No. 22A952

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

DARRYL BRYAN BARWICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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REPLY TO RESPONSE TO APPLICATION FOR STAY OF EXECUTION

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

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Respondent's position that this Court should deny Mr. Barwick a stay of execution is premised upon mischaracterizations of Mr. Barwick's presented claims, a distortion of facts, and a faulty representation of the applicable law. Mr. Barwick submits that he has demonstrated that a stay of execution is appropriate.

I. The first stay factor: reasonable probability of certiorari grant

Respondent asserts that Mr. Barwick cannot satisfy the first stay factor because both of the claims in his petition for writ of certiorari are procedurally barred and meritless. For similar reasons, Respondent urges this Court to deny a stay on jurisdictional grounds. *See* Response at 5, 10. On the contrary, there are neither procedural nor jurisdictional bars precluding the Court's review of this claim. Furthermore, the imposition of these bars, if left uncorrected, would be to entirely preclude litigants from raising science-based claims under the Eighth Amendment's evolving-decency standard.

The conformity clause claim

Respondent's contention that "Barwick has not presented a coherent claim, much less has he presented one worthy of certiorari[,]" Response at 6, is a misrepresentation. Respondent has vastly distorted Mr. Barwick's conformity clause issue. *See* Response at 6 (claiming Mr. Barwick has alleged "that the conformity clause violates the United States Constitution on account of its perfect alignment herewith."); *id*. at 6-7 (characterizing the claim as that "the conformity clause too closely—indeed perfectly—matches its federal analogue"); *id.* at 7 (alleging that Mr. Barwick's position is that a state is "required" to "exceed the protections afforded by the United States Constitution"); *id*. ("In Barwick's view, a state can adhere to the Constitution only by expanding upon the protections provided therein."); *id*. ("under Barwick's reasoning, Florida's conformity clause so precisely matches the Constitution that it is therefore unconstitutional.").

However, Respondent's attempt to manufacture a straw man and obfuscate this Court's review is belied by the record. Mr. Barwick has repeatedly made clear that his constitutional claim is not that Florida *must* extend protections that this Court has not, but whether Florida can blanketly opt out of any and all consideration of evolving standards of decency in violation of this Court's longstanding Eighth Amendment jurisprudence. *See* Petition at 14 ("Florida does not merely treat this Court's holdings as both the 'floor' and 'ceiling' of protections…it also falls below the 'floor' established by this Court's jurisprudence by failing to adhere to this Court's minimum prescribed standards for evaluating the applicability of Eighth Amendment protections"); *id*. at 22 ("although the federal constitution does not *require* a state court to offer more protection in a particular case than this Court's jurisprudence has established, a state cannot *prohibit* itself wholesale from independently considering evolving standards of decency.") (emphases in original); *see also id*. at 24-25 ("Florida is not simply declining to extend particular protections" but rather "wholly ignor[ing] legitimate Eighth Amendment claims.").

There is a reasonable probability that four Justices, when evaluating Mr. Barwick's claim as he properly presented it, will find the issue sufficiently meritorious to grant certiorari review.

The *Roper* claim

Initially, Respondent says that Mr. Barwick's claim is untimely because he "could have raised this question long before now." On the contrary, the factual basis for the claim did not exist until August 2022, when the APA overwhelmingly adopted

a resolution calling for an end to the late-adolescent death penalty. As Mr. Barwick explained in his petition for certiorari, the passage of the APA resolution was a key turning point in establishing that what had previously been an ongoing debate within the relevant scientific communities had cemented into a near-universal consensus. *See* Petition at 29-31. While individual pieces of information relied upon by the APA were already known to the scientific community in isolation, the *collective* body of evidence they generated, along with the consensus embodied by the resolution itself, were not.

The claim Mr. Barwick presents is based on a fundamental shift in understanding of the timeline on which the adolescent brain develops and the constitutional implications of that timeline. Necessarily, it could not have been raised before that shift occurred. As such, the claim is not untimely, as Mr. Barwick raised it within the one-year time limitation contemplated by Florida's rules. *See* Fla. R. Crim. P. 3.851(d)(1); Fla. R. Crim. P. 3.851(d)(2)(A). The Florida Supreme Court's erroneous ruling should not hinder this Court from granting certiorari review.

Similarly, Respondent's mischaracterization of the claim as "substantively meritless" because "[t]hings have not sufficiently changed since *Roper,*" Response at 11, ignores the evidence showing that, in the eighteen years since *Roper* was decided in 2005, society has evolved to the point that standards of decency now require shifting the line of death eligibility from 18 to 21. For example, in the past several years, states have begun passing legislation restricting those under 21 from engaging in activities that frequently lead to "highly stressful and extremely arousing

circumstances," including "operating a fireworks display" or "obtain[ing] a license to carry a concealed handgun." PCR3. 428; *see also, e.g.*, *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1320 (11th Cir. 2023) (upholding state law restricting individuals under 21 from purchasing firearms). This is consistent with the neurobiological and psychological research showing that "during emotionally arousing situations, [the] late adolescent class responds more like younger adolescents than like adults," but "show cognitive capacity similar to adults when not under pressure or heightened emotional arousal." PCR3. 427. Society's laws now codify the same nuanced understanding of adolescent brain development reflected in the APA resolution. These considerations make it reasonably likely that at least four Justices will find this issue worthy of certiorari to ensure that these standards are followed uniformly nationwide.

II. The second stay factor: significant possibility of reversal

As for the second stay factor, Respondent relies on many of the same arguments already discussed above, which are unavailing here for the same reasons.

The conformity clause claim

Respondent claims Mr. Barwick could have raised a conformity challenge prior to "the eve of his execution[.]". But it was not until the eve of his execution that any court applied the conformity clause to his case. In other words, his cause of action did not ripen until three days before he filed his petition for certiorari. At Respondent's behest, and over Mr. Barwick's strong objection in briefing, the Florida Supreme Court applied the conformity clause to foreclose relief to Mr. Barwick without any

consideration of his arguments regarding evolving standards of decency. Petition App. A at 18-19, 23-24. The Florida Supreme Court's opinion was released on the afternoon of April 28, 2023. Three days later, Mr. Barwick filed the underlying petition for writ of certiorari. The idea that he was dilatory in raising a federal question that did not ripen in his case until five days before his scheduled execution defies belief.

Further, Respondent's allegations regarding the merits of Mr. Barwick's conformity clause claim misrepresent his argument. Mr. Barwick is not arguing that "the conformity clause [is] unconstitutional for requiring exactly what is unconstitutional." Response at 8. He is arguing that Florida's unconstitutional use of its Eighth Amendment conformity clause to wholly opt out of any consideration or analysis regarding evolving standards of decency violates this Court's Eighth Amendment jurisprudence. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Hall v. Florida*, 572 U.S. 701, 708 (2014).

The *Roper* claim

Mr. Barwick's claim is not subject to a time-bar because the scientific consensus on which he relies did not exist prior to August 2022. *Contra* Response at 13. Nor is the claim meritless, because society's standards of decency have evolved to recognize that late adolescents under age 21 have largely the same maturational imbalance as juveniles, which is exacerbated in "highly stressful and extremely arousing circumstances." PCR3. 428. These vulnerabilities merit the same constitutional safeguards provided by *Roper*.

Respondent also argues that Mr. Barwick's claim is procedurally barred because he previously raised "a variation of" the claim. Response at 12. Yet, while Mr. Barwick has previously raised claims that cited *Roper*, they were qualitatively distinct from his current claim, which is based on the APA's August 2022 resolution that called for an end to the adolescent death penalty. His argument is that there is now an established scientific consensus that, as a categorical matter, society's standards of decency have evolved to recognize that late adolescents under age 21 warrant the same constitutional protections as juveniles in the context of criminal sentencing. This conclusion hinges on what neurobiologists and psychologists now widely recognize: that "there is no neuroscientific bright line regarding brain development that indicates the brains of 18-to-20-year-olds differ in any substantive way from those of 17-year olds." (PCR3. 427).

By contrast, the claim Mr. Barwick raised in 2005 argued that as a "brain damaged youthful offender" with "neuropsychological handicaps," his "mental and emotional age" were under eighteen and therefore, he lacked the "highly culpable mental state" required to impose a death sentence. *See Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011); *see also Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1257-58 (11th Cir. 2015). It was, in essence, an as-applied argument that the proportionality principle underpinning *Roper*—and the Eighth Amendment generally—should be extended to someone with Mr. Barwick's neurocognitive and neurodevelopmental issues, particularly in light of his young age at the time of the offense. The claim did

not rely on newly emerging scientific research, much less a definitive consensus—nor could it, because no such consensus yet existed.

The 2005 claim and the 2023 claim rely on entirely separate factual bases and, although both cite *Roper*, it is used to support very different legal arguments. The Florida Supreme Court's erroneous determination that these claims are functionally identical could, if left unchallenged, potentially render *any* claim that uses previously cited cases to make new arguments procedurally barred. Under these circumstances, there is a significant possibility that this Court would reverse in order to provide late adolescents with the constitutional safeguards to which they are entitled.

III. The third stay factor: irreparable injury

Respondent concedes that the third factor is satisfied because irreparable injury "is usually inherent in a death sentence." Response at 14. Indeed, Respondent even goes so far as to admit that "the irreparability of death is a truth too obvious to mention." *Id.* at 9. Mr. Barwick has clearly satisfied this factor.

Mr. Barwick has thus demonstrated that his categorical-exemption claim under *Roper* satisfies this Court's three-factor test to grant a stay of execution. *See Barefoot*, 463 U.S. at 895.

IV. Respondent inappropriately suggests that this Court impose additional stay requirements

Respondent seeks to create a heightened standard with two additional factors that Mr. Barwick supposedly fails to satisfy. *See* Response at 14-15. But this Court in *Bucklew* cited 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." Contrary to Respondent's argument, nowhere in *Bucklew* did this Court create an additional stay requirement.

Furthermore, the facts and procedural history in *Bucklew* are inapposite. *Bucklew* involved protracted post-warrant proceedings, including five years of litigation on the cause of action, and two eleventh hour stays of execution. *Bucklew*, 139 S.Ct. at 1134. Also, not mentioned by Respondent, this Court's concerns specifically 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.").

Moreover, even if this Court had a timing concern similar to the one it expressed in *Bucklew* related to method of execution challenges, Mr. Barwick's claims merit a stay of execution because Respondent has misconstrued when the underlying actions accrued for purposes of diligence.

Respondent's first complaint about the purported "fourth factor", that Mr. Barwick "pursued [his claims] in a dilatory fashion," Response at 9-10, 14-15, is inaccurate.

Regarding the conformity clause issue, Respondent bizarrely says that Mr. Barwick presented "no justification for his present-day litigation of a state constitutional provision that was adopted over two decades ago." Response at 9. But

the justification is clear from the history of this case. The conformity clause was not applied to Mr. Barwick's case until after the signing of his execution warrant. Indeed, it was *Respondent* who brought up the conformity clause in response to Mr. Barwick's state-court claim that current standards of decency merited his exemption from execution. *See* PCR3. 586, 601-02. Within three days of the Florida Supreme Court's reliance on this argument to deny Mr. Barwick relief, Mr. Barwick presented the conformity clause in his petition for writ of certiorari. The idea that he was dilatory in raising a federal question that did not ripen in his case until five days before his scheduled execution is blatantly untrue.

Regarding the *Roper* issue, Respondent miscasts the claim as one "based on a 2005 case" that "could have been raised well over a decade ago." Response at 14. Yet, as Mr. Barwick has explained, the factual basis for the claim only became available in August 2022, when the APA overwhelmingly voted to adopt its resolution calling for an end to the late-adolescent death penalty. Before the signing of his death warrant on April 3, 2023, Mr. Barwick expected to have until August 2023 to file a timely postconviction motion under Florida's procedural rules. *See* Fla. R. Crim. P. 3.851(d)(1); Fla. R. Crim. P. 3.851(d)(2)(A). The timing of Mr. Barwick's death warrant and subsequent litigation—which he could neither anticipate nor control—should not distract from the fact that he has been diligently pursuing his rights.

Finally, regarding the purported "fifth factor", Respondent accuses Mr. Barwick of raising his claims "solely for purposes of delay." *See* Response at 9, 15. This unjustly faults an indigent capital defendant for diligently pursuing his rights.

Mr. Barwick is attempting to litigate the Florida's unconstitutional foreclosure of an Eighth Amendment claim that, if successful, will categorically prohibit his execution. This Court should not be swayed by Respondent's efforts to obscure the meritorious nature of Mr. Barwick's claim.

Respectfully submitted,

/s/ Karin L. Moore
KARIN L. MOORE
Counsel of Record
DREW SENA
Office of the Capital Collateral
Regional Counsel—North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
karin.moore@ccrc-north.org
drew.sena@ccrc-north.org

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