ACTIVE WARRANT CAPITAL CASE NO. 23-5667

In The

Supreme Court of the United States

MICHAEL DUANE ZACK, III,

Petitioner,

v.

RON DESANTIS, GOVERNOR OF FLORIDA, ET. AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT

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

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CAPITAL CASE
QUESTIONS PRESENTED

Michael Duane Zack, III, sexually assaulted and brutally murdered Laura Rosillo and Ravonne Smith during a nine-day crime spree in June 1996. In 2013-2014, under a prior Florida administration, Zack was appointed clemency counsel, participated in a clemency interview, and provided a written submission in support of clemency. On August 17, 2023, after reviewing clemency materials, Florida Governor Ron DeSantis determined clemency was "not appropriate for Zack" and signed his death warrant. Zack's execution is scheduled for October 3, 2023.

Zack filed a 42 U.S.C. § 1983 suit alleging Florida violated his minimal due process rights in clemency by failing to invite him to update his materials with more information about his Fetal Alcohol Syndrome and failing to give notice Governor DeSantis was considering clemency. Both the district court and Eleventh Circuit denied Zack a stay after finding his due process claims had no substantial likelihood of success. This Court should likewise deny Zack a stay pending certiorari review, and his petition for certiorari review, of the following questions presented:

I. Does clemency-related, minimal due process require a set of enforceable rules and standards constraining a Governor's discretion to grant clemency "at any time, for any reason"?

II. Does clemency-related, minimal due process require an explicit rule providing for clemency updates from a defendant when the rules explicitly provide clemency may be denied "at any time, for any reason," and explicitly provide the Governor has discretion to reinvestigate cases from prior administrations?

III. Did the Eleventh Circuit err by considering the State's assertion that clemency remains open to Petitioner under state constitutional law as a reason to decline the equitable relief of an execution stay?

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The Eleventh Circuit's decision petitioned for review appears as *Zack v. DeSantis*, et al., No. 23-13021-P (11th Cir. 2023), and is reproduced as Attachment A in Petitioner's Appendix accompanying his certiorari petition.

JURISDICTION

This Court has certiorari jurisdiction over the Eleventh Circuit's order denying Zack's motion to stay his execution. 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process clause of the Fifth Amendment to the United States Constitution: "No persons . . . shall . . . be deprived of life, liberty or property, without due process of law."

The Eighth Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, section one: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

BACKGROUND ON FLORIDA CLEMENCY

Clemency in Florida derives "solely from the Florida Constitution." *Davis v. State,* 142 So. 3d 867, 877 (Fla. 2014). Florida's Constitution provides that the Governor, "with the approval of two" Cabinet members,[1] may "commute punishment." Fla. Const. Art. IV, § 8(a). In this constitutional provision, the people of Florida vested "sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977); *Davis*, 142 So. 3d at 877. As a matter of pure state law under the Florida Constitution, nothing can constrain the Executive Branch's unbridled discretion to grant clemency "**at any time**, **for any reason**." *See* Fla. R. Exec. Clemency 4 (emphases added). But clemency cannot be granted without the Governor's assent. Fla. Const. Art. IV, § 8(a).

Florida's constitutional decision to vest clemency power exclusively in the Executive Branch means neither the state legislative nor judicial branches may intrude on that power apart from the judiciary's duty to enforce constitutional law. *Parole Comm'n v. Lockett*, 620 So. 2d 153, 154-58 (Fla. 1993); *Chavez v. State*, 132 So. 3d 826, 830-32 (Fla. 2014). Thus, while a legislatively imposed statute requires the Governor to make an initial clemency decision before signing a warrant, § 922.052(2)(b), Florida Statutes, it does not constrain the Clemency Board's

[1] The Cabinet is made up of Florida's Attorney General, Chief Financial Officer, and a Commissioner of Agriculture. Fla. Const. Art. IV, § 4(a). The Florida's Governor and cabinet are elected every four years. Fla. Const. Art. IV, § 5(a). Neither the Governor nor the Cabinet may seek re-election immediately following two terms in office. Fla. Const. Art. IV, § 5(b); Fla. Const. Art. VI, § 4(a).

discretion to reconsider that decision at any time and for any reason, including post-warrant. *See* Fla. R. Exec. Clemency 4; *Davis v. State*, 142 So. 3d 867, 877 (Fla. 2014). Florida's Governor also has the unilateral power to stay an execution. § 922.06(1), Fla. Stat.

Florida's Clemency Board, made up of the Governor and Cabinet, has adopted **non-binding** Rules of Executive Clemency.[2] *See Barwick v. Governor of Florida*, 66 F.4th 896, 898 (11th Cir. 2023) (citing *Parole Comm'n v. Lockett*, 620 So. 2d 153, 155 (Fla. 1993)); Fla. R. Exec. Clemency 1., 2.A. But "**nothing** contained within these rules **can or is intended to limit the authority or discretion given to the Clemency Board in the exercise of its constitutional prerogative**." Fla. R. Exec. Clemency 2.A. Only Rules 1, 2, 3, 4, 15, and 16 are generally applicable to clemency proceedings involving a death sentence. *See* Fla. R. Exec. Clemency 15.

In capital cases, the Florida Commission on Offender Review ("FCOR")[3] "may conduct a thorough and detailed investigation into all factors relevant to" clemency, including a defendant interview, and "provide a final report to the Clemency Board." Fla. R. Exec. Clemency 15.B. That investigation begins when the Governor instructs or when the Eleventh Circuit affirms the denial of the capital defendant's 28 U.S.C. § 2254 petition. Fla. R. Exec. Clemency 15.B., C. After the investigation, the

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[2] These rules are freely available on the internet: https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf.

[3] FCOR is separate from the Clemency Board. *Bowles v. DeSantis*, 934 F.3d 1230, 1236 (11th Cir. 2019).

Commissioners prepare a report on their findings and conclusions. Fla. R. Exec. Clemency 15.D. That report includes statements made by the defendant and his counsel, a detailed summary of the interview, and any information gathered during the investigation. Fla. R. Exec. Clemency 15.D. The report must be sent to the Clemency Board within 120 days after the investigation commences, unless the Governor extends the time. Fla. R. Exec. Clemency 15.D.

A hearing is set if any Clemency Board member requests one within 20 days of receiving the report. Fla. R. Exec. Clemency 15.E. But Rule 15.E. does not preclude a hearing from being scheduled if any Clemency Board member requests one more than 20 days after receiving the report. *See* Fla. R. Exec. Clemency 2.A., 15.E. And the Governor, without whom clemency cannot be granted, always has complete discretion to set a hearing at any time. Fla. R. Exec. Clemency 15.F. Moreover, cases "investigated under previous administrations may be reinvestigated at the Governor's discretion." Fla. R. Exec. Clemency 15.C.

Florida provides for clemency counsel in death cases at the discretion of the Clemency Board and compensates counsel at a maximum of $10,000. § 940.031, Fla. Stat. Clemency Counsel may be present at the clemency interview, receive a copy of any clemency-related statements or testimony by the defendant, provide a statement in support of clemency, will receive notice of any scheduled hearing, and may make an oral presentation if a hearing is scheduled. Fla. R. Exec. Clemency 15.B., D., E., G. If a hearing is scheduled, clemency counsel is generally allotted fifteen minutes to

make an oral presentation regarding clemency's appropriateness. Fla. R. Exec. Clemency 15.H.

All records and documents generated and gathered during the clemency process are confidential and may only be disclosed at the Governor's discretion. Fla. R. Exec. Clemency. 15.A., 16. Nothing in the Rules of Executive Clemency explicitly authorizes or prohibits clemency updates from a capital defendant. But clemency may be granted or denied "at any time, for any reason." *See* Fla. R. Exec. Clemency 4. Florida's Governor, with the approval of two other Clemency Board members, thus has full discretion to grant clemency based on materials generated after the initial investigation and even an initial clemency denial. *See* Fla. R. Exec. Clemency 4; Fla. R. Exec. Clemency 15.C.

Nothing in Florida law requires a second clemency proceeding based on either the passage of time between the initial clemency proceeding and a warrant or a change in administration. *E.g.*, *Pardo v. State*, 108 So. 3d 558, 568 (Fla. 2012) (rejecting an argument the "long time lapse between a defendant's clemency proceeding and the signing of his death warrant renders the clemency process inadequate or entitles the defendant to a second proceeding"); *Johnston v. State*, 27 So. 3d 11, 24-26 (Fla. 2010) (rejecting an argument that a 1987 clemency proceeding was inadequate because it was held long before the active-warrant, capital defendant's "mental health issues and life history were fully developed for consideration in the clemency process"); Fla. R. Exec. Clemency 15.C. ("Cases

investigated under previous administrations **may be reinvestigated at the Governor's discretion**."). (Emphasis added).

The Governor's act of signing a death warrant with an attestation that clemency was considered and deemed not appropriate means "clemency was *again* considered by the executive branch *prior to the signing of the warrant*." *Johnston*, 27 So. 3d at 24 (emphasis added); *Carroll v. State*, 114 So. 3d 883, 888 (Fla. 2013).

STATEMENT OF THE CASE AND FACTS

Zack sexually assaulted and murdered Laura Rosillo and Ravonne Smith in 1996 during a nine-day crime spree. He was provided full clemency proceedings in 2013-14, including the appointment of clemency counsel, an interview, and a written submission. After reviewing clemency materials, Governor DeSantis denied Zack clemency and signed his death warrant in 2023. Below, Zack contended that his clemency proceedings violated minimal due process. Both the district court and Eleventh Circuit refused to let Zack escape justice on the eve of his execution after determining his claims did not have a substantial likelihood of success. This Court should likewise reject Zack's latest attempt to delay execution of his long-delayed death sentence.

1996 Double Murder and Crime Spree

Zack killed both Laura Rosillo and Ravonne Smith during a nine-day crime spree in June 1996. *Zack v. State*, No. SC2023-1233, 2023 WL 6152489, at *1-2 (Fla. Sept. 21, 2023). The events leading up to the spree began with Zack frequenting a bar in Tallahassee and befriending a bartender, Edith Pope, who felt sorry for Zack after he told her that he witnessed his sister murder their mother with an axe. *Id.* at *2. Pope began giving Zack odd jobs around the bar and lent Zack her car to pick up his belongings after she learned he was being evicted. Zack repaid her generosity by stealing the car. *Id.*

Zack traveled to Panama City where he met and befriended another individual, Bobby Chandler, at a pub. *Id*. Chandler hired Zack to work at his construction

business and invited Zack to live with him temporarily. *Id.* Zack repaid Chandler by stealing his rifle, handgun, and forty-two dollars. *Id.* Zack pawned Chandler's guns for $225. *Id.*

Zack made his way to Okaloosa County and stopped at yet another bar where he encountered his first murder victim, Laura Rosillo. *Id.* Zack and Rosillo left the bar and drove to a beach where Zack attacked Rosillo. *Id.* He pulled her from the car and "beat her head against one of the tires." *Id.* Rosillo's tube top was torn, her spandex pants were pulled down around her ankles, and evidence suggested sexual assault. *Id.* Zack "strangled her, dragged her body behind a sand dune, kicked dirt over her face, and departed." *Id.*

Zack then went to Pensacola and stopped at another bar where he met his second murder victim, Ravonne Smith. *Id.* Zack and Smith went to Smith's house and, upon entering it, "Zack hit Smith with a beer bottle causing shards of glass and blood to spray onto the living room love seat and two drops of blood to spray onto the interior doorframe." *Id.* Zack then chased Smith down the hall and sexually assaulted her as she lay bleeding on the bed. *Id.* Smith managed to escape to an empty room after the assault, but Zack pursued her, beat her head against the bedroom's wooden floor, and stabbed her four times in the chest with an oyster knife. *Id.* Zack then cleaned and put away the knife, washed the blood from his hands, and placed Smith's bloody clothes in her dresser drawer. *Id.* Zack stole Smith's car, her television, her VCR, and her purse. *Id.*

Florida law enforcement apprehended Zack shortly after he botched an attempt to pawn Smith's items. *Id*. Zack gave a full confession to Smith's murder and the Pope and Chandler thefts. *Id*. DNA also tied Zack to Smith's murder. (T. IV 671-73, 679, 699). And Zack took the stand and testified he killed Smith in a mutual combat scenario. (T. VI 1086-1167).

Zack was sentenced to death and his sentence became final in October 2000 when this Court denied certiorari. *Zack*, 2023 WL 6152489, at *3 (citing *Zack v. Florida*, 531 U.S. 858 (2000)).

Zack's Clemency Proceeding and Denial

Former Florida Governor Rick Scott began Zack's clemency proceeding and appointed clemency counsel in 2013. (Doc.1:13-14.) Zack's clemency interview occurred in April 2014. (Doc.1:14.) Clemency counsel submitted a memorandum in support of clemency in May 2014. (Doc.1:14.)

On August 17, 2023, "after a review of the clemency investigation material" in "accordance with the Rules of Executive Clemency," Florida Governor Ron DeSantis denied Zack clemency and issued his death warrant. (Doc.4:54.) The death warrant explicitly stated that "executive clemency for MICHAEL DUANE ZACK, III, as authorized by Article IV, Section 8(a), of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that

executive clemency is not appropriate."[4] Zack's execution is scheduled for October 3, 2023.

A letter sent to Zack's clemency counsel to notify him of the clemency denial stated the "death warrant…concludes the clemency process." (Doc.4:54.)

Unlimited Clemency Power

Governor DeSantis still has complete and unfettered discretion, with the approval of two Cabinet members, to grant Zack clemency "**at any time**, **for any reason**." *See* Fla. R. Exec. Clemency 4 (emphasis added); Fla. Const. Art. IV, § 8(a); *Davis v. State*, 142 So. 3d 867, 877 (Fla. 2014) (recognizing the clemency power vested in Florida's Executive Branch is both "unrestricted" and "unlimited" as a matter of Florida Constitutional Law).

Zack's 42 U.S.C. § 1983 Suit and Stay Request

Zack filed a 42 U.S.C. § 1983 suit in the Federal District Court for the Northern District of Florida alleging Florida violated his minimal, clemency-related due process rights. (Doc. 1.) Zack argued that his clemency proceedings violated due process because his clemency process began under the Scott administration, and he was not afforded an opportunity to provide the DeSantis administration with an "updated memorandum" outlining alleged medical-community changes regarding

[4] *See Zack v. State*, SC1960-92089, Death Warrant filed August 17, 2023, at PDF page 5.

Fetal Alcohol Syndrome (FAS). (Doc.1:16-17; Doc.2:4-5, 7.) Zack also sought a stay to litigate these claims. (Doc.3.)

Zack's complaint never alleged he tried to provide the DeSantis administration with updated materials either pre- or post-warrant and was turned away.

District Court Stay Denial

The district court declined to issue a stay because Zack's claims did not have a substantial likelihood of success. Minimal due process, the court held, does not require clemency to restart every time there is an administration change. Nor does it require state officials to check with a defendant to see if he has anything else to add before denying clemency. The district court determined Zack's clemency process (including appointment of counsel, an interview, and a written submission) comported with minimal due process.

While noting it would deny a stay regardless, the district court observed that Zack (during the § 1983 litigation) had been invited to provide Florida's Clemency Board with the clemency-related materials he complained it lacked. The court noted Zack clearly did not believe "his own suggestion" that the materials would have made a difference in the clemency outcome.

Eleventh Circuit Appeal and Stay Denial

Zack appealed the district court's stay denial to the Eleventh Circuit and sought an emergency stay of execution pending that appeal. The Eleventh Circuit declined to issue a stay after determining Zack's clemency-related due process claims had no substantial likelihood of success. The court agreed that the change in

administration and Clemency Board composition between 2014 (when the clemency issue was submitted) and 2023 (when clemency was ultimately denied) did not violate minimal due process because the current Clemency Board had access to the same materials as the previous Board. If the Governor, whose vote is essential to any clemency grant, wanted to schedule a hearing, he had full discretion to do so.

The court also pointed out that Zack was aware since around 2014 that clemency could be denied or granted at any time, for any reason, and he had no minimal-due-process right to know exactly when the Governor was considering his application.

Finally, the Eleventh Circuit recognized that, since no rules prohibited Zack from providing updated submissions to the Clemency Board, the failure to consider materials Zack never tried to provide could not constitute a minimal due process violation.

The Eleventh Circuit therefore found Zack's clemency-related, minimal-due-process, claims did not have a substantial likelihood of success and declined to stay his execution.

Zack's Certiorari Petition and Stay Application

On September 28, 2023, five days before his scheduled execution, Zack filed a petition for certiorari review of the Eleventh Circuit's decision and an emergency application to stay his execution pending this Court's certiorari decision. His petition nominally presents three issues for this Court's review. His stay application argues this Court should grant him a stay pending certiorari review.

This is the State's[5] Brief in Opposition to certiorari review, contemporaneously filed with its response opposing Zack's request to further delay execution of his long-delayed capital sentence for crimes that occurred nearly three decades ago.

Zack's victims have waited long enough for justice. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). This Court should deny certiorari and allow them to finally have it.

[5] The clemency-related state officials named in Zack's § 1983 suit below (Defendants in the district court, Appellees in the Eleventh Circuit, and now Respondents in this Court) will be collectively referred to as the State in this Brief.

REASONS FOR DENYING THE WRIT

Zack seeks certiorari in a final attempt to rob his victims of justice on the eve of his execution for heinous crimes committed nearly thirty years ago. He claims his minimal due process rights under *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Conner, J., concurring) were violated and that the Eleventh Circuit wrongly accepted the State's assertion that clemency was open to him over the past near-decade (including post-warrant). But his certiorari petition is little more than an attempt to immensely broaden his clemency-related due process rights, contort *Woodard* beyond recognition, and circumvent his failure to provide the clemency-related materials to the Clemency Board at any time over the past near-decade. Zack's certiorari questions are entitled to no answer from this Court. *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 Michael Duane Zack, III.

Before analyzing Zack's questions presented individually, a few additional words must be said about reasons to deny certiorari applicable to all three of them. Zack ostensibly raises three questions for this Court to consider five days before his execution: (1) does Florida's clemency system's lack of enforceable rules violate *minimal* due process? (2) did Florida provide him with adequate notice under *minimal* due process? And (3) did the Eleventh Circuit err in accepting Florida's assertion that Zack could have submitted clemency-related materials at any time.

But while Zack vaguely sets out these questions, his five-page argument that this Court should exercise its discretionary power to review them neither explicitly analyzes any of them nor even attempts to employ this Court's normal certiorari standard. *See* Sup. Ct. R. 10. Zack points to no lower-court conflict, no conflict between the lower court's decision and this Court, and only obliquely suggests the questions he presents are important and unsettled. Instead, he provides a laundry list of complaints about Florida's clemency process. That is an independent reason to deny certiorari review of the entire petition, particularly on the eve of an execution.

Zack also elected to nominally analyze his questions presented under a single heading and without clearly referring to any of them, which raises another problem with his petition: it is not clear several of his arguments are even encompassed in the questions he presents. *See* Sup. Ct. R. 14.1.(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Zack raises a kitchen-sink-full of complaints that are not clearly tied to any of his three questions presented, including: (1) he was denied access to the current decisionmakers due to the change in administration; (2) no current Clemency Board member could request a hearing under Florida Rule of Executive Clemency 15.E.; (3) Zack's clemency process was deficient because the decisionmakers failed to consider updated information regarding Zack's Fetal Alcohol Syndrome and legal deficiencies in

Florida's capital system recognized by this Court.[6] That lack of clarity is also an independent reason to deny certiorari on all of Zack's questions presented, particularly since his petition was filed five days before his scheduled execution. *See* Sup. Ct. R. 14.4. (a petitioner's failure to set out the essential points with clarity is an independent reason to deny certiorari); *cf. Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992) (A court deciding whether to issue a stay "may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission."). This Court should not grant certiorari on Zack's scant, deficiently presented arguments on the eve of his execution and put off decades-awaited justice for his victims.

It is also not clear that even resolving all of Zack's questions presented in his favor would alter the Eleventh Circuit's stay decision. The Eleventh Circuit employed it's normal four-part test when deciding to issue a stay, but only analyzed a singular element (substantial likelihood of success) after recognizing Zack was required to prevail on all of them to gain a stay. See Pet.App.A. at 4. The State also advanced arguments that Zack's failure to try and submit his materials to the Office of

[6] Zack's remaining, merits-based arguments that (1) he was provided no notice that Governor DeSantis was considering clemency; (2) he received no notice that an execution date would be scheduled; (3) a post-warrant clemency application would not be granted as easily as a pre-warrant one; (4) Florida's procedures are "non-binding and ever-shifting"; (5) he was entitled to notice by the "clemency deciders"; and (6) the alleged clemency-related deficiencies identified by Zack cannot be remedied by the facts the current Clemency Board had access to the materials Zack originally submitted or that Zack could have submitted his clemency materials any time over the past near-decade because clemency counsel expended the resources available to him and postconviction counsel cannot represent him in clemency, are at least arguably encompassed in the questions he presents.

Executive Clemency any time in the last decade was an independent reason to deny equitable relief under *Bucklew*. As a result of the Eleventh Circuit's decision to analyze only one element of the stay test, a favorable decision from this Court for Zack would only provide him with a remand to the Eleventh Circuit for consideration of the other stay elements and the State's arguments. Given the uncertainty of whether Zack would actually prevail in the Eleventh Circuit on remand, this Court should exercise its unlimited, unfettered discretion to deny certiorari. *See* Sup. Ct. R. 10. This Court should not waste its scarce judicial resources deciding an issue that may not end up mattering to the capital defendant other than by putting off his execution date.

The final reason to deny certiorari applicable to all of Zack's questions presented is simple. Zack never tried at any time since the current administration took over to provide the Clemency Board with his updated FAS information. Zack had duly appointed clemency counsel that entire time and nothing prohibited either his state postconviction counsel (who were actively litigating his FAS claims) or his federal counsel (who filed the § 1983 suit below) from handing state clemency counsel the FAS information. Clemency counsel could then have tried to update Zack's submission with that information based on the Governor's unbridled discretion and explicit ability to reinvestigate cases that began under prior administrations. Zack's federal habeas counsel even recognize that they could submit the information themselves. Petition at 24 (citing *Bowles v. DeSantis*, 934 F.3d 1230, 1236, 1245-46 (11th Cir. 2019) (recognizing that, while federal counsel cannot force themselves into

state clemency proceedings, the DeSantis administration "invited" federal counsel to provide whatever clemency-related information they wished "three times" and did not "refuse to hear" from federal counsel).)

Zack's questions presented are incredibly disingenuous because he never tried to submit his FAS information despite being on notice that clemency could be granted "at any time, for any reason," after around 2014, explicitly being on notice the Governor had discretion to reinvestigate prior cases, and (supposedly) believing FAS information would matter to the clemency outcome. *Cf. Parole Comm'n v. Lockett*, 620 So. 2d 153, 158 (Fla. 1993) ("We are disturbed that no attempt was made by" state postconviction counsel "to request the Governor to exercise his authority" over clemency-related records before resorting to the courts). Instead, Zack and his counsel withheld the FAS information and waited until a warrant was signed to sue in federal court rather than try and urge the Governor to utilize his discretion to grant Zack clemency before a warrant based on that information. Zack's failure to even try to submit this information to the Governor pre-warrant, and decision to instead file suit post-warrant, is another reason for this Court to deny certiorari. *Cf. Bucklew*, 139 S. Ct. at 1134 (urging courts to protect state judgments when the defendant pursued relief in dilatory fashion); *Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 654 (1992) ("Equity must take into consideration" a defendant's "obvious attempt at manipulation.").

All that said, the State will deal with each of Zack's questions presented in turn. But none of them warrant this Court's review. The bottom line is this case would

be unworthy of this Court's review under normal circumstances, much less on the eve of an execution. The decision below properly stated and applied all governing federal principles, 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. *See* Sup. Ct. R. 10.

This Court has refused to grant certiorari for Zack three times before today and should do so again.

I.
Does Clemency-Related, Minimal Due Process Require a Set of Enforceable Rules Constraining a Governor's Discretion to Grant Clemency "at any Time, for any Reason"?

Zack's first question appears[7] to ask this Court to decide whether the lack of enforceable rules and standards governing clemency violates minimal due process under *Woodard*. 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 minimal due process requires enforceable rules governing clemency. Indeed, this Court recently denied certiorari on a very similar question presented in another active death warrant case arising out of Florida. *Barwick v. DeSantis*, No. 22-7412 (22A949), 143 S. Ct. 2452 (May 5, 2023).[8]

This Court should do so again for three reasons. First, this Court does not have the benefit of conflicting opinions on this issue. Second, this question presented is little more than an attack on this Court's settled precedent. Third, minimal due

[7] Zack's first two questions presented are not clear and overlap regarding the alleged notice and clarity aspects of minimal due process. Zack's decision to analyze all his questions presented together in five pages does not elucidate any distinction between his first two questions. His lack of clarity is a standalone reason to deny certiorari on these questions. *See* Sup. Ct. R. 14.4. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (explaining that questions presented serve the twin purposes of providing respondents with the specific ground petitioner urges and assisting this Court in efficiently channeling its unfettered discretion and resources when selecting cases).

[8] Barwick's question presented was: "Whether a standardless clemency process, one that affords no meaningful opportunity to show mercy, satisfies this Court's mandate in" *Woodard*. *See Barwick v. DeSantis*, No. 22-7412, Petition filed April 28, 2023, at i.

process under *Woodard* does not require enforceable rules or standards antithetical to the very heart of clemency: unbridled discretion.

A. This Issue Should Not Be Addressed by this Court Without the Benefit of Conflicting Opinions and Deep Analysis

This Court should not decide whether minimal due process requires enforceable rules because it does not have the benefit of any (much less 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 Brennan and Marshall, JJs.). 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.").

Zack has failed to argue (much less establish) conflict and it does not appear any court is on his side. *E.g.*, *Lee v. Hutchinson*, 854 F.3d 978, 981 (8th Cir. 2017) (violation of state statutes, regulations, and policy during clemency were not minimal due process violations); *Barwick v. Governor of Florida*, 66 F.4th 896, 904 (11th Cir. 2023) ("The State's decision to provide the Governor and the Clemency Board with wide discretion to make clemency decisions without tangible standards does not resemble" the "scenarios that *Woodard* outlines."), *cert. denied, Barwick v. DeSantis*, 143 S. Ct. 2452 (2023); *Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 794 F.3d 1327,

1333 (11th Cir. 2015) ("Nothing in Justice O'Connor's concurring opinion suggests that a clemency board's compliance with state laws or procedures is part of the "*minimal* procedural safeguards" protected by the Due Process Clause.").

This Court should not wade into this issue before there is some form of conflict, particularly since it involves a State's chosen clemency process, an area where courts must tread even more carefully than normal. *See Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (stating "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review").

In short, Zack's first question has not sufficiently percolated in the lower courts that it warrants this Court's final judgment. And additional percolation is especially important to Zack's first question presented considering its potential, wide-ranging consequences to situations outside minimal, clemency-related due process. For example, this Court only has non-binding guidelines for employing its unfettered, unlimited discretion in granting certiorari petitions in capital cases. *See* Sup. Ct. R. 10.

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 days before an execution.

B. Zack's First Question Presented is Little More than an Attack on Settled Precedent Based on Speculative Theories.

This Court should also decline to review Zack's first question presented because it does little more than attack this Court's long settled precedent in *Woodard* based on speculative theories about clemency-related due process rights. *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 based on "speculative theories").

"Justice O'Connor's concurring opinion provides the holding in *Woodard*." *Barwick v. Governor of Florida*, 66 F.4th 896, 902 (11th Cir. 2023). She determined a capital defendant has a "*minimal*" due process right in clemency proceedings and that judicial intervention "*might*" be warranted if "a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner *any* access to its clemency process." *Woodard*, 523 U.S. at 289 (O'Conner, J., concurring) (emphases added). But she held that Ohio's clemency system comported with due process despite the fact the capital defendant was afforded only "3 days' notice of the interview," "10 days' notice of the hearing," and claimed he did not have a "meaningful opportunity to prepare his clemency application." *Id.* at 289-90. Minimal due process also permitted the state to exclude Woodard's counsel from the interview and only participate in the hearing at the discretion of the parole board chair. *Id.* And minimal due process allowed the state to preclude Woodard "from testifying or submitting documentary evidence at the hearing." *Id.*

Measured against *Woodard*, Florida's clemency process indisputably satisfies minimal due process. Unlike in *Woodard*, the Clemency Board has never barred the door to documentary evidence supporting clemency. Zack simply never knocked. Unlike in *Woodard*, Zack was afforded far more than a few days to prepare for his clemency interview and permitted to submit whatever "documentary evidence" he wanted without limit. Florida went far beyond the confines of minimal due process by appointing him clemency counsel. *Cf. Murray v. Giarratano*, 492 U.S. 1, 8-13 (1989) (holding due process does not require the appointment of even postconviction counsel in a capital case). Zack was told when his clemency process began in 2013, and was also on notice, for nearly a decade, that clemency could be granted or denied "at any time, for any reason." *See* Fla. R. Exec. Clemency 4. Governor DeSantis, after reviewing the clemency investigation materials and determining clemency was not appropriate, then denied Zack's clemency application. This factual scenario is not remotely close to either of the situations Justice O'Conner suggested "might" violate minimal due process: flipping a coin and leaving the clemency decision completely to chance rather than discretion or denying him *any* access to clemency.

This question presented is nothing more than a thinly veiled attempt to expand clemency-related, minimal due process well beyond what Justice O'Conner recognized, and is entirely inconsistent with her opinion. This Court should not countenance Zack's speculative assault on *Woodard*'s settled precedent and instead deny certiorari on this active-warrant case.

C. Minimal, Clemency-Related Due Process Does Not Require Enforceable Rules.

This Court should also decline to review Zack's first question presented. The State complied with all of its rules, and minimal, clemency-related due process does not require enforceable rules anyway. Zack has not specifically pointed to any rule the State violated, or suddenly changed. Instead, his generalized, non-specific complaints boil down to a sheer misreading of the Rules of Executive Clemency.

In any event, the enforceable rules Zack seeks "would be 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." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, (1998) (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJs.). "Under any analysis, the Governor's executive discretion need not be fettered by the types of procedural protections sought by" Zack. *Id.* at 282. Indeed, "the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges." *Id.* at 285.

The lack of binding rules gave Florida's Executive the flexibility to invite Zack to submit his FAS materials post-warrant for reconsideration of clemency's appropriateness, despite the fact that he should have submitted that information pre-warrant. Zack's refusal to accept that invitation immediately does not show a flaw in Florida's system. It exposes Zack's true desire: delay, not due process.

II.

Does Clemency-Related, Minimal Due Process Require an Explicit Rule Providing for Clemency Updates from a Defendant when the Rules Explicitly Provide Clemency may be Denied "at any Time, for any Reason," and Explicitly Provide the Governor has Discretion to Reinvestigate Cases from Prior Administrations?

Zack's second question presented appears to ask this Court to decide whether minimal, due process requires a rule explicitly telling a defendant he may submit updates after his initial submission. As with his first question presented, this second question presents no unsettled, divisive issue of federal law worth expending this Court's scarce judicial resources on. It does not appear any court has held minimal due process is violated by the failure to inform a defendant he may submit updates when no rule precludes him from doing so. Zack was given notice when his clemency proceeding and investigation began, which is all the notice minimal due process requires under *Woodard*.

This Court should decline to answer this second question presented for three reasons. First, it is nothing more than a speculative attempt to expand *Woodard* for the same reasons argued in the prior section (which the State will not repeat). Second, the only notice required under minimal due process is notice a clemency proceeding and investigation started. Third, Zack's case is a poor vehicle to address this question because Zack had both actual and constructive notice he could submit clemency updates.

A. Clemency-Related, Minimal Due Process Only Requires Notice a Clemency Proceeding and Investigation Started.

Justice O'Conner's binding opinion in *Woodard* held that the only notice needed to comply with minimal due process was "notice of the hearing" by the entity investigating clemency and submitting a recommendation to the Governor. *Woodard*, 523 U.S. at 277-78, 289-90. As it relates to Florida's clemency process, that is the equivalent of saying minimal due process only requires notice of clemency's initiation and that FCOR's investigation has begun. Zack had that notice back in 2013-2014. *See* Fla. R. Exec. Clemency 15.B., D.

Zack had all the notice he was entitled to under a straightforward application of *Woodard*. He was told when the clemency investigation began, told when his interview would be, and told that he could provide a written submission. He points to no case indicating minimal due process requires explicit notice that the Clemency Board will consider additional, updated submissions from a capital defendant. No such case appears to exist. For that matter, he points to no *normal* due process case indicating the failure to inform a defendant of the potential for additional submissions violates *full* due process. Since Zack's notice question presented was settled by this Court twenty-five years ago in *Woodard*, there is no need to redecide it now on the eve of his execution.

B. Zack's Case Is a Poor Vehicle to Address this Question Because He Was Provided Both Constructive and Actual Notice He Could Provide Updated Information.

This Court should also decline to review Zack's second question presented because he received both actual and constructive notice that he could provide updated information to the Clemency Board.

Regarding pre-warrant constructive notice, both Zack and his numerous counsel should have been aware he could provide additional submissions. The Rules of Executive Clemency explicitly do not cabin the Clemency Board's discretion. Governor DeSantis, and two Clemency Board members, have unlimited discretion to grant clemency "at any time, for any reason," and Governor DeSantis (without whom clemency could not be granted) had the power to reinvestigate cases investigated under prior administrations. *See* Fla. R. Exec. Clemency 2.A. (nothing in the rules limits the Clemency Board's discretion), 4. (clemency may be granted or denied "at any time, for any reason"), 15.C. (providing the Governor has discretion to reinvestigate previously investigated clemency cases); *Davis v. State*, 142 So. 3d 867, 877 (Fla. 2014) (recognizing the clemency power vested in Florida's Executive Branch is both "unrestricted" and "unlimited" as a matter of Florida Constitutional Law).

Any reasonable counsel with that publicly available information, combined with the fact that no rule precludes additional submissions, would have concluded additional submissions could be provided, and that clemency could be granted on those additional submissions if appropriate. That is especially true since, once the DeSantis administration took over, the rules explicitly provided Governor DeSantis

had the authority to reinvestigate prior cases (like Zack's). Despite that explicit rule, none of Zack's counsel ever asked the Governor to employ that discretion based on Zack's FAS materials. The fact that any reasonable reading of Florida's Rules of Executive Clemency, in conjunction with the caselaw on the constitutionally unlimited discretion afforded the Governor, would have put any reasonable counsel on notice that he could submit an update (or ask the Governor to reinvestigate the case) makes this case a poor vehicle to explore the contours of notice under minimal due process.

Regarding post-warrant actual notice, Zack had actual notice that the Clemency Board would entertain additional submissions. From the beginning of the § 1983 litigation, as the district court recognized, the State expressly told Zack that additional submissions were permitted and would be entertained. That actual notice defeats any minimal due process notice argument.

Zack proffers four reasons to circumvent his failures: (1) speculation a post-warrant clemency application would not be granted as easily as a pre-warrant one; (2) clemency counsel expended the financial resources available to him long ago; (3) postconviction counsel cannot represent him in clemency; and (4) he did not have notice an execution would be scheduled. Zack's first argument is based on nothing more than sheer speculation and should be disregarded by this Court. That is doubly true since, whether pre- or post-warrant, it is extremely unlikely Florida's Executive would turn a blind eye to a truly persuasive clemency application presenting (for example) compelling evidence a capital defendant was actually innocent.

Zack's complaints about clemency counsel's financial resources and postconviction counsel's role blink the obvious reality that nothing prohibited either state postconviction or federal habeas counsel from handing the "compelling" FAS information to state clemency counsel. For that matter, federal habeas counsel could have directly submitted the FAS information to the Office of Executive Clemency.

Zack's final complaint, that he had insufficient time to assemble an additional clemency petition because he did not know his execution would be scheduled, defies reality. Zack has had a near-decade to do so prior to the warrant. And he had sufficient time to complete and file a post-warrant federal § 1983 suit complaining the Clemency Board failed to consider materials he never submitted. Insufficient time is not the issue. Manipulation is.

In light of the notice Zack actually received in this case, his case is a poor one to explore the contours of minimal due process notice and this Court should decline review.

III.
Did the Eleventh Circuit Err by Considering the State's Assertion that Clemency Remains Open to Petitioner under State Constitutional Law as a Reason to Decline the Equitable Relief of an Execution Stay?

Zack's final question presented takes issue with the Eleventh Circuit's acceptance of the State's assertion that clemency was open for Zack to submit whatever he wanted both before and after his warrant was signed.

This Court should decline review of this question presented for four reasons. First, Zack appears to seek a factbound decision with little precedential value from this Court. Second, Zack's question has not percolated in the lower courts at all. Third, the district court denied Zack's motion to stay without relying on the State's factual assertion. And fourth, the Eleventh Circuit was correct to accept the State's assertion because it was true as a matter of binding Florida law.

A. Zack's Petition Arguments Appear to Seek a Factbound Decision Inappropriate for Certiorari Review.

This Court should decline jurisdiction over this question presented. Zack's entire argument "supporting" this question comprises two paragraphs that simply argue the Eleventh Circuit got the facts wrong. He argues that Florida clemency is closed because of state clemency counsel's lack of financial resources and the fact that state postconviction counsel cannot represent him in clemency.

Zack's arguments do not support the contention, seemingly presented by his question, that the Eleventh Circuit committed a *legal* error by accepting the State's asserted fact as true in its stay denial. Instead, he seems to only argue the Eleventh

Circuit got the facts wrong in this particular case, not because (as a matter of law) the Eleventh Circuit could not decide conflicting facts. Put another way, Zack seems to complain about the Eleventh Circuit's factual conclusion rather than its legal ability to engage in a factual analysis while deciding whether to issue the equitable relief of an execution stay. That is not a reason to grant certiorari. It is a reason to deny it. *See Cash v. Maxwell*, 565 U.S. 1138 (2012) (statement of Sotomayor, J., respecting the denial of certiorari) ("Mere disagreement with" a "highly factbound conclusion is, in my opinion, an insufficient basis for granting certiorari."); Sup. Ct. R. 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."). To the extent Zack is actually asking for a legal rule and failed to make that clear, his lack of clarity is a standalone reason to deny review. *See* Sup. Ct. R. 14.4 (lack of clarity a "sufficient reason" to "deny a petition").

B. <u>This Issue has Not Percolated in the Lower Courts.</u>

Even taking Zack's question presented at face value, this Court should not grant certiorari on this issue because it does not have the benefit of lower court opinions analyzing the question. Zack's certiorari petition does not cite a single case addressing the issue. This Court should not be only the second court to consider whether a factual dispute may be resolved when deciding whether to issue an equitable, execution stay. *See Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (statement of Sotomayor, J., respecting the denial of certiorari) (agreeing to deny review, despite the question being a "weighty" one, because the legal issue

was "complex and would benefit from further percolation in the lower courts prior to this Court granting review").

C. The Resolution of this Question May Not Affect the Underlying Stay Decision.

Five days before an execution is not the time to grant certiorari on an issue that may have no effect on the underlying decision. While Zack correctly points out that the Eleventh Circuit relied on the State's assertion that clemency was open as part of its stay denial, the district court reached the same conclusion without reliance on the State's factual assertion. The district court instead held that Zack's claims had no substantial likelihood of success as a matter of law and without the need to analyze the factual issue. See Doc. 25 ("This order would reach the same result anyway."). Given the district court's stay denial, which did not rely on the factual dispute, there is a substantial question on whether reversing the Eleventh Circuit would even change the outcome of its stay decision. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (stating certiorari is the power "to correct wrong judgments, not to revise opinions," and explaining that, if the same judgment would be entered after this Court's review, review would be nothing more than an advisory opinion); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic). This Court should not grant certiorari, and forestall an execution, on an issue that may not actually change the underlying stay denial.

D. The Eleventh Circuit Correctly Accepted the State's True-As-A-Matter-of-State-Law Assertion that Clemency Remained Open to Zack.

Finally, this Court should not grant certiorari because the Eleventh Circuit's decision to accept the State's true-as-a-matter-of-state-law assertion that clemency was open to Zack for the past near-decade and even post-warrant was correct. It is not clear how a court analyzing whether the claims have "a significant possibility of success on the merits" sufficient to warrant a stay could avoid deciding factual issues when the merits are factually based. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992) (A court deciding whether to issue a stay "may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission.")

The question before the Eleventh Circuit was not whether Zack's claims could survive a motion to dismiss or summary judgment, but whether the district court abused its discretion in determining Zack would not likely prevail at the end of his § 1983 litigation. It is perfectly proper to look forward to the likely resolution of factual issues when making that determination. If a capital defendant's claim rests on disputed factual issues the State will likely win, there is nothing wrong with denying the defendant a stay on that basis because he has the burden of showing he will likely prevail "on the merits" (both law and facts) before he can obtain a stay.

The State's assertion that clemency was never closed to Zack was also true as a matter of Florida law because nothing can bind the Executive Branch's discretion to grant clemency "at any time, for any reason." Fla. R. Exec. Clemency 4; *see Davis*

v. State, 142 So. 3d 867, 877 (Fla. 2014) (recognizing the clemency power vested in Florida's Executive Branch is both "unrestricted" and "unlimited" as a matter of Florida Constitutional Law). Further, Governor DeSantis had explicitly detailed discretion to reinvestigate Zack's case because Zack's clemency process began under the prior administration. Fla. R. Exec. Clemency 15.C. Clemency, as a matter of pure Florida Constitutional Law, has never been closed to Zack at any time over the past near-decade for additional submissions. The Eleventh Circuit had the power to determine whether Zack's factual arguments were likely to prevail, determined they would not, and correctly denied a stay on that basis.

Zack myopically focuses on the word "final" describing FCOR's report to argue clemency closed after the report. But he has failed to read the word "final" in its full context, including the fact that clemency may be denied "at any time, for any reason," that Governor DeSantis has explicit discretion to reinvestigate cases from the prior administration, and that as a matter of Florida Constitutional Law the Executive Branch's clemency discretion cannot be cabined. Zack's myopic reading of the word "final" as eliminating the Clemency Board's discretion is directly contradicted by the rules. S*ee* Fla. R. Exec. Clemency 2.A.

Zack then confuses the question of whether clemency was open to him with the question of whether his clemency counsel had adequate resources to make an additional submission. The issue about clemency counsel's financial resources is a non-sequitur. Minimal due process does not even require clemency counsel (much less clemency counsel funded over $10,000). Moreover, nothing prohibited either of Zack's

better-funded federal habeas or state postconviction counsel from giving clemency counsel everything they developed. Federal habeas counsel certainly had access to these materials and could have handed them to Zack's clemency counsel years ago instead of filing a post-warrant § 1983 suit. Federal habeas counsel also could have simply submitted the updated clemency materials themselves.

Since Zack's third question presented is substantively meritless, it is not worth this Court's review on the eve of Zack's execution for heinous crimes committed almost three decades ago. This Court should deny certiorari.

CONCLUSION

This Court should deny certiorari and allow true finality for the State of Florida, the victims, and Michael Duane Zack, III.

Respectfully submitted,

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