Filing # 138220728 E-Filed 11/09/2021 04:24:26 PM

RECEIVED, 11/09/2021 04:40:21 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-1077

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.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This proceeding involves a Petition for Writ of Habeas Corpus filed with Mr. Covington's appeal of the circuit court's denial of his Motion to Vacate Judgement of Conviction and Sentence under Fla. R. Crim. P. 3.851. The State filed its Response to Mr. Covington's initial habeas petition, and this Reply follows. This reply will address only the most salient points argued by the State. Mr. Covington relies on his initial habeas petition in reply to any argument raised by the State that is not specifically addressed in this Reply. He expressly does not abandon the issues and claims not specifically replied to herein.

CITATIONS TO THE RECORD

References made to the record prepared in the direct appeal of Mr. Covington's conviction and sentence are in the form, e.g., (Dir. ROA Vol I, 123). References to the record of the most recent postconviction record are of the form, e.g., (PC ROA, 123). The State's Response is referred to by name, followed by page number, e.g., (State's Response at 1).

All other record citations are self-explanatory or explained herein.

REPLY ARGUMENT

The State's response begins by listing the "Respondents, Mark S. Inch, Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel," and directs the reader to footnote 1. At footnote 1, the State claims that Attorney General Ashley Moody is not properly listed as a party in the case style of the petition. Undersigned counsel for the Petitioner, Mr. Covington, is regularly accustomed to seeing the Florida Attorney General specifically named as a party in state habeas petitions by Florida prisoners. *See e.g. Dane Abdool et all* [numerous death row inmates] *v. Pamela Jo Bondi, State of Florida*, Case SC13-1123, concerning an all writs petition challenging the Timely Justice Act; *Nasedra Lumpkin v. Pamela Jo Bondi, Etc.*, Case SC15-82, a petition by a person in custody/writ of mandamus; and, *Jose Antonio Jimenez v. Pamela Jo Bondi, et al.*, Case SC18-195, an all writs petition filed by an inmate under and active death warrant. Ashley Moody *is* a properly-named and identified party to the instant action.

Furthermore, it was specifically Attorney General Ashley Moody and her assistants who were successful in persuading this Court to abandon its proportionality review in *Lawrence v. State*, 308 So. 3d

544 (Fla. 2020), not Mark S. Inch and his correctional staff. The *Lawrence* case is one of the main issues in this petition. Attorney General Ashley Moody is properly named as a party in the petition.

Next, at page 1, the State claims that "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." *Lawrence* was issued in late 2020, which post-dates both the direct appeal and the postconviction proceeding in this case. Mr. Covington did raise a claim for ineffective assistance of counsel for failing to inform the sentencer that he was insane at the time of the offense. Now, he asks this Court to recede from *Lawrence* so that it can conduct a meaningful proportionality analysis.

On page 2, the State raises more "strawman" arguments, insinuating that these issues should be barred because they "were raised on appeal or in a [postconviction] motion, or on matters that were not objected to at trial." Mr. Covington obviously did not ask this Court to recede from *Lawrence* on direct appeal, nor did he do so in his postconviction motion. Additionally, Mr. Covington could not have been aware that this Court would be abandoning proportionality review in late 2020; therefore, he cannot be held to

object to something that would occur in the future.

REPLY TO THE RELEVANT FACTS AND PROCEDURAL HISTORY

The majority of this section in the State's Response contains a block quote from this Court's direct appeal opinion from 2017. This is not particularly relevant to this petition, except to the extent that nowhere within the quoted material is there a discussion from this Court about Mr. Covington being insane at the time of the offense. Mr. Covington's trial counsel is to blame. Trial counsel was deficient for failure to present insanity at the time of the offense as mitigation. As such, the sentencer was not able to consider all the mitigating circumstances which would have weighed heavily against a death sentence. Furthermore, this Court was deprived of crucial information that should have been included in the direct appeal proportionality analysis. This petition asks this Court to recede from *Lawrence* and re-conduct proportionality analysis in light of newly presented, unrebutted evidence in postconviction that Mr. Covington was insane at the time of the offense.

On page 5, the State points out that a proportionality claim was made on direct appeal. Again, this claim was lacking the strongest piece of mitigating evidence available in the case: insanity at the time

of the offense. The block quote from this Court's proportionality analysis (pages 6-7) is missing the ultimate consideration and mitigating circumstance that Mr. Covington was insane at the time of the offense.

Finally, the State identifies and block-quotes the claims Mr. Covington raised in his initial 2019 postconviction motion, and discusses the postconviction procedural history, including the date of the denial of all postconviction claims: December 28, 2020.

REPLY TO CLAIM I

In his Petition for Writ of Habeas Corpus, Mr. Covington asserts that this Court should re-conduct a proportionality analysis in his case, to ensure accordance with the Eighth Amendment's prohibition against cruel and unusual punishments. The State erroneously claims that this issue is procedurally barred and lacks merit. (State's Response at 12-13). This specific claim, regarding *Lawrence*, was not raised in postconviction. This claim is properly raised in a state habeas petition.

Regarding insanity at the time of the offense, the State presented absolutely no experts in postconviction to opine that Mr. Covington was sane at the time of the offense. In that context, the

opinions of Drs. McClain, Wood, and Cunningham went unrebutted. Any mental health expert who previously opined to the contrary outside the record did so without factoring Mr. Covington's PET scan into such analysis. The State wrongly claims that Mr. Covington "cannot ask this Court to consider, as a fact, that he was insane at the time of the offense." (State's Response at 16). Mr. Covington can and did. Insanity at the time of the offense is an established and reasonable explanation for Mr. Covington's actions the morning of the murders.

The State also posits that Mr. Covington "has not presented this Court with any persuasive reason to recede from [*Lawrence*]." (Id.) He has. Here is another persuasive reason for the Court's consideration: Mr. Covington submits that receding from *Lawrence* is necessary for this Court to provide "the further safeguard of meaningful appellate review [ ] to ensure that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Contrary to the State's assertion that "*Caldwell* does not apply to an appellate court's review of a death sentence," it is legally correlative to *Caldwell* that the abandonment of proportionality review diminishes this Court's responsibility to ensure that death sentences

are compatible with the Eighth Amendment.

In reference to this Court's responsibility to conduct proportionality review, the State asserts that "[a] responsibility that does not exist cannot be diminished." (State's Response at 17). The State overlooks that, prior to *Lawrence*, that responsibility existed, and it was vested with this Court to carry out that responsibility. This Court can and should return to conducting proportionality analysis in the interest of "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

REPLY TO CLAIM II

In his Petition for Writ of Habeas Corpus, Mr. Covington asserts that his severe mental illness exempts him from the death penalty based on evolving standards of decency and because his case is not the most aggravated and least mitigated. In response, the State erroneously argues that this claim is procedurally barred, waived, and lacks merit. (State's Response at 18).

The State posits: "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." (State's Response at 21). When numerous courts evolve a bit further, these Eighth Amendment claims will be accepted, rather than rejected by the courts. Despite the courts' reluctance to admit that evolving standards of decency support a prohibition on the death penalty for the mentally ill, state legislatures around the country have witnessed the introduction of bills seeking to do exactly that, including Arizona (SB 1696), Florida (SB 1156), Kentucky (HB 148), Missouri (HB 278), and Texas (HB 140).[1]

Given the substantial evidence in this record indicating that Mr. Covington was actually insane at the time of the offense, this Court should vacate the sentence of death. This Court can grant such relief pursuant to these specific grounds of Claim II, or pursuant to the substantially-related grounds contained in Claim I.

Undersigned counsel recently virtually attended a webinar entitled "The Death Penalty in Florida: The Case Against Death."[2] The webinar was originally broadcast live on October 15, 2021, and it was

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[1] *Recent Legislative Activity*, Death Penalty Information Center, (Nov. 08, 2021, 3:37 PM), https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity
[2] *Alumni*, Shepard Broad College of Law, (Nov. 08, 2021, 3:50 PM), https://www.law.nova.edu/alumni/2021-deathpenalty-symposium.html

hosted by Nova Southeastern University Shepard Broad College of Law. Sister Helen Prejean, the Founder of the Ministry Against the Death Penalty was the keynote speaker. Undersigned counsel references this recent webinar here because it exemplifies growing public sentiments that the execution of severely mentally ill people like Mr. Covington would offend "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958), and because it supports relief for this claim.

As Sister Helen Prejean explained at the webinar:

> I mean, you don't go for the death penalty for ordinary murders; not your garden variety murders; only the worst of the worst. [ ] Whenever a unique, irreplaceable human being has been ripped from the universe, and is irreplaceable, that is always the worst of the worst. So, in *Gregg*, you put the criteria only for the worst to the worst, which is supposed to give guidance to a jury, and then you leave the discretion up to the prosecutor to go for death or not. I'm sure you can point out the counties in Florida where you still have prosecutors that cut notches on their belt because they are going to go for the death penalty from square one, in a trial. You never have to have the seeking of death. And the fact is, if you don't have a prosecutor seeking death, you will not have the death penalty.
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> . . . .
>
> [T]here's a great song, *Truth Springs Up from the Ground*—people gain [and] evolve in their consciousness. People evolve in conscience. . . .The evolving standards of decency that mark the progress of a mature society -- we're

always going to be on our way. And that's what happened with the Catholic Church. And it wasn't just because I reached the Pope; it's because the consciousness builds in a society. Truth springs from the ground of the people.

. . . .

I've learned a few things about educating the public. . . .And I've known instances this happened in Pueblo, Colorado where two priests had been killed, and the whole community wrote to that DA [and] called that DA. It was a mentally ill person who had killed the two priests. Then, their public action as a community persuaded him, don't go for death. This person is mentally ill and needs help. It's persuasive. . . .That Defense lawyer, standing there with her or his hand on the shoulder of that person who's being considered disposable human waste and to tell about his life and to say there's more to him than this act of what he has done, to acknowledge the horror of what he has done, but there is more to this human being.

. . . .

And we, as a nation <u>are</u> waking up. The testimony of the exonerated is helping us a lot. [ ] And I hold up Virginia, in fact I'm going to get to go to the celebration. They're going to have a celebration to celebrate [ ] [the] Virginia Coalition Against the Death Penalty. . . But [in] Virginia [ ] the DA is waking up; former judges are waking up; and [each are] beginning to speak publicly about why the [system] is broken. And no small thing in it is the cost. We can't say we want to be with the moral issues, not with the economy. How you spend your money, and your tax money, *is* a moral issue. It's a very moral issue: how you spend your resources for your community: on the killing of one person or look at all the cold cases, look at all the unsolved murders, look at these at-risk kids. Look at what we could be doing with these resources. Look at the education, just to boost education for people. When they're

> educated, they are in mainstream jobs, [and] they don't do crimes. You can put all that money into killing one person and people are getting it [ ]. The waking up that goes on in Virginia [sows] all those seeds of waking up are present in Florida. And that's why I want to be with you today. That's why I want to have a chance to talk to you because I still believe in what you're doing in Florida [ ].

Unofficial Transcript of Sister Helen Prejean's October 15, 2021, presentation received by CCRC-M November 8, 2021, from Professor Jane Cross, NSU Shepard Broad Law Center, pgs. 4, 5, 10.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein and in his Petition for Writ of Habeas Corpus, Mr. Covington respectfully urges this Court to grant his petition for habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the above has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Reply Petition for Habeas Corpus, on Marilyn Muir Beccue, Senior Assistant Attorney General, on this 9th day of November 2021.

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CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS

We hereby certify that this Reply Petition for Writ of Habeas Corpus complies with the briefing, word-count, and other formatting requirements for computer-generated briefs, pursuant to Fla. R. App. P. 9.045 and 9.210.

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