

No. _____

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*

APPLICATION FOR STAY OF EXECUTION

***THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
TUESDAY, OCTOBER 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 Michael Duane Zack for **October 3, 2023, at 6:00 p.m.** Mr. Zack requests a stay of execution pending the consideration and disposition of the petition for a writ of certiorari that he is filing simultaneously with this application.

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 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; there must be a significant possibility of reversal of the lower court’s decision (here, the denial of Mr. Zack’s motion to stay his execution); and there must be a likelihood that irreparable harm will result if that decision is not stayed.” *Id.* (internal quotations omitted).

MR. ZACK SHOULD BE GRANTED A STAY OF EXECUTION

The underlying issue is sufficiently meritorious

The questions raised in Mr. Zack’s petition are sufficiently meritorious for a grant of certiorari. The underlying issue is whether the unenforceable, inconsistent and arbitrary rules governing Florida’s clemency procedures satisfy this Court’s mandate in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring)—particularly when those rules are subject to change without notice and the actual practices they govern are shrouded in secrecy. The petition thus presents a significant question of constitutional law and is not subject to any procedural impediments.

This Court has recognized that the importance of the clemency process in a capital case cannot be understated: “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)). This “fail safe” is necessary due to the “unalterable fact that our judicial system, like the human beings who administer it, is fallible.” *Herrera*, 506 U.S. at 415. It is “deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted.” *Id.* at 390; *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.”).

As explained in Mr. Zack’s underlying petition, at the time of his 2013-2014 clemency proceedings, scientific understanding of FAS and its relationship to intellectual disability—which was critical to a clemency determination—did not exist. Nearly a decade later, when that knowledge came into being, there was no longer a meaningful avenue to present it: no more state-allocated resources; no ability for his state postconviction or federal habeas counsel to act as clemency counsel; no opportunity for a clemency interview or hearing, despite the complete Clemency Board turnover; no notice that clemency considerations had resumed; no updates. Every mechanism contemplated by the governing rules had already been concluded.

Thus, Mr. Zack’s clemency proceedings deprived him of all meaningful opportunity to present—and thus failed to contemplate—the significant new scientific understanding of Mr. Zack’s disability, which places him in the category of persons exempt from execution. That restriction of meaningful access obviated the “fail safe” purpose of executive clemency. This is a due process violation that cannot

be tolerated. *See Ohio Adult Parole Authority, et. al v. Woodard*, 523 U.S. 272, 288-89 (1998). This Court now has the opportunity to enforce its holding in *Woodard*, and to ensure that death-sentenced individuals have meaningful access to the “fail safe” of clemency.

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

Should this Court grant Mr. Zack’s request for a stay and grant review of the underlying petition, there is a significant possibility of the lower court’s reversal. The Eleventh Circuit denied Mr. Zack’s motion to stay solely based upon their finding that he could not demonstrate a substantial likelihood of success on the merits of his due process claim under existing precedent. As Mr. Zack’s case presents a pristine opportunity for this Court to enforce its mandate in *Woodard* that clemency proceedings afford a level of due process, and because Mr. Zack’s claim is free of procedural impediments, there is a substantial likelihood that this Court will reverse the lower court’s denial of a stay.

This Court has repeatedly recognized clemency’s importance in the death penalty scheme. In *Woodard*, the legal underpinning—a violation of due process in clemency proceedings—was cognizable. Although the specific procedure at issue in *Woodard* was not held to violate due process, the Court only ruled after careful consideration of the clemency process and alleged deficiencies.

Mr. Zack, like *Woodard*, has identified several specific deficiencies in his clemency process. But unlike in *Woodard*, the deficiencies here deprived Mr. Zack of a meaningful process because the specific deficiencies in Zack’s case had the effect of

fully barring him from access to the clemency process as it pertained to the vital and previously unavailable knowledge that he must be exempted from execution. Such a system cannot be tolerated at the critical and last juncture of whether Mr. Zack lives or dies. As the denial of a stay deprives Mr. Zack of even the opportunity to fully litigate this important issue, and because Mr. Zack's petition makes out a cognizable claim for relief, there is a substantial likelihood that this Court, upon granting certiorari review, would reverse the lower court's denial of a stay to more fully litigate the due process issue.

Furthermore, Mr. Zack's claim is not subject to any procedural impediment. After clemency was denied and a death warrant was signed, Mr. Zack sought injunctive relief under 42 U.S.C. § 1983 based on the denial of due process that occurred with regard to his clemency proceedings. Both the district court and the Eleventh Circuit recognized that death-sentenced individuals have a limited right to due process during clemency proceedings, and that vindication of this right is proper in § 1983 proceedings. The denial of a stay in both courts rested solely on determinations that Mr. Zack did not have a substantial likelihood of success on the underlying merits of his claim.

Accordingly, this Court has the ability to address the substantial due process issue presented by Mr. Zack's petition, which is unencumbered by any procedural impediment.

Irreparable harm will occur absent a stay

The irreparable harm to Mr. Zack is clear: without a stay, he will be put to death. *Wainwright v. Booker*, 473 U.S. 935, 937 n.1 (1985) (Powell, J., concurring) (finding the requirement of irreparable harm as “necessarily present in capital cases”). Mr. Zack faces imminent execution, despite having no meaningful opportunity to access the clemency process as it pertains to presenting critical information that 1) was unavailable during his clemency interview and submission nearly a decade ago; and 2) is relevant to a determination of whether he deserves mercy. This is particularly impactful because Mr. Zack—by virtue of his disabilities—is among the class of persons categorically exempt from execution under the Eighth Amendment. Yet, he has been barred from review in the Florida courts due to strict procedural rules and rigid adherence to measurements that have been deemed “outmoded” by the scientific and medical community.

Additionally, public interest will be harmed absent a stay. Clemency has long been regarded as the “safeguard” of our death penalty system. *See, e.g., Herrera*, 506 U.S. at 411-12 (“Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”) Mr. Zack’s situation—in which compelling information warrants relief from his death sentence but has fallen through the cracks of the legal system due to a technicality—epitomizes the potential miscarriage of justice that clemency is designed to address. The public and judiciary have a heightened interest in ensuring that the unfairness of Mr. Zack’s death sentence was adequately

addressed in clemency. As the long-held maxim goes, death is different. *See Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (“[D]eath is a punishment different from all other sanctions in kind rather than degree.”). The public interest is best served by ensuring that the State of Florida maintains clemency’s important safeguard function, and all death-sentenced individuals have meaningful access, in line with their federal rights, to that safeguard.

CONCLUSION

The Court should stay Mr. Zack’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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