IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

LOWER TRIBUNAL NO. 08-CF-009312 (Hillsborough Co.)

EDWARD ALLEN COVINGTON,
Petitioner,
v.
MARK S. INCH,
Secretary,
Florida Department of Corrections,
Respondent,
and
ASHLEY MOODY,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: The writ of habeas corpus shall be grantable of right, freely and without costs. This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Covington was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

References made to the record prepared in the direct appeal of Mr. Covington's conviction and sentence are of the form, e.g., (Dir. ROA Vol I, 123). References to the record of the most recent postconviction record on appeal are of the form, e.g. (PC ROA, 123).

REQUEST FOR ORAL ARGUMENT

Mr. Covington has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. 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 penalty that the State seeks to impose on Mr. Covington.

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INTRODUCTION

Mr. Covington is being denied due process of law. When this Court conducted the proportionality analysis following direct appeal in 2017 (*Covington v. State*, 228 So. 3d 49 (Fla. 2017)), in part because of the errors and omissions of trial counsel, this Court was unaware that Mr. Covington was insane at the time of the offense. This would have weighed heavily in favor of Mr. Covington's death sentence being vacated because he is not in the category of the least mitigated of individuals.

Now this Court no longer conducts proportionality analysis. On October 29, 2020, this Court announced that it would no longer be conducting proportionality analysis in death penalty cases in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). Mr. Covington urges that this Court recede from *Lawrence*, resume proportionality analysis, and vacate his death sentence because he is severely mentally ill. Throughout these proceedings in Mr. Covington's case, fairness and the correctness of the outcome were undermined.

Mr. Covington asks this Court to correct errors in the appellate process that denied him fundamental constitutional rights. This petition will demonstrate that he is entitled to habeas relief.

PROCEDURAL HISTORY

Edward Covington pled guilty to all charges, including three counts of first-degree murder, shortly after a jury trial commenced in Hillsborough County, Florida in 2014. He then proceeded to penalty phase trial after pleading guilty and waiving his right to a jury. Following direct appeal, this Court affirmed Mr. Covington's conviction and death sentence. *Covington v. State*, 228 So. 3d 49 (Fla. 2017). Following the appointment of CCRC-M to represent Mr. Covington in postconviction, his 3.851 Motion was denied on December 28, 2020 after an extensive evidentiary hearing (see Order at PC ROA, 1965-2035). Along with this Petition, Mr. Covington is concurrently filing an Initial Brief with this Court appealing that Order.

GROUNDS FOR HABEAS CORPUS

This is Mr. Covington's first petition for habeas corpus in this Court. Mr. Covington asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in the trial court and then affirmed by this Court in violation of Mr. Covington's rights guaranteed by the Fourth, Fifth, Sixth, Eighth,

and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). *See*. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Covington's death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Covington's direct appeal. *See, e.g., Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Covington to raise the claims presented herein. *See, e.g., Way v. Dugger*, 568 So. 2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987).

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving

fundamental constitutional error. *See Dallas v. Wainwright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Covington's claims.

Claim I

THIS COURT SHOULD RECONDUCT PROPORTIONALITY ANALYSIS TO ENSURE ACCORDANCE WITH THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

In Claim III of Mr. Covington's 3.851 Motion filed February 28, 2019, he argued in part that his proceedings "were inadequate to determine whether his case was the most aggravated and least mitigated." PC ROA, 361. This was a proportionality argument. In its interim Order rendered October 25, 2019, the lower court found "the State's response as to claim III [ ] persuasive and finds an evidentiary hearing is not warranted on claim III." PC ROA, 820. In its final Order rendered December 28, 2020, the lower court found that "[n]o relief is warranted on Claim III." PC ROA, 2034.

On October 29, 2020, this Court announced that it would no longer be conducting proportionality analysis in death penalty cases

in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). Mr. Covington asks that this Court now recede from *Lawrence* and conduct an informed proportionality analysis in this case, knowing now what this Court did not know back in 2017 when it first conducted proportionality analysis.

Following direct appeal, on August 31, 2017, this Court conducted proportionality analysis, *Covington v. State*, 228 So. 3d 49, 68-69 (Fla. 2017), and concluded that "the death sentences are proportionate." *Id.* at 69. At the time that the proportionality analysis was conducted on direct appeal, this Court was unaware that Mr. Covington was insane at the time of the offense. This was due in large part to the ineffective assistance of counsel.

Trial counsel should have presented available evidence from their defense expert Dr. Valerie McClain that Mr. Covington was insane at the time of the offense. Two more experts consulted in postconviction, Dr. Mark Cunningham and Dr. Frank Wood, both agreed with Dr. McClain's conclusions that Mr. Covington was insane at the time of the offense. These conclusions presented at the postconviction evidentiary hearing remain unrebutted. In light of Mr. Covington being insane at the time of the offense, this is not the least

mitigated of cases, rather, this is perhaps one of the most mitigated cases that has been presented to this Court. This Court should reconduct proportionality analysis in light of the additional mitigation that has been presented in postconviction, including the PET scan evidence and unrebutted evidence from three mental health experts that Mr. Covington was insane at the time of the offense. When proportionality analysis is conducted, this Court should reach the conclusion that this death sentence violates the Eighth Amendment prohibition against cruel and unusual punishment because Mr. Covington is an extremely mitigated individual. Mr. Covington respectfully urges this Court to change course and recede from *Lawrence* expressed by Justice Labarga in his dissent.

> LABARGA, J., dissenting.
>
> Today, the majority takes the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence—a step that eliminates a fundamental component of this Court's mandatory review in direct appeal cases.
>
> **The Majority's Recent Decisions in Context**
>
> I cannot overstate how quickly and consequentially the majority's decisions have impacted death penalty law in Florida. On January 23, 2020, this Court decided *State v. Poole*, 297 So. 3d 487 (Fla. 2020). As I noted in my dissent in *Poole,* despite the clearly defined historical basis for requiring unanimous jury

verdicts in Florida, this Court receded from the requirement that juries must unanimously recommend that a defendant be sentenced to death. *Poole*, 297 So. 3d at 513 (Labarga, J., dissenting). After 2016, only the state of Alabama permitted a nonunanimous (10-2) jury recommendation (footnote omitted). *Poole* paved the way for Florida to return to an absolute outlier status of being one of only two states that does not require unanimity.

On May 14, 2020, this Court decided *Bush v. State*, 295 So. 3d 179 (Fla. 2020). In that case, this Court uprooted the long applied heightened standard of review in cases that are wholly based on circumstantial evidence. Under the heightened standard, "[e]vidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict." *Davis v. State*, 90 So. 2d 629, 631-32 (Fla. 1956). This standard, applied for more than one hundred years, served as an important check on circumstantial evidence cases. As I noted in my dissent in *Bush,* while circumstantial evidence is a vital evidentiary tool in meeting the State's burden of proof, "circumstantial evidence is inherently different from direct evidence in a manner that warrants heightened consideration on appellate review." *Bush*, 295 So. 3d at 216 (Fla. 2020). (Labarga, J., concurring in part and dissenting in part). "The solemn duty imposed upon this Court in reviewing death cases more than justifies the stringent review that has historically been applied in cases based solely on circumstantial evidence." *Id.* at 217.

On May 21, 2020, this Court decided *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020). In *Phillips*, this Court receded from *Walls v. State*, 213 So. 3d 340 (Fla. 2016)(holding that *Hall v. Florida*, 572 U.S. 701 [ ] (2014), is to be retroactively applied). The United States Supreme Court's decision in *Hall* held that Florida law, which barred individuals with an IQ score above 70 from demonstrating that they were intellectually disabled, "creates an

unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Id.* at 704 [ ]. The Supreme Court concluded: "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723 [ ]. In *Walls*, this Court held that *Hall* is to be retroactively applied. The majority's recent decision in *Phillips* subsequently receded from *Walls*.

As expressed in my dissent in *Phillips*, in light of the majority's decision to recede from *Walls*, "an individual with significant deficits in adaptive functioning, and who under a holistic consideration of the three criteria for intellectual disability could be found intellectually disabled, is completely barred from proving such because of the timing of his legal process. This arbitrary result undermines the prohibition of executing the intellectually disabled." *Phillips*, 299 So. 3d at 1025 (Labarga, J., dissenting).

In each of these cases, I dissented, and I lamented the erosion of our death penalty jurisprudence. Now today, the majority jettisons a nearly fifty-year-old pillar of our mandatory review in direct appeal cases. As a result, no longer is this Court required to review death sentences for proportionality. I could not dissent more strongly to this decision, one that severely undermines the reliability of this Court's decisions on direct appeal, and more broadly, Florida's death penalty jurisprudence.

Mandatory Review in Death Cases

Until today, this Court has for decades carried out its solemn responsibility to evaluate each death sentence for both the sufficiency of the evidence on which the State relied to convict the defendant, and the proportionality of the death sentence when compared with other cases. We have consistently explained: "In death penalty cases, this Court conducts an independent review of the sufficiency of the evidence." *Caylor v.*

State, 78 So. 3d 482, 500 (Fla. 2011)(citing *Phillips v. State*, 39 So. 3d 296, 308 (Fla. 2010). Whether the evidence is sufficient is judged by whether it is competent and substantial. *See Blake v. State,* 972 So. 2d 839, 850 (Fla. 2007). "In conducting this review, we view the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Rodgers v. State,* 948 So. 2d 655, 674 (Fla. 2006)(citing *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001)).

Moreover, "[i]n capital cases, this Court compares the circumstances presented in the appellant's case with the circumstances of similar cases to determine whether death is a proportionate punishment." *Caylor*, 78 So. 3d at 498 (citing *Wade v. State*, 41 So. 3d 857, 879 (Fla. 2010)). "In deciding whether death is a proportionate penalty, 'we make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.' " *Offord v. State*, 959 So. 2d 187, 191 (Fla. 2007) (quoting *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003)) "This entails 'a *qualitative* review ... of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.' " *Id.* (quoting *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998)).

"[P]roportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). In fact, the sufficiency of the evidence and the proportionality analyses are so fundamental to this Court's direct appeal review that they are conducted regardless of whether the defendant challenges sufficiency and proportionality on direct appeal. *See* Fla. R. App. P. 9.142(a)(5) ("On direct appeal in death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief.").

This Court first recognized the doctrine of proportionality in 1973 in *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973), *superseded on other grounds by* ch. 74-383, § 14, Laws of Fla., *as stated in State v. Dene,* 533 So. 2d 265, 267 (Fla. 1988), in which this Court explained:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia ... can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

In the decades since *Dixon*, a robust body of case law, consisting of literally hundreds of cases, has reaffirmed this rationale and continually strengthened the reliability of this Court's proportionality review.

While the overwhelming majority of this Court's death penalty cases are upheld on proportionality grounds, the fact that this Court has reversed death sentences due to a lack of proportionality underscores the need for proportionality review. *See, e.g., McCloud v. State*, 208 So. 3d 668 (Fla. 2016); *Phillips v. State*, 207 So. 3d 212 (Fla. 2016); *Yacob v. State*, 136 So. 3d 539 (Fla. 2014); *Scott v. State*, 66 So. 3d 923 (Fla. 2011); *Crook v. State*, 908 So. 2d 350 (Fla. 2005); *Williams v. State*, 707 So 2d

683 (Fla. 1998); *Jones v. State*, 705 So. 2d 1364 (Fla. 1998); *Voorhees v. State,* 699 So. 2d 602 (Fla. 1997); *Curtis v. State*, 685 So. 2d 1234 (Fla. 1996); *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995). Yet, I emphasize that not only is the reversal of a death sentence on proportionality grounds a rare occurrence, when a death sentence is reversed as disproportionate, the result is not a "get out of jail free" card. It means that the death penalty is not a proportionate punishment in a particular case, and that instead, the statutory maximum punishment for first-degree murder, a sentence of life imprisonment, is what the law requires.

Today's decision by the majority, striking proportionality review from this Court's mandatory review in death penalty appeals, leaves only the sufficiency analysis. In removing this fundamental component of proportionality review, the majority's decision threatens to render this Court's initial review of death sentences an exercise in discretion.

Proportionality Review is Consistent with the Eighth Amendment

"The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 [ ] (2010). Contrary to the conclusion reached by the majority, I view this Court's lengthy history of conducting proportionality review as entirely consistent with the Eighth Amendment as interpreted by the United States Supreme Court, and thus, not a violation of the conformity clause contained in article I, section 17 of the Florida Constitution. Even though the United States Supreme Court concluded in *Pulley v. Harris*, 465 U.S. 37 [ ] (1984), that proportionality review was not constitutionally mandated, the Supreme Court acknowledged proportionality review as "an additional safeguard against arbitrarily imposed death sentences." *Id.* at 50 [ ].

Thus, I disagree with the majority's reasoning that because the Supreme Court does not expressly mandate proportionality review, Florida's conformity clause forbids it. The Supreme Court

recognized proportionality review as an "additional safeguard" against the very thing the Eighth Amendment prohibits—arbitrarily imposed death sentences. As observed by Justice Brennan in his dissent in *Pulley*:

> Disproportionality among sentences given different defendants can only be eliminated after sentencing disparities are identified. And the most logical way to identify such sentencing disparities is for a court of statewide jurisdiction to conduct comparisons between death sentences imposed by different judges or juries within the State. This is what the Court labels comparative proportionality review. Although clearly no panacea, such review often serves to identify the most extreme examples of disproportionality among similarly situated defendants. At least to this extent, this form of appellate review serves to eliminate some of the irrationality that currently surrounds imposition of a death sentence. If only to further this limited purpose, therefore, I believe that the Constitution's prohibition on the irrational imposition of the death penalty requires that this procedural safeguard be provided.

Pulley, 465 U.S. at 70-71 [ ] (Brennan, J., dissenting) (citation omitted).

The United States Supreme Court's acknowledgment of proportionality as an additional safeguard—combined with the fact that the Supreme Court has not held proportionality review unconstitutional—affirms that in this case, the majority could well have concluded that proportionality does not run afoul of the conformity clause. Instead, yet again placing Florida outside of the majority of death penalty states, the majority has chosen to construe the United States Supreme Court's reasoning as prohibiting Florida's decades old proportionality review. I could not disagree more.

Proportionality Review in Other States

Further supporting my conclusion that the majority's decision is

a highly unfortunate departure from settled law is the fact that proportionality review is conducted in a majority of other death penalty states. Twenty-five states currently impose the death penalty (footnote omitted). Sixty percent of those twenty-five states, not including Florida, conduct a proportionality review. In fourteen of those states, the review is statutorily imposed: Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, and Virginia (footnote omitted).

Similar to Florida (prior to today's decision), appellate review of death sentences in Utah involves a proportionality review despite the lack of a statutory requirement. *State v. Honie*, 57 P. 3d 977, 988 (Utah 2002). ("Despite the fact that proportionality review is not required, either by the Utah or federal constitutions or by statute, we have chosen to assume the responsibility of reviewing death sentences for disproportionality."); *State v. Wood*, 648 P. 2d 71, 77 (Utah 1982). ("In the penalty phase, it is our duty to determine whether the sentence of death resulted from error, prejudice or arbitrariness, or was disproportionate."); *see also State v. Maestas*, 299 P. 3d 892, 987 (Utah 2012); *State v. Andrews*, 574 P. 2d 709, 710-11 (Utah 1977); *State v. Pierre*, 572 P. 2d 1338, 1345 (Utah 1977).

The Utah Supreme Court has emphasized that a proportionality review "means that this Court will not allow sentencing authorities to impose the death penalty in an invidious fashion against particular types of persons or groups of persons or in a fashion disproportionate to the culpability in a particular case ... that over time, as this Court becomes aware of a general pattern in the imposition of the death penalty in this state, the Court may set aside death sentences that fall outside the general pattern and thus reflect an anomaly in the imposition of the death penalty." *State v. Holland*, 777 P. 2d 1019, 1025-26 (Utah 1989). The court stated that this review function "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Pierre*, 572 P. 2d 1338, 1345 (Utah 1977)(quoting *Gregg v. Georgia*, 428 U.S. 153, 206 [ ] (1976)).

Even in states that statutorily mandate proportionality review, several state supreme courts have emphasized its importance. The Supreme Court of Virginia explained: "The purpose of our comparative [proportionality] review is to reach a reasoned judgment regarding what cases justify the imposition of the death penalty. We cannot insure complete symmetry among all death penalty cases, but our review does enable us to identify and invalidate a death sentence that is 'excessive or disproportionate to the penalty imposed in similar cases.' " *Orbe v. Commonwealth*, 258 Va. 390, 519 S.E. 2d 808, 817 (1999)(quoting Va. Code Ann. § 17.1 – 313(C)(2)); *see also Lawlor v. Commonwealth*, 285 Va. 187, 738 S.E. 2d 847, 894-95 (2013).

Similarly, the Tennessee Supreme Court has recognized that "the purposes of comparative proportionality review are to eliminate the possibility that a person will be sentenced to death by the action of an aberrant jury and to guard against the capricious or random imposition of the death penalty," and that "comparative review of capital cases insures rationality and consistency in the imposition of the death penalty." *State v. Bland*, 958 S.W. 2d 651, 665 (Tenn. 1997)(citing *State v. Barber*, 753 S.W. 2d 659, 665-66 (Tenn. 1988)); *see also State v. White*, 355 N.C. 696, 565 S.E. 2d 55, 68 (2002) (recognizing that "[p]roportionality review also acts '[a]s a check against the capricious or random imposition of the death penalty.' " (quoting *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510, 544 (1979))); S*tate v. Ramsey*, 864 S.W. 2d 320, 328 (Mo. 1993)(stating that proportionality review "is designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences."); *State v Kyles*, 513 So. 2d 265, 276 (La. 1987)(stating that although not constitutionally required, the court "conducts a proportionality review as a further safeguard against arbitrariness").

Without proportionality review, each death sentence stands on its own. Failing to consider a death sentence in the context of other death penalty cases impairs the reliability of this Court's decision affirming that sentence.

Conclusion

In line with a vision consistent with evolving standards of decency, as envisioned by the United States Supreme Court in *Trop v. Dulles*, 356 U.S. 86, 101 [ ] (1958), our state's jurisprudence has in many instances provided its citizenry with greater rights and protections than the minimum required by the United States Supreme Court, the federal government, and other states. In this instance, our state has consistently done just that, by requiring a proportionality review in every death penalty case, thus providing "an additional safeguard against arbitrarily imposed death sentences." *Pulley*, 465 U.S. at 50 [ ]. As noted earlier, sixty percent of the twenty-five states that currently impose the death penalty require a proportionality review.

Sadly, this long-standing jurisprudential approach has been significantly, if not completely, repudiated by this Court's various opinions, beginning with its decision in *Poole*, followed by Bush and *Phillips*, and continuing with today's decision to discontinue conducting a proportionality analysis in each death penalty appeal.

I deeply, regretfully, and most respectfully dissent.

Lawrence at 552-558.

A. Judicial *Caldwell* Considerations / Judicial Mercy

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court held, and reasoned that it:

> has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for

> determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341, 2646. With this Court's recent decision in *Lawrence*, this Court's role and responsibility of providing careful appellate review of death sentences to ensure that they do not violate the Eighth Amendment has not just been minimized, it has been altogether eliminated. Prior to *Lawrence*, this Court had great gravity in its task of having to conduct careful appellate review of the death sentences handed down from below. That responsibility was truly awesome. In essence, the extension of judicial mercy from this Court was previously possible in cases where the death sentences were carefully evaluated and deemed either unfair or unreliable.

With *Lawrence*, this Court's death penalty jurisprudence and its safeguarding of established constitutional protections has now fallen from the ceiling, to the floor, to the basement. This Court should recede from *Lawrence*, reconduct proportionality analysis in this case, and grant relief from this unfair death sentence because Edward Covington was clearly insane at the time of the offense. This

Court should grant relief in this case because "[t]he execution of an insane person simply offends humanity." *Ford v. Wainwright*, 477 U.S. 399, 407 (1986).

Mr. Covington had planned to argue to this Court that trial counsel's deficiencies deprived this Court of vital information consequently leading to an unfair and ill-informed proportionality analysis in 2017. At this point, all Mr. Covington can do is urge this Court to recede from *Lawrence*.

B. "Professionalism In The Practice of Law, Death Penalty Litigation, and The Legislative Process."

On Tuesday June 29, 2021, the undersigned counsel attended a webinar on the topic of "Professionalism In The Practice of Law, Death Penalty Litigation, and The Legislative Process." The webinar was announced in the June 23, 2021 edition of The Florida Bar News. It was sponsored by Ita Neymotin, the Criminal Conflict and Civil Regional Counsel for the Second District Court of Appeal jurisdiction. Some of the presenters included Twelfth Judicial Circuit Chief Judge Kimberly Bonner, Florida Bar President Mike Tanner, President-elect Gary Lesser, Sen. Keith Perry, R-Gainesville, chair of the Senate Criminal and Civil Justice Appropriations Subcommittee, elected

State Attorney for the Thirteenth Judicial Circuit Andrew Warren, elected Public Defender for the Thirteenth Judicial Circuit Julianne Holt, and elected Public Defender for the Tenth Judicial Circuit Rex Dimmig.

State Attorney Andrew Warren took time to discuss and appeared critically concerned with this Court's recent decisions in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), *Bush v. State*, 295 So. 3d 179 (Fla. 2020), *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) and *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). Public Defender Rex Dimmig voiced grave concerns with this Court's decision in *Lawrence*, stating in part at the webinar:

> It is long been said that religion and politics should not be discussed in polite company. I would suggest that the death penalty is also been included in that list of taboo topics. But I can think of no issue where discussion of professionalism is more needed than when the government seeks to take a human life. Few topics elicit as strong an emotional response from people on all sides of the issue as the death penalty. And regrettably, when the death penalty is discussed, those who speak the loudest are often those who know the least about the issue.
>
> I want to start my discussion today by acknowledging certain truths about the death penalty. Truths that, if we are being completely honest, we all recognize but are too often reluctant to politically or to publicly admit. The death penalty is not just a legal issue. For most, feelings about the death penalty are less determined by legal considerations and more influenced by those other two taboo topics of conversation, religion and politics.

Unquestionably the taking of human life is a moral issue. That is true even when the taking of human life is by the government. Practically every major religion today opposes capital punishment. Most recently the Vatican clarified its position, so that there can no longer be any doubt that the Catholic Church is firmly opposed to the death penalty. And as is the case with most things, politics certainly influences our attitude toward the death penalty.

We all recognize that prosecutors have a great deal of discretion in our criminal justice system. Law enforcement arrests people, but it is prosecutors who have the responsibility of deciding if someone will be charged with a criminal offense and what that offense will be. In death penalty cases, prosecutors must first decide if a crime has been committed. Did the accused act in self-defense? Or did they stand their ground? Was the killing justifiable homicide or excusable homicide? If the prosecutor decides a crime was committed, they must next decide if they will seek an indictment for first-degree murder, or will they charge second degree murder, or manslaughter, or some other offense. If the prosecutor seeks an indictment for first-degree murder, still more decisions must be made. Not all first-degree murders are punishable by death. Case law makes it abundantly clear that the maximum penalty for first-degree murder is life in prison without the possibility of parole. Only when there is a first-degree murder, and one or more aggravating factors, is death a possible sentence. But even when aggravating factors exist, the prosecutor is not required to seek the death penalty. They can exercise their discretion to not file a notice of intent to seek death and the death penalty is off the table.

In Florida, another undeniable fact is that the state attorney in each of our 20 circuits faces election or reelection every four years. And how a state attorney exercises their discretion could be a campaign issue. Certainly, we all recall four years ago when a state attorney publicly announced that she would never seek the death penalty in a first-degree murder case. That definitely became a major political issue, with the governor and many others, chiming in. I don't know if it would have become a

campaign issue because that State Attorney decided not to seek reelection.

The potential political implications of the death penalty exists for more than just prosecutors. Florida also elects trial court judges. And whether initially elected to office or appointed, trial judges face reelection every six years. And judges have discretion in death penalty cases as well. A judge can exercise his or her discretion not to impose a death sentence even if the trial jury unanimously voted in favor of death. Many of you may be less familiar with the recent contested election for an open circuit court judgeship. In that race one candidate published campaign literature suggesting that voters should reject their opponent because he had previously represented murderers while a criminal defense attorney. The influence of the death penalty in politics.

Let me be very clear, I am not suggesting that any prosecutor or any judge has been influenced by their religious beliefs or by political considerations when exercising their discretion concerning seeking or imposing the death penalty. What I am suggesting, is that it is professionalism that ensures that their discretion will be exercised without improper influence. I am also suggesting, that in light of a recent reversal of well settled case law, the exercise of professionalism at the local circuit level is now more important than it has ever been in what is commonly called the modern era of capital punishment. In 1972, the United States Supreme Court decided the case of *Furman versus Georgia.* In a one paragraph *per curiam* decision, the court held that the procedure for imposing the death penalty, but not the death penalty itself, violated the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments to the Constitution. Each of the nine justices then went on to write separate opinions: five concurring, four dissenting, which explained their individual rationale for their decision. The bottom line, the general holding, the process of imposing the death penalty left too much unguided discretion in the hands of the jury, resulting in the imposition of the death penalty being arbitrary and random.

In the aftermath of *Furman*, Florida became the first state to reenact the death penalty statute. Then in 1973, the constitutionality of Florida's new law was challenged in the case of *State v Dixon*. The Florida Supreme Court described Florida's new death penalty process as consisting of five steps. The final of which, was automatic review of every death sentence imposed in the state. In upholding the constitutionality of the statute, the Florida Supreme Court wrote, "Review by this court guarantees that the reasons present in one case will reach a similar result to that reached in similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia* can be controlled and challenged until the sentencing process becomes a matter of reasoned judgment, rather than an exercise in discretion at all." The sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

With those words, proportionality review was born. It was even adopted as a rule of appellate procedure by the Florida Supreme Court. Rule 9.142(a)(5) [2020] addresse[d] the scope of appellate review. It read[]: "On direct appeal in death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for appropriate relief." Even if not raised as an issue on appeal, proportionality would always be automatically reviewed by Florida's highest court. And from that day forward the Supreme Court engaged in performing proportionality review in every death penalty case for over 45 years, until October 29th, 2020.

On that date the Court decided *Lawrence v. State,* and five justices decided to eliminate proportionality review. [F]ive justices decided that the Conformity Clause of Article 1, Section 17 of the 1968 Florida Constitution prohibited proportionality review. And more than 45 years of case precedent and a rule of

appellate procedure were abandoned. In the [cautionary] words of *Dixon*, [under *Lawrence*,] "Reasoned judgment was eliminated from the sentencing process and discretion returned." But if the constitutional flaw identified in *Furman* was uncontrolled discretion in the hands of jurors, post-*Lawrence*, what controls the discretion that is in the hands of prosecutors and trial judges. I would submit it can only be their professionalism, and only time will tell if that is enough.

The proportionality review not only controlled discretion, it provided a means to challenge the improper exercise of discretion, and provide relief when needed. Here too, only time will tell if persons similarly situated will be treated similarly across the entire state if there is not automatic proportionality review. If they are not, if there is disparate treatment of similarly situated defendants, the Conformity Clause of Article 1, Section 17 only requires that Florida courts follow the US Supreme Court rulings on what constitutes cruel and unusual punishment under the Eighth Amendment. Challenges to the exercise of discretion resulting in random and arbitrary application of the death penalty can still be raised under the Equal Protection Clause of the Fourteenth Amendment.

Now having raised the issue of Equal Protection, I would be remiss not to briefly mention one other open question [of] death penalty law. The Florida legislature passed what was called the Timely Justice Act of 2013. In the Act, an attorney employed by the state who is found to have rendered constitutionally deficient representation twice in capital cases is prohibited from representing a person who is charged with a capital offense for a period of five years. What is constitutionally defense deficient representation? I think we all can agree that it includes ineffective assistance of counsel. The question is, though, does it also include prosecutorial misconduct? But the provision of the Timely Justice Act of 2013 does not impose similar sanctions if a prosecutor abuses their discretion, if a prosecutor does not follow the rules and act professionally. The rule provides that the person a person is only prohibited from representing a person charged with a capital offense. It only addresses defense

> attorneys. It does not deal with prosecutors. Should there not be equal treatment of defense attorneys and prosecutors in capital litigation. If one renders constitutionally deficient representation and can be suspended from practicing capital litigation, should not the other suffer the same fate, if they exercise prosecutorial misconduct?
>
> We must remember that professionalism is a goal. It is a goal of all of us. It is a goal which we all strive to achieve. And we all hope every practicing lawyer follows, but is it enough? Is it enough, or do there need to be new procedures put into place to ensure that the exercise of discretion is fair and impartial and does not result in the arbitrary or random imposition of the death penalty? Should we impose new rules that say both prosecuting attorneys and defense attorneys must be treated equally if they fail to live up to their professional obligations and provide constitutionally deficient representation in the capital case?
>
> In Florida we've had a new death penalty statute, a post-*Furman* death penalty statute since 1973. In 2017, after the *Hurst* decision in the United States Supreme Court that statute was significantly amended. But I hope you can see the questions still remain, that litigation will still be ongoing, and I hope you recognize, as we all must, the absolutely vital role professionalism plays in capital litigation.[1]

C. "Death is Different"

The United States Supreme Court has consistently reminded that death is different: "[t]he taking of life is irrevocable. It is in capital

[1]Unofficial transcription of Public Defender Rex Dimmig's presentation during the Professionalism in the Practice of Law, Death Penalty Litigation, and the Legislative Process webinar, originally aired June 29, 2021. Transcribed by CCRC-M Paralegal Belinda Wright during the webinar's July 1, 2021 re-broadcast.

cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring). *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). Nearly 20 years ago, the United States Supreme Court cited "[p]roportionality review under [ ] evolving standards [of decency that mark the progress of a maturing society]" as it held the Eighth Amendment was offended and violated with the execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

This Court should not permit the execution of the Petitioner, Edward Allen Covington, because he was insane at the time of this offense, he suffers from severe mental illnesses, and his execution would therefore constitute cruel and unusual punishment under the Eighth Amendment because he is not the least mitigated of individuals.

Lawrence takes several steps back, and is yet another example of the unfortunate devolving standards of decency in the State of Florida's death penalty jurisprudence. With *Lawrence*, the State of

Florida continues to slide further in its death penalty outlier status. Around the nation, the death penalty is clearly in disfavor. Virginia recently enacted a new law abolishing the death penalty (effective July 1, 2021). The State of Ohio banned the execution of the severely mentally ill with a bill signed January 9, 2021. Earlier this month, the United States Department of Justice announced a pause of federal executions. In line with the Eighth Amendment and the "evolving standards of decency that mark the progress of a maturing society," this Court should not permit the execution of Edward Allen Covington, a severely mentally ill individual who was insane at the time of the offense.

This Court should recede from *Lawrence* and grant relief.

Claim II

MR. COVINGTON'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE MR. COVINGTON'S SEVERE MENTAL ILLNESS EXEMPTS HIM FROM THE DEATH PENALTY BASED ON EVOLVING STANDARDS OF DECENCY AND BECAUSE MR. COVINGTON'S CASE IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED. THE PROCESS FOR DETERMINING MR. COVINGTON'S DEATH SENTENCE WAS INADEQUATE, THUS DENYING HIM DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND FURTHER VIOLATING THE EIGHTH AMENDMENT BY FAILING TO ACCURATELY DETERMINE WHETHER HIS CASE BELONGED IN THE CLASS OF CASES THAT

MAY LEAD TO A DEATH SENTENCE. TO THE EXTENT THAT THE ARGUMENTS THAT FOLLOW COULD HAVE BEEN DEVELOPED AND PRESENTED BY TRIAL COUNSEL, TRIAL COUNSEL WAS INEFFECTIVE, THUS DENYING MR. COVINGTON HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Evolving standards of decency prohibit Mr. Covington's death sentence because of his severe mental illness.

Mr. Covington's death sentence is unconstitutional because evolving standards of decency have reached the point where someone suffering from the severe mental illness that Mr. Covington does cannot constitutionally be sentenced to death. This claim was made in Claim II of the Petitioner's 3.851 Motion, but was denied as the lower court found "that mental illness is not a categorical bar to a death sentence." PC ROA, 820.

The United States Supreme Court has barred the execution of the intellectually disabled and the execution of juveniles in *Atkins, Id.* and in *Roper v. Simmons*, 543 U.S. 551 (2005). Both cases cited to evolving standards of decency in today's society as the main factors justifying vacation of those death sentences. In light of the principles announced in *Atkins* and *Roper v. Simmons*, and in light of the evolving standards of decency in today's society, this Court should

vacate Mr. Covington's death sentences. The United States Supreme Court reaffirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. The Court outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the intellectually disabled.

Prior to 2002, the Court had refused to categorically exempt intellectually disabled persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins*, the Court held that standards of decency had evolved in the 13 years since *Penry* and that a national consensus had formed against such executions, demonstrating that the execution of the intellectual disability is cruel and unusual punishment. *Atkins*, *Id*. at 307. The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. The Court counted the states with no death penalty, pointing out that a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles. Similarly, there is now a growing

consensus that the death penalty should be prohibited for the severely mentally ill.

In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the *Roper v. Simmons* Court found it significant that juveniles are vulnerable to influence and susceptible to immature and irresponsible behavior. In light of a juvenile's diminished culpability, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said: Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. *Roper v. Simmons* at 571.

Mr. Covington's culpability and blameworthiness are diminished in this case. Mr. Covington's sentence of death violates the Eighth and Fourteenth Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious imposition of the ultimate penalty as applied.

Evolving standards of decency prevent the execution of the mentally ill. The United States Supreme Court has long recognized that:

> The prohibition against Acruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to Athe evolving standards of decency that mark the progress of a maturing society@ to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100B101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560-61(2005). Indeed:

> Capital punishment must be limited to those offenders who commit Aa narrow category of the most serious crimes and whose extreme culpability makes them Athe most deserving of execution. *Atkins*, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey v. Georgia*, 446 U.S. 420, 428B429 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor Aany aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *see also Johnson v. Texas*, 509 U.S. 350, 359B362 (1993) (summarizing the Court's jurisprudence after *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), with respect to a sentencer's consideration of aggravating and mitigating factors). There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782(1982) (felony murder

> where defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson v. Oklahoma*, *supra*; *Ford v. Wainwright*, 477 U.S. 399(1986); *Atkins*, supra. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

Id. 568-69.

In *Atkins,* the Supreme Court found that the execution of the intellectual disabled violated the Eighth Amendment's prohibition of cruel and unusual punishment based on evolving standards of decency. *Id*. at 306-307. The Court was very careful to distinguish between the criminal responsibility of the intellectual disabled and the prohibition of their execution:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry* v. *Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus

> rejected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

Id.

Mr. Atkins presented expert testimony that he was "mildly mentally retarded." *Id.* at 308. Mr. Atkins' expert psychologist reached this conclusion "based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full-scale IQ test of 59." *Id.* Like the instant case, the Supreme Court noted that Mr. Atkins' credibility at trial was damaged because of "its substantial inconsistency with the statement he gave to the police upon his arrest." *Id.* at 308, N2.

At the resentencing, the State presented testimony from their own rebuttal expert. *Id.* at 309. The State's expert expressed an opinion that Mr. Atkins "was not mentally retarded, but rather was of 'average intelligence, at least,' and diagnosable as having antisocial personality disorder." *Id.* The State's expert reviewed Mr. Atkins school records, interviewed correctional staff, and asked Mr. Atkins questions taken from a "1972 version of the Wechsler Memory Scale."

Id.

Mr. Atkins argued on state appeal "that he is mentally retarded and thus cannot be sentenced to death." *Id.* at 310 (citation omitted). The majority rejected this claim. Two Justices on the court dissented and "rejected [the State's expert]'s opinion that Atkins possesses average intelligence as 'incredulous as a matter of law,' and concluded that 'the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive.'" *Id.* The dissenters found that "'it [wa]s indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.'" *Id.* (citations omitted).

The Court explained the evolving standards of decency regarding the execution of intellectually disabled. *Id.* at 313-14. The Court found it determinative that despite the legislative popularity of "anti-crime legislation" overwhelmingly, states had prohibited the execution of the intellectually disabled by statute. Moreover, states that had the death

penalty and did not regularly use it, and states that had no death penalty, showed the consensus against executing the intellectually disabled. This:

> provide[d] powerful evidence that today our society views the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. Mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 315-316. The Court found:

> This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

Id. at 317.

The Court found that neither of the two permissible bases for capital punishment, deterrence and retribution, were measurably contributed to by the execution of the intellectually disabled. *Id*. at 319. The Court concluded:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is

> not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender."

Id. at. 321.

In both cases, the Court found that death may not be imposed on a certain class of individuals because of "evolving standards of decency." *See Roper*, 536 U.S. at 589; citing *Trop v. Dulles*, 356 U.S. 86, 100-101, [] (1958); *Atkins*, 536 U.S. at 311-12; citing *Trop* at 100-101. In the case of the execution of the "insane" which are those who are incompetent to be *executed,* the standard of decency did not have to evolve because as *Ford v. Wainwright*, 477 U.S. 399 (1984) makes clear, such standards predate the Constitution. *Id*. at 406-410.

Evolving standards of decency have rendered the execution of the severely mentally ill constitutionally impermissible. Deterrence and retribution are not served with Mr. Covington's execution because:

1. People suffering from the level of mental illness Mr. Covington did at the time of offense are incapable of being deterred by the death

penalty.

2. It is hardly a fair retribution if Mr. Covington had little capacity at the time of offense to act rationally and avoid the conduct.

3. Like the intellectually disabled, Mr. Covington's mental illness affected his ability to make decisions concerning his defense thus unfairly subjecting him to the death penalty. Mr. Covington continues to make decisions that are adverse to his best interest because of his severe mental illness. Mr. Covington confessed to the police and spoke with a number of doctors. Every time he did this it made his crimes seem worse. His participation in the postconviction process has been minimal, to his disadvantage. It is unfair to take the life of an individual whose ability to defend themselves is so impaired by severe mental illness.

This Court should grant relief from this death sentence.

CONCLUSION

This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to all counsel of record on this 22nd day of July, 2021.

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CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS of the Appellant was generated in a Bookman Old Style 14-point font, pursuant to Fla. R. App. P. 9.210, it contains 10,008 words, and it does not exceed 50 pages in length or 13,000 words in accordance with Fla. R. App. P. 9.210(g).

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