No. 25-5379

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

KAYLE BARRINGTON BATES,

*Petitioner*,

v.

RON DESANTIS, GOVERNOR OF FLORIDA,

*Respondent*.

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

# BRIEF IN OPPOSITION
**EXECUTION SCHEDULED FOR AUGUST 19, 2025, AT 6:00 P.M.**


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**CAPITAL CASE**

## QUESTION PRESENTED

Whether this Court should grant review of the Eleventh Circuit's decision denying a motion for a stay to appeal the district court's dismissal for failure to state a claim for relief of a 42 U.S.C. § 1983 suit raising an equal protection claim and Eighth Amendment arbitrariness claim based on *McCleskey v. Kemp*, 481 U.S. 279 (1987), regarding Governor DeSantis' warrant selections?

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The Eleventh Circuit's unpublished order is available at *Bates v. Gov. of Fla.*, No. 25-12762 (11th Cir. August 15, 2025).

## JURISDICTION

On August 15, 2025, the Eleventh Circuit denied the motion to stay the execution. On August 17, 2025, Bates, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a petition for writ of certiorari in this Court in this active warrant case. The petition is timely. See Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed for cruel and unusual punishment inflicted.

U.S. Const. amend. VIII

The Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Eleventh Circuit recounted the facts of the murder in its opinion affirming the denial of habeas relief. *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1283 (11th Cir. 2014). On the afternoon of June 14, 1982, Janet White, a State Farm Insurance clerk, returned from lunch around 1:00 p.m., as was her normal practice. *Id*. at 1283. As she came into the office, she answered the phone. Unknown to her, she was not alone. She knew that Kayle Barrington Bates had stopped by the office earlier that day, talked with her, and left. She did not know that having seen that she was alone in the office, Bates had returned to the area and parked his truck in the woods some distance behind the building where it could not be seen and waited. She did not know that while she was out at lunch he had broken into the office and was there waiting for her to return. When Bates surprised White she let out a "bone-chilling scream" and fought for her life. *Id*. He overpowered her and forcibly took her from the office building to the woods where he savagely beat, strangled, and attempted to rape her, leaving approximately 30 contusions, abrasions, and lacerations on various parts of her face and body. *Id*. at 1283.

Warrant selection litigation

On July 18, 2025, Governor DeSantis signed a warrant for Bates' execution.

On July 29, 2025, Bates, represented by CHU-N, filed a 42 U.S.C. § 1983 suit contending that Governor DeSantis' warrant selection process violated equal protection and was arbitrary in violation of the Eighth Amendment, as well as a memorandum of law in support of the complaint. (5:25-cv-00192 (N.D. Fla.) Docs. 1, 2). The complaint relied solely on statistics to attempt to establish racial

discrimination in the Governor's warrant selection process. Bates also filed a motion to stay the execution. (Doc. 3).

On August 4, 2025, Governor DeSantis filed a motion to dismiss, pursuant to Federal Rule of 12(b)(6) (Doc. 11). The motion to dismiss asserted that both the equal protection claim and the Eighth Amendment arbitrariness claims were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and were properly only raised as habeas claims. Alternatively, the motion to dismiss asserted that the § 1983 suit should be dismissed for failure to state a claim under *McCleskey v. Kemp*, 481 U.S. 279 (1987). The motion to dismiss, which was properly limited to the statistics involving the warrants signed by Governor DeSantis, definitively showed no significant racial disparity in the race of the capital inmates or the race of the victims in the warrants. The Governor also filed a response to the motion to stay. (Doc. 12).

On August 12, 2025, the district court granted Governor DeSantis' motion to dismiss for failure to state a claim for relief. (Doc. 21 at 26). The district court discussed *McCleskey* "at some length" noting that the McCleskey case provided "the analytical framework" for resolving the claims. (Doc. 21 at 8-17, 20). The district court then addressed the issue of the plausibility of Bates' two claims based on his alleged facts and statistics. (Doc. 21 at 21). The district court noted that the claims were actually limited to the warrants Governor DeSantis has signed since taking office in 2019. (Doc. 21 at 22). The lower court noted the "small sampling" involved in the warrants signed by the Governor and observed that weight given to the results of a "small sample is limited" quoting *McCleskey*, 481 U.S. at 295, n. 15. The lower court

also noted that the race of the victims in the warrants was unclear because the victims in the Zakrzewski warrant were Korean and half-Korean. (Doc. 21 at 22-23). The district court emphasized that any statistical evidence of discrimination had to be "stark" and "exceptionally clear" quoting *McCleskey*, 481 U.S. at 293 & n.12, 297 (Doc. #21 at 23). The district court concluded that in absence of any evidence that "Governor DeSantis acted with discriminatory purpose" and the statistics that Bates relied on did "not qualify" as such evidence, and therefore, Bates "failed to state a claim for relief." (Doc. 21 at 25). The district court granted the Governor's Rule 12(b)(6) motion to dismiss for failure to state a claim. (Doc. 21 at 26). The district court also concluded that Bates "failed to show having a substantial likelihood of success on the merits of his claim" and denied the motion to stay. (Doc. 21 at 25).

Bates appealed the dismissal of his §1983 suit to the Eleventh Circuit. *Bates v. DeSantis*, No 25-12762 (11th Cir.). On August 14, 2025, Bates filed an initial brief and a motion for expedited briefing. (Doc. 7; 8). An amicus brief was also filed. (Doc. 12). On August 14, 2025, Bates additionally filed a motion to stay the execution. (Doc. 9). On the same day, August 14, 2025, the Governor filed a response to the motion to stay the execution. (Doc. 14). On August 15, 2025, Bates filed a reply to the response to the motion to stay. (Doc. 15). The Eleventh Circuit denied the motion to stay the execution.

Bates then filed a petition for writ of certiorari in this Court.

## REASONS FOR DENYING THE PETITION

Whether this Court should grant review of the Eleventh Circuit's decision's denying a motion for a stay to appeal the district court's dismissal for failure to state a claim for relief of a 42 U.S.C. § 1983 suit raising an equal protection claim and Eighth Amendment arbitrariness claim based on *McCleskey v. Kemp*, 481 U.S. 279 (1987), regarding Governor DeSantis' warrant selections?

Petitioner Bates seeks review of the Eleventh Circuit's decision which concluded that he did not have a substantial likelihood of success on the merits of his warrant selections claims and therefore, denied his motion for a stay of execution. Pet. at 8. Bates filed a 42 U.S.C. § 1983 suit contending that Governor DeSantis' warrant selection process violated equal protection and was arbitrary in violation of the Eighth Amendment, relying on *McCleskey v. Kemp*, 481 U.S. 279 (1987). There is a threshold issue of whether the two claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). This threshold issue alone is sufficient reason for this Court to deny review. Alternatively, there is no conflict between this Court's decisions in *McCleskey v. Kemp*, 481 U.S. 279 (1987), and *Bucklew v. Precythe*, 587 U.S. 119 (2019), and the Eleventh Circuit's decision. There is no conflict with this Court's decision in *McCleskey* in which this Court denied an equal protection claim and an Eighth Amendment arbitrariness claim. As the Eleventh Circuit properly concluded both claims are "foreclosed" by this Court's decision in *McCleskey*.

There certainly is no conflict with this Court's decision in *Bucklew*. The Eleventh Circuit by denying the motion to stay followed this Court's admonishment to curtail § 1983 litigation in capital cases that amount to nothing more than an attack on settled precedent or are speculative. Nor is there any conflict between the other

circuit courts or state courts of last resort and the Eleventh Circuit's denial of a motion to stay. The Eleventh Circuit properly determined that Bates did not have a substantial likelihood of success on the merits of his *McCleskey* claims regarding warrant selection. For these reasons, this Court should deny review.

**The Eleventh Circuit's Decision**

The Eleventh Circuit concluded that Bates had not established that he was "substantially likely to succeed on the merits of his appeal" and denied the motion to stay the execution. *Bates v. Gov. of Fla.*, No. 25-12762, slip op. at 2. The Court explained that Bates was asserting that the Governor "over-selects" warrants of black inmates who killed white victims. Slip. op. at 3. The Eleventh Circuit noted that a court may grant a stay of execution only if the inmate establishes that he is substantially likely to succeed on the merits, he will suffer irreparable injury absent the stay, and the stay would not substantially harm the opposing party or the public interest." *Id.* at 3 (quoting *Mills v. Hamm*, 102 F.4th 1245, 1248 (11th Cir. 2024)). The movant "must satisfy all of the requirements for a stay." *Id.* (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). The Eleventh Circuit denied the stay based solely on his failure to demonstrate a "substantial likelihood" that he would "succeed on the merits of his claims." *Id.* at 4.

The Eleventh Circuit agreed with the district court that Bates' claims were "foreclosed by the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987)." *Bates*, No. 25-12762, slip op. at 4. The Eleventh Circuit reasoned that, as in *McCleskey,* Bates had failed to allege that the decisionmaker "in his particular case

acted with a discriminatory purpose." *Id*. at 4. The statistical evidence regarding Governor DeSantis' warrant selection process did not present a "stark enough pattern to be accepted as the sole proof of discriminatory intent." *Id*. (citing *McCleskey*, 481 U.S. at 293). For statistical evidence to be stark enough, it "must be virtually 100 percent." *Id*. at 5 (quoting *Jones v. White*, 992 F.2d 1548, 1573 (11th Cir. 1993) (citing *McCleskey*, 481 U.S. at 293 n.12). Bates' evidence was not so "irresistible" that it was "tantamount for all practical purposes to a mathematical demonstration that the State acted with a discriminatory purpose." *Id*. at 5. The Eleventh Circuit noted of the 21 inmates selected for a warrant by Governor DeSantis, four were black inmates and two of them had murdered non-white victims.

The Eleventh Circuit also noted the "small sample size" of 21 warrants which limited its "evidentiary value." *Bates*, No. 25-12762, slip op. at 5. The Eleventh Circuit compared the sample size of the 21 warrants to the sample size of the 2,000 murder cases involved in the Baldus study at issue in *McCleskey*. *McCleskey*, 481 U.S. at 286 (noting the Baldus study examined "over 2,000 murder cases that occurred in Georgia during the 1970's").

For "largely the same reasons," the Eleventh Circuit concluded that *McCleskey* foreclosed Bates' Eighth Amendment arbitrariness claim as well. *Bates*, No. 25-12762, slip op. at 6. The *McCleskey* Court explained that the "disparities stem in large part from the inherent discretion given to jurors and the inevitable variability in how different individuals, each with their own perspectives and decisionmaking styles, evaluate a case." *Id*. at 6 (citing *McCleskey*, 481 U.S. at 310-12). Such personal

viewpoints "combined with the distinct facts and personal circumstances of each criminal defendant," produce "outcomes that may differ without necessarily indicating a constitutional violation." *Id*.

Bates "therefore failed to sufficiently demonstrate a constitutionally significant risk of racial bias." *Bates*, No. 25-12762, slip op. at 7 (citing *McCleskey*, 481 U.S. at 313). The Eleventh Circuit held "that Bates has not demonstrated a substantial likelihood that he will succeed on the merits of his claims" and denied the motion to stay. *Id*. at 7.

**Threshold Issue**

This Court typically does not grant review of cases involving a threshold issue. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp*., 510 U.S. 27 (1993) (dismissing a writ of certiorari as improvidently granted because there was a threshold issue); *N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc*., 556 U.S. 1145 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (explaining that the petition for writ of certiorari was properly denied by the Court, despite the question being presented being a significant one that is worthy of review, because the case might require the Court to first resolve antecedent questions).

There is a threshold issue regarding whether both claims raised in the § 1983 suit are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). Both the equal protection claim, and the Eighth Amendment arbitrariness claim regarding the Governor's warrant selections are *Heck* barred. Because an execution is the carrying out of a

death sentence, in challenging his selection for execution, Bates is necessarily challenging his underlying death sentence.

In *Hill v. McDonough*, 547 U.S. 573, 583 (2006), this Court distinguished between proper § 1983 actions challenging only the method of execution and improper § 1983 actions challenging the sentence itself. The Court explained that if "a grant of relief to the inmate would necessarily bar the execution," the claim must be raised in a federal habeas petition rather than in a § 1983 action. *Id.* at 583. While method-of-execution challenges are properly raised in § 1983 actions, warrant selection claims are not. *Nance v. Ward*, 597 U.S. 159, 163 (2022). In method-of-execution challenges, the capital plaintiff is asking "only for a change in implementing the death penalty" and an order granting that relief "would not prevent the State from executing him." *Nance*, 597 U.S. at 168-69. But a "claim should go to habeas" if granting the prisoner relief would "necessarily prevent the State from carrying out its execution." *Id.* at 168.

Bates, in his complaint, sought an order that would necessarily bar his execution. Bates, in his memorandum of law, requested a "permanent" injunction barring his execution. (Doc. 2 at 5). He sought "injunctive relief" regarding the warrant selection process which he admits was a "necessary precursor" and "triggering event" to "carrying out" his "death sentence." (Doc. 2 at 34). Bates asked, "that Defendant not be allowed to execute him." (Doc. 2 at 34). So, under *Hill* and *Nance*, the only appropriate vehicle for Bates to raise such claims is in a federal habeas petition under 28 U.S.C. § 2254, not in a § 1983 suit.

Bates is not raising a method or manner of execution claim or a clemency claim; Bates is raising a warrant selection claim. Specifically, Bates is making a claim based on *McCleskey v. Kemp*, 481 U.S. 279 (1987), transposed from the earlier prosecution and sentencing stage to the later warrant selection stage. But *McCleskey* itself was a habeas case. *McCleskey*, 481 U.S. at 286.

This Court should be wary of permitting habeas claims to be improperly litigated as § 1983 claims. Allowing claims to be raised as § 1983 claims instead of as habeas claims has the effect of undermining the AEDPA and its numerous limitations on habeas review, including the limits on discovery in federal habeas. *Shoop v. Twyford*, 596 U.S. 811 (2022). Bates raised the claims in a § 1983 suit instead of in a successive habeas petition, in part, to evade the statutory prohibition on discovery that would apply to him if he had raised the unexhausted claims in a successive habeas petition. Indeed, he sought expedited discovery in the district court including requesting to take several depositions which would be prohibited in habeas litigation.

Bates seems to be arguing for an exception to *Heck* bars for claims of racial discrimination. Pet. at 25. But any such exception would also apply to habeas claims based on *Batson v. Kentucky*, 476 U.S. 79 (1986), and to most selective prosecution habeas claims as well. That is not the dividing line established by this Court over thirty years ago in *Heck* and recently reaffirmed in *Nance*.

Governor DeSantis raised the *Heck* bar in his motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) filed in the district court and raised the *Heck* bar again at the first opportunity in the Eleventh Circuit. This Court would have to

address the proper characterization of the claims as being either habeas claims or § 1983 claims before addressing the merits of the issue of *McCleskey* as applied to warrant selections. This Court should deny review based on the presence of the threshold issue of the *Heck* bars.

**No Conflict with this Court**

There is no conflict with this Court. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). There is no conflict with this Court's decisions *McCleskey v. Kemp*, 481 U.S. 279 (1987), and *Bucklew v. Precythe*, 587 U.S. 119 (2019), and the Eleventh Circuit's denial of the motion to stay the execution.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), this Court rejected both an equal protection claim and an Eighth Amendment arbitrariness claim. McCleskey, a black capital defendant, who had killed a white police officer during a robbery, sought habeas relief alleging that Georgia's capital sentencing scheme was being applied in a racially discriminatory manner. *Id.* at 283, 286. McCleskey involved a statistical study, the Baldus study, regarding the imposition of death sentences in over 2,000 murder cases in Georgia that concluded that decisions to seek and impose the death penalty were racially skewed. *Id.* at 286-87. The Baldus study concluded there was "a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. The study found that prosecutors sought the death penalty much more often in cases involving black defendants with white victims than in cases involving white defendants with black

victims. The study additionally found that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing black victims. *Id.* at 287. The study found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, 32% of the cases involving white defendants and white victims, 15% of the cases involving black defendants and black victims, and 19% of the cases involving white defendants and black victims. *Id.* McCleskey relied "solely on the Baldus study." *Id.* at 293. The Supreme Court assumed that the Baldus study was valid statistically with the caveat that even sophisticated multiple-regression analysis can only demonstrate a risk that discrimination entered into "some" capital sentencing decisions. *Id.* at 291, n.7; (5:25-cv-00192 N.D. Fla. Doc. 21 at 10-11, n. 2).

This Court held that a capital defendant must prove that the decisionmakers in his case acted with discriminatory purpose. *McCleskey*, 481 U.S. at 292. Statistical proof must present a "stark pattern" to be the sole proof of discriminatory intent. *Id.* at 293-94 (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). In defining discriminatory purpose, this Court explained that McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. *McCleskey*, 481 U.S. at 298.

This Court rejected the equal protection challenge to Georgia's death penalty scheme. *McCleskey*, 481 U.S. at 292-99. The *McCleskey* Court observed that McCleskey offered no evidence specific to his own case to support an inference that racial

considerations played a part in his sentence. *Id*. at 292-93. This Court found the study to be insufficient to support an inference that the decisionmakers in McCleskey's case acted with purposeful discrimination. *Id*. at 313 (stating "the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process"). The *McCleskey* Court also rejected the Eighth Amendment arbitrariness challenge. *Id*. at 299-320.

Governor DeSantis has signed 21 death warrants since being sworn into office in 2019.[1] Of the 21 inmates he selected for execution, four inmates have been black. The four warrants involving black inmates were Curtis Windom, Kayle Bates, Michael Bell, and Louis Gaskin. So, 19% of the warrants signed by Governor DeSantis have been for black inmates, while 15% of the population of Florida is black. U.S. Census Bureau, 2020 Census.

While statistical evidence alone is rarely sufficient to support an equal protection claim, statistical evidence alone can definitively rebut an equal protection claim and these figures do just that. The slight discrepancy between the figures of 19%

[1] Warrants were signed for: (1) Robert Long; (2) Gary Bowles; (3) James Dailey; (4) Donald Dillbeck; (5) Louis Gaskin; (6) Darryl Barwick; (7) Duane Owen; (8) James Barnes; (9) Michael Zack; (10) Loran Cole; (11) James Ford; (12) Edward James; (13) Michael Tanzi; (14) Jeffrey Hutchinson; (15) Glen Rogers; (16) Anthony Wainwright; (17) Thomas Gudinas; (18) Michael Bell; (19) Edward Zakrzewski; (20) Kayle Bates; and (21) Curtis Windom. Courts may take judicial notice of the warrant litigation in the Florida courts regarding the warrant litigation in those 21 cases and the state court records involved in those 21 warrants. The Governor signed a warrant for James Dailey in 2019, but the execution was stayed, and the federal litigation is still ongoing. *Dailey v. Sec'y, Florida Dep't of Corr.*, No. 8:07-cv-1897-T-02AAS, 2019 WL 5423314 (M.D. Fla. Oct. 23, 2019). The warrant litigation in both Bates and Windom is currently ongoing. There were 21 warrants signed after 2018 and 18 executions.

and 15% is not statistically significant. And the slight discrepancy between the number of black inmates involved in the 21 warrants compared to the black population of Florida certainly is not even close to being a "stark pattern," as required by *McCleskey*. These figures totally negate Bates' equal protection claim regarding the race of the inmates selected for a warrant by Governor DeSantis.

Governor DeSantis has signed warrants involving murder victims who were not white. The three victims murdered by Curtis Windom were black and the two victims murdered by Michael Bell were black. The three victims murdered by Edward Zakrzewski were Asian. So, 8 of the 30 victims associated with the 21 warrants signed by Governor DeSantis. were victims of color, which is over 26% of the total victims in all the 21 warrants. The five black victims comprised 16% of the total victims in the 21 warrants, which is slightly greater than the black population of Florida of 15%. The three Asians victims are 10% of the total murdered victims involved in the 21 warrants, which is three times greater than the Asian population of Florida of 2.9%. These figures definitively negate any equal protection claim as to the race of the victims as well.

These statistics are exceptionally strong proof that there is neither discriminatory effect nor intentional discrimination in the Governor's warrant selection process. That Bates does not dispute these figures regarding the race of the defendant or the race of the victims in the 21 warrants is quite telling. The figures provide definitive proof of lack of discrimination as to both the race of the inmate

selected for a warrant and the race of the murdered victims. Bates' claims are beyond implausible, they are positively refuted by these statistics.[2]

Bates states that no warrant has been signed by Governor DeSantis involving a white defendant who murdered a "non-white victim." (Doc. #2 at 24, 27). And he repeats that statement in his Petition. Pet. at 13. But that statement is not accurate. Governor DeSantis signed a warrant for Edward Zakrzewski, a white inmate who murdered his Korean wife and their two half-Korean children. (No. SC2008-0059 at T. 980-982). The district court correctly noted that the three victims involved were, in fact, Korean and half-Korean. (Doc. #21 at 22-23). Bates' core assertion is not accurate, much less plausible.

Bates failed to provide the district court with any information regarding his assertion coupling the race of the defendant with the race of the victim, specifically black victims. While he accurately states that no warrant has been signed so far for a white inmate who murdered a black victim, he did not provide the number of warrant-eligible white inmates who killed black victims in his complaint. Nor did he provide the

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[2] Bates attempts to use historical statistics, both from Florida and nationwide, to prove discrimination but then admits that the § 1983 suit "focuses solely on the actions of the Governor." *Bates v. DeSantis*, 25-12762-P 11th Cir. (Doc. #9 at 5-7; Doc.#7 at 28 n.13). Because Bates attempts to distinguish *McCleskey* on the basis that a single decisionmaker, the statistics he may use is likewise limited to Governor DeSantis' 21 warrants.

Bates also makes an implausible on its face, and indeed farcical, assertion that the Governor signed a warrant for Windom within hours of receiving Bates' § 1983 suit to be able to counter the racial allegations in the complaint. Warrants require more than a couple of hours of preparation, including coordination with the Department of Corrections.

lower courts with the exact number of warrant eligible inmates on Florida's death row and then compare those figures.[3] This particular paired allegation involving both the race of the inmate coupled with the race of the victim was totally unsupported by any statistics or other evidence. The factual basis for the paired claim is non-existent and therefore, the claim was implausible.[4]

As the Eleventh Circuit noted, of the 21 inmates selected for a warrant by Governor DeSantis, four were black inmates and two of them had murdered non-

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[3] The total number of white inmates who murdered a black victim may be as low as one or two out of the more than 100-plus warrant-ready inmates. *Freeman v. Atty. Gen. of Fla*, 536 F.3d 1225, 1226 (11th Cir. 2008) (reviewing a selective prosecution claim based on petitioner being white and the victims of his crime being black that was basically a reverse-*McCleskey* claim). The district court noted that the *McCleskey* Court had observed that there was no reason why a white inmate could not raise the same type of equal protection claim that McCleskey raised and then the district court cited the *Freeman* case (Doc. #21 at 16 & n.3 quoting *McCleskey*, 481 U.S. at 316, n. 39).

[4] Bates in his initial brief in the Eleventh Circuit implied that the number of warrant ready inmates is not available to him and he needed discovery to determine it. *Bates v. DeSantis*, 25-12762-P 11th Cir. IB at 27. That is not accurate. Florida law, since the Timely Justice Act of 2013 was signed into law, has required the Florida Supreme Court send notice to the Governor of any capital defendant who has completed one full round of state postconviction proceedings and federal habeas review. *Abdool v. Bondi*, 141 So. 3d 529, 539-43 (Fla. 2014) (holding the Timely Justice Act was constitutional including the provision that requires the clerk of the Florida Supreme Court to certify to the Governor when a capital inmate has completed the initial federal habeas review). The Florida Supreme Court posts those notices on its website. While the clerk's notices would have to be aggregated into a master list, the number of warrant-ready is publicly available information. The well-staffed Capital Habeas Unit could ready create a master list of the exact number of warrant ready cases and determine the race of the inmates and the victims involved in those 100-plus cases. That they did not do so (or did not disclose that figure) is very telling of what that figure would reveal regarding the validity of the paired claim. That figure could well "actually undercut his allegation of discriminatory purpose," just like the statistics in *Fuller v. Georgia State Bd. of Pardons and Paroles*, 851 F.2d 1307 (11th Cir. 1988), did, and just like the statistics limited to the 21 actual warrants does.

white victims. The Eleventh Circuit also noted the "small sample size" of 21 warrants which limited "its evidentiary value" and compared its size that to the size of the 2,000 murder cases involved in the Baldus study at issue in *McCleskey*. Such statistics completely fail to establish a "stark" pattern of discrimination, as required by this Court in *McCleskey*. *McCleskey*, 481 U.S. at 293-94 (stating that "statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent" citing *Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 266 (1977)).

While Bates argues the Eleventh Circuit's standard, which required statistical proof that was "virtually 100 percent," was too high a standard that was at odds with this Court's standard in *McCleskey*, the Eleventh Circuit's standard is irrelevant. Pet. at 16. Because the statistics properly limited to the 21 warrants completely fail under this Court's standard of a "stark" pattern under *McCleskey* and *Arlington,* the question regarding the Eleventh Circuit's standard is a meaningless debate. This Court does not grant review of such purely theoretical questions. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic). Bates' claims fail under either standard. In the end, the Eleventh Circuit properly rejected such statistics as proof of discrimination.

Both the equal protection and Eighth Amendment arbitrariness claims failed to state a claim for relief under *McCleskey*. The Eleventh Circuit correctly determined that both claims were foreclosed by this Court's decision in *McCleskey*. And the

Eleventh Circuit properly concluded that Bates did not have a substantial likelihood of success on the merits and properly denied the motion to stay. There is no conflict between this Court's decision in *McCleskey* and the Eleventh Circuit's decision.

There certainly is no conflict with this Court's decision in *Bucklew* and the Eleventh Circuit denying the motion to stay the execution. The *Bucklew* Court condemned the § 1983 suit as "little more than an attack on settled precedent" that was lacking in "essential legal elements," required by precedent. *Id.* at 149. This Court urged lower federal courts to protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail § 1983 suits which are speculative or pursued in a dilatory fashion. *Id.* at 151. This Court stated that federal courts should dismiss suits that are based on purely speculative theories without any support in the current case law. *Id.* at 151.

The equal protection and Eighth Amendment arbitrariness claims are nothing more than an attack on the "settled" precedent of *McCleskey*. Both of those same type of claims were rejected in *McCleskey*, which was decided in 1987, so it has been settled precedent for over 30 years. Further, Bates is making a *McCleskey* claim transposed from the prosecution and sentencing stage to the warrant selection stage. But the Eighth Amendment has even less relevance to the later stage of warrant selection. It is pure speculation that there even is an Eighth Amendment arbitrariness component to warrant selection.

The Eleventh Circuit followed this Court's admonishment to curtail § 1983 litigation in capital cases that is nothing more than an attack on settle precedent or is

speculative by denying the motion to stay. There is no conflict with *Bucklew* and the Eleventh Circuit's denial of a stay.

There is no conflict between this Court and the Eleventh Circuit. Because there is no conflict with this Court, review should be denied.

**No Conflict with the Lower Appellate Courts**

As this Court has observed, one of the principal reasons 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); Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue,* 482 U.S. 182, 184, n. 3 (1987).

Bates points to no decision from any court applying *McCleskey* to warrant selection and then holding there was a violation of equal protection or the Eighth Amendment. He cites no decision from any federal circuit court or state court of last resort finding a substantial likelihood of success on the merits involving a *McCleskey*-applied-to-warrant-selection claim and granting a stay, much less one involving a case where the statistics regarding the actual warrants selected establish that there is, in fact, no racial disparity in the selection, as this case does. There is no conflict between the lower appellate courts and the Eleventh Circuit's decision finding there was not a substantial likelihood of success on the merits.

In sum, there is a threshold issue regarding both claims being barred by *Heck* and there is no conflict with this Court's decisions in *McCleskey* or *Bucklew*. As the Eleventh Circuit properly concluded both claims are "foreclosed" by this Court's decision in *McCleskey*. Alternatively, the Eleventh Circuit followed this Court's

admonishment in *Bucklew* about curtailing meritless and speculative § 1983 litigation in capital cases by denying the stay. Nor is there any conflict with the other federal circuit courts or the state courts of last resort and the Eleventh Circuit's decision.

Accordingly, review should be denied.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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