

**ACTIVE WARRANT-EXECUTION SCHEDULED 6:00 PM JUNE 15, 2023,**

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2023-0819

DUANE EUGENE OWEN,  
APPELLANT,

VS.

STATE OF FLORIDA,  
APPELLEE.

.....  
ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL  
CIRCUIT IN AND FOR BRADFORD COUNTY, FLORIDA  
.....

ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellant, Duane Eugene Owen, Defendant below, will be referred to as “Owen” and Appellee, State of Florida, will be referred to as “State.”

Owen has been before this court five times previously.

**Direct Appeal** - “ROA” in case number 1960-68549; *Owen v. State*, 596 So. 2d 985 (Fla. 1992), *cert. denied*, *Owen v. Florida*, 506 U.S. 921 (1992);

**Postconviction Relief Appeal** - “1PCR-R” for the record and “1PCR-T” for the transcripts case No. SC1960-92144; *Owen v. State*, 773 So. 2d 510 (Fla. 2000), *cert. denied*, *Owen v. Florida*, 532 U.S. 964 (2001);

**Second Postconviction Relief Appeal** - “2PCR” for case number SC01–2146 (postconviction) and case number SC2001–2476 (state habeas); *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003);

**Third Postconviction Relief Appeal** - “3PCR” in case number SC2018–382; *Owen v. State*, 247 So. 3d 394 (Fla. 2018), *cert. denied*, *Owen v. Florida*, 139 S. Ct. 1171 (2019);

**Fourth Postconviction Relief Appeal** - “4PCR” the postconviction appeal during active Death Warrant, case number SC2023-0732;

**Direct Appeal Record - (ROA-KS) in case number SC1960-95526** (in this Court’s possession) from *Owen v. State*, 862 So. 2d 687 (Fla. 2003) (affirming Owen’s conviction and sentence for first-degree murder, “attempted sexual battery with a deadly weapon ... and burglary of a dwelling while armed” of 14-year-old female)

**Rule 3.812 Appeal** - "R" for record cites and "T" for transcript cites in this appeal following an evidentiary hearing.

Owen’s initial brief will be noted as “IB.”

## **STATEMENT OF THE CASE AND FACTS**

Owen is under an active death warrant based on the affirmance of his 1986 conviction and sentence for the burglary, sexual assault, and first-degree murder of a Boca Raton mother, GW,<sup>1</sup> whose body was discovered by her children on May 29, 1984. *Owen v. State*, 596 So. 2d 985 (Fla. 1992), *cert. denied*, *Owen v. Florida*, 506 U.S. 921 (1992). Previously, Owen litigated four motions for postconviction relief and their related appeals. *Owen v. State*, 773 So. 2d 510 (Fla. 2000) (finding Owen's waiver of postconviction claims/evidentiary hearing was 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 claim based on *Hurst v. Florida*, 572 U.S. 92 (2016), *cert. denied*, *Owen v. Florida*, 139 S. Ct. 1171 (2019); *Owen v. State*, 2023 WL 3813490 (Fla. June 5, 2023) (affirming denial of postconviction challenge under active death warrant). Also, Owen unsuccessfully pursued habeas relief in state and federal court. See *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003) (denying relief of habeas petition challenging appellate counsel's

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<sup>1</sup> The victim's initials are being used because a sexual assault was involved. See *Owen v. State*, 862 So. 2d 687 (Fla. 2003), *cert. denied*, *Owen v. Florida*, 543 U.S. 986 (2004).

effectiveness); *Owen v. Sec'y for Dept. of Corr.*, 568 F.3d 894 (11th Cir. 2009) (concluding the state court properly rejected challenge to Owen's waiver of his original postconviction claims), *cert. denied*, 558 U.S. 1151 (2010).

On May 22, 2023, pursuant to Owen's letter invoking the procedure set out in section 922.07(1), Fla. Stat., and out of an abundance of caution, the Governor issued an Executive Order staying Owen's execution and appointed a three-psychiatrists commission ("Commission") to evaluate Owen for his sanity to be executed. On May 23, 2023, the commission reviewed pertinent records and mental health materials, met with several Department of Corrections ("DOC") personnel, interviewed Owen, and considered whether he is insane under Rule 3.811, Fla. R. Crim. P. The following day, the Commission provided its report to the Governor finding:

In summary, based on our clinical interview, review of the records, and interviews with correctional employees, it is our opinion with reasonable medical certainty that Mr. Owen: (1) has no current mental illness, (2) is feigning psychopathology (malingering) to avoid the death penalty, (3) has an Antisocial Personality Disorder, and (4) understands the nature and effect of the death penalty and why it is to be imposed on him.

(R 550).

Following a status hearing, Owen was given until June 1, 2023, to file a motion under Rule 3.812, Fla. R. Crim. P. and an evidentiary hearing

was set by a judge of the Eighth Judicial Circuit Court, Bradford County for June 1 and 2, 2023. (R 308-11) In his Rule 3.812 motion, Owen also sought a continuance, a stay of execution, and the appointment of three additional mental health experts to reevaluate his sanity to be executed. (R 318-72)

### **Facts Developed During Rule 3.812 Evidentiary Hearing on Owen's Claim of Insane to Be Executed**

At the commencement of the hearing, the court entertained Owen's motion for a continuance, and appointment of new experts. (T 3-7; R 373-412) The State filed its written objections. (R 413-20) The request for a continuance was sought to allow time for Drs. Sultan and Berlin to testify in person regarding their evaluations of Owen conducted between 1994 and 1999 and as they testified in the re-trial for the KS murder. Owen's counsel had yet to speak with Dr. Berlin even though it was represented counsel had started calling him shortly after the warrant was signed. (T 3-7; R 373-82).

At the hearing on the preliminary issues, Owen's counsel admitted neither Dr. Sultan nor Dr. Berlin had seen Owen recently nor were they seeking or planning a visit with him. Both doctors were to be called to report on their 1994-1999 interaction with Owen, however, contact with Dr. Berlin had yet to be secured, but it was anticipated Dr. Berlin would



telephone later that afternoon. The trial court stated it would work as late as needed to complete the hearing. (T 3-7) With respect to the request for appointment of additional experts, the court found that an insufficient showing had been made to necessitate appointment of additional doctors under Rule 3.812; however, should Owen's counsel believe such becomes "a little more relevant or pertinent," the matter should be re-raised for the trial court's reconsideration (T 8-9).

On the issue of Owen's sanity to be executed, defense expert, Dr. Hyman Eisenstein ("Dr. Eisenstein") was the first to be called. He is a licensed clinical psychologist with a subspecialty in clinical neuropsychology. Dr. Eisenstein disclosed that he had testified in approximately 100 cases, the vast majority of which were capital cases, and in each case, he was called by the defendant. (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 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 defense counsel to conduct a neuropsychological evaluation, review background materials, and assess whether Owen was competent and whether he was insane. He saw Owen on May 15, 2023, and again on May 30, 2019, where an additional interview was conducted and testing administered for the first time. The doctor submitted reports after each visit. (T 11, 17-20; R 555-61) Following both contacts with Owen, Dr. Eisenstein found Owen discussed his professed "delusion" of being a woman in a man's body and need to have intercourse with women as they "expire" so he could obtain their essence and become a woman. According to Dr. Eisenstein, Owen met the criteria for schizophrenia based on his "ongoing psychiatric delusional belief system" and that he was incompetent and unable to provide legal counsel with assistance. Further, Dr. Eisenstein announced Owen did not have a rational understanding of the reason for his execution and was insane. (T 20-23, 25-26, 47-50, 66-67; R 555-57) The testing administered by Dr. Eisenstein led him to conclude Owen suffers from the onset of dementia, has brain damage, gender dysphoria, and major distortions of reality which were consistent with schizophrenia. Dr. Eisenstein did not find Owen to be malingering, but

that Owen was incompetent to proceed and was insane. (T 30-47, 50-51, 53, 73; R 559-60)

It was Dr. Eisenstein's position that Owen is a "very passive individual;" he is "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 mental health 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)

Owen was asked to describe his "delusion." In response, Owen related he "had to have intercourse [with female victims]<sup>2</sup> the moment they expired." Owen's use of the word "expired" in this context means the victims' lives "ceased in this form." (T 70-72; R 556) 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." None the less, Owen knows that if he is executed, he will die. (T 72-73)

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<sup>2</sup> Dr. Eisenstein knew that Owen's reference to "expired" meant he was talking about the KS and GW murder victims where Owen stabbed KS 18 times and bludgeoned GW in the head with a hammer five times.

Dr. Eisenstein admitted that the finding of delusion was necessary for his diagnosis of schizophrenia and without Owen's "delusion," Owen is not schizophrenic. (T 74) The doctor conceded that Owen had not been prescribed any medication for schizophrenia and that Owen 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 revealed to Dr. Blackman the details of the seven rapes, five attempted murders, two murders, and several burglaries and misdemeanors he committed. Dr. Blackmon found Owen to have an antisocial personality and cautioned that Owen admitted to other crimes and murders that have not been revealed to the police and that Owen stated he would hold this information in reserve to delay his execution. (T 81) Also, Dr. Eisenstein acknowledged Owen committed six horribly violent rapes in addition to the current murders and attempted murder of another young female. (T 88)

Dr. Tonia Werner, a Board-certified psychiatrist,<sup>3</sup> was the State's first expert called. Presently, she is the Chief Medical Officer at Meridian Behavioral Healthcare. (T 121) She testified she was familiar with the Commission the Governor creates following the signing of a death warrant as she was appointed five times previously and appointed to the Commission to evaluate Owen. (T 122-23) Here, the Commission was to evaluate Owen's sanity to be executed. Along with Dr. Werner, the Governor appointed Drs. Myers and Lazarou and together they evaluated Owen. The process entailed reviewing documents and records related to Owens' trials, prior mental health testimony and reports, and materials from the Department of Corrections ("DOC") including Owen's medical and classification records. In addition to its review of record materials and criminal investigative materials, the Commission interviewed Owen and five DOC personnel who had known Owen for up to 14 years. (T 123-24, 140, 146) One of Owen's attorneys was in the interview room when the Commission spoke with Owen. The interview process of Owen lasted from 3:04 PM to 4:40 PM. (T 125-26, 140)

Although the Commission spent less time with Owen than Dr.

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<sup>3</sup> Dr. Werner is licensed to practice medicine in Florida and is Board certified in Psychiatry and Neurology and Board certified in general psychiatry and forensic psychiatry. (T 121)

Eisenstein did, Dr. Werner and her colleagues developed a rapport with Owen. In fact, Owen immediately told the Commission about his "delusion" as they introduced themselves and obtained his understanding of why doctors were seeing him. In discussion of his "delusion," Owen told the Commission that "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) In response to the question whether the genuineness of the "delusion" was essential to a diagnosis of schizophrenia, Dr. Werner explained that "[i]t takes more than one delusion to meet the criteria for the diagnosis of schizophrenia. It would be more consistent if it was a true and believed delusion. It would be more consistent with a diagnosis of delusion disorder, as opposed to 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)

In fact, "the 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. The first report was some ten years after the murders. That fact is something that must be considered in assessing the credibility of the offered "delusion," especially in a forensic setting. Also of

import, is consideration that the "delusion" was first offered when Owen was facing a re-trial of his first murder trial. (T 142-43, 157-59, 165-66) Dr. Werner, as part of her evaluation and review of records, considered Owen's 20-hour police interrogation conducted shortly after the murders. Dr. Werner would have expected Owen, who was alleged to be in the midst of his "delusion," to have mentioned it to the police. However, Owen never spoke of his "delusion" with the officers. Not to mention to the police what has been alleged as an active "delusion" is unusual. That alone is counter-indicative of a diagnosis of delusion. (T 166-67)

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 the 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. Putting the hammer in her vagina has nothing to do with that and is unexplainable." (T 127, 140-41) Likewise, if Owen had a fixed delusion, Dr. Werner would expect it to be exhibited in his life in other ways as well. She elucidated that she would expect to see the "delusion" manifested in Owen's behaviors, actions, mannerisms, and dress; "just the way he behaves and

holds himself." (T 128) While Owen offered that he tried to hide outward manifestations of feminine mannerisms for fear of retaliation in prison, Dr. Werner rejected that explanation noting that in the 1990's, while Owen was in prison, he did exhibit some female characteristics, thus, indicating he was not concerned for his safety then. Further, exhibiting himself with feminine mannerisms on occasion and male characteristics at other times generally is inconsistent with a fixed delusion. (RT128, 154-55)

It was Dr. Werner's estimate that she had made thousands of evaluations of people for schizophrenia and has diagnosed people with schizophrenia. She has worked with schizophrenics and those who are unmedicated schizophrenics. 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 that a person must exhibit two of the following four criteria: (1) hallucinations, (2) delusions, (3) disorganized behaviors and thoughts, and (4) "the negative symptoms are avolition, not being reactive to anything." In reaching his diagnosis of schizophrenia, Dr. Eisenstein used delusions and avolition. However, the Commission did not find those symptoms. When interviewed by the Commission, Owen "was very personable, very interactive." Important to Dr. Werner was when Owen laughed saying he did not understand



something "because he wasn't a woman." This indicated to Dr. Werner that Owen was reactive; the negative of avolition. Owen's reactions during the interview were "completely inconsistent with the diagnostic criteria" for schizophrenia. (T 128-29, 165-66)

Turning to Dr. Eisenstein's finding that Owen was exhibiting dementia, and "insidious dementia process," Dr. Werner stated that such was not a medical diagnosis. It was Dr. Werner's opinion that Dr. Eisenstein was reporting "some type of decline in [Owen's] cognitive functioning or memory." According to Dr. Werner, a dementia or Alzheimer patient typically would exhibit a slow progressive memory loss starting with the loss of short-term memory then eventually long-term memory. The Commission found that Owen did not exhibit any of the memory loss symptoms during his interview. (T 129-30) Also, dementia was not documented in Owen's DOC records. (T 159-60). Dr. Werner pointed out that Dr. Eisenstein had stated Owen "knocked it out of the park" "did quite well" on the first day of testing with respect to a memory test administered. That result is "totally inconsistent with then saying that [Owen] had dementia on the second day. (T 162-63)

Review of Owen's medical records revealed that he had been symptom-free of any signs of serious mental illness, although he had been

prescribed various anti-depressants and anti-anxiety medications. Over the last 40 years in prison, Owen had not been prescribed any medications for the treatment of schizophrenia. Dr. Werner treats schizophrenics and has experience with unmedicated schizophrenia patients. A schizophrenic who is medicated can remain stable and maintain the activities of daily living; sometimes the medicated person is able to work and function within the community. However, an unmedicated schizophrenic, especially one 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 the interview with Owen revealed any evidence of a downward drift in functioning. (T 130-32, 140, 143)

The following exchange between the Assistant Attorney General and Dr. Werner elucidates the Commission's rejection of Owen's "delusion" and Dr. Eisenstein's offered diagnoses:

Q So if someone is unmedicated for this long a time, would they be able to turn on and off they symptoms over time?

A Correct. They can't just turn them on and off like that. They may be more present at different time, but they don't just turn on and off.

Q And would you expect to see behavioral issues or

DRs<sup>4</sup> or reports of officers that he's acting weird at all?

A Yes. In the majority of them, absolutely, yes.

Q And did you see any evidence of that in the record?

A No. He had been incarcerated since 1986 in the Department of Corrections, and I think there were a total of three DRs, and they were very early on. And all of the officers who had known him, like, for the past 14 years and since he's been transferred to FSP<sup>5</sup> said that they had never had any behavioral issues with him.

Q So, if anything, his behavior got better over time that worse.

A Correct.

(T 138)

Following the interviews of DOC personnel and Owen, as well as review of relevant records/materials, a joint report was written and submitted to the Governor revealing the Commission's findings. The report was a collaboration between the three doctors with Dr. Werner drawing up the first draft and the doctors each adding his/her own edits and suggestions. The Commission found that Owen met the diagnostic criteria for antisocial personality disorder as described in the DSM-5<sup>6</sup> and that

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<sup>4</sup> Disciplinary Reports.

<sup>5</sup> Florida State Prison.

<sup>6</sup> Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.

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, State's Ex. 3) 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 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 difference between the crime facts and his offered "delusion." (T 133-34)

The Commission also discussed with Owen his pending execution. Owen's answers 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 was 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)

With respect to the Minnesota Multiphasic Personality Inventory ("MMPI") test administered to Owen by Dr. Eisenstein and reported by him that it was a "floating profile," Dr. Werner explained such was describing "an overacknowledgment of symptoms." To a psychiatrist, that means "malingering as opposed to schizophrenia." (RT135-36) Dr. Wrrner also 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:"

And 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. In clinical setting, (sic) when somebody comes to my office and wants assistance with something, I believe them, and I take them at face value, but in the correctional setting, you can't do that.

(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)

Lisa Wiley ("Wiley"), a former DOC Psychological Specialist with a master's in psychology, testified she provided mental health services to inmates, including Duane 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, Defense Exhibit #4) When Owen would have returned to death row from scheduled court proceedings, Wiley would have notified him of any new services, such as whether transgender accommodations were available or Owen may have heard it from other inmates or staff officers. (T 227-28) Wiley would not be privy to Owen's court appearances or schedule. She would not have any knowledge of whether Owen was preparing to use gender dysmorphia/gender disorder as a trial defense in any court proceedings. Moreover, generally Wiley assumes when an inmate is seeking out her services, he is doing so in good 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. However, generally she takes inmates as coming to her in good

faith. (T 228-29)

Wiley testified that 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 attention of the senior psychologist. (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. Wiley had no reports, other than Owen's self-report, as to what steps he may have taken to alter his gender; she saw no physical evidence supporting Owen's account. However, she had no reason to doubt Owen's report or to find him malingering. (T 230-32)

The State also called Dr. Wade Cooper Myers ("Dr. Myers"), who for the last 14 years has been a professor of psychiatry at Brown University and is the chief of the division of forensic psychiatry. He has been practicing for approximately 35 years. Dr. Myers is Board certified in general, forensic, and child and adolescent psychiatry. He was a member of the Governor's three-psychiatrist Commission that evaluated Owen regarding his claim of insane to be executed and he has done approximately ten such evaluations. Dr. Myers, along with Drs. Werner

and Lazarou, was tasked with determining whether Owen "understands the nature of the death penalty, its effects, and why it has been imposed on him" and to assess Owen's current mental status. (T 254-57, 271-72) Following the Commission's review of materials, including videos of Owen's police interrogations, and interviews with DOC personnel and guards, the three-psychiatrist Commission collaborated in drafting the report on Owen for the Governor. The doctors "didn't really have any disagreements in putting the report together." The Commission found Owen has no current mental illness, was malingering to avoid the death penalty, has an antisocial personality disorder and understands the nature and effect of the death penalty and why it is to be imposed upon him. Owen is legally sane. (T 267, 269-73, 282-83, 298; R. 550)

Like Dr. Werner, Dr. Myers reported having reviewed trial evidence/testimony, a sentencing report, test results, investigative evidence, and DOC medical/mental health records. The Commission also reviewed Dr. Eisenstein's report on his evaluation of Owen conducted post-warrant signing and the Commission interviewed DOC personnel and Owen. (T 258-59) When Owen was first presented, the Commission explained why the doctors were there and described the nature and purpose of the evaluation. The doctors confirmed that Owen understood



the purpose of the evaluation and advised him that he could take a break if needed. Owen's interview lasted about 100 minutes without Owen seeking a break. (R 259-60)

The Commission listened to Owen describe some beliefs he had, but Dr. Myers "didn't in any way believe that they were delusions...." Owen described his belief he was a woman trapped in a man's body; and to release his inner self was to take in fluid from a female, and thus, help him get estrogen and then he could convert into a woman and grow breasts and make his penis and testicles disappear. As Owen continued, his voiced beliefs grew more fantastical. He described for the Commission that his penis was a hose designed to extract estrogen from his female homicide victims. 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. (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 a delusion who has a delusion. You can't reason with them." (T 261-62)

Dr. Myers doubted the genuineness of Owen's professed "delusion" because it came on years after the two sadistic homicides of which he was convicted; 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. Dr. Myers would expect a person with a delusion "to be talking about these delusions to people that he interacts with, healthcare personnel, to doctors, and so on - - early on, if he really had such delusions around the time of these original crimes." There was no evidence of Owen discussing his "delusion." Had Owen's "delusion" been true, he would have discussed it during the protracted police interview. (T 262-63)

Of note for Dr. Myers was the fact Owen's "delusional belief" surfaced only "when he talks to expert witnesses about his case, but they (sic) don't seem to come out with any healthcare personnel or with any of the correctional officers who are around him on a regular, not uncommon daily basis." (T 286) 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) Dr. Myers saw no DOC records for referrals for delusional thinking over the last 20 years; "... it's

inconceivable to me that somebody could have schizophrenia with these severe delusions and nobody for 20 years picked it up, except for expert witness on a rare occasion during an interview with him." (T 286-87)

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. Owen's complaint that he feels like a woman trapped in a man's body 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. Very commonly, they will have other paraphilias as well as sexual sadism." (T 287) Gender dysphoria does not cause aggression or delusional thinking; it is not a delusion. (T 288) Clear to Dr. Myers, based on the DOC personnel interviewed, none of the officers saw any feminine traits exhibited by Owen, nor did Owen voice his desire to transition to a woman or disclose to the officers that he felt like a woman trapped in a man's body. In fact, recently on a DOC medical form, Owen identified himself as "heterosexual." Also, the fact Owen rapes women not men, supports the finding he is "oriented in a heterosexual way." While Owen voiced that he has sex with his victims to obtain their essence, Dr. Myers was suspicious of that account as Owen had orgasms, as seen by the semen he left and it was more plausible that

Owen was just "getting sadistic gratification from these violent sexual attacks." (T 297)

While Dr. Myers agreed that Owen may have some gender dysphoria, it was not "a terrifically strong urge." 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." As an example, Dr. Myers offered:

[Owen] said that when he put his hose, his penis, in the victims and was raping them, the hose was to suck out their fluids and estrogen. And so I believe I asked him, I said, well if you're ejaculating in them and putting something in them, how is the estrogen then going to go through your hose? Because then your ejaculate is coming out. And he says - - and he had an answer for that.

And he said, oh, well, what happens is the semen, going through my penis, opens it up; so then that makes a nice open tube for the estrogen to go back into me through the hose.

. . .

And every time we asked him a question like that, he'd come up with another answer that you don't see in people with delusions. Typically, when you confront, and I say confront, I don't mean in a harsh way, but you ask them - - someone with a delusion, well, tell me how you know that there are robots in your attic.

And they'll tell you, well, I just know they're there. Well how can they be there? I don't know how they're there, but I just know they're there.

You can't start reasoning with them and give them logical reasons why that can't be or how that's difficult to understand because it's a hundred percent belief that they have that they can't be reasoned out of that.

...

But they [the delusional person] don't keep giving you more and more answers.

(T 301-02)

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)

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)

Experienced in evaluating/treating thousands of people with schizophrenia for over 30 years, 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." Owen "showed a full range of affect;" he showed a

sense of humor; sometimes he would smile. (T 265, 293) Dr. Myers' understanding and interpretation of the records, in addition to the Commission's interview of Owen showing he was high functioning, led Dr. Myers to the conclusion Owen has been completely free of any symptoms and signs of serious mental illness for decades. It is very rare that Dr. Myers has met someone with a psychotic disorder who would not share his delusional thinking. (T 293).

Dr. Myers also disagreed with Dr. Eisenstein's conclusion 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)

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, 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)

While Dr. Myers agreed some people with beliefs or interests may be embarrassed if others found out about them, in his experience, it would be



very unusual for a person with a genuine psychiatric delusion to be embarrassed about his delusion. In fact, that person with a true delusion would "tend to tell" others of his delusion; he genuinely believes his "delusions a hundred percent." "[T]he way the illness works, for instance, in schizophrenia, you lose insight, and . . . it also erodes your skills, where you're not thinking so much about embarrassment but that you've got this delusion or delusions dominating your thought process and . . . it's leaking out to other people around you; it comes out in your writings and so on." A person with a true delusion would not be able to turn it on and off. The same would be true of schizophrenia;" it's such a pervasive disorganizing illness," the person "would not be able to suppress that." (T 270-71)

Dr. Myers noted from Dr. Eisenstein's May 26, 2023, report that he administered an MMPI to Owen. Unfamiliar with the term Dr. Eisenstein used, "floating profile," Dr. Myers understood that term to mean Dr. Eisenstein found a lot of elevated scales on the MMPI. That 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)

With 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.

... virtually, without exception, serial sexual killers have antisocial personality. It's just a key ingredient to why they started getting involved in that sort of behavior." Owen's "arrest sheet is quite long and varied. There's a lot of different types of crimes on there . . . 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, really, when you look at all of the things he's been involved.

(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)

The third doctor on the Commission was Dr. Emily Lazarou. She is a general and forensic psychiatrist with Board certification in general adult and forensic psychiatry. (T 321-22) She reviewed trial materials, police interrogation videos, mental health expert reports/testimony and other materials for her evaluation of Owen. Dr. Lazarou relied on her experience with seeing over a 1000 schizophrenic people to assist with her evaluation of Owen. (T 324-26)

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)

Transgenderism is very familiar to Dr. Lazarou from her practice. 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 had any thoughts of wanting to be female, he would have been acting like a woman on the video, "and if that's what your goal is, so much so that you're willing to beat someone's head in and rape them to get their essence,

you're going to be acting feminine. ... there was not a feminine shred in that whole [video]...." (T 333-34) Dr. Lazarou also noted that when Owen was moved from Union to Florida State Prison recently, he identified himself as "heterosexual." (T 335) Also, Dr. Lazarou noted that Owen first discussed his gender story a decade after the murders and two trials, and never mentions 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. Furthermore, a schizophrenic cannot turn his delusional disorder on and off; the person lives in his delusion and speaks to others as though they are living with him in his delusion. The person cannot turn off his delusion because that is where he lives. He cannot turn it on and off; he cannot stop the delusion. (T 335-37)

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 program allows for group therapy, hormone therapy, and the wearing of panties and bras. The only time Owen discussed the gender issue coincided with his retrial for the KS murder in 1994; initially Owen grew his hair out a little, but right after the trial, his hair was again cut and he went

back to "Mr. Owen" and refusing mental health visits. (T 337-40) Dr. Lazarou concluded that Owen's "delusion" was nothing but a story; his actions at the crime scene have 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)

Owen is not schizophrenic and has never been medicated for schizophrenia and never been on any antipsychotic medications even when he was claiming he was in the throes of his "delusion." 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 all agreed that Owen was malingering and had an antisocial personality. Owen committed several crimes when he was a young person. He also liked to dominate women and to shock women. (T 341-43) 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." Further, 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. Lazarou is familiar with the facts of Owen's two murders. She noted that Owen took steps to conceal his identity and to preclude his

arrest. Those factors lead Dr. Lazarou away from a diagnosis of schizophrenia more than anything else. A person with a true delusion would not be interested in creating an alibi, setting the scene as he did, pre-planning what he would do should the children at the homes awaken, or planning out every little detail of the crime as he did. Someone who wants to be a woman, as Owen claims he wants to be, would not be going through his victim's purse, casing the scene an hour before his attack, moving KS's body so he could rape her, or cleaning the GW scene. Those activities are inconsistent with finding Owen's "delusion" genuine. (T 343-45) When someone has a true delusion, "it would spill out into other things. It wouldn't be circumscribed to just one thing. "It spills out into their life." (T 383)

Everyday Dr. Lazarou works with those that have delusions. She knows how those with a delusional disorder look and she has worked on defense cases where a true delusional disorder exists. Those with a true delusion "live in the delusion;" they do not turn it off and on whenever convenient for them or when something is up for an appeal or they get a retrial. Without medication the delusion in fact gets worse. If Owen had a delusion, and he had yet to become a woman, then any female in the prison would have been at potential risk. Owen never attacked in prison,

because his "delusion" was not genuine. (T 386-87)

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)

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 because Owen does not suffer from a psychosis. (T 408-10)

The State presented four DOC correctional officers who have had contact with Owen. They are Sergeant John Manning, Assistant Warden Jeffrey McClellan, Lieutenant Daniel Philbert, and Sergeant Danny Halsey. Sergeant Manning has known Owen for almost six years and the other DOC personnel have known Owen since May 9, 2023. (T 170-71, 184, 202, 246) In the almost six years Sergeant Manning has supervised Owen,



Owen never talked of becoming a woman, never acted feminine, and never mentioned anything about transgenderism. While on death row, Owen read, wrote, and drew a lot. Owen did not exhibit any signs of memory loss, reduced concentration, personality/behavioral changes, or depression. 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. (T 172-76) Assistant Warden McClellan first met Owen when he was transferred to Florida State Prison ("FSP") after the warrant was signed on May 5, 2023. When first admitted to FSP, Owen identified himself as heterosexual. Owen did not claim to be transgender. Also, Owen brought over 20 books with him to FSP and looks at them daily. (T 184-92)

Daniel Philbert, first met Owen at FSP after the death warrant was signed. Owen brought about three dozen books with him to FSP. Many were math and science test books; there was a law book included. Owen reads daily. No odd or altered behaviors have been noted; no disruptive or psychotic behaviors have been observed. (T 202-07) Sergeant Halsey met Owen at FSP after the warrant was signed. They see each other daily. The officer has observed no changes in Owen's behavior or mental abilities. Owen's mental capacity is the same, if not better than others

Sergeant Halsey supervises. Recently, Owen has been happy to visit with friends and continues to correspond with others, including a girlfriend from Ireland. Owen reads daily. No memory, cognitive, or concentration problems have been observed. (T 244-48)

Following the close of evidence,<sup>7</sup> the trial court issued his order finding Owen sane to be executed. (R 607-29) The court set forth the legal standard for a sanity determination under Rule 3.812, i.e., "whether [inmate under an active warrant] 'lacks the mental capacity to understand the fact of his impending execution and the reason for it.'" (R 609) 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 "credible and compelling" as related to Owen's current mental condition. 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

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<sup>7</sup> The State has not outlined the testimony from his two former and one current legal counsel given the question at issue in the Rule 3.812 ruling and subsequent appeal.

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 announced:

This Court finds that Duane E. Owen does not have any current mental illness. This Court finds that Mr. Owen's purported delusion is demonstrably false. This Court finds that Mr. Owen has an antisocial personality disorder. This Court finds that Mr. Owen is feigning or malingering psychopathology to avoid the death penalty. Even 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. 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)

Following the trial court's ruling, this Court issued a scheduling order.

Owen's appeal followed.

## SUMMARY OF THE ARGUMENT

**Argument I** - In assessing Owen's sanity to be executed, the trial court applied the proper standard as announced in *Ferguson v. State*, 112 So. 3d 1154 (Fla. 2012). The trial court also made credibility findings when determining Owen is sane to be executed. That determination is based on substantial competent evidence resting on evidentiary hearing testimony, appellate records, investigative materials, and DOC records spanning some 40 years. This Court should affirm.

**Argument II** - The trial court did not abuse its discretion in denying a continuance to allow Drs. Berlin and Sultan to testify live before the court. Neither doctor has seen or asked to see Owen to re-evaluate him and based on their admitted, but unsworn affidavits, those doctors were anticipating merely testifying to what they did in 1994-1999 and presented in the retrial of the KS murder. Their testimony was a matter of record and the parties agreed Drs. Berlin and Sultan, had they been called, would testify consistent with their former trial testimony. No reversible error occurred, and this Court should affirm.

## **ARGUMENT**

### **ARGUMENT I**

#### **THE CIRCUIT COURT'S DECISION FINDING OWEN COMPETENT TO BE EXECUTED IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE (RESTATED)**

Owen was afforded a full and fair hearing on his competency and/or sanity to be executed following an evidentiary hearing pursuant to Rule 3.812. The lower court found that Owen had not met his burden of establishing by clear and convincing evidence or even the lower preponderance of the evidence standard that he was incompetent or insane to be executed. The 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, and therefore, this Court should affirm the decision below.

As noted above, Owen has the burden to establish that "he lacks the capacity to understand the fact of the impending execution and the reason for it." *Ferguson*, 112 So. 3d at 1157. The appropriate standard applicable for this determination has been settled previously in Florida wherein this Court reaffirmed that the United States Constitution requires the following:

In this context, the Eighth Amendment requires only that defendants be aware of the punishment they are about to receive and the reason they are to receive it. *See Ford*, 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring). Our

decision in *Provenzano* requires that Ferguson understand the connection between his crime and the punishment he is to receive for it. *Provenzano*, 760 So.2d at 139. In finding Ferguson sane to be executed, the circuit court found that “Ferguson 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 evidence that in his current mental state Ferguson believes himself unable to die or that he is being executed for any reason other than the murders he was convicted of in 1978.” Order at 18. We find that there is competent, substantial evidence to support the circuit court's determination that Ferguson is sane to be executed.

*Ferguson* 112 So. 3d at 1157. Florida adopted the Eighth Amendment standard announced by Justice Powell in *Ford*.” *Provenzano v. State*, 760 So. 2d 137, 140 (Fla. 2000). See Rule 3.812(b) (“whether the prisoner lacks the mental capacity to understand the fact of the pending execution and the reason for it”). Florida law comports with the constitutional requirements under the Eighth Amendment. See *Ferguson v. Sec’y Dept. of Corr.*, 716 F.3d 1315, 1335 (11th Cir. 2013) (finding that the Florida Supreme Court’s competency standard is constitutional and not inconsistent with clearly established federal law). In its order, the lower court applied the correct standard pursuant to *Provenzano v. State*, 760 So. 2d 137 (Fla. 2000).

On June 4, 2023, the trial court issued its order denying Owen’s claim pursuant to Rule 3.811 (d) finding that Owen failed to meet his burden that he is insane to be executed. The court made clear that it had analyzed the

claim under both the clear and convincing standard as well as the lesser standard of preponderance of the evidence and concluded as follows:

Duane E. Owen does not meet the criteria for insanity at the time of the execution.

Duane E Owen does not lack the mental capacity to understand the fact of the pending execution.

Duane E. Owen does not lack the mental capacity to understand the reason for the pending execution.

Duane E. Owen understands that his execution is imminent and the reason why he is to be executed.

(R 627). 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 asserts that those findings are well supported by the record and relief must be denied.

As detailed extensively in the State's Statement of The Facts, the evidence in support of the trial court findings included the testimony of the three forensic psychiatrists who comprised the Governor's Commission; four prison guards; and documents, reports, testimony and evaluations, Owen's taped confessions, actions, and behavior from 1984 to the present. The hearing lasted over a day and half and the court heard testimony from multiple witnesses.

The pith of Owen's claim below was that he has suffered most of his

life from delusional schizophrenia. He argued below that this mental illness is long-standing, fixed, and chronic and now it is the basis for his allegation that he is insane and incompetent to be executed. (R 393-410, 555-563, 603-606). However, on appeal Owen has modified that argument and he now takes aim at the lower's court's findings alleging that The Circuit Erred in Taking into Consideration Owen's Past Sanity Instead of Only Considering Owen's Current Sanity to be Executed. (IB 28-33) He argues that the trial court focused impermissibly on evidence from the time of the crimes and from his previous legal proceedings rather than on his present mental illness today. The State asserts that Owen's argument is stunningly disingenuous as it is Owen who framed the issue and made his past mental health the focus of the proceedings below. The entire premise for his claim before the lower court was based on the opinion of Dr. Eisenstein who evaluated Owen on May 15, 2023 and May 31, 2023. The overriding and primary claim in support of Eisenstein's theory that Owen has schizophrenia now and suffers from delusions now is his opinion that 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 on May 16, 2023 the following:

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) (emphasis added). He further explains the following:

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) (emphasis added). Dr. Eisenstein concluded that this long-standing chronic delusion forecloses Owen's ability to understand the reason for his execution. (R 557) While faulting the State's experts for relying on information concerning Mr. Owen's past mental health record, Dr. Eisenstein relies on similar information to support his own diagnosis, including: (1). testimony of various doctors from Owen's re-trial in **1999**; (2) medical and school records from **1977**; (3) jail records for **1978**; (4) and Dr. Blackman's report from **1984**. (R 561).

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 wherein Judge Cohen re-imposed the death penalty for the killing of KS. He also attached the unsworn affidavit of Dr. Sultan who has not seen Owen since 1999. Notably she opines today:

When reviewing Mr. Owen's **prison records**, [1994-1999] I noted there were extensive mental health records and

psychiatric examination records concerning his **psychological and psychiatric difficulties through the years....**

Mr. Owen has experienced severed, fixed **delusions since his young teenage years, and was suffering from a delusional disorder during the incidents.**

(R 394-409) (emphasis added). 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 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 can opine today that the same schizophrenia still exists and makes him insane to be executed. (R 603-606) Lastly, Owen introduced as evidence his DOC Problem List from 1996 referencing his complaint of gender identity disorder. He then offered the testimony of Ms. Lisa Wiley, his mental health counselor from 1996-2003, to demonstrate that Owen did in fact report it to others. This Court will recall that Owen submitted into evidence the unsworn affidavits of Drs. Berlin<sup>8</sup> and Sultan which purported to reaffirm their 1999 testimony and findings. (T 221-25, R 407-10, 563, Defense

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<sup>8</sup> Additionally, Dr. Berlin offered his assessment that Owen today continues to suffer from schizophrenia which impacts currently his ability to "think and choose rationally." Incredibly, this "opinion" was offered without Dr. Berlin ever having contact with Owen in the last 24 years.

Exhibit #4, 603-05) Now, on appeal, Owen is abandoning that unsuccessful strategy by directing the focus away from the mountain of evidence presented below that laid bare his baseless and unsupported claim that he is insane to be executed. Instead, he claims that the trial court placed undue focus on his past because that is irrelevant to whether he is insane to be executed today.

As noted above, the State presented the testimony of the three psychiatrists who comprised the Governor's Commission. Dr. Tonia Werner was the first to testify. She spent hours at home reviewing records sent to her and reviewed medical and classification records for Owen prior to the evaluation with him. (T 123-127) She testified that Owen readily discussed the delusion which generally was that he is a woman in a man's body, and he must have intercourse with a female victim at the time she "expires" in order to get her essence. (T 127) Dr. Werner opined that the delusion was fake for several reasons. First, the delusion was inconsistent with some of the facts of the murder of GW. Although Owen claimed he must absorb her essence, he sexually assaulted GW with a hammer as well. That assault had no purpose or place in his "delusion" and remains unexplained. (T127) Second, this alleged long term fixed delusion would have been evident in Owen's behavior, actions, mannerisms, dress, and how he holds himself

overall. (T 128) Third, contrary to Dr. Eisenstein's assessment that Owen exhibits avolition, Owen was the opposite in the interview. He was personable, interactive, and he even laughed. He was also reactive, which is contrary to what a schizophrenic would present. Fourth, Owen has never been prescribed any medicine for schizophrenia while in DOC. (T 131) Dr. Werner, who has extensive experience with unmedicated schizophrenic patients, opined that you would see a downward drift in their overall functioning. (T 131) There was no evidence of that in Owen. (T 131) In fact, his behavior in prison improved over time. (T 138) Dr. Werner has diagnosed and evaluated people with schizophrenia thousands of times and in her opinion, Owen does not present like that. (T 138) Instead, he meets criteria for antisocial personality disorder; he is not insane to be executed, he is not incompetent to be proceed, this is a feigned delusion, and he is a malingerer. (T 133)

Dr. Werner disagreed completely with Dr. Eisenstein's finding that Owen was not malingering. Dr. Eisenstein's description of the MMPI for malingering, included a showing of a floating profile. Dr. Werner explained that a "floating profile" means that every category in the MMPI is above normal which means the person is overreporting of symptoms, i.e., malingering. (T 135-136)

Dr. Werner discounted Dr. Eisenstein's approach to his evaluation because Owen is not a patient who "must be believed", he is an evaluatee in a forensic setting and not a patient in a clinical setting. (T 137).

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

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. He—I had a couple marked.

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 that 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)

The State's next expert witness was Dr. Myers, a professor of psychiatry at Brown University and the Chief of the forensic psychiatry division. (T 254-57, 2710-72) Dr. Myers listened to Owen explain his delusion, however, Dr. Myers dismissed it completely because: (1) Owen never mentioned it during his confessions or to the mental health professionals who had evaluated him early on; (2) Dr. Myers testified that

the “delusion” was not presented until years after two sadistic homicide trials; (3) the delusion fits the facts of the crimes perfectly.

Additionally, genuine delusions are pervasive in someone’s life and if present, Owen would have discussed it during his confessions. (T 262-63). Owen does not exhibit any symptoms of a schizophrenic; he does not have confused thinking; his thoughts are not jumbled and illogical; there is no disorganization; and indeed, someone untreated would not be able to hide his manifestations or symptoms for three to four minutes much less 30-40 years. In other words, a true schizophrenic cannot turn the delusional thought process on and off as Owen contends that he can. (T 264-265, 270-271) Schizophrenia is a “downward deteriorating illness” that would be observed by someone. (T 286-89) Owen’s alleged delusion is self-reported and is presented only to defense expert witnesses in legal proceedings. (T 286) Dr. Myers was also suspicious of the genuineness of the delusion because Owen, orgasmed in his attacks which is more consistent with a sadistic gratification from these violent sexual attacks. (T 297) He also explained that even if someone had gender dysphoria, that is not a mental illness, it does not cause aggression; it does not cause delusions; it does not cause a cognitive decline. (T 289) Dr. Myers also testified that when asked about the impending execution, Owen admitted knowing the fact of

his execution would lead to his death, and it was related to his killing of these women. (T 267-268, 306-307)

The final doctor to testify about her findings was Dr. Emily Lazarou. She is board certified in adult, general adult, and forensic psychiatry. (T 322) Dr. Lazarou has a forensic practice and a clinical practice, and has evaluated over a thousand people for schizophrenia. (T 325-326) Before meeting with Owen, Dr. Lazarou reviewed the records from both murder cases; crime scene photographs; Owen's video taped confessions; testimony, reports, and depositions of different doctors, and DOC medical and classification records; and interviewed DOC staff. (T 325, 327-328) She noted that there was no presentation of schizophrenia in the information she reviewed. (T 328) She was very direct and clear that Owen is not mentally ill:

Because he has no criteria, meets no criteria, a shred of criteria for schizophrenia. I mean, there's nothing about him that ever even looked like that. There's not an insane bone in his body. I mean, it's just—it jumps off of him, It is very clear, It's crystal clear.

(T 329).

The videotaped confession was also very telling. Owen was calm, casual, speaking clearly and confidently. He was running that interrogation. Moreover, there was not a shred of paranoia. (T 330) Most telling is the

fact that his interactions with the police were very consistent with the description of Owen by his mitigation witness, Dr. Peterson who testified at the penalty phase in the GW case. (T 332) Dr. Lazarou stated that Owen does not present as a schizophrenic; he presents as a man who thinks of himself as intellectually superior to the police<sup>9</sup>; one who thrives on the attention he gets from illegal activities; he was masculine sitting in the interview with his legs apart and his shirt open, drinking a beverage. (T 333-334)

Dr. Lazarou found it significant that Owen's alleged delusion motivated him to beat someone's head in and rape them, but there is not one shred of that behavior in the interview with the police. (T 334) She would expect to see some presentation of that delusion so close in time to actual murder, but there was none. (T 334) Moreover, Owen's purposeful behavior to cover the crimes is not the behavior of a delusional schizophrenic, but rather that of a person with an antisocial personality disorder. (T 344) Additionally, it would not be possible for Owen to control the delusion as it is not possible to turn it off and on. People with schizophrenia live in that world and they do not know that you do not live

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<sup>9</sup> Dr. Lazarou was very much taken that Owen would make up poems while talking with the police, and she repeated one during her testimony, "Roses are red, you pigs are blue. When you start counting victims, there will be quite a few." (T 333)



there with them, so they speak with you as though you are there with them. (T 336) The intensity of the alleged delusion described by Dr. Eisenstein in these proceedings, would make it impossible for Owen to hide it. Dr. Lazarou explained: "You can't separate it. You can't stop it. You can't turn it off and on. And it is just impossible." (T 337) Also significant to Dr. Lazarou, was the fact that Owen never received anti-psychotic medicine; he was classified as an "S1" inmate for the last twenty years, which means no psychiatric problems; and the description of his delusion to his expert witnesses is completely different from what he is and does in prison.<sup>10</sup> (T 340)

Dr. Lazarou arrived at the prison early on the day of the evaluation to review all Owen's medical records to ensure that she did not miss any information that would point to a different picture than what was revealed in the available records already reviewed. (T 346) However, the DOC records were consistent with everything else, as there was no indication of any reported mental illness; no treatment; and no medication. (T 346) Likewise, the guards with whom she spoke all stated that Owen was a great inmate, did not do anything wrong, and communicated appropriately. (T 347-348)

Dr. Lazarou was questioned as to why she did not view all 100 hours

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<sup>10</sup>Also significant was the fact that the "gender story" did not come out for a decade after the murders and after his first two trials. (T 335)

of Owen's videotaped confessions, just in case some symptoms of schizophrenia had emerged. She emphatically stated that is not possible, as schizophrenia does not just pop in, it is present from the beginning. The delusion would spill out into the person's entire life, and not just remain in one story. Delusions do not go away; they get worse with time and without medication. If Owen truly had schizophrenia, he would have been unable to sit quietly in court. (T 359, 384,386, 389) The type of illness Owen claims to have is not the type that you can reveal when you want to and hide it when you want to. It is a part of you as an individual. (T 239)

Dr. Lazarou also pointed out that Owen has been planning his last meal; he is determining where his possessions are going; and he is communicating by emails with others. (T 379) Such behavior is indicative of Owen's awareness of the fact of his pending execution.

All three doctors relied in part on the observations and interactions Owen has had with some of the guards who know him and are responsible for him. For instance, John Manning, is a sergeant at Union Correctional Institution, and part of his duties is to oversee the recreation and day room activities. (T 171) He has interacted with Owen for five or six years. He has spoken to Owen dozens of times; they talk about fishing, hunting, and Owen never mentioned becoming a woman. Owen has very intelligent

conversations, he likes to read books, and up until he was transferred out of UCI, he read and wrote a lot. No change in his behavior was observed. Sergeant Manning stated Owen has never appeared confused. The Sergeant saw no changes in Owen, no reduced concentration, no memory issues, and no personality changes. When he left UCI to be transferred to FSP after the warrant was signed, Owen said he understood what was going on, and he told people around him he was gone. (T 175) Owen enjoyed the day room, interacting with other inmates. (T 182)

Assistant Warden Jeffrey McClellan was next to testify. He explained the process generally about what happens when an inmate is transferred after a warrant is signed. Part of the process includes a sexual risk indicator. There Owen indicated that he was a heterosexual male. (T 190) When he was moved over to FSP Owen brought about three dozen books with him. Owen was not confused. (T 201).

Further evidence in support of the finding that Owen has not been suffering from schizophrenia is the testimony of his own witness, Lisa Wiley. Ms Wiley, had been a psychological specialist at FSP for twenty-five years, saw Owen monthly from approximately the mid-1990s until the early 2000s. (T 221) Notably, in their sessions together she never saw any evidence of schizophrenia. (T 229-230) Moreover, if she had, she would

have brought it to the senior psychologist's attention. (T 230)

The record is clear that the overwhelming weight of the evidence in this case, demonstrates that Owen is sane to be executed. He is aware of the fact of his execution, and that he will die. He also understands why he is being executed. The trial court's findings are more than supported by the record. *Gore v. State*, 120 So.3d 554, 557-559 (Fla. 2013) (upholding denial of relief under 3.811 as state's doctors' findings of malingering and no mental illness is competent and supported by other evidence including observations by DOC personnel, and the defendant's records); *Ferguson*, 112 So. 3d at 1157 (explaining that the presence of a mental illness does not preclude a finding that the defendant is sane to be executed and record supports finding that he is aware of the fact of execution and the reason for it); *Provezano v. State*, 760 So. 2d 137, 140 (Fla. 2000) (states' doctors conclusion that the defendant is sane to be executed is supported by the record, regardless of the fact that the defendant has some mental illness as he is deceptive and exaggerates symptoms).

Finally, the trial court appropriately determined that Dr. Eisenstein's testimony was not credible. Dr. Eisenstein saw Owen for the first time on May 15, 2023, six days after the signing of his death warrant. The next day, Dr. Eisenstein wrote a letter, which formed the basis for Owen to pursue

relief under Fla. Stat. 922. 07(1) (R 555) Following the Commission's report of May 24, 2023, finding Owen to be sane, a malingerer, free of any major mental illness, and antisocial, Owen doubled down on his allegation and was seen again by Dr. Eisenstein for an additional 7.5 hours on May 31, 2023. 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. (R 559-560)

For instance, Dr. Eisenstein's<sup>11</sup> fantastical claims that Owen is passive, not a liar, and non-violent strains credulity. Curiously, Dr. Eisenstein viewed this evaluation process in these proceedings as a "clinical examination" where "[p]atients don't lie." (T 59) On cross-examination, Dr. Eisenstein reluctantly stated that "perhaps" a person facing imminent execution may malingering during an evaluation. Dr. Eisenstein was intractable in his description of Owen's non-violent disposition regardless of overwhelming evidence to the contrary. (T 71-72, 76, 87-88).

For instance, Dr. Eisenstein was unable to explain how Owen can be described as non-violent and yet admit to numerous other crimes and murders. Dr. Eisenstein did not have an explanation for Owen's

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<sup>11</sup> Dr. Eisenstein has testified in 100 cases, the majority of which were capital, yet has never testified for the State.

premeditated actions before and after both murders to avoid detection and create an alibi. He could not reconcile that glaring contradiction. In fact, Dr. Eisenstein admitted that he did not and would not question Owen about any of the facts of the cases that were inconsistent with his delusion. (T 72)

In defending his opinion that Owen's delusion is real and is an element of his alleged schizophrenia, Dr. Eisenstein maintained that Owen has shared his delusion with others and has been consistent overtime about it. But, yet again, Dr. Eisenstein, could not explain why Owen never mentioned the delusion during his extensive confessions that took place less than three weeks after he murdered GW; he could not explain why Owen denied ever experiencing a delusion to Dr. Blackman or Dr. Peterson; or that he has never revealed this delusion to anyone at any time during the lengthy trial proceedings for the murder of GW or the lengthy trial proceedings in the first prosecution for the murder of KS. Dr. Eisenstein refused to consider Owen's actions as "selective reporting" of the delusion. (T 81)

Indeed, even this Court, found it significant that Owen had never mentioned his "delusion" before his re-trial for the murder of KS. See *Owen v. State*, 862 So. 2d 687,702 (Fla. 2003):

Notably, Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a

mental illness caused him to kill. He did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female. He did not explain or disclose in any way that the more frightened the woman, the more bodily fluids she would secrete, and the more satisfying it would be for him. In fact, during his interrogation, Owen in no way attempted to justify his actions. Also, there is no indication in either of Owen's previous direct appeals to this Court, first for the Slattery murder and then for the Worden murder, that he has ever raised this justification in the past.

When asked about Owen's prior medical history in the DOC records; Dr. Eisenstein could not remember whether Owen was ever prescribed anti-psychotic medicine over the last 40 years. When told that he had not, Dr. Eisenstein offered as a rationale that in DOC, the schizophrenic patient would have been required to report his problem to DOC, otherwise they would not be aware of his schizophrenia. (T 91) It was because Owen was too embarrassed to admit the delusion to anyone, he never received treatment for it. According to Dr. Eisenstein, Owen was able to control, suppress this serious untreated and debilitating disease for 40 years. Dr. Eisenstein's palpable bias was apparent and prompted the lower court to find: "Dr. Eisenstein presents as either incredibly naïve or intentionally and willfully naïve. The court does not find Dr. Eisenstein's testimony to be credible when evaluated against all the other testimony and other evidence." (R 613)

The State asserts that the lower court's rejection of Dr. Eisenstein's opinion that Owen is insane to be executed was proper as Owen's evidentiary presentation was equally void of any substance. It was completely refuted by: (1) the three independent doctors; (2) the objective facts of the cases; (3) Owen's confessions; (4) his numerous pro se filings and argument from 1992-2021, (5) a complete absence of any supporting treatment, diagnosis or observations in his medical or DOC records that support his alleged schizophrenia; and (6) no testimony from those who interact with him in his daily life in prison that he acted abnormally. Owen's eleventh-hour presentation is as glaringly deficient today as it was when first presented at his 1999 re-trial. In fact, the fallacy of this "delusion" and alleged insanity to be executed is further buttressed today, given that there is an additional 25 years of absolutely no indication whatsoever that this "delusion" exists let alone that it has impaired his daily life at all in the last 39 years. The trial court's findings are supported by competent substantial evidence and must be affirmed. *Gore*, 120 So. 3d at 557-58 (upholding denial of relief where evidence supported a finding that the state experts' opinions were more credible and supported by the other evidence); *Ferguson*, 112 So. 3d at 1157 (explaining that despite a diagnosis of paranoid schizophrenia, the evidence supports a finding that defendant



possesses a rational understanding of the fact of execution or the reason for it); *Provenzano*, 760 So. 2d at 140 (affirming rejection of Provenzano's claim of incompetency to be executed as the evidence shows exaggeration of symptoms and use of deception, therefore, regardless that there exists some degree of mental health problems, he understands the fact of his pending execution and the reason behind it). Notably, Dr. Eisenstein admitted on cross-examination that Owen was aware that he killed KS and GW. (T 72). Also, Owen knows that if he is executed, he will die. (T 73). The fact that he may disagree with the reason for his execution, does not belie the fact that he understands it.

## **ARGUMENT II**

### **THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A CONTINUANCE TO ALLOW THE TESTIMONY OF DOCTORS WHO HAD NOT SEEN OR EVALUATED OWEN IN TWENTY-FIVE YEARS**

Owen next alleges that the trial court abused its discretion in failing to continue the evidentiary hearing until both Dr. Berlin and Dr. Sultan could testify.<sup>12</sup> This argument is completely devoid of merit.

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<sup>12</sup> The State is compelled to point out the disingenuous position taken in this argument as it is in complete contradiction to the position taken in Argument I where Owen asserted that the trial court should not have

Neither doctor has seen Owen in 24 years, and neither doctor was going to see Owen at any point before the execution. Yet, Owen relying on *Provenzano v. State*, 750 So. 2d 597 (Fla. 1999) claims that the trial court committed reversible error by not continuing the evidentiary hearing until the following Monday. Owen argues that because both doctors evaluated Owen in the 1990s they now could have testified about the duration of Owen's longstanding and fixed "delusion". (IB 51)

The trial court did not abuse its discretion in denying Owen's request for continuance as this case is completely distinguishable from *Provenzano*. Therein, Dr. Fleming, had recently evaluated the defendant for the purpose of determining his sanity to be executed. *Provenzano*, 750 So. 2d at 600. This Court noted that it has remanded the case previously to specifically permit her testimony on the issue of Provenzano's sanity to be executed. *Id* at 601. However, that is not the facts of this case. Neither Dr. Sultan nor Dr. Berlin had seen Owen since 1999. In the three weeks after the warrant was signed, Owen never sought to have Dr. Sultan or Dr. Berlin re-examine him, nor did either doctor request time to be able to see Owen

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considered any evidence relevant to Owen's mental health status 30 to 40 years ago.

again. Dr. Sultan's unsworn affidavit,<sup>13</sup> was a repeat of what she testified to previously in 1999. (R 408-410) Moreover, there was no argument that her testimony would have been any different than her trial testimony. Likewise, Dr. Berlin's unsworn affidavit pretty much tracks his trial testimony and if he were to testify, it would be consistent to what he testified to in 1999. (T 467-470) The trial court allowed both affidavits to come in. (T 470) The trial court did not abuse its discretion in denying the request for a continuance. See *Gore v. State*, 599 So. 2d 978, 984- 985 (Fla. 1992) (finding no abuse of discretion in denying continuance to accommodate witness as substance of her testimony was presented through deposition).

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<sup>13</sup> The issue of whether Dr. Sultan would be available to testify at these proceedings came up initially at the May 26, 2023, status conference. (R 295-304, T 3-8). Therein the State objected to a long continuance highlighting the warrant schedule and timing of Owen's claim under Rule 3.811. (R 413-20 T 3-8) Owen's death warrant had been signed 17 days before the status hearing. Dr. Eisenstein had already seen Owen 11 days prior to the status conference which was only six days after the warrant was signed. Owen had already stated that he was going to pursue a claim of insanity to be executed the previous week during litigation of his postconviction motion. Dr. Sultan was known to Owen long before the signing of the warrant, therefore, securing her services before her week-long cruise was certainly a strategy that Owen could have pursued earlier.

## **CONCLUSION**

Based upon the foregoing, the State requests respectfully this Court affirm the denial of Owen's Rule 3.812 motion and finding that Owen is sane to be executed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7th day of June, 2023, I electronically filed the foregoing with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Lisa M. Fusaro, Assistant CCRC, at [Fusaro@ccmr.state.fl.us](mailto:Fusaro@ccmr.state.fl.us); and [support@ccmr.state.fl.us](mailto:support@ccmr.state.fl.us); Morgan P. Laurienzo, Assistant CCRC, at [laurienzo@ccmr.state.fl.us](mailto:laurienzo@ccmr.state.fl.us); and [warrant@flcourts.org](mailto:warrant@flcourts.org).

## **CERTIFICATE OF FONT AND PAGE LIMIT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in the foregoing is 14-point Arial, in compliance with Fla. R. App. P. 9.045(b) and pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief does not exceed 75 pages in length.

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