No. 23A276
CAPITAL CASE

EXECUTION SCHEDULED FOR
TUESDAY, OCTOBER 3, 2023, AT 6:00 P.M.

In the
Supreme Court of the United States

MICHAEL DUANE ZACK, III

Petitioner,

v.

GOVERNOR OF FLORIDA, et. al.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

On September 28, 2023, Zack, represented by the Capital Habeas Unit of the Office of the Federal Defender of the Northern District of Florida (CHU–N), filed, in this Court, a petition for writ of certiorari seeking review of a decision from the Eleventh Circuit Court of Appeals denying a stay of execution in this active warrant case. *Zack v. State*, No. 23-13021 (11th Cir. Sept. 26, 2023) (unpublished). The petition raised three issues: (1) whether the minimal due process required of state clemency proceedings mandates a state's clemency rules be binding and enforceable; (2) whether

the minimal due process required of state clemency proceedings mandates the state's clemency rules explicitly provide for additional notice of clemency consideration by the current clemency officials and also provide for the means to provide updates to clemency materials after the clemency interview; and (3) whether a court may accept a factual assertion by clemency officials that clemency remained open, unrebutted by the actions of the capital defendant, when deciding the equitable remedy of a motion to stay an execution. CHU–N also filed an application for a stay of the execution in this Court. Zack is seeking a stay of execution for this Court to decide his pending petition for writ of certiorari. This Court, however, should simply deny the petition and then deny the stay.

Procedural history

On September 5, 2023, Zack, represented by his federal habeas counsel, CHU-N, filed a 42 U.S.C. § 1983 action in federal district court raising a claim that the Governor and the Clemency Board violated the minimal due process required of state clemency proceedings. *Zack v. DeSantis*, 4:23cv392-RH (N.D. Fla). He asserted he had a right to additional notice that clemency was being considered by the current administration and that he had a right to be heard by the current members of the Clemency Board regarding developments in research about his diagnosis of Fetal Alcohol Syndrome ("FAS") that occurred after his clemency interview in 2014. Zack also filed a motion to stay the execution in the district court. The Defendants filed a motion to dismiss for failure to state a claim or for judgment on the pleadings. The

Defendants also filed a response to the motion to stay. The federal district court did not rule on the motion to dismiss but denied the motion to stay. On September 15, 2023, the district court, while noting that the State's clemency officials asserted that clemency remained open for updates, denied the stay without accepting the assertion. (Doc. #25).

Zack appealed the denial of his motion to stay to the Eleventh Circuit. Zack also filed a motion for a stay of execution pending his appeal in the appellate court. On September 26, 2023, the Eleventh Circuit denied the stay in an unpublished order. *Zack v. State*, No. 23-13021 (11th Cir. Sept. 26, 2023). The Eleventh Circuit stated that to obtain a stay, Zack had to establish four factors: (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public interest. *Id.* slip op. at 8 (citing *Barwick v. Governor of Florida*, 66 F.4th 896 (11th Cir. 2023) (quoting *Bowles v. Desantis*, 934 F.3d 1230, 1238 (11th Cir. 2019)), *cert. denied*, *Barwick v. Desantis*, 143 S.Ct. 2452 (2023) (Nos. 22-7412; 22A949). The Eleventh Circuit observed that Zack must satisfy all four factors to be granted a stay. The Eleventh Circuit denied the stay based on the first factor alone finding Zack did not have a substantial likelihood of success on the merits of his clemency claim. *Id.* slip op. at 16, n.1. The Eleventh Circuit accepted the factual assertion that any clemency material submitted by CHU-N would be accepted by the Office of Executive Clemency including after the warrant was signed but the Court also relied on the fact that there was no Florida rule of clemency

prohibiting further written submissions. *Id.* slip op. at 13-14.

Stays of execution

Stays of executions are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584. There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Equity must also consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). This Court has highlighted the State's and the victims' interest in the timely enforcement of the death sentence. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133-34 (2019). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Bucklew*, 139 S.Ct. at 1134. The Court stated that courts should "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Id.* at 1134. The *Bucklew* Court noted that the § 1983 action in the end, was little "more than an attack on settled precedent" *Id.* (which is particularly apt of this litigation). This Court has also stated that last-minute stays of execution should be the "extreme exception, not

the norm." *Id.*

Under this Court's caselaw, Zack must first establish that he did not delay in bringing his § 1983 action. CHU-N has been Zack's federal habeas counsel since February of 2020. *Zack v. McNeil*, 3:05-cv-00369-RH (N.D. Fla – Doc. #78). And once the warrant was signed, CHU-N waited nearly 20 days to file the § 1983 action in the federal district court. CHU-N is not a sole practitioner or a small two attorney law firm. CHU-N is staffed with numerous experienced attorneys who specialize in capital litigation only as well as investigators and support staff. Nor was CHU-N busy with the warrant litigation in state court all of which was handled by Zack's two state postconviction attorneys from Capital Collateral Regional Counsel - North (CCRC-N). Given CHU-N's resources and singular focus on litigating one federal court suit, the § 1983 action should have been filed earlier.

Furthermore, CHU-N's refusal to submit the new clemency materials to the Office of Executive Clemency is a form of manipulation. They are attempting to create an issue rather than genuinely seeking clemency review.

Stay standard

To be granted a stay of execution, Zack must establish three factors: (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal if review was granted; ***and*** (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (emphasis added). Zack must establish all three factors.

Probability of this Court granting certiorari

As to the first factor, there is little chance that four justices of this Court would vote to grant certiorari review of any of the three questions presented in the petition. This Court grants petitions for writ of certiorari "only for compelling reasons." Sup. Ct. R. 10.

There is no conflict between this Court's jurisprudence regarding the minimal due process standard required of state clemency proceedings and the Eleventh Circuit's conclusion that there was not a substantial likelihood of success on the merits of his clemency claims.

This Court, in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), held that there was no violation of minimal due process in Ohio's clemency proceedings, despite Woodard only being given a few days notice of the clemency hearing and his not being permitted to testify or submit documents at the clemency hearing and his clemency counsel being excluded from the clemency interview. The concurring opinion established the standard that death-row inmates have *minimal* due process rights in state clemency proceedings. *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring) (emphasis in original). Justice O'Connor in her concurring opinion gave two examples of situations that would violate minimal due process: (1) a State arbitrarily denying a prisoner any access to clemency; or (2) a state official flipped a coin to determine whether to grant clemency. *Id.* at 289. The concurrence concluded that notice of the clemency hearing and an opportunity to participate in the clemency interview was sufficient to satisfy minimal due process.

This Court recently denied review of a petition raising a similar question regarding Florida's clemency process being "standardless" in the active warrant case of *Barwick v. DeSantis*, 143 S.Ct. 2452 (2023) (Nos. 22-7412; 22A949).

Nor does the Eleventh Circuit's denial of a stay in this case conflict with any other circuit's decision. The Eleventh Circuit has held that state clemency proceedings "without tangible standards" were not akin to the "truly outrageous" examples given by Justice O'Connor, in *Woodard*, of the total denial of access to clemency or flipping a coin. *Barwick v. Governor of Florida*, 66 F.4th 896, 903 (11th Cir. 2023), *cert. denied*, *Barwick v. DeSantis*, 143 S.Ct. 2452 (2023). A "state is not required to provide a detailed set of criteria for clemency. *Id.* at 904. And, in *Gissendaner v. Comm'r, Ga Dep't of Corr.*, 794 F.3d 1327 (11th Cir. 2015), the Eleventh Circuit held that outside of "extreme situations," the federal Due Process Clause does not justify judicial intervention into state clemency proceedings." *Id.* at 1331 (citing *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999)). The Eleventh Circuit reasoned that the process Gissendaner received was at least equal to the process in *Woodard* because she was given notice of the hearing, allowed to present witnesses, and to submit written statements in support of clemency. That process, the Eleventh Circuit concluded, was "enough" to satisfy the minimal due process of *Woodard*. *Id.* at 1331. And, in *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013), the Eleventh Circuit rejected a claim that minimal due process required a second clemency proceeding because decades had passed since the first clemency proceeding. The Governor of Florida conducted a full clemency hearing in 1985. *Id.* at 1316. Nearly

three decades later, in 2012, a different Governor signed a death warrant for Mann without conducting a second full clemency proceeding. The Governor had, however, conducted an updated clemency investigation before signing the warrant. Mann argued he was denied notice of, and the opportunity to be heard during the update, as well as being denied clemency counsel during the update process as a consequence of the lack of notice. The Eleventh Circuit concluded that Mann could not "show any violation of his due process rights in the clemency proceedings." *Id.* at 1316. The Eleventh Circuit determined that the process he received, including notice of the hearing and an opportunity to participate in the state clemency proceedings comported with "whatever limitations the Due Process Clause may impose on clemency proceedings." *Id.* at 1316-17 (citing *Woodard*, 523 U.S. at 290).

The Eleventh Circuit's decision in this case finding that Zack did not have a significant possibility of success on the merits of his clemency claims follows their precedent. CHU-N cited no federal circuit cases holding to the contrary in their petition and thus, failed to establish any conflict among the federal appellate courts regarding minimal due process and state clemency rules. Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). CHU-N certainly did not cite any published opinion from any circuit court or state court of last resort in their petition holding a state's clemency rules must be binding or contain details about new clemency material or that an appellate court may not accept a factual assertion in deciding the equitable remedy of a motion to stay. As this Court has observed, a principal purpose for certiorari

jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Issues that have not divided the courts do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). Opposing counsel has not even attempted to establish conflict with this Court or among the lower appellate courts regarding any of the three questions presented and therefore, this Court is highly unlikely to grant the petition.

Instead, opposing counsel argues that this Court should ignore its normal standards for granting review due to clemency's role as a fail-safe. But that argument would apply equally to any petition raising any clemency issue. Surely, counsel is not advocating that this Court automatically grant review of every clemency question in any petition. Furthermore, clemency acts as a fail-safe for claims of innocence. But Zack has no viable claim of innocence in light of his confession, his fingerprints on the victim's stolen property and the DNA evidence. Nor does Zack have a viable claim of innocence of the death penalty, assuming that clemency's role as a fail safe extends to claims of innocence of the penalty. Clemency would not be operating as a fail-safe in in this case but as an alternative forum for Zack to raise his Fetal Alcohol Syndrome for the fourth time (first, in front of the jury and the penalty phase judge, second, in the Rule 3.203 motion filed in 2004 and the appeal to the Florida Supreme Court, and third, in the current warrant litigation in the state courts). In his latest round of state court litigation, while the Florida Supreme Court rejected the claim to expand *Atkins* to include a diagnosis of FAS on procedural grounds, the Florida Supreme Court also

rejected that claim on the merits. When courts rejects a claim on the merits, clemency is not operating as a fail-safe but merely as an alternative forum. While Florida's clemency officials would consider his new information regarding FAS, it is not proper to invoke the fail-safe aspect of clemency in this case and certainly not a reason for this Court to grant the petition. Contrary to opposing counsel's argument, the public interest is anything but served by granting a stay of the execution so Zack can have a second clemency proceeding.

The State's brief in opposition, which is being filed simultaneously with the State's response to the motion to stay, contains a detailed explanation of why this Court should deny review of the three questions presented in the petition. There is little probability that the Court would vote to grant certiorari review of the three questions presented in the petition. Zack fails the first factor, which is alone sufficient to deny the motion for a stay.

Significant possibility of reversal

As to the second factor, there is not a significant possibility of reversal on the merits of any of the three questions presented. There is no real possibility of this Court deciding that Florida's clemency rules violate minimal due process or that an appellate court relying, in part, on a factual assertion to deny an equitable stay is reversible error, especially when the district court also denied a stay without any such reliance.

It is highly doubtful that the minimal due process of *Woodard* even requires that a state have *any* clemency rules, much less that a state's clemency rules provide

additional notice or detail how, when, and by whom, new clemency material may be submitted to the state's clemency officials. And there is no indiction in any of this Court's caselaw regarding state clemency, since *Woodard* was decided in 1998, that this Court would expand the due process required of state clemency proceedings beyond the current minimal due process standard. This Court's most recent statements regarding clemency contain no hint of seeking to expand *Woodard*. *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) (observing that clemency is "a prerogative granted to executive authorities" but it is not for the Judicial Branch to determine the standards for discretion in clemency and if the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention). This Court has never found a state's clemency process violated the minimal due process standard. *Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013) ("The Supreme Court has never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process."). This § 1983 action is nothing "more than an attack on settled precedent" of *Woodard*. *Bucklew*, 139 S.Ct. at 1134.

Nor is it at all clear that additional notice and detailed, binding, enforceable rules of clemency would be required even under a *full* due process standard. It is not considered inherent in the concept of due process that a board or committee have detailed rules covering every contingency or even common contingencies. Due process requires notice and opportunity to be heard, not a particular set of rules.

It is also doubtful that an appellate court cannot accept a factual assertion by the clemency defendants that they will consider new clemency material in a § 1983

action, that was unrebutted by any action by CHU-N, such as actually attempting to submit their additional clemency material to the Office of Executive Clemency. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (stating, in a federal § 1983 action, it "is difficult to criticize the State's procedures when Osborne has not invoked them" and "without trying them, Osborne can hardly complain that they do not work in practice."). The Eleventh Circuit has a published opinion noting that CHU-N has been informed in the past by this same clemency administration in another capital case that they may submit written materials to clemency officials. *Bowles v. DeSantis*, 934 F.3d 1230, 1233, 1236-37 (11th Cir. 2019). Indeed, CHU-N was invited three times to submit any clemency material it wished by Florida's current clemency officials during the Bowles clemency proceedings. *Id.* at 1237-38, 1246. Because a stay is an equitable remedy, courts have greater leeway in what they may consider including alternative remedies not pursued by the party requesting the equitable relief. And it is doubtful this Court would reverse the denial of a stay by an appellate court for relying in part on a factual assertion, when the district court also denied a stay but explicitly did not rely on that factual assertion.

There is not a significant possibility of reversal on the merits regarding any of the questions. So, Zack fails the second factor as well.

Irreparable injury

As to the third factor of irreparable injury, it is often viewed as a given in a capital case that an execution will cause irreparable harm but the harm is the inherent

nature of a death sentence. For that reason, this truism by itself is not a critical factor in consideration of a stay of execution. The factors for granting a stay due to a petition pending in this Court are taken from the standard for granting a stay for normal civil litigation. *Barefoot*, 463 U.S. at 895-96 (citing *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell. J., in chambers). But *Times-Picayune Publishing* was a First Amendment prior restraint case seeking a stay for this Court to review a lower court's order restricting media coverage of a racially-charged, highly-publicized rape and murder trial. This factor is not a natural fit in a capital case. Because actual finality of the sentence in a capital case is the execution, there must be more than the execution itself to establish this factor in an active warrant capital case.

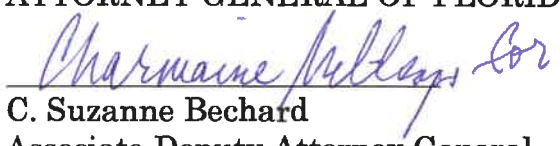
But Zack does not provide any special argument in support of this factor. Instead, Zack's argument consists largely of boilerplate language applicable to all capital cases with an active warrant. Application for stay at 6 (quoting *Wainwright v. Booker*, 473 U.S. 935, 937 n.1 (1985) (Powell, J., concurring)). Because Zack points to no particular arguments in support of this factor, he fails the third factor too.

But even assuming the third factor as a given, Zack does not meet the other two factors for being granted a stay of execution. Zack fails at least two of the three factors when he must establish all three factors and, therefore, the motion for a stay of the execution should be denied.

Accordingly, the application for stay of execution should be denied.

Respectfully submitted,

ASHLEY MOODY,
ATTORNEY GENERAL OF FLORIDA



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