IN THE SUPREME COURT OF FLORIDA

EDWARD ALLEN COVINGTON,

Petitioner,

v.

CASE NO. SC21-1077
L.T. No. 08-CF-009312
DEATH PENALTY CASE

MARK S. INCH,
Secretary Florida,
Department of Corrections, etc.,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COME NOW, Respondents, Mark S. Inch, Secretary, Florida Department of Corrections, etc.,[1] by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled cause. Respondents respectfully submit that the petition should be denied because habeas corpus is not the proper method for raising claims that could have or should have been raised on appeal or in a postconviction proceeding. Pham v. State, 177 So. 3d 955, 963 (Fla. 2015).

[1] Covington names Attorney General Ashley Moody as a Respondent. "[T]he proper respondent in a habeas corpus petition is the party that has actual custody and is in a position to physically produce the petitioner." Florida Dept. of Corrections. v. Monroe, 308 So. 3d 265, 266 (Fla. 1st DCA 2020) citing Alachua Reg'l Juvenile Det. Ctr. v. T.O., 684 So. 2d 814, 816 (Fla. 1996). The Attorney General does not have custody of Covington. Therefore, she is not a proper party to the habeas petition.

Likewise, "habeas corpus petitions are not to be used for additional appeals on questions which . . . were raised on appeal or in a [postconviction] motion, or on matters that were not objected to at trial." Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) quoting Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989).

RELEVANT FACTS AND PROCEDURAL HISTORY

As summarized in this Court's opinion on direct appeal, the sentencing court found the following aggravating factors and mitigating circumstances and assigned them the noted weight:

> As to the murder of Lisa Freiberg, the trial court concluded that three aggravating circumstances were proven beyond a reasonable doubt: (1) the capital felony was especially heinous, atrocious, or cruel (great weight); (2) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); and (3) the capital felony was committed while Covington was on felony probation (minimal weight).
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> As to the murder of Zachary Freiberg, the trial court concluded that four aggravating circumstances were proven beyond a reasonable doubt: (1) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); (2) the victim of the capital felony was a person less than twelve years of age (great weight); (3) the capital felony was committed while Covington was on felony probation (minimal weight); and (4) the victim of the capital felony was particularly vulnerable because Covington stood in a position of familial or custodial authority over the victim (great weight).

As to the murder of Heather Savannah Freiberg, the trial court concluded that five aggravating circumstances were proven beyond a reasonable doubt: (1) the capital felony was especially heinous, atrocious, or cruel (great weight); (2) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); (3) the victim of the capital felony was a person less than twelve years of age (great weight); (4) the capital felony was committed while Covington was on felony probation (minimal weight); and (5) the victim of the capital felony was particularly vulnerable because Covington stood in a position of familial or custodial authority over the victim (great weight).

The trial court found that two statutory mitigating circumstances were established: (1) the capital felony was committed while Covington was under the influence of extreme mental or emotional disturbance [FN4] (moderate weight); and (2) Covington has no significant history of prior criminal activity (moderate weight). The trial court also found that twenty-four nonstatutory mitigating circumstances were established: (1) Covington suffers from bipolar disorder, intermittent explosive disorder, and cocaine and alcohol abuse disorder (great weight); (2) Covington's capacity to conform his conduct to the requirements of the law was diminished due to his mental illness and his voluntary use of cocaine and alcohol [FN5] (moderate weight); (3) Covington's mother suffered with gestational diabetes during her pregnancy with him and delivered prematurely (no weight); (4) Covington suffers a life-long hearing loss due to an antibiotic overdose at the age of three weeks (no weight); (5) Covington had two major head injuries resulting in loss of consciousness at ages seven and twelve (no weight); (6) Covington was diagnosed and treated for sleep apnea due to obesity (no weight); (7) Covington went through gastric bypass surgery to improve his physical health (no weight); (8) Covington suffered several medical complications following his gastric bypass surgery, which led to additional surgeries to repair abdominal obstructions (no weight); (9) Covington was a good high school football athlete and graduated with average grades (no weight); (10) Covington

received a private pilot's license at age seventeen (no weight); (11) Covington was rejected from entering the Navy due to hearing loss, which deeply affected his future goals (no weight); (12) Covington earned numerous training certificates before and during his ten years of employment with the DOC and he was subsequently accepted into an electrical apprenticeship program (minimal weight); (13) Covington was awarded a certificate of appreciation in 1999 for assisting law enforcement in a domestic incident by coming to the assistance of the adult and child victims (moderate weight); (14) Covington has the ability to form positive friendships (minimal weight); (15) Covington's parents love and care for him and have been constant sources of support and will continue to support him (minimal weight); (16) Covington did not resist law enforcement and cooperated with detectives during the investigation of the murders (moderate weight); (17) Covington expressed remorse during his initial interviews with detectives, to expert witnesses, and directly to the Freiberg family (moderate weight); (18) Covington's risk for violence decreases with every year of incarceration based on a published research study (minimal weight); (19) Covington's risk for violence will decrease with stabilization of his psychotropic medications (minimal weight); (20) Covington is intelligent and can help others through education (no weight); (21) Covington has a diagnosis of bipolar disorder and can be helpful to prison medical staff as they treat others with similar symptoms (no weight); (22) Covington and his parents want to work to increase public awareness of bipolar disorder and the need for access to low-cost medications for treatment (no weight); (23) Covington has conformed to incarceration and has had no disciplinary actions since 2012 (minimal weight); and (24) Covington pleaded guilty and acknowledged responsibility for the deaths of a mother and her children, thereby sparing the family of the victims the trauma of a trial (moderate weight). The trial court rejected two proposed nonstatutory mitigating circumstances—that a death sentence should not be based on emotions and that society can be protected and justice served by a sentence of life without parole—finding that they constituted argument rather than mitigating factors.

> [FN4] But the trial court noted that Covington's "mental or emotional disturbance, and his rage and violence, were precipitated by his voluntary use of cocaine, alcohol, and his voluntary discontinuing of his psychotropic medications because they caused him sexual dysfunction, knowing such would precipitate rage and violence."
>
> [FN5] Covington proposed the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired due to his mental illness, but the trial court found that his ability to appreciate the criminality of his conduct was not impaired because of his mental illness and that his ability to conform his conduct to the requirements of the law was not substantially impaired due to his mental illness but was merely diminished due to his mental illness and his voluntary use of cocaine and alcohol.

Covington v. State, 228 So. 3d 49, 52–61 (Fla. 2017).

Direct Appeal:

Covington raised six issues on direct appeal, including:

> Whether Appellant's death sentences are disproportionate because the murders were the product of Appellant's mental illness and because substantial mitigation demonstrates that this case is not among the "least mitigated."

In affirming the death sentences on direct appeal, this Court conducted a comparative proportionality analysis. Finding the death sentence proportional, this Court stated as follows:

Here, the trial court found that three aggravating circumstances for Lisa's murder (including HAC and prior violent felony), four aggravating circumstances for Zachary's murder (including prior violent felony), and five aggravating circumstances for Heather Savannah's murder (including HAC and prior violent felony) were proven beyond a reasonable doubt. HAC and prior violent felony are among the weightiest of the aggravators. Hodges v. State, 55 So.3d 515, 542 (Fla. 2010). The trial court accorded moderate weight to the two statutory mitigating circumstances that were established—extreme mental or emotional disturbance and no significant criminal history—and found that twenty-four nonstatutory mitigating circumstances were established but accorded only one of them great weight and twelve of them no weight.

We have found the death penalty to be proportionate in other similar cases. In Aguirre–Jarquin, 9 So. 3d [593, 610 (Fla. 2009)], the death sentences were affirmed where the defendant stabbed to death a mother and daughter who were his neighbors and with whom he visited socially. The defendant was drinking and using cocaine prior to the murders. 9 So. 3d at 599–600, 600 n.4. Three aggravators were found as to the mother's murder: prior violent felony, engaged in the commission of a burglary, and HAC. Id. at 600 n.6. Five aggravators were found as to the daughter's murder: prior violent felony, engaged in the commission of a burglary, avoid arrest, HAC, victim particularly vulnerable due to age or disability. Id. And the mitigation in Aguirre–Jarquin was similar to the mitigation here, including extreme mental or emotional disturbance (moderate weight), substantially impaired ability to appreciate the criminality of his conduct (moderate weight), and long term substance abuse (moderate weight). Id. We concluded that Aguirre–Jarquin's death sentences were proportionate compared to other death sentences we have upheld based on the evidence set forth at trial, the aggravators, and the totality of the circumstances. Id. at 610; see also Smithers v. State, 826 So. 2d 916 (Fla. 2002) (upholding both death sentences in double murder where there were three aggravators found for one murder and two for the other (HAC

and prior violent felony for contemporaneous murder found for both) and where there were two statutory mitigators as well as seven nonstatutory mitigators); Francis v. State, 808 So. 2d 110 (Fla. 2001) (upholding death penalty for both stabbing murders of elderly sisters when trial court found four aggravators for each murder (HAC, victims vulnerable due to age, prior violent felony for contemporaneous murder, and murders committed during the course of a robbery) and two statutory mitigators along with six nonstatutory mitigators); Morton v. State, 789 So. 2d 324 (Fla. 2001) (upholding both death sentences in double murder by gunshot and stabbing where trial court found three aggravators with respect to one murder and five with respect to the other (prior violent felony for contemporaneous murder and CCP found for both) and found two statutory mitigators and five nonstatutory mitigators).

In light of the presence of two of the weightiest aggravators as to the murders of Lisa and Heather Savannah and one of the weightiest aggravators as to Zachary's murder, only two statutory mitigators of moderate weight, and the fact that only twelve nonstatutory mitigators were accorded any weight with eleven of them being relatively weak, we conclude that the death sentences are proportionate.

Covington, 228 So. 3d at 68–69.

Postconviction Claims:

On February 28, 2019, Covington filed his Initial Motion to Vacate Judgement and Sentence[2] raising the following claims:

CLAIM I: Trial counsel was ineffective during the penalty and sentencing phase, thus denying Mr. Covington his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

[2] (R298).

A. Trial counsel was ineffective for failing to object to and adequately rebut Dr. Myer's and Dr. Lazarou's so-called diagnosis of Antisocial Personality Disorder and to refute and to object to the use of the bad character evidence of Mr. Covington being a psychopath.

B. Trial counsel was ineffective for failing to develop and present evidence of Mr. Covington's severe mental illness as a bar to execution and to fully present Mr. Covington's as a cogent integration or explanation of the tragic synergy of neurodevelopmental insult, mental illness, substance dependency, and substance-induced psychosis that supported this deterministic perspective. Thus, the Court did not hear testimony that would allow it to make an informed test of the role of unfettered volition as opposed to the influence of impairing 16 bio-psycho factors in the capital conduct.

C. Trial counsel was ineffective for failing to fully develop and present substance abuse as mitigating factor itself thus denying Mr. Covington his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

D. Trial Counsel was ineffective for utilizing the qEEG scan instead of the firmly established, Frye-tested and approved PET scan, for failing to notify the court of the Grady Nelson case in support of the admissibility of the qEEG scan. Furthermore, the trial court violated Lockett, Eddings, Hitchcock, And Chambers in refusing to consider the qEEG scan as mitigating evidence in support of life over death thus denying Mr. Covington his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

E. Trial counsel was ineffective for failing to move to sanitize/redact the videotaped interrogation played to the trier of fact thus denying Mr. Covington his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to

the United States Constitution.

F. Trial counsel was ineffective for waiving pretrial motions/objections thus denying Mr. Covington's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The State also denied Mr. Covington Due Process Under the Fourteenth Amendment to the United States Constitution and contributed to trial counsel's ineffectiveness.

G. Trial Counsel was ineffective for failing to interview and present evidence from important people from Mr. Covington's past.

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.

B. A number of factors support a conclusion that Mr. Covington was profoundly psychologically disturbed (i.e., psychotic) during the capital conduct.

C. Whatever the etiology of the psychosis Mr. Covington demonstrated during the offenses, this profound

psychological disturbance has enormous impact on his moral culpability, i.e., the psychological resources he brought to the offense.

D. The profound psychological disturbance present in Mr. Covington during the offenses reflected the pathological synergy of three factors (neurodevelopment complication and multiple brain insults, bipolar disorder,[3] and polydrug interaction).

CLAIM III: The proceedings in Mr. Covington's case were inadequate to determine whether his case was one of the most aggravated and least mitigated thus violating the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Denying Mr. Covington Hurst relief violates Equal Protection Under the Eighth and Fourteenth Amendments.

CLAIM IV: Cumulative Error.

On July 8, 2019, Covington filed his first amended motion to vacate judgment and sentence supplementing Claim II(B) with the following: ""A number of factors support a conclusion that Mr. Covington was profoundly psychologically disturbed (i.e., psychotic) during the capital conduct" these factors also support the conclusion that Mr. Covington was insane at the time of the offense under Fla. Stat. 775.027 and Florida Jury Instruction 3.6(a)" and that "[t]he evolving standards of decency in capital sentencing should prohibit the execution of a severely mentally ill man who was insane

[3] Hurst v. State, 202 So. 3d 40 (Fla. 2016) receded from by State v. Poole, 297 So. 3d 487 (Fla. 2020).

at the time of the offense." On August 21, 2019, Covington again amended his motion to include a claim of ineffective assistance of counsel for failure to present evidence in mitigation that Covington was abused as a child. (R 607, 741).

On October 25, 2019, the circuit court granted an evidentiary hearing on certain claims. Relevant to this response, an evidentiary hearing was granted on Claims I(A); I(B), except to the extent it argues evolving standards of decency prohibiting the death sentence for severely mentally ill defendants. The court limited the evidentiary hearing on Claims I(B), II(B), II(C) II(D) "to the extent Defendant is alleging evolving standards of decency and his *insanity* at the time of the offenses precludes the imposition of a death sentence or that counsel was ineffective for failing to argue such, or that counsel was ineffective for otherwise failing to present the testimony and argument set forth" in those claims. (R819).

The postconviction court issued a final order denying relief on all claims on December 28, 2020. (R1965).

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

CLAIM I

THE EIGHTH AMENDMENT DOES NOT REQUIRE A COMPARATIVE PROPORTIONALITY ANALYSIS; THEREFORE, IT DOES NOT REQUIRE THIS COURT TO RECONDUCT A COMPARATIVE PROPORTIONALITY ANALYSIS.

Contrary to the assertion in the petition, Covington did not raise a proportionality argument in Claim III of his postconviction motion. That claim involved the impact, *vel non*, of Hurst v. State, 202 So. 3d 40 (Fla. 2016) on Covington's penalty phase and ultimate sentence. The postconviction court summarily denied that claim. Of course, had the issue now being presented been raised and ruled on in the postconviction proceedings it would be procedurally barred in petition for habeas corpus. Issues raised in a postconviction motion are not properly presented in a petition for writ of habeas corpus. Smith v. State, 126 So. 3d 1038, 1053 (Fla. 2013).

Regardless, the claim is procedurally barred, not because it was raised in the postconviction motion, but because the proportionality of Covington's death sentence was raised and decided on direct appeal. "Habeas corpus is not to be used to relitigate issues determined in a prior appeal." Bolender v. Dugger, 564 So. 2d 1057, 1059 (Fla. 1990) citing

Porter v. Dugger, 559 So. 2d 201 (Fla.1990); Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987) (stating habeas corpus is not a vehicle for obtaining a second appeal.)

Even if the claim was not procedurally barred, it has no merit. Covington urges this Court to conduct another proportionality review alleging the Court was unaware that Covington was insane at the time of the offenses. According to the petition, "[t]his was due in large part to the ineffective assistance of counsel." Covington details the alleged deficiency of *trial* counsel for failing to elicit from Dr. McClain her opinion regarding Covington's sanity at the time of the offenses. Covington then turns to the postconviction testimony of Dr. Cunningham and Wood who agree that Covington was insane at the time of the murders. According to Covington, the conclusion that he was insane was "unrebutted."

There is no legal or factual support for Covington's argument. As an initial matter, the appropriate vehicle to raise ineffective assistance of trial counsel claims is a postconviction motion in circuit court (or rarely on direct appeal),[4] not in a habeas petition. In fact, Covington raised a claim of

[4] Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013) (stating ineffective assistance of trial counsel claims can be considered on direct appeal in "rare" instances where the ineffectiveness is apparent on the face of the

ineffective assistance of trial counsel for failure to elicit Dr. McClain's opinion and argue insanity at the time of the offenses as a mitigating circumstance in his postconviction motion. Covington appealed the denial of that claim. He is not permitted to raise the clam in a habeas petition as well.

Additionally, the conclusion that Covington was insane was not "unrebutted." It is true that the only mental health experts who testified at the postconviction evidentiary hearing were Dr. McClain, Dr. Cunningham, and Dr. Wood. That does not mean that their opinions regarding insanity were "unrebutted." The record, both on direct appeal and on postconviction appeal, reflects that multiple experts, some hired by the defense and some by the State, opined that Covington was not insane at the time of the murders. Dr. Myers and Dr. Lazarou were prepared to testify at the guilt phase that Covington was not insane at the time of the offenses. (V17/3305). At the postconviction hearing, the court heard testimony that Drs. Roa, Krop, Maher, and Taylor all were of the opinion that Covington was not insane at the time of the murders. (R1433,1435, 1442).

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record, and it would be a waste of judicial resources to remand for further litigation.)

In urging this Court to conduct another proportionality review, Covington utilizes many pages of the petition to ask this Court to recede from Lawrence v. State, 308 So. 3d 544 (Fla. 2020). In Lawrence this Court held that "the conformity clause of art. I, § 17 of the Florida Constitution forbids this Court from analyzing death sentences for comparative proportionality . . .". Id. at 545. This Court's previous comparative proportionality analysis compared the defendant's death sentence "with other similar cases to determine if death [was] a proportionate sentence." Lawrence, 308 So. 3d at 554 (Labarga, J. dissenting) quoting Caylor v State, 78 So. 3d 482 (Fla. 2011).

Assuming for the sake of argument that it is appropriate for Covington to use a petition for writ of habeas corpus to ask this Court to recede from a previous decision that has no application to his case, doing so would not help Covington's cause. In compliance with then-existing law, this Court already conducted a comparative proportionality analysis of Covington's death sentence. Further, it does not appear that what Covington is asking this Court to do is actually a comparative proportionally analysis. Instead, it appears Covington is asking this Court to reweigh the aggravating factors and mitigating circumstances, accepting as a mitigating circumstance a fact that no other court has found to exist -- that he was insane at the time of

the offenses. This Court does not make factual findings; it only reviews the lower court's factual findings for competent substantial evidence. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999) (recognizing the trial court's superior vantage point in making findings of fact and stating the "deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review.") Whether Covington is asking for a comparative proportionality review, or a reweighing of the aggravating and mitigating circumstances, he cannot ask this Court to consider, as a fact, that he was insane at the time of the offense. Even if Lawrence did apply in some way to Covington's habeas claim, he has not presented this Court with any persuasive reason to recede from that decision and doing so would not alter the result of Covington's appeal.

Like the decision in Lawrence, the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985) is inapplicable. In Caldwell, the United States Supreme Court stated that a capital penalty-phase *jury* should not be misled regarding the role it plays in the sentencing process; and the jury's responsibility in determining an appropriate sentence should not be diminished. A Caldwell error, therefore, has two interrelated components. First, a *jury must be misled* by jury instructions, prosecutor argument, or judicial comments. Second, the *jury must be misled* in a way that

diminished their role in the process. See also Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Caldwell focuses on what the *jury* was told and the effect erroneous information may have had on its sense of responsibility. Caldwell does not apply to an appellate court's review of a death sentence.

In any case, even post-Lawrence, this Court's responsibility to ensure that death sentences are compatible with the Eighth Amendment is not diminished. The entire point of Lawrence is that because comparative proportionality *is not required* by the Eighth Amendment to the United States Constitution the conformity clause of the Florida Constitution prohibits this Court from judicially mandating such a review. Lawrence, 308 So. 3d at 550; see also Pulley v. Harris, 465 U.S. 37 (1984). In sum, there is no *Eighth Amendment responsibility* to conduct a comparative proportionality review. A responsibility that does not exist cannot be diminished.

It is unclear why Covington included in his habeas petition an unofficial transcript of a webinar. Opinions of webinar presenters or attendees are not authoritative or even particularly persuasive. A point of agreement though, attorneys and judges should act with professionalism when involved in capital litigation – or any litigation for that matter.

This Court should deny the writ.

CLAIM II

MENTAL ILLNESS IS NOT A BAR TO EXECUTION.

This claim is procedurally barred and waived because it was raised in the postconviction motion and Covington opted not to brief the issue in his Initial Brief. Barwick v. State, 88 So. 3d 85, 102 (Fla. 2011) (holding that claims that should be but are not argued in the Initial Brief, and are argued in a habeas petition, are waived.)

Even if it were not waived, Covington's claim that his mental illness precludes him from a death sentence has no merit. This Court has held on several occasions that mental illness and other mental defects are not on the same plane as intellectual disability for purposes of the death penalty. Schoenwetter v. State, 46 So. 3d 535, 563 (Fla. 2010) citing Connor v. State, 979 So. 2d 852, 867 (Fla. 2007) (rejecting claim where defendant suffered from mental and psychological disorders such as organic brain damage, frontal lobe damage, micrographia, and stuttering, on grounds these conditions were different from mental retardation); Lawrence v. State, 969 So. 2d 294, 300 n. 9 (Fla. 2007) (declining to extend the holding in Atkins v. Virginia, 536 U.S. 304 (2002) to the mentally ill). Muhammad v. State, 132 So. 3d 176, 207 (Fla. 2013) (stating the Court has rejected claims that the mentally ill are categorically exempt from the death penalty);

Carroll v. State, 114 So. 3d 883, 886–87 (Fla. 2013) (holding that similar claims that mental illness bars the death penalty have been rejected on the merits); Simmons v. State, 105 So. 3d 475, 511 (Fla. 2012) (holding claim that persons with mental illness must be treated similarly to those with intellectual disability due to reduced culpability to be without merit); Barwick, 88 So. 3d at 106 (noting that "the Court has expressly rejected the argument that [Roper v. Simmons, 543 U.S. 551 (2005)] extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment"); Johnston v. State, 27 So. 3d 11, 26 (Fla. 2010) (finding no merit in the claim that mentally ill persons are similar to and should be treated the same as juvenile murderers who are exempt from execution); Lawrence v. State, 969 So. 2d 294, 300 n. 9 (Fla. 2007) (rejecting assertion that the Equal Protection Clause requires extension of Atkins to the mentally ill due to their reduced culpability).

Likewise, other courts have rejected the argument that the Equal Protection Clause of the United States Constitution requires that the decision in Atkins be extended to the mentally ill. Lewis v. State, 620 S.E. 2d 778, 786 (Ga. 2005) (declining to extend Atkins to the mentally ill); State v. Hancock, 840 N.E. 2d 1032, 1059-1060 (Ohio 2006) (declining to extend

Atkins to the mentally ill because mental illnesses come in many forms and different illnesses may affect a defendant in different ways and to different degrees, thus creating an ill-defined category of exemption from the death penalty without regard to the individualized balance between aggravation and mitigation in a specific case); Dunlap v. Kentucky, 435 S.W. 3d 537, 616 (Ky. 2013), as modified (Feb. 20, 2014) ("We are not prepared to hold that mentally ill persons are categorically ineligible for the death penalty."); Commonwealth v. Baumhammers, 960 A. 2d 59, 96 (Pa. 2008) (rejecting a substantially similar argument); State v. Dunlap, 313 P. 3d 1, 36 (Idaho 2013) ("It appears that every court that has considered this issue have refused to extend Atkins and hold that the Eighth Amendment categorically prohibits execution of the mentally ill."). People v. Castaneda, 254 P. 3d 249, 290 (Ca. 2011) (holding that antisocial personality disorder is not analogous to mental retardation or juvenile status for purposes of imposition of the death penalty); Mays v. State, 318 S.W. 3d 368, 379 (Tex. Crim. App. 2010) (noting absence of authority to support claim that mental illness renders one exempt from execution under the Eighth Amendment); State v. Johnson, 207 S.W. 3d 24, 51 (Mo. 2006) (noting that "federal and state courts have refused to extend Atkins to mental illness situations"); Malone v. State, 293 P. 3d 198, 216 (Okla. Crim. App. 2013) ("Appellant

cites no cases from any American jurisdiction that hold that the Atkins rule or rationale applies to the mentally ill . . . . We expressly reject that the Atkins rule or rationale applies to the mentally ill.") Covington's assertion that the evolving standards of decency prohibit the execution of the mentally ill is refuted by the decisions of numerous courts that have considered and rejected similar claims.

Additionally, mental illnesses, in their various forms, are not treated the same as intellectual disability because they are, in fact, different. Tigner v. Texas, 310 U.S. 141, 147 (1940) (holding equal protection "does not require things which are different in fact or opinion to be treated in law as though they were the same"). There is no basis in law or fact for the proposition that the death penalty's justifications of deterrence and retribution are not applicable to those with mental illnesses. Mental illness can be considered by the judge in sentencing as a mitigating factor, "thus providing the individualized determination that the Eighth Amendment requires in capital cases." Hancock 840 N.E. 2d at 1059-1060.

Covington has not cited any support for his proposition that the evolving standards of decency broadly prohibit executing individuals with mental illness. To the extent he argues that his particular level of mental illness prohibits his execution, he is likewise unsuccessful. Additionally,

Covington claims his "mental illness affected his ability to make decisions concerning his defense . . .". Covington was subjected to multiple mental health evaluations, including competency evaluations; the last of which was just prior to entry of his guilty plea. Covington, 228 So. 3d at 54. This Court found Covington freely, voluntarily, and knowingly pleaded guilty and waived a penalty-phase jury. Id. at 67. To the extent Covington is attempting to raise a competency claim, that claim is procedurally barred and meritless.

This Court should deny the writ.

CONCLUSION

In conclusion, Respondents respectfully request that this Honorable Court DENY the instant petition for writ of habeas corpus.

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Marilyn Muir Beccue
MARILYN MUIR BECCUE
Senior Assistant Attorney General
Florida Bar No. 119581
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: 813-287-7910
Facsimile: 813-281-5501
capapp@myfloridalegal.com [*and*]
marilyn.beccue@myfloridalegal.com
COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2021, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal which will send a notice of electronic filing to the following: Cortney L. Hackett and David Hendry, Assistants CCRC-M, Office of the Capital Collateral Regional Counsel Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **hackett@ccmr.state.fl.us**, **hendry@ccmr.state.fl.us**, and **support@ccmr.state.fl.us**.

CERTIFICATE OF FONT AND WORD LIMIT COMPLIANCE

1. This document complies with the word limits of Fla. R. App. P. 9.100(j) because, excluding the parts of the document exempted by Fla. R. App. P. 9.045(e), this document contains 5,231 words and does not exceed 50 pages.

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/s/ Marilyn Muir Beccue
COUNSEL FOR RESPONDENT-APPELLEE