No. 20-1171

In the Supreme Court of the United States

MICHAEL MADISON,
Petitioner,

v.

STATE OF OHIO
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION
CAPITAL CASE-EXECUTION DATE SET MAY 15, 2024

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CAPITAL CASE-*EXECUTION DATE SET MAY 15, 2024*

QUESTIONS PRESENTED

Madison was sentenced to death for the aggravated murder of three women. When the State became aware that the defense's strategy centered on mitigating mental condition evidence, the State moved the trial court for permission to have a psychiatrist of it's choosing to examine Madison as well. When Madison relied upon mental condition evidence during the penalty phase of his trial, the State introduced mental condition evidence in rebuttal, including a video clip of Madison's interview with the state's expert. Madison claims, in three issues, that the court order compelling his interview, and the admission of evidence arising from it, violated his constitutional rights. The Supreme Court of Ohio unanimously rejected Madison's claims. *State v. Madison*, 160 Ohio St.3d 232, 155 N.E.2d 867, 2020-Ohio-3735.

1. When a capital defendant admits that he intends to present mental health expert testimony to the jury as mitigation where he claims that he suffered brain impairment as a result of childhood trauma, can the state consistent with *Kansas v. Cheever*, 571 U.S. 87 (2013) compel the defendant to submit to a mental health examination by the state's rebuttal expert?
2. Does the state's presentation of testimony and evidence at the rebuttal stage of the penalty phase of a capital trial violate a defendant's Fifth Amendment privilege against self-incrimination when the defendant has

already presented testimony that squarely placed his mental status at issue?

3. Did the prosecution exceed the scope of the trial court's order limiting the Petitioner's mental health examination to issues involving "brain damage"?

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INTRODUCTION

The Court should decline certiorari in this case because Madison's arguments have already been decided in *Kansas v. Cheever*, 571 U.S. 87, 93-95 (2013). Specifically, Madison takes issue with his compelled psychiatric examination and the admission of evidence from the examination. But as the Supreme Court of Ohio found, a "rule shielding [a] defendant from examination by the state's expert 'would undermine the adversarial process' by depriving the state of 'the only effective means of challenging' the defendant's psychological experts." *State v. Madison*, 160 Ohio St.3d 232, 255 (citing *Cheever*, 571 U.S. at 94).

As with many capital defendants, Madison's primary focus was to develop mitigation evidence. In 2014, Madison's defense retained psychiatrists to produce mitigation evidence regarding "evidence of mental illnesses or of possible mental-status defenses." *Petition* at p. 5. These psychiatrists evaluated Madison's intelligence, looked for indications of mental illness or psychosis, and for brain damage. *Id.* The psychiatrists found that various adverse and traumatic circumstances affected Madison during his early childhood and youth. Madison's counsel developed a two-pronged mitigation argument involving childhood trauma related "risk factors" catalyzing criminal behavior, and childhood trauma causing a negative impact on the development of Madison's brain. *Petition* at p. 7-8. Madison claims that, while his counsel centered his entire trial strategy on penalty phase mitigation based on mental-state evidence, he did not put his mental state "at issue." The record clearly belies this assertion.

Because Madison intended to-and did-present psychiatric evidence at the penalty phase, the state was entitled to rebut the presentation in the only effective means available, rebuttal expert testimony. Consistent with the Court's precedent, the Ohio courts did not err in compelling Madison to submit to a psychiatric evaluation with an expert selected by the State of Ohio, and correctly admitted rebuttal evidence about Madison's mental condition.

The Court should deny certiorari.

COUNTERSTATEMENT

A. Relevant Facts

In 2013, a jury convicted Michael Madison of murdering three women: Shetisha Sheeley, Angela Deskins, and Shirellda Terry. In July 2013, after cable workers noticed a foul odor emanating from the garage Madison and others used, East Cleveland police officers found Shirellda Terry's decomposing body wedged between Madison's car and the garage wall, wrapped up within a large garbage bag. *State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, ¶2. Officers found Shetisha Sheeley's decomposing body in another garbage bag behind the garage. *Id.* at ¶3. A third body, that of Angela Deskins, was found in a garbage bag that was left in the basement of a nearby abandoned house. *Id.* "Autopsies revealed that Terry and Deskins had been strangled to death with a belt. Terry had a severe laceration penetrating her vagina and her anus that was inflicted while she was still alive." *Id.* at ¶4. Police found each victim's body bent in half; their heads had been tied to their legs before each body was stuffed into a garbage bag. *Id.*

Friends and family reported each of the victims missing within the last year. *Id.* at ¶ 5. At trial, Brittney Darby, a girlfriend of Madison, reported that she had noticed odd scratches and scabs on Madison around the time of Sheeley and Terry's disappearances. At the same time, Darby, and another friend, Shawnta Mahone also noticed the smell of decaying flesh in Madison's apartment. *Id.* at ¶ 5, 7, 10. A friend of Deskins testified that, in May 2013, he dropped her off near an abandoned restaurant in East Cleveland to meet Madison, and she was never seen alive again. *Id.* at ¶ 6. In July 2013, Terry texted Madison to hang out, and gave him her location. "That was Terry's last message." *Id.* at ¶ 9.

Madison admitted to police that he choked a woman to death in 2012, a month after Sheeley's disappearance. He left her in his apartment, went out drinking, returned, 'folded her up,' put her body in a garbage bag. He left her body in the garage for months before eventually dumping the bag in bushes behind the building. He did not know her name. *Id.* at ¶ 11. Madison admitted inviting Terry to his apartment, claiming that he was 'really drunk and high' that night. He did not remember killing her, but he recalled waking up to her dead body and putting it in the garage. Madison did not remember "anything about" killing Deskins, or "what he did with the body." *Id.* at ¶ 12. A search of Madison's apartment uncovered inculpatory evidence, including DNA profiles that matched Terry and Deskins. *Id.* at ¶ 13.

A grand jury returned a 14-count indictment, including aggravated murder, felony murder, and rape. *Id.* at ¶ 14. Each murder charge carried course-of-conduct

or felony murder death specifications, making it a capital case. *Id.* at ¶15. Ten of the charges carried additional sexual motivation specifications.

B. Psychiatric Evidence at Trial

While preparing for trial, Madison's counsel retained two forensic psychiatrists for evaluation. At the state's motion, the trial court ordered a mental examination by a state-selected psychiatrist. That psychiatrist, Dr. Steven Pitt, testified for the state during the penalty phase.[1] *Id.* at ¶ 99. In response to the state's motion:

> "Madison claimed that he had 'not given pre-trial notice of any intent to put his mental state at issue,' that 'neither his competency, nor his sanity or mens rea will be an issue' in any phase, and that he was 'not putting his state of mind in issue.' Madison contended that the state would have 'no psychiatric evidence to rebut.' Nevertheless, Madison 'reserve[d] the right to present expert psychological evidence * * * in mitigation that does not call into question his mental state." *Id.* at ¶ 102.

In a subsequent hearing, counsel for Madison revealed that, according to their experts, early childhood abuse causes 'changes in the brain,' which may be relevant to Madison's defense. Counsel denied that Madison was 'claiming brain damage,' but acknowledged that they 'anticipated' using brain damage as a mitigating factor during the penalty phase. *Id.* at ¶103-04. The trial court then granted the state's motion to have Dr. Pitt examine Madison but limited that

[1] Dr. Steven Pitt was murdered in Arizona in 2018. https://www.azcentral.com/story/news/local/phoenix-breaking/2018/06/01/steven-pitt-forensic-psychologist-baseline-killer-case-killed/663556002/ (last accessed March 29, 2021).

examination's scope to the discussion of Madison's potential brain damage. Madison challenged the order in interlocutory appeal. The Ohio Eighth District Court of Appeals affirmed the order. *Id*. at ¶105; *State v. Madison,* Ohio 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365. Madison appealed the Ohio appellate court's decision to the Ohio Supreme Court, which declined jurisdiction. *State v. Madison*, 144 Ohio St.3d 1505, 45 N.E3d 1050, 2016-Ohio-7748. Dr. Pitt examined Madison under the limitations imposed by the trial court. Madison's counsel was not present during the interview.

The trial jury found Madison guilty of each of the murder charges, and each of the death specifications. During the penalty phase, Madison's retained psychiatrists testified that Madison had experienced several adverse conditions during his childhood, which "correlated with a high risk of negative outcomes, including criminal or violent behavior," and could have negatively affected the development of Madison's brain. *State v. Madison*, 160 Ohio St.3d, at ¶ 107-08. In rebuttal to that submission, Dr. Pitt testified that, in his opinion, Madison's childhood did not cause him to commit the murders. Dr. Pitt's examination of Madison was recorded. The trial court admitted the recording into evidence, and the jury viewed parts of it. Ultimately, the jury recommended death. In June 2016, the trial court adopted the jury's recommendation and sentenced Madison to death for each aggravated murder count. *Id*. at ¶ 18.

C. Appeal to the Supreme Court of Ohio

Madison appealed the decision directly to the Supreme Court of Ohio. *State v. Madison*, 160 Ohio St.3d. Madison raised twenty propositions of law, several of which are mirrored in his *Petition*. Before the Supreme Court of Ohio, Madison claimed that the trial court's order for an additional psychiatric evaluation violated his constitutional rights, arguing:

> "the compelled examination in this case violated the Fifth Amendment because he did not place his mental state in issue, ordering the examination unconstitutionally forced him to choose between his Fifth Amendment right against self-incrimination and his Eighth Amendment right to present mitigating evidence, his Sixth Amendment right to counsel was violated because his counsel lacked adequate advance notice of the examination's scope, and his right to counsel was violated because counsel was not present for the examination." *Id.* at ¶ 110.

He also argued that admission of testimony and video footage arising from that examination violated his Fifth Amendment right against self-incrimination, because Madison's defense did not place his mental state "at issue."

That Supreme Court of Ohio found that the trial court did not violate Madison's Fifth Amendment rights. When a criminal defendant presents, or intends to present, expert psychiatric testimony at the penalty phase of a capital trial, "the prosecution is entitled to rebut that testimony by presenting testimony from an expert who has also examined the defendant." *Id.* at ¶114 (citing *Buchanan v. Kentucky*, 483 U.S. 402, 422-424 (1987), *Kansas v. Cheever*, 571 U.S. 87, 93-95

(2013), *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317). Madison's Fifth Amendment claim relied on the argument that he was "compelled to forfeit one constitutional right in order to assert another." *State v. Madison*, 160 Ohio St.3d at ¶ 122 (citing *Simmons v. United States*, 390 U.S. 377, 393-394 (1968)). The Supreme Court of Ohio rejected this claim. *State v. Madison*, 160 Ohio St.3d at ¶ 124-25.

Relevant here, Madison also claimed two violations of his Sixth Amendment right to counsel: *first*, that Dr. Pitt's evaluation over-reached its permitted scope; *second*, that he had a right to counsel during his interview with Dr. Pitt. Madison claimed that Dr. Pitt's examination was over-expansive, and violated his Sixth Amendment rights to counsel, because counsel was unaware of the "full scope of the examination." *Id.* at ¶ 127. The trial court's explicit instructions provided: 'state may not inquire into the facts and circumstances of the case. Examination only relates to the brain damage of defendant.' *Id.* at ¶ 128. The Supreme Court of Ohio found that every question posed during the examination could relate directly to Madison's mitigation claims of psychological and neurological harm, and that "Dr. Pitt adhered to the court's admonition not to inquire into the facts of the case." *Id.* at ¶ 129. Madison also argued that the Sixth Amendment entitled him to the presence of counsel during the examination with Dr. Pitt. The Supreme Court of Ohio held that a defendant has the "right to the assistance of counsel 'before submitting' to a psychiatric interview," but does not have the right to the presence of counsel during such an interview. *State v. Madison*, 160 Ohio St.3d at ¶ 130 (citing *Estelle v. Smith*, 451 U.S. 454, 469 (1981)).

Finally, Madison argued that the trial court abused its discretion by admitting testimony and video recordings from Dr. Pitt's interview during the penalty phase. *Id.* at ¶161. Evidence at issue included Dr. Pitt's opinion that Madison had an "antisocial-personality disorder," and language from Dr. Pitt's report about Madison being "depraved" and "twisted." *Id.* at ¶162-63. The Supreme Court of Ohio found that expert psychiatric testimony about Madison's mental health was appropriate, and pointed out that "it was *the defense* [original emphasis] that first brought those descriptions ["depraved" and "twisted"] to the jury's notice." *Id.* at ¶162. After introducing those descriptors to the jury, counsel for Madison examined Dr. Pitt at length about the meaning and use of those terms.

The Supreme Court of Ohio affirmed the admission of evidence from Madison's compelled mental health examination by Dr. Pitt. The court vacated two counts of kidnapping as well as the felony-murder specifications predicated upon those counts, but Madison's convictions and sentence were otherwise affirmed. *Id.* at ¶ 245-46. Madison's application for reconsideration was denied. *09/29/2020 Case Announcements*, 2020-Ohio-4574. His application to reopen his appeal was also denied. *03/02/2021 Case Announcements*, 2021-Ohio-534.

REASONS FOR DENYING THE WRIT

I. The order compelling Madison to submit to an examination with a state-retained psychiatrist did not violate Madison's rights under the Constitution of the United States. When a criminal defendant introduces psychiatric evidence that places his state of mind directly at issue at trial, he may be compelled to submit to a psychiatric evaluation.

The lower courts' decisions were correct because Madison did, in fact, place his mental condition at issue. Mental conditions are at issue when they are in controversy, not merely when a party asserts a mental-state defense. The "in controversy" requirement is met when the mental health of the party is a relevant factor in the case. *Brossia v. Brossia*, 65 Ohio App.3d 211, 215 (6th Dist.1989). A party's mental condition is "in controversy" when it is "directly involved in some material element of the cause of action or defense." *In re Guardianship of Johnson*, 35 Ohio App.3d 41, 44 (10th Dist.1987) (quoting *Paul v. Paul*, 366 So.2d 853 (Fla.App. 1979)).

a. The trial court was on firm legal position to order a reciprocal psychiatric evaluation of Madison.

The Court already had decided cases that permitted the state a reciprocal evaluation of Madison at the time the trial court granted the state's motion. This was not new ground. It is well-settled that when a defendant introduces psychiatric evidence that places his state of mind directly at issue at trial, he may be compelled to submit to a psychiatric evaluation. *See Buchanan v. Kentucky*, 483 U.S. 402, 422-424 (1987). Conversely, it is also undisputed that "when a criminal defendant 'neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric

evidence,' his compelled statements to a psychiatrist cannot be used against him." *Kansas v. Cheever*, 571 U.S. 87, 93 (2013) (quoting *Estelle v. Smith*, 451 U.S. 454 (1981)).

While the trial court did grant the state's motion, it limited the examination to "Madison's brain damage and prohibited questioning about the facts and circumstances of this particular case." *Madison*, 160 Ohio St.3d 232, 252. The limitation was a recognition of the state's ability to present rebuttal evidence coupled with careful consideration for Madison's constitutional rights. When Madison sought to submit his own psychiatric evidence, be made the choice to be a witness in his proceedings. Madison cemented the placement of his mental condition at issue when relying upon psychiatric evidence during the penalty phase. The law does not allow criminal defendants to present psychiatric testimony while simultaneously depriving the prosecution of the ability to adequately rebut the same. When it became apparent that Madison would rely on psychiatric evidence, the court was right to allow the State reciprocal evaluation.

b. Madison's introduction of mental condition evidence during the penalty phase placed his mental condition at issue.

Madison also contends that *Cheever* and *Buchanan* are not applicable to the penalty phase of a capital trial. Madison's proposed distinction has no basis in case law. In *Buchanan*, the Court held that a compelled psychological examination was consistent with the Fifth Amendment when the defendant introduced evidence of his mental state to support a claim of "extreme emotional disturbance." *Buchanan*

at 424. The Court placed no emphasis on the nature of the defense involved. Rather, the Court's holding was based on the defendant's introduction of evidence. The underlying rationale of *Buchanan* is one of fair access to evidence, not an arbitrary distinction between types of psychological evidence introduced.

In *Buchanan,* the Court made no attempt to discuss whether Buchanan's defense was a mental disease or defect. The Court instead referred to it broadly as a "'mental status' defense," with no indication that there was any distinction between offering such evidence at the guilt phase and offering it at the mitigation phase. *Id.* at 423. The dispositive fact was that Buchanan introduced psychological evidence. "In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence." *Id.* at 423. The unfairness of only one side having access to a full mental examination, which necessarily includes the participation and statements of the defendant, was not narrowed to the extent that Madison proposes to the Court.

"Mental status" evidence includes evidence offered for the first time at mitigation. In his *Petition*, Madison claims that he did not offer evidence under the Ohio Revised Code §2929.04(B)(3) subcategory to show that he suffered from a mental disease or defect.[2] In *Cheever,* the Court explicitly rejected that argument,

[2] Ohio Revised Code §2929.04(B)(3) states that if an offender was found guilty of an aggravating circumstance, "the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors: (3) whether, at the time of committed the offense, the offender, because of mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law."

recognizing that "'mental status' is a broader term than 'mental disease or defect[.]'" *Cheever* at 96. Because "mental status" is broader than Ohio Revised Code §2929.04(B)(3), it also included evidence of Madison's mental state that he presented as "any other factors that are relevant" to the imposition of death under Ohio Revised Code §2929.04(B)(7).[3] In this case, that evidence consisted of the effect of childhood trauma on the development of Madison's brain. There is no precedent – and Madison identifies none – that *Cheever* and *Buchanan* should not apply to the penalty phase of a capital trial. Federal courts to have considered the issue have in fact held the opposite: a defendant who intends to present expert psychiatric testimony in mitigation subjects himself to a compelled evaluation by the state. For example, the Court in *Estelle v. Smith* allowed the prosecution to prove future dangerousness – relevant only to the imposition of death under Texas law – through a compelled evaluation "where a defendant intends to introduce psychiatric evidence at the penalty phase." 451 U.S. at 472. And the Court held in *Cheever* that this rule was not limited to affirmative defenses. *Cheever* at 601. See also *United States v. Wilson*, E.D.N.Y. No. 04-CR-1016, 2013 U.S. Dist. LEXIS 47032, *11 (April 1, 2013) ("A mitigation case that eventually includes these types of evidence may very well waive Wilson's Fifth Amendment privilege against self-incrimination"); *United States v. Mikos*, N.D. Ill. No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 18649, *6

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[3] Ohio Revised Code §2929.04(B)(7) states that if an offender was found guilty of an aggravating circumstance, "the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors: (7) any other factors that are relevant to the issue of whether the offender should be sentenced to death."

(Sep. 14, 2004) ("to the extent that Defendant asserts an insanity defense and/or raises mitigation issues, Defendant and his counsel are aware of the fact that issues relating to the rebuttal of such theories will be well within the scope of any examination conducted by the Government's expert"). "Whether a defendant has waived his Fifth Amendment right is not claim-specific; it is based on principles of fundamental fairness." *Wilson* at *11. By drawing an illusory distinction between guilt-phase defenses and mitigation-phase evidence, Madison attempts to make his Fifth Amendment privilege claim-specific. The mitigation phase is every bit as much a part of the capital trial as the guilt phase. *See State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 189. The underlying need for fairness remains the same.

Madison decided to place his mental state at the center of his defense strategy, rendering it very much at issue. Well-settled law permitted the prosecution to have Madison submit to an examination for rebuttal purposes. The procedural nuances of a capital trial does not render *Cheever* inapplicable. To the contrary, where the jury (and the court) must engage in an independent and moral weighing, *Cheever* is at its most important. Madison's arguments are not novel. He may have wanted to have his cake and eat it too, but "[a]ny other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime." *Cheever* at 94.

II. The admission of evidence arising from an examination with a state-retained psychiatrist did not violate Madison's privilege against self-incrimination because he chose to offer testimony.

Madison waived his privilege against self-incrimination by choosing to introduce testimonial evidence. Once Madison introduced expert psychological testimony at trial, he opened the door to rebuttal of that testimony by the state. "A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief." *Phung v. Waste Management*, 71 Ohio St.3d 408, 410 (1994). As the Ohio appellate court found, to allow a defendant to "present expert evidence of his mental condition without allowing the state to investigate [the defendant's] claims and present a case in rebuttal is not fair and 'would undermine the adversarial process, allowing a defendant to provide the jury * * * a one-sided and potentially inaccurate view,' unfairly tipping the weight of the evidence in his favor." *State v. Madison*, 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365, ¶ 22 (quoting *Cheever* at 94). "[A]ny burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981).

The introduction of Dr. Pitt's testimony based on the court-ordered examination did not violate the Fifth Amendment. Madison stresses that his theory of the case "was not claiming 'brain damage.'" However, the content of that claim

does not change the fact that, by voluntarily offering testimony, Madison exposed himself to the admission of psychiatric evidence to rebut his. The state courts were correct to rule accordingly, and the Court should deny certiorari over this uncontroversial issue.

III. Madison did not have a right to the presence of counsel during his evaluation with Dr. Pitt, and Dr. Pitt's evaluation did not exceed the trial court's limitation.

Madison's compelled examination did not violate his Sixth Amendment right to counsel. Madison was not entitled to the presence of counsel during Dr. Pitt's examination. And, Dr. Pitt's examination did not inquire into the facts of the case because the trial court limited questioning to the issue of "brain damage."

a. Madison was not entitled to the presence of counsel during his examination with Dr. Pitt.

Madison argues that he should have been allowed to have counsel present at his examination with Dr. Pitt. His is mistaken because the examination was not a critical stage of the proceeding. The Court has previously disclaimed any implication of a "constitutional right to have counsel actually present during the examination[.]" *Cain v. Ambramson*, 220 S.W.3d 276, 281 (2007)(citing *Estelle v. Smith*, 451 U.S. at 470, n. 14). As the Court referenced, having an attorney present "during the psychiatric interview could contribute little and might seriously disrupt the examination." *Smith*, 451 U.S. at 470, n. 14 (citing *Smith v. Estelle*, 602 F.2d 694 (1979)).

The Sixth Amendment guarantees every defendant the right to counsel during "critical stages" of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 228 (1967). To constitute a "critical stage" of the proceedings, "the accused must find himself 'confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.'" *United States v. Byers*, 740 F.2d at 1117-1118, quoting *United States v. Ash*, 413 U.S. 300, 321 (1973).

Neither of those two circumstances were true of Dr. Pitt's psychiatric evaluation. "[A]t the psychiatric interview itself, [the defendant] was not confronted by the procedural system; he had no decisions in the nature of legal strategy or tactics to make[.]" *Byers* at 1118. Nor did Dr. Pitt – an independent psychiatrist who had testified for both the prosecution and the defense in prior cases – represent Madison's expert adversary. "An examining psychiatrist is not an adversary, much less a professional one. Nor is he an expert in the relevant sense – that is, expert in 'the intricacies of substantive and procedural criminal law." *Id.* at 1119 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

> "The doctors designated * * * to make the examination are not partisans of the prosecution, though their fee is paid by the state, any more than is assigned counsel for the defense beholden to the prosecution merely because he is, as here, compensated by the state. Each is given a purely professional job to do-counsel to represent the defendant to the best of his ability, the designated psychiatrists impartially to examine into and report upon the mental condition of the accused."

McGarty v. O'Brien, 188 F.2d 151, 155 (1st Cir. 1951).

Madison did not have the right to counsel during Dr. Pitt's evaluation. That evaluation was not a critical stage of the proceedings at which Madison was confronted by either the procedural system or by the prosecution. As the Supreme Court of Massachusetts stated, "[a]lthough the decision to undergo [a] psychiatric evaluation is a critical stage, the interview itself is not." *Commonwealth v. Trapp,* 423 Mass. 356, 359, (1996) (internal citation omitted). Madison had a Sixth Amendment right to his attorneys' help and guidance before the evaluation in preparation, and he received that counsel. But he was not entitled to have his attorneys physically present during the evaluation itself.

b. Dr. Pitt's examination of Madison did not exceed the scope of the trial court's limitations.

Madison argues that Dr. Pitt's testimony exceeded the scope of the limitations the trial court placed on his evaluation. The record reveals that Dr. Pitt adhered to the trial court's order regarding the scope of the interview and did not inquire into the facts and circumstances of the murders.

When deciding Madison's interlocutory appeal of this issue, the Ohio appellate court found that Madison "admitted at the trial court hearing that he intends to present expert testimony of his mental condition as mitigating evidence to avoid the death penalty should the case proceed to the trial phase. Therefore, Madison has made his mental condition a relevant factor in determining whether a death sentence is appropriate." *State v. Madison*, Ohio 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365, ¶16. The court listed nine potential issues that Madison

admitted he intended to raise regarding his mental state during the mitigation phase. *Id*., ¶17. These included the effect on Madison's mental state of exposure to childhood trauma, violence, verbal, and physical abuse, and of the abusive and dysfunctional environment in which he was raised. *Id*. The Ohio appellate court found that each of these claims placed Madison's mental condition in controversy. *Id*., ¶ 18. The court thus held that "the state is entitled to its own evaluation solely for the purposes of rebutting the evidence Madison presents concerning his brain damage and mental condition." *Id*., ¶24 (emphasis added).

Consistent with the trial court's order and the Ohio appellate court decision, Dr. Pitt did not raise questions about the facts of Madison's murders. Instead, Dr. Pitt thoroughly interviewed Madison to understand his mental condition and its evolution from Madison's childhood. That scope of interview had bearing on Madison's mental state, the state of his mind in 2012 and 2013, and the potential influences his maturation may have had on that mental state. Therefore, Madison's Sixth Amendment rights were not offended by "lack of notice to counsel about the scope of the examination." The Court should decline to grant certiorari over Madison's meritless claim.

IV. The admission of psychiatric evidence during rebuttal did not violate Madison's constitutional rights because it did not exceed the limited scope of rebuttal.

There is no merit to Madison's argument that the trial court's order forced him into an unconstitutional choice between his Fifth Amendment privilege against self-incrimination and his Eighth Amendment right to present mitigation. "[T]he

Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)). For example, a defendant who chooses to testify in his own defense gives up his privilege against self-incrimination. A defendant who requests a continuance to better prepare temporarily gives up his right to a speedy trial. These are not Hobson's choices

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann v. Richardson*, 397 U.S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

McGautha v. California, 402 U.S. 183, 213 (1971).

a. The state was entitled to present rebuttal evidence.

In *Cheever*, the Court held that the admission of the state's rebuttal testimony from its own expert psychologist "harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination." *Kansas v. Cheever*, 571 U.S. 87, 94 (2013). There was no tension between Madison's constitutional rights in this case that was not inherent in every decision Madison made at trial.

When a defendant claims that he has been unconstitutionally forced to choose between two constitutional rights, "[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973) (quoting *Crampton v. California*, 402 U.S. 183, 213 (1971)). Here, the trial court's decision to grant the state an opportunity to present fair rebuttal is entirely consistent with the policies behind both the Fifth and Eighth Amendments.

The State's right to present any rebuttal evidence in mitigation at all could potentially dissuade a defendant from presenting mitigating evidence to open that door in the first place. Madison's argument here attempts to elevate a truism into a travesty.

> "Defendants may, in any and all circumstances, exercise their Constitutionally-guaranteed rights. However, exercise of these rights does not provide an unrestrained free for all for death penalty defendants. If a defendant elects, with the advice of counsel, to put his mental status into issue in the penalty phase, then he has waived his right to refrain from self-incrimination arising from a mental health examination, and there is no Fifth Amendment implication. If a defendant elects to present mitigation testimony addressing his mental status, then the government is free to rebut such testimony."

United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995) (superseded by statute).

If the prosecution is prohibited from introducing any rebuttal evidence that might have the effect of chilling a defendant's willingness to present mitigating

evidence, the prosecution would be unable to introduce any evidence at all. Madison is demanding the unconditional silence and surrender of the state during the mitigation phase of a death penalty trial. The Constitution does not demand such a one-sided free-for-all during the penalty phase, and the Court should not countenance such a result.

Only an expert witness could adequately rebut the testimony of Madison's experts regarding his mental state. "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him." *Cheever*, 571 U.S. at 94. "Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony; and for that purpose * * * the basic tool of psychiatric study remains the personal interview[.]" *Id.* (quoting *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir.1984)). To deny the prosecution the right to present rebuttal testimony in this context would "undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime." *Cheever* at 94. To prevent such a one-sided presentation, "jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors." *Barefoot v. Estelle*, 463 U.S. 880, 898- 899 (1983).

b. The prosecution's rebuttal evidence did not exceed the scope of rebuttal to Madison's psychiatric evidence.

Madison also argues that the evaluation in this case exceeded the scope of the prosecution's right to present rebuttal testimony because Dr. Pitt testified to various aspects of Madison's "character." There are two problems with this argument.

First, Madison's psychiatrists testified to dozens of aspects of Madison's history, character, and background in the context of the risk factors present for criminal behavior. In his *Petition*, Madison attempts to subdivide the issue of his upbringing from that of his mental state. But that is not how Madison's psychiatrists presented those issues at trial. According to their testimony, Madison's upbringing affected how his brain developed. That, in turn, led him to make the choices that he made in this case. To rebut that testimony, Dr. Pitt focused on the same aspects of Madison's life – his substance abuse, whether or not he was physically or sexually abused and to what extent, whether he had positive role models, his relationship with mother, his feelings about women, his childhood, etc. Dr. Pitt concluded that these risk factors were not enough to explain why Madison did the things that he did. In some cases, such as alcoholism or sexual abuse, Dr. Pitt disagreed that the risk factors existed at all. Madison, having introduced evidence of all these risk factors during the penalty phase, could not credibly claim that Dr. Pitt exceeded the scope of rebuttal by testifying as to those same factors.

Second, Ohio law requires all capital juries to consider whether there is anything mitigating about a defendant's character. Ohio Revised Code §2929.04(B) provides that during the mitigation phase, the jury "***shall consider***, and weigh against the aggravating circumstances * * * the nature and circumstances of the offense [and] the history, character, and background of the offender * * *." (Emphasis Added). This statute requires the jury to weigh the defendant's character to determine only whether it is mitigating, regardless of whether the defendant introduces evidence of his character or not. Dr. Pitt's testimony about various aspects of Madison's character was thus properly admissible under Ohio Revised Code §2929.04(B) because it addressed whether there was anything mitigating about Madison's character. At no time did the State ask the jury to weigh Madison's character as an aggravating circumstance.

The Court should decline certiorari because Madison's arguments do not properly reflect the facts or the law.

CONCLUSION

Michael Madison is unquestionably guilty of the horrific murders of three women. His attorneys knew that and chose to focus their efforts on mitigation. But the jury was also allowed to hear from a rebuttal state expert, because the Constitution of the United States does not compel limitations that would "undermine the adversarial process." *Cheever* at 94. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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