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

PETITION FOR A WRIT OF CERTIORARI

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

LINDA McDERMOTT
Counsel of Record
JESSICA HOUSTON
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
linda_mcdermott@fd.org
jessica_houston@fd.org

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the right to minimal Due Process required in clemency proceedings is satisfied when the governing rules are unenforceable, subject to change without notice, and fail to notify a capital defendant of the procedures he may use in order to obtain meaningful access to the proceeding.

2. Whether, in the clemency context, if a State determines that clemency will be considered in a capital case, Due Process requires that the State devise a process that is unambiguous and clear in notifying a defendant as to rules for obtaining meaningful review.

3. In evaluating whether a clemency scheme violates due process, may a court rely on the discretionary nature of executive clemency power to accept a governor's factual assertions as true when they are disputed, shrouded in secrecy, and contradicted by the existing record?

PARTIES TO THE PROCEEDINGS

Petitioner Michael Duane Zack, a death-sentenced Florida prisoner scheduled for execution on October 3, 2023, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Florida State officials responsible for Mr. Zack's executive clemency proceedings at the time his warrant was signed, were the appellees in that court.

RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Proceedings Under 42 U.S.C. § 1983:
District Court for the Northern District of Florida
Zack v. DeSantis, et al., No. 4:23-cv-392-RH
Judgment Entered: September 15, 2023 (denying motion for stay of execution)

Eleventh Circuit Court of Appeals No. 23-13021
Zack v. DeSantis, *et al.*, No. 23-13021
Judgment Entered: September 26, 2023 (denying motion for stay of execution)

Underlying Criminal Trial:
Circuit Court of Escambia County, Florida
State of Florida v. Michael Duane Zack, Case No. 1996 CF 2517
Judgment Entered: November 24, 1997

Direct Appeal:
Florida Supreme Court (No. SC1960-92089)
Michael Duane Zack v. State, 753 So. 2d 9 (Fla. 2000)
Judgment Entered: January 6, 2000 (affirming conviction and sentence)
Rehearing Denied: March 20, 2000

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 99-10062)
Michael Duane Zack v. Florida, 531 U.S. 858 (2000)
Judgment Entered: October 2, 2000

Initial Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996 CF 2517
Judgment Entered: July 15, 2003 (denying motion for postconviction relief)

Florida Supreme Court (Nos. SC03-1374; SC04-201)
Zack v. State, 911 So. 2d 1190 (Fla. 2005)
Judgment Entered: July 7, 2005 (affirming denial of postconviction relief and denying petition for habeas corpus)
Rehearing Denied: September 16, 2005

Federal Habeas Proceedings:
District Court for the Northern District of Florida (No. 3:05-cv-369-RH)

Zack v. Crosby, 607 F. Supp. 2d 1291 (N.D. Fla. 2008)
Judgment Entered: November 17, 2008 (dismissing all but one claim as untimely)
Judgment Entered: March 26, 2009 (denying timely *Atkins* claim)

Eleventh Circuit Court of Appeals
Zack v. Tucker, 666 F.3d 1265 (11th Cir. 2012)
Judgment entered: January 9, 2012 (vacating District Court's decision and remanding)
Zack v. Tucker, 678 F.3d 1203 (11th Cir. 2012)
Order entered: April 30, 2012 (vacating panel judgment and granting en banc rehearing)
Zack v. Tucker, 704 F.3d 917 (11th Cir. 2013)
Judgment Entered: January 9, 2013 (overruling prior circuit precedent and affirming denial of habeas petition)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 12-10693)
Zack v. Crews, 571 U.S. 863 (2013)
Judgment Entered: October 7, 2013

District Court for the Northern District of Florida
Zack v. Secretary, Dep't of Corrs., (No. 3:05-cv-369-RH)
Judgment Entered: September 4, 2014 (denying Rule 60(b) motion)

Eleventh Circuit Court of Appeals
Zack v. Secretary, Dep't of Corrs., 721 Fed. Appx. 918 (11th Cir. 2018)
Judgment Entered: January 12, 2018 (affirming denial of Rule 60(b) motion)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 17-9549)
Zack v. Jones, 139 S. Ct. 322 (2018)
Judgment Entered: October 9, 2018

First Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996 CF 2517
Judgment Entered: January 13, 2005 (dismissing motion for postconviction relief)

Florida Supreme Court (No. SC05-963)
Zack v. State, 982 So. 2d 1179 (Fla. 2007)
Judgment Entered: September 20, 2007 (denying appeal)
Rehearing Denied: May 1, 2008

State Habeas:
Florida Supreme Court (No. SC05-378)
Zack v. Crosby, 918 So. 2d 240 (Fla. 2005)
Judgment Entered: October 6, 2005 (denying petition for habeas corpus)
Rehearing Denied: December 22, 2005

Second Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996 CF 2517
Judgment Entered: July 8, 2015 (denying postconviction motion for postconviction relief)

Florida Supreme Court (Nos. SC15-1756; SC16-1090)
Zack v. State, 228 So. 3d 41 (Fla. 2017)
Judgment Entered: June 15, 2017 (affirming denial of postconviction relief and denying petition for habeas corpus)
Rehearing Denied: October 12, 2017

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 17-8134)
Zack v. Florida, 138 S. Ct. 2653 (2018)
Judgment Entered: June 18, 2018

Third Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996 CF 2517
Judgment Entered: January 16, 2018 (denying motion for postconviction relief)

Florida Supreme Court (No. SC18-243)
Zack v. State, 2018 WL 4784204 (Fla. 2018)
Judgment Entered: October 4, 2018 (affirming denial of postconviction relief)

Petition for Writ of Certiorari Denied
Supreme Court of the United States (No. 18-8052)
Zack v. Florida, 139 S. Ct. 1622 (2019)
Judgment Entered: April 29, 2019

Fourth Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996 CF 2517
Judgment Entered: August 31, 2023 (denying motions for postconviction relief and stay of execution)

Florida Supreme Court (No. SC23-1233)
Zack v. State, 2023 WL 6152489 (Fla. 2023)
Judgment Entered: September 21, 2023 (affirming denial of postconviction relief and motion for stay of execution)

Petition for Writ of Certiorari Filed:
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DECISION BELOW

The Eleventh Circuit's decision is available at 2023 U.S. App. LEXIS 25432 (11th Cir. Sep. 26, 2023), and is reprinted in the Appendix (App. A).

JURISDICTION

The Eleventh Circuit's opinion was entered on September 26, 2023. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. Introduction

Michael Zack suffers from Fetal Alcohol Syndrome (FAS), the most severe form of Fetal Alcohol Spectrum Disorder (FASD) (App. B at 7, App. C at 1).[1] The medical community now recognizes FAS as identical to intellectual disability (ID) in both nature and severity. (*See generally* App. B, App. C). This is not an abstract comparison applicable to any number of conditions; it is a rare causal[2] and functional connection found in only a few disorders, such as FAS[3] and Down Syndrome (App. B at 7-12, App. C at 3-8). The ID-equivalence of FAS is so ubiquitous that Mr. Zack *has a clinical diagnosis of intellectual disability* (App. D at 11).

From a medical perspective, Mr. Zack's diagnoses of FAS and intellectual disability are uncontroverted (App. B at 12). In other societal contexts—including education, healthcare, and social services—Mr. Zack would be entitled to protections and benefits due to his disability (App. B at 8). Yet, the Florida courts have repeatedly

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[1] Citations to appendix materials submitted with this petition are designated as "App. __". References to non-appendix material from the record below are as follows: References to Mr. Zack's trial transcripts are designated as "T. __". References to the record of Mr. Zack's direct appeal are designated as "R. __". References to the record of Mr. Zack's respective postconviction proceedings are designated as "PCR1. ___"; "PCR2. ___"; "PCR3. ___"; "PCR4. ___"; and "PCR5. ___". All other reference are self-explanatory or otherwise explained herein.

[2] Fetal Alcohol Spectrum Disorder is the leading known cause of intellectual disability.

[3] Although the scientific and medical communities recognize the full continuum of FASD as ID-equivalent, it is important to note that Mr. Zack's specific condition, FAS, is considered the most severe form of FASD, and represents a very small minority of individuals diagnosed with FASD (App. B at 7).

asserted that because Mr. Zack's IQ score is slightly above 75, he cannot meet Florida's statutory criteria for intellectual disability in the criminal legal context. Thus, although Mr. Zack has repeatedly and timely attempted to litigate his intellectual disability, he has been barred at every turn from the protections espoused by this Court in *Atkins* and its progeny.[4] *See, e.g.*, *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (summarily denying *Atkins* claim due to Florida's strict IQ cutoff of 70); *Zack v. State*, 228 So. 3d 41, 46-47 (Fla. 2017) (summarily denying *Atkins*/*Hall* claim due to IQ score above 75).

The Florida courts have not simply declined to exempt Mr. Zack from execution due to his disability—they have ruled that Florida's state constitution renders them utterly powerless to do so. *See Zack v. State*, No. SC2023-1233, 2023 WL 6152489, at *9-10 (Fla. Sep. 21, 2023) This situation—a compelling issue warranting relief from a death sentence, but which has fallen through the cracks of the legal system due to a technicality—epitomizes the 'fail-safe' function clemency is intended to serve. *See Herrera v. Collins*, 506 U.S. 390, 415 (1993) (executive clemency is "the 'fail-safe' in our criminal justice system" and can act as a remedy to the "unalterable fact that our judicial system, like the human beings who administer it, is fallible.").

But Mr. Zack has been shut out of the 'fail-safe'. At the time of Zack's clemency investigation, interview, and representation in 2013-2014, the scientific understanding of FAS and its relationship to intellectual disability did not exist. (*See generally* App. B, App. C). Nearly a decade later, when that knowledge came into

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[4] *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 572 U.S. 701 (2014).

being, there was no longer a meaningful avenue to present it on Mr. Zack's behalf. Clemency counsel had long exhausted the state-allocated resources. Counsel appointed to litigate Mr. Zack's intellectual disability in the state courts were statutorily prohibited from acting as clemency counsel. *See* Fla. Stat. § 27.711(11). The clemency interview had concluded. Every mercy-seeking mechanism contemplated by the Rules of Executive Clemency had already been undertaken. And the entire administration considering Mr. Zack's request had been replaced.

Neither Mr. Zack nor his counsel received any notice that clemency considerations had resumed prior to the signing of his warrant, nor is there any evidence that an updated consideration occurred at all. Thus, through no fault of his own, no clemency consideration has been given to the significant new scientific understanding of Mr. Zack's disability, which places him in the category of persons exempt from execution.

With this new scientific understanding, and with multiple courts refusing to vindicate the constitutional rights it implicates, Mr. Zack's circumstances embody this Court's vision of clemency's role in the justice system. *See Herrera*, 506 U.S. at 390 (clemency "is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted."); *Harbison v. Bell*, 556 U.S. 180, 192 (2009) ("Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'") (quoting *Herrera*, 506 U.S. at 415). But Mr. Zack was foreclosed from any meaningful opportunity to offer this new information as grounds for mercy. This deprived Mr. Zack of even limited due process.

II. Procedural History

A. Prior Litigation Related to Mr. Zack's Death Sentence

On June 25, 1996, Mr. Zack was indicted for first-degree murder and related offenses (R. 1-3). His trial began on September 8, 1997. Mr. Zack's counsel argued that due to Zack's numerous impairments, he did not have the requisite level of intent for first-degree premeditated murder (T. 197, 1418-42). Mr. Zack was found guilty as charged (R. 419-20).

The penalty phase of Mr. Zack's trial began on October 14, 1997. His defense relied heavily on his FAS as a mitigating factor, and—although intellectual disability was not a categorical bar to execution at that time—counsel presciently analogized Mr. Zack's FAS diagnosis to intellectual disability. (*See, e.g.*, T. 1967 (testimony establishing "to a high degree of medical certainty that the causative influence of [Mr. Zack's] cognitive problems is exposure to alcohol prenatally"); T. 1921 (testimony establishing that the most common reason for intellectual disability is prenatal alcohol exposure); T. 1921-23 (referencing large percentage of individuals with FASD who enter the criminal justice system due to a result of their deficits, including impulsivity); T. 1950-51 (referencing symptom patterns of FASD that are at risk of "being described as antisocial…rather than attempting to arrive at a more physiologically, medically based diagnosis to explain the symptoms"); T. 2043-44 (discussing similarities among individuals with FAS and intellectual disability)). A non-unanimous jury recommended death, which the trial court imposed on November 24, 1997 (R. 792, 852-75). The conviction and sentence were affirmed by the Florida

Supreme Court on direct appeal. *Zack v. State*, 753 So. 2d 9 (Fla. 2000), *cert. denied*, *Zack v. Florida*, 531 U.S. 858 (2000).

In 2002, while Mr. Zack's initial postconviction proceedings were pending, this Court decided *Atkins* and postconviction counsel amended the pending motion to include a claim that Mr. Zack's execution would violate the Eighth Amendment (PCR1. 226-34). The postconviction motion was denied on July 15, 2003. With regard to the *Atkins* claim, the denial relied on a strict IQ cutoff (PCR1. 577 (identifying "70" as the "statutory figure…which would be required to establish [intellectual disability].")).

Mr. Zack appealed to the Florida Supreme Court and filed a simultaneous state habeas corpus petition with that court. In October 2004, while Mr. Zack's appeal of the 3.851 denial was pending, the Florida Supreme Court promulgated a new rule, Fla. R. Crim. P. 3.203(d)(4), which laid out procedures for determining whether an already death-sentenced individual was now ineligible for execution on account of intellectual disability. *See Amendments to Fla. R. Crim. P. and Fla. R. App. P.*, 875 So. 2d 563 (Fla. 2004). Pursuant to the new rule, Mr. Zack's postconviction counsel timely moved for the Florida Supreme Court to relinquish jurisdiction and filed a successive postconviction motion in the trial court presenting the issue of his intellectual disability (PCR2. 6-26). He was procedurally barred due to his prior efforts raising the issue (PCR2. 58-62, 227-30). Again, the trial court again cited the "threshold" IQ cutoff of 70 (PCR2. 58-63).

The Florida Supreme Court ultimately affirmed the trial court's denial of 3.851 relief based on the strict IQ cutoff of 70. *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (citing *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000)). Mr. Zack's counsel appealed the denial of his successive postconviction motion related to Fla. R. Crim. P. 3.203, but the Florida Supreme Court held that "[b]ecause Zack does not meet the threshold requirement of an IQ of 70 or below, we find no useful purpose would be served" by a remand to the trial court. (*See* 9/20/07 Amended Order (Case No. SC05-963)).

On September 28, 2005, Mr. Zack filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida. Case No. 3:05-cv-369-RH. The proceedings were stayed pending resolution of the state court appeal, after which the petition was amended. Due to a grave misunderstanding by postconviction counsel prior to the filing of Mr. Zack's initial postconviction motion, all claims not based on *Atkins* were dismissed as untimely and the *Atkins* claim was again denied based on Florida's statutory IQ cutoff. *See Zack v. Crosby*, 607 F. Supp. 2d 1291 (N.D. Fla. 2008); *see also* 3/26/09 Order, Case No. 3:05-cv-369-RH, ECF 36. Although a panel of the Eleventh Circuit reversed the district court's decision dismissing the non-*Atkins* claims, subsequent en banc review used Mr. Zack's case to overrule then-existing circuit precedent, change the law, and affirm the dismissal of Mr. Zack's other federal claims due to untimeliness. *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013), *cert. denied*, *Zack v. Crews*, 134 S. Ct. 156 (2013). A subsequent FRAP 60(b)(6) motion was denied.

In 2014, this Court issued *Hall*, which invalidated Florida's strict 70 cutoff because "intellectual disability is a condition, not a number." 572 U.S. at 723. With this sea change, Mr. Zack—through counsel—again moved for relief from his death sentence on account of intellectual disability. The motion explained that in cases such as Mr. Zack's, where an individual has FASD, severe adaptive deficits, and a profound split between verbal and performance IQ scores, "full-scale IQ may not be a reliable index of actual functioning" and a clinician's judgment may be utilized in reaching a conclusion regarding intellectual function (PCR3. 118-20). He proffered numerous sworn lay statements establishing his lifelong history of significant adaptive deficits (PCR3. 169-79). He provided a report from a qualified neuropsychologist, Hyman Eisenstein, Ph.D, ABN, diagnosing him with intellectual disability (PCR3. 158-67). He requested an evidentiary hearing at which his intellectual disability could be further proven (PCR3. 125). And, despite *Hall*'s warning about the use of strict cutoffs, he was again denied solely on the basis that his IQ score was above 75 (PCR3. 222-23). *Zack v. State*, 228 So. 3d 41 (Fla. 2017); *cert. denied*, *Zack v. Florida*, 138 S. Ct. 2653 (2018).

On January 11, 2017, Mr. Zack sought postconviction relief based on this Court's watershed decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), which found unconstitutional the capital sentencing scheme in place at Mr. Zack's trial. However, due to Florida's unusual, partially retroactive, application of *Hurst v. Florida* (*see, e.g.*, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)), Mr. Zack was denied relief. *Zack v.*

State, No. SC18-243, 2018 WL 4784204 (Fla. Oct. 4, 2018)); *cert. denied*, *Zack v. Florida*, 139 S. Ct. 1622 (2019).

On August 17, 2023, Governor Ron DeSantis signed a death warrant scheduling Mr. Zack's execution for October 3, 2023 (PCR5. 29-33). On September 28, 2023, Mr. Zack filed a successive postconviction motion raising claims that he is constitutionally exempt from execution via *Atkins* and its progeny, and that the Eighth Amendment prohibits his execution due to a non-unanimous jury death recommendation (PCR5. 261-428). The circuit court summarily denied relief, and that denial was affirmed by the Florida Supreme Court. *Zack v. State*, No. SC2023-1233, 2023 WL 6152489 (Fla. Sept. 21, 2023) Certiorari is pending before this Court.

B. Relevant Information About Mr. Zack's Background

Michael Duane Zack's profound trauma began well before the car accident which led to his premature birth on December 14, 1968 (T. 1705). Exposed to alcohol *in utero* due to his mother's heavy drinking during pregnancy (T. 1701-04), Mr. Zack's birth records revealed a critical marker for FAS: microcephaly (App. B at 11; *see also* App. C at 1, 5) ("We now know that microcephaly in a child prenatally exposed to alcohol is associated with a high risk of severe brain functional impairments). However, the first discovery of FAS would not even take place in the United States for another five years (App. B at 1, App. C at 4). As a result, Mr. Zack's FAS—widely regarded as the most severe form of Fetal Alcohol Spectrum Disorder—went undiagnosed until 1997 (App. B at 7, App. C at 1).

Within months of Mr. Zack's birth, his biological father divorced his mother due to her alcohol consumption and abandoned Mr. Zack and his older sister, Theresa (T. 1708, App. D at 2). When Mr. Zack was 9 months old, his mother remarried and subsequently gave birth to Mr. Zack's younger sisters, Melissa and Ziva (App. D at 2).

The devastating developmental effects of Mr. Zack's prenatal alcohol exposure manifested almost immediately. He was delayed in crawling, walking and talking; constantly rocked back and forth; and was described as "very slow" (App. C at 5).

Then, at the tender age of three, Mr. Zack was hospitalized after consuming approximately 10 ounces of cherry-flavored vodka (App. D at 3). His deficits became more apparent throughout his childhood. He had a pattern of attention deficits and academic underachievement despite strong efforts (App. C at 5). Hospital notes indicate that when Mr. Zack was about eight years old, "serious problems" were observed by his health care provider, but his parents refused to follow up on treatment and care (App. C at 6).

As a child and teenager, Mr. Zack was repeatedly moved from residence to residence, including long bouts in psychiatric institutions and foster care (T. 1663-67). When living in the family home, Mr. Zack's stepfather, Anthony Midkiff, violently abused him physically, sexually, and mentally. Midkiff put scalding silverware to Mr. Zack's tongue and penis, forced him to perform sex acts, kicked him with spurs, beat him with closed fists, repeatedly knocked him unconscious, ran over him with a car, forced him to drink alcohol, injected him with drugs, attempted to poison him,

attempted to drown him, and created devices to give him an electric shock if he wet the bed (which occurred nearly nightly into his adolescence) (*see, e.g.*, App. D at 2-3).

Mr. Zack was periodically removed from the custody of his mother and Midkiff, but suffered further abuse in foster care. Dr. Akinsulure-Smith, who recently conducted an evaluation with Mr. Zack, noted that he scored a "9 out of 10" on the Adverse Childhood Experiences (ACE) instrument measure, "indicating childhood exposure to all but one of the ten categories used to identify childhood incidents of abuse and neglect (this finding indicates multiple traumatic exposures prior to age 18 and supports his description of early traumatic events)", which is of great concern (App. E at 7). The only category Mr. Zack was not exposed to was parental incarceration.

When Mr. Zack was ten, he was slipped LSD by a stranger and again hospitalized (App. D). Shortly after that, Mr. Zack ingested an unknown liquid with seemingly hallucinogenic effects and was admitted for long-term psychiatric hospitalization after bizarre, suicidal behavior (App. C at 6, App. D at 4). Other than his present incarceration, that hospitalization was the most safety and stability Mr. Zack ever experienced. He thrived in the structured institutional environment. But then his world was upended: Theresa, in the midst of a psychotic break, murdered their mother with an axe. Midkiff promptly removed Mr. Zack from the hospital against medical advice, further destabilizing him in the aftermath of unthinkable tragedy. By contrast, Theresa was removed from Midkiff's custody, received intensive psychiatric treatment and is presently able to live in a non-institutional setting.

Mr. Zack's deficits grew more pronounced as he progressed through adolescence and into adulthood. This is typical of FASD, and is *more severe* than what occurs for individuals who have intellectual disability but not FASD (App. B at 9).[5] At the age of 12, he was functioning at a lower level than his six-year-old sister (App. C at 5). A friend of Mr. Zack's family, who was a retired prison guard and deputy sheriff and with whom Mr. Zack resided as a teenager, stated that Mr. Zack was one of the lowest functioning individuals he had *ever* encountered (App. C at 7). As an adult, he was still functioning at the level of a disabled child (App. C at 6).

This manifested in numerous tangible ways. He wet the bed well into his teenage years (App. C at 5). He displayed attention deficits (App. C at 5). He has a documented history of academic underachievement from childhood, struggling so much with learning, reading, writing, memorizing, and coloring (App. C at 5). When his sisters tried to help him with his homework, he struggled so much that he would wind up in tears and his sisters would do his homework (App. C at 5). He couldn't understand rules to the games other siblings played (App. C at 5). His childhood IQ testing showed a significant split in verbal and performance IQ scores, which itself makes full-scale IQ scores unreliable (App. B at 11, App. C at 5). In adulthood, just as it had been in childhood, he could not complete simple chores or routine tasks (App.

[5] In cases of intellectual disability without FASD, deficits in executive and adaptive functioning tend to remain relatively stable throughout the lifespan. But in cases of FASD, deficits in areas such as socialization worsen with age to the point of stagnation. Consequently, individuals with FASD have arrested development and tend to function many years below their actual age. This leads to secondary disabilities and adverse outcomes in adulthood (App. B at 9).

C at 5). He could not wash dishes; measure; cook; choose weather-appropriate clothing; color-match or fold clothes; make his bed; remember or follow a bathing routine; engage in basic hygiene; bring belongings with him when he moved; or determine when others were taking advantage of him (App. C at 5). He could not navigate or follow directions; prepare food; obtain a driver's license (due to failing the driving test 12 times); or open a bank account (App. D at 4). As an adult, he was not capable of living up to increased expectations. He could not safely live alone; supervise a child; buy diapers, formula, or groceries; pick up a pizza order; or maintain a time schedule (App. C at 6). He even lost a job as a janitor because he could not measure the chemicals in a basic mixing bucket (App. C at 6).

Additionally, Mr. Zack suffers from every single one of the eight secondary disabilities caused by FASD (App. B at 12). These disabilities are: mental health problems, school disruption, substance abuse, employment problems, dependent living, sexually inappropriate behavior, trouble with the law,[6] and confinement (App. B at 3). His life history contains each of the most prominent risk factors for secondary disabilities, and none of the recognized protective factors (App. B at 12). In other words, "a convergence of factors Mr. Zack had no control over predisposed him to catastrophic outcomes, including what would appear to be inexplicable criminal

[6] Scientific research has now discovered that of "males with FASD between the ages of 12 and 51, 68% were found to have experienced trouble with the law." (App. B at 3). When combined with additional risk factors such as disrupted school experience, the percentage jumps to 83%, making "individuals with FASD dramatically more vulnerable to legal troubles." (App. C at 4, 7).

behavior in the absence of an understanding of his FASD and its ID-equivalence." (App. B at 12).

At the time of Mr. Zack's trial in 1997, prenatal alcohol exposure was known to "cause significant impairment in executive functioning, with direct, severe, and far-reaching effects on adaptive behavior and developmental outcomes." (App. B at 2). But at the time of Mr. Zack's clemency submission and interview, understanding of FASD was still in its infancy. The 2013 DSM-5 was the first diagnostic manual to include Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE), the primary cognitive effect of FASD. But the condition was included under the category entitled "Conditions for Further Study" and simply described proposed criteria to diagnose the condition (App. B at 4-6). There was still not a comprehensive understanding of the impact. Over the next few years, understanding and acceptance continued to build, culminating in the consensus that FASD is functionally equivalent to intellectual disability (App. B at 6-7; *see also* App. C at 4 ("FASD is an ID-equivalent condition")). The extent of cognitive and adaptive dysfunction, and its equivalence to intellectual disability, was not known until well after Mr. Zack's clemency proceedings took place (App. B at 6-7).

It is now accepted that FASD occurs through no action of the afflicted individual and causes lifelong brain damage. Further, according to Dr. Novick Brown, who is a preeminent expert on FASD, "it is frankly absurd that [Mr. Zack] with an IQ score of 79 and established cognitive/adaptive deficits related to FAS/FASD would be denied the supports and protections given to an individual without FASD whose

IQ is a few points lower." (App. B at 10). This absurdity is emphasized by the fact that, in 2015, Mr. Zack was indeed diagnosed with ID by a qualified practitioner, but legally precluded from relief in the Florida courts simply because his IQ score was over 75.

C. Clemency Proceedings

In May, 2013, former Governor Rick Scott instituted clemency proceedings for Mr. Zack. On July 1, 2013, the Office of the Public Defender for the Tenth Judicial Circuit (PD-10) was appointed to represent Mr. Zack (App. F). PD-10 did not represent Mr. Zack in his substantive collateral litigation, so the appointment accompanied a single budgetary allotment for the representation. Mr. Zack's clemency interview was scheduled and occurred on April 24, 2014, and a memorandum in support of clemency was submitted on May 23, 2014 (App. F). After the memorandum was submitted, PD-10 heard nothing from FCOR, the Governor, or the Clemency Board. Over nine years later on August 17, 2023, without any indication that Governor DeSantis or the newly comprised Clemency Board was considering Mr. Zack's clemency that former Governor Rick Scott had initiated, Governor DeSantis denied executive clemency and scheduled Mr. Zack's execution for October 3, 2023.[7] The letter sent to clemency counsel states unambiguously that the

[7] At the time Governor Scott initiated Mr. Zack's clemency proceedings, the Clemency Board was comprised of: Governor Scott, Attorney General Pam Bondi, Chief Financial Officer Jeff Atwater and Commissioner of Agriculture and Consumer Services Adam Putnam. The Florida Parole Commission's Chairperson was Tena Pate; Commissioners Bernard Cohen and Charles Lawson participated in Mr. Zack's interview. When Mr. Zack's warrant was signed, Governor DeSantis, Attorney General Ashley Moody, Chief Financial Officer Jimmy Patronis and Commissioner of

"death warrant signed on August 17, 2023, *concludes the clemency process*." (App. G) (emphasis added). Throughout the process, Mr. Zack abided by the Rules of Executive Clemency.

However, in the years following Mr. Zack's clemency interview and submission of a memorandum in support, numerous legal challenges to his death sentence occurred, including proceedings directly relating to defects in Florida's capital death penalty scheme (App. F). *See Hall v. Florida*, 572 U.S. 701 (2014); *Hurst v. Florida*, 577 U.S. 92 (2016). In addition, as Assistant Public Defender Peter Mills explains:

> 7. Most importantly, provided with the opportunity, I would have offered FCOR, the Governor and the Clemency Board information about Fetal Alcohol Syndrome (FAS), a condition with which Mr. Zack suffers. Specifically, the information contained in the declarations of Dr. Natalie Novick Brown, Ph.D. and Dr. Julian Davies, M.D., which outlines the recent understanding and consensus about FAS and its functional equivalence to intellectual disability, strongly compels clemency. The critical impact of Mr. Zack's lifelong condition—one that preexisted his birth—explains why he does not squarely meet Florida's statutory definition of intellectual disability requirements but demonstrates how individuals like Mr. Zack must be exempt from the death penalty.
>
> 8. My experience in representing capital defendants at trial has provided me insight as to how the clinical understanding of FAS, if adequately presented and explained, often causes jurors to recommend life. Unfortunately, some courts have not caught up to the science and as Mr. Zack's case demonstrates, FAS is often misunderstood. Clemency is meant to be the fail-safe of the criminal justice system. But, the fact that the recent consensus and understanding of FAS was not presented to FCOR, the Governor, and the Clemency Board means that there was no opportunity for the fail-safe to work.

(App. F).

Agriculture and Consumer Services Wilton Simpson comprise the Clemency Board. The Florida Commission on Offender Review's Chairperson is Melinda Coonrod along with Commissioners Richard Davison and David Wyant.

D. Mr. Zack's § 1983 Proceedings

After clemency was denied and a death warrant was signed,[8] Mr. Zack filed a 42 U.S.C. § 1983 action in the Northern District of Florida. *Zack v. Ron DeSantis et al.*, 4:23-cv-392, ECF No. 1. This action alleged that Mr. Zack's clemency proceedings involved an arbitrary denial of access to the clemency process and current decision makers, which violated the minimal due process to which he was entitled. Mr. Zack explained that this deprivation occurred at a critical stage of the death penalty scheme; indeed, the only stage at which factors like remorse, rehabilitation, racial and geographic influences, and other factors the legal system does not correct can be considered. *See id.* ECF No. 2 at 5-6 (citing *Herrera*, 506 U.S. at 412). Where that critical proceeding is inadequate, the death penalty scheme is obviated.

Specifically, in 2014, Mr. Zack submitted to a clemency interview and provided his memorandum to individuals who did not initiate or participate in the final clemency determination; at the time of his clemency interview and submission, the scientific understanding of his FAS and its intellectual disability-equivalence was not known; by the time that scientific knowledge emerged, pursuant to the Florida Rules of Executive Clemency, no current Clemency Board member had an opportunity to request a hearing as the time frame for such a request had long expired; and, Mr. Zack was provided no notice that the new administration was considering his clemency and provided no opportunity to provide the current Chairman and

[8] A letter from the Florida Commission on Offender Review sent to clemency counsel stated that the "death warrant signed on August 17, 2023, concludes the clemency process." (App. G at 1).

Commissioners of FCOR, the Clemency Board, and the Governor updated information that was relevant and critical to a determination of whether Mr. Zack deserves mercy. *See generally, id.* ECF 1, 2.

Mr. Zack proffered significant, compelling information that he would have been able to present if given notice and a forum via the clemency proceedings. This information centers around his diagnosis of FAS and intellectual disability, and the ways in which he has been barred from relief in the court system despite falling into the class of persons—those with intellectual disability—who are exempt from execution on account of their inherently lesser culpability. This information included the following facts, which were not known at the time of his prior proceedings:

- Intellectual and adaptive functioning of individuals with FAS is *lower* than in individuals with similar IQ scores who do not have FAS, which means that individuals with FAS function far lower than their IQ score suggests. For instance, someone with FAS whose IQ falls in the 70s typically functions adaptively as if their IQ is in the 50s or 60s (App. B at 8).

- Infants born with FASD are at higher risk for further abusive and traumatic experiences, which further increases their risk of secondary disabilities. Although protective factors can improve outcomes for individuals with FASD, like intellectual disability, the condition cannot actually be "treated" or "cured" (App. B at 9).

- Strict reliance on IQ scores to determine intellectual disability is rooted in white supremacy and eugenics, and rather than being used for meaningful diagnosis and implementation of supports, the metric was originally used to prevent procreation of certain individuals with low IQs under the guise of "protecting the superiority of the white race," regardless of whether those individuals had any actual problems functioning (App. C at 2).

- Using a barometer of "two standard deviations below the mean" to determine IQ is considered outmoded and is medically known to create an excessive number of "false negatives" where individuals who are

clearly intellectually disabled were wrongly denied a diagnosis (App. C at 2).

- Individuals with FASD who have IQs above 70 are actually more likely to have trouble with the law than those with an IQ below 70 (App. C at 4).

- The consensus regarding FASD as an intellectual disability-equivalent disorder is not limited to experts in the field of FASD, but joined by medical and scientific professionals whose primary specialization is intellectual disability (App. C at 5).

On September 15, 2023, the district court denied Mr. Zack's stay motion on the singular ground that "Mr. Zack is unlikely to prevail on the merits of his due-process challenge" (App. H at 6). Although the district court found that Mr. Zack had properly brought this due process claim under § 1983 (App. H at 2), it found that the procedures Mr. Zack received (being represented by counsel in the 2014 clemency proceeding, being allowed to make a written submission in 2014, and being allowed to appear with counsel for the 2014 interview) satisfied "whatever minimal level of process was due." (App. H at 4). Although the district court did not find Mr. Zack dilatory, it found no obligation on the clemency officials to provide any notice to Mr. Zack when their clemency considerations resumed nearly a decade later, with new officials (App. H at 4-5).

E. The Eleventh Circuit's Decision

On September 19, 2023, Mr. Zack appealed the district court's ruling to the United States Court of Appeals for the Eleventh Circuit, via an emergency motion for stay of execution pending appeal. On September 26, 2023, the Eleventh Circuit denied Mr. Zack's stay motion, finding that he could not demonstrate a substantial

likelihood of success on the merits because “we cannot agree that any purported deficiency rises to the level required to sustain a constitutional violation.” (App. A at 10). In rejecting Mr. Zack’s allegation that the current Clemency Board members could not have requested a clemency hearing due to the passage of time, the Court relied heavily on the blanket discretion given to Florida’s Governor:

> Even if the current Board members could not unilaterally decide to schedule a hearing the Clemency Rules permit the Governor to set a hearing at any time. Fla. R. Exec. Clemency 15(F). And clemency cannot be granted without the Governor’s approval. Fla Stat. § 940.01(1). So if the necessary members of the Clemency Board believed a hearing was warranted, the Rules provided a mechanism for such a hearing.

(App. A at 13.) Similarly, the court relied on the Governor’s “unfettered discretion” to grant or deny clemency “at any time, for any reason” (App. A at 13) in rejecting Mr. Zack’s allegation that his due process rights were violated by the lack of notice regarding clemency review occurring nearly a decade after the prior proceedings.

Significantly, in reaching its decision that minimal due process had not been violated, the Eleventh Circuit 1) relied on the fact that the Clemency Rules did not specifically prohibit certain actions, despite Mr. Zack’s contention that no notice, guidance, mechanism, or even contemplation is given to them in Florida’s clemency scheme; and 2) accepted clemency officials’ unsupported representations as true, despite the fact that they were contradicted by the record:

> According to the State, the Clemency Board would consider any new materials, even if clemency had previously been denied, because clemency in Florida is an ongoing process.

(App. A at 7).

> While Zack is correct that there is no Clemency Rule affirmatively authorizing supplemental submissions, there is also no Rule precluding them. And the State says that any materials that Zack submitted about the research on FAS would have been considered as part of his clemency application.

(App. A at 15-16).

> Zack suggests we should not take the State's representations at face value because the Commission sent a letter to Zack's counsel indicating that the signed death warrant "concludes the clemency process." But despite that letter, the State has said that any materials Zack submits will receive full consideration. In essence, the State says it will provide Zack with the same relief he seeks from us—the Clemency Board's full consideration of his updated FAS materials.

(App. A at 15).

> Zack believes that he should have an opportunity to submit his supplemental information without the threat of an active death warrant because, in his view, any post-warrant submissions "certainly will encounter a greater burden of review as to the standard for granting clemency than one would pre-warrant." But because the Board has significant discretion to dictate the clemency standards, we have no way to evaluate the correctness of Zack's claim.

(App. A at 16).

> No matter what we say in this decision, Zack retains the opportunity to submit these materials to the Board for its consideration.

(App. A at 17).

REASONS FOR GRANTING THE WRIT

Because Florida's Capital Clemency Scheme Lacks Notice and Meaningful Access to the Process By Which a Defendant May Seek Review It Does Not Provide the Minimal Due Process Required by the Constitution.

When a state creates a right that carries a liberty or life interest with it, the right is protected by the Due Process Clause of the Fourteenth Amendment. This

Court has recognized that States "may create liberty interests that are entitled to procedural protection of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *see also Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985) ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause."). And, as recognized in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998), this is so in a proceeding, such as clemency.

In *Woodard*, 523 U.S. at 288-89, Justice O'Connor, in a plurality opinion, reasoned that as long as the condemned person is alive, he has an interest in his life that the Due Process Clause protects. The specific procedural flaws in *Woodard*—that he did not have enough days' notice of his interview after the setting of his warrant and that he did not have enough time to prepare a clemency petition—did not rise to the level which would trigger a cognizable due process challenge. *Id*. at 289-90. However, each of those criticisms dealt with discrete aspects of the internal structuring of a clemency hearing and are minor in comparison to the problems presented in Mr. Zack's situation.

Unlike *Woodard*, the deficiencies in Mr. Zack's proceedings involve denial of access to the clemency process and current decision-makers. Here, Mr. Zack submitted to a clemency interview and provided his memorandum to individuals who prepared a final report almost a decade ago, without reference or consideration of the current understanding of FAS. Also, pursuant to Rule 15(E), no current Clemency

Board member had an opportunity to request a hearing because the timeframe for such a request had long expired. Zack was provided no notice that Governor DeSantis was considering his clemency and therefore had no mechanism to provide the current decision-makers with updated information critical to a determination of whether he deserves mercy.

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.'").

Clemency is a critical "part of [Florida's] overall death penalty procedural scheme[,]" *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990), and the only stage at which factors like remorse, rehabilitation, racial and geographic influences, and factors the legal system does not correct can be considered. *See Herrera*, 506 U.S. at 412. Where that critical clemency proceeding is inadequate, the death penalty process is obviated.

Further, in *Harbison*, 556 U.S at 193, this Court explained that federal habeas representation may develop "the basis for a persuasive clemency application" which arises from counsel's development of "extensive information about his [client's] life history and cognitive impairments that was not presented during his trials or appeals." This analysis presupposed that the clemency proceeding is conducted following litigation in a case which may expose relevant information not known at

trial. This would ensure that clemency consideration would fulfill the "fail safe" function for which it is intended, allowing the arbiter to consider *all* information uncovered in the course of collateral litigation which may warrant serious clemency consideration. Here, that includes recent advances in the understanding of FAS and its equivalence to ID, and defects in Florida's death penalty scheme which were recognized in *Hall* and *Hurst*.

Because neither Mr. Zack nor his counsel were notified that Governor DeSantis had initiated clemency proceedings, they were arbitrarily denied "access to [the] clemency process." *Woodard*, 523 U.S. at 289, and an opportunity to participate in an investigation into "all factors relevant to the issue of clemency[,]" including the past decade's significant developments concerning FAS. Rule 15(B); *see also* F. That Mr. Zack's clemency proceedings occurred nearly a decade ago before an entirely different group of decision-makers is significant.

The defects in Mr. Zack's case cannot be remedied by the notion that the current clemency board members had access to the clemency materials submitted nearly a decade ago or that the clemency process remains open until Mr. Zack is executed (App. A at 7-8). It is simply not true that any process remained open to Mr. Zack over the past several years. The rules and procedures in place provide for the exact opposite conclusion. For instance, clemency counsel has long since expended

the single budgetary allotment provided to represent Zack.[9] Since 2014, no resources have been available to clemency counsel to continue representing 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 system's structure divides Zack's representation. Indeed, 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 wholly within FCOR's discretion. *Bowles v. DeSantis*, 934 F.3d 1230, 1236, 1245-46 (11th Cir. 2019). This division, along with the funding restrictions and limitations on representation, illustrates a critical flaw in the district court's order.

Under the existing rules, 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 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

[9] 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.

receive review ignores two facts: no attorney representing 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 clemency consideration that complies with even minimal due process.

A clemency procedure designed to access what this Court has described as the "fail safe" of the death penalty scheme does not provide minimal due process when its rules and procedures are non-binding and ever-shifting—instead, it provides no process. Due process requires notice and the opportunity to be meaningfully heard. Here, notice and meaningful access must be provided by the clemency deciders and cannot be relegated to guesswork based upon what is not contained in the rules outlining the procedures. Mr. Zack has been denied even minimal due process.

CONCLUSION

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

Respectfully submitted,

/s/ LINDA McDERMOTT
LINDA McDERMOTT
Counsel of Record
JESSICA HOUSTON
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818

linda_mcdermott@fd.org
jessica_houston@fd.org

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