NO. 17-6514

IN THE SUPREME COURT OF THE UNITED STATES

ZACHARY D. HOLLY,
Petitioner

v.

STATE OF ARKANSAS,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a capital defendant's last-minute proffer to plead guilty in exchange for life imprisonment is relevant mitigation evidence under *Lockett v. Ohio*, 438 U.S. 586 (1978)?

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The Arkansas Supreme Court opinion (Pet. App. at 1-23) is published at 2017 Ark. 201, 520 S.W.3d 677.

JURISDICTION

The Arkansas Supreme Court opinion was delivered on June 1, 2017. The petition for writ of certiorari was filed on September 29, 2017. This Court has discretionary jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution prohibits, in pertinent part, the infliction of "cruel and unusual punishments[.]"

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In the middle of the night on November 20, 2012, Petitioner entered his neighbor's house and kidnapped her six-year-old daughter, J.B. (Pet. App. at 2). Petitioner carried J.B. to a nearby vacant house where he laid her on the ground, stripped her, and vaginally raped her. *Id.* Petitioner then sat on J.B.'s chest, pinning her arms to her side, and wrapped her pajama pants around her neck and tied a knot. *Id.* Petitioner tightened the pants around J.B.'s neck until she stopped kicking and stopped gasping for air. *Id.* After straggling J.B. to death,

Petitioner dragged her lifeless body by her hair and pajama pants and dumped her in a closet in the vacant house. (R. 1093-94).

Over the next three days, police interviewed Petitioner several times. On November 23, 2012, Petitioner confessed to kidnapping, raping, and murdering J.B. (R. 1074-96). Petitioner was arrested, and the State charged him with residential burglary, kidnapping, rape, and capital murder. (Pet. App. at 1). The State sought the death penalty. *Id*.

After the case had been pending for over two and a half years, and five days before trial, Petitioner filed a proffer to plead guilty in exchange for a sentence of life imprisonment. (Pet. App. at 6, 24). The State rejected Petitioner's offer and filed a motion in limine to prohibit Petitioner from introducing his proffered guilty plea as mitigation evidence during sentencing. (Pet. App. at 6). After a hearing, the state circuit court granted the State's motion in limine and stated that Petitioner's proffered guilty plea was "not admissible" under Arkansas Rule of Criminal Procedure 25.4 and *Howard v. State*, 238 S.W.3d 24 (Ark. 2006). (Pet. App. at 6). When pressed for a ruling on Petitioner's claim that the proffer to plead guilty was relevant mitigation evidence, the state circuit court found that the relevancy issue was moot. *Id*.

During opening statements, Petitioner's counsel informed the jury that he would not be "disput[ing] much of the State's case in [the] first phase of the trial." (R. 1890). Counsel further "acknowledge[d]" that Petitioner "entered the house of [J.B.]," "removed her from her home," "had sexual contact with her,"

and "caused her death." (R. 1890). Counsel stated that Petitioner "accepted responsibility" for J.B.'s death and that he "must be held responsible for what he did." (R. 1891-92).

The jury convicted Petitioner of capital murder, kidnapping, rape, and residential burglary. (Pet. App. at 1). During the penalty phase, Petitioner put forth extensive mitigation evidence. Petitioner listed 47 potential mitigating circumstances on Form 2 for the jury to consider in sentencing him. (R. 530-38). Of those 47 potential mitigating circumstances, the jury unanimously found that 30 circumstances "probably exist[ed]," including that Petitioner confessed to the crimes for which he was convicted and that he was raised in an abusive and drug-fueled environment. *Id.* At least one, but not all jurors, found that nine circumstances "probably exist[ed]." *Id.* Also, at least one member of the jury, but not all, found an additional mitigation circumstance which "probably exist[ed]" but was not listed on Form 2. *Id.*

After hearing the evidence in the penalty phase, the jury sentenced Petitioner to death for capital murder, two life sentences for rape and kidnapping, and 20 years' imprisonment for residential burglary. (Pet. App. at 1). On direct appeal, the Arkansas Supreme Court concluded that Petitioner's last-minute offer to plead guilty in exchange for life imprisonment was irrelevant mitigation evidence. *Id.*

REASONS FOR DENYING THE WRIT

I. The Arkansas Supreme Court's conclusion that Petitioner's conditional offer to plead guilty was not relevant mitigation evidence is consistent with the Eighth and Fourteenth Amendments and this Court's precedent.

The Arkansas Supreme Court correctly held that this Court's decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), did not entitle Petitioner to introduce irrelevant evidence of his conditional guilty plea as mitigation evidence during the penalty phase of his capital case. Indeed, as the Arkansas Supreme Court reasoned, Petitioner's proffer "tended to show that [he] was avoiding full responsibility for his crime [and] therefore [it was] not relevant." *Holly v. Arkansas*, 520 S.W.3d 677, 684 (Ark. 2017). Further review here is therefore not warranted.

In capital cases, the Eighth and Fourteenth Amendments require "individualized consideration of mitigating factors." *Lockett*, 438 U.S. at 606. Under that standard, a capital defendant is entitled to introduce relevant evidence of "any aspect of the defendant's character or record and any of the circumstances of the offense" to demonstrate that a sentence less than death ought to be imposed. *Id.* at 604. The focus of such mitigating evidence is on the defendant and on the crime. *See id.* *Lockett*, and its progeny, clearly stand for the proposition that courts may not exclude relevant evidence about the defendant and his offense. *See Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (stating that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a

sentence less than death" (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982))).

Those cases and others also clearly establish that in determining whether to impose the death penalty, juries are not required to consider evidence that has nothing to do with the defendant or the offense. *See Lockett*, 438 U.S. at 605 n.12. Indeed, even in capital cases, trial courts still retain the "traditional authority [] to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.*; *see also*, *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) (noting that some evidence is "irrelevant to the sentencing determination").

Contrary to Petitioner's assertion, he did not seek to introduce that kind of evidence. Rather, he sought to introduce evidence having no bearing on his character. The state circuit court used its "traditional authority" as an evidentiary gatekeeper to exclude such evidence that lacked even minimal relevance to Petitioner's character. *Lockett*, 438 U.S. at 605 n.12. Petitioner's plea offer, instead, demonstrated that, once faced with the overwhelming evidence of his guilt, he sought a last-ditch effort to avoid the death penalty. His proffer did not show that he desired to accept full responsibility for kidnapping, raping, and murdering six-year-old J.B. As the Arkansas Supreme Court noted, at the time of Petitioner's proffer, "full responsibility for his crime carried with it the death penalty" and not the mandatory minimum of life imprisonment which Petitioner sought. *Holly*, 520 S.W.3d at 684.

Moreover, the facts surrounding Petitioner's proffer to plead guilty demonstrate his interest in avoiding death, and not an interest in accepting responsibility. *First*, Petitioner did not make the proffer until five days before trial. The case had been pending over two and a half years before Petitioner's half-hearted attempt to plead guilty. *Second*, the plea offer itself lacked sufficient factual detail to show the full depravity of his crimes and to show a genuine acceptance of responsibility. In fact, the proffer merely stated that he was willing to "change [his] plea from not guilty to guilty" in exchange for life imprisonment. (Pet. App. at 24). *Third*, the offer was contingent upon the State agreeing to sentence Petitioner to the minimum punishment available for capital murder in Arkansas—life without the possibility of parole. Petitioner's conditional proffer on the eve of trial was not relevant to his character under *Lockett* as it showed solely an acknowledgment that the evidence against him was overwhelming and that he feared being put to death.

Petitioner's contrary reading of *Lockett* and its progeny would virtually eliminate the relevancy requirement and allow capital defendants to introduce any and all evidence during the penalty phase at trial. The nature of Petitioner's proffered guilty plea is not the type of evidence covered by *Lockett* because such evidence did not relate to his "character or record [or] any of the circumstances of the offense." *Lockett*, 438 U.S. at 604.

Thus, as the Arkansas Supreme Court correctly concluded, Petitioner's last-minute proffer to plead guilty in exchange for life imprisonment had no bearing on his character and was not relevant evidence of mitigation.

II. The consensus among federal courts of appeal and state courts of last resort is that a defendant's conditional plea offer is not relevant mitigation evidence.

Few federal courts of appeal or state courts of last resort have ever directly decided the question of whether a defendant's proffer to plead guilty in exchange for life imprisonment was relevant mitigation evidence in the penalty phase of a capital case. In fact, only Arkansas, Arizona, California, Ohio (twice), and the United States Court of Appeals for the Fourth Circuit have answered the question.

The consensus among those courts, contrary to Petitioner's assertion, is that such a proffer is irrelevant. *See United States v. Caro*, 597 F.3d 608, 635 (4th Cir. 2010) (holding that Caro's conditional plea offer did not "show[] acceptance of responsibility" and the district court did not "abuse[] its discretion or violate[] due process by excluding it as irrelevant"); *People v. Wall*, 404 P.3d 1209, 1225 (Cal. 2017) (holding that the "exclusion of evidence of Wall's [conditional] plea offer did not violate his constitutional right to present mitigating evidence"); *Holly*, 520 S.W.3d at 684 (concluding that Petitioner's "offer to plead with the stated condition was not relevant mitigating evidence as it did not support the purpose [of showing acceptance of responsibility] for which it was offered"); *State v. Sowell*, 71 N.E.3d 1034, 1064 (Ohio 2016), *cert. denied*,

138 S. Ct. 101 (2017)[1] (reaffirming the holding in *State v. Dixon*, 805 N.E.2d 1042 (Ohio 2004), that "a defendant's offer to plead guilty, never accepted by the prosecutor, is not relevant to the issue of whether the defendant should be sentenced to death").[2]

The Arizona Supreme Court decided the case in a contrary manner and is the only state court of last resort to do so. *See Busso-Estopellan v. Mroz*, 364 P.3d 472, 473 (Ariz. 2015) (holding that Busso-Estopellan's conditional "pretrial offer to plead guilty [was] relevant because it tend[ed] to make his acceptance of responsibility for the murders more probable"). No federal court of appeals has endorsed its reasoning.

Petitioner seeks to exaggerate this minor split of authority by including in his petition a number of lower court decisions, many of them inapposite. For example, the district court in *Johnson v. United States* did not have a *Lockett* claim properly before it and merely held that Johnson's attorney should have attempted to introduce her offers to plead guilty as mitigating evidence because there was a colorable argument for its introduction and there was no controlling

[1] In fact, this Court denied Sowell's petition for writ of certiorari on the exact same question presented here.

[2] Federal courts of appeal have broadly found evidence of unsuccessful plea negotiations to be inadmissible under *Lockett*. *See Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 483 (11th Cir. 2014) ("[e]vidence of a rejected plea offer for a lesser sentence . . . is not a mitigating circumstance because it sheds no light on a defendant's character, background, or the circumstances of the crime"); *Wright v. Bell*, 619 F.3d 586, 599 (6th Cir. 2010) ("[b]ecause the alleged offer of a life sentence in exchange for a guilty plea did not bear on the defendant's character, prior record, or the circumstances of the offense, Wright was not constitutionally entitled to present evidence of the failed plea negotiations"); *Owens v. Guida*, 549 F.3d 399 (6th Cir. 2008) (noting the broad agreement among courts).

contrary authority in the Eighth Circuit. 860 F.Supp.2d 663, 901, 903 (N.D. Iowa 2012).

In *United States v. Fell*, the district court permitted Fell to introduce a stipulation informing the jury that he had offered to plead guilty in exchange for a life sentence without parole. 372 F.Supp.2d 773, 784 (D. Vt. 2005). While Petitioner notes that this ruling was "not disturb[ed]" by the Second Circuit, *see* Pet. Arg. at 7, he neglects to mention that this was because the Second Circuit never considered the issue because it was not raised by the government on appeal. *U.S. v. Fell*, 531 F.3d 197 (2d Cir. 2008).

The remaining cases do not help Petitioner because they did not address the constitutional issue under *Lockett*, instead determining that proffers such as Petitioner's are irrelevant under the rules of evidence. *See Jenkins v. State*, 493 S.W.3d 583, 609 (Tex. Crim. App. 2016); *Mobley v. State*, 455 S.E.2d 61, 70 (Ga. 1995), *cert. denied* 516 U.S. 942 (1995). In any case, these courts followed the overwhelming consensus in excluding such proffers.

A single outlier case is insufficient to create a cert-worthy conflict as Petitioner attempts, and fails, to demonstrate. Nevertheless, consistent with the majority of those cases, the Arkansas Supreme Court held that Petitioner's proffer was irrelevant. There is no serious split of authority requiring this Court's intervention, and further review is not warranted.

III. Even assuming *arguendo* that Petitioner's conditional proffer to plead guilty was relevant mitigation evidence, any error was harmless beyond a reasonable doubt.

This Court should not waste its limited resources in intervening to resolve such a minor conflict where the decision would have no realistic effect on the outcome of the case. This Court can confidently conclude that the exclusion of Petitioner's proffer was harmless beyond a reasonable doubt. A federal constitutional error is harmless if this Court finds "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). If a state trial court excluded relevant mitigation evidence from the jury in a capital penalty phase, the error "renders the death sentence invalid" unless the state proves the error to be harmless. *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *see also Skipper*, 476 U.S. at 8 (stating that it was "implausible" that the excluded evidence was "harmless" as "it appear[d] reasonably likely that the exclusion of evidence . . . may have affected the jury's decision to impose the death sentence").

It is beyond doubt that Petitioner's proffer, had it been considered, would not have persuaded the jury to recommend a life sentence. One additional mitigation circumstance, which is negligibly mitigating at best, would have made no difference in the jury's decision to impose the death penalty. At sentencing, the jury unanimously determined beyond a reasonable doubt that three aggravating circumstances existed. That the capital murder was committed: (1) to prevent arrest or effect an escape, (2) in an especially cruel or

depraved manner, and (3) against a victim who was especially vulnerable because she was under the age of 12. (R. 529). The jury, also, heard evidence, and unanimously found, that 30 mitigating circumstances probably existed, including that Petitioner confessed to the crimes for which he was convicted. (R. 530-38). Additionally, the jury unanimously found that Petitioner was verbally and physically abused by multiple people growing up, raised in an unstable and drug-fueled environment, and was forced to beg for food as a child. (R. 530-38).

Furthermore, Petitioner's counsel made it known from the beginning of trial that Petitioner had already confessed to the crimes and "accepted responsibility" for murdering J.B. (R. 1890-92). Presenting a bare plea offer would have been merely cumulative as the jury learned that Petitioner "accepted responsibility" for, and confessed to, murdering J.B.

Given the specific facts of this crime—that Petitioner kidnapped, raped, and strangled a six-year-old girl whom he babysat—and the compelling aggravating evidence, the exclusion of his last-minute conditional proffer to plead guilty was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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