No. 12-609

In the Supreme Court of the United States

STATE OF KANSAS, *Petitioner,*

v.

SCOTT D. CHEEVER, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, GEORGIA, HAWAII, KENTUCKY, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, WYOMING AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?

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INTEREST OF AMICI CURIAE

This case presents the question whether the Fifth Amendment privilege against compelled self-incrimination can be asserted to bar prosecution expert testimony that relies upon statements made by the defendant in a court-ordered mental evaluation, when that testimony is offered to rebut defense expert testimony on the same subject. Those accused in state courts of crimes requiring proof of a specific intent, such as premeditation to kill, routinely assert voluntary intoxication and other mental status defenses as a means to negate that element or establish an affirmative defense. As in the present case, those defenses may be advanced through expert witnesses whose testimony calls into question the contents of previous mental examinations. Amici States therefore have a substantial interest in this Court's determination whether those defendants can successfully assert the Fifth Amendment privilege against compelled self-incrimination to bar responsive in-kind evidence from the prosecution.

Amici States have a concordant interest in whether the answer to that question depends upon a given State's rules of evidence governing mental defense procedures, or whether it is resolved by uniform application of constitutional doctrine.

SUMMARY OF ARGUMENT

The Kansas Supreme Court erred by holding that, although respondent Cheever had presented expert testimony to support his mental status

defense, his Fifth Amendment privilege against compelled self-incrimination precluded in-kind prosecution rebuttal evidence. By choosing to advance his defense, Cheever placed at issue statements he made during a court-ordered mental evaluation. He thus opened the door to reciprocal expert opinion testimony drawing upon those statements, and should not have been able to hide behind his Fifth Amendment privilege when the prosecution sought to provide the jury with that responsive evidence.

1. The position advocated by Amici States is a straightforward application of established principles informing the scope of the privilege against self-incrimination. This Court has held consistently that a defendant's decision to introduce evidence on his or her behalf forecloses his or her ability to assert the Fifth Amendment privilege to prevent the prosecution from exploring and challenging that evidence. *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900); *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958). This axiom is rooted in an interest in fair criminal proceedings designed to ascertain the truth of disputed facts.

By extension, as suggested in *Powell* v. *Texas*, 492 U.S. 680, 683-685 (1989) (per curiam), *Estelle* v. *Smith*, 451 U.S. 454, 465 (1981), and *Buchanan* v. *Kentucky*, 483 U.S. 402, 423-424 (1987), defense introduction of psychiatric evidence precludes use of the Fifth Amendment as a bar to reciprocal prosecution rebuttal expert testimony that draws upon statements the defendant made during a court-ordered examination. The scope of the privilege against self-incrimination should not depend on how

state law classifies a mental defense for purposes of ordering the defendant to submit to an evaluation. Rather, it should turn on whether the defense has presented expert testimony that places the contents of a court-ordered mental evaluation at issue.

In particular, the subjective nature of psychiatry as a scientific discipline, and the technical and scientific issues occasioned by a mental state defense, often requires that juries hear expert testimony from both sides. This Court explored the underpinnings of that need in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), concluding that juries "must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." *Id*. at 81. In addition, because opinions on mental status issues typically rely upon statements made by the defendant during psychological evaluations, depriving an expert of that basis by injecting Fifth Amendment restrictions into his or her testimony may well strip opinions of their foundations and render them irrelevant. See, *e.g.*, Fed. R. Evid. 702(b), (d).

2. In this case, the Kansas Supreme Court erred by conflating the scope of the Fifth Amendment privilege against self-incrimination with state rules of evidence it interpreted as providing the exclusive circumstances under which a defendant "waives" the privilege when presenting a mental defense. In essence, Kansas has yoked the availability of the privilege against self-incrimination to the substantive mental status defense offered by a defendant. The Kansas Supreme Court held that, when the substance of the mental defense does not trigger a mental examination and subsequent

"waiver" of the privilege, the privilege remains intact, even where the defendant offers expert testimony that places his or her statements into dispute on the question of *mens rea.*

In view of the diverse range and variety of approaches to mental defenses among the States, affirming the lower court's decision would in effect constitutionalize state definitions and labels of mental status defenses. As a result, juries in some states could hear rebuttal expert opinion on given mental state issues, while juries in other states could not.

Moreover, by parsing out the substantive particulars of a mental state defense to determine whether the privilege against self-incrimination can be properly asserted, the Kansas Supreme Court's approach offers defendants an incentive to "game the system" by carefully circumscribing their mental defenses to avoid Fifth Amendment "waivers," while preserving the admissibility of their own expert's testimony. This result would be unjust, inimical to the truth-finding process, and at odds with a consistent application and coherent interpretation of the Constitution.

ARGUMENT

I. A DEFENDANT MAY NOT INVOKE THE FIFTH AMENDMENT TO PREVENT THE PROSECUTION FROM ELICITING RESPONSIVE EXPERT TESTIMONY THAT DRAWS UPON STATEMENTS MADE DURING A COURT-ORDERED MENTAL EVALUATION

This case calls for the straightforward application of an established principle: When a

defendant presents a defense that opens the door to prosecution rebuttal evidence predicated upon statements made by the defendant, that door must remain open. A defendant may not use the Fifth Amendment's privilege against compelled self-incrimination as a shield just because the rebuttal evidence draws upon statements made during the defendant's court-ordered mental evaluation.

1. The privilege against self-incrimination is rooted in "our sense of fair play" in interactions between the government and individuals. *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964). Fairness goes both ways. A basic example is that 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); see also *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958) (a defendant may not claim a Fifth Amendment immunity from cross-examination upon matters he chooses to put in dispute). Thus, when a defendant offers evidence on his own behalf, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown*, 356 U.S. at 156; see also Christopher Slobogin, *Estelle* v. *Smith: The Constitutional Contours Of The Forensic Evaluation*, 31 Emory L.J. 71, 100 (1982) ("As Justice Frankfurter's language [in *Brown*] suggests, the defendant who takes the stand may be compelled to talk, not because he has 'waived' his Fifth Amendment privilege, but because

his direct testimony standing unchallenged would tip the state-individual balance in his favor."); *Mitchell* v. *United States*, 526 U.S. 314, 322 (1999); *cf. Wong* v. *Belmontes*, 558 U.S. 15, 24 (2009) (observing in murder case that defense evidence about defendant's mental state "seeking to explain his behavior, or putting it in some favorable context" would have opened the door to responsive prosecution evidence that defendant had killed before).

It is not just a defendant's choice to take the stand and testify that informs the limits of the Fifth Amendment privilege. The scope of the privilege pivots off other defense trial strategies as well. This Court has indicated on more than one occasion that fair play implies a limit on Fifth Amendment protection when, as in this case, the defendant chooses to present a mental status defense and the prosecution seeks to reciprocate with expert psychiatric testimony. *Powell* v. *Texas*, 492 U.S. 680, 683-685 (1989) (per curiam) ("[I]t may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony . . . ."); *Estelle* v. *Smith*, 451 U.S. 454, 465 (1981) ("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 has interjected into the case.").

Estelle v. *Smith* held that a defendant may not be compelled to speak to a psychiatrist when the defendant did not request the evaluation or attempt to introduce mental status evidence, and that the prosecution may not use such statements against

him. 451 U.S. at 468. But the opinion was limited to the "distinct circumstances" where the defendant chose not to introduce psychiatric evidence, gave no indication that he might, and was unaware that his statements would be used by the State to secure the death penalty. *Id*. at 466, 472. "[A] different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." *Id*. at 472; see also *Penry* v. *Johnson*, 532 U.S. 782, 795 (2001) (distinguishing *Estelle* v. *Smith* by noting that the Fifth Amendment analysis "might be different" where a defendant chooses to put on mental state evidence in his defense).

The nature of the defense strategy similarly informed this Court's analysis in *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). *Buchanan* clarified that, if a defendant seeks a mental evaluation or offers mental status evidence, "at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Id*. at 422-423. This principle was central to *Buchanan's* conclusion that no Fifth Amendment violation occurred where the defendant himself joined the request for a mental examination, and then presented a mental defense based on "extreme emotional disturbance." *Id*. at 423-424.

These precedents apply with equal strength to a situation such as that presented in this case, where (1) the defendant undergoes a court-ordered mental examination, (2) he elects to present expert psychiatric testimony on the issue of guilt, and (3)

the prosecution offers rebuttal expert testimony that draws upon statements the defendant made during the court-ordered examination. The determining factor in the Fifth Amendment analysis, as in any case, is that the defense advances evidence opening the door to in-kind rebuttal.

Lower courts have, for many years, utilized this approach in cases presenting facts analogous to those here. For example, the District of Columbia Circuit in *United States* v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984), held that prosecution psychiatric testimony based on a compulsory mental examination of the defendant was admissible after the defense introduced psychiatric testimony to support an insanity claim. *Id*. at 1115. In so doing it noted that that "virtually all other circuits" considering the issue "have uniformly" reached the same conclusion. *Id*. at 1111 (collecting cases).[1] The Fifth Circuit concurred in *Battie* v. *Estelle*, 655 F.2d 692 (5th Cir. 1981), acknowledging that "virtually every other federal and state court addressing this issue" has concluded that a defendant waives his or her Fifth Amendment privilege by deciding to introduce psychiatric testimony to advance a mental defense, "in the same manner as would the defendant's election to testify at trial." *Id*. at 701-702 & nn.22, 23

[1] See also, *e.g.*, *Gibbs* v. *Frank*, 387 F.3d 268, 274 (3d Cir. 2004); *United States* v. *Curtis*, 328 F.3d 141, 144-145 (4th Cir. 2003); *Savino* v. *Murray*, 82 F.3d 593, 604 (4th Cir. 1996), cert. denied, 518 U.S. 1036 (1996); *Washington* v. *Murray*, 952 F.2d 1472, 1480 (4th Cir. 1991); *Silagy* v. *Peters*, 905 F.2d 986, 1005 (7th Cir. 1990); *Vardas* v. *Estelle*, 715 F.2d 206, 210 (5th Cir. 1983).

(cited with approval by *Powell* v. *Texas*, 492 U.S. at 683-684). Examples of analogous state court holdings likewise abound. See *State* v. *Martin*, 950 S.W.2d 20, 24 (Tenn. 1997) ("Virtually every . . . state court jurisdiction has held that where a defendant raises an insanity defense, the Fifth Amendment right against self-incrimination is not violated by a court-ordered psychiatric examination or by the prosecution's use of evidence from the examination to rebut evidence introduced by the defendant.").[2]

Lower court decisions on this issue are numerous and consistent in outcome because they promote criminal proceedings that are fair, and faithful to their truth-seeking function. As one court phrased it, to deny the State the opportunity to "follow where [the defendant] has led" would have an "unreasonable and debilitating effect . . . upon society's conduct of a fair inquiry into the defendant's culpability." *United States* v. *Byers*, 740 F.2d at 1113. Another cited "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 at 702 (footnote omitted); see also *Schneider* v. *Lynaugh*, 835 F.2d 570, 576 (5th Cir. 1988) ("It is unfair and

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[2] See, *e.g.*, *Lewis v. State*, 195 P.3d 622, 633 (Alaska Ct. App. 2008); *Arnold* v. *Commonwealth*, 192 S.W.3d 420, 425 (Ky. 2006); *Nance* v. *State*, 272 Ga. 217, 219, 526 S.E.2d 560, 564-565 (2000), cert. denied, 531 U.S. 950 (2000); *Hartless* v. *State*, 327 Md. 558, 564-566, 611 A.2d 581, 584-585 (1992); *State* v. *Briand*, 130 N.H. 650, 658, 547 A.2d 235, 240 (1988); *State* v. *Jackson*, 77 N.C. App. 491, 499, 335 S.E.2d 903, 908 (1985); *State v. Whitlow*, 45 N.J. 3, 23, 210 A.2d 763, 774 (1965).

improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony."). No matter how articulated, these rationales are variations on a theme: When a defendant offers expert testimony that places his or her statements at issue, the privilege against compelled self-incrimination bows to the interests of truth and fairness.

2. There are two key reasons why defense mental state evidence allows reciprocal expert testimony.

a. First, given the subjective nature of psychiatry as a scientific discipline, and the technical and scientific issues implicit in a mental state defense, the jury's truth-seeking function is best served by hearing expert testimony from both sides. Opinions on mental state issues are generally characterized by a greater degree of subjectivity than typical of other forensic science disciplines. The Court explained in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985):

> Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms . . . . Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession

> on the basis of the evidence offered by each party.

Id. at 81; see also Daniel W. Shuman, *Psychiatric and Psychological Evidence* § 6.2 (3d ed. 2005) ("Psychiatry and psychology are not value-free and the school of thought a psychiatrist or psychologist chooses to embrace is a function of a multitude of considerations, some of which involve personal values."). Thus, juries receiving expert evidence on a mental state issue are inevitably well-served by hearing opposing points of view.

In view of the potential for disagreement among experts on matters of psychology or psychiatry, this Court's warning that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it," *Daubert* v. *Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993) (quotations omitted), resonates with particular strength. Concepts employed in the fields of psychology, psychiatry, and neurology will be "inevitably . . . complex and foreign" to lay jurors. *Ake* v. *Oklahoma*, 470 U.S. at 81. Accordingly, "[b]y organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* While *Ake* addressed an insanity defense, the Court's observations hold true when a mental state defense of any variety occasions testimony from experts. See, *e.g.*, *State* v. *Briand*, 547 A.2d at 237 (recognizing that, "[r]egardless of the proposed defense," a lay jury is ill-equipped to

evaluate expert psychiatric testimony unless "the State has an opportunity to produce evidence of a similar quality in rebuttal").

b. Second, an expert providing testimony on mental state issues will characteristically draw upon statements made by the defendant as grounds for opinions. See *Clark* v. *Arizona*, 548 U.S. 735, 758 (2006) (evidence of mental disease usually presented through experts who base opinions on psychiatric examinations of the defendant); *State* v. *Briand*, 547 A.2d at 239 (experts providing mental state evidence will require the defendant's account of events at issue, as well as psychological and psychiatric history, in order to form opinions). A mental health assessment of a criminal defendant will typically consist of neurological examination, clinical interviewing, and psychological testing as "three overlapping modalities." John Parry, *Criminal Mental Health and Disability Law, Evidence, and Testimony* 285 (2009). Statements from the defendant, rather than measurements or instrument output, will be the data points generated under any approach to a mental examination. Shuman, *supra*, at § 1:12 ("Diagnostic techniques in psychiatry and psychology depend, to a large extent, on the patient's self-report of complaints . . . ."); *United States* v. *Haworth*, 942 F. Supp. 1406, 1408 (D. N.M. 1996) ("'[T]he basic tool of psychiatric study remains the personal interview . . . .'") (citation omitted). Thus, a defendant's statements will be the foundational building blocks for the expert's opinions.

That observation holds true in this case, where the substance of the voluntary intoxication defense squarely placed at issue the contents of Cheever's

dual mental evaluations, both of which involved Cheever's statements to the examiners as key components. See J.A. 35, 47-52, 56-57, 62, 63, 67-69, 85-86, 89, 114-118, 126-127, 134-135, 137. This defense trial strategy opened the door to prosecution testimony that likewise considered statements made during a mental examination. See *Blaisdell* v. *Commonwealth*, 372 Mass. 753, 766, 364 N.E.2d 191, 200 (1977) ("[A] defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial evidence in essentially the same way as if he himself had testified.").

Conversely, limiting an expert's ability to rely upon statements made during a mental examination may deprive resulting opinions of necessary foundation, rendering them irrelevant. When a defendant makes statements in a mental examination that an expert witness considers in forming a conclusion, those statements will be necessary components to an admissible expert opinion. Any expert opinion "is a syllogism: the major premise is the validity of the general theory or technique, the minor premise is the case specific data, and the application of major to minor yields a conclusion relevant to the merits of the case." Kenneth S. Broun, 1 *McCormick on Evidence* 72 (6th ed. 2006); see also Edward J. Imwinkelried, *The "Bases" Of Expert Testimony: A Syllogistic Structure Of Scientific Testimony*, 67 N.C. L. Rev. 1, 2-3 (1988); accord Fed. R. Evid. 702(d). An expert opinion that does not apply theory to data may lack both foundation and, consequently, relevance. *E.g.*, Fed.

R. Evid. 702(b), (d). When a defendant's statements constitute case-specific "data" for an expert, the expert's testimony on mental status will inevitably require express reliance upon them to explain opinions. The fact that an opposing party's expert may rely on different statements, or no statements at all, is of no import to this conclusion.

3. In keeping with the principle of reciprocity, however, permitting the prosecution to respond in-kind to defense expert testimony is not a blank check for the government. Prosecution expert testimony drawing upon a court-ordered mental evaluation of a defendant may be offered only in rebuttal to a mental status defense. See, *e.g.*, *State* v. *Reid*, 981 S.W.2d 166, 171 (Tenn. 1998). The scope of this protection is equivalent to the use and derivative use immunity set forth in *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). And the prosecution's rebuttal may rebut, but no more.[3] The Supreme Court of Ohio correctly characterized responsive evidence from the prosecution as only what is necessary to maintain "a level playing field between the state and the defense as to expert testimony." *State* v. *Goff*, 128 Ohio St. 3d 169, 183, 942 N.E.2d 1075, 1088 (2010). Nor do Amici contend here that the mere act of filing a notice that a mental defense may be offered bars a criminal defendant from asserting his or her Fifth

[3] The trial court in the present case understood this limitation, as evidenced by its admonition to the prosecution that it could present its rebuttal testimony "as long as you stay targeted on debugging the voluntary intoxication defense, but if you get far afield from that, I think I may have some trouble with that." J.A. 92.

Amendment rights. See, *e.g.*, *United States* v. *Hall*, 152 F.3d 381, 398 (5th Cir. 1998), cert. denied 526 U.S. 1117 (1999).

In sum, this Court should clarify that the privilege against self incrimination does not bar prosecution rebuttal evidence on mental state defenses that is directly responsive to defense expert testimony, notwithstanding state rules providing for "waiver" of the privilege under more limited circumstances. Principles of fair play and ascertainment of the truth require this approach:

> The issue of whether a defendant is criminally responsible for the offense with which he is charged is a fact for the jury to decide. Accordingly, the Commonwealth must have the right to rebut this position, a right which necessarily includes obtaining its own independent examination of the defendant. Since the results of the Commonwealth's examination are admissible only to rebut the mental health evidence introduced by the defense, Appellant can preclude introduction of the Commonwealth's evidence by declining to assert such evidence on his own behalf.

Arnold v. *Commonwealth*, 192 S.W.3d at 425, quoting *Bishop* v. *Caudill*, 118 S.W.3d 159, 164 (Ky. 2003) (quotation marks omitted). This logic guides the equitable reach of the Fifth Amendment.

II. THE KANSAS SUPREME COURT ERRED BY TETHERING THE SCOPE OF THE FIFTH AMENDMENT PRIVILEGE TO STATE-SPECIFIC PROCEDURES

1. The principles set forth above stand in stark relief to the reasoning employed by the Kansas Supreme Court in this case. That court erred by conflating the scope of the Fifth Amendment privilege against self-incrimination with state rules of evidence interpreted as providing the exclusive circumstances under which a defendant "waives" his or her privilege by presenting a mental defense. In essence, the Kansas Supreme Court has yoked the availability of the privilege against self-incrimination to the categorical label the State Legislature placed upon the mental status defense. But, "a state statute does not and cannot define the scope of constitutional rights." *Anaya* v. *Crossroads Managed Care Sys.*, 195 F.3d 584, 591 n.2 (10th Cir. 1999).

In Kansas, if a defendant indicates that he or she may pursue a defense based upon a permanent "mental disease or defect," that decision sets off a chain of events which may, in the eyes of the Kansas Supreme Court, end in a "waiver" of the privilege for purposes of prosecution expert rebuttal testimony. Conversely, the Kansas Supreme Court maintained, if this chain of events does not exist because the mental state defense does not fit statutory terminology, the Fifth Amendment privilege remains intact no matter what other strategic choices the defendant makes at trial, including presentation of expert testimony that places his or her statements into dispute on the question of *mens rea*.

A State may enact rules and laws providing more protection to criminal defendants than that afforded by the Federal Constitution.[4] See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 748 n.12 (1994). But the reasoning of the lower court in this case was erroneous because it was premised ultimately on a perceived violation of the Federal Constitution. Pet. App. 35. More specifically, what a State high court may not do is instruct its lower courts that the scope of the Fifth Amendment privilege hinges upon the vagaries and nuances of state evidence rules. The Kansas court's approach dictates as constitutional doctrine that juries in some states can hear rebuttal expert opinion on given mental state issues, while juries in other states cannot. Mental defense labels, definitions, and limitations vary substantially from jurisdiction to jurisdiction and thus are particularly ill-suited to defining the contours of the Fifth Amendment. What matters should not be the assumptions of waiver teased out of individual States' laws, but rather whether defense expert testimony is actually received that places the contents of a court-ordered mental evaluation at issue.

2. Here, Cheever "asserted a voluntary intoxication defense, based on the theory that methamphetamine use had rendered him incapable of forming the necessary premeditation" required for commission of those crimes. Pet. App. 10. The

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[4] Of course, if a State "determines that its State's laws call for protection more complete than the Federal Constitution demands," the state court must "be clear about its ultimate reliance on state law." *Ohio* v. *Robinette*, 519 U.S. 33, 44 (1996).

defense expert, Dr. Roswell L. Evans, Jr., was allowed to testify that Cheever had poisoned his brain to the point that it functioned at a significantly subnormal level. The Kansas Supreme Court held, however, that Dr. Michael Welner, a forensic psychiatrist who had conducted a court-ordered mental examination of Cheever in a related federal proceeding, should not have been permitted to controvert.

The Kansas court's rationale rested upon a sequence of events informed by Kansas criminal procedures. The end product was the court's assumption that the privilege against self-incrimination would be "waived", and prosecution expert testimony based on a court-ordered mental examination permitted, only if each of the following criteria is satisfied:

> (1) A criminal defendant files a timely notice of intent to assert at trial that he or she, "as a result of mental disease or defect lacked the mental state required as an element of the offense charged." Pet. App. 28; Kan. Stat. Ann. § 22-3219(1).
>
> (2) The defendant actually "presents evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect." Pet. App. 31.
>
> (3) The "mental disease or defect" at issue is the basis for a "mental capacity" defense. Pet. App. 32.
>
> (4) The mental capacity defense does not rely upon evidence of "voluntary-intoxication-induced-temporary mental incapacity at the time of the crime" or another condition not meeting the State's

> definition of "mental disease or defect." Pet. App. 32-35.

Under any other circumstances, the state court held, the Fifth Amendment privilege remains intact and may be asserted to bar to prosecution rebuttal testimony.

3. The Kansas court's approach is ultimately unworkable because it leaves the scope and contours of the Fifth Amendment subject to the vicissitudes of state labeling of mental defenses, and not simply to whether the defendant chooses to present a defense that opens the door to rebuttal evidence.

Certainly the States and Federal Government possess wide latitude to adopt rules of evidence permitting—or not—mental status defenses to criminal conduct, entirely apart from whether a compelled examination is admissible under the Fifth Amendment. Variety in this regard is the rule, not the exception. This Court explained why by citing

> the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Powell v. *Texas*, 392 U.S. 514, 535-536 (1968) (plurality opinion, footnote omitted). On other occasions the Court has recognized that states have historically made divergent and even transitory policy choices on the admissibility of mental defenses. See, *e.g.*, *Clark* v. *Arizona*, 548 U.S. at 750-752, 778-779; *Montana* v. *Egelhoff,* 518 U.S. 37, 46-49, 51 (1996); *Foucha* v. *Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring); *Fisher* v. *United States*, 328 U.S. 463, 473-476 (1946).

Mental defenses may take many forms, including showings of insanity, "an enduring incapacity to form the criminal state of mind necessary to the offense charged," and "the actual state of mind" at the time of the crime. *Clark* v. *Arizona*, 548 U.S. at 767-768 & 768 n.38. California's experience illustrates how rules governing admissibility of mental defenses hinge upon fine points of distinction, and even then evolve over time. According to the California Supreme Court, "[t]he essence of a showing of diminished capacity is a 'showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication.'" *People* v. *Steele*, 27 Cal. 4th 1230, 1253, 47 P.3d 225, 240 (2002) (quotation & citation omitted), cert. denied, 537 U.S. 1115 (2003). But, through the legislative and voter initiative processes, the defense of diminished capacity was abolished in the early 1980s. *People* v. *Wright*, 35 Cal. 4th 964, 978, 111 P.3d 973, 981 (2005).

Nationwide, many states disallow diminished capacity defenses. See Comment Note, *Mental or Emotional Condition as Diminishing Responsibility for Crime,* 22 A.L.R.3d 1228, at § 3 (Supp. 2012)

(collecting cases). The American Bar Association's reference manual on criminal mental health evidence law notes that "[a]lmost no jurisdictions have the traditional diminished capacity defense anymore . . . ." Parry, *supra*, § 4.04 at 138. Even so, "[n]early half of the state criminal codes provide either that intoxication is a defense if it negatives a mental state or that it is admissible in evidence whenever relevant to negate an element of the offense charged." W. LaFave, *Substantive Criminal Law* § 9.5(a), at 43 n.8 (2d ed. 2003) (citing statutes); see also *Montana* v. *Egelhoff,* 518 U.S. at 47-48 (observing that by the end of the 19th century and continuing on to the present, "in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged"); R. W. Gascoyne, Annotation, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236, § 4 (2013) (collecting cases).

These States have decided as a matter of policy that voluntary-intoxication evidence may create a significant question of fact of the jury, requiring thoughtful analysis by a jury presented with enough information to conduct a thoughtful analysis: "[W]hen a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." *Hopt* v. *People*, 104 U.S. 631, 634 (1881).

Other states, however, have adopted the view that evidence of voluntary intoxication is never admissible, even when it demonstrates the absence of a specific intent or knowledge element of a crime. LaFave, *supra*, § 9.5(a), at 46 & n.25 (citing cases and statutes); see also *Montana* v. *Egelhoff,* 518 U.S. at 48 & n.2 (citing cases and statutes). This absence of uniformity in definition, recognition, and availability of mental state defenses demonstrates the futility of tying constitutional doctrine to state definitions and labels.

4. Even the semantics attached to mental defenses defy consistency of use and meaning. For example, defining the phrase "mental disease" is anything but simple. One commentator reports how a hospital classified the diagnosis of "sociopathic personalities:" "First it was not a mental illness and then, following a weekend staff meeting, it was." Lawrence P. Tiffany & Mary Tiffany, *The Legal Defense of Pathological Intoxication* 210 (1990).

Unsurprisingly, the phrase, "mental disease or defect" has been subject to different interpretations by different states. See, *e.g.*, *Arnold* v. *Commonwealth*, 192 S.W.3d 420, 424 n.1 (Ky 2006) (agreeing that defense of voluntary intoxication falls within ambit of state rule permitting "expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his or her guilt or punishment"); *State* v. *Galloway*, 133 N.J. 631, 642, 628 A.2d 735, 741 (1993) (describing how New Jersey courts interpret "mental disease or defect" broadly: "Forms of psychopathology other than clinically-defined mental diseases or defects may affect the mental

process and diminish cognitive capacity, and therefore may be regarded as a mental disease or defect in the statutory or legal sense."); *Commonwealth* v. *Harvey*, 397 Mass. 803, 807 & n.2, 494 N.E.2d 382, 385 & n.2 (1986) (holding that the State's "mental disease or defect" rule applied where the defense offered psychiatric evidence that "the defendant did not possess the mental capacity to 'deliberately evaluate the pros and cons of carrying out an aggressive act like murder'" because of drug and alcohol use, even though this was not "the traditional defense of lack of criminal responsibility").

The nuances and variations of States' approaches to mental status defenses highlight the core argument advanced by Amici States. That is, the scope of the privilege against self-incrimination should not depend on how state law classifies a mental defense for purposes of ordering the defendant to submit to an evaluation. Rather it should turn on whether the defense produces expert testimony that places the contents of a court-ordered mental evaluation at issue in the case. See, *e.g.*, *Lewis v. State*, 195 P.3d at 633-634.

5. Finally, Kansas law excluding voluntary intoxication from the rubric of mental capacity defenses likely was not intended as a tool to assist defendants defend more effectively against criminal charges. See *Montana* v. *Egelhoff*, 518 U.S. at 49-50 (observing that disallowing evidence of voluntary intoxication on issue of *mens rea* "has the effect of increasing the punishment for all unlawful acts," ensures "that those who prove incapable of controlling violent impulses while voluntarily

intoxicated go to prison," and holds responsible those who impair their own faculties). Yet the Kansas Supreme Court held that Cheever should have been able to exercise his Fifth Amendment privilege more expansively precisely because the State's rules narrowed the meaning and availability of the voluntary intoxication defense. Because the State did not recognize Cheever's defense as a mental capacity defense, held the court, he should have been permitted to advance it without concern that the prosecution would present in-kind rebuttal evidence.

Thus, if the lower court's opinion were affirmed, the scope of the Fifth Amendment would depend upon mental defense labels and definitions set forth by individual state laws, and defendants would have an incentive to "game the system" by carefully circumscribing their mental defenses to avoid Fifth Amendment "waivers" while preserving the admissibility of their own expert's testimony. This result would be unjust, inimical to the truth-finding process, and at odds with a consistent application and coherent interpretation of the Constitution.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted,

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