IN THE SUPREME COURT OF FLORIDA

EDWARD ALLEN COVINGTON
Appellant,

vs. Case No. SC21-295

STATE OF FLORIDA,
Appellee.

and

EDWARD ALLEN COVINGTON,
Petitioner,

vs. Case No. SC21-1077

RICKY D. DIXON, etc.,
Respondents.
_____/

APPELLANT/PETITIONER'S MOTION FOR REHEARING

COMES NOW the Appellant/Petitioner, Edward Allen Covington, by and through undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.330, and hereby files Appellant/Petitioner's Motion for Rehearing, concerning this Court's opinion issued on August 25, 2022, and states the following:

REHEARING ON THE APPEAL

THIS COURT MISAPPREHENDED OR OVERLOOKED POINTS OF LAW OR FACT IN AFFIRMING THE DENIAL OF POSTCONVICTION RELIEF MR. COVINGTON RAISED IN THIS APPEAL.

This Court misapprehended and overlooked points of law and specific facts in the Court's opinion affirming the denial of postconviction relief, dated August 25, 2022. *Covington v. Florida*, *Covington v. Dixon*, 2022 WL 3651594 (Fla. 2022). Florida Rule of Appellate Procedure 9.330(a)(2)(A) provides that "[a] motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision." Mr. Covington respectfully moves this Court to grant rehearing on the instant appeal. No arguments in the case that are not made explicitly herein are waived.

Mr. Covington's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because Mr. Covington is one of the most profoundly mentally ill persons condemned to death in Florida. His death sentence does not pass Eighth Amendment scrutiny, yet he remains sentenced to death despite a significant showing that his case is one of the most

mitigated. Technical rulings and affirmance by this Court despite clear evidence of his mental illness and ineffectiveness do not overcome the Eighth Amendment violations in this case. This Court should grant rehearing and vacate Mr. Covington's death sentence.

ARGUMENT

On pages 11-12 of the Opinion, this Court concluded that the trial court properly denied Claim I.A. that "[e]volving standards of decency prohibit Mr. Covington's death sentence because of his severe mental illness," because "this Court has repeatedly concluded that there is no categorical bar on execution of the mentally ill and because this claim should have been raised on direct appeal." Opinion at *12. However, this particular claim could not be raised on direct appeal because trial counsel failed to raise and preserve the claim; thus, Mr. Covington was prevented from showing he should be excluded from the death penalty due to trial counsel's failure to argue that evolving standards of decency and Mr. Covington's insanity at the time of the offenses precludes the imposition of the death penalty, and failed to present evidence and testimony demonstrating Mr. Covington's insanity and severe mental illness. Simply because "this Court has repeatedly concluded that there is no categorical bar on

execution of the mentally ill," does not excuse trial counsels' failure to raise the challenge and preserve the argument for appeal.

At page 16 of the Opinion, this Court says: "[a]t the evidentiary hearing, Covington presented testimony from two experts retained by Covington in postconviction, Drs. Mark Cunningham and Frank Wood, who opined that Covington was insane at the time of the murders." Opinion at *16. Here, the Court appears to overlook the fact that a third expert, Dr. Valerie McClain, also testified at the evidentiary hearing that Edward Covington was insane at the time of the offense. This Court overlooks that this extremely powerful testimony from three mental health experts remains unrebutted. Rare is the case with unrebutted expert testimony that the defendant was insane at the time of the offense, yet both the trial court and this Court failed to appreciate the magnitude of the highly mitigating evidence presented in support of Mr. Covington's insanity. This is clearly not the least mitigated of murders this Court has reviewed.

Further, on pages 16-17 of the Opinion, this Court gives too much weight to defense counsel's testimony regarding "opening the door" to State rebuttal testimony about how Mr. Covington was allegedly *not* insane at the time of the offense. There is no danger in

"opening the door" to the question of insanity at the time of the offense. The real danger lies in *closing* the door, which is exactly what trial counsel did. Even though current defense counsel "opened this door" in postconviction, the State presented no rebuttal testimony at the evidentiary hearing. The trial court would have been less inclined to impose death had it heard testimony that Mr. Covington was insane at the time of the offense.

This Court unfairly discounts the significance of unrebutted expert opinions that Mr. Covington was insane at the time of the offenses. Similarly, this Court also overlooks the immense amount of extremely compelling mitigation evidence presented by postconviction expert Dr. Cunningham – evidence which the trial court never heard because of trial counsel's ineffectiveness in failing to develop and fully present the information.

At page 44 of the Opinion, this Court states: "Covington did not allege in his postconviction motion that counsel's alleged deficiencies here prejudiced him such that but for the alleged deficiencies, the result of the proceeding would have been different," and that "even if the trial court did separate substance abuse into its own mitigating circumstance, Covington does not assert that the result would have

been a life sentence." Opinion at *44. Here, this Court appears to dismiss this issue because Claim VI of Mr. Covington's Initial Brief argued only that trial counsel was ineffective for failing to fully develop and present substance abuse as a separate mitigating factor. However, Claim VI of Mr. Covington's Initial Brief had been pled as a subclaim in his Motion to Vacate Judgment of Conviction and Sentence. On page 5 of the Motion, under Claim I, Mr. Covington states that "[a]ll other allegations, factual matters, and legal argument contained in this motion are fully incorporated in this claim," and argues that "counsel's performance during this stage was deficient and prejudicial because there is a reasonable probability that had Mr. Covington received the effective assistance of counsel, he would not have been sentenced to death." The postconviction court granted an evidentiary hearing on this claim.

There is no rule that a defendant must repeatedly refer to both prongs of *Strickland* for a reviewing court to evaluate it, but that is what this Court appears to suggest by noting that "Covington did not assert that the result would have been a life sentence." Opinion at *44.

There is no question that the brief raised an ineffective

assistance of counsel claim under the Sixth and Fourteenth Amendments. The *Strickland* two-prong analysis to show ineffective assistance of counsel is:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate "that counsel's representation fell below an objective standard of reasonableness" under prevailing professional norms. *Id.* at 688; *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

To show prejudice, it is not necessary to establish "that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In determining prejudice, "a court hearing an ineffectiveness claim must consider

the totality of the evidence before the judge or jury." *Id.* at 695. Determination of prejudice in the penalty phase requires evaluation of "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding." *Williams v. Taylor*, 529 U.S. 362, 397 (2000). Further, in light of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and its progeny, confidence in the outcome of the penalty phase trial is undermined when "the swaying of the vote of only one juror would have made a critical difference." *Bevel v. State*, 221 So. 3d 1168, 1182 (Fla. 2017) (quoting *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992)).

Ineffectiveness thus contains two prongs - deficient performance and prejudice. This Court's opinion creates a specific requirement that prejudice be pleaded separately when it is included as one of the prongs under *Strickland*'s ineffectiveness standard. This claim involves one aspect of trial counsel's ineffectiveness that was part of a larger ineffectiveness claim, Claim I in the postconviction motion. Due to page limits and for purposes of emphasis, the claim was argued separately on appeal. This Court's finding of a lack of outcome being pleaded is a stylistic critique and not a matter of constitutional or Florida law.

This aspect of the Court's opinion should be reheard. "'An objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.'" *Lee v. Kemna*, 534 U.S. 362, 378 (2002); quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). *See also Wright v. Georgia*, 373 U.S. 284, 291 (1963) ("Obviously petitioners did in fact argue the point which they press in this Court. Thus, the holding of the Georgia court must not have been that the petitioners abandoned their argument but rather that the argument could not be considered because it was not explicitly identified in the brief with the motions for a new trial. In short, the Georgia court would require the petitioners to say something like the following at the end of the paragraph . . . [making the federal point]: 'A fortiori it was error for the trial court to overrule the motions for a new trial.' As was said in a similar case coming to us from the Georgia courts, this 'would be to force resort to an arid ritual of meaningless form.'" quoting *Staub v. Baxley*, 355 U.S. 313, 320 (1958); *Ward v. Board of County Commissioners of Love County, Oklahoma*, 253 U.S. 17, 22 (1920) ("Whether the right was denied, or

not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support."); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defence on the merits, which imports an appearance pro hac vice, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The

state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. . . . If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.") . . . This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.")

Mr. Covington raised a federal claim of ineffective assistance of counsel for this argument, first under Claim One of the postconviction motion. The postconviction court heard evidence and denied the claim on the merits. *See* Final Order Denying Motion to Vacate Judgment of Conviction and Sentence p. 25. ("Although the trial court found Defendant's cocaine and alcohol abuse was voluntary, the Court finds that in light of the evidence, the aggravators, and the litigators presented, there is not a reasonable probability that Defendant would have received a life sentence had counsel presented Dr. Cunningham's testimony or argued that substance abuse was a mitigating factor in itself No relief is

warranted on claim I-C.") Mr. Covington raised an ineffectiveness claim under the United States Constitution.

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Baldwin v. Reese, 541 U.S. 27, 32 (2004). Mr. Covington certainly did so in this Court and in the postconviction court. Mr. Covington, in the Initial Brief stated in the heading:

> CLAIM VI THE CIRCUIT COURT ERRED IN DENYING PENALTY PHASE RELIEF. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY DEVELOP AND PRESENT SUBSTANCE ABUSE AS A MITIGATING FACTOR ITSELF THUS DENYING MR. COVINGTON HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

IB at 91. This was sufficient to show that Mr. Covington was arguing that the outcome would have been different because that is the second part of the Sixth Amendment right to counsel under *Strickland.* Mr. Covington was then explicit that: "[h]ad defense counsel not been ineffective, the trial court would have considered Mr. Covington's history of substance abuse disorder purely as mitigation and afforded it appropriate weight." IB 94. In the Initial

Brief, Mr. Covington made clear:

> The wrongful characterization of the drugs as voluntary would have been eliminated and the mitigator would have assumed proper status as a statutory mitigator and been accorded the appropriate "great weight."

IB at 94. In the Reply Brief, Mr. Covington argued: had trial counsel presented the evidence as a separate mitigator, it would have altered the balance of aggravators and mitigators. All of these arguments were made under the *Strickland*, two-pronged analysis. Thus Mr. Covington properly appealed the denial of this sub-claim.

This Court should grant rehearing.

REHEARING ON THE STATE PETITION FOR WRIT OF HABEAS CORPUS

THIS COURT MISAPPREHENDED OR OVERLOOKED POINTS OF LAW OR FACT IN DENYING MR. COVINGTON'S STATE HABEAS PETITION

This Court misapprehended and overlooked points of law and specific facts in its opinion denying Mr. Covington's State Petition for a Writ of Habeas Corpus, dated August 25, 2022. *Covington v. Florida*, *Covington v. Dixon*, 2022 WL 3651594 (Fla. 2022). "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision." Fla. R. App. P. 9.330(a)(2)(A) (2022).

Mr. Covington respectfully moves this Court to grant rehearing on the denial of his petition.

ARGUMENT

In the Opinion, this Court ruled that the claims in Mr. Covington's petition that this Court should reconduct its proportionality analysis and that Mr. Covington's death sentence violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because of his serious mental illness are procedurally barred.

As stated above, three experts testified in postconviction that Mr. Covington was insane at the time of the offense; there was also testimony that he suffers from a serious mental illness. That testimony has never been rebutted or questioned. The execution of an individual with a serious mental illness would constitute cruel and unusual punishment under the Constitutions of the United States and the State of Florida. The execution of Mr. Covington, a person with a serious mental illness, would offend the evolving standards of decency of a civilized society and would serve no legitimate penological goal. Mr. Covington submits that his Eighth Amendment right to be free from cruel and unusual punishment

cannot and should not be subject to a procedural bar; to prevent an individual from raising a fundamental constitutional right at any stage in a proceeding in which a court determines whether he is to die at the hands of the State is in itself cruel and unusual.

Society's standards are changing and evolving in relation to the imposition of a death sentence on those individuals considered to be seriously mentally ill. Of the 27 states that retain the death penalty, two have enacted statutes barring the execution of defendants diagnosed with a serious mental illness. See Ohio Rev. Code § 2929.025; KRS 532.130. Of the remaining 25 states, an additional ten (including Florida) have introduced similar bills since 2017. As the law in general is trending away from the death penalty altogether, those that still cling to the punishment are nevertheless continuing to narrow the class of individuals to whom the ultimate sanction applies. Mr. Covington is outside of that class.

"A criminal sentence must relate directly to the personal culpability of the criminal offender." *Tison v. Arizona*, 107 U.S. 1676, 1685 (1987). Capital punishment is the ultimate sanction, "unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Every safeguard should and must be observed when a

defendant's life is at stake. *Id.* (citations omitted). A court must make an "individualized determination of culpability" based, at least in part, on "the mental state with which the defendant commits the crime." *Tison*, at 1687. Imposing a procedural bar on claims such as those raised in the state habeas petition does not safeguard Mr. Covington's life, rather it places the life of a person with a serious mental illness, one who has been diagnosed as having been insane at the time of the crime, in further jeopardy.

Mr. Covington's death sentence was cruel and unusual at the time it was imposed and postconviction has made this absolutely certain. Mr. Covington's mental illness and insanity at the time of the offense renders his death sentence unconstitutional under the Eighth Amendment's prohibition on "cruel and unusual punishment." This Court should grant rehearing and vacate Mr. Covington's death sentence.

CONCLUSION

Based on the argument above, Mr. Covington respectfully requests this Court grant Appellant/Petitioner's Motion for Rehearing. Mr. Covington has demonstrated that based on his severe mental illness and the extreme deficiencies of trial counsel, to rule

otherwise would be a violation of the United States and Florida Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing APPELLANT/PETITIONER'S MOTION FOR REHEARING has been transmitted to this Court through the Florida Courts E-Filing Portal, which will send a notice of electronic filing to all counsel of record and mailed via U.S. Postal Service to Edward Allen Covington, Union Correctional Institution, State Prison, P.O. Box 1000, Raiford, Florida 32083 on this 9th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing APPELLANT/PETITIONER'S MOTION FOR REHEARING was generated in Bookman Old Style, 14-point font, pursuant to Fla. R. App. 9.045

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