IN THE UNITED STATES SUPREME COURT

DUANE E. OWEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

Capital Case

ACTIVE DEATH WARRANT
Execution scheduled for
Thursday, June 15, 2023 at 6:00pm

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

COMES NOW the State of Florida, by and through undersigned counsel and responds to Petitioner, Duane Owen's Application Stay of Execution, and states as follows:

On June 1, 2023, Owen, a Florida death row inmate with an active death warrant, filed a motion pursuant to Fla. R. Crim P. 3.811(d) alleging that he is insane and incompetent to be executed. (See Petitioner's App. D). Following an evidentiary hearing on June 1-2, the state trial court issued an order on June 4, 2023, finding Owen sane to be executed. (Petitioner's App. B.) Owen's appeal of that order was denied by the Florida Supreme Court on June 9, 2023. *Owen v. State,* 2023 WL 39141193 (Fla. June 9, 2023). Therein the state supreme court found that the circuit court findings that Owen currently does not have any mental illness and is feigning delusions to avoid the death penalty, and the state's witnesses were more credible and compelling, is supported by competent and substantial evidence in the record. *Owen,* 2023 WL 3914193 *1-2.

The state supreme court also found that the trial court applied the correct legal standard in concluding Owen was sane to be executed. The court explained:

> Here, the circuit court applied the appropriate legal standard in concluding that Owen is sane to be executed. That is, it determined that Owen has a 'rational understanding' of the fact of his pending execution and the reason for it," and is "aware that the State is executing him for the murders [4] he committed and that he will physically die as a result of the execution.

Id. at 2023 WL 3914193 at *2.

Subsequently, Owen filed a federal habeas petition pursuant 28 U.S.C. § 2254 alleging that he is incompetent and insane to be executed in violation of *Ford v. Wainwright,* 477 U.S. 399 (1986) and *Panetti v. Quarterman,* 551 U.S. 930 (2007) and *Madison v. Alabama,* 139 S. Ct. 718 (2019). *Owen v. Dixon Sec'y, Fla. Dept. of Corr.* and *Moody, Attorney General of the State of Florida,* Case No. 9:23-cv-80901-RS. Along with the petition, Owen filed an "Emergency Motion To Stay Execution." Therein, Owen requested a stay so that he may challenge the factual findings and legal determination by the Florida Supreme Court. (State Ex. 1). Following the State's response, United States District Court Judge Rodney Smith issued an order denying the stay with prejudice. (State Appx. 2). In denying the stay, the district court judge found that Owen cannot overcome the presumption of correctness afforded to the state court's findings; the state trial court explained the reasoning behind its credibility determinations; the state trial court made a proper finding that "there is no evidence that [ ] mental illness interferes, in any way, with his 'rational understanding' of the fact of his pending execution and the reason for it"; and the

record contradicts Petitioner's argument that the state court improperly focused on Petitioner's past mental state. (State's Appx. 2). Lastly, the district court determined that because the factual findings of the state courts are not an unreasonable determination of the record, Petitioner cannot establish that the state court's decision was contrary to clearly established law. (State's Appx. 2 at 3-4).

On June 12, 2023, Owen filed a Petition for Writ Of Certiorari in this Honorable Court. With that petition, Owen also filed an Application for Stay Of Execution. In his request for a stay Owen claims that this case raises "significant compelling questions" related to his allegation that he is insane to be executed. (Petitioner's App. at 2). However, even a cursory review of this request for a stay, as well as of the certiorari petition itself, contradicts that contention. Instead, Owen presents futile challenges to the state courts' credibility determinations, again criticizing the state courts' alleged undue emphasis on his self-reported alleged chronic and long-standing schizophrenia; and the state courts' improper emphasis on the testimony of the three board-certified psychiatrists presented by the state over that of Owen's single expert, a neuropsychologist. Owen concludes his challenge with the claim that those "faulty state court findings contradict" *Panetti* and *Madison.* Owen does not elucidate on the nature of the contradiction; he just flatly contends that it exits. (Motion at 3). Owen's "questions" are not compelling, significant nor factually accurate justifications for certiorari review and consequently a stay is not warranted.

MERITS

Stays of execution are not granted as "a matter of course," but instead are based on equity with a deep appreciation for the State's strong interest in enforcing its criminal judgments without unnecessary interference from federal courts. Consequently, Owen has the very high burden of establishing his entitlement to relief. He must establish: (1) a reasonable probability that this Court would vote to grant certiorari; (2) a significant possibility of reversal; and (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Additional equitable concerns involve whether the stay will substantially harm the other litigant, which herein is the State of Florida and the families of Owen's murder victims; and whether the stay would be adverse to the public interest. *Hill v. McDonough,* 547 U.S. 573, 584 (2006). Should Owen fail to establish even one of the factors identified, this Court should deny the motion to stay. *Hill,* 547 U.S. at 584 (holding that an inmate seeking a stay of execution "must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. With these principles in mind, Owen cannot establish the existence of any of these factors -- let alone all of them.

As to the first factor, Owen complains that the state courts put the credibility of the Commission above the credibility of Dr. Eisenstein. (Motion at 3.) Owen is not arguing that state courts' factual findings are not supported by the record, instead he is asking this Court to substitute the state courts' credibility findings with Owen's

version of the evidence. That request is not proper for certiorari review, much less for a stay. This Court must presume the state courts' factual findings are correct, and it may not substitute its factual findings absent demonstrable proof the state court facts are unsupported by the record. *Marshall v. Loneberger*, 459 U.S. 422, 432 (1983) (requiring federal courts to afford state court factual findings a high degree of deference); *Hoag v. New Jersey*, 356 U.S. 464, 471 (1958) (ruling federal court's authority to examine record does not include authority to substitute state findings on controverted factual findings); *Thomas v. Arizona*, 356 U.S. 390, 402 (1958) (same).

This Court has repeatedly explained that review will not be granted for the purpose of reviewing evidence and/or discussing specific facts. *United States v. Johnston*, 268 U.S. 220 (1925) (denying certiorari to review evidence or discuss specific facts). Further, this Court has rejected requests to reassess or re-weigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions). Yet, factual and credibility disputes are the entire premise of Owen's petition for certiorari review. He **disagrees** with the trial court's assessment, comparative weight assigned to the evidence, and credibility findings. Owen cannot make a credible claim that this Court would likely grant review.

As to the second factor, Owen has no chance of success on the merits, much less a substantial one, regarding his claim that he is incompetent to be executed. Specifically, he alleges that the state courts' decisions improperly focused on his competency at the time of the crimes and at the time of trial rather than his present

condition. Additionally, he alleges that the state courts did not make the requisite a finding that Owen possesses a rational understanding of the connection between his sentence and the crimes. (Motion at 3-4) However, a review of the Florida Supreme Court's opinion belies completely both allegations. The opinion is replete with references to Owen's mental status today. For instance, the opinion includes references such as: "Owen's current mental state"; "Owen does not have a mental illness"; "based on clinical evaluation of Owen"; "review of his medical records and correctional records from 1986 to the present"; "a lack of positive symptoms in Owen's recent behavior tracks the conclusion that Owen is feigning his delusion to avoid the death penalty." *Owen,* 2023 WL 3914193 at *1-2. Because the record and the Florida Supreme Court's opinion, demonstrate that the state courts focused on Owen's current mental state when assessing his claim, he has failed to show a substantial likelihood of success on the merits. *Marshall* 459 U.S. at 432, *Hoag,* 356 U.S. at 471; *Thomas,* 356 U.S. at 402. Moreover, references made to past events which assist in determining the veracity of the current claims are not a basis to attack the determination that Owen presently is sane to be executed.

Likewise, the state courts did indeed make the requisite determination regarding Owen's rational understanding. Consistent with Federal and Florida law, the Florida Supreme Court found in this case as follows:

> [T]he Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has 'lost his sanity' after sentencing." *Madison v. Alabama,* 139 S. Ct. 718, 722 (2019) (quoting *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)). To be ineligible for

> execution under the Eighth Amendment, a prisoner's mental state must be "**so distorted by a mental illness that he lacks a rational understanding of the State's rationale for his execution**." *Id.* at 723 (cleaned up) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007)); *see Gore*, 120 So. 3d at 556. In other words, **sanity for execution depends on whether a "prisoner's concept of reality" prevents him from grasping "the link between his crime and the punishment**." *Panetti*, 551 U.S. at 958, 960. "**What matters is whether a person has the 'rational understanding'** " of why the State seeks to execute him, "not whether he has any particular memory or any particular mental illness." *Madison*, 139 S. Ct. at 727.
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> **Here, the circuit court applied the appropriate legal standard in concluding that Owen is sane to be executed. That is, it determined that Owen has a " 'rational understanding' of the fact of his pending execution and the reason for it," and is "aware that the State is executing him for the murders he committed and that he will physically die as a result of the execution."** See *id.* at 722, 727; *Ferguson v. State*, 112 So. 3d 1154, 1156 (Fla. 2012) ("[F]or insanity to bar execution, the defendant must lack the capacity to understand the nature of the death penalty and why it was imposed.") (quoting *Johnston v. State*, 27 So. 3d 11, 26 n.8 (Fla. 2010)). Indeed, the circuit court found it "inconceivable and completely unbelievable" that Owen has "any current mental illness" and determined that "Owen's purported delusion is demonstrably false"

Owen, 2023 WL 3914193 at *2 (emphasis added) Clearly, the Florida Supreme Court's decision does not contradict in any way the holdings of *Ford, Panetti;* or *Madison.* A stay of execution must be denied. *See Ferguson,* 716 F.3d 1315, 1336 (11th Cir. 2013) (finding that Florida Supreme Court's assessment that the defendant understands the connection between his pending execution and the murders he committed and that he will die when executed is a correct application of federal law; *See also* Fla. R. Crim. P. 3.811(b) (defining insanity" [a] person under sentence of death is insane for purposes of execution if the person lacks the mental capacity to understand the fact of the impending execution and the reason for it.)

As to the third factor, Owen alleges that he will suffer irreparable harm if he is executed. However, that generic and boiler plate argument is meaningless because the inherent nature of every capital sentence is "irreparable." This factor, derived from civil litigation, is unhelpful and not an appropriate consideration in a capital case. Owen does not provide any unique or special argument in support of this factor as it pertains to his litigation or to any specific question left unanswered in his previous litigation and caselaw. *Compare Madison,*139 S. Ct. at 726-727 (explaining that *Madison* presents two questions ripe for an answer before this Court: may a person without memory of the crime committed be considered sane to be executed; and can an unrebutted diagnosis of dementia satisfy the requirement of a mental illness sufficient to conclude a person may be insane to be executed); *Compare also Panetti,* 551 U.S. at 958 (explaining that *Panetti* clarified the scope of the category of people who are insane to be executed by focusing on whether that person can reach a rational understanding of the reason for execution); *see also Ross v. Moffitt,* 417 U.S. 600 (1974) (explaining certiorari review by this Court "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). Neither Owen's personal irreparable harm, nor his personal disagreement with the decisions of the state courts provide a sufficient basis for review. Certiorari review may not be used to examine errors which have no importance or significance beyond the instant litigants and therefore it is not a compelling reason to stay his execution. *Fields v. United States*, 205 U.S. 292 (1906)

(finding certiorari inappropriate where case resolution will not affect interests of nations, resolve conflicts between two or more courts of appeal, or is not generally a question of national importance).

Turning to the remaining factors regarding whether the stay will substantially harm the other litigant, and whether the stay would be adverse to the public interest, Owen again does not present a valid justification to delay any further his sentence. Owen murdered KS in March of 1984; he murdered GW in May of 1984. Throughout the protracted litigation history of Owen's cases, he has presented legal challenges premised on the exact factual allegations he is making here. He has presented allegations of delusions, gender dysphoria and schizophrenia and the like in multiple proceedings in both capital cases since the 1990s.[1] Owen presented this evidence in the re-trial for the murder of KS as both an insanity defense and as mitigation for the penalty phase. *See Owen v. State,* 862 So. 2d 687 (Fla. 2003).[2] He also presented this evidence in support of several claims of ineffective assistance of counsel in postconviction proceedings for the murder of GW. *Owen v. State,* 773 So. 2d 510 (Fla.

[1] Notably, however, the gender transition murder theory did not make an appearance for more than a decade after Owen committed the two murders. This theory first appeared before the KS retrial, a fact the forensic psychiatrists called below, found indicative of malingering.

[2] He then pursued relief unsuccessfully in postconviction proceedings. *Owen v. State,* 986 So. 2d 534 (Fla. 2008). He also pursued relief unsuccessfully in federal court. *Owen v. Fla. DOC,* 686 F.3d 1181 (Fla. 2012).

2000)[3]. Now before this Court, just days before his scheduled execution, Owen repackages most of the same evidence as a claim that he is insane to be executed. [4] This continued recycling of the same suspect and incredible facts to support a stay would be a gross miscarriage of justice and would amount to a commutation of his death sentences for the duration of the stay. Owen is not entitled to any further review.

Furthermore, a stay continues to injure the State as a representative of Florida's citizens and the victims' families as the interest of finality is compelling to both. The victimization continues to occur to the families and loved ones of Owen's murder victims. Additionally, the State of Florida as a sovereign, is entitled to enforce its laws and carry out this sentence. The longer it is delayed, the greater the assault is on the sovereign's legitimate interest and that of the families of Owen's victims. *Cf. McFarland v. Scott,* 512 U.S. 849, 872-873 (1994) (warning that federal habeas review "disturbs the State's significant interest in repose for concluded litigation, denies

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[3] Although Owen was granted an evidentiary hearing on multiple claims related to his alleged gender identity issues and delusional schizophrenia, he waived the hearing. *Owen,* 773 So. 2d at 515; *Owen v. Crosby,* 854 So. 2d 182 (Fla. 2003)*; Owen v. Sec'y of DOC*, 568 F.3d 894 (11th Cir. 2009).

[4] Owen's expert, Dr. Eisenstein, first saw him on May 15, 2023 and on May 16, 2023, presented a letter that in his opinion Owen is insane to be executed. The entire premise of that opinion was based on the allegation that Owen has had delusional schizophrenia and gender dysphoria since he was a child and now those mental illnesses have become so chronic and embedded, he is insane and incompetent to be executed. The Commission disagreed. (See Appendix C and E attached to Owen's federal habeas petition).

society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority"); *Calderon v. Thompson,* 523 U.S. 538, 556 (1992) (explaining that the state and the victims possess an important interest in enforcement of its sentence); *Bucklew v. Precythe,* 139 S. Ct. 1112, 1133-1134 (2019) (recognizing that a two-decade delay in carrying out the death sentence following multiple reviews of the merits is excessive as families of victims and citizens deserve better).

In summary, it is not in the public interest to delay an execution so that Owen can pursue a claim, the factual basis of which has been rejected previously; which the state courts have found to be completely devoid of any merit; and to be conjured up by a malingering defendant. It is not in the public interest to grant a stay which would accomplish nothing but to compromise a federal court's ability to protect States from dilatory or speculative suits," and certainly from frivolous suits. *Brooks v. Warden*, 810 F.3d 812, 824 (11th Cir. 2016) (quoting *Hill v. McDonough,* 547 U.S. 573, 585 (2006)).

WHEREFORE, based on the facts and relevant case law, the State respectfully requests that this Court DENY Owen's Emergency Motion for Stay Of Execution.

Executed on June 13, 2023.

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