No. 23-5667

IN THE

Supreme Court of the United States

MICHAEL DUANE ZACK,

Petitioner,

v.

RON DESANTIS, ET AL.,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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

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Mr. Zack Was Denied Minimal Due Process In His Clemency Proceeding

A. Introduction

The issues before this Court concern whether Florida must provide a capital defendant seeking clemency reasonable notice of its procedures and a meaningful opportunity for access to the clemency process in order to comply with the minimal due process recognized by Justice O'Connor in her plurality opinion in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998).

Respondents' response indicates that it is the position of the State of Florida that *Woodard* "does not require enforceable rules or standards antithetical to the very heart of clemency: unbridled discretion." (BIO at 20-21; *see also* 25 ("minimal, clemency-related due process does not require enforceable rules anyway."). In support, Respondents rely on Chief Justice Rehnquist's noncontrolling opinion in *Woodard* arguing that providing enforceable rules is inconsistent with the discretion afforded the clemency decision makers (BIO at 25). However, Respondent conflates the "complete and unfettered discretion" to deny clemency at any time for any reason, i.e., the subjective considerations concerning clemency, with the requirement that the clemency procedure must comply with the Due Process Clause (BIO at 20-1, 34).[1]

[1] Respondents' misunderstanding of the issue presented is further elucidated by the suggestion that *Barwick* presented a "very similar question" (BIO at 20 (referencing *Barwick v. DeSantis*, 143 S. Ct. 2452 (May 5, 2023)). Although *Barwick* involved a due process claim, the asserted violation was very different. In that case, the "standardless process" Barwick challenged was related to the Clemency Commission's singular focus on his criminal conduct during the clemency interview. Barwick argued that this shifted the only standard FCOR provided—that it was not concerned with Barwick's guilt of the crime. In Zack's case, the issue is far more encompassing: it is about his access to the process itself. Zack's due process challenge centers around the fact that no notice or standards exist that even contemplate access

Woodard, 523 U.S. 272, 288-89 (1998). Thus, a clemency scheme without enforceable rules or which deprives capital defendants access to the clemency process is antithetical to due process.

The breakdown of the clemency process is especially pronounced in Zack's case, where his disabilities are interwoven with breakdowns in his legal process. Cursory review of Zack's litigation reveals that the courts continue to reject the medical community's consensus that individuals suffering from FAS experience disabilities equivalent to—and even more pronounced than—ID. Clemency's role as a "fail safe" is used to justify withholding equitable relief via traditional court process. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-17 (1993) (discussing, at length, the role of clemency—as opposed to habeas—in remedying the "unalterable fact that our judicial system, like the human beings who administrate it, is fallible"). It is therefore unacceptable that Zack did not have access to an adequate clemency proceeding—one that provided him notice and opportunity to be heard.

B. Matters related to this Court's Review

1. Zack has presented an important question of federal law.

This Court has recognized the importance of the clemency process in a capital case: "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)). "Clemency is deeply rooted in

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to the clemency process after his 2014 proceedings. Thus, unlike in *Barwick*, Zack has been fully shut out of the process when critical information has surfaced that bears on the issue of whether he deserves mercy.

our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 411-12; *see also Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider."). Clemency power exists "to help ensure that justice is tempered by mercy." *Cavazos v. Smith*, 565 U.S. 1, 8-9 (2011).

Respondents argue that the questions presented by Zack do not merit certiorari review because he has shown no conflicts in the courts and "only obliquely suggests the questions he presents are important and unsettled." (BIO at 15; *see also* 19). However, the questions implicated by Zack's case are clearly important and not yet settled. Further, prior to the specific considerations identified in determining whether certiorari review will occur, this Court notes: "A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers …". Sup. Ct. R. 10. Thus, this Court's discretion is wide and certainly appropriate in the circumstances raised by Zack. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (describing certiorari jurisdiction as "given for two purposes, first to secure uniformity of decision between those courts … and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort….").

Also, in *Woodard*, Justice O'Connor specifically addressed Respondents' argument concerning the level of caution to be used to address issues related to clemency proceedings (BIO 22). In discussing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), Justice O'Connor reasoned:

> Thus, although it is true that "pardon and commutation decisions have not traditionally been the business of courts," *Dumschat*, supra, at 464, 101 S.Ct. at 2462, and that the decision whether to grant clemency is entrusted to the Governor under Ohio law, I believe that the Court of Appeals correctly concluded that some minimal procedural safeguards apply to clemency proceedings.

Woodard, 523 U.S. at 289. The circumstances in Zack's case compel this Court's review of Florida's clemency process.

Respondent also argues that Zack seeks to expand *Woodard*, relying on the circumstances present there that were not held to violate due process (BIO 23, 26). But, in *Woodard*, the issues presented were discrete and related to the internal structuring of a clemency hearing, as opposed to the complete lack of access to a meaningful process Zack has suffered. In Zack's case, critical information—the new scientific understanding of FAS and its equivalence to intellectual disability—did not even exist at the time of the clemency proceeding. Nearly a decade later, that scientific knowledge exists and would be a compelling aspect to determinations of mercy—but Zack's death warrant was signed without providing any meaningful opportunity to present this new information via the clemency process.

2. Supreme Court Rule 14.

Additionally, Respondents criticize Zack's petition, suggesting that he did not fairy presented "his arguments" (BIO at 15-16). However, Respondents

misunderstand the purpose of certiorari, suggesting that it is more akin to a merits brief where discrete issues are addressed (*see generally* BIO 20-36), rather than "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ." Sup. Ct. R. 14(1)(h). Zack, in compliance with this Court's Rules, simply and clearly explained why his questions presented warrant this Court's review.

3. Zack is not responsible for any delay.

Initially, in evaluating Zack's request for certiorari and a stay at this juncture, it is critical to consider that while Respondents repeatedly urge this Court to "reject Zack's latest attempt to delay execution of his long-delayed death sentence" and lob unsubstantiated accusations of federal counsel's manipulation to delay Zack's death sentence (BIO at 7, 18-19, 30), it was Respondents and not Zack who decided to initiate a clemency proceeding and then not sign a death warrant for nearly ten years. This delay is entirely attributable to Respondents. And because Respondents seek to execute Zack now, nearly a decade later, Florida's clemency scheme must provide a "fail safe" function that conforms with today's standards, not those of 2013-2014. The information considered in 2013-2014 is now considered scientifically outmoded. Today, it is clearly known that (1) Fetal Alcohol Syndrome (FAS) is equivalent to intellectual disability, (2) the presence of FAS reduces validity of IQ scores, and (3) reliance on IQ scores to deny protections is "frankly absurd" from a scientific and medical perspective (Petition, App. B at 10). This means Zack is entitled access to a process by which he has a meaningful opportunity to present this compelling information as a basis for mercy.

C. Respondents' arguments rest upon a fatally flawed premise riddled with inconsistencies and fail to acknowledge the specific circumstances that exist in Florida's clemency scheme.

In Florida, the Governor possesses discretion to grant clemency. Respondents acknowledge that the Governor's clemency power is restrained by the constitutional due process right that Zack maintains until he is executed (BIO at 2). However, despite this concession, Respondent asserts (1) that the Governor's "unbridled" discretion permits him to ignore the Rules of Executive Clemency and the law and (2) that a clemency attorney appointed ten years ago, without resources or knowledge about any substantive litigation in Zack's case, was somehow on notice that he could obtain meaningful access to the clemency process, even after a death warrant had been signed (BIO at 2-3).[2] Respondents' reliance on ambiguity, at best (i.e., that the rules don't *explicitly prohibit* the later mailing of additional information), simply does not provide reasonable notice or meaningful access—the constitutionally required aspects of due process.

Contrary to Respondents' argument, reasonable counsel, be it clemency counsel with no resources, appointed state court counsel who is precluded from

[2] Respondent incorrectly relies on the current version of Florida Statute § 940.031 in arguing that Zack was provided minimal due process, including that clemency counsel is compensated at a maximum of $10,000.00 (BIO 4, 35). However, in Zack's case, the Office of the Public Defender for the Tenth Judicial Circuit was provided with a single budgetary allotment in 2013 for the representation of six capital defendants in their clemency proceedings. After Zack's 2014 clemency submission, the statute was amended. Thus, Respondents' argument is flawed. In addition, not mentioned by Respondent is the fact that under the current statute and contract clemency counsel must execute, no funding exists for clemency counsel to provide any further representation on a capital client's behalf after the submission of a clemency petition. *See* Fla. Stat. § 940.031.

representing Zack in his clemency proceedings, or federal counsel who has previously been told that she cannot participate in clemency proceedings, are certainly aware of the provisions in the Rules of Executive Clemency which provide no process for access to clemency after the initial submission of materials (BIO at 28): Rule 15(B) indicates that in all cases where death has been imposed, the Florida Commission on Offender Review (FCOR), conducts an "investigation into all factors relevant to the issue of clemency *and provide[s] a final report* to the Clemency Board." (emphasis added); After an investigation is "concluded," FCOR prepares a "final report on their findings and conclusions[,]" which is sent to "all members of the Clemency Board within 120 days of the commencement of the investigation, unless the time period is extended by the Governor." Rule 15(D). "[A]ny member of the Clemency Board [may] request[] a hearing within 20 days of the transmittal of the final report to the Clemency Board." Rule 15(E).

Additionally, the interplay between Rule 15(B) and 15(C) is significant. Rule 15(B) lays out the minimum what FCOR's clemency investigations "shall include," which among other things involves notice to various parties and an interview at which clemency counsel may be present. Rule 15(C) discusses FCOR's monitoring of cases, and states: "Cases investigated under previous administrations may be reinvestigated at the Governor's discretion." Taken together, reasonable counsel's reading of these provisions would suggest that if a new administration will be reconsidering clemency conducted under a prior administration, clemency counsel would be informed.

Further, while clemency is an executive function, the Florida Legislature has statutorily prescribed that a death sentence cannot be carried out without first undertaking the "clemency process." Specifically, although the legislature empowered the Governor to initiate, with the signing of a warrant, the execution of a death-sentenced individual, the Governor is only permitted to issue such a warrant if "the executive clemency process *has concluded* . . . ." Fla. Stat. § 922.052(b), (c) (emphasis added). Indeed, the day Governor DeSantis signed Zack's warrant, FCOR sent a letter to clemency counsel stating: "A death warrant signed on August 17, 2023, concludes the clemency process." (Petition App. G).

Thus, Respondents' assertions that counsel should be on notice that the clemency process is "flexible" or can be granted after the signing of a death warrant (BIO 2-3, 25, 28), are contradicted by the governing law, rules, and communications. Indeed, a bedrock principle of due process is the right not just to notice, but also to be meaningfully heard. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'"). The lack of binding rules, or any rules for a situation such as Zack's, does not "invite flexibility" (BIO at 25), but rather fails to provide any process, much less due process, to submit clemency materials post-2014. Florida's clemency scheme fails to comport with the fundamental principles of due process.

Despite the design of Florida's clemency system, Respondents insist that Zack could have obtained access to the clemency process post-warrant and his failure to

seek further review, even though he was told that the death warrant concluded the clemency process, serves as a basis to deny certiorari (BIO at 11, 17, 18, 25). But Respondent fails to recognize that the first Zack heard that the clemency process remained "open", even after a warrant had been signed was when the State, in responding to his § 1983 complaint, made such a proclamation; that was on September 9, 2023, just over three weeks before his scheduled execution. *See Zack v. DeSantis, et al.*, Case No. 4:23-cv-392-RH (ECF No. 19 at 3, 6). There was simply no time, no resources, no guidance, no rules, and *no process* for such a review to occur. This Court has recognized that: "[a] fundamental requirement of due process is 'the opportunity to be heard.' *It is an opportunity which must be granted at a meaningful time and in a meaningful manner*." *Armstrong v Manzo*, 380 U.S. 545, 552 (1965) (citation omitted) (emphasis added). Respondent's reliance on an illusory representation that "clemency remains open" does not satisfy the minimal due process to which Zack is entitled.

In addition, while Respondents argue that it is simply speculative that a capital defendant's request for mercy will face greater hurdles after a warrant has already been signed (BIO at 29), in requesting denial of a stay, Respondents have repeatedly asserted that stays close in time to a scheduled execution are "the extreme exception, not the norm." *See, e.g.*, *Zack v. Governor of Fla.*, No. 23-13021, Doc. 7 at 7 (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019)). And, in the course of this litigation, Respondents have repeatedly denigrated Zack's assertions that his ID-equivalent condition (and, indeed, his clinical ID diagnosis) warrants the 'fail-safe' of

clemency. Their post-hoc suggestion that a rushed, unfunded, previously unconceptualized, and literally mailed-in clemency submission would be meaningfully considered after a warrant was signed—particularly in light of their August 17, 2023, letter indicating that the clemency process had concluded—rings hollow.

Additionally, Respondents' reliance and accusations of disingenuity about federal counsel's opportunity to submit updated materials are unfounded (BIO 17-18, 25). Specifically, *Bowles v. DeSantis*, 934 F.3d 1230 (11th Cir. 2019), does not stand for what Respondent asserts (BIO at 17-18). The three "invitations" for federal counsel to submit clemency materials alludes to the proceedings that occurred prior to the clemency interview and prior to clemency counsel's final submission. Further, they occurred as part of FCOR's routine practice of contacting prior counsel and court officials soliciting comments as part of the pre-interview clemency investigation. Thus, those "invitations" offered nothing more than counsel for Zack was offered approximately a decade ago.

The first "invitation" was a form letter on March 28, 2018—two days after clemency was initiated and over four months before the clemency interview. FCOR simply stated that as "postconviction counsel" CHU-N's former Chief could submit a comment "either supporting or opposing commutation of the death sentence."[3] (A May 7, 2018, follow-up email indicated that FCOR's report was due in "approximately one

[3] Undersigned counsel Linda McDermott, who was then Zack's CJA counsel, received a nearly identical solicitation (and accordingly submitted comments prior to his 2014 clemency proceeding).

month"). The second was a concluding sentence in the EOG's June 22, 2018, refusal of CHU-N's request to reschedule Bowles' clemency interview due to pending intellectual disability proceedings in state court: "You are welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration." The third was addressed to clemency counsel in FCOR's July 30, 2018, email refusing his joint request that CHU-N be permitted to attend the clemency interview. It simply said: "Any party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration."

The highly distinguishable circumstances in Bowles' case offered no notice to Zack's counsel that there was a mechanism for review of clemency-related materials (a) *after* the "final submission" from clemency counsel in 2014, and (b) *after* the signing of a death warrant. If anything, FCOR's representations in *Bowles* suggest that clemency submissions by past and current counsel are to be received *before* FCOR's preparation of a clemency report (which in Zack's case appears to have taken place in 2014). These circumstances certainly did not create an additional burden on counsel to affirmatively update clemency submissions in other warrant-eligible cases without any indication that clemency was being reconsidered.

Moreover, *Bowles* illustrates the problem with Respondents' argument that federal counsel could simply have provided materials for clemency counsel to submit in the near decade following 2014. First, counsel had no notice to do so, based on the Rules' timeline for submission of a final report and FCOR's representation in *Bowles* that its final report was due approximately three months after clemency was

initiated. In *Bowles*, as here, current federal counsel actively submitted information for consideration during the initial clemency proceedings, and actively sought to be involved in the process. The limits on counsel's provision of information in Zack's case have resulted only from a lack of notice and reasonable opportunity—both of which are attributable to Respondents.

D. Conclusion.

Although the clemency process is discretionary, it must still be meaningful. In Zack's case he was denied access at a critical time. The execution of an individual suffering from FAS is not in line with the purpose of the death penalty and principles of a civilized society. Executing the most vulnerable or, more precisely, refusing them access to an opportunity to request mercy, merely illustrates inhumanity.

Respectfully submitted,

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