

CASE NO. 22-7764

IN THE SUPREME COURT OF THE UNITED STATES

October 2022, Term

DUANE EUGENE OWEN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION
EXECUTION SCHEDULED FOR JUNE 15, 2023, AT 6:00 P.M.

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

I - Whether certiorari review should be denied where the Florida Supreme Court's determination that Owen is sane to be executed is a fact specific/credibility driven decision with overwhelming support in the record and that decision comports with *Ford*, *Panetti*, and *Mason* and does not raise an unsettled question of constitutional law which has engendered conflict among the State or Federal Appellate Courts?

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CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Owen v. State*, --- So. 3d ---, 2023 WL 3914193 (Fla. June 9, 2023).

JURISDICTION

Petitioner, Duane Eugene Owen (“Owen”), is seeking jurisdiction pursuant to 28 U.S.C. § 1257(a). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (“State”), accepts as accurate Petitioner’s recitation of the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

The instant capital defendant is under an active death warrant and is before this Court upon the Florida Supreme Court's affirmance of the ruling that Petitioner, Duane Eugen Owen ("Owen"), is sane to be executed under Florida Rule of Criminal Procedure 3.811 and 3.812.

Owen is in custody, under an active death warrant pursuant to a valid judgment of guilt entered on April 11, 1988, for the 1984 first-degree murder of GW.¹ The Florida Supreme Court affirmed Owen's conviction and death sentence on direct appeal. *Owen v. State*, 596 So. 2d 985 (Fla. 1992), *cert. denied*, *Owen v. Florida*, 506 U.S. 921 (1992). The Florida Supreme Court found:

The body of the victim, [GW], was discovered by her children on the morning of May 29, 1984, as they prepared for school. An intruder had forcibly entered the Boca Raton home during the night and bludgeoned [GW] with a hammer as she slept, and then sexually assaulted her. Owen was arrested the following day on unrelated charges and was interrogated over several weeks. He eventually confessed to committing numerous crimes, including the present murder and a similar murder in Delray Beach in March 1984. *See Owen v. State*, 560 So.2d 207 (Fla.), *cert. denied*, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990). At trial on the present murder, sexual battery and burglary, the evidence consisted of Owen's confession, his fingerprint on a library book at the murder scene, and other corroborating evidence. The jury returned guilty verdicts on the charges and recommended death by a vote of ten to two. The trial judge followed the jury's recommendation and imposed death, finding the aggravating circumstances^{FN1} outweighed the mitigating.^{FN2}

FN1 The judge found four aggravating circumstances: The

¹ The victim's initials have been used due to the sexual nature of the crime.

defendant had been previously convicted of a violent felony; the murder was committed during a burglary or sexual battery; the murder was especially heinous, atrocious, or cruel; and the murder was cold, calculated, and premeditated. See § 921.141(5), Fla.Stat. (1983).

FN2 The judge considered the following claims made by the defense: Owen's mother died when he was very young; his alcoholic father committed suicide a year later; Owen and his brother were shuffled from one foster home to another until his brother finally ran away and left him; Owen was sexually and otherwise abused in the foster homes; Owen's mind “snapped” during the murder; he had enlisted twice in the army and aspired to be a policeman.

Owen, 596 So. 2d 985, 986-87 (Fla. 1992).

Following the denial of certiorari, *See Owen v. Florida*, 506 U.S. 921 (1992), Owen litigated four motions for postconviction relief and their appeals. *Owen v. State*, 773 So. 2d 510 (Fla. 2000) (finding waiver of postconviction claims/evidentiary hearing valid), *cert. denied*, *Owen v. Florida*, 532 U.S. 964 (2001); *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003) (finding summary denial of successive challenge to waiver of original postconviction claims was proper); and *Owen v. State*, 247 So. 3d 394 (Fla. 2018) (rejecting *Hurst v. Florida*, 572 U.S. 92 (2016) claim), *cert. denied*, *Owen v. Florida*, 139 S. Ct. 1171 (2019); *Owen v. State*, 2023 WL 3813490 (Fla. June 5, 2023) (affirming denial of postconviction claims under active death warrant finding claims untimely, procedurally barred, and meritless). Owen unsuccessfully pursued habeas relief in state and federal court. *See Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003) (denying state habeas relief); *Owen v. Sec’y for Dept. of Corr.*, 568 F.3d 894 (11th Cir. 2009) (concluding state court properly rejected challenge to waiver of original postconviction claims), *cert. denied*, 558 U.S. 1151 (2010).

Simultaneously with his 2023 successive postconviction litigation, Owen filed a letter with Florida's Governor invoking section 922.07(1), Fla. Stat. and claiming, "insane to be executed." As provided under the statute, a three-psychiatrist commission ("Commission") was created and the doctors were provided access to relevant mental health and trial records. On May 23, 2023, the Commission met with several Department of Corrections ("DOC") staff who had contact with Owen over the years and during the last two weeks. The Commission interviewed Owen for approximately 100 minutes and issued its report finding Owen was malingering, was not schizophrenic, but had an antisocial personality disorder. The Commission determined Owen had the mental capacity to understand the fact of his impending execution and the reason for it. (R 549-51)

Owen requested a ruling under Fla. R. Crim. P. 3.811 and a two-day hearing² was held in the 8th Judicial Circuit Court where the parties presented mental health experts and lay witnesses on the issue of Owen's sanity to be executed. (T 3-7; R 373-420). On the issue of Owen's sanity to be executed, defense expert, Dr. Hyman Eisenstein ("Dr. Eisenstein") was the first called. He is a licensed clinical psychologist with a subspecialty in clinical neuropsychology who has testified approximately 100 times, mostly in capital cases, and all for the defense. (T 11, 15-16, 68) In describing his approach to Owen, Dr. Eisenstein stated he did not challenge Owen; and later announced, "[p]atients don't lie." In response to a question whether criminal

² Reference to the record from the Rule 3.811/Rule 3.812 hearing is "R" for the record cites and "T" for the two-day hearing followed by the appropriate page number(s).

defendants are the best source for facts about the murder, Dr. Eisenstein stated, "*One's self perception is usually accurate.* Certainly, how they perceive the world, how they perceive what happened to them, what they're doing, *I never discount that. ... I give that certainly primary emphasis.* (T 22, 59-60, 75) (emphasis supplied).

Dr. Eisenstein explained that after the death warrant was signed, he was contacted by the defense to conduct a neuropsychological evaluation, testing, review background materials, and assess Owen's competency and sanity to be executed. On May 15, 2023, and May 30, 2023, Dr. Eisenstein met and tested Owen, submitting reports after each visit. Dr. Eisenstein found Owen discussed his professed "delusion," leading to the opinion Owen met the criteria for schizophrenia based on his "ongoing psychiatric delusional belief system." The doctor also concluded Owen was not malingering, but suffers from dementia, brain damage, gender dysphoria delusion, and schizophrenia. The doctor concluded Owen was incompetent and unable to provide counsel with assistance and was insane for execution. (T 11, 17-51, 53, 66-67, 73; R 555-61)

Owen was characterized by Dr. Eisenstein as a "very passive individual;" "not a violent individual;" and there is "no indication whatsoever of [Owen] acting in any aggressive manner." This was based on Owen not being aggressive with his male defense expert, Dr. Eisenstein, during the two-days of interviewing/testing. (T 49-50) Also, Dr. Eisenstein found Owen oriented as to time, place, and person. The doctor had no difficulty communicating with Owen. During the interview, Dr. Eisenstein did not observe Owen responding to non-existent stimuli. (T 70-72; R 556)

When asked to describe his "delusion," Owen said he "had to have intercourse [with female victims]³ the moment they expired." Owen's use of the word "expired" in this context means the victims' lives "ceased in this form." Although aware of how the victims died, Dr. Eisenstein did not confront Owen with any of the facts of the crimes to assess whether they fit with Owen's "delusion." Nonetheless, Owen knows that if he is executed, he will die. (T 70-73; R 556) Dr. Eisenstein admitted that the finding of a delusion was necessary for his diagnosis of schizophrenia and without it, Owen is not schizophrenic. (T 74) The doctor conceded Owen had not been prescribed any medication for schizophrenia and was not acting out in prison. (T 74-75) When confronted with the report from Owen's first mental health doctor from 1984, Dr. Blackman, Dr. Eisenstein admitted Owen never disclosed his "delusion" to the expert and Owen told Dr. Blackman:

I have several problems. I do things I don't mean to do - - rape. I don't know why I want to do that. Maybe I just want to get away with things. Like, after breaking and entering, I feel I've accomplished something, if I allude the police. I like danger, overcoming adversity.

(T 80) Owen told Dr. Blackman the details of seven rapes, five attempted murders, two murders, and several burglaries and misdemeanors he committed. Dr. Blackman found Owen to have an antisocial personality and cautioned that Owen admitted to other undisclosed crimes and murders he committed, but that he would hold this information in reserve to delay his execution. (T 81) Dr. Eisenstein acknowledged

³ Dr. Eisenstein knew Owen's term "expired" referenced the murders of KS and GW where Owen stabbed KS 18 times and bludgeoned GW in the head with a hammer five times.

Owen committed six horribly violent rapes in addition to the current murders and attempted murder of another young female. (T 81, 88)

Board-certified psychiatrists, Drs. Tonia Werner, Wade Cooper Myers, and Emily Lazarou testified they were appointed to the Governor's Commission to evaluate Owen for sanity to be executed. The process entailed reviewing documents and records related to Owens' trials, criminal investigative materials, prior mental health testimony and reports, and materials from the Department of Corrections ("DOC") including Owen's medical and classification records, as well as interviewing five DOC personnel who had known Owen for up to 14 years. One of Owen's attorneys was in the interview room when the Commission spoke with Owen for about 100 minutes. (T 121-26, 140, 146, 258-60, 267, 269-73, 282-83, 298, 321-22, 324-26; R 550)

Dr. Werner and her colleagues developed a rapport with Owen and inquired about his alleged "delusion." Owen immediately told the Commission about his "delusion" and how "he felt like he was a female in a male's body and that he needed to have intercourse with women at the time that they were expiring, in order to get their estrogen or essence." (T 126-27) [T]he symptom of gender dysphoria were (sic) never observed or documented except by Mr. Owen's self-report and that self-report was not offered until 1996; some ten years after the murders. That fact must be considered in assessing the credibility of the offered "delusion," especially in a forensic setting, especially where the "delusion" was first offered when Owen was facing a re-trial of his first murder trial. (T 142-43, 157-59, 165-66) Also, Dr. Werner explained "[i]t takes more than one delusion to meet the criteria for the diagnosis of

schizophrenia. It would be more consistent if it was (sic) a true and believed delusion. It would be more consistent with a diagnosis of delusion disorder, as opposed to schizophrenia." Dr. Werner would have expected Owen, who was allegedly in the midst of his "delusion," to have mentioned it to the police. Yet, Owen never spoke of his "delusion" with the officers. That alone is counter-indicative of a diagnosis of delusion. (T 166-67) A delusion is one of the symptoms for a schizophrenia diagnosis; however, if the delusion were faked or untrue, such would impact all diagnoses based on the alleged delusion. (T 127, 142)

The State's doctors saw no reason to believe Owen to have a "delusion."⁴ Dr. Werner saw no reason to believe Owen's proffered "delusion" as he "was inconsistent at different times" when speaking of his "delusion." She gave examples of Owen's inconsistency which involved Owen's insertion of a hammer into GW's vagina. The doctor explained that the insertion of the hammer, "... which has nothing to do with trying to absorb an essence through your, what he calls his hose or his penis. ... and

⁴ If Owen had a fixed delusion, Dr. Werner would expect it to be exhibited in his life in other ways as well; she would expect to see the "delusion" manifested in Owen's behaviors, actions, mannerisms, and dress. Owen, around the time of the 1999 retrial, exhibited himself with feminine mannerisms on occasion, but otherwise exhibited male characteristics at other times. This generally is inconsistent with a fixed delusion. (T 128, 154-55) Dr. Myers doubted the genuineness of the professed "delusion" because it came on years after the two sadistic homicides and only when talking to defense experts/attorneys; the "delusion" perfectly fit the crime facts; and Owen never told the police during his interrogations or jail/prison mental health personnel following his incarceration. (T 262) Genuine delusions "are very, very powerful," influence your life, and are pervasive. A person with a delusion would "be talking about these delusions to people that he interacts with, healthcare personnel, to doctors, ... if he really had such delusions around the time of these original crimes." There was no evidence of Owen discussing his "delusion." (T 262-63, 286-87, 295)

is unexplainable." (T 127, 140-41)

Dr. Myers "didn't in any way believe"⁵ Owen's alleged "delusion" as Owen continued, his voiced beliefs grew more fantastical. Owen admitted he needed to kill his female victims and the moment each victim died Owen needed to orgasm and that the victim's soul would go into his body right as he was having an orgasm and the victim was dying.⁶ (R 261) In psychiatry, a delusion is defined as "a false, fixed belief that does not comport with reality in terms of what the average person would think could be reality, and it's something that would be very unlikely to be true" and "it's a symptom that . . . you can't talk somebody out of having You can't reason with them." (T 261-62, 301-02)

Dr. Lazarou concluded Owen's "delusion" was nothing but a story;⁷ his actions

⁵ Those presenting with a true delusion are not trying to hide it from the mental health professional; the delusion becomes obvious when the person starts talking to the doctor. (T 295) Another factor causing Dr. Myers to reject Owen's claimed "delusion" was the fact that each time the Commission questioned Owen on his "delusion" and Owen gave "another explanation for it or a reason . . . it was really true to him." (T 301-02)

⁶ The 1996 note in the DOC record to a gender dysmorphia was discounted by Dr. Myers as that complaint is not considered a "delusion or a mental illness;" it is a mental disorder; it is akin to "a paraphilia or sexual perversion of sorts." Those "kind of things commonly occur in people who are serial murderers and commit sexual homicides as well as sexual sadism." (T 287) Gender dysphoria does not cause aggression or delusional thinking; it is not a delusion. (T 288) The fact Owen rapes women not men, supports the finding he is "oriented in a heterosexual way." Dr. Myers was suspicious of Owen's voiced "delusion" because Owen had orgasms, as seen by the semen he left; it was more plausible that Owen was just "getting sadistic gratification from these violent sexual attacks." (T 297)

⁷ Knowing Dr. Eisenstein's report discussed gender dysphoria, Dr. Lazarou expected to see reference to the gender identity in the police videos. Finding Owen, with his shirt open, his legs splayed, drinking, and not exhibiting any feminine mannerisms at all was significant. Had Owen truly wanted to be female, he would have been

at the crime scene had nothing to do with his professed "delusion." Taking the victim's purse, looking through the window at the eventual victim, washing up after the crime, and stealing cash from the house had no place in Owen's "delusion" and indicates such was merely a story. Dr. Lazarou considered the facts of the murders relevant to Owen's claimed "delusion" and the question she was there to answer, namely, whether Owen was competent to be executed. As Dr. Lazarou explained, Owen's competency to be executed is being challenged because he has some alleged delusion, his actions at the crime scene are relevant as they refute the claim Owen had a genuine delusion, "so therefore, the entire basis of the insanity that he is reporting to get out of the consequences of his actions are completely invalid." (T 356)

Lisa Wiley ("Wiley"), a former DOC Psychological Specialist with a master's in psychology, testified she provided mental health services to inmates, including Owen starting in 1992 or 1996 and until 2006. Wiley included "gender identity disorder" on Owen's problem list in 1996 when he first reported his dislike of having male genitalia and announced his desire to become female. (T 221-25, R 563) Generally Wiley assumes when an inmate is seeking out her services, he is doing so in good

acting like a woman on the video (T 333-34) Dr. Lazarou noted Owen first discussed his gender story a decade after the murders and two trials, and never mentioned it to Dr. Peterson, Owen's defense mental health expert from the first trial. Dr. Peterson gave a "completely different rationale" for Owen's murder. (T 335-37) Dr. Lazarou also noted that when Owen was moved from Union to Florida State Prison recently, he identified himself as "heterosexual." (T 335) Dr. Lazarou is familiar with DOC gender policies and discovered, since 2017, DOC has a transgender program. Owen had a note in his chart that he wanted to become a woman, so Dr. Lazarou expected Owen would have been one of the first inmates to seek out the program. The only time Owen discussed the gender issue coincided with his retrial for the KS murder in 1994-99; initially Owen grew his hair out a little. (T 337-40)

faith. Wiley admitted that she might be suspicious of an inmate coming forward with a claim of gender dysmorphia after 12 years of not making that claim and only when he was facing a retrial on a capital murder case. She saw no physical evidence supporting Owen's account. (T 228-32)

The Commission doctors rejected a diagnosis of schizophrenia. Dr. Werner opined Owen did not present in the Commission's interview as those Dr. Werner had encountered with schizophrenia. To be diagnosed with schizophrenia, Dr. Werner explained a person must exhibit two of four criteria. The two criteria Dr. Eisenstien used were delusions and avolition, i.e., "not being reactive to anything." Yet, the Commission did not find those symptoms. When interviewed, Owen "was very personable, very interactive;" and very telling for Dr. Werner was when Owen laughed saying he did not understand something "because he wasn't a woman." This showed Owen was reactive - the negative of avolition. Owen's reactions before the Commission were "completely inconsistent with schizophrenia. (T 128-29, 165-66)

Review of Owen's DOC medical records revealed that he had been symptom-free of any signs of serious mental illness, only having been prescribed various anti-depressants and anti-anxiety medications. Over the last 40 years in prison, Owen had not been prescribed any medications for schizophrenia. Dr. Werner noted a medicated-schizophrenic can remain stable, maintain the activities of daily living and sometimes work/function within the community. However, an unmedicated-schizophrenic, cannot turn his symptoms on and off. Especially a schizophrenic unmedicated for some 40-years, would exhibit a "downward drift: in his [sic]

socioeconomic status and general level of functioning over the years." Neither the records, the Commission's interview of DOC personnel who interacted with Owen, nor Owen's interview revealed any evidence of a downward drift in functioning. (T 130-32, 138, 140, 143)

Discussing the fact Owen has been diagnosed with schizophrenia by some defense mental health experts, Dr. Myers explained Owen exhibited no signs of any kind of thought disturbance or delusional thinking. Schizophrenia, "one of the most severe mental illnesses," is "a very disorganizing illness" which causes many problems. A schizophrenic has "confused thinking" and when talking to others, his "thoughts come out jumbled," "illogical or they don't make very good sense." In contrast, during Owen's Commission interview, he was articulate, well-spoken, and clearly intelligent. Owen's memory was good; he was alert and oriented. "[N]o signs of any kind of thought disturbance that would be consistent with schizophrenia or with delusional thinking" were seen. (T 263-64) Dr. Myers explained that a person with untreated schizophrenia would be unable to hide manifestations of schizophrenic symptoms for three to four minutes, much less for 30-40 years. (T 264-65) None of the records Dr. Myers reviewed contained information that Owen exhibited signs of schizophrenia. In fact, none of the DOC personnel interviewed, some who had contact with Owen for more than ten years, witnessed Owen exhibiting any signs of schizophrenia or unusual speech, bizarre behaviors, or disorganization in his cell. Again, contrary to a schizophrenic patient, Owen's kept his cell neat; his speech was normal; Owen was polite and respectful, "so absolutely nothing that

would suggest he has schizophrenia." Further, Owen did not exhibit the schizophrenic symptom of "disturbance in affect or a flattening of your emotional express[ion]." Owen "showed a full range of affect;" he showed a sense of humor; sometimes he would smile. (T 265, 293)

Dr. Lazarou had no difficulty communicating with Owen. Based on her rereview of the myriad of materials and her interview with Owen, Dr. Lazarou found no suggestion Owen suffered from schizophrenia. Owen was malingering. (T 327-29) Significant to Dr. Lazarou's assessment of Owen was the police interrogation videos. Those tapes showed Owen was speaking casually with the police. He was calm, "not one shred of paranoia," and appeared to be "running the show." The video indicated the interrogation was just a game for Owen. Clearly, Owen "thrives on the attention he gets for his illegal activities." One of the poems Owen composed crystalized the case for Dr. Lazarou. The poem was "Roses are red. You pigs are blue. When you start counting victims, there will be quite a few." (T 330-33)

Wiley testified she did not see any evidence Owen was suffering from schizophrenia. She has had contact with schizophrenics and Owen did not present as a schizophrenic. Had he presented as such, Wiley would have brought that to the senior psychologist's attention (T 229-30) An inmate, even one who refuses psychiatric services, will be classified as a "psychiatric grade three." Owen was never medicated for schizophrenia; he had not been prescribed any mental health medication. (T 230-32) It was Dr. Lazarou's opinion that "[s]chizophrenia doesn't pop in after 20 hours" of police interrogation. Schizophrenia would be there from the first

second. "When you have schizophrenia," you have it. "It's part of you. You can't pull it out. And whenever you think someone is going to understand you, then you are going to use some schizophrenia and be psychotic. That's not how it works." Dr. Lazarou found Owen was "was completely in control of everything in those [police] interviews. There is no way that he popped out and was schizophrenic at the end." One of the police videos showed an officer sitting very close to Owen, within inches of him. "[T]here is no way somebody who's a psychotic would have allowed that." People with schizophrenia "look a certain way;" and move a certain way. Schizophrenics have "affective flattening," "a slowness, a bluntness about them." Schizophrenics are "very guarded usually." Owen exhibited none of those mannerisms in his police videos. Owen "has zero behaviors" of a schizophrenic. (T 359-61)

Dr. Werner rejected Dr. Eisenstein's finding Owen was exhibiting dementia. A dementia patient typically would exhibit a slow progressive memory loss starting with the loss of short-term memory. The Commission found Owen did not exhibit any memory loss symptoms during his interview and dementia was not documented in Owen's DOC records. Dr. Werner pointed out that Dr. Eisenstein had stated Owen "did quite well" on the first day of testing with respect to a memory test. Dr. Eisenstein said Owen was "nearly perfect." That result is "totally inconsistent with then saying that [Owen] had dementia on the second day. (T 28, 129-30, 159-63)

Dr. Myers also disagreed with Dr. Eisenstein's conclusion that Owen had dementia. Dementia is "a deterioration in one's brain functioning and ... cognitive functioning, and it tends to cause problems with being disorientated, memory

problems, trouble with language." It also may cause problems in carrying out activities of daily living, dressing, and brushing one's teeth. Also, a dementia patient would have difficulty reading or paying attention. It is a progressive disease, like schizophrenia, that gets worse over time. Owen exhibited no signs of dementia. Dr. Myers recalled Owen had no trouble in communicating with the Commission, "in fact, he even cited legal cases and gave us a description of what the content of legal cases were. He showed a strong memory and strong reasoning skills." (T 265-66) Moreover, when considering that Owen produced a coherent 63-page brief in 2021, just two years ago, Dr. Myers found "zero indication of any signs of dementia or brain damage or problems with writing or putting his thoughts together. It came across as very bright to be able to put something like that together." That "is really opposite of what you would see in somebody with schizophrenia or dementia." Dr. Myers saw no indication of dementia in Owen during the Commission's interview and from what the Commission knows of Owen's recent writings and books he is reading. (T 307-08)

Dr. Lazarou also disagrees with Dr. Eisenstein's finding of dementia. None of the DOC personnel saw any signs of dementia in Owen. Owen's speech and word usage show he does not have dementia. The fact Owen is sending and receiving emails in real time to as many people as he has corresponding with him shows he is not demented. Owen's knowledge of the television schedule and the timing of shows he likes to watch undermines the claim he has dementia. (T 376, 379-81)

With respect to the Minnesota Multiphasic Personality Inventory ("MMPI") test administered to Owen by Dr. Eisenstein and reported by him as a "floating

profile," Dr. Werner explained such was describing "an overacknowledgment of symptoms." To a psychiatrist, that means "malingering as opposed to schizophrenia." (T 135-36) Dr. Werner discounted Dr. Eisenstein's approach to a forensic evaluation where he professed "*patients don't lie*." Her disagreement with Dr. Eisenstein stems from the fact that Owen is not a patient; Owen is an evaluatee: "[A]nd in the forensic setting, you know, with forensic training, you know that you have to consider malingering, and you have to really look at that. You can't take them at face value." (R 137) One cannot take a criminal defendant at face value because the defendant may have an incentive to lie. This is especially true where that person is set to be executed within a couple of weeks. (T 137)

Dr. Myers found Owen to be malingering because of the combination of Owen's announced intent to have sex with women to become a woman and the crimes committed using excessive violence inflicted on his victims and other sadistic acts, such as impaling one with a hammer handle. That shows that what was really driving Owen was sexual sadism. When Owen combined his "need for estrogen" with the killing, such was just "too convenient" for Dr. Myers to find a genuine delusion, especially where the "delusion" was first announced after Owen had been convicted of first-degree murder. (T 303-04) Also, Dr. Eisenstein's "floating MMPI-S profile" indicated for Dr. Myers that Owen "was embellishing or exaggerating or, frankly, malingering symptoms of mental illness because [Owen] showed no signs of mental illness when [the Commission] saw him." (T 269)

Dr. Lazarou explained that the fact Owen presents to his trial mental health

experts in one way and to the prison officials another, i.e., presenting no indication of a need for antipsychotic medication, is an indication of malingering. (T 340)

The Commission doctors agreed Owen had an antisocial personality. Owen committed several crimes when he was a young person. He also liked to dominate and shock women. (T 341-43) It was Dr. Lazarou's opinion that Owen was antisocial. She found that Owen's teenage crimes of gang rape was evidence of a conduct disorder because one does not "just pop up one day and gang-rape a little girl." It was likely that Owen was committing other acts prior to that but had not been caught. Dr. Lazarou found antisocial personality disorder because Owen does not suffer from a psychosis. (T 408-10)

DOC correctional officers - The State presented four DOC correctional officers who have had contact with Owen from two weeks to six years. They are Sergeant John Manning, Assistant Warden Jeffrey McClellan, Lieutenant Daniel Philbert, and Sergeant Danny Halsey. None saw any signs that Owen was interested in becoming a woman, was experiencing any delusions/mental health issue, or having cognitive failings. Owen has not needed help with his dressing, bathing, or grooming. At no time did Owen ever tell the officer that he did not kill anyone or that he was innocent of his crimes. Owen was known to read science and math textbooks, law materials, and correspond with those outside the prison system, including a person he identified as "his girlfriend." No odd or altered behaviors have been noted; no disruptive or psychotic behaviors have been observed. (T 170-76, 184-92, 202-07, 244-48)

Commission report - Owen sane to be executed - Owen's answers to the

Commission showed he understood that he was going to be executed by the State of Florida and the reason for his execution. Dr. Werner elucidated:

I actually have even several quotes in here. He said that he, that the State of Florida was going to kill him for having killed the two women. He said, he used the word expired a lot. ...

We asked him, he talked about getting the estrogen from them, from all the women that he had sex with. So we said, *well, why did you have to kill these two women? And he said, I don't know. Sadly enough, that's what I did, quote, unquote.*

(T 134-35, 144) (emphasis supplied) Owen made it clear he killed two people and then stated, "*I don't know how they think it is okay to kill me for killing them.*" (T 135, 154) (emphasis supplied) Owen acknowledged his victims' bodies died and their souls or essence were absorbed in him. He also told the Commission that the State's aware that if they kill him, they will release the victims' souls. (T 144-45, 164) However, periodically during the interview, Owen told the Commission he did not know where his victims were at the present time; "he had not felt them in a while;" and "don't feel them currently." (T 145-46, 164)

When asked about his crimes and whether he actually killed people, Owen did not want to use the words "they were dead" or "dead" and he kept avoiding that word. However, Dr. Myers noted that Owen admitted the victims "were buried and that their bodies had decomposed and that their bodies were essentially gone." Owen, however, "wanted to really push forward the concept that their souls were in him." Owen knew his victims' bodies were dead and that they were under the ground, buried. The Commission also explored with Owen his impending execution. Owen

admitted knowing his execution was related to his killing of his female victims. Owen told the Commission the earthly bodies of his victims were dead even though Owen was trying to avoid using the word "dead." (T 267-68, 285-86)

Following the interviews of DOC personnel and Owen, as well as review of relevant materials, a joint report was written and submitted to the Governor revealing the Commission's findings. The report was a collaboration between the three psychiatrists, Drs. Lazarou, Myers, and Werner. The Commission found that Owen met the diagnostic criteria for antisocial personality disorder⁸ as described in the DSM-5⁹ and that Owen was malingering with respect to his offered "delusion;" "it was a feigned delusion" in the Commission's estimation. The doctors also reported that Owen did not meet the criteria for "insane to be executed" nor was he incompetent to proceed. (T 132-33, 139, R 549-51; RR 549-51) Although the Commission did not run any tests to determine malingering, it was clear from the interview process that Owen was malingering. A determination of malingering may

⁸With respect to the Commission's finding of antisocial personality disorder, Dr. Myers explained that Owen's actions as a child of gang raping a girl or inserting his fingers into the vagina of a girl as she is being restrained by other boys, drinking, and using drugs at an early age together indicate a conduct disorder. Such disorder is a basis for the later finding of antisocial personality. Dr. Myers explained that "virtually, without exception, serial sexual killers have antisocial personality . . . Owen's 'arrest sheet [includes] . . . sexual assaults and burglaries, and then there's also allegations of exposing himself to others, which is a crime, and voyeurism, looking into people's windows, which is a crime, and violation of probation and going AWOL and using aliases. And the number of antisocial behaviors is somewhat staggering. . . ." (T 315-16) The fact that Owen was sent to a juvenile offender program at 16-years old is further indication he was having conduct and behavioral problems well before he was sent to the juvenile offender program. (T 317)

⁹ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.

be made through the interview process by assessing inconsistencies in the person's statements and responses to questions. Owen was inconsistent in his ability to account for the difference between the crime facts and his "delusion." (T 133-34)

Trial court's ruling¹⁰ - The trial court's order answered the question "whether [an inmate under an active warrant] 'lacks the mental capacity to understand the fact of his impending execution and the reason for it.'" (R 609) Owen was found sane to be executed. (R 607-29)

When evaluating Dr. Eisenstein's testimony, the trial court noted he had stated "[p]atient's don't lie" and that when confronted, "Dr. Eisenstein appeared hesitant to accept the distinction between a patient interview in a clinical setting versus a forensic setting (such as an incarcerated inmate facing possible imminent execution)." The trial court found Dr. Eisenstein either was unaware of inconsistencies between Owen's voiced "delusion" and the facts of his crimes or he failed to confront Owen with the inconsistencies.¹¹ (R 612) The trial court recognized Dr. Eisenstein's admission that he "did not confront Mr. Owen with any facts inconsistent with [Owen's] reported delusions." (R 612) Also appreciated by the trial court was Dr. Eisenstein's admission that if "Owen's delusion was not credible, then neither would his schizophrenia diagnosis be credible." (R 612) Also appreciated by

¹⁰ The State has not outlined the testimony from Owen's two former and one current legal counsel given the question at issue and the limited value of such testimony.

¹¹ The inconsistencies noted were: (1) Owen's claim his penis was a hose to absorb the victims' essence and the fact Owen inserted a hammer into GW's vagina and (2) Owen took steps to avoid detection by removing clothes to avoid blood staining, washing after the murders, and concocting a false alibi. (R 612)

the trial court was Dr. Eisenstein's concession "that Mr. Owen had never requested any medication for schizophrenia and the Department of Corrections had never determined Mr. Owen to need any such medication." (R 612) Further noted by the trial court was Dr. Eisenstein's additional concession that in the approximate 20-hours of police questioning in 1984: "Owen never once mentioned this delusion. Instead, Mr. Owen told law enforcement that he didn't know why he raped other than he liked to get away with things. ... Mr. Owen never even suggested to the officers ... that a mental illness caused him to kill." Also, "Dr. Eisenstein acknowledged on cross examination that the first time the current reported delusion of Mr. Owen arose was in 1996 in preparation of a retrial." (R 612-13). Of apparent import to the trial court was Dr. Eisenstein's conclusion that "Owen was passive with no violent tendencies" even when confronted with the fact Owen had committed six violent rapes, two murders, and an attempted murder. (R 613). The trial court made the credibility finding that: "*Dr. Eisenstein presents as either incredibly naive or intentionally and willfully naive. The court does not find Dr. Eisenstein's testimony to be credible when evaluated against all the other testimony and other evidence in the case.*" (R 613) (emphasis supplied).

In the circuit court's discussion of the State's experts, it was noted:

a. "Dr. Werner stated that it takes more than one delusion to meet a diagnosis of schizophrenia and if the delusion was (sic) determined to be untrue or false, then any and all diagnosis' would be affected." (R 616);

b Owen admitted to Dr, Werner the State "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" and that this "very clearly demonstrate[s] Mr. Owen understands the nature and effect of the death penalty and why it is to be imposed on him." (R 617);

c. Dr. Myers testified Owen displayed no signs of dementia, but "instead was able to recite caselaw cites and specific legal rulings during the forensic interview; and demonstrated a strong memory and strong reasoning skills." (R 618).

d. "Dr. Myers further indicated that Dr. Eisenstein's *IQ test of Mr. Owen argues against any signs of dementia*. Specifically, he stated that it would be very challenging to test IQ under the current stress of imminent execution. And despite those difficult circumstances, Mr. *Owen still scored a 92*." (919-20) (emphasis supplied);

e. Dr. Myers agreed Owen met "almost every criteria for Antisocial Personality Disorder and that there is evidence of the same all throughout [Owen's] history and he has been previously described as such going back almost 40 years." (R 618-19) and "Owen's delusions only come out when he is speaking to experts about his criminal case and that the evidence indicates that there have been no referrals for delusional thinking on Mr. Owen in the last 20 years."

f. "Dr. Myers stated that it is inconceivable that someone could have schizophrenia with severe delusions, and no one would pick up on it except on a rare occasion, during an interview with an expert witness." (R 619).

g. Dr. Lazarou concluded "Owen did not meet 'a shread' of criteria for schizophrenia" and that Owen, in the hours of police interrogation videotapes "never raised gender dysphoria and demonstrated zero feminine mannerisms or characteristics." (R 620-21)

h. Owen had not raised the gender dysphoria in either of his first two trials. (R 621)

i. "Dr. Lazarou testified that schizophrenics can't turn their mental illness on and off, and that they live in

the delusions they are experiencing and especially so if the delusions are of the nature and quality that is causing the individual to kill others." (R 621)

j. Dr. Lazarou found Owen to have an antisocial personality disorder and "that this was not a difficult case or close call. " (R 621)

k. Dr. Lazarou testified "Owen planned out every single detail of his crimes and that none of the details of his crimes are consistent with his current self-reported delusion" and she "believed this delusion was fabricated to avoid the consequences of his actions." (R 621) The court observed Dr. Lazarou's opinions: "Owen is not psychotic and knows exactly what is going on;" "***there was no evidence to support or indicate***" insidious dementia;" and " Owen has both a factual and rational understanding of the death penalty and why the death penalty is being imposed on him. (R 621-22).

Based on the court's review of the evidence and credibility determinations (R 611-26), it found "Owen has not met his burden of proving by clear and convincing evidence that he is presently insane or incompetent to be executed" and even under preponderance of the evidence standard, Owen has not carried his burden. Mr. Owen has also not met that lower burden. (R 626) The opinions of Drs. Werner, Myers, and Lazarou were found by the trial court to be "credible and compelling" as related to "Owen's current mental condition." (R 626) The doctors' conclusion that Owen was sane is clearly and conclusively supported by the record. There is no credible evidence that [Owen] does not understand what is taking place and why it is taking place. The court found that the testimony of the DOC personnel supported the doctor's findings/opinion. (R 626-27) The trial court determined: (1) "Owen does not have any current mental illness;" (2) "Owen's purported delusion is demonstrably false" (3)

"Owen has an antisocial personality disorder;" (4) "Owen is feigning or malingering psychopathology to avoid the death penalty; (5) "[e]ven if Mr. Owen did currently suffer from schizophrenia there is no evidence that that mental illness interferes, in any way, with his 'rational understanding' of the fact of his pending execution and the reason for it;" (6) "Owen 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;" and (7) "[t]here is no credible evidence that in his current mental state Mr. Owen believes himself unable to die or that he is being executed for any reason other than the murders he was convicted of." (R 627)

On appeal, the Florida Supreme Court affirmed finding "[t]here is competent, substantial evidence supporting the circuit court's determination, *see Gore v. State*, 120 So. 3d 554, 557 (Fla. 2013)...." *Owen v. State*, --- So. 3d ---, 2023 WL 3914193 at *1 (Fla. June 9, 2023). The Florida Supreme Court pointing to *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019); *Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007); and *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) set out the legal standard for an Eighth Amendment claim of insane to be executed. *Owen*, 2023 WL 3914193 at *2. The Florida Supreme recognized the correct legal standard had been applied when the trial court concluded "it 'inconceivable and completely unbelievable' that Owen has 'any current mental illness' and determined 'Owen's purported delusion is demonstrably false.'" *Owen*, 2023 WL 3914193 at *2. The trial court's ruling was found supported by substantial competent evidence as:

...the three psychiatrists testifying on behalf of the State concluded "with a reasonable degree of medical certainty"

that Owen does not have a mental illness, much less one preventing him from having a “factual and rational understanding of the death penalty and why the death penalty is being imposed on him.” Based on their clinical evaluation of Owen, review of his medical and correctional records from 1986 to the present, and interviews with correctional employees, the State’s three psychiatrists testified that Owen instead “met the diagnostic criteria for antisocial personality disorder” and “was malingering.” And testimony from two of the correctional officers concerning the lack of positive symptoms in Owen’s recent behavior tracks the conclusion that Owen is feigning delusion to avoid the death penalty.

Owen, 2023 WL 3914193 at *2. The Florida Supreme Court also noted the trial court found Dr. Eisenstein " 'to be less credible than the other expert testimony and other evidence in the case' given Dr. Eisenstein’s failure to consider several inconsistencies, including those between the facts from Owen’s criminal convictions and his self-reported delusions." *Owen*, 2023 WL 3914193 at *2. (footnote omitted).

The state supreme court found Owen's sanity was determined through an "adversarial process" where counsel had the opportunity to submit evidence and make argument as intended by *Panetti*, 551 U.S. at 950 and the trial court properly considered the evidence, and made a determination based on the appropriate standard under Rule 3.812(e). *Owen*, 2023 WL 3914193, at *3 (citing *Ferguson v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 1315, 1339, 1339 n.6 (11th Cir. 2013) (concluding Florida's procedures for determining a prisoner's sanity to be executed, codified under Florida Rules of Criminal Procedure 3.811 and 3.812, “did satisfy the minimum due process requirements identified in *Ford* and *Panetti*”)).

REASONS FOR DENYING THE WRIT

ISSUE I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S DETERMINATION THAT OWEN IS SANE TO BE EXECUTED IS A FACT SPECIFIC/CREDIBILITY DRIVEN DECISION WITH OVERWHELMING SUPPORT IN THE RECORD AND DOES NOT RAISE AN UNSETTLED QUESTION OF CONSTITUTIONAL LAW WHICH HAS ENGENDERED CONFLICT AMONG EITHER STATE OR FEDERAL APPELLATE COURTS.
(restated)

Owen takes issue with three areas of the state courts' resolution of his *Ford v. Wainwright* issue. He asserts: (A) the state courts should have found his defense expert, Dr. Eisenstein, more credible than the three psychologists the State offered; (B) it was error to consider any time period other than the present to assess the *Ford* issue; and (C) his alleged dementia supports his claim of insane to be executed. The pith of his three challenges revolves around credibility determinations and factual findings. This Court should deny certiorari because the state courts provided Owen with a full and fair hearing and applied the dictates of *Ford*, *Panetti*, and *Madison* in a manner consistent with this Court's precedent. Moreover, it is inappropriate for this Court to conduct a fact/credibility-specific review of the state courts' rejection of his *Ford* claim as those findings are well supported by the record, do not create a conflict between state or federal appellate courts and are of no importance or significance beyond the instant litigants. *See* Rule 10, Rules of the Supreme Court of the United States.

This Court has noted that it is very important to be "consistent in not granting

the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). See, *Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140, 1140 (1985); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923). The law is well-settled that this Court does not grant certiorari 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 reweigh factual disputes. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269 (1932) (rejecting request to review fact questions); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1924) (same). In fact, this Court must presume the state court's 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 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).

This Court has recognized that cases which have not developed conflicts between federal or state courts or presented important, unsettled questions of federal law usually do not deserve certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987). Likewise, certiorari review should not be used to examine errors which have no importance or significance

beyond the instant litigants. *Fields v. United States*, 205 U.S. 292 (1906) (finding certiorari inappropriate where case resolution will not effect interests of nations, resolve conflicts between two or more courts of appeal, or is not generally a question of national importance).

Owen was afforded a full and fair hearing in state court to litigate his Ford claim. The Florida Supreme Court reviewed the denial of Owen's Ford claim following an evidentiary hearing noting the appropriate law as:

"[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*, — U.S. —, 139 S. Ct. 718, 722, 203 L.Ed.2d 103 (2019) (quoting *Ford v. Wainwright*, 477 U.S. 399, 406, 106 S.Ct. 2595, 91 L.Ed.2d 335 (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, 127 S.Ct. 2842, 168 L.Ed.2d 662 (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, 127 S.Ct. 2842. "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.

Owen, 2023 WL 3914193, at *2. It then concluded that the trial court applied the proper legal standard in determining 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." *Owen*, 2023 WL 3914193, at *2. Those findings were determined

to be supported by competent substantial evidence and based on credibility assessments of the witnesses and evidence presented. *Id.*

In considering Dr. Eisenstein's testimony, the trial court stated: "Dr. Eisenstein presents as either incredibly naive or intentionally and willfully naive. The court does not find Dr. Eisenstein's testimony to be credible when evaluated against all the other testimony and other evidence in the case." (R 613) After hearing from all of the State's witnesses, the trial court assessed Dr. Eisenstein's rebuttal testimony concluding: "The court continues to find Dr. Eisenstein's testimony to be less credible than the other expert testimony and other evidence in the case." (R 625). In assessing the evidentiary hearing testimony and evidentiary presentations, the trial court concluded "the testimony and opinions of Dr. Werner, Dr. Myers and Dr. Lazarou [are] both credible and compelling as it relates to Mr. Owen's current mental condition." (R 626). The trial court also found: "the testimony and opinions of Dr. Werner, Dr. Myers and Dr. Lazarou to be credible as to the limited question of Mr. Owen's competency to be executed. . . . This Court finds their conclusion that [Owen] is sane to be clearly and conclusively supported by the record. There is no credible evidence that he does not understand what is taking place and why it is taking place." (R 626-27) The trial court determined Owen had no "current mental illness" and that his "purported delusion is demonstrably false." (R 627) The trial court concluded "Owen is feigning or malingering psychopathology to avoid the death penalty" and even if Owen:

...suffer[s] from schizophrenia *there is no evidence that that mental illness interferes, in any way, with his*

“rational understanding” of the fact of his pending execution and the reason for it. Mr. Owen 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. ***There is no credible evidence that in his current mental state Mr. Owen believes himself unable to die or that he is being executed for any reason other than the murders he was convicted of.***

(R 627) (emphasis supplied).

A. The state courts’ factual findings and credibility determinations are entitled to deference and Owen has not presented any clear and convincing evidence otherwise, therefore, Owen’s challenge to the state courts’ rulings must not be disturbed.

Owen’s argument is a compilation of various challenges to the trial court’s credibility determination of the evidence and as such it is not a proper basis for this Court’s review. *See, Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (observing such credibility determinations “can virtually never be clear error”) *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (finding "our review of a state trial court's findings of fact made in connection with a federal constitutional claim" deserves deferential standard of review); *Johnston*, 268 U.S.at 227; *Texas v. Mead*, 465 U.S. 1041 (1984). Fatal to his claim is that Owen cannot overcome the deference owed to the state courts’ findings because he cannot present by clear and convincing evidence that the state court’s determination of the facts is not supported by the record. His argument is another futile attempt to have this Court reweigh the evidence, make different credibility findings based on Owen’s assessment, and substitute Owen’s suggested findings for that of the state courts. This Court is precluded from granting that request as it is foreclosed. *Hoag*, 356 U.S. at 471. As

fully detailed in the state's rendition of the facts, the evidence was overwhelming in support of the findings by the state courts that Owen is sane to be executed. *Panetti, Ferguson; Madison.*

The evidence upon which the state courts relied is briefly recounted here and more fully in the statement of the case. To be diagnosed with schizophrenia, Dr. Werner explained a person must exhibit two of four criteria. The two criteria Dr. Eisenstien used were delusions and avolition, i.e., "not being reactive to anything." "The State's doctors rejected the veracity of Owen's alleged "delusion" and rejected Dr. Eisenstein's finding of avolition. Dr. Werner explained it "takes more than one delusion to meet the criteria for the diagnosis of schizophrenia. A delusion is one of the symptoms for a schizophrenia diagnosis; however, if the delusion were faked or untrue, such would impact all diagnoses based on the alleged delusion. (T 127, 142)

The "delusion" was found not genuine as the "symptom of gender dysphoria were "never observed or documented" except through Owen's self-report and then not until 1996, 12 years after the two sadistic murders, years after his two murder convictions, only once he was facing re-trial on the murder of KS; only disclosed when talking to defense experts/attorneys; and the "delusion" perfectly fit the crime facts. Were Owen in the midst of a "delusion" he would mention it to the police during the more than 20-hours of confessions.¹² Yet he did not. Failure to mention the

¹² The video indicated the interrogation was just a game for Owen. He "thrives on the attention he gets for his illegal activities." One of the poems Owen composed crystalized the case for Dr. Lazarou. The poem was "Roses are red. You pigs are blue. When you start counting victims, there will be quite a few." (T 330-33)

“delusion,” to the police, while alleged to be in an active delusion, alone is counter-indicative of a diagnosis of delusion. (T 166-67) A genuine delusion would manifest in Owen's life in other ways such as his behaviors, actions, mannerisms, and dress, but did not, except for a short period of time around the 1999 re-trial, otherwise he exhibited male characteristics. During his taped confession, his mannerisms were all male - legs splayed and shirt open. This is inconsistent with a fixed delusion. Those presenting with a true delusion are not trying to hide it from the mental health professional. Even as recent as his May 9, 2023, transfer to FSP, Owen identified as heterosexual. (T 128, 142-43, 154-59, 165-66, 228-32, 262-63, 286-87, 295 333-37)

Further evidence that the proffered "delusion" was feigned came from Owen's inconsistency in discussing the "delusion" and his varying and ever-evolving and "more fantastical" explanations of his delusion; as Owen continued, his voiced beliefs grew more fantastical. One inconsistency Dr. Warner noted involved Owen's insertion of a hammer into GW's vagina. The doctor explained that the insertion of the hammer, had nothing to do with the "delusion" of trying to absorb his victims' essence through his "hose"/penis. It is "unexplainable." (T 127, 140-41, 301-02)

Also significant for the State's doctors was how Owen presented himself. When interviewed, Owen "was very personable, very interactive;" and very telling for Dr. Werner was when Owen laughed saying he did not understand something "because he wasn't a woman." This showed Owen was reactive--the negative of avolition. Owen's reactions before the Commission were "completely inconsistent with schizophrenia. This further undercuts the suggestion Owen was schizophrenic. Dr.

Myers explained Owen exhibited no signs of any kind of thought disturbance or delusional thinking. Dr. Myers explained that a person with untreated schizophrenia would be unable to hide manifestations of schizophrenic symptoms for three to four minutes, much less for 30-40 years. None of the records Dr. Myers reviewed, nor DOC personnel interviewed provided information that Owen exhibited signs of schizophrenia. Schizophrenia does not come and go. If Owen were truly schizophrenic, he would not have been able to sit through the hours of confessions he did with the police. Owen did not exhibit the schizophrenic symptom of "disturbance in affect or a flattening of your emotional express." Owen "showed a full range of affect;" he showed a sense of humor; sometimes he would smile. Dr. Lazarou found no criteria/not a shred suggesting Owen suffered from schizophrenia. The consensus was Owen was malingering. Such was supported by the MMPI Dr. Eisenstein administered yielding a "floating profile, i.e., above normal and over-reporting in each profile (T 128-29, 135-37, 165-66, 263-65, 293, 327-29, 333-34, 359, 384-86, 389). Defense witness and former DOC psychology specialist, Lisa Wiley, admitted she saw no signs of schizophrenia, and had she seen signs, she would have reported them to the licensed DOC psychologist. (T 230)

Dr. Werner wrote down Owen's statements, quoting as follows:

He said . . . that the State of Florida was going to kill him for having killed the two women. He said, he used the word expired a lot.

We asked him, we talked about getting the estrogen from them, from all of the women that he had sex with. So we said, Well, why did you have to have to kill them, these two women? And he said, I don't know. Sadly enough, that's

what I did, quote, unquote.

(T 135) Dr. Werner testified Owen was very clear that he understood that he had killed two people. He then stated to the doctors: "I don't know why they think it is okay to kill me for killing them, quote, unquote." (T 135, 154) Also, Owen was planning/making his end-of-life decisions, namely, last meal, making a disposition of belongings, and communicating with friends.

To the extent Owen relies on *Madison*, as support that the state courts erred, he is incorrect. In fact, the glaring factual differences between *Madison* and the case at bar demonstrate that the states courts' legal determinations were correct, and the factual findings are supported by the evidence. In *Madison* doctors for the state and the defense agreed Madison suffered from a series of strokes; several significant ones in the recent past that left him with cognitive impairment, confusion, and vascular dementia. *Id* at 23-724. However, the state erred when it argued that Madison's dementia would not support a finding of insanity to be executed pursuant to *Ford*, and *Panetti*, because Madison was never also diagnosed with psychosis, paranoia, or delusions. *Id* at 724. This Court reversed¹³ because the focus of the inquiry should not be on the *nature or type* of mental illness, but rather does the mental illness regardless of what it is, preclude the defendant from having a rational understanding of the fact of the execution and why it is to be imposed. *Id* at 731. This Court did not offer an opinion as to what the outcome should be for Madison, instead remanding for

¹³ This Court found that because the state's sole expert had been suspended to practice psychology his entire testimony was discredited. *Madison*, at 725.

further factual development under the correct standard of *Panetti* and *Ford*. *Id.*

There has never been a consensus between the State's and Owen's doctors that Owen has any mental illness. To the contrary, the state presented overwhelming evidence through three psychiatrists; DOC and medical records from 1986 through today; and observations of DOC guards that have known Owen for the last 14 years to those who have been with him for sixteen hours a day since the signing of his death warrant. The state trial court found Owen's claim to be demonstrably false. Regardless of his disagreement with the credibility findings made below, he is bound by those factual findings therefore certiorari review is not warranted.

B. The state court properly considered Owen's mental condition at the time of the crime in assessing the veracity of his insanity at time of execution.

Owen asserts that the only timeframe the state courts could consider when assessing his competency for execution is the present day and any time frame beyond the present is a violation of *Panetti*. However, Owen's argument is wholly without merit because it is Owen who focused on his past alleged delusional schizophrenia as evidence to support his claim of insanity to be executed today.

Dr. Eisenstein, Owen's expert who evaluated him in May 2023, theorized that Owen has schizophrenia and suffers from delusions because, in his opinion, Owen has had this mental illness for most of his life, which has become embedded and fixed, making him incompetent and insane to be executed. For instance, Dr. Eisenstein wrote in his May 16, 2023, report "Owen's delusions are chronic and fixed. They have been consistent and unchanging over many years, as seen when reviewing

background information from multiple mental health experts." (R 556) He further opined: "Mr. Owen meets the criteria for a diagnosis of Schizophrenia. He has an ongoing psychotic delusional belief system that has never changed but has only been enhanced and became more embedded over time." (R 557). Yet, curiously, Owen takes issue with the trial court's discussion and exploration of Owen's actions and mental health issues at the time of the crime when assessing the veracity of his present claim of a delusion and schizophrenia. (P 18)

Continuing with this theory that he has suffered this debilitating "delusion" since childhood, Owen asserts that this "delusion" was the motivational factor in committing the murders of KS and GW and it is the basis for his claim today. Dr. Eisenstein expended much time and energy recounting Owen's gender dysphoric delusion at the time of the crime as a basis for his claim of insanity to be executed. In fact, the main premise of his claim in state court was that Owen's delusion prevents him from understanding the rational connection between his execution and his crimes. Owen allegedly believes that his victims are not dead, and they live in him. Throughout his testimony and written reports, Dr. Eisenstein consistently connected this alleged "delusion" making him insane to be executed, to the murders Owen committed 39 years ago. (T 447-48). Dr. Eisenstein's report concluded that this **long-standing chronic delusion** forecloses Owen's ability to understand the reason for his execution. (R 557) (emphasis added).

Also, as part of the information upon which he relied for his assessment, Dr. Eisenstein listed: (1) testimony of various doctors from Owen's re-trial in 1999; (2)

medical and school records from 1977; (3) jail records from 1978; and (4) Dr. Blackman's report from 1984. (R 561). Additionally, in his Appendix to Motion for Stay of Execution and Determination of Sanity to Be Executed Pursuant to Florida Rule of Criminal Procedure 3.811, Owen attached the 1999 sentencing order from the KS re-trial wherein Judge Cohen re-imposed the death penalty for the killing of KS; and the unsworn affidavit of Dr. Sultan. (R 394-409) Owen persisted in attempting to establish a link between his past alleged mental health issues and their continued presence today with the unsworn affidavit of Dr. Fred Berlin. Although Dr. Berlin has not seen or evaluated Owen since 1999, today he maintains that Owen's schizophrenia made him legally insane at the time of the murders and given the chronic nature of his mental illness, Dr. Berlin offered that the same schizophrenia still exists and makes Owen insane to be executed today. (R 603-606)

Consequently, it is Owen who has made relevant his past behavior, and to now assert his past sanity was irrelevant and the trial court erred by considering it, is utterly disingenuous. In reality, Owen is making a desperate attempt to turn the focus away from the damaging evidence that destroys completely any plausible notion that he ever had delusional schizophrenia. The evidence of his past included: (1) his confessions and behaviors shortly after the murders; (2) facts of the crime; and (3) other mental health evaluations through the years from 1984-1997. Owen's historical evidence placed into context Owen's competency status today. The evidence in support of his sanity to be executed included the three psychiatrists¹⁴ who evaluated

¹⁴ Dr. Lazarou was asked to explain why Owen's actions back in the 1980s are

him on May 24, 2023, medical and DOC records from 1994 to the present; and the four DOC guards who have had interactions with Owen either over the last several years to today. The State's entire presentation supports completely, the trial court's findings that Owen does not have any current mental illness; his purported delusion is demonstrably false; and that he is feigning or malingering psychopathology to avoid the death penalty. (R 627) Owen's disingenuous attack on the evidence highlights the complete absence of any delusion for the past 39 years; today's attack is a red herring designed to divert the focus away from the overwhelming evidence that Owen is sane to be executed.

C. The trial court's factual findings regarding Owen's alleged dementia and determination he has a rational understanding between the fact of his execution and the crimes he committed is supported by the evidence.

Owen complains the circuit court failed to make findings on his claim of dementia, and that the lower court "appears to discount improperly Dr. Eisenstein's testimony." (P 26) As with his previous challenges, not only is Owen misrepresenting the record, but he is also improperly expressing his disagreement with the credibility findings of the lower court without coming forward with clear and convincing evidence to demonstrate that those findings are unreasonable. Although, he claims

relevant in the assessment of whether he is competent to be executed today. She explained:

If his competency is being questioned due to this ideation that he has a delusion, it is relevant because then the facts of the case then refute that; and so therefore, the entire basis of the insanity that he is reporting to get out of the consequences of his actions are completely invalid. (T 356).

that the judge did not consider his evidence, the record belies that contention; there is competent and substantial evidence that wholly rebutted Dr. Eisenstein's conclusion.

The State's psychiatrists disagreed with Dr. Eisenstein's opinion that Owen suffers from dementia. Dr. Werner and the Commission found Owen did not exhibit any memory loss symptoms during his interview and dementia was not documented in Owen's DOC records. (T 129-30, 159-63) Owen exhibited no signs of dementia. Dr. Myers recalled Owen had no trouble in communicating with the Commission, "in fact, he even cited legal cases and gave us a description of what the content of legal cases were. He showed a strong memory and strong reasoning skills." (T 265-66) Dr. Lazarou also disagrees with Dr. Eisenstein's finding of dementia. None of the DOC personnel saw any signs of dementia in Owen. Owen's speech and word usage show he does not have dementia. (T 376, 379-81)

The state trial court detailed its findings in its recitation of the state's experts' testimony. It then found the states' doctors credible and Dr. Eisenstein not credible in comparison. The trial court ultimately found "[t]here is no credible evidence that in his current mental state Mr. Owen believes himself unable to die or that he is being executed for any reason other than the murders he was convicted of. (R 618-20, 627). Owen's dissatisfaction with the trial court's credibility determination is not a ground for certiorari review. Simply because the Florida Supreme Court did not mention Owen's alleged dementia specifically does not mean that the trial court's rejection of

dementia is not supported by the record.¹⁵ Nor does it mean that the Florida Supreme Court's decision is a violation of *Ford*, *Panetti*, and *Madison*. Owen's claim is patently frivolous. Given the trial court's treatment of the state's experts testimony on the issue of dementia and the findings that are more credible than Dr. Eisenstein, the claim of dementia was rejected by the state courts. That finding is supported by the record and must be upheld here. Owen is not entitled to relief.

¹⁵ Notably, Dr. Eisenstein tested Owen's present IQ and obtained a 92 – in the average range. (T 32)

CONCLUSION

Based on the foregoing arguments and authorities, and because the question presented here holds neither widespread nor case-specific importance, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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