No. 12-609

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF OF PETITIONER

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I. This Court Has Jurisdiction Over The Kansas Supreme Court's Final Decision On The Fifth Amendment Question.

Under 28 U.S.C. § 1257(a), "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . ." The Kansas Supreme Court in this case clearly addressed and decided the federal issue presented in Question 1 in the State's petition for a writ of certiorari, namely that the admission of the State's expert testimony violated respondent's Fifth Amendment privilege against self-incrimination. Pet. App. 18-19, 22-35.

The Kansas Supreme Court's decision on respondent's Fifth Amendment claim is a final decision on the federal question that – if not reviewed and reversed by this Court – necessarily results in the reversal of respondent's capital murder conviction and sentence. Respondent nonetheless erroneously contends that the judgment is not "final" because the court below chose not to resolve all other claims respondent raised on appeal. Brief in Opposition ("Opp.") 5-9. Respondent argues that finality is lacking because, if this Court grants certiorari and reverses the decision below, additional litigation will follow. But that is often the case, particularly so in criminal cases in which a conviction or sentence has been reversed and further trial court proceedings remain.

The fact that a reversal by this Court on a federal question the lower court conclusively decided may not

finally resolve the entire case does not alter the conclusion that the ruling below on the federal question is "final" under § 1257(a), as numerous decisions of the Court over many years clearly establish. *See, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 168-169 (2006) (Eighth Amendment question); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984) (Fourth Amendment question); *Florida v. Meyers*, 466 U.S. 380, 381 n.a1 (1984) (Fourth Amendment question); *South Dakota v. Neville*, 459 U.S. 553, 558 n.6 (1983) (Fifth Amendment question); *California v. Stewart*, 384 U.S. 436, 499 n.71 (1966) (Fourth Amendment question).

This case is readily distinguishable from *Johnson v. California*, 541 U.S. 428 (2004), the primary case the respondent cites for the argument that there is no "final" decision here for the Court to review. *Johnson* involved an attempt to obtain review of a state supreme court decision that was reversing a state intermediate appellate court decision, a reversal with directions that the intermediate court consider unresolved appellate issues on remand; *Johnson* did not involve a state supreme court reversing a trial court decision and remanding for a new trial. Thus, in *Johnson*, unlike this case, additional *appellate* proceedings in the state courts necessarily were to occur. As a result, even if the defendant lost on all issues in the further appellate proceedings, nothing would have precluded him from reasserting the federal *Batson* claim in a subsequent appeal to the state supreme court and then to this Court, if necessary.

In stark contrast, here there are no additional state appellate proceedings to follow from the Kansas Supreme Court's decision, and no further appellate

opportunity for the State to prevail in this case on non-federal grounds. Rather, the State's only options are an appeal of the Fifth Amendment issue to this Court at this time, or to retry the respondent with an adverse Fifth Amendment ruling that seriously impairs the State's ability to contest the respondent's claim that he was incapable of forming the requisite mental state to commit capital murder. Whether respondent is acquitted or convicted in a retrial, there will be no opportunity for a renewed appeal of the Fifth Amendment question. *Cf. Kansas v. Marsh*, 548 U.S. at 168.

Indeed, this case presents a situation that is legally indistinguishable from *Kansas v. Marsh*, in which the Court readily concluded that the potential for retrial in a criminal case does not call into question the finality of the state supreme court's conclusive decision on a federal question. In *Marsh*, the Court emphasized that, under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975), § 1257 authorizes review of a state court judgment "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 548 U.S. at 168. This case, like *Marsh*, fits squarely within that category.

Notably, *Marsh* postdates *Johnson v. California* by two years, and if the Court actually intended *Johnson* to work the radical change in finality jurisprudence that respondent claims, presumably the *Marsh* decision would have had something to say about *Johnson*. Instead, the clear and well-settled rule is that finality exists in the circumstances presented here, as *Marsh*

makes plain. *See also Neville*, 459 U.S. at 558 n.6 (Fifth Amendment question is "final"); *Quarles*, 467 U.S. at 651 n.1 (Fourth Amendment question is "final"); *Meyers*, 466 U.S. at 381 n.a1 (same); *Stewart*, 384 U.S. at 499 n.71 (same). Indeed, even respondent grudgingly admits that "[t]his case arguably falls in that category" under *Cox Broadcasting*. Opp. 8-9.

That Kansas may retry respondent on the charges of capital murder and attempted capital murder does not alter the fact that the Kansas Supreme Court indisputably and conclusively decided the federal question whether the admission of Dr. Welner's testimony (in rebuttal to respondent's claim that he lacked the mental capacity to form the intent to commit the crimes) violated the Fifth Amendment. That issue cannot now be relitigated in the state courts, so its resolution is "final" for purposes of § 1257.

II. The Kansas Supreme Court Decided The Fifth Amendment Question On The Merits, Plainly Giving This Court Jurisdiction To Review That Federal Issue.

A. The Fifth Amendment Question Is Properly Before The Court.

Respondent incorrectly argues that the State waived the Fifth Amendment question by not making specific *arguments* about that question in the state courts. Opp. 9-11. That assertion is baseless for several reasons. First, it was *respondent* who raised the Fifth Amendment claim; the State simply responded to his argument that the Constitution had been violated. In the trial court, respondent was convicted of capital

murder and sentenced to death; it was not the State's obligation or duty to raise issues on appeal from a judgment in the State's favor; indeed it would have been improper for the State to do so. In answering respondent's assertion of trial court error, however, the State argued that "differences between [federal] rules and state rules do not transform Dr. Welner's lawful interview with Defendant into something unlawful." Appendix to Respondent's Brief in Opposition ("Resp. App.") 31. The State also argued that the admission of Dr. Welner's testimony was consistent with this Court's decisions in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Buchanan v. Kentucky*, 483 U.S. 402 (1987). Resp. App. 31-32.

In any event, which party did or did not raise what issue(s) is completely irrelevant at this point. The Court's longstanding practice, applied in numerous cases for a century at least, is that "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review." *Franks v. Delaware*, 438 U.S. 154, 161 (1978). At least as far back as 1914, the Court has recognized its authority to review a federal question *actually* decided by state courts, even if that particular federal question "had not been expressly asserted below." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914); *id*. ("it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided."); *see also Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); *Orr v. Orr,* 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life, supra*); and *Payton v. New York*, 445

U.S. 573, 582 n. 19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). *See also Ward v. Monroeville*, 409 U.S. 57, 61 (1972); *Ocala Star-Banner v. Damron*, 401 U.S. 295, 299 n.3 (1971); *Whitney v. California*, 274 U.S. 357, 360-62 (1927); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was *either* addressed by, *or* properly presented to, the state court that rendered the decision we have been asked to review.") (Emphasis added).

Thus, even if the Fifth Amendment question somehow was not "properly presented" by the parties' briefs in the Kansas state courts, the fact that the Kansas Supreme Court indisputably addressed and decided the issue suffices to confer jurisdiction on this Court to review the question. *See* Pet. App. 35 ("allowing Dr. Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.") There is no question that the jurisdictional requirements of 28 U.S.C. § 1257 are satisfied here.

B. The Kansas Supreme Court's Decision Does Not Rest On Any Independent And Adequate State Ground.

Contrary to respondent's misguided contention that there are independent and adequate state grounds to sustain the Kansas Supreme Court's decision, Opp. 20-24, the truth is that the lower court's decision rests *solely and exclusively* on *federal* constitutional grounds. What respondent actually asserts, effectively, is that there may be *potential* state grounds which – if this Court was to reverse the decision below – on remand could permit the state courts to rule in respondent's favor, at least possibly, maybe, perhaps.

In this regard, respondent tellingly admits that he argued below that the admission of Dr. Welner's testimony also violated state evidentiary rules, but "the court did not reach it [the state law claim]." Resp. Opp. 20-21. To similar (non-)effect, respondent advises that "should this Court reverse the decision of the Kansas Supreme Court, Mr. Cheever will seek further review on this issue." *Id*. at 21-23. Even assuming those assertions to be accurate, they matter not a whit: the fact that state law arguments *could potentially be made if* this Court reverses on the federal constitutional issue and remands the case does not demonstrate in any way that the decision the State is asking this Court to review rests on an independent and adequate state law ground. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

Although respondent raised many issues in his appeal to the Kansas Supreme Court, that court relied solely on its Fifth Amendment analysis to reverse

respondent's capital murder convictions and death sentence. There simply is no plausible claim that the Kansas Supreme Court actually decided the appeal on the basis of an independent and adequate state law ground. See *Florida v. Meyers*, 466 U.S. at 381 n.a1.

III. Respondent Concedes That The Kansas Supreme Court's Decision Conflicts With Precedent In The Federal Circuits.

The State already has demonstrated in its petition that the Kansas Supreme Court's decision conflicts with this Court's precedents, with numerous decisions in the federal Circuits, and with decisions by other state courts of last resort. In essence, the majority view (following the rationale of *Buchanan v. Kentucky*, 483 U.S. 402 (1987)), is that when a criminal defendant puts his mental state at issue, either through the admission of expert or other testimony, the Fifth Amendment does not bar the State from rebutting that testimony with expert testimony, including reports from court-ordered mental examinations. In this case, however, the Kansas Supreme Court ruled exactly the opposite and took the minority view, deepening a split of authority on the question. Respondent's efforts to characterize the Kansas Supreme Court's decision as consistent with the vast bulk of federal precedent fails utterly, Opp. 11-20, as demonstrated in the State's petition for a writ of certiorari. Moreover, respondent does not even mention or discuss the contrary state supreme court decisions. *Cf.* Pet. 18-21 (discussing several contrary state court decisions).

Instead, respondent repeatedly argues the specifics of Kansas law and his understanding of how Kansas

law purportedly differs from federal law. Opp. 13-17 (referring to "Kansas law" at least eight times). Thus, respondent embraces the same erroneous rationale that the Kansas Supreme Court adopted here, *i.e.*, that the Fifth Amendment question turns on the particular characteristics of Kansas's or any other particular State's law. That rationale is fundamentally flawed because the Court long has made clear that the scope of the Fifth Amendment privilege against self-incrimination is a federal question, not a question of state law. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

Like the Kansas Supreme Court, respondent misguidedly attempts to rely on the non-existent distinction between federal and state statutes in this context when he argues that the Kansas Supreme Court decision is distinguishable from contrary federal Circuit precedent such as *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983), because he says those decisions involved federal criminal statutes rather than state statutes. The Fifth Amendment privilege, however, does not differ depending on whether a criminal case is brought under federal or state statutes; the privilege is not forum dependent.

Notably, respondent does not even try to reconcile *Schneider v. Lynaugh*, 835 F.2d 570, 575 (5th Cir. 1988), with the Kansas Supreme Court's decision. Instead, he simply asserts that *Schneider* was decided incorrectly. Whether or not that is true, it certainly proves the point that even respondent recognizes that there is a genuine split of authority on the first question presented in the State's petition. In fact, the split of authority is considerably more extensive than

between just *Schneider* and the Kansas Supreme Court's decision here, because again respondent totally ignores *all other state supreme court decisions* on this question, decisions identified and discussed in the State's petition at pages 18-24.

Ultimately, there is no denying that there is a split of authority on an important and recurring constitutional question, a situation that warrants this Court's review.

IV. The Kansas Supreme Court Rejected On Federal Constitutional Grounds The State's Primary Rationale For Permitting The Use of Dr. Welner's Testimony To Impeach Respondent's Own Testimony Regarding His Mental State, An Issue Inextricably Intertwined With The First Question Presented.

As explained in the State's petition for a writ of certiorari, the Kansas Supreme Court rejected the primary rationale in support of the State's argument that the prosecution could use statements respondent made to Dr. Welner in order to impeach respondent's own testimony about respondent's mental state at the time he shot Sheriff Samuels. The State argued that, by analogy to cases such as *Harris v. New York*, 401 U.S. 222 (1971), and *Kansas v. Ventris*, 556 U.S. 586 (2009), even if the State could not use respondent's statements in the prosecution's case-in-chief, the State should be able to use those statements to impeach respondent once he chose to testify. Pet. App. 36. The Kansas Supreme Court plainly rejected that rationale for admitting the evidence as impeachment, although

that court at the same time purported not to resolve conclusively whether such evidence ever could be used for impeachment.

That part of the opinion plainly rejects the States' primary – if not sole – rationale for the admission of such evidence, leaving no further realistic avenue for the State to raise the issue again in this case, including in a retrial where a trial court necessarily will and must conclude that the impeachment evidence is inadmissible. At bottom, the impeachment use of Dr. Welner's testimony presents a Fifth Amendment question closely related to and inextricably bound up with the first Question Presented in the State's petition. In these circumstances, the Court certainly may – and with all due respect in the view of Kansas the Court should – grant review of *both* of these closely-related Fifth Amendment questions in order to resolve the splits of authority that exist on both issues.

Respectfully submitted,

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