

No. _____

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*

APPLICATION FOR STAY OF EXECUTION

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

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

The State of Florida has scheduled the execution of Petitioner Darryl Bryan Barwick for **May 3, 2023, at 6:00 p.m.** The Florida Supreme Court denied state court relief on Friday, April 28, 2023. Mr. Barwick respectfully requests a stay of his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending the

consideration and disposition of the petition for a writ of certiorari that he is filing simultaneously with this application.¹

STANDARDS FOR A STAY OF EXECUTION

The standards for granting a stay of execution are well-established. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). There must be: (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court’s decision; and (3) a likelihood that irreparable harm will result if that decision is not stayed.” *Id.* (internal quotations omitted).

PETITIONER SHOULD BE GRANTED A STAY OF EXECUTION

The underlying issue is sufficiently meritorious

The questions raised in Mr. Barwick’s petition are sufficiently meritorious for a grant of certiorari. Mr. Barwick has presented this Court with an issue of first impression related to Florida’s use of its Eighth Amendment conformity clause—the only one of its kind—which systemically undermines every Eighth Amendment adjudication currently being conducted in Florida.

While this particular issue is novel, the need for this Court’s intervention in Florida is not new. In less than 13 years, this Court has at least thrice had to overturn large-scale systemic flaws in Florida’s punishment system, either related to the Eighth Amendment or administration of the death penalty. Mr. Barwick’s petition

¹ Mr. Barwick requests expedited consideration of the petition. See Petition at 1.

has identified a similar systemic flaw in Florida's Eighth Amendment adjudications, and his case presents an excellent vessel for adjudication of this issue, as it revolves around a procedurally unencumbered claim that Mr. Barwick's categorically reduced moral culpability warrants relief from his death sentence under the Eighth Amendment. The Florida Supreme Court's adjudication of this underlying claim did not rest on an adequate or independent state law ground, but rather was solidly premised on its unique and constitutionally flawed use of the Eighth Amendment conformity clause.

As Mr. Barwick described in his petition for certiorari, the federal issues presented have broad implications, not only for death-sentenced individuals in Florida or prisoners seeking relief via claims of excessive punishment, but for this Court's own jurisprudential efficacy, national measurement of sociolegal progress, and bedrock principles of federalism that have been present since the Founding.

There is a reasonable probability that at least four members of this Court will find that this petition merits a grant of certiorari review. Mr. Barwick respectfully requests that this Court enter a stay so that this Court may thoroughly review the petition and questions presented therein, and can make a decision regarding certiorari that is free from the exigencies of an imminent death warrant.

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

Should this Court grant Mr. Barwick's request for a stay and grant certiorari review of the underlying petition, there is a significant possibility that this Court will reverse the Florida Supreme Court's decision below.

As Mr. Barwick noted above, he has presented this Court with an issue of first impression related to Florida's use of its Eighth Amendment conformity clause. Despite seemingly innocuous wording, the conformity clause's regressive function is evidenced through legislative and judicial history, and it paradoxically violates the Amendment it purports to conform with by wholly omitting a critical aspect of Eighth Amendment determinations: analysis of evolving standards of decency. And, because merits-based denial of Mr. Barwick's underlying claim—that his reduced moral culpability warrants Eighth Amendment protection from execution—was denied on the merits due solely to this flawed use of the conformity clause, there are no findings of fact related to that question that would require deference or otherwise inhibit this Court's reversal of the lower court.

In other words, although Mr. Barwick's case presents an excellent vehicle for this Court to take up the questions presented, reversal of the lower court would not require this Court to engage in any factfinding that is more properly the purview of the lower courts. Rather, should this Court grant certiorari review, the record extant supported by a full round of briefing and oral argument will demonstrate that the lower court must be reversed.

Irreparable harm will occur absent a stay

Absent a stay, Mr. Barwick will suffer irreparable harm: his execution. This stay requirement is satisfied because the factor of irreparable harm is self-evident. *See Wainwright v. Booker*, 473 U.S. 935, 937 n.1 (1985) (Powell, J., concurring) (finding irreparable harm requirement “necessarily present in capital cases”).

Additionally, the harm that will occur if this Court does not stay Mr. Barwick's execution and grant certiorari review is not limited to Mr. Barwick. And, while Mr. Barwick's petition raises a question related to his chronological age at the time of his crime, it is not only similarly situated individuals on death row who will suffer harm in the absence of this Court's intervention. Rather, as Mr. Barwick explained in his petition, the issues he has raised related to Florida's use of its Eighth Amendment conformity clause will impact any Florida case in which an Eighth Amendment claim is being raised. Further still, Florida's actions undermine bedrock principles of federalism that have been present since this Nation's Founding. The harm that will occur absent a stay is widespread and severe.

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

Respectfully submitted,

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