

**No. SC2023-0819**

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

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IN THE  
**Supreme Court of Florida**

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DUANE E. OWEN,  
Appellant,  
v.

STATE OF FLORIDA,  
Appellee.

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

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**INITIAL BRIEF OF THE APPELLANT**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....ii

TABLE OF AUTHORITIES.....iii

REQUEST FOR ORAL ARGUMENT ..... vi

PRELIMINARY STATEMENT REGARDING REFERENCES ..... vi

STATEMENT OF THE CASE AND FACTS ..... 1

    I.    Procedural History .....1

    II.   Procedural History Regarding Competency to Be Executed  
          ..... 15

    III.  Relevant Facts from Rule 3.812 Evidentiary Hearing .... 16

SUMMARY OF ARGUMENT .....25

STANDARD OF REVIEW .....26

ARGUMENT .....21

**I.    THE CIRCUIT COURT ERRED IN FINDING THAT OWEN IS  
          SANE TO BE EXECUTED ..... 27**

**a. The Eighth Amendment Bars Execution of the  
          Insane .....27**

**b. The Circuit Court Erred in Taking into  
          Consideration Owen’s Past Sanity Instead of Only  
          Considering Owen’s Current Sanity to be Executed  
          .....28**

**TABLE OF CONTENTS - cont'd**

**c. The Circuit Court Erred in Dismissing Competent and Substantial Evidence of Owen’s Mental Illness and Delusions.....33**

**d. The Circuit Court Erred in Failing to Consider Competent and Substantial Evidence of Owen’s Dementia.....41**

**e. Conclusion .....47**

**II. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN DENYING A CONTINUANCE TO ALLOW TESTIMONY FROM DOCTORS WHO HAVE PREVIOUSLY EVALUATED OWEN.....49**

CONCLUSION .....53

CERTIFICATE OF SERVICE .....55

CERTIFICATE OF COMPLIANCE .....57

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Ferguson v. Sec’y, Florida Dept. of Corr.</i> , 716 F.3d 1315 (11th Cir. 2013) .....	48
<i>Ferguson v. State</i> , 112 So. 3d 1154 (Fla. 2012) .....	26
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986) .....	27
<i>Gore v. State</i> , 120 So. 3d 554 (Fla. 2013) .....	vi, 50
<i>Gore v. State</i> , 599 So. 2d 978(Fla. 1992) .....	27
<i>Green v. State</i> , 975 So. 2d 1090 (Fla. 2008) .....	27
<i>King v. State</i> , 211 So. 3d 866 (Fla. 2017) .....	28
<i>Madison v. Alabama</i> , 139 S. Ct. 718 (2019) .....	27, 37, 41, 47
<i>Madison v. Alabama</i> , 203 L. Ed. 2d 103 (2019) .....	vi
<i>Owen v. Crosby</i> , 854 So. 2d 182 (Fla. 2003) .....	9, 11
<i>Owen v. Crosby</i> , 03-81152-CIV, 2007 WL 9719051, (S.D. Fla. Sept. 6, 2007)...	14
<i>Owen v. Florida</i> , 506 U.S. 921 (1992) .....	2

**TABLE OF AUTHORITIES – cont’d**

<b>Cases</b>	<b>Page(s)</b>
<i>Owen v. Florida</i> , 532 U.S. 964 (2001) .....	9
<i>Owen v. McNeil</i> , 558 U.S. 1151 (2010) .....	14
<i>Owen v. Sec’y for Dep’t of Corr.</i> , 568 F.3d 894 (11th Cir. 2009) .....	14
<i>Owen v. State</i> , 247 So. 3d 394 (Fla. 2018) .....	15
<i>Owen v. State</i> , 596 So. 2d 985 (Fla. 1992) .....	1, 2
<i>Owen v. State</i> , SC2023-0732, 2023 WL 3813490 (Fla. June 5, 2023) .....	15
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007) .....	<i>passim</i>
<i>Provenzano v. State</i> , 750 So. 2d 597 (Fla. 1999) .....	50, 51
<i>Provenzano v. State</i> , 751 So. 2d 37 (Fla. 1999) .....	29
<i>Stephens v. State</i> , 748 So. 2d 1028 (Fla. 1999) .....	39
<i>Tompkins v. Sec’y, Dept. of Corr.</i> , 557 F.3d 1257 (11th Cir. 2009) .....	28, 30

<b>Constitutional Provisions</b>	<b>Page(s)</b>
U.S. Const. amend. VIII .....	<i>passim</i>

<b>Statutory Provisions</b>	<b>Page(s)</b>
Fla. Stat. § 922.07(1).....	15

<b>Rules</b>	<b>Page(s)</b>
Fla. R. Crim. P. 3.812 .....	vi
Fla. R. Crim. P. 3.811(d).....	16
Fla. R. Crim. P. 3.851 .....	15, 16

**Other Authorities**

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. text revision 2022) .....	37
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## **REQUEST FOR ORAL ARGUMENT**

Owen respectfully requests oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action will determine whether Owen lives or dies. Further, this Court last considered a prisoner's competency to be executed approximately ten years ago. *See Gore v. State*, 120 So. 3d 554 (Fla. 2013). Since then, the United States Supreme Court has decided *Madison v. Alabama*, 203 L. Ed. 2d 103 (2019) which held that the Eighth Amendment may prohibit executing an individual if he suffers from dementia, or any other condition, so long as it causes a lack of rational understanding. Accordingly, a full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the ultimate penalty that the State seeks to impose on Owen.

## **PRELIMINARY STATEMENT REGARDING REFERENCES**

References to the transcript from the proceedings held under Florida Rule of Criminal Procedure 3.812 in the Eighth Judicial Circuit, in and for Bradford County, are in the form T/[page number].

References to the current record on appeal from the proceedings in the Eighth Judicial Circuit, in and for Bradford County, are in the

form R/[page number].

The initials GW and KS are used when referring to the victim in each case referred to herein.



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

### **I. Procedural History**

Owen was convicted at a jury trial of the first-degree murder and sexual battery of GW, and burglary. For the non-capital offenses, Owen received the following sentences to be run consecutively: sexual battery (natural life) and burglary (natural life). For the capital offense, the advisory jury recommended death by a ten to two vote. The trial judge sentenced Owen to death on March 13, 1986.

This Court described the aggravating factors as follows:

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

*Owen v. State*, 596 So. 2d 985, 987 n. 1 (Fla. 1992).

This Court described the only mitigating factors considered by the trial judge as:

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

*Id.* at n. 2.

Owen raised the following claims on direct appeal:

**Claim I:** The trial court erred by not granting appellant's motion for judgment of acquittal as to count II of the indictment.

**Claim II:** The trial court erred in denying motion to suppress appellant's confession.

**Claim III:** The trial court erred by allowing members of the victim's family to testify prior to pronouncement of sentence.

**Claim IV:** The trial court erred by sentencing the appellant to death based on invalid aggravating circumstances.

**Claim V:** The trial court erred in denying all death penalty motions of appellant.

**Claim VI:** The trial court erred by denying the preclusion of death qualification of jurors and a bifurcated jury.

This Court affirmed Owen's judgment of conviction and sentence of death. *Owen v. State*, 596 So. 2d 985, 987 (Fla. 1992).

Owen filed a Petition for a Writ of Certiorari to the United States Supreme Court that was denied on October 13, 1992. *Owen v. Florida*, 506 U.S. 921 (1992).

Owen filed his fourth motion for postconviction relief in state court pursuant to Fla. R. Crim. P. 3.850 on December 8, 1997. The following claims were raised:

**Claim I:** Access to the files and records pertaining to Mr. Owen's case in the possession of certain state agencies have been withheld in violation of chapter 119, Fla. Stat., the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the corresponding provisions

of the Florida Constitution. Mr. Owen cannot prepare an adequate 3.850 motion until he has received public records materials and been afforded due time to review those materials and amend.

**Claim II:** Access to trial counsel's files on Mr. Owen has yet to be provided to collateral counsel. Collateral counsel is entitled to access to these files in that the files belong to the client and must be reviewed by collateral counsel in determining what claims for relief exist. Without access to these files, counsel cannot adequately investigate Mr. Owen's case and provide the effective assistance of counsel.

**Claim III:** Mr. Owen was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, when his sentencing jury and judge relied on materially inaccurate information in sentencing Mr. Owen to death.

**Claim IV:** Mr. Owen was deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution as well as his rights under the Fifth, Sixth, and Eighth Amendments, because the state withheld evidence which was material and exculpatory in nature and/or presented misleading evidence.

**Claim V:** Mr. Owen was denied the effective assistance of counsel during pre-trial, trial and sentencing of his capital proceedings in that counsel failed to provide the mental health experts with available information which the experts needed to make an accurate competency determination, and the state withheld material exculpatory information needed to reach such a determination, in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

**Claim VI:** Mr. Owen was denied effective assistance of counsel at the guilt innocence phase of his trial, counsel failed to adequately investigate and prepare the defense case and challenge to the state's case, and a full adversarial testing did not occur in violation of Mr. Owen's Rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments. As a result, Mr. Owen's convictions and death sentence are unreliable.

**Claim VII:** Trial counsels' undisclosed conflicts of interest in violation of the laws and Constitution of the State of Florida denied Mr. Owen the effective assistance of counsel guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**Claim VIII:** Mr. Owen was deprived of his right to a reliable adversarial testing and denied the effective assistance of counsel at the penalty phase of his capital trial, in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments and the corresponding provisions of the Florida Constitution.

**Claim IX:** Mr. Owen was deprived of his right to effective assistance of counsel in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments and the corresponding provisions of the Florida Constitution.

**Claim X:** Newly discovered evidence establishes that Mr. Owen's capital conviction and sentence are constitutionally unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**Claim XI:** Mr. Owen's jury was improperly instructed on the heinous, atrocious, and cruel aggravating factor, in violation of *Espinosa v. Florida*, *Stringer v. Black*, *Maynard v. Cartwright*, *Hitchcock v. Dugger*, and the Eighth and Fourteenth Amendments to the United States Constitution.

**Claim XII:** Mr. Owen's sentence was tainted by improper instructions on the felony-murder aggravating factor in violation of *Espinosa v. Florida*, *Stringer v. Black*, *Sochor v. Florida*, *Maynard v. Cartwright*, *Hitchcock v. Dugger*, and the Eighth and Fourteenth Amendments. No meaningful harmless error was performed.

**Claim XIII:** The avoiding arrest aggravating factor was improperly applied, and the jury received inadequate instructions, in violation of the Eighth and Fourteenth Amendments.

**Claim XIV:** The trial court over broadly and vaguely instructed Mr. Owen's jury on the previous conviction of a violent felony aggravating circumstance, in violation of *Espinosa v. Florida*, *Stringer v. Black*, *Maynard v. Cartwright*, *Hitchcock v. Dugger*, and the Eighth and Fourteenth Amendments.

**Claim XV:** The "cold, calculated" aggravating circumstance instruction failed to limit the jury's consideration and was not supported by the evidence in violation of the Eighth and Fourteenth Amendment to the United States Constitution.

**Claim XVI:** The Florida Supreme Court failed to conduct a meaningful and constitutionally adequate harmless error analysis of the effect of the improper presentation to, and consideration by, the jury of an unconstitutional prior conviction, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

**Claim XVII:** Mr. Owen was denied his rights under the Sixth, Eighth, and Fourteenth Amendments when the trial court allowed the jury to hear evidence in detail of prior felonies of which Mr. Owen had been convicted.

**Claim XVIII:** Mr. Owen was denied the right to remain silent and the right to counsel at pretrial, trial and sentencing, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and subsequent admission of his purported statements at trial was erroneous.

**Claim XIX:** Mr. Owen was denied his right to a trial by a fair and impartial jury in violation of his Fifth, Sixth, and Fourteenth Amendment Rights, by improper prosecutorial conduct, and by the trial court's failure to adequately ensure that a fair and impartial jury was guaranteed to Mr. Owen.

**Claim XX:** Mr. Owen's death sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments because the

penalty phase jury instructions shifted the burden to Mr. Owen to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Owen to death. Failure to object or argue effectively rendered defense counsel's representation ineffective.

**Claim XXI:** Mr. Owen's sentencing jury was misled by comments and instructions which unconstitutionally and inaccurately diluted its sense of responsibility for sentencing in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

**Claim XXII:** The prosecutor's inflammatory and improper comments and argument rendered Mr. Owen's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments.

**Claim XXIII:** The rules prohibiting Mr. Owen's lawyers from interviewing jurors to determine if cause exists to determine if relief is appropriate due to juror misconduct violates equal protection principles, the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

**Claim XXIV:** The sentencing court's refusal to find and consider various mitigating circumstances clearly set out in the record violated the Eighth Amendment and demonstrates that the jury's consideration was similarly constrained.

**Claim XXV:** The introduction of non-statutory aggravating factors and the state's argument upon non-statutory aggravating factors rendered Mr. Owen's death sentence fundamentally unfair and unreliable, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**Claim XXVI:** Mr. Owen was denied a proper direct appeal from his judgment of conviction and a proper appeal from his sentence of death in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, art. 5, sec. 3(b)(1) of the Florida Constitution

and Florida Statutes Annotated, sec. 921.141 (4), due to omissions in the record.

**Claim XXVII:** Mr. Owen was denied a fair trial by the trial court's refusal to grant a change of venue in light of the extensive and highly prejudicial pretrial media coverage of his case. As a result, Mr. Owen was deprived of his right to a fair and impartial jury at the guilt/innocence and sentencing phases of his trial, in violation of the Sixth, Eighth, and Fourteenth Amendments

**Claim XXVIII:** Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty, and for violating the constitutional guarantee prohibiting cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

**Claim XXIX:** The introduction of prejudicial crime scene video tape rendered Mr. Owen's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments.

**Claim XXX:** Mr. Owen's right to due process was violated when the trial court instructed the jury on sexual battery.

**Claim XXXI:** Mr. Owen's trial was fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

The postconviction court denied relief on December 8, 1997, without conducting a full evidentiary hearing. R10/1862. Owen appealed to this Court, and raised the following issues:

**Argument I:** Mr. Owen was denied a full and fair evidentiary hearing in violation of his constitutional rights to due process.

**Argument II:** The trial court failed to conduct an adequate

*Faretta* inquiry to determine if Mr. Owen was knowingly, voluntarily and intelligently waiving his right to pursue postconviction relief.

**Argument III:** Mr. Owen was denied a full and fair hearing on the following issues.

**A.** Mr. Owen was denied the effective assistance of counsel during pre-trial, trial and sentencing of his capital proceedings regarding failure to provide the mental health experts with available information.

**B.** The adversarial testing at the guilt phase issue.

**C.** The conflict of interest issue.

**D.** The ineffective assistance of counsel at penalty phase issue.

**E.** The ineffective assistance of counsel issue.

**Argument IV:** The *Espinosa v. Florida* issue.

**Argument V:** The improper felony-murder instruction issue.

**Argument VI:** The improper application of avoiding arrest aggravating factor.

**Argument VII:** The previous conviction of a violent felony aggravating circumstance issue.

**Argument VIII:** The improper “cold, calculated” aggravating circumstance instruction issue.

**Argument IX:** The improper evidence of prior felonies issue.

**Argument X:** The motion to suppress issue.

**Argument XI:** The burden shifting issue.

**Argument XII:** The *Caldwell v. Mississippi* issue.

**Argument XIII:** The inflammatory and improper comments issue.

**Argument XIV:** The interviewing jurors issue.

**Argument XV:** The change of venue issue.

**Argument XVI:** Florida’s capital sentencing statute is unconstitutional.

**Argument XVII:** The unduly prejudicial crime scene video issue.

**Argument XVIII:** The fundamental error issue.



This Court affirmed the denial of all claims. *Owen v. State*, 773 So. 2d 510 (Fla. 2000). The United States Supreme Court denied review. *Owen v. Florida*, 532 U.S. 964 (2001).

Owen filed a *pro se* Successive Motion for Postconviction Relief in June 2001 and raised the following issues:

**Claim I:** Capital Collateral Regional Counsel-Middle labored under a direct conflict of interest which precluded this firm from representing Defendant in the postconviction proceedings.

**Claim II:** Capital Collateral Regional Counsel-Middle deprived Defendant of effective representation and due process during the postconviction proceedings.

**Claim III:** A. Defendant's claim of innocence, B. Brady Violation.

Owen appealed and, after this Court appointed counsel, "affirm[ed] the trial court's order summarily denying postconviction relief." *Owen v. Crosby*, 854 So. 2d 182, 188 (Fla. 2003).

Owen filed a Petition for Writ of Habeas Corpus on September 25, 2001. The following claims were raised:

**Claim I:** Appellate counsel was ineffective for failing to raise and argue on direct appeal that the petitioner was denied a fair trial because of the admission into evidence of the statements petitioner made during plea negotiations with the government.

**Claim II:** Appellate counsel was ineffective for not raising and arguing that the venire from which the Jury was selected in Mr. Owen's trial was unconstitutional because the venire unconstitutionally excluded African Americans

from the venire from which Mr. Owen's trial Jury was selected.

**Claim III:** Appellate counsel was ineffective for failing to raise and argue on direct appeal that the trial court should have declared a mistrial or struck Sgt. McCoy's alleged improper statement that the "hurting would start all over again," and that the trial court should have granted Owen's motion for a mistrial.

**Claim IV:** Appellate counsel was ineffective for failing to raise and argue on direct appeal that Mr. Owen was denied due process of law because the trial court was biased towards the state and should have recused itself.

**Claim V:** Appellate counsel was ineffective for failing to raise and argue on direct appeal the trial court's denial of petitioner's jury instruction on the difference between sexual battery and vaginal penetration of a deceased individual killed prior to any sexual contact.

**Claim VI:** Appellate counsel ineffectively raised and argued the sufficiency of the State's evidence used to prove the aggravator's and by not raising and arguing that the trial court did not properly consider all of the mitigation in favor of Mr. Owen.

**Claim VII:** The trial court illegally sentenced Mr. Owen on the non-capital cases because sentencing guidelines were unconstitutional at the time Mr. Owen was sentenced.

**Claim VIII:** Appellate counsel was ineffective for failing to cite directly to controlling precedent and the record on appeal on the issue of whether Mr. Owen's confession was involuntary thus denying this court the opportunity for meaningful review of Mr. Owen's case on appellate review.

**Claim IX:** The Florida death sentencing statute as applied is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

**Claim X:** Mr. Owen's Eighth Amendment right against cruel and unusual punishment will be violated because Mr. Owen may be incompetent at the time of execution.

**Claim XI:** This court erred by not appointing conflict free appellate counsel or remanding the case to the trial court

for a finding of fact on whether there was a conflict of interest between Mr. Owen and appellate counsel after Mr. Owen brought to this court's attention that there was a conflict of interest.

This Court denied Owen's Petition for Writ of Habeas Corpus.

*Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003).

Owen filed a Petition for Writ of Habeas Corpus in the Southern District of Florida on December 15, 2003. The following claims were raised:

**Claim I:** Mr. Owen's trial counsel was ineffective for failing to file and argue several available meritorious federal constitutional challenges to the State of Florida's use of his statements to law enforcement officers following his arrest. The State Courts of Florida did not afford Mr. Owen a fair opportunity to present evidence to establish the ineffectiveness of his trial counsel for failing to suppress his statements.

**Claim II:** The State courts of Florida erred in denying Mr. Owen's motion to suppress confession.

**Claim III:** Mr. Owen was denied due process when the Florida Supreme Court allowed Mr. Owen's conviction for sexual battery to stand when the evidence failed to show Mr. Owen committed the offense in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

**Claim IV:** Trial Counsels' undisclosed conflicts of interest denied Mr. Owen the effective assistance of counsel guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**Claim V:** Mr. Owen was denied relief on properly pled Brady claim filed in his *pro se* motion which Mr. Owen discovered in 1999 while pending retrial in the [KS] case.

**Claim VI:** Mr. Owen was denied the effective assistance of

counsel during pre-trial, trial and sentencing of his capital proceedings in that counsel failed to provide the mental health experts with available information which the experts needed to make an accurate competency determination, and the State withheld material exculpatory information needed to reach such a determination, in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

**Claim VII:** Mr. Owen was denied effective assistance of counsel at the guilt/innocence phase of his trial, counsel failed to adequately investigate and prepare the defense case and challenge the State's case, and a full adversarial testing did not occur in violation of Mr. Owen's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. As a result, Mr. Owen's convictions and death sentence are unreliable.

**Claim VIII:** Mr. Owen was deprived of his right to a reliable adversarial testing and denied the effective assistance of counsel at the penalty phase of his capital trial, in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments and corresponding provisions of the Florida Constitution.

**Claim IX:** Mr. Owen was deprived of his right to effective assistance of counsel in violation of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

**Claim X:** The Florida Supreme Court denied Mr. Owen the right to effective and conflict free counsel by not appointing conflict free appellate counsel or remanding the case to the trial court for a finding of fact on whether there was a conflict of interest between Mr. Owen and appellate counsel after Mr. Owen brought to the Florida Supreme Court's attention that there was a conflict of interest with appellate counsel.

**Claim XI:** Appellate counsel was ineffective for failing to raise and argue on direct appeal that the trial court should

have declared a mistrial or struck Sgt. McCoy's improper statement that the "hurting would start all over again," and that the trial court should have granted Owen's motion for a mistrial.

**Claim XII:** Appellate counsel was ineffective for failing to raise and argue on direct appeal that the petitioner was denied a fair trial because of the admission into evidence of the statements Petitioner made during plea negotiations with the government.

**Claim XIII:** Appellate counsel was ineffective for failing to raise and argue on direct appeal that Mr. Owen was denied due process of law because the trial court was biased towards the state and should have recused itself.

**Claim XIV:** Appellate counsel was ineffective for failing to cite directly controlling precedent and the record on appeal on the issue of whether Mr. Owen's confession was involuntary thus denying this court the opportunity for meaningful review of Mr. Owen's case on appellate review.

**Claim XV:** Appellate counsel was ineffective because he ineffectively raised and argued the sufficiency of the state's evidence used to prove the aggravators against Mr. Owen and by not raising and arguing that the trial court did not properly consider all the mitigation in favor of Mr. Owen.

**Claim XVI:** Mr. Owen was denied due process and effective assistance of appellate counsel in his direct state appeal when the Florida Supreme Court allowed Mr. Owen's conviction for sexual battery to stand and denied the claim of ineffective assistance of appellate counsel for failure to raise the issue of the trial court's denial of a jury instruction distinguishing sexual battery on a live person and lesser offenses if the victim was deceased at the time of penetration.

**Claim XVII:** Florida's capital sentencing scheme was unconstitutional as applied, denying Mr. Owen his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**Claim XVIII:** The jury that recommended death for Mr. Owen was unconstitutionally instructed and improperly considered unconstitutional aggravators thus this court

should issue the writ.

The Southern District of Florida denied Owen's petition for writ of habeas corpus. *Owen v. Crosby*, 03-81152-CIV, 2007 WL 9719051, at \*1-2 (S.D. Fla. Sept. 6, 2007). The Eleventh Circuit Court of Appeals affirmed the district court's denial of relief. *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 899 (11th Cir. 2009). The United States Supreme Court denied certiorari review. *Owen v. McNeil*, 558 U.S. 1151 (2010).

Owen filed a Third Successive Motion to Vacate Judgment of Conviction and Sentence on January 6, 2017. The following claims were raised:

**Claim I:** Mr. Owen's death sentence should be vacated because it is unconstitutional based on *Hurst*, prior precedent and subsequent developments because Mr. Owen was denied his right to a jury trial on the facts that led to his death sentence.

**Claim II:** This court should vacate Mr. Owen's death sentence because, in light of *Hurst* and subsequent cases, Mr. Owen's death sentence violates the eighth amendment because his death sentence was contrary to evolving standards of decency and is arbitrary and capricious.

**Claim III:** This court should vacate Mr. Owen's death sentence because the fact-finding that subjected Mr. Owen to the death was not proven beyond a reasonable doubt.

**Claim IV:** In light of *Hurst*, Mr. Owen's death sentence should be vacated because it was obtained in violation of the Florida constitution.

**Claim V:** The court's denial of Mr. Owen's postconviction

claims must be reheard and determined under a constitutional framework.

The trial court summarily denied relief, and this Court affirmed the summary denial of Owen's successive motion. *Owen v. State*, 247 So. 3d 394 (Fla. 2018).

On May 9, 2023, the Governor issued a death warrant for Owen. The Warden set the execution for June 15, 2023 at 6:00 P.M. On May 17, 2023, Owen filed his Fourth Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After Warrant Signed and other related motions. The lower court summarily denied the successive motion claim on May 19, 2023. The other three motions were denied on May 18-19, 2023. Owen appealed and the lower court's order was affirmed by this Court yesterday. *Owen v. State*, SC2023-0732, 2023 WL 3813490 (Fla. June 5, 2023).

## **II. Procedural History Regarding Competency to Be Executed**

Due to concerns with Owen's competency after the death warrant was signed, Owen's counsel invoked section 922.07(1), Florida Statutes on May 17, 2023. On May 22, 2023, the Governor appointed three psychiatrists to determine whether Owen

understands the nature and effect of the death penalty and why it is to be imposed upon him. Fla. Exec. Order No. 23-106 (May 22, 2023). On May 23, 2023, a panel of three psychiatrists (“the Commission”), all present at the same time, evaluated Owen for approximately 100 minutes. The Commission issued their report on May 24, 2023. The Governor adopted the Commission’s conclusion that “O[wen] has the mental capacity to understand the nature of the death penalty and the reasons why it is to be imposed upon him.” Fla. Exec. Order No. 23-116 (May 25, 2023).

On May 26, 2023, the circuit court held a status conference to schedule the rule 3.812 hearing. On June 1, 2023, Owen filed a motion pursuant to Florida Rule of Criminal Procedure 3.811(d). The circuit court heard testimony at a rule 3.812 hearing on June 1-2, 2023. The circuit court issued an order finding Owen sane to be executed on June 4, 2023. This appeal follows.

### **III. Relevant Facts from Rule 3.812 Evidentiary Hearing**

Pursuant to Florida Rule of Criminal Procedure 3.812, on June 1-2, 2023, an evidentiary hearing was held regarding Owen’s insanity to be executed. The defense’s first witness at the hearing was board-certified neuropsychologist, Dr. Hyman Eisenstein. Dr. Eisenstein



evaluated Owen on May 15, 2023 and May 30, 2023 at Florida State Prison (“FSP”) for a combined total of 13 hours and 15 minutes. T/19. This total time consisted of a combination of interviewing, and cognitive and neuropsychological testing. Throughout both interactions, Dr. Eisenstein noted that Owen’s participation was honest, forthright, and that Owen put genuine effort into the evaluation; there was no indication to Dr. Eisenstein that Owen was malingering at any point during the interviews or testing. T/27. Dr. Eisenstein provided the court with a brief overview of Owen’s childhood to provide the court with context as to how Owen came to be this way. T/24. Dr. Eisenstein’s testimony on Owen’s childhood included facts that support Owen’s early desire to try to become a female. T/26. Dr. Eisenstein administered a variety of different tests on both days he spent with Owen. T/28.

Regarding IQ, when Dr. Eisenstein administered the Wechsler Adult Intelligence Scale, Owen received a full-scale IQ score of 92, which falls into the average intelligence range. T/32. Additionally, Dr. Eisenstein found there to be an insidious dementia process, which means there is a slow decline from the level at which Owen was previously. T/36. Dr. Eisenstein further testified that Owen suffers

from schizophrenia and that he exhibits a fixed delusional thinking that is far removed from reality but has remained constant throughout Owen's life. T/46-47. Dr. Eisenstein explained to the court that Owen's delusion has remained throughout his life,

It's gone from where he certainly felt that he is a male, entrapped as a male but really wanting to be a woman, with every effort possible to try to act like a woman, dress like a woman, think like a woman, and then how he could possibly achieve this end result. The end result that he wanted to achieve was the extraction of female hormone through having sexual intercourse with a woman and expunging their essence through his ejaculation and like a penis being a hose and extracting that. And then he would somehow, this would transform him from a male to a female.

T/47.

Dr. Eisenstein additionally diagnosed Owen with gender dysphoria. T/50. Importantly, Dr. Eisenstein testified that Owen does not meet the criteria for antisocial personality disorder, especially due to the fact that there must be conduct disorder established before the age of fifteen. T/56-57. Overall, Dr. Eisenstein testified that it is his opinion that Owen does not understand the nature and effect of why the death penalty is imposed on him, nor does he have a rational appreciation of the connection between his crime and the punishment. T/67.

Carey Haughwout, Owen's former trial counsel from 1992 to 1999 also testified for the defense at the hearing. T/104-05. She testified that throughout her entire time representing Owen, his delusion that he intended to be a female and that to physically become a female he needed to absorb the fluids of his female victims, remained unchanged. T/108-09. Further, Ms. Haughwout testified that back in the 1990s she had no questions or doubts as to Owen's memory as he was able to assist counsel back then. T/111. However, Ms. Haughwout has kept in touch with Owen periodically over the past 20 plus years, and after recently visiting him after the warrant was signed, Owen seemed to have a much harder time remembering things they had corresponded about just years ago, such as Owen's studies in black hole and physics. T/113. She explained to the court that Owen is not the sharp person she knew before. T/114.

Pamela Izakowitz, Owen's former postconviction counsel in 1997, testified that Owen shared his delusions with her back then. T/235. She additionally testified that Owen asked her to bring him some women's panties, women's shoes, and dental floss so he could tie off his genitalia because he believed if he tied off his genitalia it would make him a female. T/236. Ms. Izakowitz further recalled that

Owen filed name change paperwork in Bradford County to legally change his name to something related to Madonna. T/237, 243; *see also* Bradford County Case No. 94-134-DR.

The defense presented the testimony of Lisa Wiley, a retired psychological specialist who worked at the Department of Corrections (“DOC”) from 1989 until 2005. T/221. Ms. Wiley testified that she specifically worked on Death Row at Union Correctional Institution (“UCI”) from 1992 through 2005, providing mental health services to inmates. T/222. Ms. Wiley testified that Owen became a regular patient of hers who she saw approximately once a month; she further noted in Owen’s medical records that Owen had gender identity disorder. T/223-24. Although Ms. Wiley stated she did not see any evidence of schizophrenia, she testified that she had no reason to believe Owen was malingering regarding his mental illness. T/229-30, 232.

The defense provided an affidavit of licensed clinical psychologist, Dr. Faye Sultan, due to her unavailability to testify during the day and a half allotted for the hearing. Dr. Sultan first saw Owen in 1995 and saw no signs of malingering in any testing she conducted. R/408-10. Although Dr. Sultan has had no contact with

Owen since 1999, her affidavit provided context to the Court on Owen's history of mental illness and insanity, as well as the consistency of Owen's delusions. R/408-10.

The defense also provided an affidavit of licensed psychiatrist and Director of the Johns Hopkins Sex Gender Clinic at The Johns Hopkins Hospital, Dr. Frederick Berlin, M.D., Ph.D. Dr. Berlin first evaluated Owen in 1996 and opined that Owen suffered from several psychiatric disorders including, gender identity disorder, paraphilic sexual disorder, and schizophrenia. R/603-05. Although Dr. Berlin has had no contact with Owen since 1999, his affidavit provided context to the circuit court regarding Owen's history of mental illness and insanity.

In addition, Owen requested a continuance to present the testimony of Dr. Faye Sultan and Dr. Frederick Berlin. R/378-79; T/3-7. However, the circuit court denied the continuance. T/7.

In response to the defense expert's and lay witnesses' testimony, the State presented testimony from the three doctors who comprised the Commission: Dr. Tonia Werner (T/120-70), Dr. Wade Myers (T/254-319), and Dr. Emily Lazarou (T/321-428). The State introduced into evidence each of the three doctors' CVs and the

Commission's report to the governor. T/132. Each of the three doctors on the Commission testified consistent with their report, and that based on the clinical interview, review of the records, and interviews with correctional employees, it was the opinion of the Commission within a reasonable degree of medical certainty that Owen (1) has no 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.

The State also presented testimony of four DOC employees/prison guards from FSP and UCI: John Manning (T/170-84), Jeffrey McClellan (T/184-202), Daniel Philbert (T/202-17), and Danny Halsey (T/244-52). Each individual testified that Owen is polite, compliant, and behaves appropriately. However, each of the individuals that testified from DOC stated that they are not a psychologist, they have no medical licenses, and that they have no formal education or training that would qualify them to make any diagnosis related to a psychiatric impairment.

In rebuttal, the defense recalled Dr. Eisenstein who testified that with regard to Owen's ability to understand legalese and write

briefs with cogent arguments, Owen has experienced a significant drop from his previous abilities. T/432. This supports the onset of insidious dementia. T/433. Dr. Eisenstein also reiterated during his rebuttal testimony that without evidence of conduct disorder before the age of fifteen, a person cannot be diagnosed with antisocial personality disorder. T/440-41. Further, even after listening to the testimony of each of the three doctors comprising the Commission, Dr. Eisenstein continued to testify that his opinion on whether Owen is competent to be executed remains unchanged. T/439.

The defense also called Eric Pinkard, the Capital Collateral Regional Counsel for the Middle District of Florida, and Owen's prior postconviction counsel, in rebuttal. T/445. Mr. Pinkard testified that he began working on Owen's case in 1999 and has known Owen for over 20 years. T/445. Mr. Pinkard testified he visited Owen the day after the death warrant was signed and immediately observed Owen was not the same Owen he had known in terms of Owen's cognitive abilities. T/446. Mr. Pinkard noted that when attempting to discuss legal claims with Owen after the death warrant was signed, Owen only wanted to discuss how the pending execution would prevent him from completing his transition from a man to a woman. T/446-47.

Mr. Pinkard witnessed the Commission's competency evaluation on May 23, 2023 at FSP. T/450. Mr. Pinkard testified that during the Commission's evaluation he observed Owen state to the Commission that,

he didn't understand why they were executing him because he hadn't killed anybody and that the State was well aware of that because at the Slattery retrial, the testimony had been put forth that he didn't kill the victim but, in fact, had taken them into his body through his penis, which acted as a hose to take their estrogen in, and that -- the idea that he was seeking to transition himself through that from a man into a woman.

T/453. Once Owen shared his delusion with the commission, Mr. Pinkard noted for the court that the "whole rest of it was them trying to cross-examine him and try to break him down to admit that he knew . . . he had really killed the victims." T/455. Even so, Owen maintained throughout the entire examination that he did not kill anyone. T/455-56. Further, Owen was very clear during the evaluation that before the victims expired, they entered into his body. T/460. Mr. Pinkard additionally noted that during the evaluation, Owen testified the reason he did not want to reveal he was a woman while in prison is because he was afraid of being subjected to brutality. T/461-62.



Overall, Mr. Pinkard testified that the Commission's evaluation became confrontational and that certain evaluators consistently confronted Owen with their disbelief in the veracity of his delusion. T/454-56. Mr. Pinkard testified that he has witnessed dozens of evaluations, but not all of them for execution. T/454. Notably, Mr. Pinkard testified "I've never seen anything like the evaluation that I witnessed in terms of being that aggressive to confront the person to try to get him to change his mind about something." T/456. Dr. Werner and Dr. Lazarou were peppering Owen with questions and trying to break him down to admit that he does not really harbor these delusions; Dr. Myers did not. T/455. Mr. Pinkard testified that Dr. Lazarou raised her voice at Owen for a very long period of time and took an overall hostile tone with Owen. T/457. Throughout the entirety of the evaluation, every time Owen got a sentence out, the Commission never accepted what he said or moved on to another topic, rather they continued to harp on the same points. T/458-59.

### **SUMMARY OF ARGUMENT**

**ARGUMENT I:** Under the Eighth Amendment, Owen is not competent to be executed. The circuit court erred in finding that the psychiatrists that only briefly examined Owen were more credible

than the neuropsychologist who spent over 13 hours with Owen conducting interviews and testing. Accordingly, the circuit court improperly applied *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). Owen lacks a rational understanding of the connection between his crime and impending execution due to his fixed psychotic delusions and dementia.

**ARGUMENT II:** The circuit court abused its discretion when denying a continuance of the rule 3.812 evidentiary hearing to allow the testimony of Dr. Faye Sultan and Dr. Frederick Berlin. Both doctors evaluated Owen in the 1990s and would have testified regarding the nature and duration of Owen’s delusions. Their diagnoses would have also corroborated Dr. Eisenstein’s findings regarding mental illness. Allowing a continuance until the very next business day, Monday, June 5, 2023, would have been reasonable to accommodate the testimony of Dr. Sultan.

### **STANDARD OF REVIEW**

“The proper standard of review of a trial court’s order pursuant to rule 3.812 is whether the record contains competent, substantial evidence to support the trial court's finding.” *Ferguson v. State*, 112 So. 3d 1154, 1156 (Fla. 2012). Further, this Court “review[s] the trial

court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008).

## **ARGUMENT**

### **I. THE CIRCUIT COURT ERRED IN FINDING THAT OWEN IS SANE TO BE EXECUTED**

#### **a. The Eighth Amendment Bars Execution of the Insane**

Owen's insanity to be executed places him outside of the class of individuals eligible to be executed because the Supreme Court of the United States has held that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). "[T]he execution of a prisoner whose mental illness prevents him from 'rationally understanding' why the State seeks to impose that punishment" is prohibited. *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (quoting *Panetti*, 551 U.S. at 959). "Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Panetti*, 551 U.S. at 960. This Court has also made it clear that "[i]ndividuals who lack the mental capacity to understand their pending execution

and the reasons for it cannot be executed.” *King v. State*, 211 So. 3d 866, 889 (Fla. 2017). Owen’s severe mental illness, delusions, and dementia inhibit his ability to rationally understand why the ultimate punishment is to be imposed upon him. R/555-57, 559-61. Owen is precisely the case that the Eighth Amendment seeks to protect.

There are a number of occasions where the circuit court has improperly interpreted the testimony and evidence. Due to the time constraints of the briefing schedule under warrant, Owen will address the most substantial issues but submits that there are other instances of competent, substantial evidence that Owen is insane to be executed.

**b. The Circuit Court Erred in Taking into Consideration Owen’s Past Sanity Instead of Only Considering Owen’s Current Sanity to be Executed**

“Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh.” *Tompkins v. Sec’y, Dept. of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (citing *Panetti*, 551 U.S. at 946) (explaining that it is not possible to resolve a petitioner’s *Ford* claim “before execution is imminent”). “It is not ripe years before the time of execution

because mental conditions of prisoners vary over time.” *Id.* (citing *Panetti*, 551 U.S. at 943). Further, “historical backdrop” of procedural history of past competence “has no relevance regarding whether [the defendant] is incompetent to be executed **at the present time.**” *Provenzano v. State*, 751 So. 2d 37, 41 (Fla. 1999) (Harding, C.J., concurring) (emphasis in original).

Despite the precedent, the circuit court confuses the standard as to the relevant timeframe to be considered. The circuit court improperly considered an abundance of testimony regarding Owen during irrelevant times. Whether Owen was competent to be executed in 1984 when he committed the crimes does not matter. Whether he was competent to be executed in 1997 also does not matter. Even whether Owen was competent to be executed in 2021 is irrelevant. The **only** relevant time period the circuit court should have considered when finding whether Owen is currently sane to be executed, is right now.

At the hearing, a portion of the testimony revolved around whether the experts had reviewed recordings or transcripts of Owen’s police interviews around the time of the crimes and his arrest. The circuit court noted that Dr. Myers said that no signs of mental illness

were observed in Owen's recorded interviews. R/618. However, the circuit court failed to mention that Dr. Myers only reviewed a sample of the recordings due to time constraints. T/277-78, 304-05. The order also incorrectly noted that Dr. Lazarou watched approximately 20 hours of recorded interviews, when she actually testified that she "probably saw 12 hours of it." R/620; T/359.

The circuit court's order also incorrectly stated that "Dr. Eisenstein was forced to concede that in approximately 20 hours of police interrogation in 1984, Mr. Owen never once mentioned this delusion." R/612. Dr. Eisenstein instead testified that the transcript and recordings of the police interrogation were provided to him, but he did not have an opportunity to view it due to the limited amount of time due to the impending execution. T/77, 91-92. When asked to assume that the delusional beliefs were not mentioned in the police interaction, Dr. Eisenstein specifically stated that it was not inconsistent. T/78.

However, the testimony and findings regarding Owen's behavior at the time of the crimes or police interrogation is irrelevant because none of it has anything to do with Owen currently being insane to be executed. *See Tompkins*, 557 F.3d at 1260. Further, even if the police

interrogation recordings were deemed to be relevant, under the time constraints of the accelerated warrant proceedings, none of the experts had reviewed all of the recordings. Therefore, none of the doctors knew if any portion of the police interrogation contained evidence of Owen exhibiting mental illness.

The circuit court also improperly discussed facts purported to surround the crimes and claimed those facts were inconsistent with Owen's delusions. R/612. Notably, the circuit court stated: "It was not clear that Dr. Eisenstein was even aware of the existence of these inconsistencies. And if he was, he apparently did not consider them." R/612. Dr. Eisenstein had no reason to consider whether Owen's delusions bore any inconsistencies with the underlying facts of the crimes. The proper time to consider Owen's competency is now, not at the time of the crimes. Further, even if it was relevant, Dr. Eisenstein testified that the minute details surrounding the crime do not change the fact that Owen had delusions about extracting the essence and souls from the victim. T/91.

*Pro se* pleadings and whether Owen previously had the capability to understand legal argument were also improperly discussed at the hearing. The State repeatedly asked witnesses about

pleadings and testimony that occurred in 1997. T/96-101, 239-43, 417-19. The circuit court also stated in its order that Dr. Myers testified to having reviewed *pro se* pleadings prepared by Mr. Owen in 2021, and the content of the pleadings did not demonstrate any indication of dementia, brain damage, or problems putting thoughts together. R/619-20. However, none of the pleadings supposedly written by Owen were recent, and no one could testify that they had direct knowledge of whether Owen wrote the pleadings himself. Dr. Eisenstein also testified that if Owen had previously written the pleadings, his dementia may have caused him to decline to where he is unable to write such pleadings currently. T/94. In fact, if Owen had written the briefs, it would only serve as a sense of baseline functioning and further supports Owen's significant decline and dementia. T/94, 100-01, 432-34; R/624. Any understanding of the law that Owen may have once possessed has no bearing on whether he currently has a rationally understanding of the nature and effect of the death penalty. T/95, 100-01, 432.

“The prohibition [on carrying out a sentence of death] applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Prior findings of competency



do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition.” *Panetti*, 551 U.S. at 934. Therefore, the circuit court’s consideration of whether Owen was insane or competent at the time of the crimes or at any other point in his life was erroneous.

**c. The Circuit Court Erred in Dismissing Competent and Substantial Evidence of Owen’s Mental Illness and Delusions**

Although Dr. Eisenstein testified that Owen suffered from schizophrenia and gender dysphoria, the circuit court wrongly found that “Owen does not have any current mental illness.” T/50; R/627. Dr. Eisenstein spent over thirteen hours over two days evaluating Owen, and Dr. Eisenstein administered as many tests as he could within the time constraints of the warrant. In fact, on the first day Dr. Eisenstein administered: Delis-Kaplan Executive Function System: Trail Making Test, the Wisconsin Card Sorting Test, and the Test of Memory Malingering (“TOMM”). T/28-33. On the second day, Dr. Eisenstein administered: Word Choice, the Tactical Performance test, the Minnesota Multiphasic Personality Inventory (“MMPI-2”), the Wechsler Adult Intelligence Scale, and the Wechsler Memory Scale, Fourth Edition. T/32-37.

The MMPI-2 that Dr. Eisenstein administered evaluates the individual's current thinking and emotional state. T/46. Dr. Eisenstein testified that Owen has a floating profile on the MMPI-2 because there were highs in several different clinical scales. T/44. However, Owen's scores on the MMPI-2 are indicative of a schizophrenic profile, social alienation, isolation, some paranoia, and some depression. T/44.

The circuit court erred in finding that "Owen's purported delusion is demonstrably false." R/627. Owen's delusions are fixed and have been for many years. Dr. Eisenstein's recent assessment is strikingly similar to that of doctors who have evaluated Owen in the past because Owen's delusions have remained consistent and unchanged over the years. R/408-10, 603-05. Further, two of Owen's prior attorneys, Carey Haughwout and Pamela Izakowitz, testified that Owen shared this same delusion with them in the 1990s. T/108, 235-36. Despite this, the circuit court erred and found their testimony "was not particularly relevant or helpful to the issue before the court." R/613. Based on the testimony and the evidence it is clear that Owen's delusion does not waver or deviate.

The circuit court's finding that "Owen is feigning or malingering psychopathology to avoid the death penalty" is also improper. R/627. Dr. Eisenstein conducted multiple tests to determine whether Owen was malingering and found that he was not. Dr. Eisenstein administered the TOMM, one of the most common tests given for malingering, as it assists neuropsychologists in the forensic area to determine whether an individual is putting forth full effort. T/28. On the TOMM, Owen obtained scores of 47, 50, and 49, and Dr. Eisenstein testified that because the TOMM is scored out of 50, Owen's score was nearly perfect. T/28. These scores indicate that Owen put forth full effort, did not fake, did not lie, and did not attempt to look worse than he is. T/30. To additionally test for malingering, Dr. Eisenstein administered the Word Choice measure. T/37. Owen scored a 47 out of 50 on this measure, which Dr. Eisenstein noted is a normal response indicative of no malingering. T/38.

As detailed above, Dr. Eisenstein obtained actual results counteracting any allegation of malingering, but the circuit court improperly found the Commission who solely made observations during a short interview more credible. T/133-34, 148, 299-300.

Further, the fact that Owen's delusions are consistent and have not deviated also proves that Owen is not malingering. T/88-89. Owen's delusions did not come about as a result of the death warrant, rather he has experienced them for decades. Also important to this point, the circuit court failed to consider that Dr. Werner conceded that if the Commission is wrong and Owen is not malingering, Owen's belief that he did not kill the victims because he took their essence into his body may be a delusional belief that could establish a severe mental disorder. T/143-44. Dr. Myers testified similarly regarding the possibility. T/303.

The circuit court also discussed testimony regarding Owen being well groomed and the Commission expecting his delusions to manifest in all areas including how Owen dressed. R/615-16. Although, testimony from DOC personnel confirmed that Owen did not have much of a choice in the matter. If he did not keep himself groomed and his cell tidy, he is subject to discipline. T/178-79, 195-96, 211-12. Further, Owen is not allowed to modify his DOC issued clothing to make himself appear more feminine. T/196, 212.

Regardless, Dr. Eisenstein found that Owen suffers from gender dysphoria (previously referred to as gender identity disorder). T/50.

This finding is consistent with the findings of the doctors who evaluated Owen in the KS retrial. Further, even Dr. Myers admitted that Owen may have gender dysphoria. T/301. Regardless, it is of no import whether Owen suffers from a specific mental illness, the only determination should be whether Owen exhibits a “rational understanding.” *See Madison*, 139 S. Ct. at 727.

The circuit court agreed with the Commission in finding that Owen has antisocial personality disorder (“ASPD”), but the opinions of the Commission are flawed. R/627. Based on the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 748 (5th ed. text revision 2022) (also referred to as “DSM-5-TR”), Owen cannot be diagnosed with ASPD for multiple reasons. T/56-57, 315, 440-41. First, no member of the Commission was able to point to any definitive evidence of conduct disorder with onset before the age of fifteen. Some of the members claimed that evidence existed, but either could not point to anything in particular or were not aware if the conduct in question occurred prior to age fifteen. T/317-18. Second, if the occurrence of the antisocial behavior was exclusively during the course of schizophrenia or bipolar disorder, then ASPD is not a proper diagnosis. As a result, Owen

submits that he does not meet the criteria for ASPD. The testimony of Dr. Eisenstein supports that fact. T/56-57. Worse yet, testimony the circuit court cited in its order showed that Dr. Myers was biased due to the fact Owen was convicted of murder: “Dr. Myers was adamant that Mr. Owen had antisocial personality disorder and stated that without exception, serial sexual killers always have antisocial personality disorder.” R/620.

In addition, some of Owen’s so-called quotes regarding his delusions that members of the Commission testified regarding conflicted with each other and conflicted with some of the testimony of CCRC Eric Pinkard who witnessed the Commission’s evaluation. T/134-35, 267-68, 285-86, 390, 453-56. These discrepancies could have been easily avoided by videotaping the Commission’s evaluation of Owen. However, when Mr. Pinkard requested to videotape the evaluation, the Governor’s counsel objected. T/450.

The circuit court inappropriately claimed that Dr. Eisenstein presented as naïve and found Dr. Eisenstein was not credible when evaluated against the rest of the testimony. R/613. The circuit court further erred in finding “the Commission’s testimony to be extraordinarily credible.” R/623. However, credibility determinations

by a trial court are only valid to the extent that they are supported by competent and substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). In the instant case, Dr. Eisenstein took the time to build rapport with Owen and spent over 13 hours with Owen compared to the Commission's approximately 100 minutes. T/19, 260. Dr. Eisenstein conducted a multitude of tests to supplement his findings from his clinical interview of Owen. T/28-37. Dr. Eisenstein definitively determined that Owen is not malingering and suffers from fixed psychotic delusions.

The circuit court also erred in its determination that “[t]here is no credible evidence that he does not understand what is taking place and why it is taking place.” R/627. The circuit court goes on to claim that “[e]ven if Mr. Owen did currently suffer from schizophrenia, there is no evidence that that mental illness interferes, in any way, with his ‘rational understanding’ of the fact of his pending execution and the reason for it.” R/627. However, the circuit court is failing to analyze the evidence properly. “A prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.” *Panetti*, 551 U.S. at 959.

Dr. Eisenstein made it clear to the circuit court that Owen is insane to be executed. Owen does not understand the nature and effect of why the death penalty is imposed on him. T/65-66. Owen has no rational appreciation of the connection between his crime and the punishment that he is to receive or any rational understanding of the fact that he's going to be executed for those reasons. T/67.

Dr. Eisenstein explained that Owen believes that the two women are a part of him, and their bodies and souls have been living inside of him all these years. T/67. Whatever is going to happen to Owen is also going to happen to the two women whose essence he has extracted. T/67. In Owen's mind, he truly believes that when you talk about him, you are also talking about two other people. T/67. Mr. Pinkard also confirmed that Owen detailed the same delusion during the Commission's evaluation. Owen "didn't understand why the State was trying to execute him anyway because they knew that he hadn't killed anybody, that he had actually taken them before they died into his body and they were still with him to this day." T/448-49.

Dr. Eisenstein stated that Owen's fixed delusions and schizophrenia play into the fact that Owen really does not get the linkage between why this execution is set and why he's the one who



is being executed. T/440. Dr. Eisenstein confirmed that Owen's bizarre, psychotic, chronic belief system goes to the issue of Owen being incompetent to be executed and Owen's inability to understand the linkage. T/440. Therefore, Dr. Eisenstein's findings, based on his comprehensive evaluation, confirm that Owen's execution is barred by the Eighth Amendment to the United States Constitution. This Court should assign the proper weight to Dr. Eisenstein's testimony and reverse the order of the circuit court.

**d. The Circuit Court Erred in Failing to Consider Competent and Substantial Evidence of Owen's Dementia**

Further, Dr. Eisenstein stated that Owen suffers from insidious dementia. T/440. "[A] person suffering from dementia may be unable to rationally understand the reasons for his sentence; if so, the Eighth Amendment does not allow his execution." *Madison*, 139 S. Ct. at 726-27. The Eighth Amendment applies similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions, because either condition may impede the requisite comprehension of his punishment." *Id.* at 722. Notably, Dr. Eisenstein's testimony details that Owen is suffering from both conditions. T/440.

As part of the battery of testing Dr. Eisenstein administered to Owen. He administered the Delis-Kaplan Executive Function System: Trail Making Test, which has five parts. On condition one, visual scanning, Owen had a standard score of one, which is the equivalent of a 55 IQ. T/34. On condition two, following a sequence of numbers, Owen again had a standard score of one, which is the equivalent of a 55 IQ. T/34. On condition three, letter sequencing, Owen had a standard score of two, which is the equivalent of a 60 IQ. T/34. On condition four, alternating between number, letter, number, letter, Owen lost his place twice which is extremely indicative of cognitive impairment. T/34. On condition five, motor speed, Owen obtained a standard score of nine, so he performed okay on that condition. T/35. Dr. Eisenstein also administered a verbal fluency portion of this test, and Owen obtained standard scores of four, nine, and six. T/35. Overall, Dr. Eisenstein testified that Owen was “quite impaired, certainly gave pause that there’s something seriously going on with him.” T/35.

The Wechsler Memory Scale is a comprehensive measure of memory that contains verbal, visual, and various different new learning and list learning measures. T/38. Owen’s immediate

memory score was 67 and delayed memory was 69. T/39. Given the expected consistency between one's IQ and one's memory quotient, the two should fall basically within the same area. T/38. Dr. Eisenstein testified that there is almost a 30-point split between Owen's IQ and his memory functioning. T/39. Further, Dr. Eisenstein explained to the court that comparison between the IQ and memory quotient are extremely significant in terms of Owen's lower verbal and visual functioning and indicative of his insidious dementia process. T/39.

Dr. Eisenstein also administered the Tactical Performance Test which is part of the Halstead-Reitan Battery. T/39. During the test, the evaluatee is blindfolded and must fit ten blocks into ten holes on a foam board, using the right hand, then left hand, and then both hands. T/41. It took Owen 10 minutes and 18 seconds with his right hand, 8 minutes and 4 seconds with his left hand, and remarkably, 8 minutes and 22 seconds using both hands. T/41-42. Dr. Eisenstein testified that because it took Mr. Owen longer using both hands than it did just using his left non-dominant hand, Owen likely has brain damage in his corpus callosum. T/42. Dr. Eisenstein further explained to the circuit court that the corpus callosum is the band of

fiber that connects the right and left brain, and that both hands should be controlled by both sides of the brain and the crossover between the band of fibers. T/42. “When there is no crossover, it’s highly suspicious and suspect that the band of fibers had some type of necrosis.” T/42.

The circuit court’s order detailed some of the testimony regarding dementia, but again appears to improperly discount Dr. Eisenstein’s testimony. The order seems to find Dr. Myers’ testimony persuasive and claims the IQ testing argues against dementia. R/620. However, the Wechsler Adult Intelligence Scale that Dr. Eisenstein gave is the gold standard for IQ testing and is broken down into verbal and non-verbal. T/32. Owen received a full-scale IQ score of 92, which falls into the lower end of average intelligence range. T/32. This detail is notable because Owen had previously received an IQ score of 104 when Dr. Dee tested him around 2006. T/309, 431. Dr. Lazarou even testified that it is important to know what IQ a person started with when determining a decline in cognitive function. T/349. Because IQ is well-established and does not really change over time, Dr. Eisenstein confirmed that the significant drop

in Owen's IQ score is indicative of decline and impairment in brain functioning. T/431-34.

The circuit court failed to consider that most of DOC employees that testified have only had contact with Owen for a few weeks. Instead, the circuit court found that the DOC employees' testimony supported the testimony and findings of the Commission. R/627. Owen was transported to FSP on the evening of May 9, 2023 when his death warrant was signed. T/375. At the time of the Commission's interview with the DOC, those individuals working at FSP had known Owen at most, two weeks. At the time of the hearing, the FSP employees would have only known Owen at most, just over three weeks. Dr. Eisenstein testified that Owen has an insidious onset of dementia. T/36, 440. The FSP employees would have no baseline to determine whether Owen's cognitive functioning has declined over the years. Only one employee from UCI testified, and even he admitted to only having short conversations with Owen over the years. T/172. It is likely that he also did not have a baseline of Owen's prior and current levels of memory and functioning considering they only had short, basic conversations.

In contrast, multiple witnesses who had known Owen for decades and previously engaged in more intellectual conversation with him, testified to Owen's decline in memory and cognition, or as Dr. Werner put it, "a downward drift" in functioning. T/131; R/615. The circuit court wrongly found that the testimony of Owen's prior attorney, Ms. Haughwout, "was not particularly relevant or helpful to the issue before the court." R/613. Ms. Haughwout has been in contact with Owen since her representation of him ended in 1999, and she has maintained contact ever since. T/111. She testified that she recently visited with Owen after the death warrant was signed and during that two-and-a-half-hour visit with Owen it was clear Owen did not remember a fair amount about the topics they used to correspond about such as physics and math. T/113. She noted that "the more current things in the last couple of years he seemed to have a much harder time remembering" T/113. Ms. Haughwout concluded her testimony on direct by explaining that Owen is definitely not the sharp person that she used to know. T/114.

Further, Mr. Pinkard testified that he began working on Owen's case in 1999 and has known Owen for over 20 years. T/445. Mr. Pinkard explained to the court that he visited Owen the day after the

death warrant was signed and immediately observed Owen was not the same Owen he had known in terms of Owen's cognitive abilities. T/446. The circuit court made no credibility determination in its order regarding Mr. Pinkard's testimony.

Owen's dementia is causing a cognitive decline that is contributing to his lack of sanity to be executed. T/38. However, the circuit court neglected to make a specific finding regarding Owen's dementia and whether Owen lacks a rational understanding because of it. Accordingly, the circuit court improperly failed to consider whether Owen's dementia is impeding his comprehension of the death penalty.

#### **e. Conclusion**

The Supreme Court of the United States has made clear, “[w]hat matters is whether a person has the ‘rational understanding’ *Panetti* requires—not whether he has any particular memory or any particular mental illness.” *Madison*, 139 S. Ct. at 727. Instead, the circuit court placed undue emphasis on whether Owen has had a history of insanity and mental illness. Then the order went on to inappropriately discount Dr. Eisenstein's testimony even though he spent almost eight times the amount of time with Owen as the

Commission did, and also conducted relevant testing. Dr. Eisenstein's testimony and results should have been afforded much higher weight than the confrontational doctors who only briefly met with Owen and erroneously considered Owen's past sanity. T/456; R/626. Therefore, the circuit court's findings regarding whether Owen has a rational understanding of his pending execution and the reason for it are not supported by competent, substantial evidence.

In addition, the circuit court only found that Owen was "**aware** that the State is executing him for the murders he committed and that he will physically die as a result of the execution." R/627 (emphasis added). This is not the correct legal standard. The circuit court failed to properly make a finding regarding whether Owen had a "rational understanding' of the connection between a [his] crimes and his execution." *Ferguson v. Sec'y, Florida Dept. of Corr.*, 716 F.3d 1315, 1336 (11th Cir. 2013). "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Panetti*, 551 U.S. at 959. Additionally, "gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Id.*



at 960. Here the circuit court's order is fundamentally flawed for its refusal to recognize the impact of Owen's delusional beliefs on his rational understanding of the reasons for his execution. It is hard to imagine a more impactful delusion than the belief that the victims which are the subject matter of the execution are not dead but live on inside his body. The circuit court's avoidance of the implications of *Panetti* are contrary to clearly established constitutional law emanating from the United States Supreme Court.

Accordingly, the circuit court erred in finding Owen does not meet the criteria for insanity at the time of execution. The circuit court also erred in finding that Owen does not lack the mental capacity to understand the fact of and the reason for the pending execution. Lastly, the circuit court erred in finding Owen understands his execution is imminent and the reason why he is to be executed. Owen respectfully requests that this Court reverse and find Owen insane to be executed.

**II. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN DENYING A CONTINUANCE TO ALLOW TESTIMONY FROM DOCTORS WHO HAVE PREVIOUSLY EVALUATED OWEN**

Owen moved for a continuance based on the unavailability of Dr. Faye Sultan and Dr. Frederick Berlin to testify on June 1-2, 2023,

the dates the circuit court set for the evidentiary hearing. R/378-79; T/3-7. As early as the May 26, 2023 status conference scheduling the evidentiary hearing for June 1-2, 2023, Owen's counsel expressed to the court that Dr. Sultan was in a remote area of Alaska and would be without internet access to testify on those dates. R/300-04. However, Dr. Sultan was going to be available to testify on the very next business day, on Monday, June 5, 2023. In addition, although Owen's counsel was finally able to make contact with Dr. Berlin the evening of Thursday, June 1, 2023, he was unable to testify that evening or the following day. T/118. The lower court denied the continuance and Dr. Sultan and Dr. Berlin were unable to testify. T/7; see *Provenzano v. State*, 750 So. 2d 597, 603 (Fla. 1999) (Anstead, J., concurring) ("the critical focus of the trial court should be on determining the competency of the defendant, rather than on rushing to get the proceedings over in time for the scheduled execution to take place.")

"[T]he decision to grant or deny a continuance is within the sound discretion of the trial court." *Gore v. State*, 599 So. 2d 978, 984 (Fla. 1992), Therefore, the question for this Court is whether the circuit court abused its discretion when it denied Owen's motion for

a continuance. *Provenzano*, 750 So. 2d at 600-01. Owen submits that the circuit court abused its discretion.

In light of the circuit court making the decision to schedule a rule 3.812 hearing **prior** to Owen's counsel even filing the motion to trigger the hearing and then announcing that decision the Friday afternoon of Memorial Day weekend, it was not unreasonable that doctors would be unavailable. R/297-302. Dr. Sultan would have at least been available to testify on the very next business day after the last day the circuit court set aside for the hearing. Further, if the continuance had been granted, the evidentiary hearing would have still concluded over a week prior to Owen's execution date of June 15, 2023. *See Provenzano*, 750 So. 2d at 600-01 (circuit court abused its discretion by denying reasonable request to continue the rule 3.812 hearing based on expert's availability for five days to a date which was still a week prior to execution date).

Both Dr. Sultan and Dr. Berlin evaluated Owen in the 1990s and would have been able to testify as to the duration of Owen's longstanding fixed delusions. R/408-10, 603-04. Their testimony would have supported the fact that Owen's delusions did not manifest as a result of his impending execution, which would have

precluded the circuit court from finding “Owen is feigning or malingering psychopathology to avoid the death penalty.” R/627. Notably, Dr. Berlin opined that due to Owen’s schizophrenia, during the time he had contact with him, Owen consistently appeared to be out of touch with reality and delusional. R/604. Dr. Sultan also confirmed that Owen suffers from severe, fixed delusions, and Owen believed the “victims consented to be merged with him” and “the victims live within him, physically, spiritually, religiously, and psychologically.” R/409-10.

Further, the testimony of the doctors would have been valuable because without the benefit of their testimony the circuit court found that “Owen does not have any current mental illness” and found it inconceivable that Owen was schizophrenic. R/626-27. Dr. Sultan “opined that Mr. Owen’s diagnosis was delusional disorder to the extreme, a particular subset of schizophrenia, very severe gender identity disorder falling under dysthymia, and paraphilia so severe that it does not fall into any category available other than not otherwise specified.” R/410. Dr. Berlin found that Owen “suffered from several psychiatric disorders, including gender identity disorder, paraphilic sexual disorder, and schizophrenia.” R/604.

Further, as the circuit court improperly considered whether Owen was mentally ill or insane during time periods other than the present, the testimony of these doctors may have helped to sway the circuit court's findings. *See supra* pp. 28-33. Both doctors opined that Owen was legally insane at the time of the crimes. R/410, 604. Their past findings also corroborate Dr. Eisenstein's current findings regarding Owen's diagnoses.

The circuit court abused its discretion in denying a continuance. This Court should reverse, stay the execution, and remand to allow the testimony of Dr. Sultan and Dr. Berlin to be heard.

### **CONCLUSION**

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

We hereby certify that on this 6th day of June, 2023, the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal which will send a notice of electronic filing to the following: Assistant Attorney General Celia Terenzio at Celia.Terenzio@myfloridalegal.com and capapp@myfloridalegal.com; Chief Assistant Attorney General Scott Browne at scott.browne@myfloridalegal.com; Assistant Attorney General Patrick Bobek at Patrick.Bobek@myfloridalegal.com; Assistant Attorney General Leslie Campbell at Leslie.Campbell@myfloridalegal.com; and the Florida Supreme Court, at warrant@flcourts.org.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fla. R. App. P. 9.045 and 9.210(a)(2)(B), we hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font and contains 11,917 of the 13,000 words allowed.

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