

IN THE SUPREME COURT OF FLORIDA
Case No. SC23-1233

MICHAEL DUANE ZACK, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Capital Case
Death Warrant Signed
Execution Scheduled for
October 3, 2023, 6:00 pm

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APPELLANT’S MOTION FOR STAY OF EXECUTION

Appellant, Michael Duane Zack, III, through undersigned counsel, respectfully moves this Court to enter a stay of his scheduled execution, currently set for October 3, 2023.

Concurrently with this motion, Mr. Zack has filed an initial brief in this Court on appeal from the Escambia County Circuit Court’s August 31, 2023, order summarily denying his motion for postconviction relief. This case presents important constitutional claims, including an issue of first impression regarding whether Mr. Zack’s Fetal Alcohol Syndrome (recognized by the medical community as an intellectual disability-equivalent condition) entitles him to the Eighth Amendment protections laid out in *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny. As detailed in Mr.

Zack’s brief, the circuit court summarily denied relief without consideration of Mr. Zack’s evidence regarding his eligibility for categorical exemption from execution. The circuit court also failed to consider evidence regarding an Eighth Amendment challenge to his death sentence due to evolving standards of decency and a sociolegal consensus establishing that death sentences must be based upon a unanimous jury vote.

A stay of execution is appropriate “when there are ‘substantial grounds upon which relief may be granted.’” *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (quoting *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998)). Further, this Court may enter a limited stay to meaningfully consider complex legal bases even if, on first appearance, the possibility of relief appears remote. *See King v. Moore*, 824 So. 2d 127, 128 (Fla. 2002) (Harding, J., concurring) (agreeing with the issuance of a stay due to the “possibility” of merit, despite prior actions by the United States Supreme Court “seemingly send[ing] a clear message” that no relief was due).

Stays are particularly appropriate where, as in Mr. Zack’s case, a warrant is set on a short timeframe. *See Jimenez v. State*, No. SC18-1321 (Fla. Aug. 10, 2018) (granting stay of execution on a 27-day

warrant and modifying *nunc pro tunc* the expedited post-warrant scheduling order, without making any findings of substantiality on any issue); *see also Jimenez v. State*, 265 So. 3d 462, 493 (Fla. 2018) (Pariante, J., concurring) (explaining that the “extremely short warrant period” meant that “[t]he postconviction court and Jimenez’s attorneys were forced to race against the clock in reviewing and presenting all of Jimenez’s claims, respectively” and that without a stay there would be “inadequate time to thoroughly review his claims.”).

The issues in this litigation require appellate review that is not truncated by the exigencies of an imminent execution. A stay of execution should be granted.

Respectfully submitted,

/s/ Dawn B. Macready

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been furnished by electronic service to all counsel of record on this 10th day of September, 2023.

/s/ Dawn B. Macready
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