No. 22-7134

In the Supreme Court of the United States

CHRISTOPHER WHITAKER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
DANIEL T. VAN
Assistant Prosecuting Attorney
Counsel of Record
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7865
dvan@prosecutor.cuyahogacounty.us

Counsel for Respondent State of Ohio

CAPITAL CASE

QUESTIONS PRESENTED

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.

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INTRODUCTION

The Court should deny certiorari because this *Petition* presents no novel issues or issues of extreme importance, no significant conflict between federal courts of appeals and/or state high courts, no rule of law that directly conflicts with Supreme Court precedent, and no constitutional question that warrants the Court's review. In his *Petition*, Whitaker raises two questions for the Court to consider. First, Whitaker argues that a prohibition against introducing evidence of his offer to plead guilty in exchange for a sentence of life without the possibility of parole as mitigation violates his Sixth and Eighth Amendment rights. Second, he challenges his compelled psychiatric examination and the admission of evidence from that examination. The Supreme Court of Ohio properly rejected both arguments. And the Supreme Court of Ohio's opinion shows no error in the trial court.

Whitaker's first question presented is an evidentiary challenge to the trial court's decision to exclude from the mitigation phase evidence of his conditional offer to plead guilty in exchange for a sentence of life without parole. The state supreme court relied on both its own prior decisions and the clear guidance of multiple federal courts of appeal in holding that evidence of failed plea negotiations is not admissible at trial. Such a conditional offer did not demonstrate remorse, but only that Whitaker wished to avoid the death penalty. Whitaker's attempts to avoid the death penalty were not mitigating evidence because they did not properly relate to his character, record, or the circumstances of the offense. *See Lockett v. Ohio*, 438 U.S. 587 at 604 (1978).

There are also strong policy reasons to prohibit the introduction of plea offers at trial, as such gamesmanship would discourage parties from making or considering such offers. A conditional offer to plead guilty, never accepted by the opposing party, is not and should not be admissible as evidence of each party's trial tactics.

Whitaker's second question relates to his compelled psychiatric examination by the state's expert that was necessary to rebut his mitigation evidence. Because of the overwhelming evidence against him, Whitaker conceded his guilt at trial. Instead, he chose to focus on developing mitigation evidence to attempt to persuade the jury to spare his life. He retained a psychologist Robert G. Kaplan "to determine what if any psychological factors were relevant to the criminal charges." *Petition*, p. 12. Kaplan identified several factors from Whitaker's childhood, including adverse experiences that caused him to develop a "maladaptive coping mechanism of dissociation," which, together with cocaine intoxication, led him to release his repressed anger in an uncontrolled and violent manner. *See Petition*, p. 13. Ultimately, Kaplan diagnosed Whitaker with mixed anxiety and depressed mood, as well as cocaine, marijuana, and alcohol abuse disorders.

During the penalty phase, Kaplan testified extensively about factors from Whitaker's childhood, including the death of his mother when he was a young child, the lack of positive male role models, and the domestic violence that he witnessed in his sister's home, that led to the development of his dissociative disorder. Even though Whitaker's entire trial strategy centered on the penalty phase, he claims that he did not put his mental state "at issue." The record belies this assertion.

Whitaker presented evidence of his mental state at the penalty phase. The only effective means for the state to rebut Whitaker's presentation was with rebuttal expert testimony. Consistent with the Court's precedent, the trial court properly compelled Whitaker to submit to a psychiatric evaluation with an expert selected by the State of Ohio and correctly admitted rebuttal evidence about Whitaker's mental condition. The Court should allow the Supreme Court of Ohio's well-reasoned opinion on both of Whitaker's questions presented to stand.

The Court should deny certiorari.

COUNTERSTATEMENT

A. Relevant Facts

In 2018, a jury convicted Christopher Whitaker of the kidnapping, rape, and murder of fourteen-year-old A.D. In January 2017, A.D. was a seventh-grade student at E Prep School, located in Cleveland, Ohio. *State v. Whitaker*, No. 2022-Ohio-2840, ¶ 2, 2022 Ohio LEXIS 1710, 2022 WL 3449785 (Ohio Aug. 18, 2022). To get to school, A.D. took a public bus from her home, switching to a second bus before arriving at school. *Id.* On January 26th, 2017, A.D. left her home and boarded the bus as usual. That afternoon, A.D.'s mother became concerned when A.D. failed to return home after school. *Id.* at ¶ 4. She contacted the school and a school official informed her that A.D. had never arrived that day. *Id.* A.D.'s mother called the police and reported her missing. *Id.*

On January 29th, 2019, police discovered A.D.'s body inside a vacant house. *Id.* at ¶ 8. When they entered the house, police saw a trail of blood leading from the

dining room to an adjoining bedroom. *Id*. at ¶ 9. Upon forcibly entering the bedroom, police discovered A.D.'s nude body on the floor. *Id.* They found a drill, a box cutter, a screwdriver, a hammer, and a nut driver in the dining room. *Id*. Several tools had bloodstains on them. *Id*.

At autopsy, the medical examiner observed eight puncture wounds of various depths to A.D.'s face and head. *Id*. at ¶ 29. "One puncture wound through her right eyelid forced her eye partly from its socket, fractured the bone above and behind her eye and entered the right side of her brain." *Id.* A puncture wound on the right side of A.D.'s face was consistent with "a corded drill with a sprocket at the end of it." A third puncture wound went through A.D.'s right ear, puncturing the skull, and went into A.D.'s brain. *Id*. Several other wounds were consistent with tools. The medical examiner identified a pattern injury on A.D.'s face that was consistent with the metal teeth of a power drill, a tear to the scalp that could have resulted from a hammer or a wrench, and a puncture wound to her head that was consistent with a Philips-head screwdriver. *Id*.

DNA from semen found in A.D.'s vagina and on her labia matched Whitaker. *Id*. at ¶ 26. Y-STR testing revealed Whitaker's DNA on A.D.'s fingernails, thigh, labia, vagina, and ankles. Tr. 2512-18. Whitaker was arrested after his DNA was identified. *Id.* at ¶ 13. After his arrest, police interviewed Whitaker. After waiving his rights under *Miranda*, Whitaker at first denied knowing A.D. or what had happened to her. *Id*. at ¶ 15. He admitted that he recognized the vacant house where she was found, because he and some of his friends had taken the water heater,

furnace, and scrap metal from the basement. *Id.* Confronted with the DNA evidence, he changed his story, first claiming that A.D. was naked when he arrived at the house and that he had ejaculated on her after masturbating, and eventually admitted that "things***got out of hand" and A.D. had pushed and hit him. *Id.* at ¶ 17-18. Whitaker stated that he reacted by punching her. *Id.* After that, "it was like a blur and *** [he] almost blacked out" but "[e]verything was done by the time [his] mind cleared up." *Id.* Whitaker wasn't sure if A.D. was still alive. *Id.* He dragged her to the closet and ran out of the house. *Id.*

A grand jury indicted Whitaker with ten felonies. He was charged with the aggravated murder of A.D. while committing rape, in violation of Ohio Rev. Code §2903.01(B). He was also charged with aggravated murder while committing kidnapping and aggravated murder while committing aggravated burglary. His final murder charge was aggravated murder with prior calculation and design. Each count of aggravated murder included three capital specifications under Ohio Rev. Code §2929.04(A)(7). At trial, because of the overwhelming evidence against him, Whitaker conceded his guilt. During the trial, defense counsel repeatedly told the jury that Whitaker wanted to take responsibility for his actions and told counsel "not to defend him." Tr. 3235.

B. Whitaker's Mitigation Evidence

Whitaker's trial strategy focused on the mitigation phase. In preparation, he retained psychologist Dr. Robert Kaplan. Kaplan's report stated that Whitaker was

"addicted to alcohol, cocaine, and cannabis" and that Whitaker's "memory of the offense was impaired because of a variety of factors." *Whitaker* at ¶ 112. On the basis of Kaplan's report, the state moved the court to order Whitaker to submit to an examination by the state's expert. *Id.* As the Ohio Supreme Court explained, "defense counsel objected to Whitaker's being examined by the state's expert because Dr. Kaplan was going to address mitigating factors rather than a medical diagnosis like brain trauma." *Id.* at 113. Similar to his arguments here, Whitaker argued in the trial court that examination by the state's expert "forced him to choose between his Eighth Amendment right to present mitigation and his Fifth Amendment right not to incriminate himself." *Id.* In response, the state argued that Kaplan's report addressed Whitaker's mental status, as it concluded that "Whitaker was not able to control his behavior due to a combination of dissociation and cocaine intoxication." *Id.* The trial court granted the state's motion and Whitaker was ordered to submit to an examination by the state's expert, Dr. Sara West.

> At Whitaker's mitigation hearing, Kaplan testified that:
>
> > Whitaker "was under the influence of repressed anger that was released in an uncontrolled and violent manner" when he killed A.D. Dr. Kaplan stated that Whitaker repressed the anger that he had developed after he witnessed domestic violence against his sister when he was young. Dr. Kaplan added that Whitaker had developed "a maladaptive coping system [of] dissociation" that impaired his ability to control his behavior and explained his inability to recall "the actual act of violence" against A.D. Dr. Kaplan also testified that Whitaker's cocaine intoxication contributed to his inability to control his behavior.

Id. at ¶ 114.

Kaplan concluded that "Whitaker would not be facing capital-murder charges if his mother had not died when he was young, he had a positive male role model, and he had not witnessed domestic violence against his sister. *Id*. at ¶ 115. In rebuttal, psychiatrist Dr. Sara West testified that it was her opinion that Dr. Kaplan's testing "indicated a low probability of dissociation." *Id*. at ¶ 116. She also pointed out that there was no evidence to corroborate Whitaker's statement that he was under the influence of cocaine at the time of the offenses. *Id*. West also disagreed that the childhood events that Kaplan referenced led to Whitaker facing capital-murder charges. *Id*.

Following the mitigation phase of the trial, the jury returned a unanimous verdict imposing the death penalty. The trial court accepted the jury's recommendation and imposed a death sentence. In imposing the sentence, the trial court noted

> In considering the together the facts that the Defendant assisted law enforcement as to the location of additional evidence, his offer to plead guilty to life without parole and his advice to counsel not to contest the charged they are entitled to little, if any weight. Given his voluntary confession, his DNA match and the information he received as to what the Cleveland Police Department already knew during his almost four-hour interviews, he had to have known his situation as indeed bleak.

Sentencing Opinion, 3/27/2018, p.11

C. Appeal to the Supreme Court of Ohio

Whitaker appealed his conviction and death sentence directly to the Supreme Court of Ohio. He raised twenty-one propositions of law, some of which are mirrored

in his *Petition*. Before the Supreme Court of Ohio, Whitaker claimed that his Fifth Amendment rights were violated because "he had not placed his state of mind directly in issue." *Id*. at ¶ 117. He also argued that the state supreme court had previously misconstrued the Court's precedents in *Buchanan v. Kentucky,* 483 U.S. 402 (1987) and *Kansas v. Cheever,* 571 U.S. 87(2013) because those cases require that the defendant's mental state be placed directly at issue and that the state's psychiatric evidence be presented only to rebut the defendant's mental status evidence. *Whitaker* at ¶ 120. In rejecting Whitaker's argument, the Supreme Court of Ohio concluded that "neither *Cheever* nor *Buchanan* requires defendant to assert a psychiatric diagnosis during trial-phase proceedings before the state is allowed to present a state-ordered psychiatric evaluation. Similarly, the state is not limited to rebutting only a psychiatric diagnosis." *Id*. at ¶ 123.

As he did in his *Petition*, Whitaker also argued to the Supreme Court of Ohio that the trial court erred when it refused to allow Whitaker's offer to plead guilty in exchange for a sentence of life without parole to be introduced as evidence in mitigation. *Id*. at ¶ 140. He claimed that his offer to plead guilty was evidence of his character and acceptance of responsibility. *Id*. at ¶ 143. Although Whitaker provided some examples of other states that permit such evidence in various forms, the Supreme Court of Ohio concluded that none of those cases supported Whitaker's claim that his "constitutional rights were violated by the trial court's refusal to admit evidence in mitigation that [he] made a pretrial offer to plead guilty in exchange for a life sentence." *Id*. at ¶ 148.

The Supreme Court of Ohio overruled Whitaker's arguments regarding the compelled psychiatric examination and exclusion of his offer to plead guilty. The court vacated his conviction of aggravated burglary as well as the felony-murder capital specifications predicated upon that count. Whitaker's convictions and death sentence were otherwise affirmed. *Id.* at ¶ 247. The court denied Whitaker's application for reconsideration. *10/25/2022 Case Announcements*, 2022-Ohio-3752. His application to reopen his appeal was also denied. *04/11/2023 Case Announcements*, 2023-Ohio-1149.

REASONS FOR DENYING THE WRIT

I. The Supreme Court of Ohio correctly held that a defendant's conditional offer to plead guilty, not accepted by the prosecution, is not relevant to the defendant's character, record, or the circumstances of the offense.

Whitaker's first question presented asks this Court to find that a defendant's conditional offer to plead guilty in exchange for a life sentence, never accepted by the prosecution, must be admissible during the mitigation phase of a capital trial. Whitaker bases this argument on the Court's holding in *Lockett,* 438 U.S. at 604, that the sentencing body 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." From this, Whitaker claims that his conditional offer to plead guilty was potentially

relevant to his acceptance of responsibility, and that the trial court therefore violated his right to present mitigating evidence by excluding it.

Whitaker's argument attempts to stretch *Lockett* beyond its reasonable application. "Nothing in *Lockett* or *Eddings* requires that the sentencing authority be permitted to give effect to evidence beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense." *Franklin v. Lynaugh*, 487 U.S. 164, 186 (1988) (O'Connor, J., concurring), citing *Lockett* at 604, n. 12 ("[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense").

The Court has relied on footnote 12 of *Lockett* to hold that courts may exclude certain evidence from capital sentencing hearings as irrelevant. *See Oregon v. Guzek*, 546 U.S. 517, 523 (2006) (a defendant has no right to present new evidence of his innocence at the sentencing hearing); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (a defendant has no right to jury instruction encouraging jury to weigh lack of severity of aggravating factors as a mitigating circumstance).

The Supreme Court of Ohio correctly held that evidence of a defendant's conditional offer to plead guilty is not relevant to the defendant's character, background, or the circumstances of the offense. "While 'acceptance of responsibility' could be a reason for mitigation," a conditional offer to plead guilty "shows no such acceptance." *Owens v. Guida*, 549 F.3d 399, 420 (6th Cir.2008). "Instead, [the defendant] offered to plead guilty only if guaranteed a life sentence in return." *Id.*

"Thus, [he] was less interested in accepting responsibility and more interested in avoiding the electric chair, a motivation that is much less persuasive as a mitigating factor." *Id.*

A defendant's self-serving trial tactics are not evidence of remorse. This is particularly true in light of Whitaker's concessions during trial and on direct appeal. Whitaker's trial attorneys repeatedly informed the jury that Whitaker was not contesting he killed the victim. Such stated remorse is belied by Whitaker's own jail calls during his pretrial detention. *Whitaker* at ¶ 243. Given that concession and the brutality of Whitaker's crime, he was essentially offering to give up nothing in exchange for what was likely the equivalent of the minimum sentence here. This was not remorse, nor could it reasonably be interpreted as such. Whitaker did not offer to accept responsibility. He simply wished to avoid the death penalty.

In Ohio, a death sentence is imposed by the jury and the trial judge if, like Whitaker, the defendant elected to have a jury trial. Ohio Rev. Code §2929.03(C)(2)(b)(ii). After the jury returned its verdict imposing the death sentence, the trial judge separately weighed the aggravating and mitigating factors. It is clear from the sentencing opinion, filed on March 27, 2018, that the trial court did consider Whitaker's offer to plead guilty. That said, the trial court held that the offer was "entitled to little, if any, weight" in favor of mitigation. Whitaker simply disagrees with the trial court's finding on this matter.

Nothing in *Lockett* suggests that evidence of plea bargains, successful or unsuccessful, are relevant or admissible in capital sentencing hearings. This is

despite the fact that the petitioner in *Lockett* had rejected a plea offer from the prosecution. *Lockett*, 438 U.S. at 591. This Court, while holding that the defendant's "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime" were all relevant to mitigation and could not be excluded from the sentencing body's consideration, did not include the prosecution's plea offer among that list. *Id.* at 597. Whitaker's argument for admitting such evidence of a plea offer is even weaker in this case than in *Lockett* because he was attempting to introduce his own plea offer, rather than a plea offer made by the State.

Every federal appellate court to have considered the admissibility of unsuccessful plea negotiations in capital sentencing hearings has found such evidence inadmissible under *Lockett*. *See Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 483 (11th Cir.2014) ("[e]vidence of a rejected plea offer for a lesser sentence * * * is not a mitigating circumstance because it sheds no light on a defendant's character, background, or the circumstances of the crime"); *Wright v. Bell*, 619 F.3d 586, 599 (6th Cir. 2010) ("[b]ecause the alleged offer of a life sentence in exchange for a guilty plea did not bear on the defendant's character, prior record, or the circumstances of the offense, Wright was not constitutionally entitled to present evidence of the failed plea negotiations"); *United States v. Caro*, 597 F.3d 608, 635 (4th Cir.2010) ("[b]ecause Caro's letter was calculated to persuade the government not to seek the death penalty, rather than expressing unqualified remorse, we cannot agree with Caro's argument that the letter shows acceptance of responsibility"); *Owens v. Guida*, 549 F.3d 399 (6th Cir. 2008) (noting that every court to have

addressed the question of whether the Constitution required the admission of failed plea negotiations as relevant mitigation evidence had held that the Constitution did not prohibit the exclusion of such evidence). There is thus already clear guidance from federal courts on this issue, and no split among the lower courts for the Court to resolve.

There is also a strong policy justification in support of excluding evidence of failed plea negotiations from trial:

> "Allowing a defendant to use plea negotiations in mitigation would clearly discourage plea negotiations in capital cases as prosecutors would correctly fear that during the second stage proceedings, they would be arguing against themselves. Plea bargaining is to be encouraged, not discouraged, and therefore is improper evidence to present in mitigation."

Owens at 422, quoting *Ross v. State*, 717 P.2d 117, 122 (Okla. Crim. App. 1986). "This reasoning persuades us, and explains why every court to hear Owens's argument has rejected it." *Owens* at 422.

It is for this same reason that both Ohio Evid.R. 410(A)(5) and Fed. R. Evid. 410(a)(4) exclude evidence of unsuccessful plea offers. The Advisory Committee Notes to Fed. R. Evid. 410 state that "[e]xclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise." To allow criminal defendants to introduce incomplete, unaccepted, or conditional plea negotiations into evidence would substantially chill the State's incentive to compromise and allow capital defendants to manufacture their own mitigation shortly before trial by offering to plead guilty in exchange for consideration.

Finally, even if the trial court erred by excluding the evidence, such an error was harmless beyond a reasonable doubt. "The mitigating weight of a defendant's attempt to avoid a death sentence by offering to plead guilty is so slight, if it exists at all, that even undiminished the effect would hardly register." *Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1285 (11th Cir.2004). The undisputed evidence here showed that Whitaker brutally murdered 14 year old A.D. and then left her naked, bloody, and brutalized body in an abandoned house to be found three days later by police. Given those facts, any mitigating weight from Whitaker's conditional offer to plead guilty – intended to do little more than to save his own life – would have been negligible at best, and not enough to affect the outcome. Whitaker's first question presented does not warrant the granting of his petition.

II. The order compelling Whitaker to submit to an examination with a state-retained psychiatrist did not violate Whitaker'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.

In Whitaker's second question, he challenges the psychiatric examination that he was compelled to undergo because he does not believe that the expert psychological evidence that he introduced at mitigation placed his mental status at issue. The lower courts' decisions were correct because Whitaker did, in fact, place his mental condition at issue when he introduced evidence of his mental status. This evidence included the substance use disorders and the childhood experiences that led to the

alleged maladaptive coping mechanism of dissociation, which he claimed disrupted his capacity to control his behavior and conform it to the law.

A. Whitaker's mitigation evidence placed his mental status at issue

Mental conditions are at issue when they are in controversy, not merely when a party asserts a mental-state defense. Appellate courts recognize that the "in controversy" requirement is met when the mental health of the party is a relevant factor in the case. *Brossia v. Brossia*, 583 N.E.2d 978, 980 (Ohio Ct. App. 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*, 519 N.E.2d 655, 659 (Ohio Ct. App. 1987) (quoting *Paul v. Paul*, 366 So.2d 853 (Fla.App. 1979)).

Whitaker seeks to narrow the definition and argues that he did not present a claim of not guilty by reason of insanity, evidence of a serious mental illness, or a question of his competence to stand trial. *Petition* at p. 11. Yet there is no support for Whitaker's proposed narrowing. *See Cheever*, 571 U.S. at 96 (The term "'metal status is a broader term than 'mental disease or defect[.] Mental-status defenses include those based on psychological expert evidence as to a defendant's *mens rea*, mental capacity to commit the crime, or ability to premeditate. Defendants need not assert a 'mental disease or defect' in order to assert a defense based on 'mental status.'"). And as Whitaker notes in his *Petition*, Dr. Kaplan made multiple findings and claimed Whitaker lacked "capacity to control [his emotions] and conform his behavior according to the requirements of the law," had stressors that "affected his

psychological development and capacity to regulate his behavior," and that he was under the influence of cocaine "which impaired his ability to control his impulses and conform his behavior to the requirements of the law." *Petition* at p. 13. All of this placed Whitaker's mental state at issue. That evidence was directly relevant to Ohio's death penalty sentencing statute that required the jury to consider "any other factors that are relevant" to the imposition of death under Ohio Rev. Code §2929.04(B)(7).

B. Because Whitaker introduced expert testimony that placed his mental state at issue, he may be compelled to submit to a psychiatric evaluation.

The constitutional law on the State's right to its own expert evaluation of a criminal defendant is uncontroversial. 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. S*ee Buchanan* at 422-424. Yet 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.". *Cheever*, 571 U.S. at 93, (*quoting* Estelle v. Smith, 451 U.S. 454 (1981).

The reason for this bright-line distinction is that the choice to be a witness or not is a binary one. A defendant who chooses to be a witness cannot refuse cross-examination. "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness." *Raffel v. United States*, 271 U.S. 494, 496, (1926). "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or

embarrassing." *Id.*, at 497. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Id.*, at 499.

In *Estelle*, the Court held that a defendant's voluntary participation in a mental examination was a testimonial act. *Estelle* at 463. Examination by a State's expert is thus analogous to cross-examination. It is part of the package that the defendant must accept when he chooses to become a witness by retaining his own expert, participating in an examination, giving statements to that expert, and offering testimony of those statements at trial. Just as in a defendant who chooses to testify at trial, the defendant has "cast aside the cloak of immunity" with regard to his testimony. *Raffel* at 497.

Applying the above cases, the Supreme Court of Ohio has held that "in a capital case, when the defendant demonstrates an intention to use expert testimony from a mental examination in the penalty phase, the Fifth Amendment permits the trial court to order that the defendant submit to a mental examination by an expert of the state's choosing. Further, when the defense uses expert testimony from a mental examination in the penalty phase, the state may rebut that evidence by presenting expert testimony derived from the court-ordered mental examination." *State v. Madison*, 155 N.E.3d 867, 900 (Ohio 2020).

In this case, Christopher Whitaker chose to be a witness, and was not compelled to be one, when he submitted to mental examinations by his own experts and introduced those experts' testimony at trial. Having chosen to become a witness

in his own case, Whitaker could not then assert a Fifth Amendment privilege against questioning on those same issues.

Once Whitaker introduced Dr. Kaplan's 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*, 644 N.E.2d 286, 289 (Ohio 1994). As the court of appeals 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*, No. 101478, 2015 Ohio App. LEXIS 4250, 2015 WL 6391100, ¶ 22 (Ohio Ct. App. Oct. 22, 2015) quoting *Cheever* at 601. "[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. West's testimony based on the court-ordered examination therefore did not violate the Fifth Amendment.

C. Ohio's right to a reciprocal evaluation extends to any "mental status" evidence, including mitigation.

The core of Whitaker's argument is his attempt to distinguish *Cheever* on the grounds that testimony by a defense expert as to the defendant's mental state does

not entitle the state to its own evaluation of the defendant where such evidence is presented solely for mitigation purposes. Whitaker's proposed distinction has no basis in case law. The Court has previously held that a compelled psychological examination adhered to the Fifth Amendment when the defendant introduced evidence of his mental state to support a claim of "extreme emotional disturbance." *Buchanan,* 483 U.S. at 423-24. *Buchanan* 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 rationale of *Buchanan* is one of fair access to evidence, not an arbitrary distinction between types of psychological evidence introduced.

Buchanan made no attempt to discuss whether the defense at issue 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 the defendant in *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, does not depend on the classification of the defense the defendant chooses to assert.

"Mental status" evidence includes evidence offered for the first time at mitigation. Whitaker relies heavily upon the fact that he did not offer evidence under

the Ohio Rev. Code §2929.04(B)(3) subcategory to show that he suffered from a serious mental disease or defect. But *Cheever* explicitly rejected that argument, recognizing that "'mental status' is a broader term than 'mental disease or defect[.]'" *Cheever* at 96. Because "mental status" is broader than Ohio Rev. Code §2929.04(B)(3), it also included evidence of Whitaker's mental state that he presented as "any other factors that are relevant" to the imposition of death under Ohio Rev. Code §2929.04(B)(7). In this case, that evidence consisted of the effect of childhood trauma and drug abuse on Whitaker's ability to "regulate" and "conform his behavior according to the requirements of the law." *Petition* at p. 13..

There is no precedent – and Whitaker identifies none – that "mental status" evidence is limited to the guilt phase. 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, *Estelle* 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." *Estelle* 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 (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, Whitaker is attempting to make his Fifth Amendment privilege claim-specific. He cannot do so. The mitigation phase is every bit as much a part of the capital trial as the guilt phase. *See State v. Gross*, 776 N.E.2d 1061,1109 (Ohio 2002). The underlying need for fairness remains the same.

D. Allowing the State to rebut expert testimony that Whitaker introduced regarding his mental state was consistent with both the Fifth and Eighth Amendments.

Whitaker argues 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 (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. A defendant who pleads guilty to avoid a harsher sentence gives up his right to a trial by jury.

These are not Hobson's choices; they are simple fairness.

> "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).

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." *Cheever*, 571 U.S. at 94. There was no tension between Whitaker's constitutional rights in this case that was not inherent in every decision Whitaker 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." *Id.* Here, the trial court's decision to follow *Buchanan* and *Cheever* and allow Ohio a reciprocal evaluation of Whitaker was consistent with both the policies behind both the Fifth and Eighth Amendments.

The policies behind the Fifth Amendment include, among other things, "our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him

and by requiring the government in its contest with the individual to shoulder the entire load[.]'" *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55, (1964), quoting 8 Wigmore, Evidence (McNaughton rev., 1961), 317. That principle is not offended by allowing the state a fair opportunity to rebut the evidence the defendant himself has chosen to inject into the trial. A defendant "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

The policy behind the Eighth Amendment, meanwhile, is "to assure that the State's power to punish is 'exercised within the limits of civilized standards.'" *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976), quoting *Trop v. Dulles*, 356 U.S. 86 (1958). This purpose is not compromised when a defendant chooses to seek out a psychiatric evaluation for the specific purpose of introducing evidence of his mental state, knowing that the state might obtain an equal bite at the apple. It is widely accepted that a defendant who chooses to raise an issue at trial opens the door to rebuttal testimony by the state on that very issue. "[I]t is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons[.]" *McGautha* at 215.

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. Whatever evidence the defendant presents, the state can

always then rebut with new evidence. Whitaker'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).

If the State is prohibited from introducing any rebuttal evidence that might have the effect of chilling a defendant's willingness to present mitigating evidence, the State would be unable to introduce any evidence at all. Whitaker is demanding the unconditional silence and surrender of the state during the mitigation phase of a death penalty trial. He does so out of a desire to prohibit the jury from hearing any contrary opinion – a fear that a competing marketplace of fact and evidence will topple the house of cards that he presented in mitigation. The Constitution does not demand such a one-sided free-for-all during the sentencing phase.

E. The only effective means by which the State could rebut Whitaker's expert testimony was through an evaluation by its own expert.

Only an expert witness could adequately rebut the testimony of Whitaker's expert 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).

Allowing only Whitaker to present the jury with the testimony of experts who have evaluated him would have unfairly tipped the scales in Whitaker's favor on any factual disputes in the mitigation phase. Such an imbalance would provide only Whitaker's evidence with the stamp of "expert testimony" and the inherent credibility such testimony carries. "[I]t is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *State v. Kromah*, 737 S.E.2d 490, 499 (S.C. 2013). No other witness could effectively rebut the testimony of Dr. Kaplan. "Testimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." *Ake v. Oklahoma*, 470 U.S. 68, 81, fn. 7 (1985), quoting F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970).

To deny the state 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 (1983). "[T]he psychiatrists for each party enable the jury to

make its most accurate determination of the truth on the issue before them." *Ake* at 81-82.

The Court should decline certiorari as to Whitaker's second question because his arguments do not properly reflect the facts or the law.

CONCLUSION

Christopher Whitaker is unquestionably guilty of the brutal torture, rape, and murder of a 14-year-old child. His attorneys conceded guilt and focused on mitigation. His offer to plead guilty is not properly introduced as mitigation evidence because it shows little more than his desire to avoid the death penalty. He placed his mental status at issue by raising the childhood trauma and substance abuse issues that he argued contributed to the commission of this horrific murder. 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.

In summation, the *Petition* does not prevent a novel issue or issue of extreme importance. The *Petition* presents no significant conflict between the federal courts of appeals and/or state high courts, and the Ohio courts have not issued a rule of law that directly conflicts with Supreme Court precedent. As such certiorari should be denied.

Respectfully submitted,

/s/ Daniel T. Van

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
DANIEL T. VAN
Assistant Prosecuting Attorney
Counsel of Record
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
dvan@prosecutor.cuyahogacounty.us
(216) 443-7800