

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*

---

---

**PETITION FOR A WRIT OF CERTIORARI**

---

---

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

---

---

**Lisa M. Fusaro\***

*\*Counsel of Record*

Florida Bar Number 119074

fusaro@ccmr.state.fl.us

Law Office of The Capital Collateral  
Regional Counsel - Middle Region  
12973 North Telecom Parkway  
Temple Terrace, Florida 33637  
(813) 558-1600

---

---

## CAPITAL CASE

### QUESTIONS PRESENTED

Owen was sentenced to death thirty-seven years ago. Owen has been found to be incompetent to be executed by a neuropsychologist who evaluated Owen for over thirteen hours and conducted a battery of testing. Owen lacks a rational understanding of the connection between his crime and impending execution due to his fixed psychotic delusions and dementia. Accordingly, Owen raises the following issues:

1. Whether the State of Florida's perfunctory evaluation of Owen's claim that he is legally insane and incompetent to be executed violated the Eighth Amendment when the state courts refused to provide meaningful consideration of whether Owen's longstanding and fixed delusions prevented a rational understanding of the link between the crime and its punishment?

2. Whether the Florida courts' failure to explicitly consider and make findings regarding Owen's dementia as a basis for lack of rational understanding when evaluating whether Owen is incompetent to be executed violates his rights under the Eighth Amendment?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Duane E. Owen, a death-sentenced Florida prisoner, was the appellant in the Supreme Court of Florida. Respondent, State of Florida, was the appellee in the Supreme Court of Florida.

## LIST OF RELATED CASES

### **Trial**

Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida  
*State of Florida v. Duane E. Owen*; Case number: 1984-CF-004000  
Judgment entered: Guilty as charged date, on one count of first-degree murder, one count of sexual battery, and one count of burglary. Death recommendation, March 5, 1986. Death sentence imposed by court on March 13, 1986.

### **Direct Appeal**

Supreme Court of Florida  
*Owen v. State*, 596 So. 2d 985 (Fla. 1992); Case Number: 68549  
Judgment entered: January 23, 1992; Rehearing denied: April 1, 1992.

### **Certiorari**

Supreme Court of the United States  
*Owen v. Florida*, 506 U.S. 921 (1992); Case Number: 92-5530  
Judgment entered: October 13, 1992; *cert denied*.

### **Postconviction Motion**

Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida  
*Duane Eugene Owen v. State of Florida*; Case Number: 501984CF004000AXXXMB  
Judgment entered: December 8, 1997; order denying postconviction relief (unpublished).

### **Appeal of denial of postconviction**

Supreme Court of Florida  
*Owen v. State*, 773 So. 2d 510 (Fla. 2000); Case Number: SC92144  
Judgment entered: September 21, 2000; Rehearing denied: November 13, 2000.

### **Certiorari**

Supreme Court of the United States  
*Owen v. Florida*, 532 U.S. 964 (2001); Case Number: 00-8649

Judgment entered: April 2, 2001; *cert denied*.

**Pro se motion for postconviction relief**

Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida  
*Duane Eugene Owen v. State of Florida*; Case Number: 501984CF004000AXXXMB.

Judgment entered: October 17, 2001; order denying pro se motion for postconviction relief (unpublished)

**Appeal from the denial of postconviction**

Supreme Court of Florida

*Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003); Case Number: SC01–2146

Judgment entered: July 11, 2003; Rehearing denied: September 2, 2003.

**State habeas petition**

Supreme Court of Florida

*Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003); Case Number: SC01–2476

Judgment entered: July 11, 2003; Rehearing denied: September 2, 2003.

**Federal habeas petition**

United States District Court, Southern District. Florida, Miami Division.

*Owen v. Crosby*, 2007 WL 9719051 (S.D. Fla. Sept. 6, 2007); Case Number: 03-81152-CIV-Graham

Judgment signed: September 4, 2007; Judgment entered: September 6, 2007.

United States District Court, Southern District. Florida, Miami Division.

*Owen v. Sec’y for Dep’t of Corr.*, 2008 WL 11433469 (S.D. Fla. July 3, 2008); Case number: 03-81152-CIV-Graham

Judgment signed: June 20, 2008; Judgment entered: July 3, 2008; Certificate of Appealability granted in part and denied in part.

**Appeal from the denial of federal habeas petition**

United States Court of Appeals, Eleventh Circuit.

*Owen v. Sec’y for Dep’t of Corr.*, 568 F.3d 894 (11th Cir. 2009); Case Number: 07–14727

Judgment entered: May 18, 2009; Rehearing denied: July 7, 2009.

**Certiorari**

Supreme Court of the United States

*Owen v. McNeil*, 558 U.S. 1151 (2010); Case Number: 09–6983

Judgment Entered: January 19, 2010; *cert denied*.

**Postconviction motion**

Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida  
*Duane Eugene Owen v. State of Florida*; Case Number: 501984CF004000AXXXMB

Judgment entered: January 5, 2018; order denying motion for postconviction relief (unpublished).

**Appeal from denial of postconviction motion**

Supreme Court of Florida

*Owen v. State*, 247 So. 3d 394 (Fla. 2018); Case Number SC18–382

Judgment Entered: June 26, 2018; affirmed.

**Certiorari**

Supreme Court of the United States

*Owen v. Florida*, 139 S. Ct. 1171 (2019); Case Number 18–6776

Judgment entered: February 19, 2019; *cert denied*.

**Postconviction motion**

Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida

*Duane E. Owen v. State of Florida*; Case Number: 501984CF004000AXXXMB

Judgment entered: May 19, 2023; Order denying Fourth Successive Motion to Vacate Judgment of Conviction and Sentence.

**Appeal from denial of postconviction motion**

Florida Supreme Court

*Owen v. State*, ---So. 3d --- (Fla. 2023); Case Number: SC23-0732

Judgment entered: June 5, 2023

**Motion for stay of execution and determination of sanity to be executed**

Circuit Court of the Eighth Judicial Circuit, in and for Bradford County, Florida

*Duane E. Owen v. State of Florida*; Case Number: 04-2023-CA-000264-CAAM

Judgment entered: June 4, 2023; Order Finding Duane E. Owen Sane to be Executed.

**Appeal from denial of motion for stay of execution and determination of sanity to be executed**

Florida Supreme Court

*Owen v. State*, ---So. 3d --- (Fla. 2023); Case Number: SC23-0819

Judgment entered: June 9, 2023

**Federal Habeas Petition**

United States District Court, Southern District. Florida, West Palm Beach Division.

*Duane E. Owen v. Ricky Dixon, et al.*; Case Number: 23-80901-CV-SMITH

Petition Filed: June 9, 2023; Stay Denied: June 11, 2023; Habeas Petition: *pending*

**TABLE OF CONTENTS**

<b>CONTENTS</b>	<b>PAGE</b>
QUESTIONS PRESENTED.....	i
LIST OF PARTIES .....	ii
LIST OF RELATED CASES .....	ii
TABLE OF CONTENTS.....	v
INDEX TO APPENDICES .....	vii
TABLE OF AUTHORITIES .....	viii
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW .....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
I.    Procedural History.....	1
II.   Procedural History Related to Incompetency to be Executed.....	4
III.  Summary of Facts from the Competency to be Executed Evidentiary Hearing .....	5
REASONS FOR GRANTING THE PETITION .....	12
I.    THE EIGHTH AMENDMENT BARS EXECUTION OF THE INSANE..	12
A.  Owen’s mental illness and delusions prevent his rational understanding of the link between the crime and the punishment .....	13
B.  Under <i>Panetti</i> , the only relevant time to measure competency to be executed is at the time of execution.....	20

**TABLE OF CONTENTS (cont'd)**

<b>CONTENTS</b>	<b>PAGE</b>
C. Owen also lacks rational understanding of the link between the crime and its punishment due to his dementia.....	24
CONCLUSION.....	29

**INDEX TO APPENDICES**  
**[IN SEPARATE VOLUME]**

Appendix A	<i>Owen v. State</i> , No. SC2023-0819, (Fla. June 9, 2023).
Appendix B	The Eighth Judicial Circuit, In and For Bradford County, Florida Order Finding Duane E. Owen Sane to Be Executed, dated June 4, 2023
Appendix C	Governor of Florida’s Commission’s Report, dated May 24, 2023
Appendix D	Transcript from June 1-2, 2023 Hearing
Appendix E	Dr. Eisenstein’s May 16, 2023 Report
Appendix F	Dr. Eisenstein’s Supplemental Report, dated May 31, 2023



## TABLE OF AUTHORITIES

<b>CASES</b>	<b>PAGE(S)</b>
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986) .....	12, 13
<i>Madison v. Alabama</i> , 139 S. Ct. 718 (2019) .....	12, 13, 14, 20, 24, 28
<i>Owen v. Crosby</i> , 854 So. 2d 182 (Fla. 2003) .....	3
<i>Owen v. Crosby</i> , 03-81152-CIV, 2007 WL 9719051 (S.D. Fla. Sept. 6, 2007).....	3
<i>Owen v. Florida</i> , 506 U.S. 921 (1992) .....	2
<i>Owen v. Florida</i> , 532 U.S. 964 (2001) .....	3
<i>Owen v. McNeil</i> , 558 U.S. 1151 (2010).....	3
<i>Owen v. Sec’y for Dep’t of Corr.</i> , 568 F.3d 894 (11th Cir. 2009) .....	3
<i>Owen v. State</i> , 247 So. 3d 394 (Fla. 2018) .....	3
<i>Owen v. State</i> , 596 So. 2d 985 (Fla. 1992) .....	2
<i>Owen v. State</i> , 773 So. 2d 510 (Fla. 2000) .....	2
<i>Owen v. State</i> , SC2023-0732, 2023 WL 3813490 (Fla. June 5, 2023).....	4
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	12, 13, 14, 20, 21, 24
<i>Tompkins v. Sec’y, Dept. of Corr.</i> , 557 F.3d 1257 (11th Cir. 2009) .....	20
<b>CONSTITUTIONAL PROVISIONS</b>	<b>PAGE(S)</b>
U.S. CONST. amend. VIII .....	1, 12, 13, 20, 24, 28
<b>STATUTES AND RULES</b>	<b>PAGE(S)</b>
28 U.S.C. § 1257.....	1
28 U.S.C. § 2254.....	5

**TABLE OF AUTHORITIES (cont'd)**

<b>STATUTES AND RULES</b>	<b>PAGE(S)</b>
Fla. Stat. § 922.07.....	4
Fla. R. Crim. P. 3.811 .....	5
Fla. R. Crim. P. 3.812 .....	4, 5
Fla. R. Crim. P. 3.850 .....	2
<b>OTHER AUTHORITIES</b>	<b>PAGE(S)</b>
AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 748 (5th ed. text revision 2022) .....	16
Fla. Exec. Order No. 23-106 (May 22, 2023).....	4
Fla. Exec. Order No. 23-116 (May 25, 2023).....	4
Josh Solomon & Zachary T. Simpson, <i>Will Prosecutors Lose a Key Witness in the John Jonchuck Case? Defense Attorneys Say They Should.</i> , Tampa Bay Times (Dec. 7, 2018), <a href="https://www.tampabay.com/news/pinellas/crime/will-prosecutors-lose-a-key-witness-in-the-john-jonchuck-case-defense-attorneys-say-they-should-20181204/">https://www.tampabay.com/news/pinellas/crime/will-prosecutors-lose-a-key-witness-in-the-john-jonchuck-case-defense-attorneys-say-they-should-20181204/</a> ..	17

**IN THE SUPREME COURT OF THE UNITED STATES**

**PETITION FOR A WRIT OF CERTIORARI**

Duane E. Owen respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

**OPINIONS BELOW**

This is a petition regarding the errors of the Supreme Court of Florida in affirming the Circuit Court of The Eighth Judicial Circuit, In and For Bradford County, Florida’s (“circuit court”) Order Finding Duane E. Owen Sane to Be Executed. The opinion at issue is unreported and reproduced at Appendix A (hereinafter App. A). The circuit court’s unpublished Order Finding Duane E. Owen Sane to Be Executed is reproduced at App. B.

**JURISDICTION**

The opinion of the Supreme Court of Florida was entered on June 9, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII.

**STATEMENT OF THE CASE**

**I. Procedural History**

Owen was convicted at a jury trial of first-degree murder, sexual battery, and burglary. For the non-capital offenses, Owen received the following sentences to run

consecutively: sexual battery (natural life) and burglary (natural life). For the capital offense, the advisory jury recommended death by a ten to two vote. The trial judge sentenced Owen to death on March 13, 1986.

Owen appealed his judgment and sentences. The Supreme Court of Florida affirmed Owen's judgment of conviction and sentence of death. *Owen v. State*, 596 So. 2d 985, 987 (Fla. 1992). Owen subsequently filed a Petition for a Writ of Certiorari to this Court, which was denied on October 13, 1992. *Owen v. Florida*, 506 U.S. 921 (1992).

Owen filed his motion for postconviction relief in state court pursuant to Fla. R. Crim. P. 3.850 on December 8, 1997. Relevant here, Owen raised:

**Claim V:** Mr. Owen was denied the effective assistance of counsel during pre-trial, trial and sentencing of his capital proceedings in that counsel failed to provide the mental health experts with available information which the experts needed to make an accurate competency determination, and the state withheld material exculpatory information needed to reach such a determination, in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The postconviction court denied relief on December 8, 1997, without conducting a full evidentiary hearing. Owen appealed to the Supreme Court of Florida, relevant here, Owen raised:

**Argument III:** Mr. Owen was denied a full and fair hearing on the following issues.

**A.** Mr. Owen was denied the effective assistance of counsel during pre-trial, trial and sentencing of his capital proceedings regarding failure to provide the mental health experts with available information.

The Supreme Court of Florida affirmed the denial of all claims. *Owen v. State*, 773 So. 2d 510 (Fla. 2000). This Court denied review. *Owen v. Florida*, 532 U.S. 964 (2001).

Owen then filed a *pro se* Successive Motion for Postconviction Relief on June 29, 2001. Owen appealed and, after the Supreme Court of Florida appointed counsel, the court affirmed the trial court's order summarily denying postconviction relief on July 11, 2003. *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003). Owen's Petition for Writ of Habeas Corpus was denied. *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003).

Owen filed a Petition for Writ of Habeas Corpus in the Southern District of Florida on December 15, 2003. The Southern District of Florida denied Owen's petition for writ of habeas corpus. *Owen v. Crosby*, 03-81152-CIV, 2007 WL 9719051, at \*1-2 (S.D. Fla. Sept. 6, 2007). The Eleventh Circuit Court of Appeals affirmed the district court's denial of relief. *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 899 (11th Cir. 2009). This Court denied certiorari review. *Owen v. McNeil*, 558 U.S. 1151 (2010).

Owen filed a Third Successive Motion to Vacate Judgment of Conviction and Sentence on January 6, 2017. The trial court summarily denied relief on May 8, 2018, and the Supreme Court of Florida affirmed the summary denial of Owen's successive motion. *Owen v. State*, 247 So. 3d 394 (Fla. 2018).

On May 9, 2023, the Governor of Florida issued a death warrant for Owen. The Warden set the execution for June 15, 2023 at 6:00 p.m. On May 17, 2023, Owen filed his Fourth Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After Warrant Signed

and other related motions. Owen appealed and the lower court's order was affirmed by the Supreme Court of Florida on June 5, 2023. *Owen v. State*, SC2023-0732, 2023 WL 3813490 (Fla. June 5, 2023). That opinion of the Supreme Court of Florida is not at issue here.

## **II. Procedural History Related to Incompetency to be Executed**

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. App. C. 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. App. D. 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.

On June 9, 2023, Owen filed a Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus By a Person in State Custody in the United States District Court for the Southern District of Florida. As of the time of this writing, it 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 on the habeas petition in time.

### **III. Summary of Facts from the Competency to be Executed Evidentiary Hearing**

Pursuant to Florida Rule of Criminal Procedure 3.812, on June 1-2, 2023, an evidentiary hearing was held regarding Owen's insanity to be executed. The transcript is submitted as App. D. The defense's first witness at the hearing was board-certified neuropsychologist, Dr. Hyman Eisenstein. Dr. Eisenstein evaluated Owen on May 15, 2023 and May 30, 2023 at Florida State Prison ("FSP") for a combined total of 13 hours and 15 minutes. T/19.<sup>1</sup> Dr. Eisenstein issued a report dated May 16, 2023 (App. E) and a supplemental report dated May 31, 2023. App. F. This total time consisted of a combination of interviewing, and cognitive and neuropsychological testing. Throughout both interactions, Dr. Eisenstein noted that

---

<sup>1</sup> References to the transcript from the proceedings held under Florida Rule of Criminal Procedure 3.812 in the Eighth Judicial Circuit, in and for Bradford County (App. D), are in the form T/[page number].

Owen's participation was honest, forthright, and that Owen put genuine effort into the evaluation; there was no indication to Dr. Eisenstein that Owen was malingering at any point during the interviews or testing. T/27. Dr. Eisenstein provided the court with a brief overview of Owen's childhood to provide the court with context as to how Owen came to be this way. T/24. Dr. Eisenstein's testimony on Owen's childhood included facts that support Owen's early desire to try to become a female. T/26. Dr. Eisenstein administered a variety of different tests on both days he spent with Owen. T/28.

Regarding IQ, when Dr. Eisenstein administered the Wechsler Adult Intelligence Scale, Owen received a full-scale IQ score of 92, which falls into the average intelligence range. T/32. Additionally, Dr. Eisenstein found there to be an insidious dementia process, which means there is a slow decline from the level at which Owen was previously. T/36. Dr. Eisenstein further testified that Owen suffers from schizophrenia and that he exhibits a fixed delusional thinking that is far removed from reality but has remained constant throughout Owen's life. T/46-47. Dr. Eisenstein explained to the court that Owen's delusion has remained throughout his life,

[i]t's gone from where he certainly felt that he is a male, entrapped as a male but really wanting to be a woman, with every effort possible to try to act like a woman, dress like a woman, think like a woman, and then how he could possibly achieve this end result. The end result that he wanted to achieve was the extraction of female hormone through having sexual intercourse with a woman and expunging their essence through his ejaculation and like a penis being a hose and extracting that. And then he would somehow, this would transform him from a male to a female.



T/47.

Dr. Eisenstein additionally diagnosed Owen with gender dysphoria. T/50. Importantly, Dr. Eisenstein testified that Owen does not meet the criteria for antisocial personality disorder, especially due to the fact that there must be conduct disorder established before the age of fifteen. T/56-57. Overall, Dr. Eisenstein testified that it is his opinion that Owen does not understand the nature and effect of why the death penalty is imposed on him, nor does he have a rational appreciation of the connection between his crime and the punishment. T/67.

Carey Haughwout, Owen's former trial counsel from 1992 to 1999 also testified for the defense at the hearing. T/104-05. She testified that throughout her entire time representing Owen, his delusion that he intended to be a female and that to physically become a female he needed to absorb the fluids of his female victims, remained unchanged. T/108-09. Further, Ms. Haughwout testified that back in the 1990s she had no questions or doubts as to Owen's memory as he was able to assist counsel back then. T/111. However, Ms. Haughwout has kept in touch with Owen periodically over the past 20 plus years, and after recently visiting him after the warrant was signed, Owen seemed to have a much harder time remembering things they had corresponded about just years ago, such as Owen's studies in black hole and physics. T/113. She explained to the court that Owen is not the sharp person she knew before. T/114.

Pamela Izakowitz, Owen's former postconviction counsel in 1997, testified that Owen shared his delusions with her back then. T/235. She additionally testified that

Owen asked her to bring him some women's panties, women's shoes, and dental floss so he could tie off his genitalia because he believed if he tied off his genitalia it would make him a female. T/236. Ms. Izakowitz further recalled that Owen filed name change paperwork in Bradford County to legally change his name to something related to Madonna. T/237, 243; *see also* Bradford County Case No. 94-134-DR.

The defense presented the testimony of Lisa Wiley, a retired psychological specialist who worked at the Department of Corrections ("DOC") from 1989 until 2005. T/221. Ms. Wiley testified that she specifically worked on Death Row at Union Correctional Institution ("UCI") from 1992 through 2005, providing mental health services to inmates. T/222. Ms. Wiley testified that Owen became a regular patient of hers who she saw approximately once a month; she further noted in Owen's medical records that Owen had gender identity disorder. T/223-24. Although Ms. Wiley stated she did not see any evidence of schizophrenia, she testified that she had no reason to believe Owen was malingering regarding his mental illness. T/229-30, 232.

The defense provided an affidavit of licensed clinical psychologist, Dr. Faye Sultan, due to her unavailability to testify during the day and a half allotted for the hearing. Dr. Sultan first saw Owen in 1995 and saw no signs of malingering in any testing she conducted. Although Dr. Sultan has had no contact with Owen since 1999, her affidavit provided context to the Court on Owen's history of mental illness and insanity, as well as the consistency of Owen's delusions.

The defense also provided an affidavit of licensed psychiatrist and Director of the Johns Hopkins Sex Gender Clinic at The Johns Hopkins Hospital, Dr. Frederick

Berlin, M.D., Ph.D. Dr. Berlin first evaluated Owen in 1996 and opined that Owen suffered from several psychiatric disorders including, gender identity disorder, paraphilic sexual disorder, and schizophrenia. Although Dr. Berlin has had no contact with Owen since 1999, his affidavit provided context to the circuit court regarding Owen's history of mental illness and insanity.

In addition, Owen requested a continuance to present the testimony of Dr. Faye Sultan and Dr. Frederick Berlin. T/3-7. However, the circuit court denied the continuance. T/7.

In response to the defense expert's and lay witnesses' testimony, the State presented testimony from the three doctors who comprised the Commission: Dr. Tonia Werner (T/120-70), Dr. Wade Myers (T/254-319), and Dr. Emily Lazarou (T/321-428). The State introduced into evidence each of the three doctors' CVs and the Commission's report to the governor. T/132. Each of the three doctors on the Commission testified consistent with their report, and that based on the clinical interview, review of the records, and interviews with correctional employees, it was the opinion of the Commission within a reasonable degree of medical certainty that Owen (1) has no mental illness, (2) is feigning psychopathology (malingering) to avoid the death penalty, (3) has an Antisocial Personality Disorder, and (4) understands the nature and effect of the death penalty and why it is to be imposed on him.

The State also presented testimony of four DOC employees/prison guards from FSP and UCI: John Manning (T/170-84), Jeffrey McClellan (T/184-202), Daniel Philbert (T/202-17), and Danny Halsey (T/244-52). Each individual testified that

Owen is polite, compliant, and behaves appropriately. However, each of the individuals that testified from DOC stated that they are not a psychologist, they have no medical licenses, and that they have no formal education or training that would qualify them to make any diagnosis related to a psychiatric impairment.

In rebuttal, the defense recalled Dr. Eisenstein who testified that with regard to Owen's ability to understand legalese and write briefs with cogent arguments, Owen has experienced a significant drop from his previous abilities. T/432. This supports the onset of insidious dementia. T/433. Dr. Eisenstein also reiterated during his rebuttal testimony that without evidence of conduct disorder before the age of fifteen, a person cannot be diagnosed with antisocial personality disorder. T/440-41. Further, even after listening to the testimony of each of the three doctors comprising the Commission, Dr. Eisenstein continued to testify that his opinion on whether Owen is competent to be executed remains unchanged. T/439.

The defense also called Eric Pinkard, the Capital Collateral Regional Counsel for the Middle District of Florida, and Owen's prior postconviction counsel, in rebuttal. T/445. Mr. Pinkard testified that he began working on Owen's case in 1999 and has known Owen for over 20 years. T/445. Mr. Pinkard testified he visited Owen the day after the death warrant was signed and immediately observed Owen was not the same Owen he had known in terms of Owen's cognitive abilities. T/446. Mr. Pinkard noted that when attempting to discuss legal claims with Owen after the death warrant was signed, Owen only wanted to discuss how the pending execution would prevent him from completing his transition from a man to a woman. T/446-47.

Mr. Pinkard witnessed the Commission's competency evaluation on May 23, 2023 at FSP. T/450. Mr. Pinkard testified that during the Commission's evaluation he observed Owen state to the Commission that,

he didn't understand why they were executing him because he hadn't killed anybody and that the State was well aware of that because at the Slattery retrial, the testimony had been put forth that he didn't kill the victim but, in fact, had taken them into his body through his penis, which acted as a hose to take their estrogen in, and that -- the idea that he was seeking to transition himself through that from a man into a woman.

T/453. Once Owen shared his delusion with the commission, Mr. Pinkard noted for the court that the "whole rest of it was them trying to cross-examine him and try to break him down to admit that he knew . . . he had really killed the victims." T/455. Even so, Owen maintained throughout the entire examination that he did not kill anyone. T/455-56. Further, Owen was very clear during the evaluation that before the victims expired, they entered into his body. T/460. Mr. Pinkard additionally noted that during the evaluation, Owen testified the reason he did not want to reveal he was a woman while in prison is because he was afraid of being subjected to brutality. T/461-62.

Overall, Mr. Pinkard testified that the Commission's evaluation became confrontational and that certain evaluators consistently confronted Owen with their disbelief in the veracity of his delusion. T/454-56. Mr. Pinkard testified that he has witnessed dozens of evaluations, but not all of them for execution. T/454. Notably, Mr. Pinkard testified "I've never seen anything like the evaluation that I witnessed in terms of being that aggressive to confront the person to try to get him to change

his mind about something.” T/456. Dr. Werner and Dr. Lazarou were peppering Owen with questions and trying to break him down to admit that he does not really harbor these delusions; Dr. Myers did not. T/455. Mr. Pinkard testified that Dr. Lazarou raised her voice at Owen for a very long period of time and took an overall hostile tone with Owen. T/457. Throughout the entirety of the evaluation, every time Owen got a sentence out, the Commission never accepted what he said or moved on to another topic, rather they continued to harp on the same points. T/458-59.

## **REASONS FOR GRANTING THE PETITION**

### **I. THE EIGHTH AMENDMENT BARS EXECUTION OF THE INSANE**

Owen’s insanity 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 v. Quarterman*, 551 U.S. 930, 959 (2007)). “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. Owen’s severe mental illness, delusions, and dementia inhibit his ability to rationally understand why the ultimate punishment is to be imposed upon him. T/555-57, 559-61. Owen is precisely the case that the Eighth Amendment seeks to protect.

**A. Owen’s mental illness and delusions prevent his rational understanding of the link between the crime and the punishment**

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.” *Madison*, 139 S. Ct. at 727. Instead, the Florida courts placed undue emphasis on whether Owen has had a history of insanity and mental illness. The state courts inappropriately discount Dr. Eisenstein’s testimony even though he spent almost eight times the amount of time with Owen as the Commission did, and also conducted relevant testing. Dr. Eisenstein’s testimony and results should have been afforded much higher weight than the confrontational doctors who only briefly met with Owen and erroneously considered Owen’s past sanity. T/456; App. B at 20. The state courts have incorrectly applied the standards of this Court and their findings violate the Eighth Amendment.

Neither the circuit court nor the Supreme Court of Florida made any explicit determination of whether Owen has a rational understanding of the “link between [the] crime and its punishment.” *Panetti*, 551 U.S. at 959-60. In fact, this Court has held: “It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.” *Panetti*, 551 U.S. at 960. The Supreme Court of Florida claims that the circuit court applied the appropriate legal standard, but then goes on to elaborate that the circuit

court determined Owen was “*aware* that the State is executing him for the murders he committed.” App. A. at 5 (emphasis added). This is not the correct legal standard as set forth by this Court. This Court has held:

We likewise find no support elsewhere in *Ford*, including in its discussions of the common law and the state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.

*Panetti*, 551 U.S. at 959.

In its opinion affirming the circuit court's order, the Supreme Court of Florida cites the circuit court's findings, which essentially just adopted the opinions of the Commission, that Owen does not have a mental illness, meets “the diagnostic criteria for antisocial personality disorder” and “was malingering.” App. A at 6. First and foremost, this Court has held that only rational understanding” is relevant, not whether he has any particular mental illness. *Madison*, 139 S. Ct. at 727. Regardless, Dr. Eisenstein spent over thirteen hours over two days evaluating Owen, administered as many tests as he could within the time constraints of the warrant, and found that Owen suffered from schizophrenia and gender dysphoria. T/50. Dr. Eisenstein administered: Delis-Kaplan Executive Function System: Trail Making Test, the Wisconsin Card Sorting Test, the Test of Memory Malingering (“TOMM”), Word Choice, the Tactical Performance test, the Minnesota Multiphasic Personality Inventory (“MMPI-2”), the Wechsler Adult Intelligence Scale, and the Wechsler Memory Scale, Fourth Edition. T/28-37. The Commission conducted no testing.



The MMPI-2 that Dr. Eisenstein administered evaluates the individual's current thinking and emotional state. T/46. Dr. Eisenstein testified that Owen has a floating profile on the MMPI-2 because there were highs in several different clinical scales. T/44. However, Owen's scores on the MMPI-2 are indicative of a schizophrenic profile, social alienation, isolation, some paranoia, and some depression. T/44.

The circuit court erred in finding that "Owen's purported delusion is demonstrably false" and the Supreme Court of Florida accepted its conclusion. App. A at 7; App. B at 21. Owen's delusions are fixed and have been for many years. As detailed further below, Dr. Eisenstein's recent assessment is strikingly similar to that of doctors who have evaluated Owen in the past because Owen's delusions have remained consistent and unchanged over the years. Further, two of Owen's prior attorneys, Carey Haughwout and Pamela Izakowitz, testified that Owen shared this same delusion with them in the 1990s. T/108, 235-36. Based on the testimony and the evidence it is clear that Owen's delusion does not waver or deviate.

The state courts' finding that Owen is feigning or malingering to avoid the death penalty is also improper. App. A at 6-7; App. B at 21. Dr. Eisenstein conducted multiple tests to determine whether Owen was malingering and found that he was not. Dr. Eisenstein administered the TOMM, one of the most common tests given for malingering, as it assists neuropsychologists in the forensic area to determine whether an individual is putting forth full effort. T/28. On the TOMM, Owen obtained scores of 47, 50, and 49, and Dr. Eisenstein testified that because the TOMM is scored out of 50, Owen's score was nearly perfect. T/28. These scores indicate that Owen put

forth full effort, did not fake, did not lie, and did not attempt to look worse than he is. T/30. To additionally test for malingering, Dr. Eisenstein administered the Word Choice measure. T/37. Owen scored a 47 out of 50 on this measure, which Dr. Eisenstein noted is a normal response indicative of no malingering. T/38.

As detailed above, Dr. Eisenstein obtained actual results counteracting any allegation of malingering, but the circuit court improperly found the Commission who solely made observations during a short interview more credible. T/133-34, 148, 299-300. Further, the fact that Owen's delusions are consistent and have not deviated also proves that Owen is not malingering. T/88-89. Owen's delusions did not come about as a result of the death warrant, rather he has experienced them for decades. Also important to this point, the state courts failed to consider that Dr. Werner conceded that if the Commission is wrong and Owen is not malingering, Owen's belief that he did not kill the victims because he took their essence into his body may be a delusional belief that could establish a severe mental disorder. T/143-44. Dr. Myers testified similarly regarding the possibility. T/303.

The Florida courts agreed with the Commission in finding that Owen has antisocial personality disorder ("ASPD"), but the opinions of the Commission are flawed. App. A at 6; App. B at 21. Based on the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 748 (5th ed. text revision 2022) (also referred to as "DSM-5-TR"), Owen cannot be diagnosed with ASPD for multiple reasons. T/56-57, 315, 440-41. First, no member of the Commission was able to point to any definitive evidence of conduct disorder with onset before the

age of fifteen. Some of the members claimed that evidence existed, but either could not point to anything in particular or were not aware if the conduct in question occurred prior to age fifteen. T/317-18. Second, if the occurrence of the antisocial behavior was exclusively during the course of schizophrenia or bipolar disorder, then ASPD is not a proper diagnosis. As a result, Owen submits that he does not meet the criteria for ASPD. The testimony of Dr. Eisenstein supports that fact. T/56-57. Worse yet, testimony the circuit court cited in its order showed that Dr. Myers was biased due to the fact Owen was convicted of murder: “Dr. Myers was adamant that Mr. Owen had antisocial personality disorder and stated that without exception, serial sexual killers always have antisocial personality disorder.” App. B at 14. Dr. Lazarou also made comments that demonstrated she prejudged Owen prior to ever stepping foot in the examination room. “Owen was exactly how I expected him to be, you know, because of what I had read in other testimony. So I expected him to be like that and how we saw him.” T/327. Dr. Lazarou went on to state: “It’s very circumscribed with this one little story that he talks about, but there was no evidence of anything, and that’s exactly what I expected, having looked at” prison records. T/327. Further, Although Dr. Lazarou stated that she testified for the State about 70% of the time, she has a history of exhibiting bias towards defendants. T/366-67. Josh Solomon & Zachary T. Simpson, *Will Prosecutors Lose a Key Witness in the John Jonchuck Case? Defense Attorneys Say They Should.*, Tampa Bay Times (Dec. 7, 2018), <https://www.tampabay.com/news/pinellas/crime/will-prosecutors-lose-a-key-witness-in-the-john-jonchuck-case-defense-attorneys-say-they-should-20181204/> (article

discussing Dr. Lazarou's bias and interrogation style tactics being employed in other cases); T/454-59.

In addition, some of Owen's so-called quotes regarding his delusions that members of the Commission testified regarding conflicted with each other and conflicted with some of the testimony of CCRC Eric Pinkard who witnessed the Commission's evaluation. T/134-35, 267-68, 285-86, 390, 453-56. Most of these "quotes" came from Dr. Werner claiming that Owen said such statements during his evaluation with the Commission. However, Dr. Werner is not as credible as the circuit court found her to be. For example, Dr. Werner falsely quoted Dr. Eisenstein's testimony discussing testing he administered to Owen. Dr. Werner inaccurately claimed that Dr. Eisenstein stated: "The tests on the first day, he knocked it out of the park, quote, unquote, on a memory test." T/162; AB/13. On rebuttal, Dr. Eisenstein made it clear that he did not say that and explained he described Owen as having "strengths and weaknesses." T/429. A search of the transcript shows Dr. Eisenstein indeed never used the wording "knock it out of the park" which is deeply concerning that Dr. Werner's other "quotes" may also be inaccurate. Notably, Dr. Werner used the same "quote, unquote" language to describe Owen's "quotes" where he supposedly said he killed the victims. T/135, 154, 164. Attempting to avoid a situation like this, CCRC Eric Pinkard requested to videotape the Commission's evaluation to prevent any ambiguity as to what Owen actually said. However, counsel for the Governor of Florida objected to the request. T/450. Instead, Mr. Pinkard witnessed the evaluation and testified as to what Owen said. T/450-61. Mr. Pinkard

confirmed that Owen maintained throughout the entire evaluation, he did not kill anyone. T/454-56, 461.

Dr. Eisenstein made it clear in his testimony that Owen is insane to be executed. Owen does not understand the nature and effect of why the death penalty is imposed on him. T/65-66. Owen has no rational appreciation of the connection between his crime and the punishment that he is to receive or any rational understanding of the fact that he's going to be executed for those reasons. T/67.

Dr. Eisenstein explained that Owen believes that the two women are a part of him, and their bodies and souls have been living inside of him all these years. T/67. Whatever is going to happen to Owen is also going to happen to the two women whose essence he has extracted. T/67. In Owen's mind, he truly believes that when you talk about him, you are also talking about two other people. T/67. Mr. Pinkard also confirmed that Owen detailed the same delusion during the Commission's evaluation. Owen "didn't understand why the State was trying to execute him anyway because they knew that he hadn't killed anybody, that he had actually taken them before they died into his body and they were still with him to this day." T/448-49.

Additionally, "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." *Id.* at 960. Dr. Eisenstein stated that Owen's fixed delusions and schizophrenia play into the fact that Owen really does not get the linkage between why this execution is set and why he's the one who is being executed. T/440. Dr. Eisenstein confirmed that Owen's

bizarre, psychotic, chronic belief system goes to the issue of Owen being incompetent to be executed and Owen's inability to understand the linkage. T/440. Therefore, Dr. Eisenstein's findings, based on his comprehensive evaluation, confirm that Owen's execution is barred by the Eighth Amendment to the United States Constitution.

Thus, the state courts are fundamentally flawed in their refusal to recognize the impact of Owen's delusional beliefs on his rational understanding of the reasons for his execution. It is hard to imagine a more impactful delusion than the belief that the victims who are the subject matter of the execution are not dead but live on inside his body. The state courts' avoidance of the implications of *Panetti* are contrary to clearly established constitutional law emanating from this Court. Accordingly, the State of Florida's evaluation of Owen's incompetency to be executed claim misapplies the standard detailed in *Panetti* and *Madison*.

**B. Under *Panetti*, the only relevant time to measure competency to be executed is at the time of execution**

"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). Contrarily, the Supreme Court of Florida notes that the circuit court found Dr. Eisenstein less credible than the Commission due to "Dr. Eisenstein's failure to

consider several inconsistencies, including those between the facts from Owen's criminal convictions and his self-reported delusions." App. A at 7. This is a clear misapplication of *Panetti*. "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.

Due to the State making Owen's past competency a feature of the evidentiary hearing, the circuit court considered a multitude of testimony regarding irrelevant time periods and the Supreme Court of Florida affirmed its order. For example, a lot of testimony revolved around Owen's police interrogation shortly after the crimes and whether there was any evidence of mental illness within. However, under the time constraints of the accelerated warrant proceedings, none of the experts had reviewed all of the recordings. T/77, 91-92, 277-78, 304-05, 359. Therefore, none of the doctors knew if any portion of the police interrogation contained evidence of Owen exhibiting mental illness. Past *pro se* pleadings and whether Owen previously had the capability to understand legal argument were also improperly discussed at the hearing. The State repeatedly asked witnesses about pleadings and testimony that occurred in 1997. T/96-101, 239-43, 417-19. The circuit court also stated in its order that Dr. Myers testified to having reviewed *pro se* pleadings prepared by Mr. Owen in 2021, and the content of the pleadings did not demonstrate any indication of dementia, brain damage, or problems putting thoughts together. App. B at 13-14. However, none

of the pleadings supposedly written by Owen were recent, and no one could testify that they had direct knowledge of whether Owen wrote the pleadings himself. Dr. Eisenstein also testified that if Owen had previously written the pleadings, his dementia may have caused him to decline to where he is unable to write such pleadings currently. T/94. In fact, if Owen had written the briefs, it would only serve as a sense of baseline functioning and further supports Owen's significant decline and dementia. T/94, 100-01, 432-34; App. B at 18. Any understanding of the law that Owen may have once possessed has no bearing on whether he currently has a rational understanding of the nature and effect of the death penalty. T/95, 100-01, 432.

Further, if the Florida courts wanted to consider past evidence of Owen's mental illness and delusions, the courts should have also considered the evidence that multiple mental health experts have previously diagnosed Owen with severe mental illness and found that Owen was insane at the time of the crimes. Both Dr. Faye Sultan and Dr. Frederick Berlin evaluated Owen in the 1990s and supported the duration of Owen's longstanding fixed delusions which did not manifest as a result of his impending execution. Notably, Dr. Berlin opined that due to Owen's schizophrenia, during the time he had contact with him, Owen consistently appeared to be out of touch with reality and delusional. Dr. Sultan also confirmed that Owen suffers from severe, fixed delusions, and Owen believed the victims consented to be merged with him, live within him, physically, spiritually, religiously, and psychologically.

The past findings of these doctors would have valuably assisted in rebutting



the state courts' findings that "Owen does not have any current mental illness" and improperly finding it inconceivable that Owen was schizophrenic. App A. at 6; App. B at 20-21. Dr. Sultan opined that Mr. Owen's diagnosis was delusional disorder to the extreme, a particular subset of schizophrenia, very severe gender identity disorder falling under dysthymia, and paraphilia so severe that it does not fall into any category available other than not otherwise specified. Dr. Berlin found that Owen suffered from several psychiatric disorders, including gender identity disorder, paraphilic sexual disorder, and schizophrenia. Both doctors opined that Owen was legally insane at the time of the crimes. The doctors' findings rebut what the Commission detailed in their report, that "he has been free of symptoms and signs of serious mental illness. The symptoms of gender dysphoria were never observed or documented except by Mr. Owen's self-report." App. C at 1. Dr. Sultan and Dr. Berlin's findings also rebut the Commission's assertions in its report claiming Owen "feigning psychopathology (malingering) to avoid the death penalty." App. C at 2. Dr. Sultan and Dr. Berlin's past findings also corroborate Dr. Eisenstein's current findings regarding Owen's diagnoses, but the Florida courts were dismissive of that past evidence yet appeared to fully consider past evidence presented by the State.

The fact remains that the Florida courts improperly considered an abundance of testimony regarding Owen during irrelevant times. Whether Owen was competent to be executed in 1984 when he committed the crimes is immaterial. Whether he was competent to be executed at any other point in time is also irrelevant. The *only* relevant time period the circuit court should have considered when finding whether

Owen is currently sane to be executed, is right now. The Florida courts' improper consideration of prior findings of competency is in direct violation of *Panetti*.

**C. Owen also lacks rational understanding of the link between the crime and its punishment due to his dementia**

Further, Dr. Eisenstein stated that Owen suffers from insidious dementia, meaning there is a slow decline from the level at which Owen was previously. T/440. “[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. Notably, Dr. Eisenstein’s testimony details that Owen is suffering from both conditions. T/440.

As part of the battery of testing Dr. Eisenstein administered to Owen, he administered the Delis-Kaplan Executive Function System: Trail Making Test, which has five parts. On condition one, visual scanning, Owen had a standard score of one, which is the equivalent of a 55 IQ. T/34. On condition two, following a sequence of numbers, Owen again had a standard score of one, which is the equivalent of a 55 IQ. T/34. On condition three, letter sequencing, Owen had a standard score of two, which is the equivalent of a 60 IQ. T/34. On condition four, alternating between number, letter, number, letter, Owen lost his place twice which is extremely indicative of cognitive impairment. T/34. On condition five, motor speed, Owen obtained a standard score of nine, so he performed okay on that condition. T/35. Dr. Eisenstein

also administered a verbal fluency portion of this test, and Owen obtained standard scores of four, nine, and six. T/35. Overall, Dr. Eisenstein testified that Owen was “quite impaired, certainly gave pause that there’s something seriously going on with him.” T/35.

The Wechsler Memory Scale is a comprehensive measure of memory that contains verbal, visual, and various different new learning and list learning measures. T/38. Owen’s immediate memory score was 67 and delayed memory was 69. T/39. Given the expected consistency between one’s IQ and one’s memory quotient, the two should fall basically within the same area. T/38. Dr. Eisenstein testified that there is almost a 30-point split between Owen’s IQ and his memory functioning. T/39. Further, Dr. Eisenstein explained to the court that comparison between the IQ and memory quotient are extremely significant in terms of Owen’s lower verbal and visual functioning and indicative of his insidious dementia process. T/39.

Dr. Eisenstein also administered the Tactical Performance Test which is part of the Halstead-Reitan Battery. T/39. During the test, the evaluatee is blindfolded and must fit ten blocks into ten holes on a foam board, using the right hand, then left hand, and then both hands. T/41. It took Owen 10 minutes and 18 seconds with his right hand, 8 minutes and 4 seconds with his left hand, and remarkably, 8 minutes and 22 seconds using both hands. T/41-42. Dr. Eisenstein testified that because it took Mr. Owen longer using both hands than it did just using his left non-dominant hand, Owen likely has brain damage in his corpus callosum. T/42. Dr. Eisenstein further explained that the corpus callosum is the band of fiber that connects the

right and left brain, and that both hands should be controlled by both sides of the brain and the crossover between the band of fibers. T/42. “When there is no crossover, it’s highly suspicious and suspect that the band of fibers had some type of necrosis.” T/42.

The circuit court’s order minimally detailed testimony regarding dementia in the order’s section regarding hearing testimony and related evidence, but again appears to improperly discount Dr. Eisenstein’s testimony. Perhaps even more notable, the circuit court never made a determination regarding Owen’s dementia. *See Madison*, 139 S. Ct. at 720. The order mainly cites Dr. Myers’ testimony and asserts that Dr. Myers claimed the IQ testing argues against dementia. App. B at 14. However, the Wechsler Adult Intelligence Scale that Dr. Eisenstein gave is the gold standard for IQ testing and is broken down into verbal and non-verbal. T/32. Owen received a full-scale IQ score of 92, which falls into the lower end of average intelligence range. T/32. This detail is notable because Owen had previously received an IQ score of 104 when Dr. Dee tested him around 2006. T/309, 431. Dr. Lazarou even testified that it is important to know what IQ a person started with when determining a decline in cognitive function. T/349. Because IQ is well-established and does not really change over time, Dr. Eisenstein confirmed that the significant drop in Owen’s IQ score is indicative of decline and impairment in brain functioning. T/431-34.

Without making any findings regarding dementia, the Supreme Court of Florida affirmed the circuit court’s order which failed to consider that most of DOC

employees that testified have only had contact with Owen for a few weeks. Instead, the circuit court found that the DOC employees' testimony supported the testimony and findings of the Commission. App. B at 21. Owen was transported to FSP on the evening of May 9, 2023 when his death warrant was signed. T/375. At the time of the Commission's interview with the DOC, those individuals working at FSP had known Owen at most, two weeks. At the time of the hearing, the FSP employees would have only known Owen at most, just over three weeks. Dr. Eisenstein testified that Owen has an insidious onset of dementia. T/36, 440. Therefore, the FSP employees would have no baseline to determine whether Owen's cognitive functioning has declined over the years. Only one employee from UCI testified, and even he admitted to only having short conversations with Owen over the years. T/172. It is likely that he also did not have a baseline of Owen's prior and current levels of memory and functioning considering they only had short, basic conversations.

In contrast, multiple witnesses who had known Owen for decades and previously engaged in more intellectual conversation with him, testified to Owen's decline in memory and cognition, or as Dr. Werner put it, "a downward drift" in functioning. T/131; App. B at 9. The circuit court wrongly found that the testimony of Owen's prior attorney, Ms. Haughwout, "was not particularly relevant or helpful to the issue before the court." App. B at 7. Ms. Haughwout has been in contact with Owen since her representation of him ended in 1999, and she has maintained contact ever since. T/111. She testified that she recently visited with Owen after the death warrant was signed and during that two-and-a-half-hour visit with Owen it was clear

Owen did not remember a fair amount about the topics they used to correspond about such as physics and math. T/113. She noted that “the more current things in the last couple of years he seemed to have a much harder time remembering” T/113. Ms. Haughwout concluded her testimony on direct by explaining that Owen is definitely not the sharp person that she used to know. T/114.

Further, Mr. Pinkard testified that he began working on Owen’s case in 1999 and has known Owen for over 20 years. T/445. Mr. Pinkard explained to the court that he visited Owen the day after the death warrant was signed and immediately observed Owen was not the same Owen he had known in terms of Owen’s cognitive abilities. T/446. The circuit court made no credibility determination in its order regarding Mr. Pinkard’s testimony.

Owen’s dementia is causing a cognitive decline that is contributing to his lack of sanity to be executed. T/38. Nonetheless, flouting the holding of *Madison*, both Florida courts neglected to make a specific finding regarding Owen’s dementia and whether Owen lacks a rational understanding because of it. This very Court has held that the Eighth Amendment may prohibit executing an individual if he suffers from dementia, or any other condition, so long as it causes a lack of rational understanding. *Madison*, 139 S. Ct. at 730. Further, such a condition can cause such disorientation and cognitive decline so as to prevent such a rational understanding. *Id.* at 729. Accordingly, the circuit court improperly failed to consider whether Owen’s dementia is impeding his comprehension of the link between the crimes and the death penalty. This Court should grant the petition.

## CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari; stay the execution and order further briefing; and/or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

/s/ Lisa M. Fusaro

Lisa M. Fusaro\*

*\*Counsel of Record*

Assistant CCRC

Florida Bar Number 119074

Email: fusaro@ccmr.state.fl.us

Law Office of the Capital Collateral

Regional Counsel - Middle Region

12973 N. Telecom Parkway

Temple Terrace, Florida 33637

Tel: (813) 558-1600

Fax: (813) 558-1601

Secondary Email: support@ccmr.state.fl.us

June 12, 2023

Dated