CASE NO. 22-7134

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

REPLY BRIEF IN SUPPORT OF FOR PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY ARGUMENT

As detailed below, the State's brief underscores the need for this Court to review the important constitutional questions this case presents.

I. A CAPITAL DEFENDANT'S OFFER TO PLEAD GUILTY AND WAIVE ALL POST-TRIAL PROCESS IN EXCHANGE FOR A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE CANNOT BE CATEGORICALY INADMISSIBLE BECAUSE IT MAY EVINCE REMORSE AND ACCEPTANCE OF RESPONSIBILITY AND THEREFORE BE PROPER MITIGATION EVIDENCE TO PRESENT TO A JURY.

As detailed in his Petition for Writ of Certiorari, the theme of Christopher Whitaker's capital case – at both the trial and the penalty phase – was that he accepted responsibility and felt remorse for what he had done. It was, as his trial attorneys told the jury explaining why they wouldn't be challenging the evidence, his call. He didn't want to turn a trial "into a circus." (TR 2768, 3229) As he said himself to the jury, "I asked my lawyers not to contest or challenge anything in this case because I really wanted the DeFreeze family to have closure." (TR 3110)

To that end, Mr. Whitaker offered to plead guilty and waive all post-trial procedure in exchange for a sentence of life without the possibility of parole. Respondent State of Ohio rejected that offer, and the trial court would not allow him to tell the jury he'd made it.

On appeal of Whitaker's conviction and death sentence, the Supreme Court of Ohio, and over the dissent on that issue of one justice who believed the offer should have been admissible,[1] the court held that evidence of such an offer could never be

[1] *State v. Whitaker*, ___ Ohio St.3d ___, 2022-Ohio-2840, ___ N.E.3d ____, ¶¶ 248-264 (Ohio, Aug. 18, 2022) (Brunner, J. Concurring).

admitted because it could never show acceptance of responsibility. Because the offer to plead was conditional, the court's majority said, it could only be a self-serving attempt to save his life and could have no mitigatory value. *State v. Whitaker*, ___ Ohio St.3d ___, 2022-Ohio-2840, ___ N.E.3d ____, ¶¶ 142-146 (Ohio, Aug. 18, 2022).

In its brief opposing certiorari, the State endorses that irrebuttable presumption, falsely says that there is no conflict on the issue for this Court to resolve, and ignores (if not misrepresents) the specific limitation of both Ohio Evid.R. 410(A)(5) and Fed.R.Evid. 410(a)(4).

A. Conflict in the Federal and State Courts

The State asserts in the first sentence of its brief that Whitaker raised no issue on which there is a conflict among the "federal courts of appeals and/or state high courts." Brief Opposing Certiorari at 1. In addressing this issue, the State cites opinions from several of the circuit courts, *id.* at 12, while ignoring both the federal trial[2] and state high[3] courts that have held otherwise.

There is, indeed, a conflict.

B. Irrebuttable Presumption

Moreover, those courts, including the Ohio supreme court, that have held offers like Whitaker's inadmissible, have essentially adopted an irrebuttable presumption that such conditional offers cannot ever indicate an acceptance of

[2] See, e.g,, *United States v. Fell*, 372 F.Supp.2d 773, 784-785 (D.VT. 2005); *Johnson v. United States*, 860 F.Supp.2d 663, 900, fn. 67 (N.D. Iowa 2012).
[3] See *Busso-Estopellan v. Mroz*, 238 Ariz. 553, 364 P.3d 472 (2015); *Colorado v. Dunlap*, 173 P.3d 1054 (Colo. 2007).

responsibility. The State agrees:

> The Supreme Court of Ohio correctly held that evidenced 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).

Brief Opposing Certiorari at 10 (also quoted in *State v. Whitaker*, *supra*, ¶ 145).

Ironically, given that the Ohio supreme court has now advanced an irrebuttable presumption, in at least one prior case the court actually found that an identical conditional offer was mitigating. See *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 117.

Of course, such an irrebuttable presumption violates the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 523-524 (1979). Beyond that, Ohio's determination that an offer to plead cannot ever be deemed mitigating denies capital defendant's Sixth Amendment "right to present a defense, the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Accordingly, it also implicates a capital defendant's right to be free from cruel and unusual punishment as protected by the Eighth Amendment.

C. Rules of Evidence

The State also points to Fed.R.Evid. 410(a)(4) and Ohio Evid.R. 410(A)(5), saying that they both "exclude evidence of unsuccessful plea offers." Brief Opposing Certiorari at 13. What the State fails to mention, however, is that both the federal and Ohio rules, by their own terms, prohibit admission of offers to plead only "against the defendant." The rules, that is, are protections against the prosecution

suggesting that the defendant must be guilty because he offered to plead guilty. That is precisely not the circumstance of Whitaker's offer.

II. In claiming that Whitaker "placed his mental status at issue" the State improperly conflates mental status evidence with all mitigation evidence, thereby requiring the defendant to submit to an evaluation or forego the presentation of a mitigation case.

No doubt, in asking the jury to spare his life, Christopher Whitaker sought to present evidence in mitigation, i.e., specific facts about the offender and the offense that warrant a sentence other than death. That evidence did not "place his mental status at issue" and, if it does, then all mitigation does.

Before this Court, the State exaggerates what a mental condition actually is in the sentencing phase context. To be clear, Petitioner raised no mental-status defenses in the guilt phase: He did not assert any mental disease or defect or any psychiatric diagnosis, and presented no evidence or argument that he lacked the requisite *mens rea*, the capacity to commit the crime, or the ability to premeditate. The State does not, and cannot, dispute those facts. Had he done so, this Court has held that he would likely subject himself to a counter mental health evaluation by a state expert. *Kansas v. Cheever*, 571 U.S. 87, 96 (2013).

Whitaker's approach did not change in the penalty phase. There, his mitigation evidence was focused on his pervasive family history of violence, abuse, and neglect across generations, on his own personal childhood experiences with abandonment, abuse, violence, and neglect, and on the resulting adverse impact these terrible experiences had on his development.

His "mental condition" had little to do with *that mitigation case*. And, if it did, it was only very tangentially. That is because the prevailing research recognizes that one

impact of child abuse and developmental adversity is that it can negatively affect a young child's developing brain. We now know that neurodevelopmental adversity *can* result from childhood trauma.[4] The prospect of neurodevelopmental impact is not unique to the adversity and abuse experienced by *this particular Petitioner*, nor was it apparent in any brain imaging or any other neurological testing that was undertaken in the course of his evaluation.

At bottom, 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. To the extent that the State of Ohio reads this Court's holding in *Cheever* to require such an evaluation grossly expands the means to put one's mental status at issue.

III. *This Court's decision in Kansas v. Cheever* does not call for the prosecution mandated evaluation that occurred in this case. Nor does it resolve the questions this case presents.

According to the State of Ohio, this Court settled these issues in *Kansas v. Cheever*, 571 U.S. 87 (2013). That is not true.

In *Cheever*, like *Buchanan v. Kentucky*, 483 U.S. 402 (1987), this Court recognized that the constitutional issue depends upon whether the defendant placed his mental state in issue by asserting a "mental-status defense," with that term defined in

[4] *See* Bruce D. Perry, M.D., Ph.D. and Maia Szalavitz, THE BOY WHO WAS RAISED AS A DOG: AND OTHER STORIES FROM A CHILD PSYCHIATRIST'S NOTEBOOK -- WHAT TRAUMATIZED CHILDREN CAN TEACH US ABOUT LOSS, LOVE, AND HEALING (New York: Basic Books, 2006, updated 2017).

Cheever to include "those based on psychological expert evidence as to a defendant's *mens rea*, mental capacity to commit the crime, or ability to premeditate." *Cheever* at 96. In *Buchanan*, the mental-status defense was extreme emotional disturbance; in *Cheever*, it was voluntary intoxication by methamphetamine. And, in both *Cheever* (a capital case) and *Buchanan* (a non-capital case as to that defendant), the issue arose only in the context of ***mental-status defenses to the charged crimes***, which, if successful, would result in defendant's acquittal and/or avoidance of criminal liability.

This Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981), is the only one that addresses the penalty phase of a capital case for an already-convicted defendant. There, the capital defendant did not present any mental-status defenses in the guilt phase and, therefore, he prevailed in this Court on his challenge to the State's use in the penalty phase of a compelled pretrial competency exam.

It is true that the *Estelle* Court suggested its result may be different where, for example, the defendant asserts the insanity defense and introduces supporting psychiatric evidence. *Id.* at 465 ("When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case."). But that never occurs in the penalty phase of a capital prosecution where the defendant seeks only to use mitigation generally to save his life.

But Whitaker did not assert the insanity defense or any other mental-status defense, and he presented no mental-status evidence or argument for which a fair rebuttal would necessitate that the government force him to submit to a psychiatric examination by a psychiatrist of the government's choice.

Accordingly, Petitioner's case was not addressed by *Buchanan* and *Cheever* and, at best, was left open in *Estelle*. Petitioner did not present, in the guilt phase, any

mental-status defense or any other evidence or argument that he lacked the requisite mental state to commit the crime (unlike in *Cheever* and *Buchanan*). And, although like *Estelle*, Petitioner's case proceeded to a penalty phase––and his Fifth Amendment protection followed him there too, to protect him from being made the "deluded instrument" of his own execution. *Estelle* at 462.

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

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

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

The State's brief opposing certiorari confirms that the prosecution has no

sensitivity whatsoever to the constitutional rights of those capitally-accused facing or preparing for an eventual penalty phase, and thus no tolerance for any thoughtful attention to their protection. The State argues with a bludgeon not a scalpel, insisting upon an all-or-nothing approach that any penalty-phase mental-health testimony by an expert who interviewed the capital defendant must mandate a counter compelled mental exam.

This Court's precedent in capital cases––and the importance of a thorough mitigation investigation and of a fully-informed jury capable of making an individualized moral judgment––requires sensitivity to these various constitutional rights with an awareness of what is actually at issue in the penalty phase. It is no longer about guilt or innocence; the only issue now is whether the already- found-guilty defendant will live or die––the only issue is the weighing of aggravation against mitigation for an individual who will, *in the best case*, receive a life sentence for his crimes.

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

In Whitaker's case, for example, there was no reason––and the State does not offer one––why a fair "rebuttal" could not have been obtained with the State's review, cross-examination, and its own expert's testimony, all in reliance on the reports prepared and documents reviewed by Petitioner's testifying experts. That was sufficient

in *Buchanan*. The State did not need, and was not entitled to, its own mental examination of Petitioner in order to conduct effective rebuttal, and certainly not when Petitioner did not, in either phase, rely on any mental-status defenses as defined in *Cheever*. *Cheever*, 571 U.S. at 96 (those involving "a defendant's *mens rea*, mental capacity to commit a crime, or ability to premeditate").

Adhering to *Cheever*, *Buchanan*, and *Estelle*, and to what the Constitution compels, does not prevent State from presenting expert testimony or undertaking an effective "rebuttal" in the penalty phase. The State may still offer its desired expert, and "rebut" the defendant's experts; but these cases do not say that the prosecution may force the capital defendant to participate in an interview with the State's expert.

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

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

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

Here again, Whitaker did not place his mental state directly in issue. Plus, the State and its expert blew passed the constraints of a "limited rebuttal purpose," just as they ignored the trial court's order that the "examination only relates to the brain damage of defendant." The Supreme Court of Ohio's ruling has since opened the floodgates to court-compelled, State-requested psychiatric examinations of capital

defendants when they are not even faintly necessary for any fair or necessary "rebuttal." Basically, these evaluations are now ordered whenever the defendant seeks to develop and present – even general – mitigation.

In capital cases Ohio prosecutors now exercise a ready ability to present irrelevant and prejudicial evidence of non-statutory aggravating circumstances such as alleged "bad" character, lack of "remorse," alleged mental health disorders such as "anti-social personality disorder," and other prejudicial and irrelevant matters, all wrapped up in the bow of an "expert" report and accompanying testimony, just as it was in Whitaker's case. It allows the State to push the thumb more firmly down in favor of death in cases where the capital defendant, like Christopher Whitaker, had not placed his mental status directly in issue for any relevant purpose, and it wrongly forces the defendant to be the deluded instrument of that State effort.

The U.S. Constitution and is Court's precedent demand much more sensitive consideration, than what the Ohio courts undertook here. The scope of penalty-phase mental-health-expert rebuttal in capital cases is exceedingly limited where the defendant has not placed his mental state directly in issue and has disclaimed any mental-status defense.

This Court has *not* previously addressed the important questions surrounding the scope of these state compelled reciprocal evaluations at the penalty phase of a capital trial. And this case provides an ideal vehicle for it to address the important involved and ensure that vital constitutional protections in capital cases are not sacrificed to labels, superficial inquiry, and prosecution-orchestrated gamesmanship.

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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