No. 22-7764

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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

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RESPONSE TO STATE'S REASONS FOR DENYING THE WRIT

Duane E. Owen respectfully petitions that a writ of certiorari issue to review the judgment of the Supreme Court of Florida. Mr. Owen replies to the Respondent's Brief in Opposition ("BIO") as follows:

I. The Florida courts did not make a finding as to whether Owen has a rational understanding of the link between the crime and its punishment

Noticeably absent from the State's arguments was any attempt to address the failure of the Florida courts to make a determination regarding whether Owen had a rational understanding of the link between the crime and its punishment. However, "[g]ross 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 v. Quarterman*, 551 U.S. 930, 960 (2007).

> The critical question is whether a "prisoner's mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution." Or similarly put, the issue is whether a "prisoner's concept of reality" is "so impair[ed]" that he cannot grasp the execution's "meaning and purpose" or the "link between [his] crime and its punishment."

Madison v. Alabama, 139 S. Ct. 718, 723 (2019) (quoting *Panetti*, 551 U.S. at 958-60).

Although the Supreme Court of Florida cited some of the proper standard in passing, neither court actually applied the standard and made any findings as to whether Owen rationally understands "the link between his crime and its punishment." *Id.*; App. A at 4. The state courts also fail to meaningfully consider that

"[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Panetti*, 551 U.S. at 959. Contrary to the State's assertions, the Florida courts have decided Owen's Eighth Amendment claim in a way that conflicts with relevant decisions of this Court, including *Panetti v. Quarterman*, 551 U.S. 930 (2007) and *Madison v. Alabama*, 139 S. Ct. 718 (2019).

II. No Florida court made any explicit findings regarding Owen's dementia

Regarding Owen's dementia, the State completely mischaracterizes the circuit court's order. BIO at 39. The order solely contained negligible mentions of dementia in a section entitled "HEARING TESTIMONY AND RELATED EVIDENCE." App. B at 4. The circuit court's order has a specific section entitled "CONCLUSIONS" where the court lists its findings. App B. at 20-21. No mention of dementia even appears there. The order further contains a section where the circuit court "ORDERED AND ADJUDGED" four separate points relevant to incompetency to be executed. App. B at 21-22. No mention of dementia appears there either. Therefore, it is the State who is "misrepresenting the record," not Owen. BIO at 38. Notably, the opinion of the Supreme Court of Florida contained absolutely no mention of Owen's dementia.

Further, the State ignores the wording of the actual question presented by Owen: 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? (emphasis added). Therefore, it is of no import whether the circuit court listed some testimony from the hearing in its order. The

Florida courts did not ***explicitly*** make any findings regarding Owen's dementia.

As in *Madison*, the state courts wrongly focused solely on whether the commission of three psychiatrists appointed by the Governor of Florida ("the Commission") thought Owen was delusional and did not consider his dementia. *Madison*, 139 S. Ct. at 730-31. As a result, just like in *Madison*, this record is tainted with testimony regarding the "incorrect view of the relevance of delusions or memory." *Id*. at 731. Therefore, the Florida courts have decided the important question of whether Owen is incompetent to be executed under the Eighth Amendment in a way that conflicts with *Madison v. Alabama*, 139 S. Ct. 718 (2019).

III. Competency to be executed is measured at the time of execution

Under *Panetti*, the time period to consider competency to be executed is when the execution is imminent. "The prohibition [on carrying out a sentence of death] applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition." *Panetti*, 551 U.S. at 934. The only pertinent time to assess Owen's competency to be executed is whether he is competent right now.

A. Owen submitted information regarding his history of severe mental illness solely to rebut the findings of the Commission

The State inappropriately made Owen's past competency a feature of the evidentiary hearing, but only argues that it is relevant to the proceedings at hand when it conveniently suits them. Quite the reverse, the State improperly claims that Owen made his past behavior relevant. BIO at 35, 37. The State continues to

misapprehend Owen's intentions. Owen sought to introduce evidence to show his longstanding history of severe mental illness and delusions to rebut the findings of the Commission. The Commission's report stated Owen "has been free of symptoms and signs of serious mental illness" and "feigning psychopathology (malingering) to avoid the death penalty." App. C.

The State claims that historical evidence places into context Owen's competency today. BIO at 37. However, multiple doctors have evaluated Owen in the past, such as Dr. Faye Sultan and Dr. Frederick Berlin, and have found evidence of severe mental illness including schizophrenia, delusions, and brain damage. R/408-10, 603-05. However, the State neglects to discuss all of these doctors who reached similar conclusions to Dr. Hyman Eisenstein (the board-certified neuropsychologist who recently evaluated Owen), and solely focuses on the evidence of the past that best suits them.

The State points out that Owen attached a 1999 sentencing order to a motion filed in the circuit court. BIO at 37; R/394-406. The sentencing order was relevant to discredit the Commission's findings because that judge detailed the same delusions present in Owen today and found: "[c]learly the evidence shows that the Defendant was**,** and is, mentally ill." The order goes on to note that even the State's experts conceded that Owen has a sexual disorder and is not mentally healthy.[1] Back in 2003, the Supreme Court of Florida also recognized that the sentencing court gave weight

[1] Notably, when attempting to distinguish *Madison*, the State misrepresented that "[t]here has never been a consensus between the State's and Owen's doctors that Owen has any mental illness." BIO at 35. Clearly that is not true.

to the two statutory "mental health" mitigators: "the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance" and "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired." *Owen v. State*, 862 So. 2d 687, 690, 703 (Fla. 2003). The Supreme Court of Florida went on to detail Owen's same delusions that exist today. *Id*. at 698-99.

Essentially, the State is arguing that these factual findings were incorrect because they now argue that Owen has been malingering this entire time and does not actually hold these delusional beliefs. To reach that conclusion this Court would have to completely disregard the findings of fact developed over twenty years ago and instead accept the testimony of three psychiatrists who saw Owen on one occasion for approximately 100 minutes, conducted no testing whatsoever, and completely discounted relevant history. The State is basically saying that the schizophrenic delusions that those courts found Owen to possess have been cured by his presence on death row for over twenty years. The more logical conclusion is that Dr. Eisenstein's testing and conclusions are accurate, and Owen still has schizophrenic delusions, which are hindering his ability to rationally understand the link between the crimes and its punishment.

Accordingly, it is disingenuous for the State to argue that Owen does not have mental illness and make it appear as though Dr. Eisenstein was the only doctor finding Owen to be mentally ill. BIO at 35, 37. It is further unacceptable for the State

to argue that Owen is malingering to avoid the death penalty when all of this evidence from multiple doctors and courts show that Owen's delusions and mental illness did not develop as a result of his warrant being signed. BIO at 37. For those reasons, Owen submitted documentation to rebut the conclusions of the Commission, not to contend that any time period other than the time of execution was appropriate to determine incompetency to be executed.

B. The State misconstrues testimony from the evidentiary hearing related to prior time periods

The State spends much of its BIO arguing that the allegations regarding the facts surrounding the crimes and the police's interrogation of Owen are relevant. BIO at 6-10, 13-14, 20-21, 31-32, 33. However, Owen submits that those arguments are irrelevant for multiple reasons. First, the relevant time to decide a competency to be executed claim is when "execution is imminent." *Panetti,* 551 U.S. at 946. Thus, whether Owen was competent at the time of the crimes, when the police interrogated him, or at any other point that is not the current time, is immaterial. Next, for as much time as the State spent discussing the police interrogations, the State fails to mention that 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. Additionally, not all of the police interrogation was even recorded. Therefore, none of the doctors knew if the police interrogation actually contained any evidence of Owen's delusions or mental illness.

The State falsely claims: "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)." BIO at 36. The citation to the transcript that the State noted is a cite to another witness, not Dr. Eisenstein. Further, a review of the transcript shows that Dr. Eisenstein made no determination as to Owen's past competency or competency at the time of the crimes. Dr. Eisenstein solely reiterated in detail the nature of the delusional beliefs that Owen holds and discussed that the delusions were fixed. The State also incorrectly claims that Dr. Eisenstein relied on much historical data for his assessment. BIO at 36-37. Conversely, Dr. Eisenstein solely attached a list of materials that he reviewed to his supplemental report. App. F. Dr. Eisenstein only opined on Owen's current incompetency to be executed, which is the proper assessment in such cases.

As detailed above and in the petition, it was the State who made Owen's past a feature of the evidentiary hearing. In proceedings under Rule 3.812 of Florida Rules of Criminal Procedure, the circuit "court shall not be strictly bound by the rules of evidence." Therefore, out of necessity to ensure the circuit court had the relevant information Owen had to question witnesses regarding whether these events that happened in the past, affected his competency to be executed right now. T/90, 94-95, 100-01, 243. Although the circuit court had the authority to let in extraneous evidence under the rule, the court still had a duty to weigh all the evidence and ensure its conclusions corresponded with the appropriate standard under *Panetti* and *Madison*.

IV. The State's characterization of the case and facts is misleading

The State cites to supposed "quotes" from Dr. Tonia Werner and treats them as fact. BIO at 14, 18, 33-34. However, anything she has claimed to be a quote and

refers to as "quote, unquote" is suspect and should be excluded. Dr. Werner incorrectly testified during the hearing 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. 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." Therefore, it is likely that Dr. Werner's other "quotes" are also inaccurate. For example, the State points out that she testified that this exchange occurred at the evaluation: "[W]hy did you have to kill these two women? And he said, I don't know. Sadly enough, that's what I did, quote, unquote." BIO at 18, 21, 33-34; T/135. However, the testimony of CCRC Eric Pinkard rebuts those supposed quotes.

Mr. Pinkard witnessed the Commission's evaluation and testified to what Owen actually said during the evaluation. T/450-61. He confirmed that during the evaluation Owen did not make those "quotes" and Owen never stated that he killed anyone. T/455-56. In fact, Owen was clear that before the victims expired, they entered into his body. T/460. Notably, Mr. Pinkard requested to videotape the evaluation so there would be no mistake as to what Owen said, but the request was denied. T/450.

The State falsely claims that they presented overwhelming evidence that included "observations of DOC guards that have known Owen for the last 14 years." BIO at 35. No testimony of any Department of Corrections ("DOC") personnel was presented by anyone who knew Owen longer than a few years, let alone fourteen

years. In fact, out of the four DOC employees who testified, only one of the DOC employees knew Owen longer than a few weeks. T/171-72. The State also claims the DOC employees would notice a downward drift in functioning. BIO at 12. However, at the time of the Commission's interview with DOC personnel, those individuals working at Florida State Prison had known Owen at most, two weeks. At the time of the hearing, those 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. Those employees would have no baseline to determine whether Owen's cognitive functioning has declined over the years. Only one employee from Union Correctional Institution 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.

With no real context, the State also footnotes to Owen having a present IQ of 92 and states that it is in the average range. BIO at 40. The State fails to explain the actual significance of this recent IQ score. Owen's current full-scale IQ score of 92 falls into the lower end of the average intelligence range. T/32. This score is significant because Owen had previously received an IQ score of 104 when another doctor tested him around 2006. T/309, 431. IQ is well-established and does not really change over time, Dr. Eisenstein confirmed that the substantial drop in Owen's IQ score is indicative of decline and impairment in Owen's brain functioning. T/431-34. This large drop in IQ score of almost a standard deviation supports the fact that Owen

has dementia. T/435. Further, unlike Dr. Eisenstein, the Commission did not perform any testing, so they had no evidence to corroborate any claim they made of Owen not suffering from dementia. Conversely, Dr. Eisenstein found Owen's drop in IQ score and results of other testing to be so profoundly impaired on his first day of evaluation that he suspected an insidious dementia process. T/431-32. As a result, Dr. Eisenstein went back to perform additional testing, including the Wechsler Memory Scale, and Owen's scales were almost another whole standard deviation drop from the 2006 levels. T/432, 435. These results obtained through actual tests specifically normed for these purposes provide evidence of Owen's insidious dementia.

V. This Nation has a vital public interest in preventing the State of Florida from executing an insane individual

Owen submits that the Florida courts have decided the important question of his incompetency to be executed in a way that conflicts with relevant decisions of this Court. However, in response to the State's argument that this Court should deny certiorari, Owen asserts that there is great public importance in not executing someone in violation of the Eighth Amendment. BIO at 26-28. "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force." *Hall v. Florida*, 571 U.S. 701, 708 (2014).

This Court functions as an institutional overseer of all the Nation's courts; it decides cases involving important public policy questions and other matters significantly affecting the administration of justice and resolves conflicts among the

courts. This case involves the dire need for certiorari for a special and important reason, as there is a public interest element that must be protected. The execution of Owen is "beyond the academic or episodic," rather it is one where Eighth Amendment dimensions are involved. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Because a human life is at stake, there is an urgent need for the highest court in the land to assert its constitutional authority and inherent authority to do justice in an individual case. It would be an irreparable miscarriage of justice for this Court to deny certiorari and allow an insane individual to be executed in violation of the Eighth Amendment, when this very Court has held that "[t]he Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall,* 571 U.S. at 708 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

CONCLUSION

For all of these reasons above, along with the reasons detailed in Owen's petition, the Court should grant the petition for a writ of certiorari and order further briefing, or vacate and remand this case to the Supreme Court of Florida.

Respectfully submitted,

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