, which had held "Eighth Amendment protections may not be waived, at least in the area of capital punishment." *Id.* (quoting *LaGrand v. Stewart,* 173 F.3d 1144, 1148 (9th Cir. 1999).)

cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, section one.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

Barwick stabbed Rebecca Wendt about thirty-seven times after seeing her sunbathing in a bikini, arming himself with a knife, and entering her apartment uninvited. Barwick killed Rebecca seventy-eight days after being released from prison for a violent rape and armed burglary where the victim lived to identify him. The only lesson Barwick learned between the 1983 violent rape and 1986 murder—to kill the victim so she could not identify him—earned him a death sentence. The Florida Supreme Court refused to let him escape justice on the eve of his execution for both procedural and substantive reasons. This Court should refuse to grant certiorari on Barwick's case for the fourth time.

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 December 2, 1983. (DA22:622.)

1986 Release from Custody and Rebecca Wendt's Murder

Barwick was released from prison on January 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 March 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 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*,[5] recorded confession on April 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.)

<u>Serological Testing of the Semen-Stained Comforter</u>

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.)

<u>Operative Capital Trial and Penalty Phase</u>

A grand jury indicted Barwick for first-degree murder, burglary while armed/with battery, attempted sexual battery, and armed robbery. (DA11:241-42.) The jury convicted Barwick as charged in sixty-five 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

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

her, when she seen his identity, he didn't want to go back to where he came from, from prison." (DA22:630, 634.)

Barwick's mitigation presentation focused on the abusive situation Barwick grew up in and a diagnosis of intermittent explosive disorder. (DA22:636-61; DA23:724-36; DA24:815-28, 856-61; DA25:872-88.) Barwick employed a strategy where he placed a significant amount of negative expert testimony before the jury to build credibility with them while also blaming the State for releasing Barwick from prison instead of having him committed for his sexual issues. (DA22:672, 674; DA25:939-45, 949, 952-54.)

The jury unanimously recommended death after deliberating for fifteen 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 jury's verdict convicting Barwick of attempted sexual battery); (3) avoiding 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 wound, defensive wounds, and evidence Rebecca fought for her life); (6) cold, calculated, and premeditated (CCP). (DA16:1281-86, 1306-07.) The court found the mitigation did not outweigh the aggravation. (DA16:1287-92.)

Direct Appeal

Barwick raised fourteen issues on appeal, including a claim that the trial court should not have found CCP and that his death sentence was not proportional. *Barwick v. State*, 660 So. 2d 685, 690 & n.8, n.9 (Fla. 1995). Barwick argued that his capital sentence was disproportionate to the murder because he "did not plan the murder. Barwick, suffering from mental and emotional impairment, lost control in a panic reaction to the stress of the circumstances." *Barwick v. State*, SC60-80446, Brief of Appellant filed July 7, 1994, at 69. Barwick further argued that his personality disorder with schizoid characteristics, mental disorders, and the physical and emotional abuse he suffered at his father's hands, rendered his capital sentence disproportionate. (*Id.* at 70.)

The Florida Supreme Court struck the CCP aggravator, but determined Barwick's death sentence was indeed proportionate considering the valid aggravators and mitigation presented. *Barwick*, 660 So. at 696-97. The court therefore affirmed his convictions and sentence. *Id.*

Barwick did not seek certiorari on the Florida Supreme Court's proportionality holding. *See Barwick v. Florida*, No. 95- 6964, petition filed December 4, 1995 at i. This Court denied certiorari on January 22, 1996. *Barwick v. Florida*, 516 U.S. 1097 (1996).

Pre-Warrant Postconviction Proceedings

Barwick has been continuously represented by able postconviction counsel from 1997 through the current warrant proceedings. (R:877-88.) He filed his operative

initial 3.851 motion on April 8, 2005, raising two relevant claims: (1) an exemption-from-execution claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (R:728-31); and (2) an exemption-from-execution claim that *Roper v. Simmons*, 543 U.S. 551 (2005) should be extended to him since he was a "brain damaged youthful offender." (R:816-825).

Barwick's exemption-from-execution claim under *Atkins* asserted his IQ was under 75, he functioned at a subaverage intelligence level, he had poor grades in school, he significantly underachieved in his classes, he was an extremely slow learner, he had poor communication schools, he had poor personal and self-care skills, he had a significant lack of maturity, and these deficits were all present while Barwick was a juvenile. (R:728-30.) Barwick argued the State could not legally execute him under *Atkins*. (R:731.)

The postconviction court summarily denied Barwick's *Atkins*' exemption-from-execution claim as procedurally barred and meritless because the record showed Barwick's IQ was average. (R:831-32.) Barwick raised a variant of this claim in his state habeas petition instead of on appeal. *Barwick v. State*, 88 So. 3d 85, 93 n.11 & n.12, 105 (Fla. 2011) (noting Barwick claimed that as "as a brain-damaged, mentally retarded person with a mental and emotional age less than eighteen years, Barwick's execution would be unconstitutional"). The Florida Supreme Court rejected the intellectual disability portion of this claim without comment. *See id.* at 105-11.

Barwick's extension-of-*Roper* claim asserted his capital sentence violated the evolving standards of decency and *Roper* because of his low mental age, brain

damage, neurological handicaps, and youth. (R:816-25.) Barwick explicitly argued that the rationale of *Roper* applied equally to him in light of his deficits, and that his capital sentence was not proportional. (R:816-25.)

The postconviction court declined to extend *Roper* to Barwick and summarily denied this claim. (R:833.) Barwick raised this claim in his habeas petition instead of on appeal. *Barwick*, 88 So. 3d at 93 n.11 & n.12, 105. The Florida Supreme Court held the extension-of-*Roper* claim was procedurally barred because Barwick improperly raised it in a habeas petition. *Barwick*, 88 So. 3d at 106. Alternatively, the court refused to extend *Roper*'s prohibition to Barwick, who was nineteen-and-a-half years old when he murdered Rebecca. *Id.* Barwick did not seek certiorari from this Court.

Barwick next filed a petition for 28 U.S.C. § 2254 relief in 2007 and specifically raised his extension-of-*Roper* claim. *See Barwick v. Tucker*, 5:12-cv-00159, Doc. 1 (N.D. FL). The district court denied relief and specifically rejected the extension-of-*Roper* claim. *Barwick v. Crews*, No. 5:12-cv-00159-RH, 2014 WL 1057088, at *14 (N.D. Fla. Mar. 19, 2014). The Eleventh Circuit also rejected Barwick's extension-of-*Roper* claim. *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1257-59 (11th Cir. 2015). Barwick sought certiorari from this Court, but not on his extension-of-*Roper* claim. *See Barwick v. Florida*, No. 15-8213, petition filed January 12, 2016 at i. This Court denied certiorari. *Barwick v. Jones*, 578 U.S. 947 (2016).

Barwick filed his operative first successive postconviction motion on May 2, 2017, arguing violations of *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*,

202 So. 3d 40 (Fla. 2016). (SC17-2057ROA:152-177.) The postconviction court summarily denied the motion on non-retroactivity and harmless-error grounds. (SC17-2057ROA:201-04.) The Florida Supreme Court affirmed. *Barwick v. State*, 237 So. 3d 927, 928 (Fla. 2018). This Court denied certiorari. *Barwick v. Florida*, 139 S. Ct. 258 (2018).

Barwick's Average IQ

Every expert to testify about Barwick's IQ swore that he has an average overall IQ score between 96-103. (DA23:678, 711, 756; DA24:850-51; PCR22:2991-92.) Dr. Annis examined Barwick in September 1986 and found his "[i]ntellectual functioning was in the average, normal range." (DA23:674, 678-79, 711.) Dr. McLaren examined Barwick in September 1986 and determined he had an overall IQ of 103, which was average. (DA23:741-42, 744, 747-48, 756.) Mr. Beller (master's degree) examined Barwick in September 1986 and found he had an average "overall I.Q." (DA24:774-75, 777, 781.) Dr. Hord examined Barwick in August 1986 and found he had a "verbal I.Q. of 90," which was not "borderline or retarded." (DA24:846, 850-51.) Finally, Dr. Eisenstein—Barwick's postconviction, neuropsychologist expert—examined Barwick in 2000 and 2002 and found he was not intellectually disabled and had a full-scale IQ score of 96. (PCR22:2975, 2988-89, 2991.)

Drs. McLaren and Eisenstein noted Barwick's verbal IQ is consistently lower than his performance IQ. (DA23:747; PCR22:2991-94.) Barwick scored 79 on the verbal portion of an IQ test when he was thirteen years old. (PCR22:2991.) There is no way to tell what his full-scale score was at thirteen because the tester "only gave

the verbal subtest." (PCR22:2992.) Dr. Eisenstein noted that Barwick's IQ at age four was tested at a 16 because of his speech difficulty, and the examiners "couldn't evaluate him," but Barwick "did much better approximately six months later." (PCR22:3036.)

Barwick's Impairments, Mental Age, and Disorders

Mr. Beller testified at Barwick's 1992 penalty phase that Barwick had brain damage on both the left and right side of his brain along with severe memory issues. (DA24:774, 780-82.) Dr. Eisenstein testified for Barwick at the 2006 postconviction evidentiary hearing and found: (1) the difference between Barwick's verbal and performance IQ scores was clinically significant and raised concerns about neurological impairment and organic brain abnormalities (PCR22:2992-94); (2) Barwick spelled at a fourth grade level, had the arithmetic skills of a seventh grader, was unable to read until the tenth grade, had learning disabilities, and had poor academic performance (PCR22:2994-95, 3048-49); (3) Barwick had a "left brain impairment" and a pattern of neurological deficits (PCR22:2999-3001, 3015, 3039-44); (4) Barwick demonstrated inflexible "thinking processes" consistent with frontal-lobe brain damage (PCR22:3006-07, 3056-59); (5) Barwick had no memory of the first twelve years of his life (PCR22:3022-23); (6) Barwick had a mental age of between 11 and 14 (PCR22:3063-64); and (7) Barwick's intellectual deficiencies and brain damage made him react to the abuse in his home differently than his siblings. (PCR22:3068.)

Warrant Postconviction Court Litigation

Barwick filed his post-warrant, postconviction motion on April 8, 2023 and

raised three numbered claims: (1) the truncated warrant schedule violated his right to due process and effective assistance of postconviction counsel; (2) *Roper*'s prohibition should be extended to those under twenty-one (including him); and (3) the principles in the United States Supreme Court's exemption-from-execution cases apply to him. (R:438-62.) He also attached an appendix with two declarations from doctors largely repeating Dr. Eisenstein's findings from nearly two decades before and suggesting additional testing that has been accepted for the past "two or three years." (See R:391-400.) The postconviction court summarily rejected all of Barwick's claims. (R:619-33.)

Warrant Florida Supreme Court Litigation

Barwick appealed the postconviction court's summary denial of his due process, ineffective assistance of postconviction counsel, extension-of-*Roper* to under twenty-one, and exemption-from-execution claims due to his mental age, disorders, and impairments. The State urged affirmance.

The Florida Supreme Court rejected all Barwick's claims. It found Barwick's extension-of-*Roper* claim procedurally barred under a state-law relitigation bar, untimely under state law, and substantively meritless because the court could not overrule this Court's decision in *Roper* setting the age of death-penalty eligibility at eighteen. *Barwick v. State*, No. SC2023-0531, 2023 WL 3151079 at *5-8 (Fla. Apr. 28, 2023). Likewise, it found his exemption-from-execution claim was procedurally barred under a state-law relitigation bar, untimely under state law, and substantively meritless under federal law. *Id.* The Florida Supreme Court also

reiterated its longstanding position that even exemption-from-execution claims may be procedurally barred. The court issued its mandate with its opinion and stated it would not entertain a motion for rehearing. *Id.*

Barwick timely filed his certiorari petition in this Court less than two days before his execution is scheduled to take place. This is the State's Brief in Opposition.

REASONS FOR DENYING THE WRIT

Barwick seeks certiorari in a penultimate attempt to deprive his victims of justice on the eve of his execution for heinous crimes committed nearly forty years ago. Barwick has been continuously represented by able, state-provided postconviction counsel since 1997. He has no valid excuse for waiting until a warrant to litigate, or relitigate, these issues. Every question Barwick now presents should have been (or was) asked and answered long ago. Barwick's long-belated certiorari questions are entitled to no answer from this Court on that basis alone. *Cf. Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019) ("Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay."). This Court should deny certiorari and bring true finality to the victims, the State of Florida, and Darryl Barwick.

Barwick raises two long-deferred questions for this Court to consider two days before his execution: (1) whether the Eighth Amendment precludes a state from having a conformity clause that requires it to adhere to this Court's Eighth Amendment precedent regarding exemptions from execution and not expand those protections further; (2) whether this Court should overrule *Roper* and hold first-

degree murderers who killed while under twenty-one are exempt from execution.

The State will deal with each of Barwick's dilatory questions presented in turn. But none warrant this Court's review. The bottom line is this case would be uncertworthy under normal circumstances, much less on the eve of an execution. The decision below properly stated and applied all governing federal principles, is based primarily on state law grounds, does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States Court of Appeals, and does not conflict with any decision of this Court. Review should be denied on that basis alone. *See* Sup. Ct. R. 10, 14(g)(i). This Court has refused to grant certiorari for Barwick three times before today. The fourth time is not the charm.

I.
Does a state constitutional conformity clause requiring adherence to this Court's Eighth Amendment precedent exempting certain classes of individuals from execution while permitting the execution of all others violate the Eighth Amendment?

Barwick's first question presented asks this Court to decide that a state conformity clause that requires state courts to adhere to this Court's Eighth Amendment caselaw exempting certain categories of individuals from execution while permitting the execution of all others violates the Eighth Amendment.

This question presents no unsettled, divisive issue of federal law worthy of this Court's review. It does not appear any court has ever held the Eighth Amendment precludes conformity clauses and requires state courts to expand the exemptions

recognized by this Court. This Court also lacks jurisdiction over this question presented because the Florida Supreme Court decided Barwick's exemption-claims on state-law grounds as discussed in the jurisdiction section.

Jurisdiction aside, this Court should decline to exercise jurisdiction over Barwick's question presented for the following five additional reasons.

A. Barwick Delayed Presenting this Question.

This Court should not reward Barwick for belatedly asking questions about Florida's refusal to extend this Court's exemption-from-execution cases when he declined to do so years ago. The Florida Supreme Court issued a substantively similar holding in 2011 when it rejected his *Roper* claim. *Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011) (The "Court has expressly rejected the argument that *Roper* extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment."). If Barwick wanted to challenge the Florida Supreme Court's explicit adherence to the line this Court drew in *Roper*, the time was in a circa 2011 certiorari petition. But Barwick never sought certiorari from this Court to decide whether the Florida Supreme Court's adherence to this Court's *Roper* line violated the Eighth Amendment even though the issue was squarely presented over a decade ago. Instead, he waited until the eve of his execution as a delay tactic. That tactic should not be rewarded, and this Court should deny certiorari on that basis alone.

B. The Issue should not Be Addressed by this Court without the Benefit of Conflicting Opinions and Deep Analysis.

This Court should not decide whether the Eighth Amendment requires state courts bound by a conformity clause to extend exemption-from-execution categories beyond this Court's holdings because it does not have the benefit of a deep conflict in the lower courts. It is this Court's general practice to wait until an issue has sufficiently developed with conflicting opinions before granting certiorari. *See California v. Carney*, 471 U.S. 386, 400 & n.11 (1985) (Stevens, J., dissenting with JJs. Brennan and Marshall). That way, this Court has the benefit of deep analysis on both sides of the issue and can bring its best, most-informed judgment to bear on the constitutional question. *See id.* at 400 ("To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.").

Barwick's first question presented has not developed to the point it warrants this Court's attention. He has not identified any conflict or opinion supporting his position, and the Florida Supreme Court did not engage in any analysis of this argument below. It is better to wait until this Court has the benefit of a conflict, or at least an opinion supporting one side, before it considers this question. Particularly in view of state-and-federal comity, the question of whether a state constitution violates the supremacy clause should not be taken lightly with this Court as the first to address the substantive issue.

In short, the issue of whether the Eighth Amendment requires states bound by

a conformity clause to extend exemption-from-execution claims beyond this Court's holding should develop in the lower courts before it is addressed by this Court. This Court should not depart from its normal practice and review this issue now without the benefit of any conflict or lower-court analysis, particularly on the eve of a warrant.

C. This Case is a Poor Vehicle to Decide the Question Presented.

This case is a poor vehicle to decide whether a state conformity clause bars a state from adhering solely to the exemption-from-execution categories adopted by this Court. It comes to this Court in warrant posture for one. But more broadly, this case is a poor vehicle to decide the question presented because the Florida Supreme Court rejected Barwick's claims on both procedural, time, and merits-based grounds. To the extent the question Barwick presents is even certworthy, a case where the state court decided the Eighth Amendment claim based solely on a conformity clause would be a far better vehicle than this one. *E.g.*, *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (rejecting an extension-of-*Roper* claim exclusively on the merits without mentioning any procedural bars); *England v. State*, 940 So. 2d 389, 407 (Fla. 2006) (same).

That is particularly true since the posture of this case means Barwick's first question presented cannot stand alone. Granting certiorari on this question presented would not offer Barwick any relief because of the Florida Supreme Court's alternative holdings rejecting his exemption claims for procedural reasons.

Finally, it is noteworthy that the Florida Supreme Court rejected Barwick's extension-of-*Atkins* for *two* merits-based reasons. First, the court rejected the claim as without merit under its longstanding precedent and without citing the conformity

clause. *Barwick v. State*, No. SC2023-0531, 2023 WL 3151079, at *7 (Fla. Apr. 28, 2023).[6] Second, the court held the claim was "also meritless"—alternative holding language—under the conformity clause. Since the Florida Supreme Court addressed Barwick's extension-of-*Atkins* claim two ways, with and without conformity, and reached the same result, this case is a poor vehicle to address the interplay between the supremacy clause, Eighth Amendment, and a state conformity clause.

This Court should deny certiorari on this question presented.

D. Barwick has Failed to Address the Retroactivity of any Decision Invalidating Florida's Conformity Clause.

This question is also uncertworthy because Barwick has failed to address retroactivity and this Court's retroactivity precedents clearly show the answer to the question Barwick presents would not apply to him. Any decision from this Court invalidating Florida's conformity clause would not be retroactive.

Whether a ruling from this Court answering the question presented applies to Barwick's case requires this Court to determine retroactivity by analyzing three questions: (1) when did Barwick's conviction become final? (2) is the rule this Court announces actually new when viewed from the legal landscape existing when the conviction became final? and (3) does the new rule fall within a nonretroactivity

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[6] The Florida Supreme Court's decision sans conformity clause was hardly surprising considering the difficulty in assessing the actual effect of mental age, brain damage, etcetera. The varying, and often conflicting, conclusions reached by the experts evaluating Barwick over the years demonstrate the inherent difficulty in diagnosing disorders that are not inherently linked to cold, hard, numbers like IQ scores.

exception? *See Beard v. Banks*, 542 U.S. 406, 411 (2004).

Barwick has failed to discuss any of these questions, and that is reason enough to deny certiorari. *See McDonough v. Smith*, 139 S. Ct. 2149, 2161-62 (2019) (Thomas, J., dissenting) (arguing that the Court should have dismissed the writ of certiorari as improvidently granted because it assumed away key antecedent questions); *see also Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must" determine retroactivity "before considering the merits of the claim."); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (refusing to reach the merits when the petitioner asked for a new rule to be applied to his case on habeas review because any decision would not have been retroactive).

But more importantly, this Court's retroactivity precedents clearly demonstrate Barwick would receive no relief on his claim that the Eighth Amendment prohibits states from adopting conformity clauses that require strict adherence to this Court's exemption-from-execution categories. Barwick's conviction became final in 1996 and it was certainly not clear a state could not adopt a conformity clause requiring strict adherence to this Court's exemption categories. The rule that Barwick seeks is indeed new to his long-finalized judgment.

The final retroactivity question also indicates that any future holding the Eighth Amendment does not permit a state under a conformity clause to adhere solely to this Court's exemption-from-execution classes would not apply to Barwick. The

only nonretroactivity exception[7] applicable to Barwick's question applies if this Court's new answer forbids punishment of certain conduct or prohibits a category of punishment on a class of defendants. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555–62 & n.3 (2021) (eliminating the watershed procedural rule exception to retroactivity and recognizing substantive rules are automatically retroactive). Holding that the Eighth Amendment does not permit a state constitutional conformity clause to require state courts to adhere solely to the exemption-from-execution categories delineated by this Court does neither. *Cf. Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). (To "hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of" this Court's retroactivity precedents).

Retroactivity bars are designed to protect the State's interest in finality. *See Beard*, 542 U.S. at 413. Such bars are designed to ensure the State is not continually forced to marshal its resources to defend judgments that were constitutionally acceptable under the standards existing at the time. *Id.* These interests are particularly acute in a case like this one, where the State has been marshaling resources for decades. *Id.* And most importantly, any delay interposed by granting certiorari to answer this question would delay justice for the victims and the State of Florida. In short, respect for the State's resources, the victims, and decades of finality

[7] This Court has recognized that this is not really an exception, but a substantive rule that does not need to go through a retroactivity analysis. *Beard*, 542 U.S. at 411 n.3.

also counsel against taking this case in light of the dispositive retroactivity question here. This Court should deny certiorari.

E. State Courts Are Not Required to Expand this Court's Exemption-from-Execution Categories Under the Eighth Amendment.

Barwick's claim also fails on the merits. Nothing in the Eighth Amendment forces state courts to violate a conformity clause and expand this Court's Eighth Amendment jurisprudence into areas where this Court has not. Indeed, this Court is often prompted to remind lower courts that they are bound to adhere to its jurisprudence. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."); *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *United States v. Hatter*, 532 U.S. 557, 567 (2001) ("The Court of Appeals was correct in applying *Evans* to the instant case, given that 'it is this Court's prerogative alone to overrule one of its precedents.' . . . Nonetheless, the court below, in effect, has invited us to reconsider *Evans*. We now overrule *Evans*."); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("Needless to say, only this Court may overrule one of its precedents. Until that occurs, *Rice* is the law."); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this

Court must be followed by the lower federal courts.").

In this case, application of Florida's conformity clause caused the Florida Supreme Court to reach two alternative, merits-based holdings: (1) it lacked authority to extend *Roper* to Barwick since he was over eighteen when he killed Rebecca Wendt; and (2) it lacked authority to extend *Atkins* to Barwick because he was not intellectually disabled. *Barwick v. State*, No. SC2023-0531, 2023 WL 3151079, at *7 (Fla. Apr. 28, 2023). But since the Florida Supreme Court also evaluated and rejected Barwick's extension-of-*Atkins* claim without the conformity clause overlay, the only relevant conformity-clause holding in this case is the *Roper*-extension holding which was solely based on the conformity clause. *Id.* at *6-7.

It is absurd to suggest that *any* lower court bound to this Court's interpretation of the Eighth Amendment could overrule *Roper* and extend the age of death-eligibility. That is this Court's sole prerogative, particularly since Barwick relies on "new" evidence that only repeats facts this Court accounted for when it set eighteen as the age of death-eligibility in *Roper*. The Florida Supreme Court's refusal to extend *Roper*'s bright-line, death-eligibility rule is exactly the holding every court bound to this Court's interpretation of the Eighth Amendment should reach. *Kearse v. Sec'y, Fla. Dep't of Corr.*, No. 15-15228, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022) (Luck, J.) ("Moving the *Roper* line to eighteen years and a few months does not extend the categorical rule; it violates it."). It simply cannot violate the Eighth Amendment to refuse to expand this Court's Eighth Amendment exemption-from-execution categories in violation of the rules this Court issued in those cases. This question is

entirely uncertworthy.

II.
Should this Court recede from *Roper* and Hold the Eighth Amendment Exempts First-Degree Murderers who Killed While Under Twenty-One from Execution?

Barwick's second question presented asks this Court to recede from *Roper* and hold that all first-degree murderers who killed while under twenty-one are exempt from execution under the evolving standards of decency. Initially, this Court lacks jurisdiction over this question presented because the Florida Supreme Court explicitly rejected it on state-law procedural grounds.

Moving past that dispositive jurisdictional hurdle, this question presented is not certworthy for two additional reasons. First, Barwick could have raised this question long before now. Second, the evolving standards of decency do not support exempting first-degree murderers under twenty-one from execution.

A. Barwick Delayed Presenting this Question.

This Court should not reward Barwick for belatedly asking to overturn *Roper* and exempt all first-degree murderers under twenty-one from execution when he declined to ask this Court that question before now. The Florida Supreme Court rejected an extremely similar claim on the merits in 2011 but Barwick never sought certiorari from that decision. *See Barwick*, 88 So. 3d at 106 (rejecting Barwick's claim that "*Roper* extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment."). Barwick's decision to await a warrant before raising this

exact iteration of his claim before this Court is particularly inexcusable since it has been long known that the brains of juveniles do not suddenly alter when they turn eighteen. *E.g.*, *Roper*, 543 U.S. at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18."); *Branch v. State*, 236 So. 3d 981, 985 (Fla. 2018) (rejecting an argument based on scientific research, state, and international law that "individuals who committed murder in their late teens and early twenties be treated like juveniles."); *Morton v. State*, 995 So. 2d 233, 245-46 (Fla. 2008) (relying on brain mapping studies to urge the extension of *Roper*). Barwick's failure to seek certiorari on this question presented long before now is an independent reason not to grant certiorari. *Cf. Bucklew*, 139 S. Ct. at 1134.

B. Barwick's Substantive Exemption Claim is Meritless.

Finally, this Court should not grant certiorari on this claim because it is substantively meritless. Barwick effectively argues that the brains of juveniles are not all that different from adults under twenty-one and therefore *Roper*'s exemption should apply at least to those under twenty-one.

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

Other indicia of societal values—some of which this Court relied on in *Roper*—

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

The views of the scientific and medical community are not the correct place to look for expanding exemption-from-execution claims to whole new categories of individuals. *See Miller v. Alabama*, 567 U.S. 460, 510-11 (2012) (Alito, J., dissenting) (noting the philosophical basis for the evolving-standards-of-decency test was "problematic from the start" but, at least, it is an objective test when based on the views of state legislatures and Congress); *Roper v. Simmons*, 543 U.S. at 616 (Scalia, J., dissenting with Rehnquist, C.J., and Thomas, J.) ("If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-

changing reflection of "the evolving standards of decency" of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people."). *See also Moore v. Texas*, 581 U.S. 1 (2017) (explaining that Eighth Amendment jurisprudence, while informed by the medical community's standards, does not adhere "to everything stated in the latest medical guide"); *Hall v. Florida*, 572 U.S. 701, 721 (2014) (stating that while the Court does not disregard the views of medical experts, experts "do not dictate" the Court's decision); *United States v. Johnson*, No. CR 17-201, 2020 WL 8881711, at *4 (E.D. La. July 13, 2020) (recognizing what is scientifically defensible and constitutionally permissible are not the same because scientific consensus and national consensus are two different things). That is doubly true where, as here, this Court already accounted for the information Barwick now presents that seventeen-year-olds do not immediately morph into responsible adults when they turn eighteen.

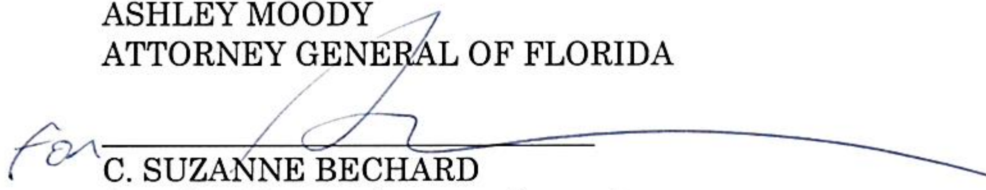
In short, not much has changed since *Roper*. Barwick's attempt to delay his execution by attacking settled precedent on the age of death-eligibility is uncertworthy.

CONCLUSION

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

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



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