UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

EXECUTION SCHEDULED FOR TUESDAY, OCTOBER 3, 2023, @ 6:00 p.m.

MICHAEL DUANE ZACK, III,

Plaintiff,

v.

CASE NO.: 4:23-cv-00392-RH
CAPITAL CASE

RON DESANTIS,
Governor of Florida,
in his official capacity, *et al.*,

Defendants.

_____/

DEFENDANTS' MOTION TO DISMISS AND
MOTION FOR JUDGMENT ON THE PLEADINGS

On September 5, 2023, Zack, a Florida death row inmate with an active death warrant, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a 42 U.S.C. § 1983 action, raising a due process claim regarding Florida's clemency process. He also filed a memorandum of law in support of his § 1983 action. Zack argues that the minimal due process required of state clemency proceedings includes a right to be heard by the current clemency officials regarding subsequent developments that occur after the first clemency interview. He claims that because there is a new scientific consensus that

Fetal Alcohol Syndrome (FAS) is the equivalent of intellectual disability which developed after his first clemency proceeding, he is entitled to a second clemency proceeding in front of the current clemency officials. Zack also filed an emergency motion for a stay of the execution with his § 1983 action.

This is all named Defendants' motion to dismiss the § 1983 action and alternatively, motion for judgment on the pleadings. Fed. R. Civ. P. 12(b)(6); Fed. R. Civ. P. 12(c).[1] The § 1983 action should be dismissed on two grounds: (1) failure to state a claim under Rule 12(b)(6) because the due process attack on Florida's clemency proceedings is baseless as a matter of law under *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013), and *Bowles v. DeSantis*, 934 F.3d 1230, 1233, 1236-37 (11th Cir. 2019); and (2) the *in forma pauperis* § 1983 action is frivolous and should be dismissed under 28 U.S.C. § 1915(e)(2)(B)(i), and *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019). The § 1983 action should be dismissed.

Facts regarding state clemency

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

[1] Defendants are Governor of Florida Ron DeSantis; Chief Financial Officer of Florida Jimmy Patronis; Attorney General of Florida Ashley Moody; Florida Commissioner of Agriculture Wilton Simpson; Chairman of the Florida Commission on Offender Review Melinda Coonrod; Coordinator of the Office of Executive Clemency Susan M. Whitworth and Director of Clemency Investigations Stephen Hebert. Each defendant is being sued in his or her official capacity.

or discretion given to the Clemency Board"). The rules of executive clemency provide: "The Governor has the unfettered discretion to deny clemency at any time, for any reason" and "No applicant has a right to a clemency hearing." Fla. R. Exec. Clemency 4; *see generally Bowles v. DeSantis*, 934 F.3d 1230, 1235-36 (11th Cir. 2019) (describing Florida's clemency process).

In 2013, Assistant Public Defendant Peter Mills was appointed to represent Zack during his state clemency proceedings. *Babb v. State*, 92 So.3d 281 (Fla. 5th DCA 2012) (holding the chief judge of a judicial circuit could appoint the public defender to handle clemency proceedings in capital cases).[2] Zack's clemency interview occurred on April 24, 2014.

On August 17, 2023, the current Governor of Florida, Governor Ron DeSantis, signed a death warrant. The warrant included the statement that executive clemency for Zack was considered and it had "been determined that executive clemency is not appropriate."

Failure to State a Claim for Relief

Zack fails to state a claim for relief under federal rule of civil procedure 12(b)(6). A complaint must state a claim for relief that is plausible on its face, not merely conceivable, to avoid dismissal for failure to state a claim. *Bell Atl. Corp. v. Twombly*,

[2] The clemency counsel statute, § 940.031, Florida Statues (2014), provides: the "Board of Executive Clemency may appoint private counsel to represent a person sentenced to death for relief by executive clemency. . ." The effective date of the statute was July 1, 2014, and the statute now controls.

550 U.S. 544, 570 (2007). Labels, conclusions, or formulaic recitation of the elements of a cause of action "will not do." *Twombly*, 550 U.S. at 555. Under *Twombly*, the allegations must rise above the speculative level. *Id*. at 555; *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013) (applying *Twombly* to a § 1983 action and finding that Mann had not alleged enough facts to nudge his claim across the line from conceivable to plausible). And, while factual assertions are taken as true, legal conclusions are not. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The "civil action for deprivation of rights" statute, 42 U.S.C. § 1983, requires that the defendant deprive the plaintiff of "rights, privileges, or immunities secured by the Constitution and laws" to be liable. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979) (explaining that the Civil Rights Act did not create any substantive rights, rather, it "only gives a remedy" and observing "one cannot go into court and claim a violation of § 1983" because "§ 1983 by itself does not protect anyone against anything"). The right the § 1983 claim rests upon must be "clearly established." *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) (explaining that a decision of a federal district court is not binding precedent and noting that many circuit courts therefore refuse to consider district court precedent when determining if constitutional rights are clearly established for purposes of § 1983 actions).

It is proper to dismiss a § 1983 action on a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"); *Myrick v. Fulton Cnty., Georgia*, 69 F.4th

1277, 1294 (11th Cir. 2023) (noting the court "may dismiss a complaint pursuant to Rule 12(b)(6) on a dispositive issue of law" citing *Patel v. Specialized Loan Servicing, LLC.*, 904 F.3d 1314, 1321 (11th Cir. 2018), and *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993)).

Zack's § 1983 action fails to state a claim under Supreme Court precedent as well as under controlling Eleventh Circuit precedent. While there is a ***minimal*** due process right in state clemency proceedings for death-row inmates, minimal due process does not include the right to a second clemency hearing under Eleventh Circuit precedent. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-90 (1998) (O'Connor, J., concurring) (emphasis added) (holding there are minimal due process standards governing state clemency proceedings, such as the right to access to the clemency process); *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013) (holding a second full clemency proceeding is not required under the minimal due process standard). Moreover, Zack is not being denied the right to submit any written materials related to clemency. As the Eleventh Circuit has noted in a case denying a stay to litigate a § 1983 action regarding Florida's clemency process, federal habeas counsel may submit written materials to clemency officials. *Bowles v. DeSantis*, 934 F.3d 1230, 1233, 1236-37 (11th Cir. 2019).

Eleventh Circuit recent precedent regarding clemency

In *Barwick v. Governor of Florida*, 66 F.4th 896 (11th Cir. 2023), *cert. denied*,

Barwick v. DeSantis, 143 S.Ct. 2452 (2023) (No. 22-7412), the Eleventh Circuit affirmed the district court's denial of a motion to stay the execution to litigate a § 1983 action regarding Florida's clemency process. Barwick, a Florida death-row inmate with an active warrant, filed a § 1983 action asserting that the lack of standards in Florida's clemency rules violated due process. *Id*. at 900. He noted that during his clemency interview, the Commissioners refused to allow him to present information regarding what happened during his prior court proceedings or "his innocence or guilt." *Id*. at 899. The Eleventh Circuit also denied the motion to stay filed in the appellate court. *Id*. at 900, 905. The Eleventh Circuit discussed Florida's clemency process noting that state law did "not impose any legal limitations on officials' exercise of their discretion" regarding clemency. *Barwick*, 66 F.4th at 898 (citing Fla. Const. art. IV, § 8(a); Fla. Stat. § 940.01(1); and *Bowles v. DeSantis*, 934 F.3d 1230, 1235-36 (11th Cir. 2019)). The Eleventh Circuit observed that, while Florida Rules of Executive Clemency provide that the Florida Commission on Offender Review "may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency, the rules did not specify the factors that should be considered during the clemency process. Instead, the clemency rules allowed the Governor "unfettered discretion to deny clemency at any time, for any reason." *Id*. at 898 (citing Fla. R. Exec. Clemency 4).

The Eleventh Circuit noted that a court may grant a stay of execution only if the prisoner "establishes that (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*, 66 F.4th at 900 (citing *Bowles v. DeSantis*, 934 F.3d 1230, 1238 (11th Cir. 2019)) (emphasis added). To obtain a stay, the prisoner "must satisfy all of the requirements" *Id*. at 900 (citing *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). The Court noted, however, the "first and most important question" is whether he can demonstrate a substantial likelihood of success on the merits and the panel began and ended with a determination that Barwick did not demonstrate a substantial likelihood of success on the merits. *Id*. at 902 (citing *Jones v. Comm'r, Ga. Dep't of Corr*., 811 F.3d 1288, 1292 (11th Cir. 2016)). The Eleventh Circuit noted that under Justice O'Connor's critical and binding concurring opinion in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998), death-row inmates have a ***minimal*** due process right in state clemency proceedings. *Id*. at 902 (emphasis in original). But the panel noted the "key word" was "minimal" and emphasized that clemency is "discretionary" and "a matter of grace." *Id*. at 903. The court noted that the Eleventh Circuit had "repeatedly upheld state clemency proceedings" challenged on due process grounds. The panel discussed both *Gissendaner v. Comm'r, Ga Dep't of Corr*., 794 F.3d 1327 (11th Cir. 2015), which held federal due process was not violated even if state law was violated, and *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013), which held Florida's Governor was not required to conduct a second full clemency hearing himself before signing a death warrant. *Id*. at 903. The *Barwick* Court held that the federal Due Process Clause does not require a state to provide any

standards for its clemency process. *Id*. The Eleventh Circuit explained that, under Supreme Court authority, it is not for the Judicial Branch to determine clemency standards. *Id*. (quoting *Cavazos v. Smith*, 565 U.S. 1, 9 (2011)). Any complaints that clemency power is being exercised "in either too generous or too stingy a way" must be resolved by "political correctives, not judicial intervention." *Id*. "Any additional information about the relevant factors that are considered in the executive clemency process must come from the political branches, such as the Clemency Board itself. *Id*. at 905. The Court reasoned that state clemency proceedings "without tangible standards" were not akin to the "truly outrageous" examples given by Justice O'Connor in *Woodard* of the total denial of access to clemency or flipping a coin to determine granting clemency. *Id*. at 903. The panel stated that under existing precedent, a state is not required to provide a detailed set of criteria for clemency. *Id*. at 904. While the Eleventh Circuit noted the Commissioners' questions about Barwick's criminal history and the facts surrounding the crime, the panel reasoned that such inquiries did not suggest arbitrariness in the clemency process or a violation of due process. *Barwick*, 66 F.4th at 904. To the contrary, the Commissioners' inquiries properly sought to obtain information to assist the Clemency Board in determining whether clemency should be granted. The panel also rejected the argument that the Commissioners' "singular focus" on the crime itself rendered his actual clemency consideration "essentially nonexistent" concluding that it was not an accurate characterization of the clemency interview and regardless, the focus on the crime did not render his clemency

arbitrary or nonexistent.

In *Gissendaner v. Comm'r, Ga Dep't of Corr.*, 794 F.3d 1327 (11th Cir. 2015), the Eleventh Circuit affirmed the district court's dismissal of a § 1983 action for failing to state a claim. Gissendaner, a Georgia death-row inmate, filed a § 1983 action asserting a prison warden, who refused to allow her clemency attorneys to speak with prison guards to gather statements for her clemency presentation, violated her due process rights to clemency. *Id*. at 1328-29. The Eleventh Circuit discussed *Woodard* and noted "the key word" was "minimal." *Id*. at 1331. The Eleventh Circuit observed that the *Woodard* Court had ultimately concluded that Woodard was not denied minimal due process, despite the fact that he was given only a few days notice of his clemency hearing, was interviewed by the parole board without his attorney present, and was precluded from testifying or submitting any documentary evidence at the hearing. Justice O'Connor gave two examples of situations that would violate minimal due process: (1) a State arbitrarily denying a prisoner any access to clemency; or (2) a state official flipped a coin to determine whether to grant clemency. *Id*. at 1331(citing *Woodard*, 523 U.S. at 289). The Eleventh Circuit held that "outside of similarly 'extreme situations,' the federal Due Process Clause does not justify judicial intervention into state clemency proceedings." *Id*. at 1331 (citing *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999)). The Eleventh Circuit reasoned that the process Gissendaner received was at least equal to the process in *Woodard*. She was given notice of the hearing, allowed to present 15 witnesses, and

to submit 13 written statements in support of clemency. That notice and opportunity to be heard was "enough" to satisfy minimal due process. *Id*. at 1331.

The Eleventh Circuit also held that a state's failure to follow its own state laws or clemency rules is not a federal due process violation. *Gissendaner*, 794 F.3d at 1331-32. The Eleventh Circuit relied on their prior precedent of *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268 (11th Cir. 2014), noting that under the Eleventh Circuit's prior precedent rule, the holding of the first panel to address an issue is the law of the Circuit and is "binding on all subsequent panels," and thus, *Wellons* controlled. *Id*. at 1332 (quoting *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001)). Alternatively, the Eleventh Circuit noted that even without the prior precedent of *Wellons*, a claim that the state did not follow its own laws or rules, would fail because nothing in Justice O'Connor's concurring opinion suggested that compliance with state laws or procedures was part of the "minimal procedural safeguards" protected by the federal Due Process Clause. *Id*. at 1333. The Eleventh Circuit also noted the "long line of Supreme Court decisions" holding that a violation of state law does not itself give rise to a federal due process claim. *Id*. at 1333 (citing *Sandin v. Conner*, 515 U.S. 472, 482 (1995); *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983); and *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)).

Right to be heard and second clemency proceedings

CHU-N is arguing that the prior clemency presentation was incomplete because

there is a new scientific consensus, regarding Fetal Alcohol Syndrome (FAS) being equivalent to intellectual disability, which developed after the first clemency proceedings in 2014. CHU-N is asserting Zack was denied an opportunity to be heard in front of the current clemency officials regarding this new development among the psychological community.

But the minimal due process standard that governs clemency matters does not include the right to a second full clemency proceeding. In *Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013), the Eleventh Circuit rejected a claim that minimal due process required a second clemency proceeding because decades had passed since the first clemency proceeding. The Governor of Florida conducted a full clemency hearing in 1985. *Id*. at 1316. Nearly three decades later, in 2012, a different Governor signed a death warrant for Mann without conducting a second full clemency proceeding. The Governor had, however, conducted an updated clemency investigation before signing the warrant. Mann argued he was denied notice of, and the opportunity to be heard during the update, as well as being denied clemency counsel during the update process as a consequence of the lack of notice. The Eleventh Circuit concluded that Mann could not "show any violation of his due process rights in the clemency proceedings." *Id*. at 1316. The Eleventh Circuit determined that the process he received, including notice of the hearing and an opportunity to participate in the state clemency proceedings comported with "whatever limitations the Due Process Clause may impose on clemency

proceedings." *Id*. at 1316-17 (citing *Woodard*, 523 U.S. at 290).[3]

As in *Mann*, the Governor in this case conducted an updated clemency investigation. Here, as in *Mann*, Zack cannot show any violation of his due process rights. Like Mann, Zack received notice of the first clemency proceeding and an opportunity to participate in the first clemency proceeding. He was also appointed clemency counsel for those proceedings, all of which more than comports with "whatever limitations the Due Process Clause may impose on clemency proceedings." *Mann*, 713 F.3d at 1316-17 (citing *Woodard*, 523 U.S. at 290). Zack is not entitled to a second full clemency proceeding. The claim is baseless as a matter of law under *Mann*.

Zack points to Florida's Rule of Clemency governing requests for a hearing by Clemency Board Members, which allows any member of the Clemency Board to request a hearing within 20 days after receiving the final report from the Commissioners. Fla. R. Exec. Clemency 15(E). Memo at 5. This is simply another way of claiming that he is entitled to an entirely new clemency proceeding if there is a change in the Clemency

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[3] There was a dissent in *Mann*. *Mann*, 713 F.3d at 1317 (Martin, J., dissenting). The dissent, however, was based on the "unusual" fact that the 1985 clemency proceeding, while related to the same underlying conviction, involved a different death sentence. That unusual fact pattern is not present in this case. Zack's clemency proceedings in 2014 concerned his death sentence for the murder of Ravonne Smith which is the same sentence in the current death warrant. Zack never received a resentencing or a second death sentence. Nor was the time span between the first clemency proceedings and the updated clemency proceedings in this case similar to the time span in *Mann*. There was less than a decade between the first clemency proceedings and the updated proceedings in this case. The dissent's concern is not present in this case.

Board since the first clemency proceeding was conducted, which is contrary to the holding of *Mann*. It also ignores the Governor's key role in clemency in Florida. Fla. Const. Art. IV, § 8(a); Fla. R. Exec. Clemency 15(F) (providing that notwithstanding any provision to the contrary in the Rules of Executive Clemency, in any case in which the death sentence has been imposed, the Governor may 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). Clemency cannot be granted in Florida without the Governor's approval. Regardless of any time limits in the rules of clemency, Zack is not entitled to a second full clemency proceeding under the federal due process clause according to *Mann*.

Even if the minimal due process associated with clemency extends to an opportunity to be heard regarding new clemency developments, Zack was not denied the opportunity to submit written clemency materials since the first clemency proceeding in 2014. In *Bowles v. DeSantis*, 934 F.3d 1230 (11th Cir. 2019), the Eleventh Circuit explained that Florida's clemency process allowed federal habeas counsel to submit written material in support of clemency. CHU-N was appointed as Bowles' federal habeas counsel in September of 2017. *Id*. at 1235. Bowles' clemency proceedings started in March of 2018. *Id*. at 1236. CHU-N was not permitted to act as clemency co-counsel at the clemency hearing but were "repeatedly offered opportunities to submit any written materials they desired in support of clemency." *Id*. at 1233. In June of 2018, CHU-N submitted a joint six-page letter along with state postconviction

counsel and state-appointed clemency counsel urging that clemency be granted. *Id*. at 1233, 1236. The letter detailed Bowles' background and asserted his intellectual disability and it also requested a stay of the clemency proceedings to litigate the intellectual disability claim in state court. *Id*. at 1236. The Governor's office wrote a letter to CHU-N stating that they were "welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration." *Id*. at 1236-37. Neither CHU-N nor their experts were permitted to appear at Bowles' August 2018 clemency interview. *Id*. at 1237. But the Commission informed CHU-N that "any party is welcome to submit any materials" in support of clemency, "which will be given full consideration." *Id*. Two days after the clemency interview, an investigator for the Commission wrote to CHU-N inviting them to submit written comments. *Id*. at 1236. CHU-N, however, did not submit any clemency material in response to either of these invitations. *Id*. at 1237. On June 11, 2019, the Governor denied clemency and signed a death warrant for Bowles. *Id*. at 1237. Bowles and his federal habeas counsel, CHU-N, had three separate invitations and opportunities to submit additional clemency materials but only submitted one letter in response.

A month after the warrant was signed, CHU-N filed a § 1983 action claiming that Bowles had a right under 18 U.S.C. § 3599 to have his federal habeas attorneys represent him in state clemency proceedings. *Bowles*, 934 F.3d at 1233, 1237-38. The Eleventh Circuit concluded that § 3599 did not create an enforceable right under § 1983 to have federal habeas counsel represent a capital defendant in state clemency

proceedings when the State provides clemency counsel. *Id*. at 1243, 1246. The Eleventh Circuit also denied a stay of execution. *Id*. at 1248.

Like Bowles, Zack may submit any new clemency material to the Office of Executive Clemency, including his new affidavits regarding the current scientific consensus on FAS, and he may do so any time despite being denied clemency previously. Clemency is an ongoing process in Florida. And CHU-N is well aware of that fact. CHU-N was the attorney of record in *Bowles*. *Bowles*, 934 F.3d at 1233 (listing Terri L. Backhus and Sean Talmage Gunn of CHU-N as counsel of record). CHU-N knows that clemency is an ongoing process in Florida and that they are permitted to make written submission in support of clemency at any time. CHU-N knows all this and has had that knowledge from their representation of Bowles since 2018.

Zack could have submitted any such new clemency material years ago when CHU-N first became Zack's federal habeas counsel in February of 2020. (*Zack v. McNeil*, 3:05-cv-00369-RH – Doc. #78). CHU-N has had the ongoing opportunity to submit clemency materials for over three years. And even before that, the current chief of the CHU-N, Linda McDermott, was Zack's federal habeas counsel when the original clemency proceedings were conducted in 2014 and for the years in between the first clemency proceeding and CHU-N becoming Zack's federal habeas counsel after Linda McDermott joined that office.

Furthermore, CHU-N could have submitted any clemency material to the Office of Executive Clemency in the last couple of weeks after the warrant was signed instead

of filing this § 1983 action. In one way, the death warrant itself is notice to both Zack and all his counsel that the clemency update is being conducted. So, contrary to CHU-N's assertion, CHU-N has both notice of the current ongoing clemency proceedings and an opportunity to he heard in writing regarding the new scientific consensus regarding FAS. Zack has ***not*** been denied an opportunity to be heard regarding any and all new developments since his clemency interview in 2014. The materials and arguments presented in the § 1983 action should have been submitted to the Office of Executive Clemency, not to this Court. The claim regarding lack of opportunity to be heard is baseless under *Bowles*.

While unclear, Zack's actual argument may be that he is entitled to be heard orally regarding his claim that FAS is equivalent to intellectual disability in person by the current Commissioners. But even normal due process does not include the right to be heard orally at most proceedings. The due process right to be heard typically is satisfied by being provided the opportunity to submit written submissions. The right of allocution normally is limited to discretionary sentencing. Indeed, many appellate cases, including the appeals of serious criminal convictions, are decided on written submissions alone, *i.e.*, the briefs. James C. Martin, Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 J. App. Prac. & Process 89, 91 (2018) (noting that oral argument is conducted in only 50% of counseled cases in most of the federal circuit courts). And the minimal due process applicable to clemency certainly does not include a right to allocution, much less a right of allocution regarding subsequent developments in the psychological community.

Woodard himself was not permitted to testify at his first clemency hearing. *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1294 (11th Cir. 2020) (noting that Woodard was not permitted to testify himself at his clemency proceeding yet the Supreme Court concluded that those clemency proceedings comported with minimal due process in *Woodard*).[4] There was no violation of the due process right to notice and an opportunity to be heard regarding subsequent developments, if such a right even exists.

Zack's claim is directly contrary to the controlling Eleventh Circuit precedent of *Mann*, *Bowles,* and *Woods*, and therefore, the claim is baseless legally. The § 1983 action should be dismissed for failure to state a claim.

Frivolous *in forma pauperis* actions

Alternatively, the § 1983 action should be dismissed under 28 U.S.C. § 1915(e)(2)(B). When an *in forma pauperis* § 1983 action is frivolous the district court must dismiss it under § 1915(e)(2)(B). According to the Supreme Court, a claim is

[4] While unclear, Zack may also be asserting a due process claim based on the fact that no capital defendant in Florida has been granted clemency since 1983. In the 1983 action, this argument is made only under the statement of the facts. Assuming CHU-N is actually raising such a claim, it is also baseless. *Banks v. Sec'y, Fla. Dep't of Corr.*, 592 Fed. Appx. 771, 773 (11th Cir. 2014) (rejecting a due process attack on Florida clemency on the basis that no death-sentenced inmate has been granted clemency in Florida in over thirty-one years); *id.* at 774 (Martin, J., concurring) (agreeing there was no violation of due process in the clemency proceedings). There is no minimal due process requirement that clemency be granted every decade to a death-row inmate. Opposing counsel cites to no case from any federal circuit court even hinting, much less holding, that there is any such requirement.

frivolous where it lacks a " basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A district court not only has the authority to dismiss an action based on being meritless legally under this statute but also the "unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Williams*, 490 U.S. at 327. The Eleventh Circuit classifies a claim as frivolous "if it is without arguable merit either in law or fact." *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001); *Irizarry v. Sec'y, Fla. Dep't of Corr.*, 2021 WL 3231163 (11th Cir. July 22, 2021) (dismissing an appeal as frivolous under § 1915(e)(2)(B)). While a § 1983 action is not necessarily frivolous for failing to state a legal claim under *Williams*, it certainly is frivolous when the action is nothing more than an attack on well-settled precedent.

This § 1983 action is nothing more than an attack on settled Eleventh Circuit precedent. The Eleventh Circuit itself recently observed that the Court has "repeatedly upheld" state clemency proceedings against various due process challenges. *Barwick v. Governor of Florida*, 66 F.4th 896 (11th Cir. 2023); *Bowles v. DeSantis*, 934 F.3d 1230 (11th Cir. 2019); *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018); *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327 (11th Cir. 2015); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268 (11th Cir. 2014); *Banks v. Sec'y, Fla. Dep't of Corr.*, 592 Fed. Appx. 771 (11th Cir. 2014); *Mann v. Palmer*, 713 F.3d 1306 (11th Cir. 2013); *Valle v. Sec'y, Fla. Dep't of Corr.*, 654 F.3d 1266, 1268 (11th Cir. 2011); *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032 (11th Cir. 2001); *Gilreath v. State Bd. of Pardons*

& Paroles, 273 F.3d 932 (11th Cir. 2001). This clemency claim is frivolous according to decades of controlling Eleventh Circuit precedent.

As no less than the Ninth Circuit has observed, the Supreme Court has never recognized any case in which the state clemency proceedings violated minimal due process. *Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013). The only type of due process attack on a state clemency proceeding that would not be frivolous under *Woodard* would be a claim of a complete denial of access to the state's clemency process. But Zack's claim is that he is entitled to repeated access to the state clemency process which necessarily makes it a frivolous claim.

This Court should do exactly what the United States Supreme Court advised courts to do when dealing with § 1983 actions that are little more than attacks on "settled" precedent. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (characterizing a § 1983 action in a capital case as amounting in the end "to little more than an attack on settled precedent"). The Supreme Court recommended the federal courts invoke their inherent equitable powers to prevent delays in capital cases and dismiss such § 1983 actions. *Bucklew*, 139 S.Ct. at 1134 (stating that 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"). The § 1983 action should be dismissed based on § 1915(e)(2)(B) and *Bucklew*.

Accordingly, the § 1983 action should be dismissed for failure to state a claim

and, alternatively, as frivolous.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I HEREBY CERTIFY that the foregoing DEFENDANTS' MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS is 5,173 words, which is under the 8,000 word limit in Northern District of Florida local rule 7.1(f).

/s/ *Charmaine M. Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DEFENDANTS' MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS has been furnished by CM/ECF to **LINDA MCDERMOTT**, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Ste. 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: linda_mcdermott@fd.org; and **SEAN T. GUNN**, Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 33301; phone: (850) 942-8818; email: sean_gunn@fd.org this 9th day of September, 2023.

/s/ *Charmaine M. Millsaps*
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