NO. 20-1171

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

PETITIONER'S REPLY BRIEF

(CAPITAL CASE:
EXECUTION DATE MAY 15, 2024)

Timothy F. Sweeney (OH 0040027)*
Member of the Bar of this Court
LAW OFFICE OF TIMOTHY F. SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
Phone: (216) 241-5003
Email: tim@timsweeneylaw.com
*COUNSEL OF RECORD

Counsel for Petitioner Michael Madison

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

REPLY BRIEF FOR PETITIONER

The State's brief confirms the need for the Court's review of the important constitutional questions which this case presents concerning the fairness and reliability of the penalty phase of a capital trial. This Court has *not* previously addressed these important issues about court-ordered mental examinations of capitally-accused persons, for purposes of the penalty phase of a capital trial, and the scope of their permitted usage in that phase.

1. The State grossly distorts Petitioner's mitigation evidence; he did not place his "mental state at the center of his defense."

In resisting this Court's review, the State grossly exaggerates, to the point of farce, the extent to which Petitioner's "mental condition" was in issue in his case. It was not in issue, and certainly not directly so. The State's assertions that it was "squarely placed [] at issue," and was the "center of [Petitioner's] defense," are pure hyperbole. (State's BIO at ii, 13.)

Petitioner raised no mental-status defenses in the guilt phase: He did not assert any mental disease or defect or any psychiatric diagnosis, and presented no evidence or argument that he lacked the requisite *mens res*, the capacity to commit the crime, or the ability to premeditate. The State does not, and cannot, dispute those facts.

Petitioner's approach did not change in the penalty phase. There, his mitigation evidence was focused on his pervasive family history of violence, abuse, and neglect across generations, on his own personal childhood experiences with abandonment, abuse, violence, and neglect as perpetrated against him by his mother and others, and on the resulting adverse impact these terrible experiences had on his developmental course.

His "mental condition" had little if anything to do with *that mitigation case*. And, if it did, it was only very tangentially, because of the prevailing research which recognizes that one impact of child abuse and developmental adversity is that it can negatively affect a young child's developing brain. That modern research and scholarly learning is what produced the now unassailable point that neurodevelopmental adversity can result from childhood trauma. There are even popular books about these concepts. *See* Bruce D. Perry, M.D., Ph.D. and Maia Szalavitz, THE BOY WHO WAS RAISED AS A DOG: AND OTHER STORIES FROM A CHILD PSYCHIATRIST'S NOTEBOOK -- WHAT TRAUMATIZED CHILDREN CAN TEACH US ABOUT LOSS, LOVE, AND HEALING (New York: Basic Books, 2006, updated 2017). *See also* T. 6614-15 (Dr. Davis references Bruce Perry's work).

The prospect of neurodevelopmental impact is not unique to the adversity and abuse experienced by *this particular Petitioner*, nor was it apparent in any brain imaging or any other neurological testing that was conducted on him. One of Petitioner's testifying psychologists, Dr. Davis, even told the jury there was

no evidence of brain damage, and he also said, that if he *had* seen such evidence, he would have referred Petitioner to a neurologist to determine if such damage exists. (T. 6592, 6669-70.) Thus, even *before* the State-requested mental examination was ordered by the trial court, Petitioner's trial counsel had already disclaimed any intent to present any such neurological evidence or any mental status defense. (T. 443 ("We're not presenting a neuropsychologist simply because we're not arguing that brain damage is an affirmative defense in either the trial phase or the mitigation phase in this case. And on that basis, because we're not placing the mental health issue as a culpability thing and we're not placing incompetency or sanity, to ask our client to submit to an examination at this point will clearly violate his Fifth Amendment privilege").) And, at trial, the judge ensured there was no confusion by instructing the jury, during the testimony of defense psychologist Dr. Mark Cunningham: "When we talk about wiring, we're not talking about brain injury or brain damage." (T. 6979.)

Petitioner's two testifying experts (Drs. Davis and Cunningham), indeed, are *psychologists*; they are not psychiatrists (as the State repeatedly misidentifies them, *see* BIO at 1, 4), and they are not neurologists or neuropsychologists. Their testimony about the modern research on the neuro-developmental impact of childhood trauma was not based on examinations, images, scans, or studies of Petitioner's brain, but on the general research and scientific learning, accepted in their profession, which recognizes such impacts. Their testimony about that

point was sourced in the literature, and was not from or dependent on personal examinations of Petitioner. The point was tangential to the mitigation case; it was a scholarly detail which helped illuminate one of the many adverse factors which plagued Petitioner's childhood and upbringing.

It is thus false for the State to claim that "brain damage" was "central" to Petitioner's defense. To the extent the State *even needed* to rebut the research point on which Petitioner's experts relied, the State had many other sufficient and effective ways to do so which did not necessitate a forced psychiatric examination of the Petitioner by a State psychiatrist.

2. *Kansas v. Cheever* does not resolve the questions presented here.

The State also claims the Court settled these issues in *Kansas v. Cheever*, 571 U.S. 87 (2013). That is plainly wrong.

In *Cheever*, like *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Court recognized that the constitutional issue depends upon whether the defendant placed his mental state in issue by asserting a "mental-status defense," with that term defined in *Cheever* to include "those based on psychological expert evidence as to a defendant's *mens rea*, mental capacity to commit the crime, or ability to premeditate." *Cheever* at 96. In *Buchanan*, the mental-status defense was extreme emotional disturbance; in *Cheever*, it was voluntary intoxication

by methamphetamine. And, in both *Cheever* (a capital case) and *Buchanan* (a non-capital case as to that defendant), the issue arose only in the context of ***mental-status defenses to the charged crimes***, which, if successful, would result in defendant's acquittal and/or avoidance of criminal liability.

The Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981), is the only one of the three which involves the penalty phase of a capital case for an already-convicted defendant. There, the capital defendant did not present any mental-status defenses in the guilt phase and, therefore, he prevailed in this Court on his challenge to the State's use in the penalty phase of a compelled pretrial competency exam. True, the *Estelle* Court suggested that its result may be different where, for example, the defendant has asserted the insanity defense and introduces supporting psychiatric evidence. *Id.* at 465 ("When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case.").

But those circumstances were not present in Petitioner's case either: He did not assert the insanity defense or any other mental-status defense, and he presented no mental-status evidence or argument for which a fair rebuttal would necessitate the government to force the defendant to submit to a psychiatric examination by a psychiatrist of the government's choice.

Petitioner's case thus presents the circumstances which are not addressed by *Buchanan* and *Cheever* and are, at best, left open in *Estelle*. Petitioner did not present, in the guilt phase, any mental-status defense or any other evidence or argument that he lacked the requisite mental state to commit the crime (unlike in *Cheever* and *Buchanan*). And, although like *Estelle*, Petitioner's case proceeded to a penalty phase—and his Fifth Amendment protection thus followed him there too, protecting him from being made the "deluded instrument" of his own execution, *Estelle* at 462—he did not present any mental-status defenses in the penalty phase either.

A mitigation case based on developmental adversity and an abusive childhood is not a mental-status defense, and certainly not as defined in *Cheever* or as eluded to in *Estelle*. It is not even a *defense* to the crimes because—since it is intended *only* for use at the penalty phase—Petitioner by definition would already have been found guilty of the charged capital crimes before any such evidence would ever be presented to his capital jury as humanizing mitigation.

3. Petitioner was unconstitutionally forced to choose between his constitutional rights for his penalty phase, in circumstances where he asserted no mental-status defenses and where other less intrusive means were available to enable rebuttal.

With no mental-status defense being placed in issue, at either phase, Petitioner's Fifth Amendment rights should have prevailed. He should not have been forced to choose, for penalty-phase purposes, between, on the one hand, his Fifth Amendment rights, and, on the other, his vitally important rights under the Sixth, Eighth, and Fourteenth Amendments, uniquely possessed in a capital case, to a thorough mitigation investigation and the resulting opportunity to present his jury and judge with the mitigation evidence that will enable them to make the constitutionally-required individualized sentencing determination *as to him*, and perhaps conclude that his moral culpability warrants that his life be spared.

The State's Brief in Opposition confirms that the prosecution has no sensitivity whatsoever to the constitutional rights of a capitally-accused person in and for an eventual penalty phase, and thus no tolerance for any thoughtful attention to their protection. The State argues with a bludgeon not a scalpel, insisting upon an all-or-nothing approach that any penalty-phase mental-health testimony by an expert who interviewed the capital defendant must mandate a tit-for-tat compelled mental exam in

response. The State has no consideration for the fundamental difference between the guilt *and* penalty phases, for the different interests at stake in the two phases, or for the availability and sufficiency of other effective means to rebut evidence presented only *in that later phase*.

The Court has never held for such an all-or-nothing approach, and certainly not for mental health testimony that will *only* be used in an eventual penalty phase of a capital case. The Court's precedent in capital cases—and the importance of a thorough mitigation investigation and of a fully-informed jury capable of making an individualized moral judgment––requires sensitivity to these various constitutional rights with an awareness of what is actually at issue in the penalty phase. It is no longer about guilt or innocence; the only issue now is whether the already-found-guilty defendant will live or die—the only issue is the weighing of aggravation against mitigation for an individual who will, *in the best case*, receive a life sentence for his crimes.

Because *that* is the framework in the penalty phase, this Court should be vigilant to ensure that the capital defendant's Fifth Amendment right that he not be made the "deluded instrument" of his own execution is not needlessly sacrificed to his equally important rights to a thorough mitigation investigation and an individualized sentencing determination which is informed by that investigation. All such rights can and must be protected, and that can be done without sacrificing fairness to the State *or* to the capital defendant in the

penalty phase. The Ohio courts failed to protect the rights of the capital defendant by being overly-indulgent to those of the prosecution.

In Petitioner's case, for example, there was no reason—and the State does not offer one—why a fair "rebuttal" could not have been obtained with the State's review, cross-examination, and its own expert's testimony, all in reliance on the reports prepared and documents reviewed by Petitioner's testifying experts. That was sufficient in *Buchanan*. The State did not need, and was not entitled to, its own mental examination of Petitioner in order to conduct effective rebuttal, and certainly not when Petitioner did not, in either phase, rely on any mental-status defenses as defined in *Cheever*. *Cheever*, 571 U.S. at 96 (those involving "a defendant's *mens rea*, mental capacity to commit a crime, or ability to premeditate").

Adherence to *Cheever*, *Buchanan*, and *Estelle*, and to what the Constitution compels, does not mean the State will be unable to present expert testimony or engage in effective "rebuttal" in the penalty phase. The State can still present its desired expert, and "rebut" the defendant's experts; but the State should not be entitled to force the capital defendant to participate in an interview with the State's expert.

Compelling that Sophie's choice was particularly unnecessary here as demonstrated by the State and Dr. Pitt's abuse of the indulgence they were given. To achieve a fair rebuttal, there was no need for Dr. Pitt to be asking Petitioner about

"character defects," and whether he's a liar, and whether he has a temper, and whether he holds "grudges," and about his "sexual practices," and what he can do to improve himself, and what he thinks of El Chapo, and on and on with Dr. Pitt's defiance of the trial court's order to limit the examination to "brain damage."

There was likewise no need for the jury to see and hear the seven unfairly prejudicial video clips, from that compelled exam, about such irrelevant matters, all under the pretense of "fair rebuttal."

It was nothing of the sort.

4. In all events, *Cheever* recognizes constitutional limits on such rebuttal evidence; they were greatly exceeded in this case.

And *even if* a compelled examination is proper, it may only be used for a "limited rebuttal purpose": "the limited purpose of rebutting a mental-status defense." *Buchanan*, 483 U.S. at 424; *Cheever*, 571 U.S. at 92.

Although the State, like the Supreme Court of Ohio, both cite to *Buchanan* and *Cheever*, they both disregard the constitutionally-essential limiting principles of those cases, which are two: (1) defendant must have placed his mental state directly in issue; and (2) even then, any rebuttal via State mental-health evidence must only be for the limited purpose of rebutting defendant's mental status evidence.

Here, Petitioner did not place his mental state directly in issue. Plus, the State and its expert blew passed the constraints of a "limited rebuttal purpose," just as they ignored the trial court's order that the "examination only relates to the brain damage of defendant."

One unfortunate result of the Supreme Court of Ohio's ruling will likely be to open the flood gates to court-compelled, State-requested psychiatric examinations of capital defendants when they are not even faintly necessary for any fair or necessary "rebuttal." It will unfairly ease the way for Ohio prosecutors, in capital cases, to present irrelevant and prejudicial evidence of non-statutory aggravating circumstances such as alleged "bad" character, lack of "remorse," absence of "brain damage," alleged mental health disorders such as "anti-social personality disorder," and other prejudicial and irrelevant matters, all wrapped up in the bow of an "expert" report and accompanying testimony, exactly as in Petitioner's case. It allows the State to push the thumb more firmly down in favor of death in cases where the capital defendant, like Petitioner, had not placed his mental status directly in issue for any relevant purpose, and it wrongly forces the defendant to be the deluded instrument of that State effort.

The U.S. Constitution and this Court's precedent demand much more sensitive consideration, than the Ohio courts provided here, of the limited scope of penalty-phase mental-health-expert rebuttal in capital cases where the defendant

has not placed his mental state directly in issue and has disclaimed any mental-status defense.

This case provides a good vehicle for the Court to address these important issues and ensure that vital constitutional protections in capital cases are not sacrificed to labels, superficial inquiry, and prosecution-orchestrated gamesmanship.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

/s/ Timothy F. Sweeney

Timothy F. Sweeney (OH 0040027)*
Member of the Bar of this Court
LAW OFFICE OF TIMOTHY F. SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
Phone: (216) 241-5003
Email: tim@timsweeneylaw.com
*COUNSEL OF RECORD

Counsel for Petitioner Michael Madison