CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2022 TERM

CHRISTOPHER WHITAKER, Petitioner,

vs.

STATE OF OHIO, Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

By compelling the Petitioner to undergo a pretrial psychological evaluation to rebut a mitigation claim it knew he was not making, and prohibiting him from presenting significant evidence of his acceptance of responsibility, the trial court violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to present a defense, thereby violating his Eighth Amendment protection against cruel and unusual punishment, all as protected by his rights under the Fourteenth Amendment. To secure those rights, Petitioner presents these two questions:

1. Is it possible that a jury might find some indication of character regarding willingness to accept responsibility – and thereby find some mitigating value – in a capital defendant's offer to plead guilty, accept a sentence of life without the possibility of parole, and waive his right to direct appeal and any other post-conviction proceedings in exchange for the state's dropping death specifications? And if so, does an absolute prohibition against telling the jury of that offer violate the Sixth and Eighth Amendments as made applicable to the states through the Fourteenth Amendment?

2. Is the accused in a capital case entitled to investigate, develop, and introduce, as mitigating evidence for the penalty phase, expert testimony explaining the accused's personal and childhood history without exposing himself to a compelled examination by the prosecution's expert? If so, then any evidence obtained during that improperly compelled examination may not be used against the accused, all as required by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Whitaker ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in *State v. Whitaker*, Slip Opinion No. 2022-Ohio-2840.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio in *State v. Whitaker*, ___ Ohio St.3d ___, 2022-Ohio-2840, ___ N.E.3d ___. (Appx., *infra*, at A-0001.)

The Supreme Court of Ohio's order of October 25, 2022, denying Petitioner's timely motion for reconsideration is reported at *State v. Whitaker*, 168 Ohio St. 3d 1420, 2022-Ohio-3752, 2022 Ohio LEXIS 2203, 196 N.E.3d 863 (Ohio, Oct. 25, 2022). (Appx., *infra*, at A-79)

JURISDICTION

The Supreme Court of Ohio issued its opinion in Petitioner's direct appeal on August 18, 2022. (Appx., *infra*, at A-0001) Petitioner's timely filed Motion for Reconsideration was denied on October 25, 2022. (Appx., *infra*, at A-79) Petitioner's motion to stay the mandate pending exhaustion of all state court remedies was granted on November 9, 2022. (Appx., *infra*, at A-80) On January 4, 2023, Petitioner was granted until March 24, 2023 to file this Petition. This Court has jurisdiction over this cause under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, which provides in 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 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 part, "Section 1. 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."

STATEMENT OF THE CASE AND FACTS

A. Trial Court Proceedings

On February 13, 2017, a Cuyahoga County grand jury returned a ten-count indictment charging Petitioner, Christopher Whitaker (Petitioner), with felony aggravated murder (Counts 1-3), aggravated murder with prior calculation and design (Count 4), rape (Count 5), kidnapping (Counts 6 and 7), aggravated burglary (Count 8), tampering with evidence (Count 9), and gross abuse of a corpse (Count 10). As relevant here, each of the aggravated murder counts was accompanied by three Ohio Rev.Code §2929.04(A)(7) felony murder death specifications: one each for rape, kidnapping, and aggravated burglary.

Months before trial, Petitioner offered to plead guilty, waive all post-trial avenues for relief, and accept a sentence of life in prison without the possibility of parole. The state, determined to seek the death penalty, rejected that offer. Petitioner asked the trial court to allow him to tell the jury that he'd made the offer and that the state refused it. The court first agreed, then reversed itself after the Supreme Court of Ohio ruled in *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, that "'[A] defendant's offer to plead guilty, never accepted by the prosecutor, is not relevant to the issue of whether the defendant should be sentenced to death.'" *Id.* at ¶ 130, quoting *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 69.

In preparation for trial, in particular the potential penalty phase, Petitioner's defense team retained Robert Kaplan, a clinical and forensic psychologist, to undertake an evaluation. Dr. Kaplan found no mental illness. Nevertheless, he did

develop a number of mitigating factors stemming from Petitioner's personal history.

When the prosecutors saw Kaplan's report, they asked for an order directing Petitioner to submit to their own psychological expert for an examination to rebut a mental illness diagnosis that Dr. Kaplan did not make. Over defense objection, the court granted the motion. What the prosecution really wanted, and eventually got, was a chance to have their psychiatrist question Petitioner and get him to say things that would contradict Dr. Kaplan's observations. The prosecution's expert evaluation of Petitioner amounted to a wide-ranging interrogation.

Petitioner's jury trial proceeded in January 2018. During voir dire, his counsel told the prospective jurors that they would not be contesting Petitioner's guilt. Specifically, counsel said, "We're not contesting liability in this case. Mr. Whitaker is responsible for taking the life of this child." (TR 1737) Petitioner's acknowledgement of the fact that he committed the crimes charges and was remorseful for that conduct was a major defense theme. The jury found him guilty of all charges and specifications. (TR 2836-2840)

At the penalty phase, the defense team underscored Petitioner's remorse for the crimes. But the jury never learned of his offer to plead guilty and resolve the case short of a trial. The defense team also pointed to the mitigation that Dr. Kaplan uncovered consequent to his examination of Petitioner. However, employing the fruits of the interrogation intended to rebut the Doctor's findings, the prosecution's expert testified that everything Dr. Kaplan said was wrong and that Petitioner was – despite not meeting the diagnostic criteria – a sociopath.

At the close of the penalty phase, the jury returned a verdict recommending a death sentence. (TR 3275-3277) The court adopted that recommendation and sentenced Petitioner to consecutive terms of death plus 48 years in prison.

B. Appeal to the Ohio Supreme Court

Among the issues Petitioner, raised in his appeal to the Supreme Court of Ohio, he argued that a defendant's pretrial offer to plead guilty, accept a sentence of life without the possibility of parole, and waive all appellate and post-conviction rights is admissible as mitigation evidence, because jurors may find that it evidences some acceptance of responsibility. Petitioner argued that the court had been wrong in *Dixon* and *Sowell* – or at least that his case was distinguishable – that the evidence should have been admitted, and that the refusal to admit it violated his constitutional rights. Over one justice's dissent on the issue, the court rejected the argument. *State v. Whitaker*, ___ Ohio St.3d ___, 2022-Ohio-2840, ___ N.E.3d ___, ¶¶ 140-149, and see Brunner, J., concurring in result but dissenting on the issue, id., at ¶¶ 248-264.

Petitioner also challenged the trial court's order compelling him to submit to a psychiatric evaluation by a prosecution expert, for purposes of developing evidence that undermined his case. Petitioner argued that such an evaluation literally forces the defendant to be a witness against himself.

On August 18, 2022, the Ohio Supreme Court vacated the counts and specifications involving aggravated burglary because the evidence thereon was insufficient. The court, however, affirmed Petitioner's death sentence after concluding that the charges and remaining specifications were valid, and the

aggravating circumstances outweighed the mitigating factors.

REASONS FOR GRANTING THE WRIT

I. A capital defendant's offer to plead guilty and waive all post-trial procedures in exchange for a sentence of life without the possibility of parole indicates something about the defendant's character and may have mitigating value. Excluding evidence of that offer from the jury violates the Sixth, Eighth, and Fourteenth Amendments.

The theme of Petitioner's case at both the trial and penalty phases was that he accepted responsibility and felt remorse for what he had done. His counsel told the venire during voir dire that they were "not contesting liability in this case. Mr. Whitaker is responsible for taking the life of this child. "[T]hat," counsel added, "is information that you need to have right now." (TR 1737) The point was echoed repeatedly.

In his opening statement counsel told the seated jury:

> Mr. Whitaker, at his direction, is why Mr. Mack told you that yesterday. At his direction that he doesn't want to make a circus out of this. That's why Mr. Mack got up there and told you we aren't contesting liability.
>
> And at Mr. Whitaker's direction is why I'm standing here today telling you again we're not contesting that. We're not contesting that he did it.
>
> We're not contesting that he's taking responsibility for the awful things that you saw in here in opening statement, the awful things you saw on the jury view, and unfortunately the awful things you're about to see over the next several days.

(TR 1825-1826)

Counsel elaborated during the trial phase closing argument:

> Look, at the outset of this case, during voir dire, we came to you, we waved that white flag and we told you we're not challenging whether or not he's responsible for taking her life.
>
> There's nothing in this world that could justify the events that occurred in this case.
>
> There may be explanations as to what occurred, but we still stand by no justifications and no excuses. And he knows that, which is the reason why

he said during the course of that interview, he did not want a circus. He acknowledged his wrongdoing and said give me my time, or what I deserve.

The reason for defending Mr. Whitaker in this manner which we have, but we're not challenging witnesses and the evidence, because he required it.

Mr. Shaughnessy and I feel like fish out of water.

It's counterintuitive not to challenge witnesses, not to challenge their credibility.

But in this case we're required to follow our client's instructions. And it's the right thing to do. It really is in this case. And I'm glad that Mr. Whitaker gets that. We cannot defend him in this way without his approval.

(TR 2767-2768)

It remained a defense theme during the mitigation phase, never more so than in Petitioner's own statement to the jury.

From the beginning I've accepted full responsibility for my actions.

I assisted the detectives as to where to find my clothes and boots I was wearing that day.

I never wanted this to happen, and ever since that day I've been feeling regret and remorse.

Through the year I made a lot of phone calls, and in those calls I've said things, a lot about things in order to protect my family's feelings.

I've admitted to my guilt to the detectives and to my lawyers.

I asked my lawyers not to contest or challenge anything in this case because I really wanted the DeFreeze family to have closure.

I will not try to hide behind drugs or alcohol. I will not pretend or lie because it wouldn't be fair to the family.

I apologize to the family and the community for my actions. There is no excuse for what I've done.

I can't imagine the pain the family feels, but I know the pain I feel when I had to look at what I've done.

If I could go back to that day in January, I'd change everything, but I can't, so I have to live with each day with the shame, hurt and guilt.

And although the trial is over, the regret and painful memories will remain with me. Just that's sometimes -- that's just things I can't shake.

(TR 3100-3101) Counsel echoed those thoughts speaking to the jury during closing argument:

It's no defense to what happened here. It's no defense to what we saw, that he said he did it. It's no excuse or justification.

But the fact that he said he did it, the fact that he showed remorse, the fact that he waived his Fifth Amendment right and agreed that he did it, the

> fact that he didn't want to turn this into a circus, the fact that he sent the police to find more evidence against him, that's mitigation.

(TR 3228-3229)

Evidence in support of Petitioner's acceptance of responsibility stretches back to the day of his arrest when he cooperated with officers investigating the case and, after an hour or so of dissembling, began acknowledging his guilt. And the jury heard that.

The prosecution disputed Petitioner's claims that he had accepted responsibility. His cooperation with law enforcement, they argued, was dilatory and dishonest, admitting what he did only when detectives "forced him to." And they offered a series of calls from jail in which he presented himself to friends and family as innocent.

But what the jury did not hear, was not allowed to hear, was that Petitioner had offered to plead guilty, waive all post-conviction proceedings, and accept a sentence of life without the possibility of parole – death in prison. And they did not hear that because the trial court, after originally granting permission to let the jury know, reversed itself in light of the Ohio high court's decision in *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, that "'[A] defendant's offer to plead guilty, never accepted by the prosecutor, is not relevant to the issue of whether the defendant should be sentenced to death.'" *Id.* at ¶ 130 (quoting *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 69).

Sowell and *Dixon* were wrong when decided, and Ohio's continuing to adhere to their holding remains wrong. An offer to plead in exchange for a life sentence is relevant and should be understood to be admissible evidence. As an indication of

acceptance of responsibility, it offers some, even if minimal, mitigatory value. Indeed, three months to the day after the court held in *Dixon* that such a conditional offer was "not relevant," it found an identical offer relevant, according it some, albeit "minimal," weight in the capital appeal of Dixon's co-defendant. *State v. Hoffner*, 102, Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 117.

Of course, a juror might find such an offer merely a self-serving attempt to avoid execution and afford it no weight in mitigation. As Ohio cases make clear, a jury "may properly choose to assign absolutely no weight to [proffered] evidence if it considers it to be non-mitigating." *State v. Steffen*, 31 Ohio St.2d 111, 129, 509 N.E.2d 383 (1987). Even then, even if Petitioner's offer were deemed non-mitigatory, it would be admissible as an indication of the defendant's character. See Ohio Rev.Code § 2929.04(B) ("the court, trial jury, or panel of three judges shall consider, and weigh . . . the . . . character . . . of the offender . . . "). The Eighth Amendment requires no less. See, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 605 fn. 12 (1978) (acknowledging "the traditional "authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character . . . "); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Ohio's blanket prohibition on admission of a rejected conditional offer to plead guilty in exchange for a life sentence thus violates the Eighth and Fourteenth Amendments. As wrongfully excluding properly admissible evidence proffered by the defense, it violates also the Sixth Amendment right to present a defense.

This Court should resolve this question on which the lower courts are divided.

Ohio's position, that a conditional offer cannot ever have mitigatory value, is not unique. Indeed, in holding that any conditional offer to plead in a capital case is irrelevant, the court in this case relied on the reasoning of the Sixth Circuit's decision in *Owens v. Guida*, 549 F.3d 399, 420 (6th Cir. 2008). *Whitaker* at ¶145.

But if Ohio's view on the issue is not unique, it is also far from universally accepted. Various state and federal courts take a different view.

In Arizona, for instance, a capital defendant's offer is recognized as admissible as it "tends to make his acceptance of responsibility for the murders more probable." *Busso-Estopellon v. Mroz*, 238 Ariz. 553, 554, 364 P.3d 472, 473. Colorado agrees, see, *Colorado v. Dunlap*, 173 P.3d 1054 (Colo. 2007).

Federal courts, too, have found such evidence admissible. See, for instance, *United States v. Fell*, 372 F.Supp. 2d 773, 784-85 (D.Vt. 1005) (citing *United States v. Biaggi*, 909 F.2d 662, 690-92 (2d Cir. 1990)), and *Johnson v. United States*, 860 F.Supp.2d 663, 900, fn. 67 (N.D. Iowa 2012). And in Dylann Roof's trial, the evidence of his offer to plead guilty "in exchange for a sentence of life in prison without the possibility of release" was not only admitted but was found by all twelve members of the jury to be mitigatory. *United States v. Roof*, No. 2:15-CR-00472, Sentencing Phase Verdict Form, p. 15 (D. S. Carolina, Jan. 10, 2017) (Appx. *infra* at 96).

The question is broadly relevant in capital cases. This Court should resolve the disagreement and hold that the Sixth, Eighth, and Fourteenth Amendments require that a capital defendant's offer to plead guilty and accept a sentence of life

in prison without the possibility of parole while waiving all post-trial procedures is admissible evidence in the mitigation phase of a death penalty trial.

II. The accused in a capital case may investigate, develop, and introduce, as mitigating evidence in the sentencing phase, expert testimony explaining the accused's personal and childhood history without exposing himself to a compelled examination by the State's expert, and any evidence from any such improperly compelled examination may not be used against the accused, all as required by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

A. Introduction

In facing the charges in this case, Petitioner did not claim that he was not guilty by reason of insanity (NGRI) when he committed the charged misconduct. There was no claim that a serious mental illness was a contributing factor in the case. Nor was his competence to stand trial questioned at any time while the case was pending. The mitigation his lawyers and other members of the defense team developed on his behalf focused on trauma he experienced as a young child, domestic abuse he witnessed, and a family dynamic that provided no positive role models and little guidance or emotional support. That history undermined his ability to develop skills that might have helped him cope with the various setbacks he faced. Without them he fell into a drug habit and struggled with impulse control and anger management, among other things. (Tr. 2880, penalty phase opening statement)

These difficulties, while mitigating, do not constitute mental health diagnoses. In seeking to rebut Petitioner's mitigation case, the State asked the trial court to order him to submit to an evaluation to enable the prosecution's

psychological expert "to opine on Whitaker's mental state." (Motion to have Defendant Submit to Psychological Examination by the State's Expert, 2/5/18, p. 2) The explicit purpose of that evaluation was to obtain information from the accused intended to undercut the mitigation his lawyers intended to present to save Petitioner's life. And, indeed, as the State expert's testimony demonstrates, that is exactly what happened.

Requiring the defendant to help the State generate evidence that the State explicitly acknowledges it will use against him is contrary to law and offends rights guaranteed under the State and Federal Constitutions. Using that evidence to then secure the defendant's death sentence is likewise repugnant.

B. Mitigation Phase Preparation

In the wake of Petitioner's indictment for capital murder, his counsel determined that the case's outcome would largely be driven by the penalty phase. Given the evidence, including Whitaker's admissions to police concerning the crimes, it was reasonable trial strategy to largely concede liability for the criminal misconduct, focusing instead on investigating Whitaker's personal and psychological history to gather and develop mitigation evidence.

To that end, Petitioner was referred to Robert G. Kaplan, a psychologist located in Northeast Ohio. Dr. Kaplan evaluated Whitaker to determine what if any psychological factors were relevant to the criminal charges. Following multiple interviews, a battery of psychological tests, review of the prosecution's case file, and Petitioner's social history, which included his education, prison, and family service records, Dr. Kaplan found the following mitigating factors to be present in

Petitioner's case:

1) Due to witnessing domestic violence against his sister at an early age, Mr. Christopher L. Whitaker learned to repress feelings of anger and developed a maladaptive coping mechanism of dissociation, which prevented him from being aware of negative emotions until they reached a point where they disrupted his capacity to control them and conform his behavior according to the requirements of the law.

a) At the time that the alleged instant offenses occurred, he was under the influence of repressed anger that was released in an uncontrolled and violent manner. He lacked the capacity to control his behavior due to a combination of dissociation and intoxication by cocaine.

2) As a consequence of losing his mother at an early age and witnessing domestic violence at an early age Mr. Christopher L. Whitaker developed the following problems:

a) Bedwetting
b) School behavior problems.
c) Rebelliousness and oppositional behavior
d) Decreased capacity for empathy
e) Reduced ability to control his impulses
f) Devaluation of women
g) Substance abuse

3) Mr. Christopher L. Whitaker had no positive male role model in his life who could inspire self-discipline or values that would lead to achievement and better self-control. This situation impaired his psychological development and capacity to regulate his behavior.

4) Within a week of losing his mother, Mr. Christopher L. Whitaker lost the support of his father's family, his home and school, and was uprooted from all that was familiar, to be moved to a community in the Cleveland metropolitan area, Garfield Heights, where, at the time, he and his family were subject to a lot of racist treatment and suffered financial hardship. These stressors affected his psychological development and capacity to regulate his behavior.

5) Mr. Christopher L. Whitaker's main source of social support, his older sister, developed a life-threatening illness over the past two years, which has presented another stressor that taxed his already limited resources for coping at the time the alleged offenses occurred, further impairing his capacity to regulate his behavior.

6) Had it not been for the death of his mother at an early age of his life, the lack of a positive male role model in his life, and the witnessing of domestic

violence against his sister, Mr. Christopher L. Whitaker's life would have taken a different direction and he would not currently be facing capital murder charges.

7) At the time that the alleged offenses occurred, Mr. Christopher L. Whitaker was under the influence of cocaine, which impaired his ability to control his impulses and conform his behavior to the requirements of the law.

8) The prison records indicate that Mr. Christopher L. Whitaker made a sincere effort to reform himself by participating in drug treatment and anger management programs, and by getting good evaluations for his work as an inmate and participation in GED classes.

9) Mr. Christopher L. Whitaker was able to refrain from violent behavior while incarcerated in prison and while awaiting trial. Therefore, if he received a sentence of Life Without Parole, it is unlikely that he would act violently in prison.

10) Mr. Christopher L. Whitaker does not qualify for a diagnosis of Anti-Social Personality Disorder because he has no history of Conduct Disorder before the age of 15.

11) Although Mr. Christopher L. Whitaker is a sexually promiscuous individual, a review of DSM-5 criteria indicates that he does not qualify for the diagnosis of any Paraphilic Disorder, including a Pedophilic Disorder.

12) Mr. Christopher L. Whitaker had no pre-existing desire to have sexual relations with adolescent females.

13) Mr. Christopher L. Whitaker is remorseful about his behavior related to the instant offenses.

As part court the ordered discovery process, the defense team provided Dr. Kaplan's report to the State of Ohio. On February 5, 2018, the State moved the Court to issue an order directing Petitioner to submit to a psychological evaluation by their expert. According to the State, the psychiatric examination was justified because Dr. Kaplan's report indicated that Petitioner suffered from cocaine, marijuana, and alcohol abuse disorders and adjustment disorder with mixed anxiety and depressed mood.

One of the observations Dr. Kaplan made was that Petitioner dissociated at some point during the underlying misconduct and does not recall precisely what he did due to a combination of cocaine use and resulting lack of impulse control. The State argued that the only way it could rebut this observation was by having its own expert evaluate him. (TR. 2249-2253) The defense countered that the law only provided for such an evaluation when the defendant's competence, sanity, or mental health is raised at the guilt phase of litigation. Dr. Kaplan's opinions did not exculpate Petitioner and would only be offered to explain his conduct and memory of what transpired. (TR. 2246-2247) Noting the defense objection, the court ordered him to participate in the requested evaluation.

C. The prosecution used their evaluation of Petitioner to undercut his own mitigation evidence.

When the matter proceeded to the penalty phase, the State cross-examined Dr. Kaplan extensively in its effort to challenge the validity of his findings in mitigation. (TR. 2985-3042) In particular, the prosecutor underscored the fact that a lot of the information Dr. Kaplan reported about Petitioner's condition and mindset at the time of the incident – came from Petitioner himself. (TR. 3029-3033) In addition, the prosecutor's cross-examination questioned Dr. Kaplan's conclusion that Petitioner did not meet the criteria for anti-social personality disorder. (TR. 3039-3042)

In further rebuttal of Petitioner's mitigation case, the state introduced testimony from their expert, Dr. Sara West, the psychiatrist who interviewed Petitioner with the sole purpose of undercutting and dampening the impact of whatever mitigation Dr. Kaplan had found. Dr. West, a staff psychiatrist at

Heartland Behavioral Healthcare Center, undertook a clinical interview with Petitioner on 2/14/18. In preparation for her testimony, she reviewed Dr. Kaplan's report and Petitioner's social history. She also listened to his jail phone calls, reviewed police records and the autopsy report. (TR. 3141)

Dr. West testified about her interview with Petitioner, during which she questioned him about the specifics of the underlying incident. She also talked with him about his personal and family history – including the factual details of that history. When she testified at the penalty phase, the doctor opined that the accounts Petitioner provided to her were inconsistent with the mitigation narrative his defense team had provided. At one point she noted that Petitioner failed to tell her he witnessed domestic violence perpetrated on his sister by her boyfriend – other than a single incident when Petitioner claimed he stood up to the boyfriend. (TR. 3149)

Although Dr. West is not a psychologist and is not qualified to do psychological testing, she went on to dispute the validity of Dr. Kaplan's testing and his conclusions. (TR. 3148) Dr. West further concluded that Petitioner did not meet the diagnostic criteria to support many of his findings and that Dr. Kaplan's opinions about the things Petitioner experienced were questionable. (TR. 3148, 3153, 3167) She also discounted Dr. Kaplan's finding that Petitioner likely dissociated during or after the misconduct. (TR. 3150)

Dr. West also opined that Petitioner more likely has a conduct disorder, rather than the difficult personal history upon which Dr. Kaplan based his conclusions. (TR. 3152) Dr. West also suggested that Petitioner had been

malingering during Dr. Kaplan's evaluation. This, even though Dr. Kaplan did several tests to rule out malingering. In the end, Dr. West's testimony made it clear that, in her mind, Petitioner had an anti-social personality disorder. Notwithstanding the fact that he did not meet that condition's diagnostic criteria. (TR. 3168)

This was the final piece of information the jury received before it retired to deliberate on whether Petitioner should receive a death sentence.

D. Capital defendants have a right under the Eighth Amendment to present a broad range of mitigating evidence at sentencing.

The Eighth Amendment guarantees a defendant facing a possible death sentence the right to present mitigating evidence. That right ensures that capital sentencing is both individualized and reliable – a need that is heightened in capital cases due to the uniquely severe and irrevocable nature of the punishment. *See Lockett v. Ohio*, 438 U.S. 568, 604 (1978). This Court has acknowledged that the nature of that potential punishment renders "the penalty of death [ ] 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). That interest requires an "individualized" sentencing determination, one which satisfies "the principle that punishment

should be directly related to the personal culpability of the criminal defendant,"[1] has duly considered the "compassionate or mitigating factors stemming from the diverse frailties of humankind,"[2] 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."[3]

The Eighth Amendment's protection of human dignity—its "fundamental respect for humanity"—mandates the requirements of individualized sentencing which this Court's precedent imposes in the penalty phase; it is 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). That "constitutionally indispensable" requirement of an individualized sentencing determination in capital cases "confer[s] *upon defendants* the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence." *Kansas v. Marsh*, 548 U.S. 163, 175 (2006).

The use of mitigation evidence is a necessary component of the individualized sentencing requirement. And decisions surrounding which evidence to use in mitigation uniquely belong to the capital defendant and his counsel. *Id.*; *Lockett*,

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

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

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

438 U.S. at 604 (plurality)("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that ***the defendant proffers*** as a basis for a sentence less than death.") (emphasis supplied).

Further, when a jury weighs that evidence in determining how to sentence in a capital case, it may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. 586 at 604. Moreover, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 113–114 (1982). See also *Hitchcock v. Dugger*, 481 U.S. 393, 398–399 (1987).

The Constitution also "limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987). "Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Penry v. Lynaugh*, 492 U.S. 302 at 327-328.

Further, Ohio Rev.Code §2929.03(D) imposes a burden upon those accused of capital murder to develop and present evidence that mitigates against a sentence of

death. This kind of evidence –

> is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry, 492 U.S. 302 at 327-328. Further, those accused in capital cases are entitled to the assistance of experts in conducting the necessarily thorough investigation the development of such evidence requires. *See, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68 (1985); *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

This will include, in almost every capital case, assistance of mental health experts in the investigation, such as those used by Petitioner in his case. *See, e.g.*, 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) ("appellate courts have recognized trial counsel's specific duty to investigate signs of mental health issues thoroughly, choose experts wisely, and provide experts with the appropriate background information that will enable them to render trustworthy opinions").

In this case, Petitioner did not raise a *mens rea*, NGRI, or other mental health defense to these charges. In fact, he conceded liability at the adjudication phase of the proceedings. The evidence he sought to introduce bolstered his mitigation case, the only purpose of which was to support a sentence other than death. Petitioner's lawyers were legally and ethically required to investigate and present this evidence. Indeed, counsel in capital cases are obligated to conduct a thorough investigation in preparation for the sentencing phase of a capital trial. See

American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003) (2003 ABA Guidelines); *Bobby v. Van Hook*, 558 U.S. 4, 16 (2009) (discussing those Guidelines); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

As noted below, mitigation covers a wide variety of evidence that may or may not include evidence of mental illness. The ABA Supplementary Guideline 10.11(B) explains:

> The (mitigation) investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender' sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.

As these Guidelines demonstrate, the range of mitigation evidence a capital defendant may introduce at sentencing is comprehensive. A social history that includes this information may well include information that relates tangentially to an accused's mental health. But if it is not presented to undermine an element of the charged offense, the accused has an Eighth Amendment right to present it – without interference – as mitigation.

E. <u>The psychiatric evaluation compelled in this case violated Petitioner's right to remain silent.</u>

The accused in a criminal case has a right under the Fifth and Fourteenth Amendments, as well as parallel rights in Ohio's Constitution, to not be compelled to be a witness against himself. *Kansas v. Cheever*, 571 U.S. 87 (2013); Section 10,

Article I of the Ohio Constitution. The essence of that constitutional principle "is the requirement that the State . . . produce the evidence against [the defendant] by the independent labor of its officers, not by the simple, ***cruel*** expedient . . . of forcing it from his own lips." *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961). This Court has made clear that the privilege against self-incrimination extends to the penalty phase of a capital case. *White v. Woodall*, 572 U.S. 415, 421 (2014); citing *Estelle v. Smith*, 451 U.S. 454, 463 (1981).

For sure, Fifth Amendment protections can be waived when the accused introduces psychiatric evidence that places his state of mind directly in issue at trial. In that scenario, the court may compel the accused to submit to a psychiatric examination. *Cheever*, 571 U.S. 87 at 96. For example, in *Cheever*, the accused had presented evidence that he lacked the requisite *mens rea* to commit the charged offense. Specifically, Cheever's expert had diagnosed him with brain damage resulting from "long-term methamphetamine use . . .[which] had rendered [him] incapable of premeditation." *Id.* The ability to premeditate was directly relevant to the question of whether Cheever was guilty of aggravated murder. Since the expert's testimony involved a mental status diagnosis, this Court resolved that the prosecution could offer counter evidence from their own or a court-ordered examination without violating the Fifth Amendment. *Id.*

But a capital defendant, like Petitioner, who does not assert any mental-illness or mental status defenses in either phase of his trial, cannot be compelled to sacrifice his Fifth Amendment privilege against self-incrimination, and be forced to undergo a pretrial mental exam by a prosecution-retained psychiatrist, merely

because he was interviewed by one or more of his own mental health experts for purposes of developing a mitigation case of childhood trauma, abuse, and neglect. The compulsion of such a mental exam, in those circumstances where no mental-status defenses were asserted, transformed Petitioner into a "'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.

F. The compelled mental exam in Petitioner's case unconstitutionally forced him to abandon his Fifth Amendment right to secure the protection of these other constitutional rights which are indispensable in the penalty phase of a capital case.

Moreover, the trial court's order compelling Petitioner to participate in the mental exam further violated Petitioner's constitutional rights here because it forced him to sacrifice one constitutional right to exercise another. When it obtained the court order directing Petitioner to submit to the State's psychiatric evaluation, the prosecution basically argued that – by choosing to present a mitigation case at the penalty phase – Petitioner had waived his right to remain silent. Given the heightened role the mitigation case played here, Petitioner had no choice but to submit. But that scenario is constitutionally offensive. A defendant fighting a potential death sentence in Ohio should not be forced to either surrender his Eighth Amendment right to present mitigating evidence at sentencing; or submit to an unrestricted intrusion on his Fifth Amendment privilege against self-incrimination.

In concluding otherwise, the Ohio Supreme Court relied on its decision in *State v. Madison*, 160 Ohio St.3d 232, 2020 Ohio 3735, 155 N.E.2d 867. That decision, however, ignored the constitutional ceiling this Court established in

Cheever. There, the court broadly held 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." *Id*. at ¶ 120-121.

But the expansive and ill-considered ruling in *Madison* disregarded the guardrails this Court has put in place to restrict compelled examinations and the admission of evidence from such examinations. Specifically, before such an examination may take place, *Cheever*, *Buchanan*, and *Estelle* requires the defendant to assert a mental-status defense – placing his mental state directly at issue for trial – before triggering a mental examination. *Cheever* (defense of voluntary intoxication); *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (defense of "extreme emotional disturbance"); *Estelle* (example of insanity defense).

This Court adopted such a prerequisite largely because those kinds of defenses seek to negate guilt to charged crimes, compel acquittal, and/or otherwise avoid criminal liability (such as by pleading insanity). These are disputed issues of potentially dispositive importance which the defendant has injected into the criminal case. In that circumstance, this Court has recognized that there will be some 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.

The *Madison* decision, which the Ohio Supreme Court again embraced in Petitioner's case, also disregards, without analysis, other rulings from this Court consistently rejecting the notion that the exercise of one constitutional right may be

conditioned on the substantial impairment of another. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (describing the forced surrender of one right "in order to assert another" as "intolerable"); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In *Simmons*, this Court held that a criminal defendant cannot be compelled to give up his Fifth Amendment privilege against self-incrimination in order to assert his Fourth Amendment right against illegal searches and seizures. 390 U.S. at 390-394.

In *Simmons*, the defendant moved to suppress the contents of a suitcase he maintained was seized illegally. But the problem was that the seized evidence, if shown to have been in his possession, would implicate him in a crime. *Id.* at 391. Nevertheless, to establish standing for Simmons' suppression motion, he needed to testify that he was the owner of the suitcase, which required him to testify to that effect at the suppression hearing. *Id.* After the trial court denied the motion to suppress, the matter proceeded to trial, where the prosecution used the defendant's testimony from the suppression hearing to link him to the crime. *Id.*

Simmons appealed and this Court reversed, holding that the defendant's testimony from the suppression hearing was inadmissible at trial. This Court reasoned that allowing the prosecution to use Simmons' suppression-hearing testimony against him at trial would chill the exercise of Fourth Amendment rights. Specifically, this Court observed:

> It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. … In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof

> linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

Id. at 393. Accordingly, this Court resolved that it was "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id*. at 394.

As in *Simmons*, Petitioner was forced to abandon one constitutional right so that he could exercise another. Given the reasoning underlying the State's request for the psychiatric evaluation, it was Petitioner's mitigation evidence that prompted the prosecution to request the evaluation. But if Petitioner were to exercise his Eighth Amendment right to present mitigating evidence at the penalty phase of his capital murder trial, the forced evaluation required him to forego his Fifth Amendment right to remain silent. This is not a reasonable "choice." It impermissibly burdens the exercise of both rights, while also potentially compromising the reliability of the capital sentencing verdict.

To preserve his Fifth Amendment right against self-incrimination, Petitioner should not have been forced to surrender a right to present evidence – a surrender which would also force him to forgo his right to a "reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001). In a case where the ultimate penalty is irreversible, the State should not be entitled to coerce a defendant into giving up his right to a reliable sentencing process. *See Lockett*, 438 U.S. at 604.

Petitioner did not assert any mental-status defense or otherwise place his mental state directly in issue for his trial. He, indeed, unambiguously disclaimed any such defenses before trial, and that fact alone should have barred the state-

requested mental exam. Moreover, the fact that he used *psychologists* to help explain and contextualize his mitigation evidence of an abusive childhood and troubling family history did not place his mental status in issue at all, much less *directly* in issue.

Further, the evidence Petitioner presented via the mental health professional that interviewed him, in support of his mitigation case of childhood trauma, 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 fundamentally, analytically, legally, 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 a defendant whose guilt has already been determined. This information is developed to enable the jury's fair assessment of his moral culpability – which is constitutionally essential in the determination of whether the defendant's sentence should be life or death. Such mitigation evidence is hardly *dispositive* of the prosecution because that capital defendant will be punished greatly for his crime in all events.

In Petitioner's case, that would be by either a sentence of life without parole (dying prison after a lifetime) or the death penalty (dying sooner by lethal injection). Moreover, the capital defendant for purposes of penalty is permitted to make an unsworn statement to his jury, 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 any capital defendant, merely because that individual may present mitigation evidence derived from an interview with a mental health professional, is minimal if non-existent with respect to most *mitigation evidence*. That is especially here, where Petitioner was presenting no mental-status defenses at the penalty phase either. The prosecution, with guilty verdict in hand, is more than capable of fully addressing the relevant moral issue of life or death without forcing the defendant to submit to a mental exam by its own psychiatrist and presenting testimony stemming from such a compelled exam.

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

> 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, New Jersey v. Portash*, 440 U.S. 450 (1979) (compelled incriminating statements inadmissible

even for impeachment purposes); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (a defendant's involuntary statements could not be used to impeach his credibility at trial).

G. The compelled mental exam was also unconstitutional in Petitioner's case because there were other effective means of rebuttal for the penalty-phase evidence at issue.

Estelle, *Cheever*, and these other cases, are concerned with avoiding the "unfairness" created when the court permits testimony from a defense mental health professional without allowing the state a means to rebut that testimony. But that "rebuttal" does not necessitate that the State obtain a compelled mental exam by a prosecution-selected psychiatrist, and certainly not when no mental-status defense is presented as to guilt. *See Buchanan*, 483 U.S. at 422-23 (prosecution may rebut "with evidence from the reports of the examination that the defendant requested"); *United States v. Byers*, 740 F.2d 1104, 1114 (U.S. App. D.C. 1984) (a personal interview by a competing expert is "ordinarily" necessary to rebut psychiatric testimony about insanity and delusional "spells").

Estelle, suggested that the real 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 the *Cheever* Court'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,[4] there were *many* alternative means for the prosecution to effectively rebut the penalty-phase testimony that Dr. Kaplan provided, which did *not* necessitate Petitioner's participation in a court-ordered mental exam by Dr. West.

For example, the prosecution had full access to the detailed reports of all the expert witnesses and the documents on which they relied. In *Buchanan*, this Court suggested that access to such reports can itself be sufficient for rebuttal, *Buchanan*, 483 U.S. at 422-23. It surely was in the instant case. The prosecution and its expert also had access Petitioner's video-taped interrogation by the police, all of the many documents and reports about Petitioner's history and family, the social-service interventions in his case, his education, his criminal record, his prison records, and hours of jail calls. The prosecution did not also need a mental exam of Petitioner, where he was forced to answer the questions of a state-selected psychiatrist, to rebut what Petitioner presented.

Here, there was no dispute about, and no allegation of, any mental illness or diminished mental capacity. The issue was whether Petitioner's difficult personal history 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-

[4] "Whether, at the time of committing the offense, the offender, because of a 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." Ohio Rev.Code §2929.04(B)(3).

dubious choice, there were absolutely no grounds, in fairness or justice, under which a compelled mental exam was necessary for fair rebuttal.

The compelled mental examination in this case also enabled the prosecution, through Dr. West, to announce that Petitioner had Anti-Social Personality Disorder (ASPD) – a finding that was not supported by Dr. Kaplan's evaluation or the objective criteria. That such a "diagnosis" is dehumanizing and prejudicial goes without saying. "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). "The overwhelming weight of legal authority views evidence that the defendant has ASPD as inherently aggravating." *Id*. at 529 & n.68 (citing cases). Yet, by allowing that testimony largely based on West's mental exam of Petitioner, the court forced Petitioner to be the deluded instrument of a dehumanizing "diagnosis" which would help send Petitioner to death row.

CONCLUSION

For all of the reasons set out above, and in the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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