No. 26-6013

IN THE

Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY TO BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, NOVEMBER 5, 2026, AT 6:00 PM

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ARGUMENT IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Jesse Guardado, respectfully petitions that a writ of certiorari issue to review the judgment of the Supreme Court of Florida. Guardado replies to the Respondent's Brief in Opposition ("BIO") as follows:

1. Respondent incorrectly asserts that the clemency process in Florida provides the minimal due process required under the Fourteenth Amendment.

a. The Governor's automatic denial of clemency deprives death-sentenced prisoners of meaningful consideration and minimal due process.

The Florida Supreme Court and the state misapprehend Guardado's arguments. Florida's clemency process for death-sentenced prisoners, provided for in its constitution and a condition precedent to the issuance of a death warrant by the governor under a state statute, denies the minimal due process required under the Fourteenth Amendment. Art. IV, § 8, Fla. Const. and § 922.052(2), Fla. Stat. (2026). Guardado acknowledges that power to grant clemency lies solely with the governor, but argues that it so infrequently granted in Florida that it is a nullity. In the last 43 years there has not been a single grant of mercy to a death-sentenced prisoner in this state.

Indeed, the last grant of clemency in a capital case was to Jesse Rutledge in 1983, due to Governor Bob Graham's concern that Mr. Rutledge was innocent.[1] Forty-

[1] *See Death Penalty Information Center*, List of Clemencies Since 1976, https://deathpenaltyinfo.org/policy-issues/policy/clemency/list-of-clemencies-since-1976 (last visited Oct. 10, 2026). Prior to Mr. Rutledge, Governor Graham also granted clemency to death-sentenced inmates Learie Alford (possible innocence),

three years have now passed since clemency was last granted in a capital case in Florida. One-hundred and forty-three people have been executed in this state without a single grant of mercy since Governor Graham granted mercy to Mr. Rutledge. *Id*.

Since he took office in 2019, current governor Ron DeSantis has issued 51 death warrants, 41 since January 2025, without a single grant of clemency. *Id.* Forty-six men have been executed upon his orders.[2]

And the governor has made it perfectly clear that he will not grant clemency to murderers. On March 10, 2021, at the conclusion of a meeting of the Board of Executive Clemency, Governor DeSantis announced that he would not grant clemency to murderers or felony sex offenders.[3] Although the State and the lower court will neither confirm or deny that the governor does in fact have an automatic denial policy for clemency for death-sentenced prisoners, his record of executions speaks for itself. *See* BIO at 15; App. A at 11.

If the Governor is following that policy with all individuals convicted of first-

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Clifford Hallman (sentence was inappropriate), Darrell Hoy (disproportionate sentence compared to co-defendant), Richard Gibson (disproportionate sentence compared to co-defendant), and Michael Salvatore (disproportionate sentence compared to co-defendants). *Id.*

[2] John Dailey's warrant expired and was not reissued in 2019. William Thompson's warrant was withdrawn by the governor without explanation in October, 2026. Three men, including Guardado, currently are under death warrants and are housed on Death Watch, awaiting their executions.

[3] *See* Press Release, Fla. Comm'n on Offender Review, Board of Clemency Adopts Governor's Proposal to Categorically Remit All Fines Related to COVID-19 Restrictions and to Revise the Rules of Executive Clemency Adopted by the Clemency Board (Mar. 10, 2021), https://www.fcor.state.fl.us/content/download/32564/file/2021%20Clemency%20Rule%20Change%20Press%20Release.pdf?version=1 (last visited November 2, 2026).

degree murder, and the numbers indicate he is, then the entire clemency process mandated by both the Florida Constitution and enabling statutes and rules is just a façade with no meaningful or actual chance of a grant of clemency. The procedures in place are illusory. Thus, Florida's clemency process for death-sentenced prisoners like Guardado fails to satisfy minimal due process requirements under the Fourteenth Amendment.

Respondent has argued and the lower court has ruled that Florida's clemency scheme satisfies the minimal due process required by the controlling opinion in Ohio *Adult Parole Auth. v. Woodard*, 523 U.S. 572 (1998).[4] In her concurring opinion, accepted as controlling by Respondent and the lower court[5], Justice O'Connor found

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[4] Respondent touts the largesse of the state in this clemency process with its appointment of clemency counsel and other "safeguards." BIO at 3-4. This bears closer examination. Yes, the state provides death-sentenced prisoners with counsel for the clemency process. Fla. Stat. § 940.031 (2026). The lawyer is paid a flat fee of $10,000 and any costs that the lawyer might incur, such as for an investigator, or mental health expert, or mitigation expert, are deducted from that fee. *Id.* The prisoner's postconviction lawyers, who have been litigating the prisoner's case for years, if not decades, are forbidden from representing their client at the interview or during the review process. The only qualifications the clemency lawyer must have to be assigned to represent a death-sentenced prisoner is that he or she is a member of the Bar, unlike the stringent qualifications that lawyers must have before they may represent a client charged with a capital offense at trial, on direct appeal, or in state or federal postconviction proceedings in Florida. *See* Fl. R. Crim. P. 3.112. The clemency investigation is conducted by the Florida Commission of Offender Review. Fla. R. Exec. Clemency 15.D. There is no citizen involvement in the process and the investigative teams are usually comprised of corrections or law enforcement officials. The interviews are held at Union Correctional Institution and are often conducted by phone or audio-visual technology. Prior to a law change in 2014, public defenders or circuit judges assigned experienced capital attorneys to represent death-sentenced prisoners in clemency procedures. Now an executive agency decides who will represent these prisoners.

[5] *See* BIO at 13 and App. A at 10.

that minimal due process was required in clemency proceedings for death-sentenced prisoners in Ohio, but that Ohio had met those requirements for the petitioner. *Id.* at 289. However, she envisioned circumstances where judicial intervention would be appropriate, such as when the executive arbitrarily withheld access to clemency or "flipped a coin." *Id*.

Here, Florida has not granted clemency in 43 years while executing 143 prisoners.[6] The current governor has expressly stated that he will not grant clemency to murderers.[7] He has arbitrarily denied clemency to an entire class of prisoners despite the statutory requirement that clemency be considered for these prisoners. Fla. Stat. §922.052(2) (2026). Respondent has argued that the governor should not have to grant clemency "every so often" to comply with due process. BIO at 14. Respondent argues that Guardado is proposing a "requirement for a due process quota of capital clemency grants every few decades, " citing to *Banks v. Sec'y, Fla, Dep't. of Corr.*, 592 F.App'x 771, 773 (11th Cir, 2014). BIO at 19. Respondent misspeaks. Guardado has never argued and is not arguing now that the governor should grant clemency every so often; he is simply asking that clemency be granted in the rare occasions when a prisoner deserves mercy after *meaningful* consideration

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[6] *Death Penalty Information Center*, List of Clemencies Since 1976, https://deathpenaltyinfo.org/policy-issues/policy/clemency/list-of-clemencies-since-1976 (last visited Nov. 3, 2026).

[7] Press Release, Fla. Comm'n on Offender Review, Board of Clemency Adopts Governor's Proposal to Categorically Remit All Fines Related to COVID-19 Restrictions and to Revise the Rules of Executive Clemency Adopted by the Clemency Board (Mar. 10, 2021), https://www.fcor.state.fl.us/content/download/32564/file/2021%20Clemency%20Rule%20Change%20Press%20Release.pdf?version=1 (last visited Nov. 3, 2026).

of that prisoner's life and circumstances. Guardado did not get that meaningful consideration here. Meaningful consideration cannot happen in Florida for Guardado or any death-sentenced prisoner when the governor automatically denies clemency, true to his word. This is the "flip of the coin" that Justice O'Connor warned was prohibited by due process. *Woodard*, 523 U.S. at 289. In Florida, both sides of the coin are stamped "denied." It is also an arbitrary denial of clemency that flies in the face of the purpose of clemency and the protections put in place by Florida for this fail-safe, this last chance for mercy.

The automatic denial of clemency to Guardado and the 50 other men executed at the direction of the current governor defeats and frustrates the purpose of Florida's constitutional clemency provisions and the laws and rules implementing them.

b. The Governor's automatic denial policy frustrates Florida's clemency procedures, and the lower court's refusal to protect those procedures justifies review.

While the lower court accepts O'Connor's concurrence in *Woodard* to the extent that minimal due process must be afforded to death-sentenced prisoners in clemency proceedings, it added, "we have never adopted a requirement of specific procedural safeguards applicable to the clemency process." App. at 10. Thus, it has declined to extend due process to the procedures established to enable the process and falls outside of the majority of states that require due process in the procedures they have put in place to consider clemency.

Every state that has capital punishment has established a clemency review process. A "state -created right can . . . beget yet other rights to procedures essential

to the realization of the parent right." *Dist. Attorney's Office for Third Judicial Circuit v Osborne*, 557 U.S. 52, 68 (2009) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981)). Indeed, during oral argument in *Woodard*, Justice commented, "I can understand, and I think *Dumschat* permits your claiming a right to the procedure which the State has accorded, so that if they violate their own procedures for clemency, yes, you would have some right to complain.", *available at* http:/www.oyez.org/cases/1997/96-1769 (last visited Nov. 3, 2026).

Here, the State has frustrated the process for consideration of mercy granted by its constitution and required as a condition precedent to the issuance of a death warrant by automatically denying clemency.[8] *See Osborne,* 557 U.S. at 68; *see also Young v. Hayes*, 281 F.3d 850, (8th Cir. 2000) (enjoining execution under *Woodard* because Missouri frustrated the purpose of the statute it created). The governor's automatic denial of clemency to Guardado and the other 50 men he has ordered executed makes no sense and does not safeguard Guardado's life interest in the least. It defeats the purpose of Florida's constitutional right to clemency review and its enabling rules and statutes. Clemency review in Florida for death-sentenced prisoners serves no purpose when the outcome is already ordained. And the lower court's refusal to accord minimal due process to the clemency procedures in place is a minority view among the states and is a reason to grant this petition.[9]

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[8] Fla. Const. Art. IV,

[9] Respondent overlooks that there is a split in circuits and states regarding the scope of rights under Justice O'Connor's controlling opinion in *Woodard*. *See* *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1333 (11th Cir. 2015) (acknowledging split). The majority rule is that the Due Process Clause requires

The clemency review provided to Guardado in his capital case violated the federal constitution because clemency has been so infrequently granted in Florida that it is a nullity, especially when the current governor has expressly stated that he will not grant clemency to murderers or felony sex offenders. The arbitrary denial of clemency to entire classes of offenses does not comport with the Due Process Clause and the governor's automatic denial of clemency per his express statement violates and frustrates the procedures the Florida Constitution put in place to guarantee this fail-safe provision. The clemency process is illusory as denial is automatic.

And the governor's policy of no clemency for murderers frustrates the purpose of Florida's constitutional provision for clemency and the statute requiring clemency review before a death warrant may issue. The denial of clemency to a death-sentenced prisoner is a *fait accompli* in Florida. There is no chance it will be granted and the process is illusory. For these reasons, this Court should grant review of the petition.

States to comply with their own State-created clemency procedures in death penalty cases. *See, e.g.,* *Com. v. Michael*, 56 A.3d 899, 903 (Pa. 2012); *Aruanno v. Corzine*, 413 Fed. Appx. 494, 497 (3d Cir. 2011); *Baze v. Thompson*, 302 S.W.3d 57, 59-60 (Ky. 2010); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000); *Sellers v. State*, 973 P.2d 894, 896 (Okla. Crim. App. 1999); and *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998). The minority position is that States do not have to comply. *Garcia v. Jones*, 910 F.3d 188, 191 (5th Cir. 2018); *Gissendaner*, 794 F.3d at 1333.

CONCLUSION

This Court should grant Mr. Guardado's petition for certiorari to review the decision below.

Respectfully submitted,

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