No. 22A1069

IN THE
Supreme Court of the United States

DUANE E. OWEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Respondent's Response to Application for Stay of Execution

APPENDIX TO RESPONSE FOR APPLICATION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, JUNE 15, 2023, AT 6:00 PM

Appendix 1. Emergency Motion for Stay of Execution, United States District Court, Southern District of Florida, Case Number 9:23-cv-80901-RS.

Appendix 2. Order Denying Motion for Emergency Stay of Execution, United States District Court, Southern District of Florida, Case Number 9:23-cv-80901-RS.

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

DUANE E. OWEN,
Petitioner,

v.

CASE NO.: _____
DEATH PENALTY CASE

RICKY D. DIXON,
Secretary, Florida Department of Corrections,

EXECUTION SCHEDULED FOR JUNE 15, 2023 AT 6:00 P.M.

and

ASHLEY B. MOODY,
Attorney General, State of Florida,

Respondents.
_____/

EMERGENCY MOTION FOR STAY OF EXECUTION

COMES NOW Petitioner, Duane E. Owen, by and through undersigned counsel, and moves the Court to grant this Emergency Motion for Stay of Execution to properly consider the grounds raised in Owen's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus.

Owen respectfully requests emergency action because his execution has been set for Thursday, June 15, 2023 at 6:00 p.m. A ruling is necessary prior to that date to avoid Owen being executed in violation of the Eighth Amendment to the United States Constitution, *Panetti v. Quarterman*, 551 U.S. 930 (2007), *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019).

Owen's incompetency to be executed places him outside of the class of individuals eligible to be executed because the Supreme Court of the United States has held that "[t]he Eighth

Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). "[T]he execution of a prisoner whose mental illness prevents him from 'rationally understanding' why the State seeks to impose that punishment" is prohibited. *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (quoting *Panetti*, 551 U.S. at 959). "Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Panetti*, 551 U.S. at 960.

Additionally, "[A] person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution." *Madison*, 139 S. Ct. at 726-27. The Eighth Amendment applies similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions, because either condition may impede the requisite comprehension of his punishment." *Id.* at 722. As the Supreme Court of the United States has made clear, "[w]hat matters is whether a person has the 'rational understanding' *Panetti* requires—not whether he has any particular memory or any particular mental illness." *Id.* at 727. Owen lacks a rational understanding of the connection between his crime and impending execution due to his fixed psychotic delusions and dementia.

Owen's claim regarding his incompetency to be executed only became ripe on May 9, 2023, when his death warrant was signed. "Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh." *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (citing *Panetti*, 551 U.S. at 946) (explaining that it is not possible to resolve a petitioner's *Ford* claim "before execution is imminent"). "It is not ripe years before the time of execution because mental conditions of prisoners vary over time." *Id.* (citing

Panetti, 551 U.S. at 943). Accordingly, Owen's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, filed simultaneously with this motion, is not second or successive. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) ("respondent was not required to get authorization to file a 'second or successive' application before his *Ford* claim could be heard").

Owen has not delayed in the filing of this motion. On May 9, 2023, the Governor issued a death warrant for Owen. The Warden set the execution for June 15, 2023 at 6:00 P.M. Due to concerns with Owen's competency after the death warrant was signed, Owen's counsel invoked section 922.07(1), Florida Statutes on May 17, 2023. On May 22, 2023, the Governor appointed three psychiatrists to determine whether Owen understands the nature and effect of the death penalty and why it is to be imposed upon him. Fla. Exec. Order No. 23-106 (May 22, 2023). On May 23, 2023, a panel of three psychiatrists ("the Commission"), all present at the same time, evaluated Owen for approximately 100 minutes. The Commission issued their report on May 24, 2023. The Governor adopted the Commission's conclusion that "O[wen] has the mental capacity to understand the nature of the death penalty and the reasons why it is to be imposed upon him." Fla. Exec. Order No. 23-116 (May 25, 2023). However, the findings of the Commission and the Governor conflicted with the findings of Dr. Hyman Eisenstein, a neuropsychologist, who evaluated Owen and conducted testing on May 15, 2023 and May 30, 2023, for a total of 13 hours and 15 minutes. Dr. Eisenstein opined that Owen was incompetent to be executed due to his delusions, schizophrenia, and dementia.

On May 26, 2023, the circuit court held a status conference to schedule the rule 3.812 hearing. On June 1, 2023, Owen filed a motion pursuant to Florida Rule of Criminal Procedure 3.811(d). The circuit court heard testimony at a rule 3.812 hearing on June 1-2, 2023. The circuit court issued an order finding Owen sane to be executed on June 4, 2023. The Supreme Court of

Florida issued an opinion affirming the circuit court's order on June 9, 2023. As a result, this is the first instance Owen could file this only now ripe Petition.

In the instant case, the state courts placed undue emphasis on Owen's past competency and mental illness instead solely focusing on his present mental condition. The state courts also put the credibility of the Commission who saw Owen for approximately 100 minutes and administered no testing above the credibility of Dr. Eisenstein who evaluated Owen for over 13 hours and administered a battery of testing. The Florida Supreme Court affirmed the circuit court's order which failed to properly make a finding regarding whether Owen had a "'rational understanding' of the connection between [his] crimes and his execution." *Ferguson v. Sec'y, Florida Dept. of Corr.*, 716 F.3d 1315, 1336 (11th Cir. 2013); *see also Panetti*, 551 U.S. at 958. "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Panetti*, 551 U.S. at 959. In addition, the state courts made no determination regarding Owen's dementia and whether that affects Owen's rational understanding. *Madison*, 139 S. Ct. at 726-27.

The findings of the state courts directly contradict the holdings in *Panetti* and *Madison*. "The prohibition [on carrying out a sentence of death] applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition." *Panetti*, 551 U.S. at 934. Consequently, the state court's adjudication of Owen's competency to be executed claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Further, the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2).

This Court has the authority to stay these proceedings and in the interest of protecting Owen's constitutional rights, should stay the execution.

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

28 U.S.C. § 2251(a)(1). A habeas corpus proceeding is pending due to the contemporaneously filed Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus.

Owen has made a strong showing that he is likely to succeed on the merits, it is indisputable he will be irreparably harmed if his execution is allowed to go forward, and the balance of equities weigh heavily in favor of a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Florida's interest in the timely enforcement of judgments handed down by its courts must be weighed against Owen's continued interest in his life. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) ("[I]t is incorrect . . . to say that a prisoner has been deprived of all interest in his life before his execution.") (O'Connor, J., plurality opinion). On the one hand, Florida has a minimal interest in finality and efficient enforcement of judgments. On the other, Owen, whose delusions and dementia prevent him from rationally understanding the consequences of his execution, has a right in ensuring that his execution comports with the United States Constitution. This right includes the ability to have meaningful judicial review of the complex constitutional claims he timely raises. "Approving the execution of a defendant before his appeal is decided on the merits would clearly be improper." *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983).

The Supreme Court of the United States has stated:

> we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid

> today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

Ford, 477 U.S. at 409-10 (internal citation omitted). These sentiments are exactly why public interest demands a stay and Owen's Petition deserves to be considered outside of the accelerated constraints of his execution being scheduled mere days later. In addition, the irreversible nature of the death penalty frequently supports in favor of granting a stay. "[A] death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983). Therefore, this Court should grant a stay to decide Owen's legal issues on the merits.

In the contemporaneously filed Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, Owen respectfully requests leave to file a memorandum of law in support of his Petition, and to exceed the page limit. Granting a stay would allow Owen to aid the Court by filing a cohesive memorandum of law.

Based on the state court's decision being contrary to, or involved an unreasonable application of, clearly established Federal law, and being based on an unreasonable determination of the facts presented in the state court proceeding, Owen asks this Court to stay his execution, currently scheduled for Thursday, June 15, 2023 at 6:00 p.m., to give this Court an opportunity to properly adjudicate Owen's claims in his habeas petition which only now became ripe.

After reviewing the facts and researching applicable legal principles, we certify that this motion in fact presents a true emergency (as opposed to a matter that may need only expedited treatment) and requires an immediate ruling because the Court would not be able to provide

meaningful relief to a critical, non-routine issue after the expiration of seven days. We understand that an unwarranted certification may lead to sanctions.

Respectfully submitted,

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Counsel for Duane E. Owen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Chief Assistant Attorney General Celia Terenzio at Celia.Terenzio@myfloridalegal.com and capapp@myfloridalegal.com; Senior Assistant Attorney General Leslie Campbell at Leslie.Campbell@myfloridalegal.com; Chief Legal Counsel Philip A. Fowler at Philip.Fowler@fdc.myflorida.com; Senior Attorney Christina Porrello at Christina.Porrello@fdc.myflorida.com; and the Florida Supreme Court, at warrant@flcourts.org. I further certify that a true copy of the foregoing was mailed to the following non-CM/ECF participant: Duane E. Owen, DOC# 101660, Florida State Prison, P.O. Box 800, Raiford, Florida 32083.

/s/ Lisa M. Fusaro
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 23-80901-CV-SMITH

DUANE E. OWEN,

Petitioner,

v.

RICKY DIXON, *et al.*,

Respondents.

_____/

ORDER DENYING EMERGENCY MOTION FOR STAY OF EXECUTION

This case is currently before the Court on Petitioner, Duane E. Owen's Emergency Motion for Stay of Execution [DE 3], filed in conjunction with Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody [DE 1], and the State's Response to Emergency Motion for Stay of Execution [DE 6]. Petitioner, an inmate in state custody, is scheduled to be executed on Thursday, June 15, 2023 at 6:00 p.m. Petitioner, arguing that he is incompetent to be executed, seeks to stay his execution. Petitioner claims that he is not competent to be executed because he suffers from schizophrenia and dementia.

Inmates seeking a stay of execution must satisfy all the requirements for a stay. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Those requirements are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). If a petitioner fails to establish any of these requirements, a court must deny the stay. *See Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011) ("Because Valle has

failed to show a substantial likelihood of success on the merits, we need not address the other three requirements for issuance of a stay of execution."). To meet the first requirement, Petitioner must show that he is likely to succeed in establishing that he is incompetent. A petitioner claiming incompetence must show that he lacks a "'rational understanding' of the connection between [his] crimes and his execution." *Ferguson v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 1315, 1336 (11th Cir. 2013) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 935, 958–59 (2007)). Because Petitioner must show he is likely to succeed on the merits, he must show that he is likely to succeed on his claim for a writ of habeas corpus based on his alleged incompetence.

A prisoner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented" to the state court. 28 U.S.C. § 2254(d)(1), (2); *see Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *Fugate v. Head*, 261 F.3d 1206, 1215-16 (11th Cir. 2001).

A state court decision is "contrary to" or an "unreasonable application of" the Supreme Court's clearly established precedent within the meaning of § 2254(d)(1) only if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams*, 529 U.S. at 405-06. So long as neither the reasoning nor the result of the state court decision contradicts Supreme Court decisions, the state court's decision will not be disturbed. *Early v. Packer*, 537 U.S. 3, 8 (2002).

Further, a federal court must presume the correctness of the state court's factual findings unless the petitioner overcomes them by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). Thus, a court "must defer to the state circuit court's credibility determination, which is a factual finding." *Rimmer v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1039, 1055 (11th Cir. 2017). Additionally, the petitioner carries the burden of proof and the § 2254(d)(1) standard is a high hurdle to overcome. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (acknowledging that § 2254(d) places a difficult burden of proof on the petitioner).

Petitioner raises two issues. First, Petitioner argues that the state court made an unreasonable determination of the facts in light of the evidence presented. Petitioner argues that the state court incorrectly weighed the evidence regarding Petitioner's mental illness. Petitioner argues that the state court gave more weight to the opinions of the three-member Commission of psychiatrists authorized by the governor than to Petitioner's doctors. However, as set out above, a federal court must presume the correctness of the state court's factual findings unless the petitioner overcomes them by clear and convincing evidence. Petitioner has not met this burden. The state trial court explained its reasoning for affording more weight to the Commission's opinions than Petitioner's witnesses and Petitioner has not shown that the state court's reasons were unreasonable. Petitioner further argues that state circuit court failed to make a finding that Petitioner had a rational understanding of the connection between his crimes and his execution. The state circuit court, however, found that Petitioner was sane, did not have any mental illness, and "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." *State v. Owen*, Case No. 04-2023-CA-000264 at 21 (opinion filed at DE 1-2).

Petitioner further argues that the state court improperly focused on Petitioner's mental state in the past. A review of the state court's decision, however, indicates that it considered Petitioner's past and present mental state. According to the state court opinion, a member of the Commission testified that Petitioner "specifically told the Commission that the State of Florida was going to kill him for having killed the two women; but that sadly enough that's what he did; and that he didn't know how they think it was okay to kill him for killing them." The state court then found that "[t]hese statements very clearly demonstrate Mr. Owen understands the nature and effect of the death penalty and why it is to be imposed on him." *Id.* at 10-11. Members of the Commission also testified: that Petitioner has no mental illness and is feigning psychopathology to avoid the death penalty; that Petitioner showed no signs of dementia; that Petitioner is not phychotic and knows exactly what is going on; and that Petitioner showed no signs of any mental illness during the Commissions interview. *Id.* at 14-16. All of this testimony contradicts Petitioner's argument that the state court improperly focused on Petitioner's past mental state. Thus, Petitioner has not shown by clear and convincing evidence that state circuit court's finding regarding his current mental state was incorrect.

Second, Petitioner argues that the state court's decision was contrary to, or involved an unreasonable application, of clearly established federal law because the decision was based on an unreasonable determination of the facts presented in the state court proceeding. However, because Petitioner has not shown that the state court's factual findings were incorrect, Petitioner cannot establish that the state court's decision was contrary to clearly established law.

Consequently, Petitioner has not established the first requirement for a stay — a strong showing that he is likely to succeed on the merits. Accordingly, it is

ORDERED that Petitioner, Duane E. Owen's Emergency Motion for Stay of Execution [DE 3] is **DENIED with prejudice** and the Court will not entertain a motion for reconsideration.

DONE AND ORDERED in Fort Lauderdale, Florida, this 11th day of June, 2023.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: All counsel of record