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IN THE SUPREME COURT OF FLORIDA

DUANE E. OWEN

APPELLANT,

vs.

STATE OF FLORIDA,

APPELLEE.
_____/

Capital Case

Case No. SC-2023-0732
ACTIVE DEATH WARRANT

STATE'S RESPONSE TO MOTION TO STAY THE EXECUTION

On Tuesday May, 9, 2023, Governor DeSantis signed a Death Warrant for Owen's execution, currently set for June 15, 2023 at 6:00 p.m. In keeping with this Court's warrant schedule issued on May 9, 2023, the postconviction proceedings in state court concluded on Friday May 19, 2023. The trial court denied relief, finding Owen's claims to be procedurally barred and untimely. (PCR 2078-84). Owen appealed and simultaneously with his Initial Brief, filed a Appellant's Motion For Stay Of Execution", The state's answer brief is filed simultaneously with this response. The state asserts that because there are no substantial grounds raised in the appeal of the denial of his successive motion, the request to stay the execution should be denied.

Facts of the crime and procedural history

The facts and a detailed procedural history of this capital case appear in the State's Answer Brief at pages 2 – 26.

Procedural history of current warrant litigation

On May 17, 2023, Owen filed a third successive postconviction motion and fourth overall, in the state trial court in this active warrant capital case. The successive postconviction motion raised two claims: (1) Owen was denied due process when the trial court did not stay his postconviction proceedings or in the alternative, the court did not conduct a proper inquiry regarding the waiver of the postconviction proceedings; and (2) a claim of newly discovered evidence of brain damage, "declining mental condition, and competency." Along with the motion for postconviction relief, Owen filed: (1) MOTION FOR STAY OF EXECUTION"; (2) "MOTION FOR DETERMINATION OF COMPETENCY PURSUANT TO FLORIDA RULE OF CRIMINAL PREOCEDURE 3.851(g)"; and (3) "MOTION FOR MRI AND PET SCAN". In denying the Motion For Stay of Execution, the trial court determined that Owen failed to present any substantial grounds for relief because all his claims were barred. The lower court also denied Owen's request for a competency determination pursuant to *Fl. R. Crim. Pro.* 3.851 (g) stating, "the Court does not find there to be factual matters requiring the

Defendant's input". (4PCR 2672-74).[1] Lastly, the lower court denied Owen's Motion For MRI and PET SCAN. Siting to *Davis v. State,* 742 So. 2d 233, 236 (Fla. 1999) and noting the issues of "brain damage, "mental health, and "competency" were previously raised by the Defendant in a prior motion for postconviction relief and subsequently waived by him, the request for further testing was denied. (4PCR 2075-77).

In the current request for a stay before this Court, Owen presents the same unsuccessful arguments and rationale denied previously. The State asserts that Owen has not presented any grounds to warrant an exemption to the procedural bars that are fatal to his claims. A stay is not warranted.

A stay of execution is warranted only when there are substantial grounds upon which relief might be granted. *Darden v. State*, 521 So. 2d 1103, 1104-1105 (Fla. 1988) (denying stay of execution when claim is procedurally barred by the law of the case doctrine). *Davis v. State*, 142 So. 3d 867, 873-74 (Fla. 2014) (explaining that a stay of execution is warranted only where there are substantial grounds upon which relief might be granted quoting *Buenoano v. State*, 708 So.2d 941, 951(Fla.1998), and denying a stay); *Chavez v. State*, 132 So.3d 826, 832 (Fla. 2014) (same standard citing

[1] Reference is to the instant appellate record, the fourth postconviction record as identified in the State's Answer Brief in the instant case.

Bowersox v. Williams, 517 U.S. 345 (1996), and denying a stay); *Howell v. State*, 109 So. 3d 763, 778 (Fla. 2013) (same standard and denying a stay).

As the State will explain in more detail in its Answer Brief in the instant postconviction appeal, neither of the two issues being raised are viable, much less substantial. Issue I, of the postconviction appeal, is procedurally barred as successive; untimely, and without merit. This claim is the third attempt to challenge the validity of Owen's 1997 waiver of his postconviction proceedings. *Owen v. State*, 773 So. 2d 510 (Fla. 2000, *cert. denied*, *Owen v. Florida*, 532 U.S. 964 (2001); *Owen v. Crosby* 854 So. 2d 182 (Fla. 2003); *Owen v. Sec'y for Dept. of Corr.*, 568 F.3d 894 (11th Cir. 2009), *cert denied*, 558 U.S. 1151 (2010).

In Issue II of the postconviction appeal, Owen alleges that he suffers from organic brain damage and incompetency and did so at the time of his trial. Although he now claims this is "newly discovered evidence", Owen is incorrect. He raised this claim in his initial motion for postconviction relief in 1997. It was raised as a claim alleging ineffective assistance of counsel for failing to pursue it at trial. Owen was granted an evidentiary hearing on the allegation; however, he ultimately waived the issue. *Owen*, 773 So. 2d at 512-513. Because it was previously known, Owen cannot demonstrate that this is newly discovered evidence, and thus, he cannot overcome the

procedural bar.

The remainder of Issue II alleges that Owen suffers from a "declining mental condition and dementia." However, as presented, that allegation has no relevance to these proceedings as those current conditions, whether they are present or not, do not impact the validity of Owen's conviction and sentence from 1986.[2]

Lastly, Owen's claim that the warrant time-frame is inadequate is also not a sufficient reason to grant a stay of execution either. While the warrant consists of a 41 day time-frame, Capital Collateral Regional Counsel-Middle (CCRC-Middle) has been Owen's counsel since 1994.[3] Finally, as demonstrated above, neither claim warrants an evidentiary hearing, as a matter of law, under this Court's controlling precedent. Moreover, when the Florida Supreme Court set the schedule for this active death warrant, it did so with the consideration that an evidentiary hearing may be warranted. However, neither claim warrants an evidentiary hearing, much less a stay of

[2] Should Owen pursue a claim for relief pursuant to *Fla. R. Crim. Pro.* 3.811, as he indicated that he may, **see IB at 58** that issue is not ripe and provides no justification for a stay.

[3] As this Court will recall, starting in 1986, Owen was represented by Capital Collateral Representative which became CCRC-Middle when that agency was created. Thus, Owen has been represented by CCRC and its successor agency for the past 37 years.

execution, the motion to stay the execution should be denied.

Owen has litigated his conviction and sentence of death since 1986. He has raised 41 issues spanning a direct appeal, four post-conviction motions; and a federal habeas petition and appeal. His current counsel, CCRC-Middle has represented Owen in all those proceedings except the direct appeal. He has had more than sufficient time to challenge this conviction and sentence.

Requesting additional time to pursue claims previously rejected after 37 years of litigation and on the eve of an execution cannot be condoned, by this Court. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (noting there is a strong equitable presumption against granting a stay of execution where the underlying claim could have been brought at such time as to allow consideration of the merits of the claim without requiring a stay); *Brooks v. Warden*, 810 F.3d 812, 824 (11th Cir. 2016) (noting a stay of execution is an equitable remedy that is not available as a matter of right and denying a stay of execution where the motion to stay was filed two months before the scheduled execution).

The State of Florida, the surviving victims, and the families of KS and GW[4] have an enormous interest in the finality and timely enforcement of valid

[4] Initials of the victims are used due to the sexual nature of the crimes.

criminal judgments. *Ledford v. Comm'r, Ga Dep't of Corr*., 856 F.3d 1312, 1320 (11th Cir. 2017) (denying an emergency stay of execution in a capital case because the claims were time-barred, not substantial, as well as due to the delay in raising the claims and noting the State and the victims' interest in the finality of the sentence). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). Courts should "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Id*. at 1134. As the United States Supreme Court has emphasized, last-minute stays of execution should be "the *extreme* exception, not the norm." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (emphasis added).

Accordingly, the motion to stay the execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May 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; and Morgan P. Laurienzo, Assistant CCR, at laurienzo@ccmr.state.fl.us. and warrants@flcourts.org.

/s/ Celia Terenzio
Counsel for State of Florida

/s/ Leslie Campbell
Co-Counsel for State of Florida

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in the foregoing is 14-point Arial, in compliance with Rule 9.045(b) Fla. R. App. P.

/s/ Celia Terenzio
Counsel for State of Florida

CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY that according to the Word program on which this motion was written the motion contains 1,667 in compliance with Rule 9.045(e) Fla. R. App. P.

/s/ Celia Terenzio
Counsel for State of Florida