

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

CASE NO: 1996 CF 2517A

MICHAEL DUANE ZACK, III,

Defendant

_____ /

Proceedings held in the above-styled cause before the Honorable Linda Nobles, Circuit Judge, on the 24th day of August, 2023, appearing remotely via videoconferencing at the M.C. Blanchard Judicial Building, 190 Governmental Center, Pensacola, Florida 32502.

MARIA ANNA BOWERS, RPR, RMR
OFFICIAL CIRCUIT COURT REPORTER

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P R O C E E D I N G S

1
2 THE COURT: All right. Let me place on the
3 record that we are here in State of Florida, Plaintiff,
4 versus Michael Duane Zack, III, the Defendant.

5 This is Case No. 96-CF-2517, Division M.

6 This is in the matter of the death warrant
7 signed, execution set for October 3rd, 2023.

8 And as far as role, let me note that I do have
9 from the Office of the Attorney General, it looks like
10 Ms. Millsaps --

11 MS. MILLSAPS: Yes, Your Honor.

12 THE COURT: -- and Mr. Rodriguez.

13 I also saw that Mr. Rodriguez filed the
14 response for the Eighth District Medical Examiner's
15 Office.

16 MR. RODRIGUEZ: Yes, Your Honor.

17 THE COURT: For the Office of the State
18 Attorney, I have Mr. Molchan.

19 I don't believe that I have anybody from the
20 Escambia County Sheriff's Office.

21 For the Florida Department of Law Enforcement
22 I have Ms. Robinson.

23 MS. ROBINSON: Good morning, Judge.

24 THE COURT: For the Executive Office of the
25 Governor, I have Ms. -- is -- telephone number

1 (850)459-2226, who is that? Is that Ms. Macready?

2 MS. BIGGART: This is Ms. Biggart.

3 Ms. Macready is going to be on Zoom.

4 THE COURT: If whoever is on 9-2226 could
5 please tell me who they are?

6 MS. BIGGART: Yes. This is Stacy Biggart.

7 THE COURT: Well, let me continue because
8 apparently that person has got difficulties with their
9 sound.

10 All right. So from the Executive Office of
11 the Governor, I think we have Ms. Pardo.

12 MS. PARDO: Yes. Good morning, Your Honor.

13 THE COURT: For the Florida Commission on
14 Offender Review, Office of Executive Clemency, we have
15 Ms. Wallace.

16 MS. WALLACE: Good morning, Your Honor.

17 THE COURT: For the Florida Department of
18 Corrections we have Ms. -- Mr. Fowler and we have
19 Ms. Porrello.

20 MR. FOWLER: Yes.

21 MS. PORRELLO: Good morning, Your Honor.

22 THE COURT: Let's see. Ms. Fortune, I believe
23 she is the observer also for the Commission on Offender
24 Review. And I believe that (850)459-2226 is -- it's
25 either Ms. Macready or Ms. Biggart, but I do need to

1 make sure that you can hear or --

2 Oh, there is.

3 MS. MACREADY: Judge, this is Dawn Macready.

4 I'm on Zoom.

5 THE COURT: I can see your mouth moving.

6 Will somebody else say something to me?

7 MR. RODRIGUEZ: Judge Nobles, can you --

8 THE COURT: I cannot hear any of you.

9 Let me make sure.

10 MR. MOLECHAN: Judge, can you hear me?

11 MS. MILLSAPS: We can hear each other, Your
12 Honor.

13 MR. MOLCHAN: You're not hearing me, Judge?
14 We're not hearing you, Judge. You're on mute.

15 THE COURT: Let's try this again. I think
16 I've got it. Can you hear me?

17 MR. MOLCHAN: I can hear you, Judge.

18 THE COURT: I can hear you, so we are good to
19 go.

20 All right. And I see -- and who is now, once
21 again, 459-2226?

22 MS. BIGGART: This is Stacy Biggart, Your
23 Honor, with CCRC. I am calling in, but Ms. Macready is
24 appearing by Zoom.

25 THE COURT: Okay. And I see that she is right

1 there.

2 So for Mr. Zack we have Ms. Macready and we
3 have Ms. Biggart.

4 So I believe -- and I note that we have
5 Mr. Bensinger, who is one of my Staff Attorneys, on
6 Zoom. I also have Ms. Gibson, who is another one of my
7 Staff Attorneys, sitting in with me today.

8 I believe I saw the clerk. Mr. McLaughlin,
9 are you on?

10 THE CLERK: Yes, Your Honor, I'm here.

11 THE COURT: There you are.

12 I'm sorry. With so many pictures, it's hard
13 to keep everybody straight. So now I believe -- and I
14 see we have the court reporter, so I believe that we
15 have everyone accounted for and we are prepared to go
16 forward with the hearing today.

17 Mr. Zack's Counsel had filed various demands
18 on various agencies. I have had the opportunity to
19 review all of those demands. I believe there were
20 eight in total.

21 We received, I believe, five objections, and I
22 have had the opportunity to review all of those
23 objections. I did receive a notice of compliance, I
24 believe, by the Office of the State Attorney.

25 I haven't received anything from the Escambia

1 County Sheriff's Office, except for I did receive an
2 e-mail yesterday. I guess it was from the Office of
3 the Attorney General indicating that they had indicated
4 that they have no additional records, but I have not
5 been formally advised of that.

6 All right. So with that, I presume that
7 Ms. Macready, I don't know whether you want to go
8 forward and make your demands since they've already
9 been made, or do you just want to get straight to the
10 objections?

11 You're still on mute.

12 MS. MACREADY: Judge, would you just like to
13 go through each agency demand and objection one by one?

14 THE COURT: That's fine.

15 MS. MACREADY: I'm sorry.

16 THE COURT: That is correct. That's fine.

17 MS. MACREADY: So I guess if we could start
18 with the Attorney General, 3.852, this was under
19 (h) (3), for any updated records since they were last
20 produced. And, particularly, we're looking for any
21 communications regarding clemency and the signing of
22 the warrant. And I believe that's all laid out in
23 paragraphs -- Paragraph 3 of our demand.

24 THE COURT: All right. I don't know whether
25 it's going to be Ms. Millsaps or Mr. Rodriguez.

1 MS. MILLSAPS: I'm going to do it, Your Honor.
2 Charmaine Millsaps appearing on behalf of the Attorney
3 General.

4 I wrote the objection, and I'm going to
5 condense it. But they really are -- what they're
6 really doing is making demands for both clemency and
7 communications regarding the signing of the warrant, so
8 now they ask for other things as well.

9 First of all, all of those things are exempt
10 from public records disclosure. Clemency records are
11 confidential under both the rule and the statute. And
12 I cited the rule and the statute and the case law in my
13 objection, but I do want to talk about the ruling,
14 quote that to you, because, unusually, the rule is
15 controlling over even the statute. And the rule --
16 that's because clemency is a matter of our State
17 Constitution as the Florida Supreme Court has
18 explained.

19 So it literally says all records and documents
20 generated and gathered in clemency are confidential and
21 only the Governor has the discretion to release them.
22 That is the controlling law and that's what must be
23 followed here.

24 Basically, if opposing counsel wants clemency
25 records, she needs to ask the Governor's Office for

1 them, not either the Attorney General's Office or this
2 Court.

3 So they're really making a demand on us to get
4 around that and there is no getting around that because
5 the law is, is even if somehow some third-party
6 releases them, they're still confidential. It's
7 brutally clear, only the Governor can do this. And
8 that's pretty much equally true of any conversations
9 regarding the signing of a warrant.

10 The Florida Supreme Court in both Henry, from
11 2014, and Daily, from 2019, says that the Governor has
12 total discretion regarding which warrants to sign, and
13 any conversations he has with his own staff, with the
14 other members, the Attorney General is a member of the
15 clemency board, but with the other members of the
16 clemency board, any conversations he has are, once
17 again, confidential. And neither one of those things
18 can lead to a colorable claim because neither one of
19 them or cognizable. And I explained that as well. For
20 them to be reasonable demands they have to lead to a
21 successive postconviction claim. And under Henry and
22 Daily, nothing having to do with the signing of the
23 warrant can lead to a valid claim.

24 And in Muhammad, the Florida Supreme Court
25 made it clear that laws -- procedural laws and clemency

1 are not cognizable either. So not only are these
2 exempt, but they can't lead anywhere.

3 Now, Your Honor, I also have a sort of bigger
4 objection. According to our records, we have no prior
5 requests from the -- from the -- from his
6 postconviction counsel. We looked at both our records
7 and at the docketing, and we do not have any first time
8 requests.

9 The request for public records are supposed to
10 be updates. They're not supposed to be first time
11 during a warrant. And it's literally entitled "Demand
12 for Additional Public Records." Even the rule that she
13 relies on, which is 3.852(h)(3), talks about additional
14 records. So these are not proper demands because
15 they're not updates from prior requests. And the
16 Florida Supreme Court has denied several of the --
17 well, affirmed the trial court's denial of several of
18 these when they are first-time requests during
19 warrants. So we object to the fact that they are a
20 first-time request as well.

21 We also think they're overbroad because, you
22 know, they're the typical any and all. So they are
23 overbroad under -- and I'm just going to talk about
24 Jimenez, because it's from 2018, and in an active
25 warrant case, the Florida Supreme Court affirmed the

1 denial of public -- of a public records demand
2 during -- as being overbroad, burdensome, and not
3 related to a colorable claim because they did not
4 specify -- specifically identify any record or even a
5 category sort of record. So we object to the fact that
6 these are first time.

7 Now, Your Honor, I had some more objections in
8 my -- about fishing expeditions and dilatory tactic and
9 Your Honor would certainly stand by that, but, Your
10 Honor, I think those are our main objections. These
11 are exempt from public records. They cannot lead
12 anywhere because they are not cognizable and they are
13 improper first requests instead of proper additional
14 requests.

15 Now, public records, that's what our records
16 show and that's what the trial court's docketing shows
17 as well.

18 THE COURT: All right. Ms. Macready.

19 MS. MACREADY: Judge, if I could just briefly
20 respond as far as the first-time requests argument?

21 I would dispute that, Your Honor. I mean,
22 certainly the Attorney General's Office is required to
23 produce initial records at the beginning of every
24 postconviction case, and so this isn't the first time
25 where we'd be asking for records or receiving any

1 records from them. They certainly would have produced
2 records to the repository in the past.

3 And as far as the clemency proceedings, I
4 would just argue, Your Honor, if Florida is going to
5 have this clemency process, it is going to be afforded
6 to our client, including Mr. Zack, then it should be
7 transparent and we should be able to find out what the
8 communications are between the Governor's Office and
9 the Attorney General's Office in deciding who they're
10 going to sign the warrant on.

11 THE COURT: All right. All right.
12 Ms. Macready, would you like to go to your next demand?

13 MS. MACREADY: Sure. I guess sort of along
14 those same lines, if you want to go to the demands to
15 the Governor's Office, since we're already sort of
16 talking about the clemency.

17 This is another request under 3.852. It's
18 under (i) though, and it's just seeking any clemency
19 records that the office might have concerning Mr. Zack.

20 And I would just say that, you know, all that
21 we have, Your Honor, is we know that in 2014 there was
22 a clemency proceeding, and then on the date that
23 Governor DeSantis signed the warrant, we also received
24 a letter dated that same date indicating that clemency
25 had been denied, otherwise, we have no information

1 about the rest of the process or what goes on. And,
2 again, what I stated just previously with Ms. Millsaps'
3 argument, that if -- if Florida is going to execute
4 Mr. Zack and have this process of clemency, then it
5 should be transparent and we should be able to review
6 these records.

7 THE COURT: Ms. Pardo.

8 MS. PARDO: Good morning, Your Honor.
9 Meredith Pardo on behalf of Governor DeSantis,
10 Executive Office of the Governor. Thank you for your
11 time this morning.

12 I'll be brief because I'd like to rely
13 primarily on our written response and objection. But
14 we agree with what some of the Attorney General's
15 Office said and, presumably, what Ms. Wallace will say
16 from FCOR.

17 It's our position that all of the records that
18 Mr. Zack requests from EOG are clemency related
19 documents and, therefore, exempt under Florida statutes
20 and the Executive Rules of Clemency. We've cited
21 several cases from the Florida Supreme Court that make
22 that point abundantly clear.

23 In addition, Mr. Zack is not entitled, because
24 under the rule, under (i), they're for additional
25 records, and good cause must be shown why they have not

1 been requested. Mr. Zack has not shown that he
2 previously requested the records, nor has he alleged or
3 demonstrated good cause. In addition, the requests are
4 overbroad and do not relate to a colorable claim for
5 relief.

6 So, finally, several similar requests have
7 been made in the past for defendant's with active death
8 warrants, and we've cited those Circuit Courts who have
9 similarly denied those requests, and we respectfully
10 ask for the same.

11 THE COURT: All right. Ms. Macready.

12 MS. MACREADY: Judge, if I could just say a
13 couple things in response?

14 I would argue these are not overly broad and
15 they are sort of narrowly tailored to -- to just get
16 the information, the communications we need, and the
17 clemency process.

18 In addition, these were not requested before
19 because we just found out on the day the warrant was
20 signed that he had been denied clemency. So any of
21 that would have been premature. And that's -- I don't
22 have anything further on that.

23 But if you want to move on to FCOR, it's
24 basically the same records that we are requesting
25 related to the clemency proceedings. And I'll just

1 rely on my previous arguments made for the Governor's
2 Office and the Attorney General's Office related to
3 these records.

4 THE COURT: Just a moment to make a couple of
5 notes.

6 All right. Ms. Macready, what is your next
7 agency?

8 MS. MACREADY: Well, I don't know if
9 Ms. Wallace had any response.

10 THE COURT: Well, that's correct. Let me get
11 to the Office of the Offender Review. Hold on just a
12 moment.

13 All right. The Office of Executive Clemency,
14 Florida Commission on Offender Review, Ms. Wallace, do
15 you have anything that you would like to state since we
16 are talking about the same information?

17 MS. WALLACE: Good morning, Your Honor. The
18 Commission who responds on behalf of itself and the
19 Office of Executive Clemency and postconviction records
20 demands, also filed a written response and objections.
21 And, of course, we rely on a written response and
22 objections and agree with everything that Ms. Pardo
23 said from the Executive Office of the Governor. And
24 our position in the law is that the defendant has to --
25 he's not entitled to any records if they're not

1 relevant to the subject matter of a postconviction
2 proceeding or reasonably calculated to lead to the
3 discovery of admissible evidence.

4 And the Florida Supreme Court has considered
5 and rejected every claim made, every clemency claim,
6 and every claim made as to the Governor's authority or
7 discretion to sign a death warrant. And so clemency is
8 not a colorable claim for postconviction relief and
9 cannot lead to the discovery of admissible evidence and
10 so he cannot even overcome the first requirement to
11 demonstrate he is entitled to the records he requested,
12 and the inquiry we believe ends here.

13 And, Your Honor, I'm sure that you're familiar
14 with the cases about clemency reposing exclusively in
15 the executive, and the trial judge is ordered to
16 disclose these clemency records would effectively
17 overrule the rules of Executive Clemency and implicate
18 a result in a violation of the separation of powers.
19 And so I'll be glad to discuss or provide the Court
20 with any more information on any of the cases that we
21 cited in our response or any other argument.

22 THE COURT: Ms. Macready, would you like to
23 respond?

24 MS. MACREADY: Just briefly as to the
25 colorable claim. I believe in Paragraph 3 of our

1 demand we stated that the colorable claim would be
2 whether Florida's clemency procedure violates due
3 process in the -- in violation of the Fifth and
4 Fourteenth amendments. I think that might be Eighth
5 and Fourteenth Amendments to the U.S. Constitution, so
6 that would be the colorable claim.

7 But if we can move on to the FDLE demand?

8 And, Your Honor, this is related to the lethal
9 injection procedure and records that are kept in the
10 course of the executions. We've asked for the records
11 related to the last three executions, Darryl Barwick,
12 Duane Owen and James Barnes. We've made a timely
13 search. These are not located at the repository.

14 They would also go to an argument, a colorable
15 claim as to whether Florida's lethal injection
16 procedurally constitute cruel and unusual punishment in
17 violation of the Eighth and Fourteenth Amendments. And
18 in Paragraph 4 we've listed specifically what we're
19 asking for, and it's narrowly tailored to get to the
20 information that would support that claim.

21 THE COURT: Okay. Ms. Robinson.

22 MS. ROBINSON: Good morning, Your Honor.

23 First, I want to correct an error, I believe,
24 on Page 4 of our response. I referenced Subsection (h)
25 of Rule 3.852, and this was exclusively a Subsection

1 (i) demand, so that was my scribner's error and I
2 apologize.

3 A couple of things. In order to obtain
4 records under Subsection (i), Counsel would have had to
5 explain why a demand for the lethal injection records
6 were not made before now and show good cause for that.
7 They did not do so or address it in their demand.

8 Secondly, their mention of the Eighth and
9 Fourteenth Amendments do not rise to the level of
10 colorable claims. They must, per Asay, and we've
11 referred it as Asay six, there are specific things that
12 defendant must show to attack the lethal injection
13 protocols, and that is showing that the method of --
14 current method of execution poses a substantive or
15 imminent risk or is likely to cause serious illness or
16 a needless suffering, and identify a known alternative,
17 which they have not done.

18 And the -- between the United States Supreme
19 Court and the Florida Supreme Court holdings, Florida's
20 method of execution has withstood constitutional
21 challenges over and over. And we attached the most
22 recent Circuit Court orders finding the same and
23 denying such demands. Otherwise, we rely on our
24 written objection.

25 MS. MACREADY: Judge, if I could just say one

1 thing in response to that?

2 As far as why these demands have not been made
3 before now, he's only been under warrant just recently,
4 and any previous requests for such documents would be
5 premature and not ripe for a claim at that time. So
6 that's why they have not been filed until now.

7 MS. ROBINSON: Your Honor, may I respond to
8 that?

9 THE COURT: Let me make sure that she doesn't
10 have anything else and then -- because I know that that
11 is -- I'm aware that that's in your memorandum. I
12 hadn't heard her statement. I know that you hadn't
13 heard the statement. I will give you an opportunity.

14 But is there anything else, Ms. Macready?

15 MS. MACREADY: No, Judge.

16 THE COURT: Okay. Then, Ms. Robinson, you can
17 certainly respond to that.

18 MS. ROBINSON: Yes, ma'am.

19 There is no limitation of when a capital
20 defendant may request those records. It is not
21 mandated to wait until the warrant is signed. As a
22 matter of fact, recently in other capital cases, we've
23 received demands for lethal injection records under
24 subsection (g), which is the norm. And defendant has
25 had 27 years to request these records and has waited

1 until now.

2 But the bottom line is there is no colorable
3 claim as Florida's lethal injection protocols and
4 methods are constitutional.

5 THE COURT: All right. Ms. Macready, you are
6 always going to have the last say since these are your
7 demands. Do you have anything further that you would
8 like to add?

9 MS. MACREADY: Judge, I don't have anything
10 further that I would like to add as far as argument,
11 but I would like to put on the record, I did receive
12 some records from Ms. Robinson from FDLE yesterday. I
13 have not had a chance to review those yet. They are
14 sort of separate from this demand, but I did want to
15 let the Court know that I have received some records
16 from FDLE.

17 MS. ROBINSON: Your Honor, if I can followup,
18 if Ms. Macready is done, just followup on that briefly?
19 Yeah, and I apologize. I meant to mention that to the
20 Court.

21 Those records, when we did a diligent search,
22 would have been submitted with the initial submission
23 and had nothing to do with any demand for additional
24 public records, which FDLE never received. So we just
25 did that in an abundance of caution.

1 MS. MACREADY: That's correct, Your Honor.

2 If we could go to the -- the demand to the
3 Medical Examiner's Office. And I believe Mr. Rodriguez
4 had filed a response -- or, I'm sorry, an objection to
5 this.

6 This is requesting the documents related to
7 the autopsies of Mr. Barwick, Mr. Owen, and Mr. Barnes,
8 who were the three most recent executions that were
9 carried out by the State of Florida. And this is just
10 any information, whether or not there might have been
11 something that -- to show that Florida's lethal
12 injection procedure violates the Eighth and Fourteenth
13 Amendments of the Constitution. So that is what we are
14 requesting. It's in Paragraph 4, and the colorable
15 claims listed in Paragraph 3.

16 I don't have anything further on that.

17 THE COURT: All right. Mr. Rodriguez.

18 MR. RODRIGUEZ: Yes, Your Honor. Jason
19 Rodriguez, Assistant Attorney General, but currently
20 representing the Eighth Judicial District Medical
21 Examiner. We have an agreement with them that, if
22 warrant litigation, we step in and actually represent
23 them.

24 They have reviewed the doctor in charge,
25 reviewed the objection, and approved it, and I am here

1 on their -- representing them with their consent.

2 Really, our arguments parallel FDLE's and are
3 identical regarding the lethal injection claim, so I
4 don't want to belabor them. There was no allegation or
5 explanation regarding good cause for not requesting
6 these records earlier.

7 And I do want to point out that comparable
8 records have been available since at least 2018, if not
9 a little bit earlier than that. The current protocol
10 Florida uses was approved in Asay in 2017, and it's
11 been used to execute individuals such as Eric Branch of
12 2018 and Bobby Joe Long in 2019, to name a few.

13 So comparable records have existed. There's
14 no excuse for waiting for them now during post warrant.

15 Like Ms. Robinson, I have a capital defendant,
16 Jesse Bell, who requested records like these under
17 3.852(g) recently and he's just moving into
18 postconviction. So they can and have, in fact,
19 requested these records in other cases before now.

20 The secondary argument is no demand doesn't
21 relate to a colorable claim for relief, because the
22 Florida Supreme Court has rejected repeatedly claims
23 that the current execution protocol violates the Eighth
24 Amendment. And once the Florida Supreme Court has
25 rejected that claim, there is no -- it is no longer

1 attached to a colorable claim for relief. There are no
2 more records that are required for the State to
3 disclose, so -- or for the Medical Examiner to
4 disclose. So for both of those reasons, in addition to
5 the fact that no demand was made on the Eighth Judicial
6 District until now, we'd request this Court sustain the
7 Eighth Judicial District Medical Examiner's objection
8 and deny the demand for public records.

9 THE COURT: Ms. Macready.

10 MS. MACREADY: Your Honor, just briefly. So
11 the three individuals that we requested records on were
12 only executed in 2023 and, therefore, we could not have
13 requested those any sooner. These are the most
14 relevant records.

15 I realize Mr. Rodriguez was saying earlier
16 records are available, however, these are the most
17 relevant. These are the closest in time to now and the
18 ones that would be most important to such a claim. But
19 I don't have any further argument on that.

20 And last, but not least, I believe we have
21 DOC. These are also similar records asking for -- I'm
22 sorry, lethal injection records related to the types of
23 documents that are kept in the possession of and are in
24 the possession of DOC regarding the drugs that are used
25 and -- and any logs that are kept by DOC in the

1 process. And all of these are very specific and they
2 are laid out in Paragraph 4. And, again, in
3 Paragraph 3 we laid out that this would relate to a
4 colorable claim that this procedure is in violation of
5 the Eighth and Fourteenth Amendments.

6 MS. PORRELLO: Your Honor, Christina Porrello
7 for the record. May I respond?

8 THE COURT: You certainly may. And that would
9 be Ms. Porrello.

10 MS. PORRELLO: Yes, on behalf of the Florida
11 Department of Corrections.

12 As far as our position is that we would
13 certainly rely on the arguments that have been made by
14 FDLE, by Ms. Robinson, and also by Mr. Rodriguez on
15 behalf of the Medical Examiner's Office. They have,
16 you know, stated the most important and the most -- you
17 know, the basis that covers this issue most succinctly.
18 Lethal injection protocol has been found -- or the
19 etomidate protocol has been found by the Florida
20 Supreme Court to be constitutional. Because of that,
21 records related to the protocol cannot be the basis of
22 a valid claim for postconviction relief. Because of
23 the Supreme Court's rulings, these records are no
24 longer or don't constitute an avenue to pursue for a
25 valid postconviction claim. This protocol, the

1 etomidate protocol has been in place since 2017, as has
2 been the -- and has been litigated since the Asay case
3 as well, and it's been litigated multiple times. All
4 courts have rules that it is not -- that all courts
5 have ruled that these records are not to be disclosed
6 to counsel, that they are not related to a colorable
7 claim.

8 The demands that they made, these are
9 boilerplate demands. They do -- they don't specify any
10 specific basis for -- for example, not showing good
11 cause why they did wait. And as the other's stated,
12 there have been requests for these demands -- for these
13 records, pardon me, before the warrants had been
14 signed. So they would not have made a showing of good
15 cause.

16 And finally in this demand, they have not
17 shown any reason to depart from this well-established
18 case law and well-established precedent that the lethal
19 injection protocol has been found constitutional and
20 that these records do not lead to a colorable claim.

21 THE COURT: All right. Ms. Macready.

22 MS. MACREADY: Judge, I'll just say again, I
23 believe these are the most relevant records, as they
24 are the last three executions that have taken place
25 this year, and we were not able to obtain those prior

1 to that time. I would, again, just emphasize the fact
2 that if the State of Florida is going to be executing
3 Mr. Zack, then it should be more transparent in its
4 procedures and processes regarding lethal injection and
5 we should be entitled to those records.

6 And I don't have anything further, Your Honor.

7 THE COURT: All right. Ms. Macready, I do
8 want to address though the Office of the State
9 Attorney. I presume, based upon their response, that
10 you are satisfied?

11 MS. MACREADY: Yes, Judge. They've indicated
12 that they've overnighted us records. I don't know
13 whether we have gotten them yet. I'm hoping they were
14 sent to the correct address and everything should be
15 good. I don't have anything else on that.

16 THE COURT: Mr. Molchan, do you have anything
17 that you want to say? I did review your document.

18 MR. MOLCHAN: Basically what we sent was a
19 file, both electronically and paper, to them on some
20 documents. I think most of them will be duplicates,
21 but we just sent it in an abundance of caution.

22 THE COURT: All right. Ms. Macready, from the
23 Escambia County Sheriff's Office, I have not seen
24 anything. Have you received anything from them?

25 MS. MACREADY: No, Your Honor. The only thing

1 I received was an e-mail. I think it was the same one
2 you were referring to from the Attorney General's
3 Office yesterday that they had no additional records
4 and would file a notice with the Court, but they
5 haven't done so at this time and I haven't heard
6 anything other than that regarding those records.

7 MR. MOLCHAN: Judge, I had a conversation with
8 Ms. Little last night informing her that they needed to
9 file something. I, again, urged her to file something
10 and that she needed to file something and she indicated
11 she would do so.

12 But the crux of it was they were -- they do
13 not have anything new. They were looking again, but
14 that was the crux of the conversation.

15 THE COURT: Does anyone have anything else
16 that they would like to add before I announce my
17 ruling? There will be a forthcoming order that is in
18 much more detailed form.

19 All right. And before we leave the meeting as
20 well, I need to ask Mr. Fowler a separate question.

21 All right. As I said, I did have an
22 opportunity to go through all of the demands. I went
23 through all of the objections. I reviewed the
24 pertinent case law, and based upon that, the objections
25 are going to be sustained. The demands are going to be

1 denied as it relates to the five entities that filed
2 objections.

3 At least at this point in time I believe that
4 the State Attorney's Office has complied, the Escambia
5 County Sheriff's Office, because I have received
6 nothing, is ordered to comply with the demand unless
7 they have no records for which to comply.

8 And, again, I am going to generate an order
9 that I will have out this afternoon in a much more
10 detailed format.

11 Mr. Fowler, what I wanted to ask you, and I
12 touched on this yesterday briefly, and thank you. I
13 did receive the proposed order to transport. I did not
14 know whether that was something that you wanted me to
15 file now and then -- would sign and file now, and then
16 if it's unnecessary, let them know; or whether they
17 understand this procedure and I am to wait until the --
18 after the second case management conference, if
19 necessary, to enter it.

20 I started to enter it yesterday and then I
21 believed that -- it's either Paragraph 3 or 4, it says
22 upon receipt of this order, they should then take
23 custody and deliver. So is -- am I supposed to wait
24 until we make a determination whether an evidentiary
25 hearing is necessary before I sign it and file it?

1 MR. FOWLER: Your Honor, we have been filing
2 these orders this year in the various warrant cases.
3 The prison officials have to work up operational plans,
4 so they started doing that as soon as the scheduling
5 order came out for having the defendant present in
6 Court, if that is necessary. So it doesn't -- the
7 entry of the order is really literally irrelevant at
8 this point, but the key factor is whether it's issued
9 now or at the Huff Hearing. We could get word as soon
10 as possible at the Huff hearing, whether the
11 evidentiary hearing is going to take place or not. In
12 other words, we are going to modify our objectives on
13 the basis of the entry of the order or not.

14 THE COURT: And so from your perspective, it
15 does not matter whether I enter it today or whether I
16 wait until we make a determination next Wednesday?

17 MR. FOWLER: Correct, Your Honor. We are
18 making operational plans to have the defendant present
19 in court if a ruling -- if the evidentiary hearing is
20 ruled necessary.

21 THE COURT: All right. Then based upon the
22 language in the proposed order that says, Upon receipt
23 of this order they will then deliver him, I will
24 probably wait until we know whether that is necessary
25 with the understanding that you are aware that they --

1 that that last late notice would not present a problem.

2 MR. FOWLER: Understood.

3 THE COURT: Okay?

4 All right. If there is nothing else, then I
5 believe that we have concluded this hearing and we will
6 continue down the timeline.

7 All right. Thank you, folks, very much.

8 (Whereupon, the proceedings were concluded.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF ESCAMBIA

I, MARIA ANNA BOWERS, RPR, RMR, Official Court Reporter, do hereby certify that the foregoing, being pages numbered 1 through 30, inclusive, is a true and correct transcript of the proceedings held remotely via videoconferencing in the case of STATE OF FLORIDA vs. MICHAEL DUANE ZACK, III, Case No. 1996 CF 2517A, on the 24th day of August, 2023, before the Honorable Linda Nobles, Circuit Judge, at 190 Governmental Center, Pensacola, Florida.

IN WITNESS WHEREOF, I have hereunto set my hand, this the 24th day of August, 2023.

Maria Anna Bowers

Maria Anna Bowers, RPR, RMR
Official Circuit Court Reporter