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No. SC2023-0819

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

IN THE

Supreme Court of Florida

DUANE E. OWEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR BRADFORD COUNTY, FLORIDA
Lower Tribunal No. 042023CA000264CAAXMX

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Appellant, Duane E. Owen, offers the following reply to the Answer Brief of Appellee ("Answer Brief"). Due to the time constraints of the briefing schedule set by this Court, Owen will not reply to every issue and argument raised by the State and will only address the most salient points. Owen expressly does not abandon any issue not specifically replied to herein and relies upon his Initial Brief of the Appellant ("Initial Brief") in reply to any argument or authority not specifically addressed.

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, are in the form T/[page number].

References to the current record on appeal from the proceedings in the Eighth Judicial Circuit, in and for Bradford County, are in the form R/[page number].

Page references to the Initial Brief are designated with IB/[page number].

Page references to the Answer Brief are designated with AB/[page number].

Reference to the postconviction record on appeal in case

number SC1960-92144 (92,144) are designated as 1PCR-R[volume]/[page number].

ARGUMENT IN REPLY

In *Madison v. Alabama*, 139 S. Ct. 718 (2019), the Supreme Court of the United States 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. "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 v. Quarterman*, 551 U.S. 930, 934 (2007).

REPLY TO STATEMENT OF THE CASE AND FACTS

Due to the warrant briefing time constraints, Owen will briefly point out some of the inaccuracies and mischaracterizations in the State's Statement of the Case and Facts. In addition, many of the incorrect or misconstrued statements here also appear in the Argument portion of the Answer Brief. A few of those statements will be instead referred to in Owen's reply to each argument.

On page 6 of the Answer Brief, the dates the State lists that Dr. Hyman Eisenstein evaluated Owen are wrong. Dr. Eisenstein

conducted his evaluation on May 15 and 30, 2023. T/19. The State also claimed Dr. Eisenstein only administered testing for the first time on the second date. AB/6. As will be discussed in more detail below, Dr. Eisenstein administered tests to Owen during his first visit but did not have enough time to administer all the tests he wanted. R/555. Thus, he had to return to conduct more testing.

One of the reasons Dr. Eisenstein wanted to conduct further testing was because he suspected "the onset of an insidious dementia process." R/555. The State later asserts that the results of the first day of testing were inconsistent with the second day of testing, hence their awareness of testing occurring on both days is clear. AB/13. The testing results that Dr. Tonia Werner discussed could not be inconsistent because Dr. Eisenstein would not have noted on the first day that he suspected dementia and wanted to explore Owen's memory problems further. AB/13; R/555; T/162.

The State mentioned multiple times that the psychiatrists who evaluated Owen ("the Commission") expected to Owen exhibit his delusion in ways such as how he dressed and the length of his hair. AB/11, 47; T/128. However, testimony from Department of Corrections ("DOC") personnel rebuts that because inmates must be

in compliance with their haircuts, cannot grow out their hair long, and cannot alter their clothing. T/196, 211-12.

The State mentioned that Dr. Werner noted that Owen laughed during the evaluation. AB/12, 48; T/129. However, Dr. Werner later confirmed that schizophrenia can present differently in different individuals and may show different symptomology. T/169. Further, Dr. Wade Myers agreed schizophrenics can smile. T/306.

The State noted that Dr. Eisenstein made a reference to the term "patients." AB/5, 17, 49. However, Owen submits that Dr. Eisenstein just misspoke because earlier in his testimony he stated "[o]ne should elicit as much as possible from the defendant or the client or the patient, however you refer to them, the examinee." T/21. Further, Dr. Myers and Dr. Emily Lazarou also made reference to "patients" in their testimony. T/311, 326, 338.

The State also referenced interviews with DOC personnel, "some who had contact with Owen for more than ten years." AB/26. However, no testimony was presented by anyone from DOC who knew Owen for that length of time. 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. This fact is also confirmed by the State on

page 36 of the Answer Brief.

REPLY TO ARGUMENT I

Above all, the State's Answer Brief completely mischaracterizes the argument Owen presents regarding the circuit court taking into consideration irrelevant time periods when assessing his competency to be executed. AB/43-47. The relevant time period to assess Owen's competency to be executed is, and always was, now, the time of execution. ***"Mental competency to be executed is measured at the time of execution, not years before then."*** *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (citing *Panetti*, 551 U.S. at 946) (emphasis added).

The State tactlessly accuses Owen of being "stunningly disingenuous." AB/44. If anyone is being disingenuous it would be the State. At the beginning of the evidentiary hearing, the State argued that Dr. Faye Sultan would have nothing to offer to the proceedings since she had not seen Owen recently. T/5. Owen's counsel detailed to the court the limited purpose for which Dr. Sultan's testimony was sought and expressed that her testimony "goes to some of his other diagnoses with his fixed delusions, to show that this is not something that just occurred as soon as his warrant

has been signed. This occurred back in the '80s, back in the '90s. It's been consistent for 40 years or more." T/5. The State then pointed out that "mental competency to be executed is -- which is what we're here for today -- is measured at the time of the execution, not years before then. A claim that a death row inmate is not mentally competent unless – means nothing, unless it's at the time of the execution" and maintained that Dr. Sultan's testimony was irrelevant. T/6-7.

After making those arguments at the beginning of the hearing, it was clear the State knew what the proper timeframe was. Nevertheless, the State went on to make Owen's past sanity, mental illness, and prior functioning a feature of the entire hearing, including having the Commission recite portions of other mental health expert reports including Dr. Blackman and Dr. Peterson. T/79, 347. Neither Dr. Blackman nor Dr. Peterson have seen Owen in thirty-nine years. Also, Owen's counsel objected when the State attempted to introduce into evidence a brief purported to be written by Owen years ago and even pointed out the State's prior argument that the relevant time period was now. T/85. The objection was overruled, likely due to the court not being strictly bound by the rules

of evidence. Fla. R. Crim. P. 3.812. Recognizing that, and because the State continued to inundate the record with testimony and documents from many years ago, Owen framed the questioning based on whether any of this mattered as to competency to be executed. T/95, 100. Owen has been nothing but consistent.

Further, the State has misconstrued Owen's request to call two doctors to testify to support the fact that he has previously been diagnosed with severe mental illness and that Owen's delusions are longstanding. As detailed at the beginning of the evidentiary hearing, Owen intended to offer the doctors' findings of his history of mental illness and the duration of his delusions. T/5. 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." R/549. The testimony of Dr. Sultan and Dr. Frederick Berlin would also rebut the Commission's assertions in its report claiming Owen "feigning psychopathology (malingering) to avoid the death penalty." IB/51-53; R/550. On page 62 of the Answer Brief, the State confirms their awareness that Owen only sought testimony from Dr. Sultan and Dr. Berlin regarding the duration of Owen's longstanding and

fixed delusions. Argument II of Owen's Initial Brief even argued that testimony from the doctors may have swayed the circuit court because the court was considering improper time periods other than the present. IB/53. Further, just as the psychiatrists of the Commission all corroborated each other, Dr. Sultan and Dr. Berlin would corroborate Dr. Eisenstein's findings of the existence of mental illness.

On a related note, the State also appears to fault Dr. Eisenstein for conducting a comprehensive and thorough evaluation of Owen. AB/44-45. Further, the State mischaracterizes Dr. Eisenstein's usage of background information. AB/45. Dr. Eisenstein noted in his report that he ***reviewed*** background information and that the information establishes that other mental health experts' findings corroborated the chronic and fixed delusions Dr. Eisenstein had seen in his own evaluation. R/556. The State incorrectly states that Dr. Eisenstein instead ***relied*** on such information. AB/45. However, the page of Dr. Eisenstein's report the State cites clearly states: "***Reviewed the Following***:" R/561. Further, the portion of Dr. Eisenstein's report that the State emphasized on page 45 of their Answer Brief, also serves to refute that Dr. Eisenstein was evaluating

Owen regarding anything other than his current insanity, because he noted that Owen "has an ongoing psychotic ***delusional belief system that has never changed but has only been enhanced and became more embedded over time.***" R/557 (emphasis as in AB/45).

The current time is the proper time period for consideration. Therefore, as explained in the Initial Brief, all of the testimony and circuit court findings regarding the police interrogation are irrelevant. IB/29-31.[1] The State appears to be cognizant of the relevant time period, yet continues to make arguments and cite testimony related to the police interrogation. AB/11, 22, 49, 31, 34, 51-52, 58. The State also argues that facts surrounding the time of the crime matter, but again, none of that is relevant since it is not from the time of execution. AB/33-35, 57-59

Additionally, the State claims that "[t]he lower court's decision is well supported by the evidence presented below. Owen's argument is simply a disagreement with the factual findings and credibility determinations of the lower court." AB/41. However, Owen's

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[1] Owen also notes that portions of the police interrogation were not even recorded. 1PCR-R20/3642, 3660-61, 3663. Therefore, evidence of delusions and mental illness may have been present in those portions of the interview too.

argument is precisely that the circuit court's findings are not supported by competent and substantial evidence, which is exactly why factual findings and credibility determinations are significant. The State goes on to argue that "The trial court's order includes very detailed and explicit credibility determinations and factual findings in support of its legal determination that Owen is sane to be executed. The state [sic] asserts that those findings are well supported by the record and relief must be denied." AB/43, 56. As detailed in the Initial Brief, the circuit court's order was mistaken in some of the findings listed in its order. IB/29-30. To note another inconsistency that the State appears to agree with since it was referenced in the Answer Brief, the circuit court was also mistaken in finding that Dr. Eisenstein testified "exclusively on behalf of capital defendants." R/610. As the State noted, the ***majority*** of the cases were capital, but Dr. Eisenstein also testifies in non-capital cases. AB/5, 57; T/15-16. Additionally, the circuit court never made a determination regarding Owen's dementia. *See Madison v. Alabama*, 139 S. Ct. 718 (2019).

The State incorrectly claims that after the Commission issued its report, Owen "doubled down on his allegation" that he was insane

to be executed and "Dr. Eisenstein for the first time conducted several tests and maintained his position that Owen was insane to be executed which prompted Owen to seek relief pursuant to Rule 3.811." AB/57. This whole statement is inaccurate. First, Dr. Eisenstein conducted testing on his first visit on May 15, 2023. R/555; T/19, 28-33. During that evaluation, Dr. Eisenstein noted his concerns regarding "the onset of an insidious dementia process." R/555. He recommended further testing which included a neurodiagnostic battery and exploration of Owen's memory problems. R/555. As indicated to the court during the May 26, 2023 status conference, Dr. Eisenstein could not go back to the prison to finish testing until May 30, 2023 due to DOC not allowing him to go earlier due to the Memorial Day holiday. R/297. Owen indicated at the same status conference that he planned to file a motion pursuant to rule 3.811 the next week, as soon as the supplemental report form Dr. Eisenstein was complete, in order to avoid piecemeal litigation. R/298. Finally, the State has been a party to all of Owen's warrant litigation, and Owen has always maintained that he would be filing under rule 3.811 if the Governor found him sane to be executed. *See* SC2023-0732 Initial Brief.

The State claims that Dr. Lazarou's discussion of Owen planning his last meal, assigning possessions, and communicating via email indicates Owen's awareness of the fact of his pending execution. AB/54. Aside from the testimony regarding Owen's delusions, much of the testimony from the hearing refutes this statement. Dr. Lazarou even conceded that she only reviewed emails sent to Owen and if it existed, did not review anything he wrote. T/379. DOC personnel also rebutted her testimony because Owen cannot write emails currently and is not allowed to have his tablet while on death watch. T/209-10. Further, it is entirely possible that Owen was just being polite and answering DOC when they asked him about his last wishes. T/64-65, 196. The DOC employee who has known Owen longest confirmed that inmates "get in trouble if they refuse to answer questions from prison staff." T/179. Therefore, the State's argument and related testimony does not confirm whether Owen rationally understands the fact of his pending execution.

The State's argument that "Owen brought over 20 books with him to FSP and looks at them daily" is misleading. AB/37. Aside from the fact that no one could testify whether Owen actually understood or comprehended anything he was supposedly reading, testimony

also refutes this statement on a basic level. Assistant Warden McClellan confirmed that Owen only had one book inside of his cell. T/198. Notably, Owen may just be using the book as a surface to write on. Assistant Warden McClellan testified: "I believe he had one book, I know for sure one book because he was writing on top of it." T/198.

The State cites many "quotes" that Dr. Werner claimed Owen said during his evaluation with the Commission. AB/16, 49. 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.

Dr. Werner used the same "quote, unquote" language to

describe Owen's "quotes" where he supposedly said he killed the victims. AB/16, 49; T/135, 154, 164. Notably, 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 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.

Lastly, the State claims that Dr. Eisenstein was biased. AB/59. Owen can make a similar claim about Dr. Lazarou and Dr. Myers. 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 the instant case Dr. Lazarou 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. Dr. Myers also made comments that appeared to exhibit bias. He claimed that virtually all “serial sexual killers have antisocial personality.” T/317, 287.

Additionally, it is telling that the State fails to argue or cite the application of *Panetti v. Quarterman* case which is essential to the application of Owen’s delusional beliefs to his rational understanding of his pending execution.

The fact remains that Owen is insane to be executed and if this Court does not take action, Owen’s execution will be in violation of the Eighth Amendment to the United States Constitution.

REPLY TO ARGUMENT II

The State footnotes an inaccurate accusation that Owen's position in Argument II is disingenuous and contradictory to Argument I. AB/61. As explained in detail above, that assertion is wrong. *See supra* pp. 4-8.

The State also claims that *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999) is distinguishable. AB/62. Owen submits that Dr. Sultan and Dr. Berlin are key witnesses for the purpose of rebutting the findings of the Commission as to Owen's history of mental illness and delusions. "To conduct an evidentiary hearing without affording the opportunity to present live testimony from the key witness defeats both interests." *See Provenzano*, 750 So. 2d at 605 (citing *Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (reasoning "[w]ithout some questioning of the experts concerning their technical conclusions, a fact-finder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent")

This Court should reverse, stay the execution, and remand to allow the testimony of Dr. Sultan and Dr. Berlin to be heard.

CONCLUSION

Based on the foregoing arguments, Owen respectfully requests that this Court reverse the lower court; grant a stay of execution; and/or grant any other relief it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on this 8th day of June, 2023, the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal which will send a notice of electronic filing to the following: Assistant Attorney General Celia Terenzio at Celia.Terenzio@myfloridalegal.com and capapp@myfloridalegal.com; Chief Assistant Attorney General Scott Browne at scott.browne@myfloridalegal.com; Assistant Attorney General Patrick Bobek at Patrick.Bobek@myfloridalegal.com; Assistant Attorney General Leslie Campbell at Leslie.Campbell@myfloridalegal.com; and the Florida Supreme Court, at warrant@flcourts.org.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045 and 9.210(a)(2)(B), we hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font and contains 2977 of the 4,000 words allowed.

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