

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

MICHAEL DUANE ZACK,

Plaintiff,

CASE NO. 4:23-cv-392

v.

**EMERGENCY
INJUNCTION SOUGHT**

RON DESANTIS, Governor,

in his official capacity;

**EXECUTION OF STATE
DEATH SENTENCE SET:
OCTOBER 3, 2023, 6:00 P.M.**

JIMMY PATRONIS, Chief Financial Officer,

in his official capacity;

ASHLEY MOODY, Attorney General,

in her official capacity;

WILTON SIMPSON, Commissioner of Agriculture,

in his official capacity;

MELINDA COONROD,

Chairwoman, Florida Commission on Offender Review,

in her official capacity;

SUSAN MICHELLE WHITWORTH,

a/k/a S. Michelle Whitworth a/k/a Michelle Whitworth,

Coordinator, Office of Executive Clemency,

in her official capacity;

STEPHEN HEBERT,

Director, Office of Clemency Investigations,

in his official capacity.

42 U.S.C. § 1983 COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

I. NATURE OF ACTION

1. This is a civil action brought under 42 U.S.C. § 1983 for violations of Plaintiff Michael Duane Zack's federal constitutional due process rights.
2. Mr. Zack, a death-sentenced Florida prisoner, seeks declaratory relief, injunctive relief, and a stay of his scheduled October 3, 2023, execution, pending this Court's review of this action and, ultimately, the defendants' provision of an executive clemency process consistent with the United States Constitution.

II. PARTIES TO THE COMPLAINT

PLAINTIFF

3. Michael Duane Zack is a prisoner on Florida's death row pursuant to his 1997 death sentence originating from Escambia County. *Zack v. State*, 753 So. 2d 9 (Fla. 2000), *cert denied*, 531 U.S. 858 (2000). He is a citizen of the United States and a resident of the State of Florida. On August 17, 2023, Governor Ron DeSantis informed Mr. Zack that his clemency was denied and signed a warrant for Mr. Zack's execution, setting it for October 3, 2023, at 6:00 p.m. at Florida State Prison, in Raiford.

DEFENDANTS

4. Defendant Ron DeSantis is the Governor of Florida and the head of the Clemency Board. He is sued in his official capacity.

5. Defendant Jimmy Patronis is the Chief Financial Officer of Florida and thus by statute a member of the Clemency Board. He is sued in his official capacity.
6. Defendant Ashley Moody is the Attorney General of Florida and thus a member of the Clemency Board. She is sued in her official capacity.
7. Defendant Wilton Simpson is the Commissioner of Agriculture of Florida and thus a member of the Clemency Board. He is sued in his official capacity.
8. Defendant Melinda Coonrod is the Chairman of the Florida Commission on Offender Review, the agency that facilitates the clemency process on behalf of the Clemency Board. She is sued in her official capacity.
9. Defendant Susan Michelle Whitworth (also known as S. Michelle Whitworth and Michelle Whitworth) is the Coordinator of the Office of Executive Clemency. She is sued in her official capacity.
10. Defendant Stephen Hebert is the Director of the Office of Clemency Investigations within the Florida Commission on Offender Review. He is sued in his official capacity.

III. JURISDICTION AND VENUE

JURISDICTION

11. This action arises under federal statute and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. §§ 1331 and 1343(a)(3). This action is brought pursuant to 42 U.S.C. § 1983. This

Court has the authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. § 2201(a), § 2202, and Federal Rule of Civil Procedure 65.

VENUE

12. Pursuant to 28 U.S.C. § 1391(b), venue is appropriate in the Northern District of Florida because the majority of Defendants live and work in this District, and the actions and decisions giving rise to this suit occurred in this District.

IV. STATEMENT OF FACTS

13. Not since 1983 has any death sentenced individual been granted executive clemency in the State of Florida. In that same time, 102 executions have occurred.¹ Thus, in the preceding 40 years, the chances of obtaining clemency or commutation of a death sentence in Florida is 0%.

¹ In addition to the 102 executions, 5 other individuals' clemency has been denied and execution dates scheduled: James Dailey's death warrant was signed on September 25, 2019. After receiving a stay of execution his execution has not been rescheduled. Paul Beasley Johnson's death warrant was signed on October 7, 2009. The Florida Supreme Court granted Mr. Johnson a new penalty phase. *Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010); David Eugene Johnston's death warrant was signed on April 20, 2009. After obtaining a stay of execution, and while litigating an intellectual disability claim before the Florida Supreme Court, Mr. Johnston died. *See Johnston v. State*, Florida Supreme Court Case No. SC10-0356, November 16, 2010 (Order dismissing case due to Appellant's death). Gregory Mills' death warrant was signed on March 23, 2001. The state circuit court granted Mr. Mills a new penalty phase and the Florida Supreme Court affirmed. *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001). Robert Trease's death warrant was signed on November 19, 2001. After receiving a stay of execution, his execution has not been rescheduled.

14. This complaint concerns the clemency proceedings of Michael Duane Zack, a death-sentenced individual in the State of Florida with a scheduled execution date of October 3, 2023. Clemency has long been regarded as the ultimate act of grace or mercy, and in the capital context, it is the difference between life and death. Given the gravity of the clemency process for Mr. Zack and the tremendous deficiencies in his clemency presentation—including the absence of many significant facts about his life and exclusion of comprehensive expert testimony regarding Mr. Zack’s diagnosis of Fetal Alcohol Syndrome (FAS), Post-Traumatic Stress Disorder (PTSD), and severe substance abuse disorder to which he was genetically predisposed and which followed his stepfather’s forcible administration of illicit substances to Mr. Zack as a child—a brief recitation of his life history is warranted prior to the specific facts giving rise to the violations of his rights that this action concerns.

A. Michael Duane Zack’s Life

15. Michael Duane Zack was born on December 14, 1968. However, Mr. Zack’s profound trauma began in utero. His mother drank heavily while she was pregnant with him (T. 1701-04). Mr. Zack was born early after his mother was in a car accident which caused her to go into labor (T. 1705). Mr. Zack’s birth records revealed a critical marker for Fetal Alcohol Syndrome: microcephaly, but FAS was not well understood at the time and therefore overlooked until 1997 when he was

diagnosed. (Appendix A – Declaration of Dr. Natalie Novick Brown, Ph.D., dated August 27, 2023, hereinafter App. A); (*see also* Appendix B – Declaration of Dr. Julian Davies, M.D, dated August 27, 2023, hereinafter App. B) (“We now know that microcephaly in a child prenatally exposed to alcohol is associated with a high risk of severe brain functional impairments.”). FAS is generally regarded as the most severe form of Fetal Alcohol Spectrum Disorder (FASD) (App. A; App. B).

16. When Mr. Zack was less than a year old, his biological father abandoned him (T. 1708), his older sister, Theresa McEwing, and his mother (Appendix C – Report of Dr. Hyman Eisenstein, Ph.D., dated May 26, 2015, hereinafter App. C). Mr. Zack’s mother remarried Anthony Midkiff when he was 9 months old (App. C). During the marriage, Mr. Zack’s sisters, Melissa Midkiff and Ziva Midkiff, now Knight, were born (App. C).

17. 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 violently abused him physically, sexually, and mentally. He jerked Mr. Zack by the hair, put scalding silverware to Mr. Zack’s tongue and penis, beat him with closed fists, kicked him with spurs, created devices to give Mr. Zack an electric shock if he wet the bed (which was nearly nightly), forced him to perform sex acts, and forced him to use drugs and alcohol. *See* App. C. Mr. Zack was also abused while in foster care. Dr.

Akinsulure-Smith, who recently conducted an evaluation with Mr. Zack, found 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 experiences prior to age 18 and supports his description of early traumatic events)”, which is of great concern (Appendix D – Report of Dr. Adeyinka Akinsulure-Smith, Ph.D., dated August 27, 2023, hereinafter App. D). The only category Mr. Zack was not exposed to was parental incarceration.

18. At the tender age of three, Mr. Zack was admitted to the hospital after ingesting 10 ounces of cherry vodka (App. C). Thereafter, 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. B). When he was ten, Mr. Zack was slipped LSD and again hospitalized (App. C). Shortly, after that hospitalization Mr. Zack made a suicide attempt and was admitted to a psychiatric hospital (App. C). He remained at the hospital, doing well in the structured environment, until his mother was murdered by his older sister, who had suffered a psychotic break. After the murder, his stepfather checked him out of the facility.
19. At the time of Mr. Zack’s 1997 trial, “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. A). Additionally, the secondary disabilities caused by FASD evidence wide-reaching impacts, including mental health problems, school disruption, substance abuse, trouble with the law², confinement, sexually inappropriate behavior, dependent living, and employment problems (App. A). However, not until the past decade has the medical community formally acknowledged the cognitive and adaptive dysfunction of FASD (App. A).

20. Still, at the time of Mr. Zack’s clemency submission, understanding the legal relevance of FASD was in its infancy. The DSM-5 included Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE), the primary cognitive effect of FASD, under the category entitled “Conditions for Further Study” which simply described proposed criteria to diagnose the condition (App. A). Over the next few years, understanding and acceptance continued to build, culminating in the consensus that FASD is functionally equivalent to intellectual disability (ID) (App. A; *see also* App. B) (“FASD IS an ID-equivalent condition”).
21. It is now accepted that FASD occurs through no action of the individual suffering from the condition and causes lifelong brain damage (App. A and B). Further,

² According to the research, “males with FASD between the ages of 12 and 51, 68% were found to have experienced trouble with the law.” (App. A); *see also* App. B (when combined with additional risk factors such as disrupted school experience, the percentage jumps to 83%); *id.* (“These factors make individuals with FASD dramatically more vulnerable to legal troubles.”).

according to Dr. Novick Brown “it is 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. A). 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 because his IQ score was over 75.

22. Mr. Zack’s history demonstrates a textbook case of FAS accompanied by all eight of the secondary disabilities. Mr. Zack’s neurobehavioral manifestations were evident in his development: he started walking and crawling late, he had communication delays, “nearly nightly enuresis (bed-wetting) into his teenage years, he rocked back and forth, and was described as “slow” (App. B). “When he was 12 years old, he was functioning at a lower level than his six-year-old sister.” (App. B). And, “[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 has ever encountered.” (App. B). As Mr. Zack aged, his limitations grew even more pronounced.³ He “was

³ This is a hallmark of FASD. Adolescence and adulthood, in typical populations, results in the development of higher-level cognitive processes—particularly in the realm of executive functioning. This development does not occur in individuals with FASD, which means that as adults, their impairments are even more pronounced as compared to their age-matched peers than they were in childhood.

incapable of basic adult responsibilities.” (App. B). The mother of Mr. Zack’s daughter compared his functioning to that of a disabled child (App. B). The only time Mr. Zack has coped effectively with life experiences was during his psychiatric hospitalization and his current incarceration, which is entirely predictable based upon what is now known about FASD (App. A, *see also* App. D) (“As an individual with a developmental disability, consistent structure and dependable supports are critical to Mr. Zack’s functioning within a given environment.”). Indeed, Mr. Zack’s disciplinary record demonstrates that he is a model prisoner (App. D). His few minor disciplinary infractions “are consistent with his cognitive impairments”, i.e., having too many stamps when he did not understand the institutional limits (July, 1997), and when he wore the wrong color shirt to a prison event after the rules had been changed (July, 2003).

B. Rules and Statutes Governing Clemency Proceedings For Death-Sentenced Individuals in Florida

23. Clemency in Florida is derived both from the Florida Constitution and state statute. *See* Fla. Const. Art. IV, sec. 8(a) (“Except in cases of treason and in cases where impeachment results in conviction, the governor may . . . with the approval of two members of the cabinet . . . commute punishment . . .”); Fla. Stat. 940.01 (same). All clemency is governed by the Rules of Executive Clemency,⁴ which was created

⁴ Available at: https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last visited on September 3, 2023).

by the Clemency Board, and was last amended in 2011. The Clemency Board is comprised of the Florida Governor and members of the Governor's Cabinet. Presently, the Clemency Board is comprised of Florida Governor Ron DeSantis, Chief Financial Officer Jimmy Patronis, Attorney General Ashley Moody, and Commissioner of Agriculture Wilton Simpson.

24. Within the Rules of Executive Clemency, there are 19 rules. However, only a select few apply to clemency for capital inmates. *See* Rule 15, Rules of Executive Clemency (2011) (“This Rule applies to all cases where the sentence of death has been imposed. The Rules of Executive Clemency, except Rules 1, 2, 3, 4, 15 and 16 are inapplicable to cases where inmates are sentenced to death.”). The rules that apply to capital clemency include Rule 1 (“Statement of Policy”), Rule 2 (“Administration”), Rule 3 (“Parole and Probation”), Rule 4 (“Clemency”), Rule 15 (“Commutation of Death Sentences”) and Rule 16 (“Confidentiality of Records and Documents”).

25. Rule 1 describes clemency as “an act of mercy.”

26. Rule 15 is the operative rule dictating the mechanics of clemency for capital inmates in Florida. Rule 15 provides that in all cases in which death has been imposed, the Florida Commission on Offender Review (FCOR), conducts an “investigation into all factors relevant to the issue of clemency and provide[s] a final report to the Clemency Board.” *See* Rule 15(B) (emphasis added). This

investigation begins “at such time as designated by the Governor” or if there has been “no such designation . . . immediately after the defendant’s initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals” Rule 15(C).

27. The rules provide for FCOR’s investigation:

The investigation shall include, but not be limited to, (1) an interview with the inmate, who may have clemency counsel present, by the Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; (3) an interview, if possible, with the presiding judge; and (4) an interview, if possible, with the defendant’s family.

Rule 15(B). When a clemency investigation is initiated, FCOR also provides notice to the Office of the Attorney General’s Bureau of Advocacy and Grants, which in turn solicits “written comments from the victims of record.” Rule 15(B).

28. Under Rule 15, after an investigation is “concluded,” FCOR prepares a “final report on their findings and conclusions,” which must include: “(1) any statements made by the defendant, and defendant’s counsel, during the course of the investigation; (2) a detailed summary from each Commissioner who interviewed the inmate; and (3) information gathered during the course of the investigation.” Rule 15(D). This report is then sent to “all members of the Clemency Board within 120 days of the commencement of the investigation, unless the time period is extended by the Governor.” Rule 15(D).

29. “[A]ny member of the Clemency Board may request a hearing within 20 days of the transmittal of the final report to the Clemency Board. Rule 15(E).
30. Apart from the transcript of the clemency interview, capital inmates are not entitled to see any other materials generated in the clemency process, including statements given by their former attorney at trial, their trial prosecutor, their trial judge, their own family members, or the victim’s family members, which are gathered as part of the clemency investigation conducted by FCOR (*see* Rule 15(B)). Likewise, capital inmates are not entitled to see the final report generated by FCOR and presented to the Clemency Board.
31. While clemency is an executive function in Florida, the Florida Legislature has statutorily prescribed that an individual’s death sentence cannot be carried out without the undertaking of the “clemency process.” Specifically, although the legislature has empowered the Governor to initiate, with the signing of a warrant, the execution of a death-sentenced individual, the Governor is only permitted to issue such a warrant if “the executive clemency process has concluded” *See* Fla. Stat. § 922.052(b), (c).

C. Mr. Zack’s Clemency Proceeding

32. 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 (Appendix E – Declaration

of Peter N. Mills, dated September 1, 2023, hereinafter App. E). 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. E). After the memorandum was submitted, PD-10 heard nothing from FCOR, the Governor, or the Clemency Board until receiving a letter over nine years later on August 17, 2023, indicating that Governor Ron DeSantis had denied clemency for Mr. Zack (Appendix F – Letter from S. Michelle Whitworth to Howard “Rex” Dimming, dated August 17, 2023, hereinafter App. F).

33. 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. E). *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. E).

34. 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, 2023.⁵

V. CAUSE OF ACTION

35. As described in more detail in Mr. Zack's accompanying memorandum in support of this complaint,⁶ Defendants violated his federal constitutional due process rights

⁵ 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 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.

⁶ This complaint provides the factual background and basis for the cause of action. Mr. Zack has filed a separate memorandum outlining the legal support for his positions, in

through an inadequate consideration process, and resultant denial of, executive clemency.

36. The United States Supreme Court has recognized that the importance of the clemency process in a capital case cannot be understated: “far from regarding clemency as a matter of mercy alone, we have called it ‘the “fail safe” in our criminal justice system.’”. *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)). When the clemency process is rendered meaningless, as it was here, Florida’s death penalty scheme is constitutionally defective.

37. In *Ohio Adult Parole Authority, et. al v. Woodard*, 523 U.S. 272, 288-89 (1998), 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.

38. Mr. Zack’s clemency process did not comport with due process. The defects in Mr. Zack’s clemency process rose to the level of coin flipping where the coin was never flipped. This meaningless aspect of the death penalty scheme in Florida has resulted in forty years without a single grant of mercy for a death sentenced inmate.

39. The failure to provide Mr. Zack any opportunity to appeal for clemency to the individuals who now decide who is entitled to mercy—and to supply them with an

addition to a motion for a stay of execution, so that this Court may consider these arguments without the exigencies of an active death warrant.

updated memorandum in support specifically outlining the sea change that has occurred in the medical and psychological community concerning FAS and what is now known—violates the most basic concept of due process: notice and opportunity to be meaningfully heard.

40. As noted, this cause of action is described in more detail in Mr. Zack's accompanying memorandum. Mr. Zack has also filed a motion to stay his scheduled October 3, 2023, execution, based on the likelihood of success of this cause. For the reasons in the memorandum and stay motion, the Court should stay Mr. Zack's execution and grant declaratory and injunctive relief.

V. REQUEST FOR RELIEF

41. Mr. Zack requests a preliminary injunction prohibiting Defendants from executing him until this Court has had the opportunity to meaningfully consider his federal constitutional arguments. Mr. Zack's meritorious cause of action should not be decided in the context of an active death warrant.

42. Mr. Zack requests that the Court declare that Defendants violated his federal constitutional due process rights during executive clemency review.

43. Mr. Zack finally requests that this Court grant a permanent injunction barring Defendants from executing him until Defendants provide him with an executive clemency process comporting with the United States Constitution.

VI. CERTIFICATION

44. Linda McDermott, attorney for Plaintiff Zack in the above-entitled action, certifies that to the best of her knowledge and belief, the facts set forth in this complaint are true and correct.

Respectfully submitted,

/s/ Linda McDermott
Linda McDermott
Chief, Capital Habeas Unit

/s/ Jessica Houston
Attorney

Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818
linda_mcdermott@fd.org
jessica_houston@fd.org

Counsel for Mr. Zack