ACTIVE WARRANT CAPITAL CASE NO. 4:23-CV-00392-RH
EXECUTION SCHEDULED FOR OCTOBER 3, 2023

In the

United States District Court for the

Northern District of Florida

MICHAEL DUANE ZACK, III,

Plaintiff,

v.

RON DESANTIS, GOVERNOR OF FLORIDA, ET. AL,

Defendants.

RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION

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INTRODUCTION

Zack brutally beat, raped, and murdered Ravonne Smith by stabbing her four times at the end of a 9-day crime spree in June 1996. During that crime spree, Zack beat and killed another woman (Laura Rosillo), and stole two cars, two guns, and several other items. Zack confessed to police that he murdered Smith and received a sentence of death that finalized in October 2000 when the Supreme Court denied certiorari. Florida Governor Ron DeSantis denied clemency and signed Zack's death warrant on August 17, 2023. Zack is scheduled for execution on October 3, 2023.

On September 5, 2023, Zack, represented by the Capital Habeas Unit – North (CHU-N), filed a 42 U.S.C. § 1983 suit broadly alleging Florida violated his minimal, clemency-related due process rights by denying clemency almost ten years after Zack's clemency interview and submission and after a change in administration. He also sought an emergency stay of execution to litigate this claim.

This Court should deny Zack's emergency motion to stay his execution. Zack never tried to update his clemency materials either in the years intervening his initial interview and clemency denial or post-warrant. His present § 1983 suit rests exclusively on speculative theories about his clemency-related due process rights. And he fails the governing stay-of-execution standard. Zack is not entitled to a stay.

RELEVANT FACTS

Florida's Rules of Executive Clemency

Florida provides for clemency in its Constitution and has non-binding Rules of Executive Clemency. *See* Fla. Const. art. IV, § 8(a); Fla. R. Exec. Clemency 2(A) (stating "nothing contained within these rules can or is intended to limit the authority or discretion given to the Clemency Board").

Florida Rule of Executive Clemency 4 provides the "Governor has the unfettered discretion to deny clemency at any time, for any reason. No applicant has a right to a clemency hearing." The Governor also has "unfettered discretion to require at any time that an individual matter be treated under other provisions of these rules, whether or not the person satisfies the eligibility requirements of a particular rule." Fla. R. Exec. Clemency 4. And the "Governor, with the approval of at least two members of the Clemency Board, has the unfettered discretion to grant" clemency "at any time, for any reason." Fla. R. Exec. Clemency 4.

Florida Rule of Executive Clemency 15(E) provides for a hearing if a member of the Clemency Board requests one within "20 days of transmittal of the final report to the Clemency Board." But the Governor always has unfettered discretion to "at any time" set "a hearing" if he deems appropriate. Fla. R. Exec. Clemency 15(F).

Zack's Clemency Proceedings and Clemency Denial

Former Florida Governor Rick Scott began Zack's clemency proceedings and appointed him clemency counsel in 2013. (Doc.1:13-14.) Zack's clemency interview occurred on April 24, 2014. (Doc.1:14.) Zack's clemency counsel submitted a memorandum in support of clemency on May 23, 2014. (Doc.1:14.)

On August 17, 2023, "*after a review of the clemency investigation material provided by the Florida Commission on Offender Review* in accordance with the Rules of Executive Clemency," Florida Governor Ron DeSantis denied Zack clemency and issued his death warrant. (Doc.4:54 (emphasis added).) In that death warrant, the Governor noted executive clemency for Zack was considered and determined "not appropriate."[1] Zack's execution is scheduled for October 3, 2023.

Florida Clemency Remains Open

Although Governor DeSantis has denied Zack clemency, he still has complete and unfettered discretion, with the approval of two Clemency Board members, to grant Zack clemency "at any time, for any reason." *See* Fla. R. Exec. Clemency 4. Due to this broad discretion, even post-warrant, post-denial materials submitted by a capital defendant in support of clemency will be considered to determine

[1] *See Zack v. State*, SC1960-92089, Death Warrant filed August 17, 2023, at PDF page 5.

clemency's appropriateness. *See* Fla. R. Exec. Clemency 4. Florida's clemency process never truly ends until the date of an inmate's execution.[2] *See* Fla. R. Exec. Clemency 4.

Zack's 42 U.S.C. 1983 Suit

Zack filed a 42 U.S.C. § 1983 suit alleging Florida violated his minimal, clemency-related due process rights under *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Conner, J., concurring). (Doc. 1.) His complaint alleged the following operative facts for his due process claim: (1) Zack's clemency proceedings began in 2013 under former Florida Governor Rick Scott; (2) Zack's clemency interview occurred on April 24, 2014; (3) Zack's appointed clemency counsel submitted a memorandum in support of clemency on May 23, 2014; (4) Zack's clemency counsel received a letter from Governor Ron DeSantis denying clemency on August 17, 2023; (5) Florida Rule of Executive Clemency 15(E) permits any member of the Clemency Board to request a hearing within 20 days after the final report is transmitted; and (6) recent consensus that Fetal Alcohol Syndrome is the equivalent of an intellectual disability was not submitted to the Governor prior to the clemency denial. (Doc.1:13-15.)

[2] Undersigned counsel Charmaine Millsaps has conferred with, and confirmed the facts stated in this paragraph with Rana Wallace, counsel for the Florida Commission on Offender Review.

Zack argued that his clemency process failed to comport with due process because he was not afforded an opportunity to provide the new administration with an "updated memorandum" outlining the "sea change" in the medical community regarding Fetal Alcohol Syndrome. (Doc.1:16-17.) Zack's complaint *never alleges he attempted to provide the DeSantis administration with updated materials before his warrant was signed and was turned away. Nor does his complaint allege he has attempted to provide updated materials to the DeSantis administration since the signing of his warrant and been turned away*.

Zack's Memorandum in Support

Zack's memorandum in support of his § 1983 suit argues: (1) he was arbitrarily denied access to the current decisionmakers (the DeSantis administration) because his clemency proceedings were instituted under the prior administration; (2) the time had long passed for any clemency board member to request a hearing; (3) Zack had no notice Governor DeSantis was considering clemency; and (4) he had no opportunity to present information that Fetal Alcohol Syndrome is now considered the equivalent of an intellectual disability. (Doc.2:4-5, 7.)

Zack's Emergency Stay Motion

Zack also sought an emergency stay of execution to litigate his clemency-related due process claims. (Doc.3.)

ARGUMENT OPPOSING EMERGENCY STAY OF EXECUTION

The State of Florida unequivocally opposes Zack's motion to prolong execution of his nearly three-decade-long-finalized capital sentence so he can litigate speculative and frivolous clemency-related due process claims. That is especially true since Zack's claims are illusory. He may, at any time up until the date of his execution, make an updated submission to the DeSantis administration and argue for reconsideration of clemency's appropriateness based on that new submission.[3]

Zack's stay request fails at every conceivable point and should be denied. It is well-settled that a stay of execution is not granted as "a matter of course." *Hill v. McDonough,* 547 U.S. 573, 583-84 (2006). A stay is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584. Equity also requires this Court to consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 654 (1992).

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson,* 523 U.S. 538, 556 (1998). The United States Supreme Court recently highlighted the State's and

[3] Zack may send his updated submission to the Office of Executive Clemency, 4070 Esplanade Way, Tallahassee, FL 32399-2450.

victims' "important interest" in the timely enforcement of a death sentence. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases, including this one. *Id.* at 1134. Courts should "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Id* at 1134. Last-minute stays of execution should be "the extreme exception, not the norm." *Id.*

All that said, Zack must establish *at least* four elements to stay execution of his long-finalized death sentence: " (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public interest." *Barwick v. Governor of Fla.*, 66 F.4th 896, 900 (11th Cir. 2023) (quoting *Bowles v. DeSantis*, 934 F.3d 1230, 1238 (11th Cir. 2019). Zack must satisfy "all" of these requirements before this Court may issue a stay. *See id.* (citing *Hill v. McDonough*, 547 U.S. 573, 584 (2006).)

But the United States Supreme Court's opinion in *Bucklew* effectively modified this test and requires Zack to show an additional two threshold elements: (5) that he has not pursued relief in dilatory fashion, and (6) his underlying suit is not based on a speculative theory. *See Bucklew*, 139 S. Ct. at 1134 ("Federal courts

can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion *or* based on speculative theories.") (Cleaned up; emphases added).

This Court should refuse to stay execution of Zack's long-finalized death sentence for six independent reasons. First, Zack never asked to submit any updated clemency materials either in the years intervening his initial clemency submission and clemency denial or after his warrant was signed. Second, Zack's suit is nothing more than a speculative attempt to expand his minimal, clemency-related due process rights and attack settled precedent. Third, Zack's suit does not have a substantial likelihood of success on the merits. Fourth, a stay would substantially harm the State of Florida. Fifth, the injunction would be adverse to the public's interest. And sixth, in these circumstances where granting relief would only provide him an additional clemency proceeding in which any relief would be speculative, Zack would not be irreparably harmed absent a stay.

A. Zack Delayed Seeking Relief Because He has Never Sought to Provide the DeSantis Administration with Updated Clemency Materials and Instead Filed this Suit Post-Warrant.

Zack fails the first *Bucklew*-added element because he has never sought to provide the DeSantis administration with updated clemency materials. He can hardly come complaining to this Court about the DeSantis administration's failure to consider updated materials he has never attempted to provide despite being on notice clemency could be denied at any time since his clemency process began in 2013. *Cf. Reed v. Goertz*, 598 U.S. 230, 237 & n.1 (2023) (explaining it is difficult for a § 1983 plaintiff to criticize state procedures he has not invoked); *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 70 (2009) (explaining when uninvoked state procedures are adequate on their face a § 1983 defendant can "hardly complain they do not work in practice" without trying them). His emergency motion to stay his execution should be denied on that basis alone.

At their core, Zack's clemency-related due process claims are that he was arbitrarily denied notice from, and access to, the current administration about his clemency proceedings. But since his clemency proceedings were instituted in 2013, Zack has been on notice that clemency could be denied "at any time, for any reason." Fla. R. Exec. Clemency 4. Likewise, he has been on notice that the "Governor, with the approval of at least two members of the Clemency Board, has unfettered

discretion to grant" clemency "at any time, for any reason." Fla. R. Exec. Clemency 4. The Governor also has complete discretion "in any case in which the death sentence has been imposed," to "at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Clemency Board." Fla. R. Exec. Clemency 15(F).

In another recent capital case, the DeSantis administration invited CHU-N—Zack's current federal counsel—to provide written submissions in support of clemency. *See Bowles v. DeSantis*, 934 F.3d 1230, 1246 (11th Cir. 2019) (recognizing, under the DeSantis administration, that CHU-N—Zack's current federal counsel—were "invited three times to submit any written materials they wished" and "did submit a lengthy letter in support of clemency"). Nothing precluded Zack from providing whatever updated materials he wanted to provide the DeSantis administration during the time he was on notice clemency could be denied "at any time, for any reason." Fla. R. Exec. Clemency 4. And nothing precludes him from submitting his updated materials to the DeSantis administration post-clemency-denial and post-warrant for reconsideration of clemency's appropriateness. *See* Fla. R. Exec. Clemency 4 (The Governor, with two Clemency Board members, has unfettered discretion to grant clemency "at any time, for any reason.").

The fact that Zack has been on notice that clemency could be denied at any time since around 2013, has never attempted to update his clemency-related materials despite the change in administration, and instead simply filed this § 1983 suit post-warrant, reveals his § 1983 suit is nothing more than a manipulative, dilatory attempt to delay execution of his long-finalized death sentence. *Cf. Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 654 (1992) ("Equity must take into consideration" a defendant's "obvious attempt at manipulation."). That is doubly true since, even now post-clemency-denial and post-warrant, nothing prevents Zack from providing the DeSantis administration with clemency-related materials, a hearing from being scheduled at the Governor's discretion, and clemency being granted if appropriate. *See* Fla. R. Exec. Clemency 4, 15(F). Since Zack delayed seeking relief from Florida's Governor at any time since the DeSantis administration began, and instead waited post-warrant to file this federal suit, his stay request should be denied. *Cf. Bucklew*, 139 S. Ct. at 1134.

B. Zack's Clemency-Related Due Process Claims Are Nothing More than Speculative Theories that Do not Warrant a Stay.

Zack also fails the second *Bucklew*-added element because his claims merely attack settled precedent based on speculative theories. *See Bucklew*, 139 S. Ct. at 1134 (bemoaning the delay achieved by a capital defendant whose suit was "little more than an attack on settled precedent" and urging courts to curtail suits pursued based on "speculative theories"). Zack's suit is nothing more than an attempt to immensely broaden the minimal clemency-related due process rights he has under the long-settled precedent of *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Conner, J., concurring). *Barwick v. Governor of Florida*, 66 F.4th 896, 902 (11th Cir. 2023) ("Justice O'Connor's concurring opinion provides the holding in *Woodard*.").

The speculative nature of Zack's clemency-related § 1983 suit is embodied in the fact that the United States Supreme Court has never found a violation of clemency-related due process. *See Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013) ("The Supreme Court has never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process."). With two isolated, out-of-circuit exceptions from decades ago,[4] neither

[4] *Young v. Hayes*, 218 F.3d 850, 852-54 (8th Cir. 2000); *Wilson v. U.S. Dist. Ct. for N. Dist. of California*, 161 F.3d 1185, 1186 (9th Cir. 1998).

have the federal appellate courts applying *Woodard*'s holding to clemency-related due process claims over the past twenty-five years.[5]

Clemency-related due process claims have been rejected in far more eyebrow-raising factual scenarios than those presented in Zack's § 1983 suit. For instance, in

[5] *Saunders v. Hall-Long*, No. 20-1957, 2021 WL 5755080, at *1 (3d Cir. Dec. 3, 2021); *Garcia v. Jones*, 910 F.3d 188, 190-91 (5th Cir. 2018); *Tamayo v. Perry*, 553 F. App'x 395, 400-02 (5th Cir. 2014); *Turner v. Epps*, 460 F. App'x 322, 330-31 (5th Cir. 2012); *Roach v. Quarterman*, 220 F. App'x 270, 274-75 (5th Cir. 2007); *Sepulvado v. Louisiana Bd. of Pardons & Parole*, 171 F. App'x 470, 471-73 (5th Cir. 2006); *Lagrone v. Cockrell*, No. 02-10976, 2003 WL 22327519, at *13 (5th Cir. Sept. 2, 2003); *McCowin v. Kent*, 32 F. App'x 126 (5th Cir. 2002); *Moody v. Rodriguez*, 164 F.3d 893, 894 (5th Cir. 1999); *Faulder v. Texas Board of Pardons and Paroles*, 178 F.3d 343, 344-45 (5th Cir. 1999); *Bolton v. Dep't of the Navy Bd. for Correction of Naval Recs.*, 914 F.3d 401, 413 (6th Cir. 2019); *Fautenberry v. Mitchell*, 572 F.3d 267, 271 (6th Cir. 2009); *Workman v. Summers*, 111 F. App'x 369, 370-72 (6th Cir. 2004); *Workman v. Bell*, 245 F.3d 849, 852-83 (6th Cir. 2001); *Bowens v. Quinn*, 561 F.3d 671, 673-76 (7th Cir. 2009); *Lee v. Hutchinson*, 854 F.3d 978, 981-82 (8th Cir. 2017); *Winfield v. Steele*, 755 F.3d 629, 630-31 (8th Cir. 2014) (en banc); *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003); *Roll v. Carnahan*, 225 F.3d 1016, 1017-1018 (8th Cir. 2000); *Schad v. Brewer*, 732 F.3d 946, 947-48 (9th Cir. 2013); *Wright v. McCurdy*, 299 F. App'x 738, 738-39 (9th Cir. 2008); *Anderson v. Davis*, 279 F.3d 674, 676-77 (9th Cir. 2002); *Gardner v. Garner*, 383 F. App'x 722, 724-28 (10th Cir. 2010); *Duvall v. Keating*, 162 F.3d 1058, 1060-62 (10th Cir. 1998); *See Barwick v. Governor of Fla.*, 66 F.4th 896, 904-05 (11th Cir. 2023); *Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 794 F.3d 1327, 1330-33 (11th Cir. 2015); *Banks v. Sec'y, Fla. Dep't of Corr.*, 592 F. App'x 771, 773-74 (11th Cir. 2014); *Wellons v. Comm'r, Georgia Dep't of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014); *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013); *Valle v. Sec'y, Fla. Dep't of Corr.*, 654 F.3d 1266, 1267-68 (11th Cir. 2011); *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1033-37 (11th Cir. 2001); *Gilreath v. State Bd. of Pardons & Paroles*, 273 F.3d 932, 933-34 (11th Cir. 2001); *Hall v. Barr*, 830 F. App'x 8, 10 (D.C. Cir. 2020).

Woodard, the Supreme Court held a clemency proceeding does not offend due process when a defendant is given "only a few days' notice of the hearing," his counsel is excluded "from his clemency interview" and allowed "to participate in the hearing only at the discretion of the parole board chair," and the defendant is not allowed to "testify or submit documentary evidence at the hearing." *See Woods v. Comm'r, Alabama Dep't of Corr.*, 951 F.3d 1288, 1294 (11th Cir. 2020) (quoting and citing *Woodard*, 523 U.S. at 289-90); *Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015) (same).

The Eleventh Circuit has likewise recognized numerous eye-catching scenarios that do not violate clemency-related due process. Violations of state statutes governing clemency do not amount to a due process violation. *Gissendaner*, 794 F.3d at 1331. Neither does the fact that officials conspired to prevent a favorable witness from giving testimony in the clemency proceeding. *Id.* (citing *Wellons v. Comm'r, Georgia Dep't of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014) for the proposition that minimal, clemency-related due process does not "guarantee state prisoners a right to acquire and present testimony from prison staff in support of an application for clemency, nor does it bar state officials from limiting prisoners' access to such testimony"). Nor does the appearance of impropriety, bias, or lack of clemency grants. *Gilreath v. State Bd. of Pardons & Paroles*, 273 F.3d 932, 934

(11th Cir. 2001) (citing *Dirt, Inc. v. Mobile County Comm'n,* 739 F.2d 1562, 1566 (11th Cir.1984) for the premise that the "appearance of impropriety and bias in proceedings that are not judicial proceedings do not necessarily violate due process"); *Banks v. Sec'y, Fla. Dep't of Corr.*, 592 F. App'x 771, 773 (11th Cir. 2014) (rejecting a defendant's arguments that Florida's clemency violated due process based on the facts that the clemency board was composed of elected politicians who would be swayed by public opinion, postconviction counsel was not statutorily permitted to represent the defendant in clemency, the defendant's clemency counsel was ineffective, and Florida had not granted clemency in thirty-one years). A standardless and completely discretionary clemency process does not violate due process either. *Barwick v. Governor of Florida*, 66 F.4th 896, 902-05 (11th Cir. 2023).

Clemency-related due process does not even inarguably preclude an Executive from having a general policy of denying clemency in capital cases. *See Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (recognizing, pre-*Woodard*, that courts "uniformly rejected allegations that due process is violated by a governor who adopts a general policy of not granting clemency in capital cases" and assuming without deciding such a claim might be cognizable post-*Woodard*); *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1035-36, 1037 n.3 (11th Cir.

2001) (holding statement from board chairman that no "one on death row" would "ever get clemency" as long as he was chair made three years beforehand did not disqualify him in light of his credible testimony that he had an open mind and would fully consider all clemency applications while reserving on whether a closed mind might violate due process).

Clemency-related due process is satisfied where the defendant received notice of *a* hearing and an opportunity to participate in *an* interview. *Woodard,* 523 U.S. at 290 (O'Connor, J., concurring) (holding that "notice of the hearing and an opportunity to participate in an interview" was enough). Florida's clemency process indisputably satisfies due process. *Valle v. Sec'y, Fla. Dept. of Corr.*, 654 F.3d 1266, 1268 (11th Cir. 2011) (stating Florida's clemency procedures are "constitutionally adequate" as it is "undisputed that Florida law provides clemency proceedings and for the appointment of counsel for those who are being considered for clemency"). Nothing more is required.

The only guideposts to what "might" violate minimal, clemency-related due process are the truly outrageous sceneries of either state officials flipping a coin to determine whether to grant clemency and leaving the clemency decision completely

to the whim of chance or denying a prisoner "*any* access to its clemency process."[6] *Woodard*, 523 U.S. at 289 (O'Conner, J., concurring) (emphases added). "Outside of similarly extreme situations, the federal Due Process Clause does not justify judicial intervention into state clemency proceedings." *Gissendaner*, 794 F.3d at 1331 (cleaned up).

Given this body of caselaw, due process claims based on anything other than a complete, or practically complete, denial of access to clemency are nothing more than "speculative theories" for relief that do not merit a stay. Based on his own allegations, Zack was provided a full clemency proceeding and interview under the prior administration. Governor DeSantis then denied him clemency "*after a review of the clemency investigation material provided by the Florida Commission on Offender Review* in accordance with the Rules of Executive Clemency." (Doc.4:54 (emphasis added).) That satisfies due process. *Mann v. Palmer*, 713 F.3d 1306, 1308, 1310, 1316 (11th Cir. 2013) (holding clemency proceedings instituted in 1985 and updated without notice before a 2013 death warrant were sufficient to satisfy

[6] Zack's complaint improbably argues that the "defects in" his "clemency process rose to the level of coin flipping where the coin was never flipped." (Doc.1:16.) But *not* flipping a coin to determine Zack fate is not a defect. Governor DeSantis decision to deny Zack clemency after reviewing the clemency investigation material is not remotely akin to leaving the clemency decision entirely to the whim of chance rather than *any* exercise of discretion, which is what Justice O'Conner's coin-flipping analogy seeks to prohibit.

clemency-related due process); *see also Barwick*, 66 F.4th at 903 (recognizing that in *Mann* the Eleventh Circuit "rejected a prisoner's argument that he was entitled to a new clemency hearing after the Governor of Florida considered an updated clemency investigation before signing the death warrant" and held that due process did not require "additional procedures before the Governor's decision").

Zack's claims that his clemency proceedings were instituted under the prior administration, that he was not afforded an opportunity to provide *updated* materials, that he was not provided notice Governor DeSantis was considering clemency, and was not given an opportunity to be heard at a clemency hearing before the DeSantis administration—are a far cry from the government conspiring to prevent a capital defendant from presenting favorable witnesses in clemency. *See Gissendaner*, 794 F.3d at 1331 (citing *Wellons*, 754 F.3d at 1269 for the proposition that due process does not "guarantee state prisoners a right to acquire and present testimony from prison staff in support of an application for clemency, nor does it bar state officials from limiting prisoners' access to such testimony"). Denying clemency "after a review of the clemency investigation material provided by the Florida Commission on Offender Review," and after clemency proceedings and an interview under the prior administration, is not remotely close to either flipping a coin and leaving the clemency decision to chance or denying Zack *any* access to clemency. *See Mann*,

713 F.3d at 1308, 1310, 1316.

In short, Zack's claims do not reach the level any court has held violates due process and are foreclosed by *Mann* and *Woodard*. This Court should deny Zack's motion to stay execution of his long-finalized death sentence because his § 1983 suit is nothing more than an attack on settled precedent based on speculative theories for relief. *See Bucklew*, 139 S. Ct. at 1134.

C. Zack's Clemency-Related Due Process Claims Have No Substantial Likelihood of Success.

Zack's § 1983 due process claims do not have a substantial likelihood of success, and therefore do not warrant a stay. *See Barwick v. Governor of Florida*, 66 F.4th 896, 902-05 (11th Cir. 2023) (denying a stay of execution because the underlying claim did not have a substantial likelihood of success without analyzing any other stay element). His claims fail both under the controlling precedent of *Mann v. Palmer*, 713 F.3d 1306 (11th Cir. 2013) and because nothing prohibited (or prohibits) Zack from providing the DeSantis administration with an updated clemency submission.

The Eleventh Circuit has specifically rejected a clemency-related due process challenge as "futile" when clemency proceedings were instituted in 1985 and the operative death warrant was not signed until 2013. *Mann*, 713 F.3d at 1308, 1310, 1316. The capital defendant argued that "he had been arbitrarily denied access to

updated clemency proceedings by the Governor before he issued Mann's death warrant." *Id.* at 1310. He also argued that "the State of Florida violated his rights when the Governor considered an updated clemency investigation before he signed the death warrant and did not give Mann an opportunity to be heard and represented by counsel in those proceedings." *Id.* at 1316. But the Eleventh Circuit rejected both of those arguments and held that, since the "Governor conducted a full clemency hearing in 1985," the process Mann received before the signing of his 2013 warrant comported with due process. *Id.* at 1316-17.

Mann controls this case and squarely requires rejection of Zack's claims that the failure to (1) provide notice Governor DeSantis was considering clemency, (2) give Zack a renewed opportunity for a hearing, and (3) explicitly invite Zack to update his 2014 clemency submission before denying clemency in 2023 violates minimal, clemency-related due process. Zack's claims do not have a substantial likelihood of success under *Mann* and his motion to stay should be denied for that reason alone.

But Zack's clemency-related due process claims also fail at an even more basic level. Zack was afforded a full clemency proceeding in 2013-2014 under the prior administration and was on notice clemency could be denied at any time thereafter. Fla. R. Exec. Clemency 4. The current administration had access to all of

those materials when deciding whether clemency was appropriate. (*See* Doc.4:54.) Nothing precluded (or precludes) the Governor from scheduling a hearing in Zack's case if deemed appropriate. Fla. R. Exec. Clemency 15(F). And Zack can provide whatever updated clemency-related materials he wants to the new administration even now. *See* Fla. R. Exec. Clemency 4. Indeed, he could have done so long before now. *See* Fla. R. Exec. Clemency 4.

In short, there is not now (and never has been) any barrier to Zack submitting whatever updated clemency-related materials he wishes and receiving clemency based on those materials if clemency is deemed appropriate. *See Barwick v. Governor of Florida*, 66 F.4th 896, 898 (11th Cir. 2023) ("The Governor, with the approval of at least two members of the Clemency Board, has the *unfettered discretion to grant, at any time, for any reason*" the enumerated forms of clemency. Fla. R. Exec. Clemency 4.") (Emphasis added); *Bowles v. DeSantis*, 934 F.3d 1230, 1246 (11th Cir. 2019) (recognizing, under the DeSantis administration, that CHU-N—Zack's current federal counsel—were "invited three times to submit any written materials they wished" and "did submit a lengthy letter in support of clemency").

Zack and his counsel, CHU-N, have been aware of the potential for denial of clemency and a warrant since clemency proceedings began in 2013. Nothing prevented Zack from updating his clemency submission after Governor DeSantis

was elected. And nothing now prevents him from doing so post-denial and post-warrant. Since Florida's clemency process has been, and still is, open to Zack, his clemency related due process claim fails. Zack's clemency process will not truly end until the day of his execution.

Zack's claims that Florida violated his minimal, clemency-related due process rights do not have a substantial likelihood of success both under *Mann* and because Florida's clemency has been (and still is) open for Zack to update his plea for mercy. This Court should therefore deny Zack's motion to stay his execution.

D. A Stay Will Substantially Harm the State of Florida.

Zack has also failed to demonstrate a stay will not substantially harm the State of Florida. Florida will be substantially harmed by a federal court interfering with its sovereign power to enforce its valid criminal judgment and delaying a scheduled execution. *In re Blodgett*, 502 U.S. 236, 239 (1992) (noting that the State of Washington had sustained "severe prejudice" from a stay of execution which prevented the State "from exercising its sovereign power to enforce the criminal law"); *Bucklew*, 139 S.Ct. at 1133 ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence"). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that typically occur in capital cases. *Bucklew*, 139 S.Ct. at 1134.

The Eleventh Circuit has also repeatedly noted a state's strong interest in carrying out an execution without a stay and rejected the argument that "the state will only suffer a minimal inconvenience" from a stay. *Bowles v. Desantis*, 934 F.3d 1230, 1247 (11th Cir. 2019) (cleaned up); *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1176 (11th Cir. 2019); *Brooks v. Warden*, 810 F.3d 812, 824 (11th Cir. 2016); *Jones v. Comm'r, Ga. Dep't of Corr.*, 811 F.3d 1288, 1296 (11th Cir. 2016) (denying a stay of execution and noting the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts").

A stay from this Court would—for its duration—commute Zack's death sentence to the life sentence for a murder that occurred nearly thirty years ago. *See Bowles*, 934 F.3d at 1248. True finality—which in capital cases means carrying out a death sentence—is "essential to both the retributive and the deterrent functions of criminal law." *See Calderon v. Thompson*, 523 U.S. 538, 554 (1998).

The State's interests in executing a death sentence are at their highest in a case like this one where a warrant has been signed, an execution has been scheduled, there is no dispute the defendant committed first-degree murder, and even granting the defendant the full relief he seeks will not preclude his execution. Given the State's strong interest in enforcement of criminal law without federal interference, and the retributive and deterrent rationales for the death penalty, Zack has failed to establish

the stay he seeks will not substantially harm the State. He is not, therefore, entitled to a stay. *Bowles v. Desantis*, 934 F.3d 1230, 1246 (11th Cir. 2019) (recognizing capital defendants seeking a stay of execution "must satisfy all of the requirements for a stay") (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006) with emphasis).

E. A Stay Is not in the Public Interest.

It is not in the public interest to stay Zack's execution to pursue his clemency-related due process claims. Zack argues a stay is in the public interest due to clemency's unique position as a failsafe. *See Herrera v. Collins*, 506 U.S. 390, 415 (1993) (noting that, over the past century, "clemency has been exercised frequently in capital cases" when demonstrations of 'actual innocence' have been made).

But Zack's failsafe arguments ring hollow in this case where there is absolutely no dispute (including from Zack himself) that he brutally beat, raped, and murdered Ravonne Smith at the end of a 9-day crime spree and after murdering another woman. Zack confessed to Smith's murder to police shortly after and was tied to the murder by DNA. Clemency's failsafe function is not remotely at issue in this case. Instead, the public interest lies in the "powerful and legitimate interest in punishing the guilty" after state and federal review of a conviction and sentence have run their course. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (quoting *Herrera v. Collins,* 506 U.S. 390, 421 (1993) (O'Conner, J., concurring).)

It is also worth noting that Zack does not have a valid claim under *Atkins*.[7] He is not intellectually disabled and has IQ scores ranging from 78 (on the low end) to 92 (on the high end). All of these scores are higher than the standard established by *Hall v. Florida*, 572 U.S. 701, 707 (2014) and *Moore v. Texas*, 581 U.S. 1 (2017), And Zack's attempts to expand *Atkins* to him despite his normal IQ have been rejected by numerous courts before his warrant was signed.

But most importantly, a stay from this Court is not in the public interest because nothing prevents Zack from providing the Governor with his updated arguments about his Fetal Alcohol Syndrome and its alleged equivalence to intellectual disability. The Governor and Clemency Board could then consider whether Zack's updated submission warrants clemency or a hearing. There is no need for this federal court to resort to the drastic measure of staying a State's scheduled execution when Zack has a state avenue open to the Governor and Florida's Executive Clemency Board for the clemency-related relief he seeks.

Since Zack is not innocent, is not intellectually disabled, and nothing prevents him from providing the Governor with an updated clemency submission without a stay, a stay is not in the public's interest. This is a rare case in which the public interest can have its cake and eat it too if Zack simply does what he should have

[7] *Atkins v. Virginia*, 536 U.S. 304 (2002)

done to begin with: provide the DeSantis administration with his updated submission rather than sue in federal court. That protects both whatever the public's interest in Zack's clemency process along with the public's stronger interest in the enforcement of Zack's sentence for his admitted first-degree murder. This Court should therefore deny Zack's motion to stay his execution.

F. Zack Will not Suffer Irreparable Harm Absent a Stay.

Finally—as strange as it may sound in a capital case with an execution looming—Zack has failed to establish he will be irreparably injured absent a stay. The most he can hope to receive from this litigation is an additional opportunity to plead for mercy. The potential that he would actually receive clemency rests on nothing more than sheer speculation.

Zack's irreparable injury argument misguidedly focuses solely on the fact that he will soon be executed. But it is critical to keep in mind that any relief from this Court on Zack's underlying clemency-related due process claim would only result in a second clemency proceeding that would not necessarily prevent Zack's execution. The irreparable *injury* analysis should therefore focus instead on whether Zack has (at least) shown something more than mere speculation he would actually receive clemency at the end of the delay.

Zack's inability to fully litigate his due process claims before his execution

should not be considered an irreparable injury because the likelihood of Zack actually obtaining anything other than delay from this suit rests on sheer speculation. *Cf. Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (rejecting the Ninth Circuit's mere "possibility" standard as too lenient to establish irreparable harm); *Koninklijke Philips N.V. v. Thales DIS AIS USA LLC*, 39 F.4th 1377, 1380 (Fed. Cir. 2022) (explaining the "party seeking a preliminary injunction must establish it is likely to suffer irreparable harm without an injunction" and the "mere possibility or speculation of harm is insufficient"). Speculative errors in clemency, which a capital defendant has failed to show affected the ultimate clemency determination, are not irreparable injuries.

Since Zack offers nothing, save perhaps speculation, that this litigation could result in anything other than mere delay of his sentence execution, he has failed to establish irreparable harm. This Court should deny Zack's motion to stay his execution.

CONCLUSION

This Court should deny Zack's motion for stay of execution and bring true finality to the victims, the State of Florida, and Michael Duane Zack.

Respectfully submitted,

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COUNSEL FOR DEFENDANTS

CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY that this response in opposition to Zack's emergency motion to stay his execution contains 6,205 words in compliance with Local Rule 7.1(F)'s 8,000-word limit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Linda McDermott, Assistant Federal Defender, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, Florida, **linda_mcdermott@fd.org**.

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