

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	CASE NO. 2016-1006
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	On Appeal from the Cuyahoga County
	)	Court of Common Pleas, Cleveland,
	)	Ohio
	)	
MICHAEL MADISON,	)	Court of Common Pleas Case No. CR-
	)	13-579539-A
Defendant-Appellant,	)	
	)	

APPELLANT MICHAEL MADISON'S MOTION FOR RECONSIDERATION

(This is a Death Penalty Case — Execution Date is May 15, 2024)

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Appellant Michael Madison requests that this Court reconsider its merits ruling of July 21, 2020, affirming his convictions (in all respects except kidnapping and related specifications on certain counts) and death sentences. State v. Madison, Slip Opinion, No. 2020-Ohio-3735. This request is made under Rule 18.02 of the Supreme Court Rules of Practice. The reasons for this motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF APPELLANT MICHAEL MADISON'S
MOTION FOR RECONSIDERATION**

I. Introduction

This Court should reconsider Michael Madison's death penalty appeal of right. The Court upheld Madison's convictions (in all respects except kidnapping and related specifications on certain counts) and death sentences. The arguments set forth concern obvious errors in the Court's opinion or are issues that were not considered by the Court or fully considered by the Court even though the issues were properly presented in the Briefs and at oral argument. Just because Madison does not raise error as to other issues addressed in his Merit Brief and Propositions of Law, he is not conceding that error did not occur. Instead, he relies on the arguments set forth in his Merit Brief and Reply Brief.

The Court erred in its rejection of the jury issues raised by Madison and especially its resolution of Madison's first and second propositions of law. The trial court imposed grossly unreasonable restrictions on the voir dire and it allowed "follow the law" platitudes to override meaningful inquiry, thereby allowing biased jurors to sit in judgment of Madison. The Court's opinion minimizes the disqualifying views of biased jurors as being only "personal opinions," and fails to recognize that those "personal opinions" — which would be *consensually* disqualifying in any fair trial — were not allowed to be meaningfully explored by Madison's trial counsel, and, instead in some cases, were permitted to infect this capital trial based primarily if not entirely upon the jurors' superficial assurances they'd follow the instructions, and, in others, required the defense

to exercise one of its six peremptory challenges until they were all used up. Madison was denied a fair trial and fair sentencing proceeding.

The Court also committed serious errors in its resolution of Madison's propositions of law (Nos. 11, 12, and 13) concerning the trial court's order compelling Madison to undergo a State-requested psychiatric examination by a State-selected psychiatrist, and allowing the State to present Madison's statements and other evidence from that examination to the jury in the sentencing phase. Madison had not placed his mental state, mental status, or mental capacity in issue and, indeed, disclaimed any intent to do so, in both the guilt and sentencing phases; there was thus nothing for the State to "rebut" with its own mental health professional, not in a mitigation case such as Madison's which was premised on his disadvantaged background and troubling family history.

But *even if* some rebuttal by the State, in the realm of a mental health professional, was deemed necessary and appropriate, there were *far less* intrusive means for that rebuttal to fairly occur, consistent with Madison's federal and state constitutional rights, without mandating *either* the compelled examination by the State's psychiatrist *or* the admission of Madison's video statements to that State psychiatrist; and, even if an examination was allowed, to impose limits on its scope and have those limits be enforced. The Court made no effort to address the *need* for the rebuttal in the circumstances of the very limited scope of the mitigation evidence Madison actually presented, or to gauge the less intrusive means by which that need could be sufficiently met. By so failing, the Court disregarded, or overlooked, the U.S. Supreme Court's holding that results of a court-ordered mental examination may only be used for a "limited rebuttal purpose": "the limited purpose of rebutting a mental-status defense." Buchanan v. Kentucky, 483 U.S. 402, 424 (1987); Kansas v. Cheever, 571 U.S. 87, 92, 95 (2013).

Although it cited Buchanan and Cheever, the Court here has disregarded their constitutionally-essential limiting principles and has, instead, opened the flood gates to court-compelled, State-requested psychiatric examinations of capital defendants when not even faintly necessary for any fair or necessary “rebuttal.” This unfortunate result will unfairly ease the way for prosecutors in Ohio, in capital cases, to present irrelevant and prejudicial evidence of non-statutory aggravating circumstances such as alleged “bad” character, lack of “remorse,” absence of “brain damage,” alleged mental health disorders such as “anti-social personality disorder,” and other prejudicial, inadmissible, and irrelevant matters — all wrapped up in the bow of an “expert” report and accompanying testimony — thereby enabling the State to push the thumb more firmly down in favor of death in cases where the capital defendant, like Michael Madison, had not placed his mental status in issue *for any relevant purpose*.

The federal and state constitutions demand much more sensitive consideration, than the Court has provided here, of the limited scope of penalty-phase mental-health-expert rebuttal in capital cases when the defendant’s mental status has not been placed in issue by the defense.

II. Voir Dire Issues in Propositions of Law Nos. 1 and 2

The voir dire in this case was grossly unfair, in large part because the trial court, at the overzealous urging of the prosecutor, disallowed the defense to conduct the meaningful and searching voir dire the federal and state constitutions demand in a capital case, and then allowed superficial “follow the law” inquiries to excuse demonstrated bias. The unfairness which these errors caused to Madison’s right to a fair trial in the guilt phase is bad enough, and alone demands relief. But, the impact of the errors on the sentencing phase requires a new sentencing proceeding because Madison was denied his state and federal constitutional rights to individualized sentencing by a jury willing and able to fairly consider the life sentencing options and the mitigating factors

Madison identified in support of a sentence less than death. Penry v. Johnson, 532 U.S. 782 (2001); Eddings v. Oklahoma, 455 U.S. 104 (1982).

The grossly unfair voir dire enforced against Madison resulted in the trial court, now with the approval of this Court, “entrust[ing] the determination of whether a man should live or die to a tribunal organized to return a verdict of death.” “No defendant can constitutionally be put to death at the hands of a tribunal so selected.” Morgan v. Illinois, 504 U.S. 719, 732 (1992).

The Court’s opinion excuses and compounds these unfortunate errors. For example, a *fair trial* would *not* require a defendant’s exercise of a peremptory challenge to excuse the veteran policeman of three-decades (Juror No. 12) who said in his questionnaire, and reaffirmed on questioning by the judge (T. 1132-34), that the death penalty should be imposed in all cases where someone is convicted of murder and in all cases involving the murder of a police officer, and that he would be more likely to impose death in cases of more than one victim. Yet this Court rejected Madison’s claim because this veteran cop’s disqualifying biased views were only those he had “at the time” — *a day earlier* — and he had supposedly “modified” them during voir dire when he claimed he better understood the law. The record does not support that. His claim to the judge that he would “have to see all the information to give an honest answer,” about whether he could fairly consider the other sentencing options (T. 1134), is far short of a pledge to set aside his opinions and decide the case on the evidence and the instructions.

And, nonetheless, the defense wasn’t permitted any meaningful inquiry to probe Juror No. 12’s alleged change of tune, with the result being that his obvious bias, at least twice expressed, was here too only excused based on hollow platitudes unable to be challenged by the skeptical probing obviously needed when such disqualifying biases are possessed by an experienced police officer. Morgan, and the U.S. Constitution demand more, *even if* the Ohio Constitution does not. Especially in a capital case.

These same problems plagued the voir dire when it came to the other jurors, identified and addressed in Proposition No. 2, whose for-cause excusals by the defense were erroneously denied by the trial court. This Court's denial of Madison's claims is rooted in its approval of the unreasonably restricted inquiry permitted by the trial court but also in this Court's minimization of some of the juror's disqualifying biased views as merely "personal opinions." (See, e.g., Op. at ¶¶ 59, 61, 75, 78.) That the jurors' disqualifying views are "opinions," or even "personal opinions," does not make them any less disqualifying. Madison was entitled to a fair trial and an impartial jury. U.S. Constitution, Amends. VI, XIV. These rights guarantee that Madison will have his case decided strictly according to the evidence and law, and not by opinions, preconceived notions, or extraneous information. Morgan, 504 U.S. at 726-27; Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("The theory of the law is that a juror who has formed an opinion cannot be impartial." (quoting Reynolds v. United States, 98 U.S. 145, 155 (1878))).

Disqualifying personal opinions cannot be permitted to poison the jury box, and this is even more essential in a capital case. Yet, in this case numerous jurors with disqualifying personal opinions in favor of the death penalty were retained, despite well-supported challenges for cause based on those opinions, merely because each juror mouthed a hollow platitude such as that he/she would "follow the law" (Op. at ¶¶ 61, 71), would "consider" mitigation (Op. at ¶¶ 43, 46, 49, 69), and/or would "consider" life sentences (Op. at ¶¶ 45-46, 52-53, 61), all without enabling the defense to meaningfully probe the veracity of those superficial assurances and without the essential commitment, after such inquiry, that the juror was even *capable* of setting aside, and would set aside, the disqualifying opinions and decide the case only on the evidence and instructions.

Finally, Madison was *not* required to prove that a juror would "automatically" vote for death in order for the excusal to be mandatory. Yet *that* is the standard this Court has erroneously applied. (Op. at ¶¶ 23, 65, 72, 74, 80.) To the contrary, Madison must only show that, due to the

challenged juror's expressed bias in favor of the death penalty, the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (Op. at ¶ 87, citing Adams v. Texas, 448 U.S. 38, 45 (1980)). Moreover, the U.S. Supreme Court has made clear that this standard "does not require a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Wainwright v. Witt, 469 U.S. 412, 424 (1985).

The Court has disregarded these important principles. Piddling formality has been allowed to prevail over meaningful inquiry, all to Madison's extreme prejudice.

III. The Compelled Psychiatric Examination and Admission of Madison's Statements and Other Evidence from that Examination (Propositions of Law Nos. 11, 12, 13)

Madison has a right under the Fifth and Fourteenth Amendments, and Ohio's counterparts, to not be compelled in any criminal case to be a witness against himself, and this privilege against self-incrimination applies to the penalty phase of a capital case. (Merit Brief at 202-03.) These constitutional rights mandate that the *State* must prove its case, especially its case for a death sentence, and that the State may not force Madison to be "the '*deluded instrument*' of his own *execution*.'" Estelle v. Smith, 451 U.S. 454, 462 (1981). Madison also has the right under the Sixth, Eighth, and Fourteenth Amendments, in a capital case, to develop and present evidence of mitigating factors, and to make decisions about which such evidence to present and how, all in consultation with his trial counsel and any experts that may be retained, and, in doing so, he does not forfeit his other constitutional rights including his right to not be compelled to be a witness against himself. (Merit Brief at 203-04.)

The Court has disregarded these most basic constitutional protections, when it holds:

We conclude 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.

(Op. ¶ 120.) The Court's conclusion tolerates, and indeed encourages in future capital cases, the overzealous and unfair tactics which occurred here when the trial court compelled Madison — even though his trial counsel had repeatedly represented, on the record, that Madison is *not* raising a mental status defense, will not be placing his mental condition in issue, and will not present any mitigation evidence under R.C. 2929.04(B)(3) (Merit Brief at 195-96) — to be examined by a State-selected psychiatrist and permitted that State psychiatrist to testify against Madison in the penalty phase about that psychiatric examination and Madison's statements made therein.

The U.S. Supreme Court cases relied upon by the Court — e.g., Cheever and Buchanan — do not permit what happened in Madison's case. Those cases identify very narrow situations where the government can compel a criminal defendant to submit to a state-requested mental evaluation, but not here. Those cases apply only in the narrowly-confined situation where the defendant intends to introduce psychiatric evidence that *places his state of mind directly in issue*. Only then can the court compel him to submit to a psychiatric examination that requires waiver of his right against self-incrimination. See Cheever, 571 U.S. at 98 (defendant introduced psychiatric evidence that he lacked requisite mental state to commit the offense). Indeed, the Court in Cheever acknowledged that such circumstances are limited to mental status diagnoses, which it defined as those involving “a defendant's *mens rea*, mental capacity to commit a crime, or ability to premeditate.” Cheever, 571 U.S. at 96.

Madison did not put in issue his mental state and/or mental condition *at all*, not even indirectly. His “mental condition” was not “in controversy” in any relevant respect for any relevant purpose. His counsel repeatedly disclaimed reliance on any such matters for any purpose, including mitigation. The mitigation case was concerned only with Madison’s troubling background and family history. Just because he used *psychologists* to help explain and contextualize that troubling background and family history did not place his mental status in issue. That his expert psychologists may have addressed relevant literature about “neurodevelopment” factors, or the known impact upon the development of a child’s brain of neglect and/or trauma, or may have used the term “wiring,” hardly placed Madison’s mental status in issue in any conceivably relevant way for any conceivably relevant purpose. What’s more, the trial court made sure the defense did not misuse the term “wiring” to suggest brain damage or mental health problems by telling the jury, during the testimony of defense psychologist Dr. Mark Cunningham: “When we talk about wiring, we’re not talking about brain injury or brain damage.” (T. 6979.)

This Court, like the trial court and the prosecutor, seems to believe that simply because a mental health professional will *testify* for the capital defendant — *regardless* of what the *substance* of that testimony will be, and even when that testimony will *not* include evidence of mental illness or mental incapacity and will *not* address a mental status defense or any of the (B)(3) mental-capacity mitigating factors — then, *ipso facto*, the defendant’s mental status is in issue thereby compelling that defendant to waive his Fifth Amendment privilege and undergo a psychiatric examination by a state doctor. That has never been the law, and certainly not in the sentencing phase of a capital case. It elevates form over substance, by making the groundless inference that, whenever a “psychologist” testifies, the defendant’s mental status must necessarily be in issue. That inference is wrong on the facts and the law. It is so broad, and unconstrained by any limiting principles, that mental status will virtually always be “in controversy,” even when it plainly is not.

This expansive view strays far from the limited scopes of Cheever and Buchanan, and, as applied here by this Court, circles right back around to subject the capitally-accused to the constitutional violations addressed in Estelle v. Smith.

The Court says *Madison* wants Buchanan and Cheever applied in a “narrow” way and is supposedly asking to “distinguish” those cases by arguing “they apply only when the defendant alleges that he has a ‘mental disease or defect,’ or a ‘mental condition’ that implicates his mens rea, mental capacity to commit a crime, or ability to premeditate or when he seeks to establish the existence of a ‘mental disease or defect’ mitigating factor under R.C. 2929.04(B)(3).” (Op. at ¶¶ 116-17.) But that is not an accurate representation of Madison’s position. It is not Madison, but the U.S. Supreme Court itself that dictates the required narrow scope. Kansas v. Cheever, 571 U.S. at 98 (“***We hold that where*** a defense expert who has examined the defendant testifies that the defendant ***lacked the requisite mental state to commit a crime***, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant’s evidence.”); Buchanan v. Kentucky, 483 U.S. at 423-24 (“[P]etitioner’s entire defense strategy was to establish the ‘***mental status’ defense of extreme emotional disturbance***. . . . In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence. Accordingly, the Commonwealth asked [the defense expert] to read excerpts of [a Commonwealth psychiatrist’s evaluation, prepared at both parties’ request, after petitioner’s arrest when the case was in juvenile court], in which the psychiatrist had set forth his general observations about the mental state of petitioner but had not described any statements by petitioner dealing with the crimes for which he was charged. The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation.”). See also Estelle, 451 U.S. 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.”).

Madison is only asking that these decisions be applied as they are intended to be applied, consistent with their holdings, and that the Ohio state courts not misapply them to circumstances such as Madison’s in which they do not properly apply by their own terms. This Court itself once appeared to agree with that appropriately narrow scope. See State v. Goff, 128 Ohio St. 3d 169, 182 (2010) (“By putting her *mental state directly at issue* and introducing expert testimony based upon her own statements to the expert, the defendant opens the door to a limited examination by the state’s expert concerning battered-woman syndrome and its effect on the defendant’s behavior.”) (emphasis supplied). Plus, “death is different” and requires greater reliability. Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion).

The errors in the Court’s ruling do not end there. Even while misapplying Cheever and Buchanan beyond the limited scope for when those cases permit State-mandated psychiatric or psychological examinations, this Court has also disregarded the holdings in those cases that any rebuttal, as may be permitted by the State with such evidence, is to be only for a “*limited rebuttal purpose*.” Buchanan, 483 U.S. at 424 (emphasis supplied); Cheever, 571 U.S. at 97. The State may offer evidence of a court-ordered psychological examination only where the defendant has placed his mental state directly in issue, and even then only for the “limited purpose of rebutting the defendant’s evidence.” Id. at 98. See also Powell v. Texas, 492 U.S. 680, 685-86 (1989) (per curiam) (defendant does not “open the door” to admission of mental health evidence on all mental health issues by placing limited mental health issues in question); Goff, 128 Ohio St. 3d at 182.

The Court has thus disregarded *both* of the constitutionally-essential limiting principles of Cheever and Buchanan: (1) defendant must have placed his mental state directly in issue; and (2) even then, any rebuttal via State psychological evidence must only be for the limited purpose of

rebutting defendant’s mental status evidence. Here, the State and its expert blew passed the constraints of a “limited rebuttal purpose,” just as they ignored the trial court’s order — with no consequences imposed by the trial court — that the State expert’s “examination only relates to the brain damage of defendant” and the State’s examiner “may not inquire into the facts and circumstances of the case.” (No. 212, Order, June 3, 2014; see also T. 443-44.) Much of Dr. Pitt’s examination had absolutely nothing to do with “brain damage” or any credible effort to seek its existence, and Dr. Pitt repeatedly explored with Madison topics which directly or indirectly inquired into facts and circumstances of the case.¹

And, the State unquestionably had other, less constitutionally-burdensome means of “rebutting” the evidence presented by the defense psychologists than a court-mandated exam by a State psychiatrist — any of which, alone or in combination, would have been more than sufficient to satisfy the “limited rebuttal purpose” recognized in Buchanan and Cheever. For example, the State and its expert had access to the entirety of the defense psychological reports to rebut any such matters. See, e.g., Buchanan, 483 U.S. at 422-23. Moreover, the State and its expert had the same opportunity to view the 17-hours of police interrogation as did Madison’s experts, and it had access to the same CFS and other documents about Madison and his background and family history. Dr. Pitt was likewise perfectly capable of countering the scholarly literature relied upon by the defense psychologists for their testimony about “neurodevelopment factors” and “wiring” and “brain impact,” by offering his own views of that literature (as he did) or presenting evidence of contrary literature.

¹ The Court made an obvious error in concluding that “there is nothing in the record that establishes that Dr. Pitt exceeded the scope of the court’s order.” (Op. ¶ 129.) On the contrary, the evidence that Pitt defied the order is abundant and unmistakable. See, e.g., Merit Brief at pages 195-201 and 213-16.

In sum, adherence to Cheever, Buchanan, and Estelle, and to what the Constitution compels, does *not* mean the State will be unable to present expert testimony or engage in effective “rebuttal.” The State can still present its desired expert, and “rebut” the defendant’s experts, but that State expert does *not* get to “interview” the capital defendant himself. Dr. Pitt’s video clips are the best proof that an interview was totally unnecessary to satisfy the permitted limited rebuttal purpose: To receive a fair trial, the State had no need whatsoever to be asking Madison about “character defects,” and whether he’s a liar, and whether he has a temper, and whether he holds “grudges,” and about his “sexual practices,” and what he can do to improve himself, and what he thinks of El Chapo, and on and on with Dr. Pitt’s defiance of the trial court’s order. (State Exh. 1103; T. 7398-7406, 7408-12, 7411-15, 7428-38, 7441-45, 7445-46, 7455-59, 7460-61, 7466-72, 7514-16, 7567-72, 7582-84.)

Finally, the Court’s opinion on this issue has no support in the capital cases it relies upon from other jurisdictions. (Op. at ¶ 115.) All of those cases are *easily* distinguishable: They involve circumstances where the capital defendant chose to place his mental status squarely in issue such as by presenting psychiatric evidence about future dangerousness or significant mental impairment, and other obviously distinguishing circumstances. See:

- Williams v. Lynaugh, 809 F.2d 1063, 1067-69 (5th Cir. 1987) (Capital defendant himself is the one who “first introduced psychiatric evidence on the issue of future dangerousness.” This enabled the State to present evidence from a pretrial examination, limited to that same issue. Additionally, the defense counsel “made no objection whatsoever, before trial or at trial, to the state’s psychiatric evidence.”).
- State v. Fitzgerald, 232 Ariz. 208, 215-17, 303 P.3d 519, 526-28 (2013) (Capital defendant put on his own mental health expert to provide mitigation evidence of his “mental impairment,” including that he “was psychotic when he murdered his mother and that he

suffered from a delusional-type disorder, paranoid schizophrenia, or a schizoaffective disorder.” The appellate court thus found no constitutional violation in the state relying upon statements the defendant made “to Correctional Health Services” during pretrial competency proceedings. The court held that “Estelle does not control when, as here, ‘a defendant claims a diminished mental condition and offers supporting psychiatric testimony.’”) (citation omitted).

- Soria v. State, 933 S.W.2d 46, 55-56 (Tex. Crim. App. 1996) (Capital defendant put on his own psychiatric expert on the issue of future dangerousness and, in doing so, “chose to present his version of the facts as they might impact his deathworthiness through [that expert’s] testimony.” The appellate court thus allowed the trial court to compel examination by the State’s expert, provided that any “rebuttal testimony is limited to issues raised by the defense expert.”).
- State v. Ross, 269 Conn. 213, 293-96, 849 A.2d 648, 703-05 (2004) (Capital defendant “claimed significant mental impairment as a mitigating factor” and called his own mental health expert to testify in support of that claim. There was thus no constitutional violation for the trial court to permit the prosecutor to confront the defense expert with videotaped statements the defendant had made to another defense mental health expert, where the testifying expert had relied on those statements.).
- Lockett v. State, 2002 OK CR 30, ¶¶ 23-27, 53 P.3d 418, 426-27 (Okla. Crim. App. 2002) (Capital defendant “initiated a psychiatric evaluation for the purpose of exploring an insanity defense, thus entitling the State to have [him] examined by its own mental health expert” at that time. Although defendant later chose not to present the insanity defense, he still “introduce[d] psychiatric evidence in the sentencing proceeding, ostensibly in mitigation of the alleged aggravating circumstances.” In those circumstances, the appellate

court found no constitutional error in admitting statements made by the defendant to the State's examiner, or in allowing that examiner to testify in the mitigation phase to rebut the psychiatric evidence presented by the defendant's expert. But the court also determined that any constitutional error was harmless because the defendant "refused to cooperate and did not complete the psychological tests. **Thus, the bulk of the [State] expert's information was gained from sources other than Appellant.**").

- Giarratano v. Proconier, 891 F.2d 483, 488 (4th Cir. 1989) (Habeas case in which capital petitioner's own expert provided evidence at trial that defendant was "not psychotic, that he suffered from a schizoid personality disturbance, and that he was under extreme mental and emotional disturbance at the time of the crimes"; thus, the state was permitted to introduce evidence from a pretrial competency examination. In any event, the defense counsel did not "object at the penalty phase to the testimony of the psychiatrist who conducted the competency examination," thereby barring the claim in habeas because of a procedural default).

Madison's circumstances are dramatically different than these cases. He vigorously objected to the compelled examination and to the admission of evidence about it including any of his statements to Dr. Pitt and the use of the 7 videotaped excerpts. And, none of the Court's cited cases involve Madison's facts: Compulsion of a capital accused to participate in a state-requested psychiatric examination by a state-selected expert, *for purposes of the penalty phase*, **and** admission of the accused's statements to the expert during that examination, all in circumstances where the capital defendant had not placed his mental state, mental status, or mental capacity in issue and, indeed, had disclaimed any intent to do so.

What's more, some of these cases additionally *support* Madison's position because their results are examples of the limiting principle that any State-presented mental health evidence, in

such circumstances in a capital case, should be only for a *limited rebuttal purpose* as determined with reference to the scope and importance of the capital defendant's corresponding sentencing-phase psychological evidence to which the State's evidence purports to "rebut." See, e.g., Williams, Fitzgerald, Soria, and Ross.

IV. Other errors for reconsideration

While the additional errors and propositions as addressed in Madison's Merit Brief are not being specifically raised here in this motion, that is not to concede that those errors did not occur. Rather, Madison relies on the arguments put forward in his Merit Brief, Reply Brief, and at oral argument, and resubmits on those for the purpose of this motion.

CONCLUSION

For these reasons, and those set forth in Madison's Merit Brief and Reply Brief, and in the interest of justice, Michael Madison respectfully requests that this Honorable Court reverse the convictions and remand for a new trial and/or reverse Madison's death sentence and remand with an order for a new sentencing hearing.

Respectfully submitted,

/s/ Timothy F. Sweeney

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT MICHAEL MADISON'S MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT was served by regular U.S. Mail, first-class postage pre-paid on Michael O'Malley, Cuyahoga County Prosecutor, and Katherine E. Mullin and Anna M. Faraglia, Assistant Prosecuting Attorneys, Cuyahoga County Prosecutor's Office, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113, this 30th day of July 2020.

/s/ Timothy F. Sweeney

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