UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MICHAEL DUANE ZACK,

Plaintiff,

v.

RON DESANTIS, et al.,

Defendants.

_____/

CASE NO. 4:23-CV-392-RH

EMERGENCY INJUNCTION SOUGHT

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

PLAINTIFF'S REPLY TO RESPONSE TO MOTION TO STAY

On October 3, 2023, the State of Florida plans to execute Plaintiff Michael Duane Zack, a man who "always has functioned as an intellectually disabled individual[.]" ECF 1-1, App. A at 12. In opposing Mr. Zack's motion for a stay of execution related to his 42 U.S.C. § 1983 complaint in this Court, *see* ECFs 1-3, Defendants (1) disingenuously claim the clemency process remains open to Mr. Zack (ECF 19 at 4, 6, 10, 11, 21, 22, 25, 26); (2) mischaracterize Mr. Zack's complaint as "frivolous" and "mere speculation" because there is no guarantee that he would ultimately receive a grant of clemency (ECF 19 at 1, 6, 8, 12, 17, 19, 26-27); (3) improperly fault Mr. Zack for the lack of updated clemency information (ECF 19 at 1, 4-6, 8-11; 21-22); and (4) engage so hollowly with the stay factors that they refuse even to acknowledge that Mr. Zack's execution would cause an irreparable injury. *See* ECF 19 at 26-27. Defendants' arguments misdirect from the

issue at the heart of Mr. Zack's complaint: lack of access to a clemency process with any semblance of meaning.

A. What Mr. Zack's due process claim boils down to

Mr. Zack has Fetal Alcohol Syndrome (FAS), the most severe form of Fetal Alcohol Spectrum Disorder (FASD). ECF 1-1, App. A at 7, App. B at 1. The medical community recognizes FAS as functionally identical to intellectual disability (ID) in both nature and severity. *See generally id.*, App. A, B. This is not an abstract comparison that could be applied to any number of mental health conditions; rather, it is a rare causal[1] and functional connection found in only a few disorders, such as FAS and Down Syndrome. *Id.*, App. A at 7-12, App. B at 3-8. The ID-equivalence of FAS is so ubiquitous that Mr. Zack has a clinical diagnosis of intellectual disability. *Id.*, App. C at 11.

From a medical perspective, Mr. Zack's diagnoses of FAS and intellectual disability are uncontroverted. *Id.*, App. A at 12. In other societal contexts (e.g., education, healthcare, social services) Mr. Zack would be entitled to protections and benefits on account of his disability. *See id.*, App. A at 8. Yet, in a position advocated by Defendants (*see, e.g.*, ECF 19 at 25), the Florida courts have repeatedly asserted that because Mr. Zack has an IQ score in the upper 70s, he cannot meet Florida's statutory criteria for intellectual disability in the criminal legal context and is thus

[1] FASD is the leading known cause of intellectual disability. *Id.*, App. A at 11.

barred from the protections espoused in *Atkins*[2] and its progeny.[3] *See, e.g.*, *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (basing denial on strict IQ cutoff of 70); *Zack v. State*, 228 So. 3d 41, 46-47 (Fla. 2017) (basing denial on IQ score above 75).[4] Such inflexible reliance on an IQ score is outmoded (ECF 1-1, App. A at 7, 10, App. B at 2); rooted in white supremacy and eugenics (*id*., App. B at 2); at odds with science, education, and history (*see generally*, *id*., App. A, App. B); and produces an absurd result (*id.*, App. A at 10).

The Florida courts have not simply declined to exempt Mr. Zack from execution due to his disability—they have ruled that they are powerless to do so. *See, e.g.*, 8/31/23 Escambia County Circuit Court Order, Case No. 1996-CF-2517-A, at 482 ("under the State's conformity clause, the Court may not expand *Atkins* to apply to a diagnosis of FAS.") (citing *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023)). This situation is the epitome of what *Herrera*[5] envisioned to trigger the 'fail-safe' of the clemency process: a compelling issue which warrants relief from a death

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[3] *See, e.g., Hall v. Florida*, 572 U.S. 701 (2014).
[4] Contrary to Defendants' assertions (ECF 19 at 25), an IQ score in the 70s is a far cry from "normal". In fact, when the standard error of measurement is taken into account for such an IQ score, it is approximately two standard deviations below the mean of the population. This is consistent with the Diagnostic and Statistical Manual (DSM-5-TR)'s discussion of impaired intellectual functioning. However, it should be noted that the DSM-5-TR *removed specific IQ scores from the diagnostic criteria* for intellectual disability.
[5] *Herrera v. Collins*, 506 U.S. 390 (1993).

sentence, but which has fallen through the cracks of the legal system due to a technicality.

But for all practical purposes, Mr. Zack is being fully shut out of such a 'fail-safe' clemency process. At the time of Mr. Zack's clemency interview and representation in 2013-2014, the scientific understanding of FAS and its relationship to ID did not exist. *See generally*, ECF 1-1, App. A, App. B. Nearly a decade later, when the scientific knowledge did exist, Mr. Zack's clemency counsel had long exhausted the state-allocated resources to present information on Mr. Zack's behalf. The clemency interview had concluded. The entire administration tasked with considering Mr. Zack's request for clemency had been replaced with new individuals. Neither Mr. Zack nor any of his counsel received notice that clemency considerations in his case had resumed prior to the signing of his warrant, nor were they invited to submit any supplementary materials. *See* ECF 1-1, App. E. at 1-4.

Thus, through no fault of Mr. Zack or his counsel, no clemency decision-maker has been presented with the significant new understanding of Mr. Zack's disability, which places him in the category of persons exempt from execution under *Atkins*. With this new scientific understanding, and with multiple courts refusing to vindicate the constitutional rights that understanding implicates, Mr. Zack's situation embodies the purpose of clemency.

Further, because the compelling information Mr. Zack seeks to present was not available at the time of his 2013-2014 clemency proceedings, this is not a case of Mr. Zack attempting a second bite at the apple. Rather, Florida's failure to conduct any meaningful clemency process after waiting nearly a decade to sign a death warrant on Mr. Zack has deprived him of his first chance to present facts crucial to any executive determination regarding mercy.

This cannot be remedied by unsupported assurances that "clemency remains open" (*see, e.g.*, ECF 19 at 3) and that Mr. Zack "may at any time up until the date of his execution" send documents to a footnoted address for the DeSantis administration. ECF 19 at 6.

B. Defendants' assurances that Florida's clemency process remains open are demonstratively false

Defendants allege Mr. Zack's due process claim is "illusory" (ECF 19 at 6) because "Florida's clemency process never truly ends" until the day Mr. Zack is to be deprived of his life. ECF 19 at 4. Defendants' response restates the principle that "Florida Clemency Remains Open" (ECF 19 at 3) more than eight times. *Id*. at 4, 6, 10, 11, 21, 22, 25, 26.

But this assurance is disproven by Defendants' own letter of August 17, 2023, informing Mr. Zack's clemency counsel that a death warrant had been signed. The letter, signed by S. Michelle Whitworth and copied to Governor Ron DeSantis, states unambiguously that the "death warrant signed on August 17, 2023, *concludes the*

clemency process." ECF 1-1 App. F (emphasis added). The plain meaning of this sentence is clear—regardless of whether Governor DeSantis has discretion to halt Mr. Zack's scheduled execution, the clemency process is over.

Moreover, even if Defendants' representations to this Court were accurate, they would still not reach—much less remedy—the due process violation. For instance, these assurances fail to confront several practical problems. The clemency process laid out in Florida's own rules includes: the appointment of paid clemency counsel; the opportunity for the death-sentenced individual and his clemency counsel to make a face-to-face presentation to at least two clemency commissioners; direct outreach to former counsel and family members of the death-sentenced individuals so that they may weigh in; the opportunity to submit a formal clemency packet; and the generation of a report by clemency decisionmakers after taking all of this information into account.

If the clemency process is still available to Mr. Zack, who is empowered to be clemency counsel? Due to the Rules and prior determinations of the Clemency Commission, Mr. Zack's state-court and federal counsel are prohibited from representing him in the clemency process or physically appearing at the clemency interview. *See, e.g.*, *Bowles v. DeSantis*, 934 F.3d 1230, 1237 (11th Cir. 2019) (laying out the Clemency Commission's decision "that neither [the CHU attorneys] nor [the CHU's expert witness] would be allowed to attend or participate in the

clemency presentation."). There is no avenue through which Mr. Zack's prior clemency counsel may access resources for the presentation of Mr. Zack's new information. There is no opportunity—for Mr. Zack, his counsel, or the experts who would support his plea for mercy—to meet with any of the individuals of Governor DeSantis' clemency administration. And there is no mechanism by which to know whether any submitted information is even viewed, much less meaningfully considered.

Mr. Zack has never argued that he is entitled to a grant of clemency—only that he is entitled to a process by which he can meaningfully present his plea for mercy. What Florida has provided is not that process.

C. Defendants' discussion of the stay factors misses the mark

For brevity, Mr. Zack will not rehash the arguments for specific stay factors contained in his initial stay motion. *See* ECF 3. Here, he will address only the most salient global aspects of Defendants' arguments regarding the stay factors.

At the outset, Defendants' arguments about speciousness, delay, and the lack of an irreparable injury should be quickly dispensed with. *See* ECF 19 at 12-13; 26-27. As to speciousness, it does not matter that Mr. Zack faces a heavy burden to prevail on the merits of his § 1983 complaint. An uphill battle does not automatically translate to speculation. And whether Mr. Zack's life will ultimately be spared upon receipt of the clemency-based due process he seeks is irrelevant to this litigation.

As to delay, Defendants improperly denigrate Mr. Zack's claim as a delayed "attempt at manipulation" for which "[h]e can hardly come complaining to this Court". *See* ECF 19 at 6, 9. Mr. Zack has not been dilatory in any of his litigation related to FAS or intellectual disability. When he had access to the clemency process in 2013-2014, he presented evidence of his intellectual disability. But the science was not there yet as it pertains to the relationship between FAS and intellectual disability. By the time that scientific knowledge evolved, he was long out of the timeframe for presenting information that was contemplated and established by the Clemency Rules. That Mr. Zack's clemency petition had not yet been officially denied does not change that fact. Whether Mr. Zack *physically* could have mailed in more materials is irrelevant—under Florida's clemency scheme, there was no *practical* reason to do so. He complied fully with the process available to him, as laid out in the Clemency Rules. Any post hoc hypotheticals about actions Mr. Zack could *technically* have taken are red herrings related to the issue of due process.

Finally, the idea that Mr. Zack will not suffer an irreparable injury absent a stay of his execution is not simply "strange" (ECF 19 at 26). It is preposterous. The injury is "self-evident." *In re Holiday*, 331 F.3d 1169, 1177 (11th Cir. 2003).

Defendants' cited cases do not negate Mr. Zack's satisfaction of the stay factors

In arguing that Mr. Zack's clemency claim is speculative and has no substantial likelihood of success,[6] Defendants rely heavily on *Mann v. Palmer*, 713 F.3d 1306 (11th Cir. 2013). ECF 19 at 17-20. But those circumstances significantly differ from this case. Mann claimed a due process violation because (1) he was arbitrarily denied access to the clemency process that occurred shortly before his 2013 warrant was signed and (2) his appointed state counsel was precluded from representing him in clemency. *Id*. at 1310. Unlike Mr. Zack, Mann cited no information that was not considered in his prior clemency proceedings. Furthermore, in *Mann*, but not here, a subsequent clemency process did occur.[7] *Id*. at 1310.

In Mr. Zack's case, he has cited to multiple substantial issues that were not considered in his initial clemency proceeding because they were not then known. As

[6] Stay motions may be granted even without meeting the threshold of "substantial likelihood of success on the merits". *See Zagorski v. Mays*, 906 F.3d 414, 416 (6th Cir. 2018) (although movant for stay of execution "face[d] an uphill battle on the merits," on balance with other factors, a stay was still appropriate); *see also In Re EMI Resorts, Inc.*, 2010 WL 11506117, *1 (S.D. Fla. 2010) (granting motion to stay pending appeal despite lesser showing of substantial merits due to "a complex and novel question that has not yet been clearly addressed by the Eleventh Circuit.").

[7] Defendants' simultaneously filed Motion to Dismiss (ECF 18 at 12) asserts that an updated clemency process occurred in Mr. Zack's case. However, there is no evidence that such a process occurred. And the Rules governing Executive Clemency contemplate no such proceeding. Rather, Rule 15 indicates the opposite by requiring a "final report" be provided to the Clemency Board "within 120 days of the commencement of the investigation, unless the time period is extended by the Governor." *See* Rule 15(B) and (D).

set forth in his complaint, the opinions in *Hall*, *Hurst v. Florida*, 577 U.S. 92 (2016), and the legal processes in his case which are tainted by the errors identified in those opinions, undoubtedly bear on whether his death sentence should be commuted. Most importantly, the current understanding and consensus concerning FAS and its equivalence to intellectual disability compels, at a minimum, an opportunity to be meaningfully heard, and ultimately mercy for Mr. Zack.

In addition, Mann did receive an updated clemency review, illustrating that when time passes such a *process* is required. Here, however, no updated process occurred, so the aforementioned reasons supporting clemency had no opportunity to come to light.

And, as the Defendants noted in *Mann*, Mann was aware that updated clemency proceedings could occur after the Eleventh Circuit Court of Appeals denied him a certificate of appealability. *Id*. at 1309. Mr. Zack had no such knowledge. The clemency rules indicate a final report was submitted in 2014, after which Mr. Zack had (1) no notice that nine years would pass and his death warrant would be signed by a governor who had not directed a clemency review; and (2) no notice regarding what process was in place for proceedings in such circumstances. Because of this void, Mr. Zack, unlike Mann, was denied even minimal due process.

Similarly, Defendants' reliance on *Gissendaner* is misplaced because the due process violation alleged in that case arose out of nearly identical facts to those upon

which the Eleventh Circuit had already foreclosed relief. *See Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1332 (11th Cir. 2015) (citing *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 (11th Cir. 2014)). And Gissendaner's complaint dealt with a clemency board's failure to comply with *state* laws and procedures. Mr. Zack's claim neither revolves around allegations that state law has been violated, nor is it premised upon nearly identical factual circumstances already found to provide sufficient due process. ECF 13 at 7-8.

Bowles is also inapposite. First, the central issue in *Bowles* was federal counsel's exclusion from the clemency interview. In the Clemency Commission's communications barring federal counsel from the clemency interview, the Commission stated that federal counsel could submit materials for consideration during clemency. But this was not a special accommodation or establishment of any additional process. Rather, this was the same invitation extended to prior and current criminal-case counsel during every Florida clemency proceeding, including Mr. Zack's 2013-2014 proceedings. It doesn't somehow create an additional burden on a death-sentenced individual or his counsel to continuously send in further submissions that aren't contemplated by the existing process.

Second, Bowles' clemency proceedings began in 2018 and his warrant was signed in 2019. There was thus no new issue arising in that case between the time of the clemency proceedings and the signing of the warrant which triggered the need

for an updated process. Here, approximately a decade has passed and a specific new issue has arisen which casts Mr. Zack's plea for mercy in an entirely different light. This cannot be cured by an invitation to submit additional materials. An entirely updated process is necessary.

Finally, Defendants' litany of "eyebrow-raising"[8] and ultimately denied clemency cases is irrelevant to the due process issue before this Court. Mr. Zack's claim does not turn on how sensational or "eye-catching"[9] his particular factual scenario is. It turns on whether that factual scenario involved meaningful access to the clemency process. Mr. Zack's did not.

Regarding interests of the State and public

Under the Timely Justice Act and Rules of Executive Clemency, the Florida Legislature requires that the Governor issue a death warrant within thirty days after receiving notification that a death-sentenced defendant has exhausted state and federal collateral challenges, provided that the executive clemency process has concluded. Fla. Stat. § 922.052(2)(b). Thereafter, the Governor must "direct[] the warden to execute the sentence within 180 days." *Id*. Under the clemency rules, the proceeding 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

[8] ECF 19 at 13.
[9] ECF 19 at 14.

of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals . . . ." Rules of Executive Clemency 15(C).

Taken together, these provisions mean Mr. Zack has been warrant-eligible since 2014. Because Defendants controlled the timing of his death warrant's issuance, their argument that a stay would cause delay that would be against public interest and substantially harm the State lacks merit.

D. Conclusion

Mr. Zack has met the stay factors. This Court should stay his scheduled October 3, 2023, execution and consider his § 1983 claim without the imminent threat of a death warrant.

Respectfully submitted,

/s/ Linda McDermott
Linda McDermott
Chief, Capital Habeas Unit
Florida Bar No. 102857

/s/ Jessica Houston
Jessica Houston
Attorney
Florida Bar No. 98568

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

Federal counsel for Mr. Zack

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this motion complies with the word-limit in Local Rule 7.1(I) because it contains 3,045 words.

/s/ Linda McDermott
Linda McDermott