No. 23A276

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 RESPONSE TO 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:

Respondents' position that this Court should deny Mr. Zack a stay of execution is premised upon an interpretation of facts not supported by the record and a distortion of Mr. Zack's claim and the applicable law. Mr. Zack submits that he has shown that a stay of his execution is appropriate.

Respondents assert that "the State and victims of crime have an important interest in the timely enforcement of a sentence" and that Mr. Zack "must first establish that he did not delay in bringing his § 1983 action." Response to Application for Stay of Execution at 5 (Response). Mr. Zack, and undersigned counsel, are accused of manipulation and delay because "CHU-N waited nearly 20 days to file the § 1983 action." *Id.* First, neither court below has found Mr. Zack's § 1983 action to be dilatory. Second, Mr. Zack has been warrant-eligible for almost a decade. It is the Respondents, not Mr. Zack, who waited nearly ten years to seek to enforce his sentence. Respondents cannot now accuse Mr. Zack of manipulation for seeking to protect his constitutional rights.

Respondents also accuse CHU-N of manipulation and "attempting to create an issue rather than genuinely seeking clemency review" for its "refusal to submit" the new Fetal Alcohol Syndrome (FAS) materials. *Id.* However, what Respondents fail to acknowledge is that their first representation to Mr. Zack that he could submit supplemental clemency materials post-warrant, and that they would be given meaningful consideration, came only after Mr. Zack filed his § 1983 action and motion for a stay. As Mr. Zack has pointed out below, there is no established process to facilitate a comprehensive post-warrant clemency submission and review. Any suggestion that Mr. Zack's constitutional challenge is manipulative or an effort at gamesmanship is unfounded. Indeed, throughout the course of Mr. Zack's § 1983 litigation, Respondents have repeatedly relied on the Rules of Executive Clemency to suggest that Mr. Zack may submit materials at any time but then quickly emphasize

that the rules are "non-binding." *Zack v. DeSantis, et al.*, Case No. 4:23-cv-392-RH, ECF 18 at 2, ECF 19 at 3*; Zack v. Governor of Fla.*, No. 23-13021, Doc. 7 at 8. This acknowledgement supports Mr. Zack's challenge that he was not afforded even minimal due process because there is quite simply no process at all. Further, putting forth a set of rules and then indicating that they may be changed at any time is the very definition of manipulation.

Standards for Granting a Stay

Respondents incorrectly state the factors that Mr. Zack must establish 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).

Probability of granting certiorari

Respondents assert that Mr. Zack failed to establish that four members of the Court would vote to grant certiorari on any of his three questions presented. Response at 6. This is because, according to Respondent, the "Eleventh Circuit's decision . . . follows their precedent" and Mr. Zack "failed to establish any conflict among the federal appellate courts [or this Court] regarding minimal due process and state

clemency rules". *Id.* at 8 (citing Sup. Ct. R. 10(b)). However, Respondents' interpretation of Rule 10 is too narrow. This Court can exercise its judicial discretion and grant certiorari for any reason that it finds compelling, and that discretion is neither controlled nor fully measured by the specific reasons identified in this Court's Rules. *See* Sup. Ct. R. 10.

Contrary to the Respondents' assertion, 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 defects found not to violate due process in *Woodard* were discrete issues related to the internal structuring of a clemency hearing, as opposed to the complete lack of access to a meaningful process that Mr. Zack has suffered. *Woodard*, 523 U.S. at 289. The petition thus presents a significant, compelling question of constitutional law and demonstrates a violation of the principles set forth in *Woodard*.

Respondents' reliance on *Barwick* to urge this Court to deny Mr. Zack the stay that he seeks is misplaced. *Barwick v. Florida*, 143 S. Ct. 2452 (2023); Response at 7. The issue in *Barwick* concerned the fact that Florida's clemency scheme provides no standards as to what information will be considered in determining whether mercy is warranted. Whereas here, the issue in Mr. Zack's § 1983 action concerns a complete

lack of access to a meaningful process. Thus, although each § 1983 action related to Florida's clemency process, *Barwick* is not dispositive of the questions that Mr. Zack has presented to this Court.

Also misplaced is Respondents' reliance on *Gissendaner* and *Mann*. Mr. Zack's claim, unlike that in *Gissendaner*, neither revolves around a violation of state (as opposed to federal constitutional) law, nor does it arise out of nearly identical facts to those upon which this Court had already foreclosed relief. *Gissendaner* v. *Comm'r, Ga. Dep't of Corr.*, 794, F.3d 1327, 1332 (11th Cir. 2015) (citing *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014)). Further, the circumstances in *Mann* significantly differ from this case. *Mann v. Palmer*, 713 F.3d 1306 (11th Cir. 2013). Mann alleged a due process violation because (1) he was arbitrarily denied access to the clemency process that occurred shortly before his 2013 warrant was signed and (2) his appointed state counsel was precluded from representing him in clemency. *Id.* at 1310. Unlike Zack, Mann cited no information that was not considered in his prior clemency proceedings. Furthermore, in *Mann*, but not here, a subsequent clemency process did occur.[1] *Id.* Mr. Zack's claim is unique, constitutional in nature, and not premised upon similar circumstances already found to provide sufficient due process.

As explained in Mr. Zack's underlying petition, the medical community now recognizes FAS as identical to intellectual disability (ID) in both nature and severity.

[1] In the district court, Respondents claimed an updated clemency process occurred in Mr. Zack's case; however, there is no evidence and there was no notice of this. Case No. 4:23-cv-392-RH, ECF 18 at 12.

(*See generally*, Appendix to Petition for a Writ of Certiorari (hereinafter, App. B and C)). The ID-equivalence of FAS is so ubiquitous that Mr. Zack *has a clinical diagnosis of intellectual disability* (App. D at 11). This critical information did not exist at the time of the clemency proceeding. Nearly a decade later, the scientific knowledge exists and would be a compelling aspect to determinations of mercy—but Mr. Zack's death warrant was signed without providing any meaningful opportunity to present this new information via the clemency process. Every mechanism contemplated by the governing rules had already been concluded.

The significant new scientific understanding of Mr. Zack's disability places him in the *category of persons exempt from execution*. Respondents improperly assert that "clemency acts as a fail-safe for claims of innocence" and they question whether "clemency's role as a fail safe extends to claims of innocence of the [death] penalty."[2]

[2] There are many examples of clemency being used to correct injustices not relating to innocence. *See* Clemency, Death Penalty Information Center, *available at* https://deathpenaltyinfo.org/facts-and-research/clemency (last visited October 1, 2023). A few examples of a state using its clemency power to correct procedural or other unfairness include: Governor Richard Celeste of Ohio, who selected eight death row inmates for clemency based on factors such as mental health and intellectual disability; Virginia Governor Terry McAuliffe, who in 2017 granted clemency to death-sentenced inmate William Burns due to his pervasive mental illness and incompetence; Ohio Governor John Kasich, who in 2018 granted clemency to death-sentenced Raymond Tibbetts on the basis of his powerful mitigation and "fundamental flaws in the sentencing phase of his trial" that prevented his jury from "making an informed decision about whether Tibbetts deserved the death penalty."; Texas Governor Greg Abbott, who commuted Thomas Whitaker's death sentence due in part to proportionality concerns, since the triggerman had not received the death penalty; and Kentucky Governor Matt Bevin, who in 2019 commuted Leif Halvorsen's death sentences, stating simply that "Leif has a powerful voice that needs to be heard by more people."

Response at 9. Mr. Zack has not asserted that he is innocent, nor has he asserted that he is innocent of the death penalty. Rather, because he has ID, he is categorically exempt from the death penalty.

Respondents also overstate the significance of the Florida Supreme Court's merits determination regarding Mr. Zack's categorical exemption claim. *See* Response at 9-10; *see also, Atkins v. Virginia*, 536 U.S. 304 (2002). The court held that it "lacks the authority to extend *Atkins* to individuals who 'are not intellectually disabled **as provided in *Atkins***.'" *Zack v. State*, No. SC2023-1233, 2023 Fla. LEXIS 1449 *24 (Sep. 21, 2023) (emphasis added). The court went on to explain that it "must interpret Florida's prohibition against cruel and unusual punishment in conformity with the decisions of [this Court] under the conformity clause in article I, section 17 of the Florida Constitution." *Id.* But finding that Florida law prohibits providing *Atkins* protections to Mr. Zack (presumably because his IQ score falls slightly above the 70-75 cutoff discussed in *Atkins* and *Hall*) is not the same thing as finding that Mr. Zack does not properly have a medical diagnosis of intellectual disability, or that he does not suffer from the same deficits as in intellectual disability. Clemency, then, would certainly operate as a fail safe in Mr. Zack's case, because his situation is exactly what clemency is designed to address: a compelling issue warranting relief from a death sentence, but which has fallen through the cracks of prior review due to legal technicalities.

Clemency exists to correct what a court cannot, or will not, correct. The failure to provide Mr. Zack meaningful access obviated the "fail safe" purpose of executive

clemency. *See Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)) ("Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'"). This is a due process violation that cannot be tolerated. *See Woodard*, 523 U.S. at 288-89. Mr. Zack has put forth compelling reasons for this Court to exercise its judicial discretion and grant certiorari.

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

Respondents also argue that there is no significant possibility that Mr. Zack would achieve a reversal on the merits of his claim. Response at 10. They assert that it "is highly doubtful that the minimal due process of *Woodard* even requires that a state have *any* clemency rules." *Id.* at 10-11. Respondents seemingly are unsure of whether *Woodard* requires any clemency rules and ostensibly take the position that it does not. This is the precise issue that Mr. Zack has presented to this Court for review.

Respondents' position that Mr. Zack's § 1983 action is "nothing 'more than an attack on settled precedent' of *Woodard*" tethers itself to a misguided interpretation of Mr. Zack's claim. *Id.* at 11. Specifically, Respondents misconstrue Mr. Zack's claim and assert that "there is no indication in any of this Court's caselaw regarding state clemency . . . that this Court would expand the due process required of state clemency proceedings beyond the current minimal due process standard" established in *Woodard*. *Id.* at 11. But Respondents' assertion that Mr. Zack seeks a "particular set of rules" is a distortion of his claim. *Id.* Mr. Zack does not seek to expand *Woodard,*

nor does he seek a particular set of rules. Mr. Zack simply seeks access to the protections guaranteed to him by *Woodard*: notice and an opportunity to be heard. As Mr. Zack has demonstrated throughout the course of his § 1983 litigation, he has been denied these constitutionally mandated protections.

Also disingenuous is Respondents' reliance on *Bowles* and their assertion that Mr. Zack has offered no rebuttal to their representation that they would give meaningful consideration to new materials submitted, post-warrant, to the Office of Executive Clemency. *Id.* at 11-12; *see also*, *Bowles v. DeSantis*, 934 F3d. 1230 (11th Cir. 2019).

First, *Bowles* is inapposite. The facts surrounding the "invitations" for CHU-N to submit materials on behalf of Bowles have no bearing on the circumstances here. The circumstances in Bowles' case are highly distinguishable, and offered no notice to CHU-N that there was a mechanism for review of clemency-related materials (1) *after* the "final submission" from clemency counsel in 2014, and (2) *after* the signing of a death warrant. If anything, Florida Commission on Offender Review's (FCOR) representations in *Bowles* suggest that clemency submissions by past and current counsel are to be received *before* FCOR's preparation of a clemency report. Not post-warrant. These circumstances certainly did not create an additional burden for counsel to affirmatively update clemency submissions in other warrant-eligible cases without any indication from Respondents that clemency was being reconsidered.

Additionally, the legal relevance of Respondents' "invitations" was completely different in *Bowles* than in Mr. Zack's case. The cause of action in *Bowles* did not

center around an allegation that due process had been violated, that Bowles had been functionally deprived of all meaningful access to the clemency process, or that his clemency decision-makers were broadly unaware of new scientific developments critical to a determination of mercy. Rather, Bowles' claim was that his federal statutory rights under 18 U.S.C. § 3599 had been violated by CHU-N's exclusion from his clemency interview. Thus, CHU-N's invitation to contemporaneously submit clemency materials during the initial review—an invitation routinely extended to prior and current counsel for a prisoner undergoing clemency proceedings—was a significantly fuller remedy than the post-hoc "invitation" extended in response to Mr. Zack's post-death warrant litigation. Additionally, less than one year elapsed between Bowles' clemency interview, counsel's submissions on his behalf, and the signing of Bowles' death warrant. His clemency proceedings contained information regarding his intellectual disability. Mr. Zack's clemency interview and submissions by counsel, on the other hand, took place nearly a decade before the signing of his death warrant. In the ensuing years, scientific understanding vastly evolved as it pertained to FAS and its equivalence to intellectual disability. Thus, unlike in *Bowles*, Mr. Zack's clemency submission was stale and missing critical information at the time his death warrant was signed. Respondents' reliance on *Bowles* is misplaced.

Second, Mr. Zack has offered rebuttal to Respondents' representation that he is able to provide supplemental clemency material and that those materials would be given meaningful review. This representation is unsupported and contradicted by the Rules of Executive Clemency and Respondents' recent communication to Mr. Zack's

clemency counsel indicating that "**A death warrant signed on August 17, 2023, concludes the clemency process.**" S*ee also*, Fla. Stat. § 922.052(b), (c). The lower courts' reliance on Respondents' representation also overlooks basic facts: clemency counsel has long since expended the single budgetary allotment provided to represent Mr. Zack.[3] Since 2014, no resources have been available to clemency counsel to continue representing Mr. Zack.

Furthermore, as here, information that surfaces after the submission of clemency materials will likely relate to substantive litigation in the criminal case, with which clemency counsel is uninvolved. Thus, the structure of Florida's system divides Mr. Zack's representation. Indeed, Mr. Zack's state court counsel is statutorily prohibited from clemency representation, Fla. Stat. § 27.711(11), and FCOR has made clear that federal counsel's role is limited to their discretion. *Bowles*, 934 F.3d at 1236, 1245-46. This division, along with the funding restrictions and limitations on representation, illustrates a critical flaw in Respondents' declaration that clemency remains open to Mr. Zack.

Additionally, clemency counsel had no reason to believe he was authorized or obligated to submit supplemental materials. No rule authorizes such a submission. Rather, the Rules instruct that the clemency submission and interview precede a **final** report submitted to the Clemency Board. At that point, a twenty-day timeframe is provided for a member of the Board to request a hearing. The rules plainly create

[3] Under the current contract between FCOR and clemency counsel, 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.

a process that does not provide any opportunity for counsel to submit updated materials.

Even if Mr. Zack could submit materials after the signing of his death warrant, the notion that clemency counsel could adequately prepare a submission that would receive meaningful review ignores two facts: no attorney representing Mr. Zack had notice that an execution date would be scheduled; and a post-warrant clemency application certainly will encounter a greater burden of review as to the standard for granting clemency than one would pre-warrant. These circumstances, especially during a short warrant period, create an unrealistic scenario for a clemency consideration that complies with even minimal due process.

Respondents' vague, unsupported assertions that Mr. Zack may submit any materials he wishes at any time prior to the date of his execution, do not remedy the lack of notice and pre-warrant exclusion from a meaningful clemency process. In the course of this litigation, Respondents have repeatedly denigrated Mr. 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 at this juncture—particularly in light of their August 17, 2023, letter indicating that the clemency process had concluded—rings hollow.

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. 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. Accordingly, this Court has the ability to address the substantial due process violation presented by Mr. Zack's petition, which is unencumbered by any procedural impediment. There is a substantial likelihood that this Court will reverse the lower court's denial of a stay.

Irreparable harm will occur absent a stay

As to whether Zack would suffer irreparable harm absent a stay, Respondents argue that "[b]ecause 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." Response at 13. However, 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's imminent execution, having been denied access to a meaningful opportunity to demonstrate that he deserved mercy, certainly establishes this factor.

Conclusion

Although the clemency process is discretionary, it must still be meaningful. A stay is necessary to allow this Court to answer the constitutionally important

questions presented. This Court should grant a stay of Mr. Zack's execution and grant a writ of certiorari to review the decision below.

Respectfully submitted,

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