NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL MADISON, Petitioner,

v.

STATE OF OHIO, Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI
(CAPITAL CASE:
EXECUTION DATE MAY 15, 2024)

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CAPITAL CASE:
EXECUTION DATE IS MAY 15, 2024

QUESTIONS PRESENTED

Petitioner was sentenced to death after the State presented extensive evidence from his court-ordered mental exam by a prosecution-retained psychiatrist. But, unlike in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and *Kansas v. Cheever*, 571 U.S. 87 (2013), Petitioner had not placed his mental state directly in issue by asserting a "mental-status defense." He did not claim that he had a mental disease or defect or that he suffered from any mental impairment which caused him to lack capacity to appreciate the criminality of the subject conduct.

Instead, Petitioner presented a mitigation case focused on his reduced moral culpability due to his abusive childhood and troubling family history. Two psychologists explained that mitigation theory in the context of widely accepted research in their profession, including that abuse is known to negatively affect children's developing brains.

The State's psychiatrist purported to rebut Petitioner's mitigation with video of the mental exam and his opinions that Petitioner has "antisocial personality disorder" and is "evil" and "depraved."

Three issues are presented:

1. When a capital defendant intends to present mitigation evidence from mental health

experts who have interviewed him, but affirmatively represents to the court that he will not present any mental-status or diminished-mental-capacity defenses at either the guilt or penalty phase, does a court order which compels that defendant to participate in a mental exam by a prosecution-retained psychiatrist unconstitutionally force him to sacrifice his Fifth Amendment right against self-incrimination in order to protect his rights to a thorough mitigation investigation and an individualized sentencing determination under the Sixth, Eighth, and Fourteenth Amendments?

2. Does the admission of testimony from the State's psychiatrist, including video clips from Petitioner's compelled mental examination, violate Petitioner's Fifth Amendment privilege against self-incrimination when Petitioner did not place his mental condition directly in issue, in either the guilt or penalty phase, and other sufficient means of rebuttal were available?

3. Even assuming *arguendo* that a capital defendant may in some circumstances be compelled to participate in a court-ordered mental examination by a State psychiatrist to rebut a defense expert who will testify only in the penalty phase, did the trial court nevertheless violate the capital defendant's constitutional rights to due process, to a fair trial, against compelled self-incrimination, and to an individualized sentencing determination when it permitted the prosecution to exceed the scope of the limited rebuttal purpose which the Fifth and Fourteenth Amendments and *Cheever* establish as

the constitutional ceiling for such rebuttal mental-health testimony?

DIRECTLY RELATED CASES

1. *State v. Madison*, Case No. 2016-1006 (Supreme Court of Ohio), judgment entered July 21, 2020 & reconsideration denied Sept. 29, 2020

2. *State v. Madison*, Case No. CA-14-101478 (Court of Appeals of Ohio, Eighth Appellate District), judgment of affirmance entered Oct. 22, 2015

3. *State v. Madison*, Case No. 2015-1734 (Supreme Court of Ohio), discretionary appeal not allowed February 24, 2016

4. *State v. Madison*, Case No. CA-15-103950 (Court of Appeals of Ohio, Eighth Appellate District), judgment of dismissal entered January 27, 2016

5. *State of Ohio ex rel. Madison v. Honorable Nancy McDonnell, Judge*, Case No. CA-14-101481 (Court of Appeals of Ohio, Eighth Appellate District), judgment entered Nov. 6, 2015

6. *State of Ohio ex rel. Timothy J. McGinty v. The Court of Appeals for the Eighth Appellate District*, Case No. 2014-1091 (Supreme Court of Ohio), judgment of dismissal entered December 3, 2014 & reconsideration denied February 18, 2015

7. *State v. Madison*, Case No. CR-13-579539-A (Ohio Ct. of Common Pleas, Cuyahoga County) (judgment of death sentence entered on June 8, 2016)

8. *State v. Madison*, Case No. CR-13-576472-A (Ohio Ct. of Common Pleas, Cuyahoga County) (case terminated by reindictment November 13, 2013)

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PETITION FOR A WRIT OF CERTIORARI

Michael Madison respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in *State v. Madison*, 2020-Ohio-3735, 160 Ohio St. 3d 232 (2020).

OPINIONS BELOW

The opinion of the Supreme Court of Ohio in *State v. Madison* is reported at 2020-Ohio-3735, 160 Ohio St. 3d 232. (*Appx*-0001.)

The Supreme Court of Ohio's order of September 29, 2020, denying Petitioner's timely motion for reconsideration is reported at *State v. Madison*, 2020-Ohio-4574, 153 N.E.3d 116 (2020). (*Appx*-0103.)

The opinion of the intermediate Ohio appellate court affirming, in an interlocutory appeal, the order requiring Petitioner to undergo a mental examination is reported at *State v. Madison*, 2015-Ohio-4365, 2015 Ohio App. LEXIS 4250 (Oct. 22, 2015). (*Appx*-0065.)

The order of the Ohio trial court, of June 3, 2014, which granted the State's motion to compel Petitioner to undergo a mental examination is unreported. (*Appx*-0084.)

The trial court's sentencing opinion of June 8, 2016, and related journal entries, in which that court sentenced Petitioner to death, are unreported. (*Appx*-0085.)

JURISDICTION

The Supreme Court of Ohio issued its opinion on July 21, 2020. (*Appx*-0001.) Petitioner filed a timely Motion for Reconsideration on July 30, 2020. On September 29, 2020, the Supreme Court of Ohio denied Petitioner's motion for reconsideration. (*Appx*-0103.) This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, which provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted with the witnesses against

> him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment, which provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

Ohio's list of mitigating factors, in R.C. 2929.04(B), is provided in the appendix. (*Appx*-0105 to -106.)

STATEMENT OF THE CASE

A. The capital charges.

Petitioner was indicted in 2013 with six counts of aggravated murder, and other offenses, arising from the deaths of three women. He was also charged with two capital specifications for each count of aggravated murder. The charged aggravating circumstances were: (1) that each aggravated murder was committed as part of a course of conduct involving purposeful killing of two or more persons (R.C. 2929.04(A)(5)); and (2) that each aggravated murder was committed while committing or attempting kidnapping and/or rape (R.C. 2929.04(A)(7)).

These charges made Petitioner subject to the death penalty under Ohio's capital-sentencing scheme.

B. The State's evidence made a penalty phase likely.

The very strong likelihood that Petitioner's case would proceed to a penalty phase was apparent from the beginning. Petitioner was apprehended on July 19, 2013, after the discovery of the first victim's body in his garage, wrapped in garbage bags. The other two victims, wrapped in a similar manner, were discovered the next day.

On July 19-22, Petitioner participated in lengthy video-recorded interviews with the local police which comprised some 16-17 hours. (Trial

Transcript ("T.") 4955; State Exhs. 301/302.) Petitioner made numerous admissions and incriminating statements during those interviews, including at one point telling officers: "I'm not expecting to beat this, this is ugly, trust me, this is ugly." As the police interviews progressed, Petitioner's admissions became more specific.

In addition to Petitioner's video-recorded police interviews, the State's investigation also developed DNA evidence and evidence of texts and/or cell calls which linked Petitioner or his apartment to two of the victims.

C. Petitioner's defense team immediately began preparing for the penalty phase.

With the trial set to begin in July 2014, and the prosecution insisting upon death, Petitioner's defense team began preparation for the anticipated penalty phase. As required by the standards of representation, including the ABA Guidelines,[1] the defense team investigated possible mental illnesses or mental-status defenses and they utilized the assistance of mental health experts.

Two such experts were utilized early on, and a third (noted below) was retained in 2016. The first two were Daniel L. Davis, Ph.D., a forensic

[1] American Bar Association: *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guidelines 4.1, 10.7, 10.11 & commentary, 31 HOFSTRA L. REV. 913, 952-60, 1015-27, 1055-70 (2003).

psychologist, and James J. Karpawich, Ph.D., a clinical and forensic psychologist. They each interviewed Petitioner at the jail, reviewed records, interviewed some of Petitioner's family members, and reviewed other collateral information. Their retention was principally for the purposes to help develop information the defense might utilize in mitigation, and to further inform the team's knowledge about whether Petitioner might be exhibiting evidence of mental illnesses or of possible mental-status defenses. (Dr. Davis ultimately testified in the penalty phase; Dr. Karpawich did not testify).

From these evaluations, it was apparent that Petitioner was of average intelligence. (T. 6709; Defense Exh. BB, Davis Report 5/29/14 ("Davis Report").) There was also no indication of any serious mental illness or psychosis, and no indication of mental disease or defect. (T. 6592, 6643-47, 6694; Davis Report, pp. 24-26.) There was also no evidence of brain damage (T. 6592, 6669-70); if Dr. Davis had seen evidence of that, he would have referred Petitioner for neurologic testing. (T. 6669-70.)

However, there *was* evidence—a lot of evidence—that Petitioner, as a child and young teen, was subjected to significant physical and emotional abuse, neglect, and psychological abandonment, and that his development occurred in a family plagued by generations of abuse, violence, criminality, and adversity. (Davis Report, pp. 3-10, 13-20.) There was, for example, a life-threatening instance of Petitioner being beaten when he was a mere *three years old* and resulting in hearing loss in one ear and bruises and

welts on his penis. (*Id.*, pp. 13-18.)

The trial court's discovery rules required the defense to provide the reports of the defendant's experts to the prosecution in discovery. Dr. Davis's May 2014 report outlined, and thus revealed to the State, what would ultimately be the central focus of Petitioner's mitigation at trial (which, as it developed, did not begin until April 2016). That theory of mitigation relied upon research by the Department of Justice and other national experts which have identified various "risk factors"—also called "adverse development factors"—arising from the circumstances of a person's childhood and family background. This deep and well-established body of research demonstrates that as more adverse development factors accumulate in a person's childhood and youth there is a much greater probability of that person being involved, later in life, with criminally violent and anti-social behavior, as compared to those persons not similarly disadvantaged. (Davis Report, pp. 26-31 & nn.1-6.)

In his report, Dr. Davis cited and relied upon some of the work of Mark D. Cunningham, Ph.D. (Davis Report, p. 27 n.3; T. 6620-21.)[2] Dr. Cunningham—a former naval officer—is one of the leading scholars in the field. (Indeed, it is Dr. Cunningham whom the defense team retained in 2016, as a third psychologist in Petitioner's case, and

[2] Mark Cunningham, Ph.D., *Best Practices -- Evaluation for Capital Sentencing* (August 2010), a volume in the Oxford "Best Practices" series (New York: Oxford University Press).

he likewise evaluated Petitioner, prepared a report, and testified in Petitioner's mitigation phase.)

One of the adverse development factors which is identified in the research of Dr. Cunningham and others, and addressed in Dr. Davis's report, is the *neurodevelopmental risk factor*. That factor acknowledges the wealth of scientific evidence—widely accepted in the field—that there are known human experiences which can negatively affect a child's developing brain. Some of these are: alcohol or drug abuse by the mother during pregnancy, chronic exposure to trauma, physical abuse, poor diet and nutrition, abandonment and neglect, and genetic predispositions to substance abuse and/or psychiatric disorders. "The research that I'm particularly quoting came from the Child Welfare Information Gateway of the Department of Health and Human Services. So this is widely accepted research." (T. 6633; Davis Report, pp. 28, 33-37 & nn.7-9; T. 6620-33).[3]

A determination that a person has endured childhood experiences which fall within the neurodevelopmental risk factor is *not* a determination that the person's brain is "damaged." Rather, it is a recognition grounded in science that the person has been compelled to endure experiences, during the critical childhood years of growth and maturity, which are known to negatively affect healthy brain development. As Dr. Davis explained: "You know, we're not really talking about brain damage here,

[3] The DHHS's Child Welfare Information Gateway is available at https://www.childwelfare.gov/topics/can/impact/.

we're just talking about how the brain develops. . . . [Their] wiring is such -- to use a metaphor, that they are always on guard." (T. 6614-15; Davis Report, pp. 32-37.)

Dr. Davis concluded from his review that Petitioner suffered from many of the adverse development factors, and no offsetting "protective" factors, and this "resulted in an adverse development trajectory in his life." (*Id.*, pp. 29, 31.)

The presence of ***so many*** adverse development factors in Petitioner's life is *quintessential mitigation*, including because their presence is neither Petitioner's fault nor his choice: "These adverse developmental factors increase the potential of negative outcomes and are those that occur not by the actions of the individual, but rather act upon the individual." (*Id.*, p. 27.)

D. The prosecution misapprehended the expected mitigation as supposedly alleging "brain damage," and thus obtained a court order compelling Petitioner to undergo a mental exam.

Armed with the reports of the defense team's expected mitigation theory, the prosecution used the reports to undermine the very purpose of capital mitigation by seeking to facilitate Petitioner's *dehumanization* by an intemperate "doctor."

Glomming on to Dr. Davis's discussion of

neurodevelopmental adversity, the prosecution alleged that Petitioner was claiming "brain damage," and the prosecutor thus moved the trial court to order Petitioner to undergo a mental exam by a prosecution-retained psychiatrist, Dr. Stephen E. Pitt, D.O. (T. 432-33.)

The defense responded that "[w]e vigorously oppose that motion" because it "clearly violates our client's Fifth Amendment privilege against self-incrimination." (T. 431.) "We are not placing the defendant's mental state into issue in either the trial or the mitigation phase." (T. 431-32.)

The defense further represented that "we are not claiming brain damage." (T. 435.)

> They took this all out of context []. What [Dr. Davis is] saying is that once subjected to early childhood abuse, that forms the type of person they ultimately become because it changes in the brain and that sort of thing that occurred. We're not offering that to say he wasn't culpable. . . . We're not offering that to say that there's no prior calculation and design. We're not offering that to say he didn't act purposefully. We're not using that as any sort of affirmative defense.

(T. 440.)

The court overruled the objections of Petitioner's counsel and ordered the mental

examination to occur (T. 443-44), and the court ordered Petitioner to cooperate with it. (T. 544-46.) In an effort to limit damage to Petitioner's rights, the court ordered that the evidence could only be used in the penalty phase, and also ordered that the "[e]xamination only relates to the brain damage of defendant" and the "State may not inquire into the facts and circumstances of the case." (Order June 3, 2014 (*Appx*-0084); T. 443-44.)

Petitioner took an immediate appeal to Ohio's intermediate appellate court, but, after months of litigation, he lost and the mental exam was allowed to proceed as ordered.[4] (That appeal delayed trial until April 2016).

E. The compelled mental exam grossly exceeded the court-ordered scope of "brain damage."

The examination was conducted by Dr. Pitt over six hours. (T. 7384-85, 7414-15.) Pursuant to the court's direction (T. 535), Pitt video-taped the mental exam. (T. 7411-17.)

As the video reveals, and specifically the 7 video clips of 25 minutes which Pitt later played for the jury (T. 7417-38; State Exh. 1103), Dr. Pitt's mental examination of Petitioner had little to do with "brain damage." It was instead an effort by Pitt to

[4] On October 22, 2015, the appellate court affirmed the trial court's order and allowed the mental exam to proceed. *Madison*, 2015-Ohio-4365 (*Appx*-0065), *review denied*, 144 Ohio St. 3d 1505 (Feb. 24, 2016) (*Appx*-0083).

dehumanize Petitioner in the face of his expected—and eventual—mitigation about childhood and developmental adversity.

Rather than inquiring about "brain damage," Dr. Pitt asked about Petitioner's sexual practices, his drug and alcohol usage, whether he was sexually abused, his self-described character "defects" and "weaknesses," his temper and if he ever quickly becomes enraged, and his experience with emotional highs and lows, among other inflammatory matters. (State Exh. 1103.)

The prosecution's retention letter to Dr. Pitt, with its broad referral question, confirmed this gross mismatch *between*, on the one hand, what the prosecution *intended* with Pitt's efforts *and*, on the other, what the court had permitted by its order limiting the mental exam to "brain damage." As Dr. Pitt testified:

> The referral question was: Whether in your professional opinion, Madison at the time of the alleged offenses, because of a mental disease or defect, lacked the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. And goes on to say, by no means is this question meant to limit the scope of your opinion, so please comment on *anything else you feel is relevant*.

(T. 7439-40; *see also* T. 7487.)

With such a broad referral question, it is not surprising that Pitt blew through the guard rails erected by the trial court's order, as was demonstrated when Pitt testified for the State as the trial's final witness, addressed *infra*.

F. Petitioner's mitigation focused on his abusive childhood and developmental adversity.

The jury found Petitioner guilty and, accordingly, the trial proceeded to the penalty phase. During the guilt phase, Petitioner and his counsel honored their pretrial representations: Petitioner did not claim insanity, did not allege any mental-status defenses, did not allege a lack of the requisite *mens rea*, and did not assert any mental disease or defect.

Likewise in the penalty phase, as promised, Petitioner's mitigation presentation focused on his abusive childhood and developmental adversity. There was no assertion of mental-status defenses, no allegation that he lacked requisite *mens rea*, no claim of mental disease or defect, and no reliance on the 2929.04(B)(3) mitigator of lack of substantial capacity to appreciate criminality. His counsel disclaimed reliance on that factor and the jury was ***not*** instructed on it. (T. 7710.)

Petitioner's mitigation presentation principally relied on three witnesses: Dr. Davis, Dr. Cunningham, and James Aiken. Drs. Davis and Cunningham presented evidence of the pervasive

adverse development factors and the absence of protective factors. Aiken, a former prison director, testified about Petitioner's low probability of posing a danger to inmates or staff in an LWOP setting.

In summary, the penalty-phase testimony of Drs. Davis and Cunningham described the five broad categories of developmental adversity as identified in the research, and the several "adverse factors" within each factor, for a total of 25-26 adverse factors. The five categories are: (1) transgenerational, (2) neurodevelopmental, (3) family and parenting, (4) community, and (5) disturbed trajectory. (T. 6908-10, 6951-52.) The experts concluded that Petitioner was subjected to nearly all the risk factors, as many as ***20 to 23*** of the 25/26 adverse factors. Dr. Cunningham described this as a "catastrophically cumulative concentration" of adverse factors. (T. 6951-52.) Plus, Petitioner did not have any of the protective factors. (T. 6942, 6980-84.)

The experts also told the jury about the research which shows, with so many adverse factors and no protective factors, that the adversity placed Petitioner at a substantially greater risk of engaging in criminally violent and anti-social behavior—and, by the time of adulthood, to be physically and psychologically damaged, with impaired decisional resources—as compared to persons not similarly disadvantaged. "You get a choice, you just don't get the same choice. You get a choice that rests on all of the damage of that history." (T. 7198-99; *see also* T. 7182-83.)

To remove possible confusion, and reaffirm that the defense was ***not*** claiming "brain damage" when using terms like "wiring," the court instructed the jury during Dr. Cunningham's testimony: "When we talk about wiring, we're not talking about brain injury or brain damage." (T. 6979.)

G. The prosecution's presentation of testimony and video of the court-ordered exam greatly exceeded any limited rebuttal purpose.

Dr. Pitt was the final witness of Petitioner's multi-week trial. He testified in supposed "rebuttal" to Petitioner's mental health experts (T. 7363-65, 7394-97), and his testimony relied heavily on his mental exam of Petitioner. He presented the jury with 7 video clips (totaling 25 minutes) of Petitioner's words and image during that compelled exam. (State Exh. 1103; T. 7438.)

Dr. Pitt's trial testimony revealed the extent to which the compelled exam was used to dehumanize Petitioner in the face of his mitigation about childhood and developmental adversity. The defense sought to bar the improper testimony by moving *in limine* for the trial court to enforce the order limiting the exam to brain damage. (Motion 5/17/16; T. 7392-93.) But the State opposed any limitation and the trial court allowed Dr. Pitt to testify in detail about the forced exam, far beyond "brain damage." (T. 7393-94.)

Thus, in clip 1, Dr. Pitt asked Petitioner about his childhood, and his mood, concentration, sleep

habits, and energy. He also explored Petitioner's mood from age 18 to the arrest, eliciting from Petitioner that he had regrets about his life when the reality of the world started to kick in and he had not accomplished anything, and that this made him down. Pitt asked Petitioner, on clip 2, about being incarcerated and what that is like, thereby, predictably, eliciting a response from Petitioner about the crime, and that it's like being in a fight with his hands behind his back, an unfair fight. (State Exh. 1103; T. 7428-30.)

In clips 3 and 4, Dr. Pitt asked about Petitioner's drinking and drug habits in the months leading up to his arrest, though it had nothing to do with "brain damage." Petitioner told Pitt he probably had some liquor on the weekends. He may have drunken more, when he went to a party or bar. He said he started smoking marijuana at age 16 or 17, and it made him relax. He said he used marijuana maybe once a day or every other day, in the weeks leading up to the arrest. (State Exh. 1103; T. 7430-31.)

In clip 5, Dr. Pitt asked about sexual abuse. Petitioner denied to Pitt that he had been sexually abused. He responded "no" to Pitt's cross-examination about whether any family members, any of his mother's boyfriends, or any member of the community had ever sexually abused him. (State Exh. 1103; T. 7431-32.)

Clips 6 and 7 are most egregious in their defiance of the court-imposed limitations. Here, Dr.

Pitt asked Petitioner if he has any **"character defects."** (State Exh. 1103; T. 7432-33.) Petitioner offered that he couldn't think of anything off the bat; but, with prodding by Pitt, he eventually responded that he was not focused on eating healthy. Pitt cleverly reframed Petitioner's answer to be demeaning and mocking: "Making important dietary choices?" Pitt further pushed by asking Petitioner if he is an honest guy. Petitioner said that he is, to a certain extent, but does not care for people to be all in his business. Nobody is perfect. Everybody lies. "You, him, everybody."

Pushing Petitioner to make more helpful admissions for the State on "character defects," Pitt asked if it's a "character defect" if you lie repeatedly. Petitioner said being a pathological liar is a character defect. Further inquiring on matters relevant to the crime, Pitt asked Petitioner if he has a "temper." Petitioner said everybody does, and he agreed with Pitt that his answer means that he (Petitioner) does too. When asked by Pitt if his temper rises to the level of a character defect, Petitioner said no. When asked by Pitt if it's a character defect when Petitioner does not tell the truth, Petitioner said no again. (State Exh. 1103; T. 7433-34.)

Moving into Petitioner's ***"sexual practices,"*** and again defiantly seeking information within the wheelhouse of the charged crimes, Pitt asked Petitioner if he thinks his "sexual practices, [his] sexual interests rise to the level of a character defect." Petitioner said no. Pitt asked Petitioner if he thinks someone who steals has a character defect. Petitioner

agreed. Knowing the trial evidence would suggest Petitioner sold marijuana, Pitt then asked Petitioner if he thinks someone who traffics in the sale of drugs has a character defect. Petitioner said no again. Pitt pushed him: "Q. No matter how big the deal is, you don't think they do? A. No." At trial, bragging about his cleverness to the jury, Pitt said: "I asked him if El Chapo would have a character defect, and he said no." (T. 7435.)

Pitt asked Petitioner how he would describe himself. Petitioner said he is "a cool customer," a "figure of speech." He said he is "pretty much laid back," and doesn't boast and brag about accomplishments. "I think I'm a decent guy." Pitt pushed him to identify his "weaknesses." Petitioner responded he was not really sure, off hand. Pitt asked him if he thinks he has any "weaknesses." Petitioner said: "I'm pretty sure I do." Pitt asked Petitioner if he holds "grudges." Petitioner said: "I can't really say that I am a person that holds grudges."

Echoing the prosecutor's theory of the crimes, Dr. Pitt asked Petitioner if he is someone who can be really happy one minute, and then, like that, be in "a rage of hate and anger," ***and if that had ever happened to him***. Petitioner denied that. He said he can go from happy to sad, but not happy to rage. Pitt asked if that was also true when Petitioner was in a "cruddy mood," and if he has a "hair-trigger temper" that can come out of nowhere. Petitioner said there has to be a reason. Pitt asked if Petitioner's "temper" ever gets to a spot where he thought it was "serious overkill." Petitioner said no. (State Exh. 1103; T.

7433-35.) Pitt asked if Petitioner's "anger" ever got to the spot where it was "serious overkill." Petitioner said he never felt his anger was just too much. He said he was "even keeled," "not too high, not too low." Petitioner said he may have broken something he could later replace, "but as far as like physical harm toward somebody, I have never displayed physical harm toward somebody while I was upset." (State Exh. 1103; T. 7437-38.)

Dr. Pitt's report and testimony also included Pitt's opinion that Petitioner is "depraved," "evil," "mean," "twisted," "warped," "vicious," "deviant," "deceitful" (T. 7541-45), and Pitt diagnosed Petitioner with "antisocial personality disorder." (T. 7441-42.)

Pitt was the final witness. After closing arguments and jury instructions, the jury unanimously recommended a death sentence, and the trial court imposed it. (*Appx*-0085.)

The Supreme Court of Ohio affirmed. That court rejected Petitioner's claim that the compelled mental exam, and Pitt's testimony about it, violated Petitioner's constitutional rights, holding:

> We conclude that in a capital case, when the defendant demonstrates an intention to use expert testimony from a mental examination in the penalty phase, the Fifth Amendment permits the trial court to order that the defendant submit to a mental examination by an expert of the state's choosing. Further,

> when the defense uses expert testimony from a mental examination in the penalty phase, the state may rebut that evidence by presenting expert testimony derived from the court-ordered mental examination. Thus, we reject Madison's Fifth Amendment claim.

Madison, 2020-Ohio-3735 at ¶120 (*Appx*-0031 to -32.)

REASONS FOR GRANTING THE WRIT

A capital defendant, who does not assert any mental-status defenses or any mental illness in either phase, cannot be compelled to sacrifice his Fifth Amendment privilege against self-incrimination, and be forced to undergo a mental exam by a prosecution-retained psychiatrist, merely because that defendant was interviewed by one or more of his own mental health experts in presenting a mitigation case of child abuse and developmental adversity. The compulsion of such a mental exam, in those circumstances where no mental-status defenses were asserted, made Petitioner the "'deluded instrument' of his own execution," *Estelle v. Smith*, 451 U.S. 454, 462 (1981); the admission of evidence from that compelled exam during Petitioner's penalty phase violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

At the very least, any presentation by the State of evidence from such a compelled mental-exam, during the State's rebuttal in the penalty phase, must comply with the constitutional ceiling for such

rebuttal mental-health testimony, under the Fifth and Fourteenth Amendments and established in *Cheever*. That limited rebuttal purpose was greatly exceeded during Petitioner's penalty phase by the admission of Pitt's testimony and video clips. Petitioner's death sentence is unconstitutional.

I. When a capital defendant prepares for the penalty phase with assistance of mental health experts who have interviewed him, but represents to the court that he will not present any mental-status defense or diminished-mental-capacity mitigation at either phase, a court order which compels that defendant to nevertheless participate in a mental exam by a prosecution-retained psychiatrist unconstitutionally forces the defendant to sacrifice his Fifth Amendment right in order to protect his rights to a thorough mitigation investigation and an individualized sentencing determination under the Sixth, Eighth, and Fourteenth Amendments.

As a threshold matter, the trial court's order which compelled Petitioner to participate in the mental exam violated Petitioner's constitutional rights because it forced him to sacrifice one constitutional right—to not incriminate himself under questioning by representatives of the state—in order to protect indispensable constitutional rights which he uniquely possessed in the penalty phase: to a thorough mitigation investigation and an

individualized sentencing determination. Compelling the capitally-accused to make such a Sophie's choice is intolerable under our Constitution; the Court should make that clear.

A. Compelling a capital defendant to undergo a mental examination by a State psychiatrist implicates multiple constitutional rights in a capital case.

A person charged with a crime has the Fifth Amendment right not to be a witness against himself. *Kansas v. Cheever*, 571 U.S. 87, 89 (2013). That constitutional right applies to the penalty phase of a capital case. *Estelle*, 451 U.S. at 462.

And *because* Petitioner was facing death, he also has the rights, under the Sixth, Eighth, and Fourteenth Amendments, in the event of conviction, to have his jury consider any appropriate mitigation evidence he may choose to offer in the penalty phase, in consultation with counsel, which may call for a sentence less than death. These constitutional requirements, as applicable in the penalty phase, have been recognized by this Court because "the penalty of death is qualitatively different from a sentence of imprisonment, however long" and there is a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Therefore, the penalty phase, should it occur, must ensure that any capital sentence is "humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). There must be an "individualized" sentencing determination, one which satisfies "the principle that punishment should be directly related to the personal culpability of the criminal defendant,"[5] has duly considered the "compassionate or mitigating factors stemming from the diverse frailties of humankind,"[6] and is attentive to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[7] These protections are a "*constitutionally indispensable* part of the process of inflicting the penalty of death." *Eddings*, 455 U.S. at 112 (quoting *Woodson*, 428 U.S. at 304).

The constitutionally indispensable requirement of individualized sentencing also mandates that the capital defendant receive effective assistance of counsel in preparation for the penalty phase; that assistance, as this Court has frequently held, requires a *thorough investigation* into all facets of the defendant's history and background, including

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[5] *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

[6] *Woodson*, 428 U.S. at 304.

[7] *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

upbringing, family history, education, health, and mental health. *Williams v. Taylor*, 529 U.S. 362, 396 (2000). No aspect of the investigation can properly be ignored or slighted because, as the Court's precedent also compels, counsel's penalty-phase investigation must be sufficiently thorough to enable counsel to make *informed decisions* from available options about what mitigation evidence to present. *Wiggins v. Smith*, 539 U.S. 510, 518, 525-27 (2003). This duty of a thorough investigation includes issues of mental health and any possible mental illnesses, even in the *absence* of any documented diagnoses. *Ayestas v. Davis*, 138 S. Ct. 1080, 1098 (2018).

The capital defendant and his counsel are entitled to the assistance of experts in conducting the necessarily thorough investigation. *Ake v. Oklahoma*, 470 U.S. 68 (1985). This will include, in virtually every capital case, *if not every case*, assistance of mental health experts in the investigation, such as those used by Petitioner in his case. *See* ABA Guidelines, Guidelines 4.1, 10.7, 10.11 & commentary, 31 HOFSTRA L. REV. at 952-60, 1015-27, 1055-70; Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC L. REV. 407, 422 (2014).

B. The compelled mental exam unconstitutionally forced Petitioner to sacrifice his Fifth Amendment right in order to secure the protection of these other indispensable penalty-phase constitutional rights.

A criminal defendant cannot be compelled to forfeit one constitutional right in order to assert others. *Simmons v. United States*, 390 U.S. 377, 393-94 (1968); *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927). But that is exactly what happened here.

The unconstitutional choice in *Simmons* was between a criminal defendant's Fourth and Fifth Amendment rights based on potentially incriminating uses of his suppression hearing testimony at trial. *Simmons*, 390 U.S. at 393-94. That situation created a Sophie's choice: If the defendant did not want the prosecution to use his motion hearing testimony at trial, he would have to give up his Fourth Amendment right to challenge the search; if he wanted to establish that he had standing for purposes of his Fourth Amendment motion, he had to give up his Fifth Amendment right for the purposes of his trial. Forced to choose, the defendant testified at his suppression hearing and, when the motion was denied, the prosecution used his testimony against him to obtain a conviction at trial.

In holding that the suppression-hearing

testimony was not admissible at trial to establish guilt, the Court's decision in *Simmons* rested first on a deterrence concern, that allowing the suppression-hearing evidence would chill a defendant's exercise of his Fourth Amendment rights. *Id.* at 393. But the Court also recognized that allowing admission of suppression-hearing testimony "imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to [assert his Fourth Amendment right] must do so at the risk that the words which he utters may later be used to incriminate him." *Id.* at 393. For those reasons, the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (invalidating New York law which provided that an officer of a political party, who refused to testify before a grand jury or waive immunity against subsequent prosecution, would lose his position and be barred from holding any office for five years unconstitutionally required choosing between First and Fifth Amendment rights).

In the death penalty context, an analogous case is *United States v. Jackson*, 390 U.S. 570 (1968). There, the Court

> held unenforceable provisions of a federal act which made the death penalty applicable only to those who contested their guilt before a jury. The "inevitable effect" in that case was "to discourage assertion of the Fifth

> Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."

United States v. Kahan, 415 U.S. 239, 244 (1974) (Douglas, J., dissenting) (quoting *Jackson*).

The rule and reasoning of *Simmons*, *Jackson*, *Lefkowitz* and related cases are consistent with the broader principle that the government may not "burden[] the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

These principles were violated in Petitioner's case by the order which forced him to submit to a mental exam by prosecution-retained Dr. Pitt. That order unconstitutionally burdened the exercise of Petitioner's *penalty-phase-specific* constitutional rights, including those rights to receive, with the assistance of counsel, a thorough mitigation investigation whose scope does not *exclude* his mental health, and to thereby obtain an individualized sentencing determination. He was, in other words, forced to accept the "risk that the words which he utters may later be used to incriminate him [in sentencing]," merely because he insisted upon the protections of his Sixth, Eighth and Fourteenth Amendment rights.

Even if *Simmons*, *Jackson*, *Lefkowitz*, and related cases, are viewed as applying more narrowly

to circumstances where, by asserting one constitutional right, the individual necessarily *extinguishes* the other, they are *still* applicable here in the capital-penalty-phase setting. Rare, indeed, will be the capital case where a court-ordered mental exam as approved by the Supreme Court of Ohio's broad rule—compelling such exam whenever the "defendant demonstrates an intention to use expert testimony from a mental examination in the penalty phase"—will *not* in effect *extinguish* the defendant's Fifth Amendment rights in the course of conducting that defendant's constitutionally-required thorough investigation and penalty-phase preparation. At the very least, however, the inevitable effect of such an order—as broadly endorsed by the Supreme Court of Ohio—is to needlessly chill the exercise by capital defendants of their Sixth and Eighth Amendment rights in order to avoid forfeiture of their Fifth Amendment rights.

No decision of this Court permits that Sophie's choice in the sentencing phase of a capital trial, where the Court has consistently said death is different and requires greater reliability. *Estelle*, indeed, involved the penalty phase of a capital case, and the Court there said the Fifth Amendment *protects* a capital defendant from being made the "deluded instrument of his own execution." *Estelle*, 451 U.S. at 462. The capital defendant in *Estelle prevailed* in challenging evidence from a compelled pretrial mental exam, and obtained a new sentencing proceeding, because he did not present any mental-status defense. And, although the Court suggested the result might be different where, for example, the defendant "asserts the

insanity defense and introduces supporting psychiatric testimony" of a nature where allowing his silence may deprive the State of its "only effective means" of "controverting" that testimony, *id.* at 465, the Court has never held that a defendant who *disclaims* any insanity defense—*plus* any other mental-status defenses—can nevertheless *still* be forced to be that deluded instrument merely because he presents testimony of a mental health professional who interviewed him in an effort to present humanizing mitigation.

The Court's most recent case about the Fifth Amendment's application to compelled mental exams, *Cheever*, did not involve the penalty phase. Nor does its holding or reasoning suggest that a capital defendant can be forced to surrender his Fifth Amendment rights in order to ensure protection of his Sixth, Eighth and Fourteenth Amendment rights in the penalty phase. To the contrary, *Cheever*'s holding is narrow and is limited to rebutting expert testimony about *mental-status defenses* in the guilt phase. *Cheever*, 571 U.S. at 98 ("We hold that where a defense expert who has examined the defendant testifies that the defendant *lacked the requisite mental state* to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence."). And *Cheever* defines mental-status defenses narrowly to include those involving **"a defendant's *mens rea*, mental capacity to commit the crime, or ability to premeditate."** *Cheever*, 571 U.S. at 96. *Even if* in some circumstances a defendant asserting such a mental-status defense to

avoid a finding of guilt might be compelled to surrender his Fifth Amendment right, that holding does not mean that a capital defendant, such as Petitioner, who asserts no such defense, may be forced to surrender *his* Fifth Amendment right merely because he might seek to vindicate his penalty-phase-specific constitutional rights—to a thorough mitigation investigation and an individualized sentence—by presenting penalty-phase testimony of a mental health expert who interviewed him.

The Supreme Court of Ohio rejected Petitioner's unconstitutional-choice argument based on its conclusion that this Court has not given *Simmons* a "broad thrust." *Madison*, 2020-Ohio-3735 at ¶ 123. But this Court has not overruled *Simmons*, *Jackson*, or *Lefkowitz*, and their reasoning is still sound, and applies with greater force where rights under the Fifth Amendment are entangled with rights under the Sixth and Eighth Amendments in the conduct of a *capital sentencing proceeding*.

II. The trial court's admission during penalty-phase rebuttal of testimony from the State's psychiatrist, including video clips from Petitioner's compelled mental examination, violated Petitioner's Fifth Amendment privilege against self-incrimination when Petitioner did not place his mental condition directly in issue, in either the guilt or penalty phase, and other sufficient means of rebuttal were available.

In addition to the unconstitutional choice Petitioner was forced to make, his Fifth Amendment rights were violated by the trial court's admission of Dr. Pitt's testimony and video about the compelled mental exam. The Fifth Amendment and this Court's precedent do not permit a compelled exam, or evidence of that exam against a defendant, when the defendant does not present any mental-status defenses or otherwise place his mental condition directly in issue, and certainly not when the State has other sufficient means of controverting testimony which allegedly necessitates the forced exam.

A. The compelled mental exam was unconstitutional because Petitioner did not assert any mental-status defenses or otherwise place his mental condition directly in issue for the penalty phase.

As noted in the preceding section, this Court's

precedent on compelled mental exams does not permit the mental exam which was ordered here. Petitioner's counsel affirmatively represented to the trial court that Petitioner would not be asserting—in either phase—any mental-status defenses as defined in *Cheever*. Counsel also represented that Petitioner would not rely upon the 2929.04(B)(3) mitigating factor in the penalty phase. The mitigation presentation, instead, would (and did) focus on Petitioner's abusive childhood, troubled family history, and developmental adversity as based on the research by DOJ, Dr. Cunningham, and others about "adverse development factors."

Cheever, *Buchanan*, and *Estelle* require, as at least one essential prerequisite for a compelled exam or the admission of evidence from it, that the defendant has asserted a mental-status defense which has placed his mental state directly in issue. *Cheever* (defense of voluntary intoxication); *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (defense of "extreme emotional disturbance"); *Estelle* (example of insanity defense). And they impose that prerequisite in part because such a defense seeks to negate guilt to charged crimes, compel acquittal, and/or otherwise avoid criminal liability (such as by pleading insanity), and is, therefore, a disputed issue of critical and potentially dispositive importance which defendant has injected.

With such a critical issue, the Court has recognized that there will be circumstances where the defendant's evidence is of such a nature that allowing his silence "***may*** deprive" the State of its "only

effective means" of "controverting" that mental-status evidence. *Estelle*, 451 U.S. at 465 (emphasis supplied).

Petitioner did not assert any mental-status defenses or otherwise place his mental state directly in issue for his trial. That fact alone should have barred the State-requested mental exam.

Moreover, the fact that Petitioner would use *psychologists* to help explain and contextualize his mitigation evidence of an abusive childhood did not place his mental status in issue at all, much less *directly* so. He likewise did not place his mental status directly in issue, for any material purpose, when the psychologists addressed relevant literature about "neurodevelopment" factors or the known impact on the development of a child's brain of neglect and/or trauma. What's more, the trial court made sure the defense did not misuse the term "wiring" to suggest brain damage or mental health problems by telling the jury, during Dr. Cunningham's testimony: "When we talk about wiring, we're not talking about brain injury or brain damage." (T. 6979.)

But even more importantly, the evidence Petitioner would present via testimony of mental health professionals who interviewed him is not evidence of the same character as the mental-status defenses the Court addressed in *Cheever*, *Buchanan*, and *Estelle*. Mental-status defenses in the guilt phase are legally, analytically, and morally different than mitigation evidence for a capital *sentencing* proceeding. The former seek to avoid criminal liability and are thus potentially dispositive of the

prosecution's "central purpose." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence"). By contrast, the only purpose of the latter is to humanize an *already-guilt-determined* defendant and thereby enable the jury's fair assessment of his moral culpability as is constitutionally essential in determining whether his sentence should be life or death. Such mitigation evidence is not dispositive of his prosecution because, if found guilty and progressing to a penalty phase, the defendant will be punished greatly for his crime in all events: in Petitioner's case, by either dying in prison after a lifetime there *or* perhaps dying sooner by lethal injection.[8] Moreover, the capital defendant for purposes of penalty is permitted to make an unsworn statement, and to make allocution, without triggering any entitlement that the prosecution may cross-examine *him* about those statements; the fact that he has likewise "spoken" to mental health professionals in preparation for his penalty phase is on the same footing, especially when he is not asserting any mental illness or any mental-status defense.

In sum, the prosecution's interest in, and need for, its own mental health expert to interview the defendant, merely because the defendant would be presenting *mitigation evidence* of a mental health professional who interviewed him, is minimal if non-existent with respect to most mitigation evidence, especially where (as here) the defendant asserted no

[8] Because Petitioner was found guilty of sexually-violent predator specifications, the only sentencing options in his case, by statute, were death or LWOP. (T. 631-33.)

mental-status defenses at either phase. A capital defendant's mental condition will be of little if any relevance in mitigation when no mental-status defenses are in issue. The prosecution, in the event such a capital case proceeds to a penalty phase and thus with guilty verdict already in hand, will be more than capable of addressing the relevant moral issue of life or death without forcing that defendant to submit to a mental exam by the State's own psychiatrist or presenting evidence of such an exam.

For these reasons, and with "psychiatric evidence" defined narrowly as in *Cheever* to mean a qualifying mental-status defense by which the defendant seeks to limit or avoid criminal liability for the charged crimes, Petitioner is in the same position as the defendant in *Estelle*, and the rule of that case should apply:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.

Estelle, 451 U.S. at 468. The Fifth Amendment barred such evidence in *Estelle*, and required a new sentencing proceeding; it does so here too. *See also Powell v. Texas*, 492 U.S. 680, 685 n.3 (1989) ("***[N]othing in [Estelle], or any other decision of this Court***, ***suggests*** that a defendant opens the door to the admission of psychiatric evidence [in that case,

"on future dangerousness"] by raising an insanity defense at the guilt stage of trial.").

Petitioner did not raise a mental-status defense at either stage; he is thus in a stronger position than Powell who claimed insanity in the guilt phase. *See also* Fed. Crim. R. 12.2(b), (c) (permitting trial court to order expert examination in its discretion for capital sentencing, but only if "defendant intends to introduce expert evidence relating to a ***mental disease or defect or any other mental condition*** of the defendant.") (emphasis supplied); *United States v. Byers*, 740 F.2d 1104, 1106 (U.S. App. D.C. 1984) (Scalia, J.) (when a defendant presents psychiatric evidence of insanity or "underlying paranoid delusion," his Fifth Amendment rights were not violated by a government psychiatrist's testimony about statements from a court-ordered examination).

B. The compelled mental exam was also unconstitutional because there were other sufficient means of rebuttal for the penalty-phase evidence at issue.

Estelle, *Cheever*, and *Powell*, and these other cases, are concerned with avoiding the "unfairness" of permitting testimony of a defendant's mental health professional "without allowing the state a means to rebut that testimony." *Powell*, 492 U.S. at 685. But that "rebuttal" does *not* always necessitate that the state must receive a *compelled mental exam* by a

prosecution-selected psychiatrist, and certainly not when defendant does not inject any mental-status defense as to guilt as per *Cheever*. *See Buchanan*, 483 U.S. at 422-23 (prosecution may rebut "with evidence from the reports of the examination that the defendant requested"); *Powell*, 492 U.S. at 685 n.3 ("mental-status defense" "*might* open the door") (emphasis supplied); *Byers*, 740 F.2d at 1114 (interview by competing expert is "ordinarily" necessary to rebut "psychiatric opinion testimony," in that case about insanity and delusional "spells").

Estelle, as noted, suggested that the pertinent question is whether allowing the defendant to remain silent would deprive the State of the "***only*** effective means" of "controverting" testimony of a mental health professional the defendant might choose to present. *Estelle*, 451 U.S. at 465 (emphasis supplied). And *Cheever*'s requirement of a "limited rebuttal purpose" and its suggestion that there is a "constitutional ceiling" on "the scope of expert testimony that the prosecution may introduce in rebuttal," confirms the same point that the rebuttal need not be via a court-ordered mental exam. *Cheever*, 571 U.S at 97-98 & n.4.

In Petitioner's case, given that he asserted no mental-status defenses or mental diagnoses and did not rely on the (B)(3) mitigator, there were *many* sufficient alternative means for the prosecution to effectively rebut the penalty-phase evidence of Petitioner's testifying mental health professionals, Drs. Cunningham and Davis, which did *not* necessitate Petitioner's participation in a court-

ordered mental exam by Dr. Pitt.

For example, the prosecution had full access to the detailed reports of Davis and Cunningham and all materials they cited. The Court in *Buchanan* suggested that access to such reports can itself be sufficient for rebuttal, *Buchanan*, 483 U.S. at 422-23, and it would have been here.

The prosecution and its expert also had access to the 17 hours of Petitioner's video-taped interrogation by the police, and to all of the many documents and reports about Petitioner's history and family, his education, criminal record, prison record, and much more. And, they also had access to the DOJ research and all the other research, studies, books, and literature—including those available online via the DHHS Gateway—as were cited and/or relied upon by Drs. Cunningham and Davis. If the prosecution and Pitt *disputed* the conclusions of such scholarship, they were free to "rebut"—as they did—by criticizing the scholarship, cross-examining Cunningham and Davis about it, and presenting different research. They did not need their own "mental exam."

Finally, the determination of the *means* of rebuttal, and what may be necessary for its fair occurrence in any particular *penalty phase*, must be sensitive to what is actually in dispute in that phase. Likewise, the decision of whether those means will include the capital defendant's participation in a compelled mental exam must recognize that such compulsion would force that capital defendant to

sacrifice his Fifth Amendment rights. The *Cheever* Court's recognition of a "constitutional ceiling" and a "limited rebuttal purpose" supports that sensitivity.

Here, there was no dispute about, and no allegation of, any mental illness or diminished mental capacity. The issue was whether Petitioner's abusive childhood and developmental adversity arising from his toxic family circumstances, with no protective factors, might be sufficient to reduce his moral culpability in the eyes of at least one juror such that his life should be spared. With so *many* effective means of rebuttal available, and giving due concern to avoiding compulsion of the constitutionally dubious choice, there were no grounds under which a compelled mental exam or evidence of it were necessary or permissible.

III. The trial court's admission during penalty-phase rebuttal of testimony from the State's psychiatrist, including video clips from Petitioner's compelled mental examination, denied Petitioner's rights to due process, to a fair trial, against compelled self-incrimination, and to an individualized sentencing determination because the State's rebuttal evidence exceeded the constitutional ceiling of providing a limited rebuttal purpose.

Even assuming *arguendo* that a capital defendant may in some circumstances be compelled to participate in a court-ordered mental examination by a prosecution-retained psychiatrist for purposes of

rebutting a defense expert who will testify only in the penalty phase, *Cheever* makes clear that evidence from a compelled exam is permitted at trial only for the "limited purpose" of rebutting the mental-status evidence which the defense expert presented. *Cheever*, 571 U.S at 97-98. As noted, *Cheever* suggests this is a "constitutional ceiling." *Id.* at n.4.

The trial court in Petitioner's case failed to enforce those limits. The Ohio Supreme Court disregarded or misperceived the constitutional ceiling in *Cheever* with its broad holding that "when the defense uses expert testimony from a mental examination in the penalty phase, the state may rebut that evidence by presenting expert testimony derived from the court-ordered mental examination." *Madison*, 2020-Ohio-3735 at ¶120.

Dr. Pitt's testimony greatly exceeded any limited rebuttal purpose; there were virtually no limits. The court's order allowing the mental exam prohibited inquiry into "the facts and circumstances of the case," but Pitt disregarded that. Then, at trial, as summarized in the Statement of Case (part G), Pitt presented the seven video clips, of 25 minutes, showing Petitioner responding to Pitt's interrogation on matters highly redolent of the crime, such as Petitioner's sexual practices, whether he has any character defects, whether he is honest, his drinking and drug habits in the months before his arrest, whether he holds grudges, whether he loses his temper and how quickly, and whether he had ever been in "a rage of hate and anger." (State Exh. 1103; T. 7428-38.) None of this had anything to do with

"brain damage" or even Petitioner's mental condition; its purpose was largely to mock Petitioner and his mitigation about childhood and developmental adversity.

The testimony and video clips were also unnecessary to rebut any mental-status evidence presented by Drs. Davis and Cunningham. Those experts did not present any mental-status defenses and did not diagnose Petitioner with any mental illness, as Dr. Pitt acknowledged. (T. 7440.) Even if the fiction is indulged that the defense experts addressed Petitioner's "mental status" in their discussion of neurodevelopment adversity, Pitt's testimony and video clips went well beyond what was necessary to rebut that narrow (and unassailable) point, and certainly so when the trial court had already instructed the jury, before Pitt even testified, that "[w]hen we talk about wiring, we're not talking about brain injury or brain damage." (T. 6979.) *Powell*, 492 U.S. at 685-86.

That is likewise the case with Dr. Pitt's branding of Petitioner with "antisocial personality disorder" (ASPD). No defense witness presented a mental health diagnosis; there were thus no permissible grounds, in a *properly* limited rebuttal, for Pitt to provide the jury with his opinion on that topic. *United States v. Jackson*, 2015 U.S. Dist. LEXIS 194201, at *6-8 (C.D. Cal. Aug. 13, 2015).

Plus, an ASPD diagnosis is dehumanizing and prejudicial. "Testimony labeling a capital defendant antisocial or psychopathic has one overriding

purpose: to obtain and carry out a sentence of death. In the most general sense, such evidence is dehumanizing." Kathleen Wayland and Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 525 (2013). Yet, by allowing that testimony in part based on Pitt's mental exam, and with no rebuttal purpose, the court forced Petitioner to be the deluded instrument of a dehumanizing "diagnosis" which would help send Petitioner to death row.

Dr. Pitt himself arguably confirmed that his purposes in conducting Petitioner's mental exam were unrelated to any need for fair rebuttal with his intemperate statements that Petitioner is "depraved," "twisted," "evil, mean, warped, vicious, deviant." (T. 7445, 7541-43.) These characterizations are not clinical terms, and "depravity" and "evil" are not concepts on which Pitt had any expertise. Wayland & O'Brien, *supra*, 42 HOFSTRA L. REV. at 527-28.

But, in any event, the limited scope of rebuttal permitted by *Cheever* was far exceeded by such gratuitous dehumanizing testimony.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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