No. _____

IN THE

Supreme Court of the United States

DUANE E. OWEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

APPLICATION FOR STAY OF EXECUTION

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

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

The State of Florida has scheduled the execution of Petitioner, Duane E. Owen, for **June 15, 2023, at 6:00 p.m.** The Florida Supreme Court denied relief on June 9, 2023. The United States District Court for the Southern District of Florida also denied Owen's Emergency Motion for Stay of Execution on June 11, 2023.[1] Owen respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed petition for a writ of certiorari.

STANDARDS FOR A STAY OF EXECUTION

The standards for granting a stay of execution are well-established. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). There "must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Id.* (internal quotations omitted).

PETITIONER SHOULD BE GRANTED A STAY OF EXECUTION

The questions raised in Owen's petition are sufficiently meritorious for a grant

[1] As of the time of this writing, Owen's Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus By a Person in State Custody is still pending, but with Owen's execution date only being a few days away, Owen petitions for a writ of certiorari in the event the United States District Court for the Southern District of Florida does not render a decision regarding the habeas petition in time.

of a writ of certiorari. The underlying issues present significant, compelling questions of constitutional law and a stay is necessary 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 (2019).

As explained in Owen's underlying petition, Owen's incompetency to be executed places him outside of the class of individuals eligible to be executed because this Court 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 this Court 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 claims are not subject to any procedural impediments because 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).

In the instant case, the state courts placed undue emphasis on Owen's past competency and mental illness instead of 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 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.

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.

It is indisputable Owen will be irreparably harmed if his execution is allowed to go forward, and the balance of equities weighs heavily in favor of a stay. 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). Florida has a minimal interest in finality and efficient enforcement of judgments, but 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 Constitution. This right includes the ability to have meaningful judicial review of the complex constitutional claims he timely raises.

This Court 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 claims deserve 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*, 463 U.S. at 888. Should this Court grant the request for a stay and review of the underlying petition, Owen submits there is a significant possibility of the lower court's reversal. This Court's intervention is urgently needed to prevent Owen's imminent execution despite the protections from the death penalty provided by the Eighth Amendment.

CONCLUSION

For the foregoing reasons, Owen respectfully requests that the Court grant his application for a stay of his June 15, 2023 execution to address the compelling constitutional questions in his case on the merits.

Respectfully submitted,

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June 12, 2023
Dated