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

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE

QUESTION PRESENTED

When a criminal defendant asserts a mental-status defense and offers evidence to support that defense at trial, has the defendant waived the Fifth Amendment privilege against self-incrimination so that the prosecution may rebut the defense with evidence from a court-ordered mental evaluation?

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The opinion of the Kansas Supreme Court is reported at *State v. Cheever*, 284 P.3d 1007 (Kan. 2012), and is reproduced in the Petition for a Writ of Certiorari as Appendix A.

JURISDICTION

The Kansas Supreme Court decided this case August 24, 2012. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fifth Amendment** to the United States Constitution provides, in pertinent part, "No person ... shall be compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V.

The **Fourteenth Amendment** to the United States Constitution provides, in pertinent part, "... nor shall any State deprive any person of life, liberty, or property without due process of law ...." U.S. Const. amend. XIV.

The relevant Kansas statutes and relevant sections of Federal Rule of Criminal Procedure 12.2 are set forth in full in the Petition for a Writ of Certiorari at pages 2-5.

STATEMENT OF THE CASE

1. ***The Murder of Sheriff Samuels.*** On January 19, 2005, Greenwood County Sheriff Matt Samuels, accompanied by two deputies, went to the Cooper home in a rural part of Greenwood County, Kansas, known as "Hilltop" (and known for illegal drug activity) to execute a warrant for Scott Cheever's arrest. Cheever was at the Cooper home that day cooking methamphetamine. As the law enforcement officers were approaching the property, the Coopers informed Cheever that the police were coming and were outside the house. Cheever then hid with a companion in an upstairs room where he had been making methamphetamine. Cheever was armed with a pair of handguns he had stolen from his stepfather, including a .44 caliber weapon.

When Sheriff Samuels went to the door of the Cooper house, Darrell Cooper lied and told the Sheriff that Cheever was not there. (Pet. App. 108.) The Sheriff asked if he could look around the house anyway. Cooper consented, and the Sheriff entered the house. Cheever heard the Sheriff ask "Where does this lead?" apparently referring to the stairs. (Pet. App. 108). Sheriff Samuels started up the stairs. Cheever testified "[t]hat's when I look out the door and he's [Sheriff Samuels] like right there, and I pull the trigger and shoot him and then as soon as I do that I jump back in the room …." (Pet. App. 110.) At that point, Cheever had shot Sheriff Samuels once in the chest at close range (about 10 feet) with a .44 caliber revolver.

After Cheever retreated into the bedroom, he told his companion "Don't go out the window. They'll shoot

you." (Pet. App. 110.) Then, according to Cheever, "I turn around and look and I don't see Matt [Samuels] anywhere, and I walk over by the railing and I look down and I see him again, and I pull the trigger again and shoot him." (Pet. App. 110.) Cheever testified that "[t]hen I jump back and go back into the room." (Pet. App. 110.) Cheever admitted that he knew he was shooting Sheriff Samuels when he fired both shots, including the first shot. (Pet. App. 110-111.)

Sheriff Samuels lay mortally wounded at the foot of the stairs when Deputy Sheriff Michael Mullins attempted to provide first-aid, but Cheever then shot at Deputy Mullins. Cheever abated fire after Mullins yelled at Cheever to stop so that the deputies could get the Sheriff out of the house. Mullins started CPR on the Sheriff while another deputy, Tom Harm, radioed for help. Sheriff Samuels was taken to a hospital, but his wounds – caused by two .44 caliber shots to the chest at close range, a distance of at most 10 feet – were fatal.

After the shooting, state and local law enforcement officers surrounded the Cooper house. After roughly seven hours, a Kansas Highway Patrol (KHP) special response team entered the house and rushed the stairs through a hail of gunfire from Cheever. Cheever shot one KHP officer who was wearing a bulletproof vest, but ran out of ammunition for the .44 caliber weapon. When the response team cleared the top of the stairs and began returning fire, Cheever finally stopped shooting and surrendered.

2. ***The Criminal Prosecutions of Cheever.*** Cheever was charged in state court with capital murder for the killing of Sheriff Samuels, with attempted capital murder for shooting at Deputies Mullins and Harm, and with attempted capital murder for shooting at the KHP response team officers who took him into custody. Cheever also was charged with manufacturing methamphetamine, conspiracy to manufacture methamphetamine, and criminal possession of a firearm.

However, because the Kansas Supreme Court recently had held Kansas' death penalty statute unconstitutional, *see State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *reversed*, *Kansas v. Marsh*, 548 U.S. 163 (2006), and that decision was still under review by this Court, the State asked federal authorities to prosecute Cheever under the Federal Death Penalty Act. Cheever then was indicted on thirteen federal counts, including capital murder. USDC Case No. 05-10050-01-MLB; *see also United States v. Cheever*, 423 F.Supp.2d 1181 (D. Kan. 2006).

In the federal case, Cheever filed notice, pursuant to Federal Rule of Criminal Procedure 12.2(b), that he intended "to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events on January 19, 2005, which negated his ability to form specific intent, *e.g.,* malice aforethought, premeditation and deliberation." (USDC Case No. 05-10050-01-MLB, Doc. 205). (Pet. App. 69-70.) Pursuant to Rule 12.2(c), the district court ordered a psychiatric evaluation of Cheever by Dr. Michael Welner, a forensic psychiatrist and clinical pyschopharmacologist, to assess (1) "the relationship of methamphetamine

and Scott Cheever's use of it on January 19th, 2005, to his killing Matthew Samuels," (2) the effects of Cheever's ongoing methamphetamine use, and (3) "to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels." (J.A. 111.)

In September, 2006, the case proceeded to jury trial. However, several days into the trial, Cheever's defense counsel became unable to continue, resulting in a halt of the proceedings. In the meantime, this Court reversed the Kansas Supreme Court in *Kansas v. Marsh* and held that the Kansas death penalty statute is constitutional. The federal case was then dismissed without prejudice, and Kansas recommenced the state prosecution.

a. ***The State's Case Against Cheever.*** At trial, the State presented the testimony of the various law enforcement officers involved in the events of January 19, 2005. Cheever himself testified in his own defense and admitted that he shot and killed Sheriff Samuels. Cheever testified that he shot the Sheriff once at close range, retreated into the room in which Cheever had been hiding, spoke to his companion, and then stepped out and shot a helpless and gravely wounded Sheriff Samuels at close range a second time, knowing the entire time that it was Sheriff Samuels he was shooting. (Pet. App. 108-111.) Cheever also admitted shooting at Deputies Mullins and Harm when they tried to rescue Sheriff Samuels, and he admitted shooting at the KHP Troopers when they entered the house.

Cheever also admitted to manufacturing methamphetamine, that he previously had pled guilty to robbing a grocery store and assaulting a clerk, and that at the time he shot Sheriff Samuels he (Cheever) was a felon in unlawful possession of a firearm (multiple stolen firearms actually).

b. ***Cheever's Defense.*** Cheever's defense was that both his long-term and short-term use of methamphetamines affected his ability to use rational judgment and to form intent. Relying on both his own testimony and the expert testimony of Dr. R. Lee Evans, a psychiatric pharmacist, Cheever argued that he was incapable of forming the necessary intent for the capital murder charge, *i.e.*, he lacked the mental ability to "premeditate" the murder he committed on January 19, 2005.

c. ***Expert Testimony – Cheever's Expert.*** In support of his mental-status defense, Cheever offered the testimony of Dr. Evans. Dr. Evans identified himself as a "psychiatric pharmacy specialist." (J.A. 32.) He explained that his work involved "questions about how drugs affect people." (J.A. 33-34.) Like the State's expert, he conducted an in-person interview and examination of Cheever. (J.A. 35.)

Dr. Evans described the effects of methamphetamine on the brain. He testified that, over time, such drug abuse inhibits brain functions, including decision-making, and causes side effects such as paranoia and violence. Dr. Evans further testified that, on the day of the murder, Cheever was under the intoxicating effects of methamphetamine and was incapable of rational thought. He opined that Cheever's

shooting of Sheriff Samuels was a drug-induced reaction to a perceived threat, and not the result of any thought process. Dr. Evans also discussed paranoid psychosis, drug-induced psychosis, and drug-induced paranoia, (J.A. 43-44.), and he opined that Cheever showed "symptoms of psychosis." (J.A. 47.) Dr. Evans' opinion was that Cheever's use of methamphetamine affected Cheever's ability to premeditate the capital crimes. (J.A. 40-44, 46-52.)

d. ***Expert Testimony – The State's Rebuttal.*** In rebuttal, the State called Dr. Welner, the psychiatrist who evaluated Cheever in the federal case after Cheever filed a notice under Fed. R. Crim. P. 12.2 of his intent to rely on the same defense in that proceeding.

Dr. Welner is a forensic psychiatrist and "board certified in ... clinical psychopharmacology." (J.A. 95.) He explained that psychopharmacology "relates to medications and drugs, and other kinds of physical treatments and their relationship to psychiatric illness." (J.A. 95-96.) He has worked on cases involving methamphetamine and treated patients who used methamphetamine. (J.A. 109.) For this case, he reviewed the police reports, witness interviews, medical reports, and historical evidence regarding Cheever's past behavior and substance abuse. (J.A. 112-13.) In conducting the federal court-ordered examination of Cheever, he interviewed Cheever for several hours, read materials that Cheever had written, and reviewed Cheever's prior neuropsychological testing. For the state trial, he also reviewed Dr. Evans' report on Cheever. (J.A. 113-14.)

As did Dr. Evans, Dr. Welner discussed paranoia and its symptoms. (J.A. 118-19.) Dr. Welner concluded that no information he received or reviewed "demonstrated a change in [Cheever's] behavior" from the time that he [Cheever] went to the Cooper residence, before he used methamphetamine, or after Cheever injected himself the morning of the murder: "there were not signs from the history of a remarkable change in [Cheever] after he used the methamphetamine that morning." (J.A. 124-26.)

Dr. Welner explained that in evaluating the relationship between methamphetamine and Cheever's behavior on January 19, 2005, he considered a variety of other possible influences such as alcohol use, personality conditions, mental disorders, and environmental phenomena. (J.A. 131-33.) He also discussed with Cheever the effects methamphetamine had on Cheever. (J.A. 134-35.)

Dr. Welner explained that Cheever's perceptions and awareness of his surroundings on January 19, 2005, were unimpaired, pointing out that Cheever engaged in a series of decisions once the police arrived, decisions that demonstrated functioning thought processes and an ability to control his actions. The crux of Dr. Welner's testimony was that, based on the available evidence of Cheever's conduct before he used methamphetamine that morning and his conduct afterward, there was no observable change in Cheever's behavior, nor was there evidence that his perceptions or decision-making ability were impaired. (J.A. 125-26, 135-41.) In Dr. Welner's professional opinion, Cheever retained the ability to think before acting on the

morning he murdered Sheriff Samuels and was able to form the premeditated intent to kill. (J.A. 136-41.)

Dr. Welner's testimony thus mirrored the same central issues that Dr. Evans' testimony addressed. The two experts covered the same topics and relied on much of the same scientific evidence and reporting.

3. ***Conviction, Sentence and Appeal.*** The jury found Cheever guilty on all counts, and Cheever was sentenced to death for capital murder. On direct appeal, the Kansas Supreme Court reversed the capital murder and attempted capital murder convictions and the death sentence, holding that the admission of Dr. Welner's rebuttal testimony violated Cheever's Fifth Amendment privilege against self-incrimination. The court observed that "Cheever relies primarily on *Estelle v. Smith*, 451 U.S. 454 (1981), *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and several related cases to argue that because he had not waived the privilege by presenting evidence of a mental disease or defect at trial, the State was precluded by the Fifth Amendment from using statements he made during Welner's examination, conducted as part of the federal case, against him." (Pet. App. 22.)

The court determined that, under Kansas law, Cheever's defense was "voluntary intoxication," and was not the same as or the equivalent of a claim of "mental disease or defect" as defined by Kansas statutes. As a result, the court opined that Cheever's intoxication defense would not—under Kansas law—have justified a court-ordered mental examination. Thus, the Fifth Amendment was violated because Cheever's defense did not waive his Fifth

Amendment privilege or open the door to the use of Dr. Welner's testimony as rebuttal. (Pet. App. 30-35.)

The court held:

> Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial.

(Pet. App. 34-35.)

SUMMARY OF THE ARGUMENT

I.A. The Court's precedents point to the clear answer to the Question Presented in this case. In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that evidence from a court-ordered competency examination of a defendant could not be used against him in a capital sentencing proceeding when he had neither initiated the examination nor put his mental state in issue at trial. However, in *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987), the case that effectively controls the outcome here, the Court clarified the scope of *Smith*, holding that *Smith* does not apply "if a defendant requests such an evaluation or presents psychiatric evidence …."

In *Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*), the Court emphasized that in *Buchanan* "the Court held that the defendant waived his Fifth

Amendment privilege by raising a mental-state defense." *Powell* suggests that such a waiver necessarily occurs because "it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony." *Id*. at 685. Read together, these three cases compel the conclusion that Cheever waived his Fifth Amendment privilege with respect to the court-ordered mental examination when he asserted a mental-status defense and presented evidence to support that defense, including his own expert witness.

I.B. The Kansas Supreme Court's decision also is contrary to general Fifth Amendment principles. This Court consistently has recognized that a defendant can waive the Fifth Amendment privilege against self-incrimination by taking actions inconsistent with the invocation of the privilege. *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 2262 (2010); *Mitchell v. United States*, 526 U.S. 314, 321 (1999); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

Indeed, by way of close analogy, if a defendant "takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness, and *the breadth of his waiver is determined by the scope of relevant cross-examination*." *Brown v. United* States, 356 U.S. 148, 154-55 (1958) (emphasis added). In this case, Cheever's deliberate decision to assert a mental-status defense and introduce evidence supporting that defense necessarily waived his Fifth Amendment privilege with respect to issues and evidence relevant to that defense. Cheever made a tactical trial decision here, and should be held to the consequences of his choices and actions.

Cases such as *New Jersey v. Portash*, 440 U.S. 450 (1979), and *Mincey v. Arizona*, 437 U.S. 385 (1978), holding that a compelled statement cannot be used for any purpose, are inapposite here. In those cases, the defendants were subjected to true governmental compulsion that was not in any sense of their own making while here, in contrast, Cheever himself made the decision that led to the court-ordered mental examination and, even then, he could have declined the examination without being sent to jail or intimidated by police. Furthermore, in both *Portash* and *Mincey*, the State was using the defendant's own unvarnished, compelled statements to impeach the defendant, not an expert's report of a mental evaluation of the defendants to rebut a mental-status defense.

I.C. A fundamental flaw in the Kansas Supreme Court's decision is that court's reliance on Kansas law to determine whether Cheever had waived his Fifth Amendment privilege against self-incrimination. "The question of a waiver of a federally guaranteed constitutional right is, of course, a *federal question controlled by federal law*." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (emphasis added). A state could, of course, enact state laws or interpret its state constitution to afford greater protection than the Fifth Amendment provides, *as a matter of state law*. But a state cannot interpret the Fifth Amendment to afford greater protection than the Self-Incrimination Clause actually provides. *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

Under *Buchanan*, when a defendant raises a mental-status defense and supports it with evidence, the prosecution may use evidence from a court-ordered mental examination to rebut that defense without

violating the Fifth Amendment. The admissibility of such evidence does not turn on the label attached to the defense or the titles or qualifications of the witnesses, nor does it matter whether the defense evidence itself is classified as "psychiatric" or "psychological," or something else. What matters is the *substance of the defense asserted* and the evidence actually presented.

II. When Dr. Welner's rebuttal testimony is laid alongside the testimony of Dr. Evans in Cheever's defense, it is clear that both experts addressed the same central issues regarding Cheever's mental status on the day he murdered Sheriff Samuels, and both experts opined on the same subjects. By raising his mental-status defense, Cheever made a deliberate tactical choice that was inconsistent with his invocation of the Fifth Amendment privilege. Thus, Cheever necessarily waived his privilege. The Fifth Amendment did not prohibit the State from responding to Cheever's mental-status defense with Dr. Welner's testimony.

ARGUMENT

I. WHEN A DEFENDANT PRESENTS A MENTAL-STATUS DEFENSE, THE FIFTH AMENDMENT PRIVILEGE IS WAIVED AND THE PROSECUTION MAY REBUT THAT DEFENSE WITH EVIDENCE FROM A COURT-ORDERED MENTAL EXAMINATION.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that evidence from a court-ordered competency examination of a defendant could not be used against the defendant in a capital sentencing proceeding on the question of "future dangerousness" when he had

neither initiated the examination nor put his mental state in issue at trial. In *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987), however, the Court held that *Smith* does not apply "if a defendant requests such an evaluation or presents psychiatric evidence."

When a defendant asserts a mental-status defense – such as the "extreme emotional disturbance" defense at issue in *Buchanan* – giving rise to a court-ordered mental evaluation, and then presents evidence at trial to support the defense, "at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination …. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Id*. at 422-23. *See also Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*) ("it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony"); *id*. ("In that case [*Buchanan*], the Court held that the defendant waived his Fifth Amendment privilege by raising a mental-state defense.").

The Kansas Supreme Court here reached a result that is contrary to the reasoning of *Smith* and *Buchanan*, as well as general Fifth Amendment principles. The essential rationale of *Buchanan* is that a defendant cannot have his cake and eat it too, by asserting a mental-status defense and presenting evidence to support it but then expecting to be immunized at trial from contrary rebuttal evidence that is lawfully in the State's possession. In this case, Cheever attempted to do just that – present an allegedly scientific, mental-status defense (based on his

methamphetamine usage) through his own and expert testimony, while simultaneously seeking immunity from effective rebuttal by arguing that he was not raising a mental-status defense under Kansas law.

Ruling in Cheever's favor, the Kansas Supreme Court relied on Kansas statutory definitions of voluntary intoxication and mental disease or defect to draw an artificial *federal constitutional* distinction between the two state law defenses, a distinction that in fact fails to acknowledge that a voluntary intoxication defense necessarily is a "mental-status" defense for Fifth Amendment purposes. The Kansas Supreme Court's reasoning is inconsistent with this Court's Fifth Amendment precedents and, if followed, would undermine reliability in criminal trials without a constitutional command to reach such a result.[1]

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[1]Any issues regarding the scope of Dr. Welner's testimony are not properly before this Court for two reasons. First, such questions are not fairly subsumed within the Question Presented. Second, the Kansas Supreme Court did not rely on any such rationale in reversing the conviction and sentence here but, rather, relied solely on the fact that Dr. Welner was allowed to testify *at all* regarding Cheever's mental-status defense. If Dr. Welner's testimony somehow exceeded the scope of proper rebuttal regarding Cheever's mental-status defense, or improperly referred to inculpatory statements Cheever made to Dr. Welner, those issues would be addressed, if at all, on a remand from this Court to the Kansas Supreme Court, presumably to be considered under the relevant rules of evidence. Indeed, Respondent has represented to the Court that he "made this argument in the Kansas Supreme Court, but the court did not reach it." Brief in Opposition at 21.

A. *Buchanan v. Kentucky*, 483 U.S. 402 (1987), Establishes That When A Defendant Asserts A Mental-Status Defense And Supports It With Evidence, The Defendant Waives The Fifth Amendment Privilege With Respect To Evidence From A Court-Ordered Mental Examination Used To Rebut The Defense.

1. *Estelle v. Smith* (1981). The analytical starting point—but not the ending point as the Kansas Supreme Court erroneously believed—for answering the Question Presented is *Estelle v. Smith*, 451 U.S. 454 (1981). There, the defendant was charged with murder and the State announced it would seek the death penalty. 451 U.S. at 456. The district court *sua sponte* ordered a competency evaluation of the defendant by a psychiatrist, even though defense counsel had not raised competency or sanity issues. *Id.* at 457. Significantly, defense counsel did nothing to initiate the examination, nor was defense counsel even notified prior to the examination occurring. *Id.* at 459, n.5.

The mental evaluation in *Smith* was not used in the guilt phase of the trial, but was introduced during the penalty phase when the State called the examining psychiatrist to establish the defendant's "future dangerousness," a factor used in deciding whether to impose the death penalty under Texas law at that time. 451 U.S. at 458-60. The State presented this psychiatric evidence even though the defendant did not present a mental-status defense and did not call any expert witnesses with regard to sentencing. *Id.* The Court in *Smith* emphasized that the State did not present the expert psychiatric testimony to rebut any

evidence the defense presented but, rather, used the psychiatrist's testimony "as affirmative evidence to persuade the jury to return a sentence of death." *Id.* at 466.

Under those narrow and unusual circumstances, the Court held that such use of a court-ordered psychiatric evaluation violated the defendant's Fifth Amendment privilege against self-incrimination. 451 U.S. at 468-69. Specifically, the Court held that "[a] criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468.

The Court further observed, however, that "[w]hen 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." 451 U.S. at 465. The Court thus expressly left open the possibility that when a defendant raises a mental-status defense, such a tactical decision could constitute a waiver of the Fifth Amendment privilege. *Id.*

2. *Buchanan v. Kentucky* (1987). In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Court addressed the question it reserved in *Estelle*, the very question that controls the outcome in this case. The defendant in *Buchanan* was charged with murder and raised an affirmative defense of "extreme emotional

disturbance."[2] 483 U.S. at 407-08. At trial, the defendant called a social worker who had been assigned to his case and had her read "from several reports and letters dealing with evaluations of [the defendant's] mental condition." *Id.* at 409-10. The State responded by having the witness read from another report of a psychological evaluation of the defendant that was conducted shortly after the defendant's arrest. *Id.* at 410.

The defendant claimed that permitting the State to use the second report violated his Fifth Amendment privilege against self-incrimination, but the Court rejected that argument. Instead, the Court held that the admission of the post-arrest psychological evaluation evidence to rebut the evidence the defendant offered in support of his mental-status defense did not violate the Fifth Amendment. 483 U.S. at 423-24. The Court distinguished *Smith*, pointing out

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[2] The "extreme emotional disturbance" defense at issue in *Buchanan* was not a state-law mental-status defense equivalent to an insanity or mental disease or defect defense. *See* 483 U.S. at 401 n.8 (citing *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980), and *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985)). The Kentucky cases make clear that (1) "extreme emotional disturbance" is a phrase that, like "sudden heat and passion," differentiates the crimes of murder and manslaughter, and (2) "[t]he contention that mental illness and extreme emotional disturbance are one and the same is without merit." *Wellman*, 694 S.W.2d at 697. Thus, under this defense, a Kentucky jury may find that a mentally healthy person experienced an "extreme emotional disturbance," and that even a mentally ill person did not act under an "extreme emotional disturbance." The Kansas Supreme Court's reasoning, however, likely would have required a different result in *Buchanan*, which simply proves the Kansas court's error.

that, unlike in *Smith,* Buchanan's "entire defense strategy was to establish [a] 'mental status' defense." *Id.* at 423. Thus, Buchanan's tactical decision to raise a mental-status defense resulted in a different holding than *Smith*:

> if a defendant requests such an evaluation or presents psychiatric evidence, then, 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.

483 U.S. at 422-23.

After *Buchanan*, it is apparent that *Estelle v. Smith* stands for a narrow proposition that has no application in the circumstances presented here. "Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecution in rebuttal." *Buchanan*, 483 U.S. at 425 n. 21. *Buchanan* established that a defendant waives his Fifth Amendment privilege with respect to evidence from a court-ordered mental exam when the defendant raises a mental-status defense and introduces evidence to support that defense.

Ultimately, the principles of *Estelle v. Smith* and *Buchanan v. Kentucky* are clear. The Kansas Supreme Court simply misapprehended the Fifth Amendment principles those cases establish. Furthermore, even if the line between *Estelle v. Smith* on the one hand, and

Buchanan v. Kentucky on the other, was not immediately clear after *Buchanan* was decided, any possible uncertainty was put to rest in *Powell v. Texas*, 492 U.S. 680 (1989).

3. *Powell v. Texas* (1989). In *Powell*, on the very day the defendant was arrested, the trial court ordered a psychiatric examination to determine competency to stand trial and sanity. The defendant was examined by two different mental health professionals on a total of six occasions. When the State then used the experts in the sentencing phase to testify to the defendant's future dangerousness, the defendant objected, arguing that the admission of such evidence violated his Sixth Amendment right to counsel because his attorney was never informed that the mental examinations would address future dangerousness. 492 U.S. at 681-82.

The Texas Court of Criminal Appeals rejected the Sixth Amendment argument, concluding that the defendant waived his Sixth Amendment right "by introducing psychiatric testimony in support of a defense of insanity" during the guilt phase of the trial. 492 U.S. at 683. After a GVR by the Court for reconsideration in light of *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Texas Court of Criminal Appeals reaffirmed its original ruling, but this Court summarily reversed that decision.

Importantly, the Court drew a clear distinction between a Sixth Amendment right to counsel claim in this context and a Fifth Amendment privilege against self-incrimination claim. 492 U.S. at 683-84. Reviewing both *Estelle v. Smith* and *Buchanan v. Kentucky*, the Court pointed out that

> In *Smith* we observed that '[w]hen 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.' And in *Buchanan* the Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense.

492 U.S. at 684 (internal citations omitted).

The Court emphasized that "the waiver discussions contained in *Smith* and *Buchanan* deal solely with the Fifth Amendment right against self-incrimination. Indeed, both decisions separately discuss the Fifth and Sixth Amendment issues so as not to confuse the distinct analyses that apply." 492 U.S. at 684. In contrast to those cases, the defendant in *Powell* was relying on a Sixth Amendment claim and the Texas courts erred by analyzing it as a Fifth Amendment claim instead: "While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to require the state to provide counsel with notice before examining the defendant concerning future dangerousness." *Id*. at 685.

Here, the State's use of Cheever's court-ordered mental examination to rebut the mental-status defense he injected into the trial and supported with expert

testimony is controlled by the rule of *Buchanan*, as the *Powell* decision makes clear: "In [*Buchanan*], the Court held that a defendant waived his Fifth Amendment privilege by raising a mental-status defense." 492 U.S. at 685. Unlike in *Powell*, Cheever's mental examination evidence was introduced in the guilt phase of the trial as rebuttal evidence on the issue of intent, here premeditation, not to address a capital sentencing factor like "future dangerousness." Furthermore, there is no Sixth Amendment right to counsel claim before the Court. Thus, the Fifth Amendment waiver principles of *Estelle v. Smith*, *Buchanan v. Kentucky*, and *Powell v. Texas*, confirm that the Kansas Supreme Court erred.

B. Fifth Amendment Rights Necessarily Are Waived When A Defendant Presents A Mental-Status Defense Because A Contrary Conclusion Would Undermine Reliability In Criminal Prosecutions.

1. A defendant may waive the Fifth Amendment privilege by tactical decision or actions.

The Court consistently has recognized that a defendant can waive the Fifth Amendment privilege against self-incrimination by actions inconsistent with the invocation of the privilege. For example, "[i]t is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (internal citations omitted); *see also North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (a waiver of Fifth Amendment rights

can be "'inferred from the actions and words of the person'" or a "course of conduct indicating waiver"); *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 2262 (2010) (same).

Thus, by way of close analogy to this case, if a defendant "takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness, and *the breadth of his waiver is determined by the scope of relevant cross-examination*." *Brown v. United* States, 356 U.S. 148, 154-55 (1958) (emphasis added). Indeed, over fifty years ago the Court aptly described the purposes and limits of the Fifth Amendment privilege as follows:

> The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, *an immunity from cross-examination on the matters he has himself put in dispute*. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.

Id. at 155-156 (emphasis added).

In this case, Cheever's decision to assert a mental-status defense and support that defense both with expert and his own testimony necessarily waived his Fifth Amendment privilege with respect to issues and evidence relevant to that defense. By his own decisions and course of conduct, not by virtue of any compulsion or improper action by the prosecution, Cheever acted inconsistently with the assertion of his Fifth Amendment privilege, and should be held to the consequences of his tactical decisions and actions.

The situation presented here is substantively the same as *Buchanan*. Like the defendant in *Buchanan*, Cheever's "entire defense strategy was to establish [a] 'mental status' defense." 483 U.S. at 423. Indeed, Cheever readily admitted, in his own testimony, that he shot and killed Sheriff Samuels. Although Cheever's defense was based on methamphetamine usage rather than the "extreme emotional disturbance" defense in *Buchanan*, both defenses are, substantively and objectively, mental-status defenses.

2. Finding waiver in these circumstances is necessary to ensure reliability in the criminal process.

The Kansas Supreme Court, however, missed the point of *Buchanan*, so plainly stated by the trial court in the *Buchanan* case: "you can't argue about [the defendant's] mental status at the time of the commitment of this offense and exclude evidence when he was evaluated with reference to that mental status." 483 U.S. at 412; *see also United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (*en banc*) (plurality opinion by Scalia, J.) (courts "have denied the Fifth

Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability"); *Blaisdell v. Commonwealth*, 364 N.E.2d 191, 766 (Mass. 1977) (a jury should "have the benefit of countervailing expert views, based on similar testimonial statements of a defendant in discharging its responsibility of making a true and valid determination of the issues thus opened by a defendant.").

"We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Oregon v. Hass*, 420 U.S. 714, 722 (1975). Here, a court ordered Dr. Welner to assess specifically (1) "the relationship of methamphetamine and Scott Cheever's use of it on January 19th, 2005, to his killing Matthew Samuels," (2) the effects of Cheever's ongoing methamphetamine use, and (3) "to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels." (J.A. 111.) When Cheever presented the testimony of Dr. Evans and his own testimony on those very issues in support of Cheever's mental-status defense, Cheever acted contrary to his invocation of the Fifth Amendment privilege. His deliberate decisions and actions necessarily acted as a waiver of his Fifth Amendment privilege, at least with respect to the prosecution's use of Dr. Welner's evaluation to rebut Cheever's mental-status defense.

In this case, "the prosecution did no more than utilize the traditional truth-testing devices of the adversary process," *New York v. Harris*, 401 U.S. 222,

225 (1971), when it introduced Dr. Welner's testimony to rebut Cheever's mental-status defense. When there has been no waiver, the "Fifth Amendment … is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise," *Kansas v. Ventris*, 556 U.S. 586, 590 (2009). But when there has been a waiver by the defendant, constructive or otherwise, the "Government is not forbidden all resort to the defendant to make out its case." *Michigan v. Tucker*, 417 U.S. 433, 450 (1974). Instead, there is a "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Id*.

The *Buchanan* rule – if a defendant "presents psychiatric evidence," the defendant has waived the "Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution," 483 U.S. at 422-23 – is fully consistent with the Court's general Fifth Amendment and criminal procedure jurisprudence, case law that recognizes the societal interest in a fair inquiry and reliable verdict while still effectively protecting individual constitutional rights.

Barring the State's use of such evidence in rebuttal would unreasonably preclude the jury from considering relevant and reliable evidence about a matter *the defendant has affirmatively and deliberately injected* into the trial. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token

always forbid requiring him to choose." *Crampton v. Ohio*, 402 U.S. 183, 213 (1971).

Further, it is inherently unfair to allow the defendant to raise a mental-status defense without granting the State *any* meaningful opportunity to contest the defense through lawfully obtained rebuttal evidence. *Powell*, 492 U.S. at 685 ("it may be unfair to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony"); *Schneider v. Lynaugh*, 835 F.2d 570, 576 (5th Cir. 1988) ("It is unfair and 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."); *United States v. White*, 21 F.Supp.2d 1197, 1200 (E.D. Cal. 1998) (observing that the "overarching rationale" of court decisions compelling a psychiatric examination of a defendant claiming insanity "is one of 'fundamental fairness' and 'judicial common sense.'")

In order to ensure reliable verdicts, the State must be permitted to present rebuttal evidence such as the evidence presented here once a defendant has raised a mental-status defense and introduced evidence in support of that defense. Unlike the situation where a defendant chooses to testify and the question is whether certain evidence may be used to impeach the defendant (and there often remain several other grounds for impeachment, such as prior convictions, for example), the *only* effective rebuttal evidence to a mental-status defense may be the results of a court-order mental examination. Reliability and fairness are

fundamental reasons the Court long has recognized that a defendant's actions inconsistent with the Fifth Amendment privilege necessarily may waive that privilege even with respect to unlawfully obtained or in some sense compelled evidence.

Thus, the Court has found waiver in a number of contexts, most especially when a defendant testifies at trial, *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971), or when the defendant puts on a defense contrary to invocation of the privilege. *Buchanan v. Kentucky*, 483 U.S. 402 (1987). *See also Kansas v. Ventris*, 556 U.S. 586 (2009) (summarizing Fourth, Fifth and Sixth Amendment cases); *Crampton*, 402 U.S. at 215 ("it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify").

3. The Court's "compelled statement" cases are inapposite here.

Cases such as *New Jersey v. Portash*, 440 U.S. 450 (1979), or *Mincey v. Arizona*, 437 U.S. 385 (1978), have no bearing here. In those cases, there was no claim that the defendant had waived his Fifth Amendment privilege by virtue of raising and asserting a mental-status defense, or any other claim that the defendant's own decisions had initiated the creation of statements that might later be used against him. Furthermore, in both *Portash* and *Mincey*, the State was using the defendant's own unvarnished, compelled statements to impeach the defendant, not an expert's report of a

mental evaluation of the defendants to rebut a mental-status defense.

In *Portash*, for example, the defendant was subpoenaed to appear before a grand jury, *i.e.*, he was "told to talk or face the government's coercive sanctions, notably a sanction for contempt." 440 U.S. at 459. And in *Mincey*, "the undisputed evidence makes clear that Mincey wanted *not* to answer Detective Hust. But Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne." 437 U.S. at 402. In each case, the defendant did nothing to initiate the creation of the defendant's own statements, the very evidence the State later used to impeach the defendant.

This case is distinguishable in both respects. First, Cheever's own trial tactic – his decision to assert and support a mental-status defense – initiated the court-ordered mental examination. Cheever could have insulated himself from any such examination by withdrawing his mental-status defense. He faced no contempt of court or police intimidation.

Cheever, however, made a deliberate decision, one inconsistent with maintaining his Fifth Amendment privilege with respect to the mental examination. Indeed, the federal court ordered the mental examination *only because* Cheever asserted a mental-status defense when he gave notice under Fed. R. Crim. P. 12.2 (see Pet. App. 69-71), and Cheever's counsel certainly knew the effect of filing such a notice was likely to be a court-ordered mental examination. Under these circumstances, the fundamental purposes of the

Fifth Amendment are not contravened by allowing the State to use the results of that examination for the very limited purpose of rebutting Cheever's mental-status defense at trial.

Second, here the State presented the testimony of an expert who evaluated Cheever's mental state; the state did not simply introduce a transcript of prior compelled statements made by Cheever. Moreover, in the impeachment context, the prosecution generally will have considerable ability to impeach a defendant's testimony even without using any compelled statements of the defendant (*e.g.*, using prior convictions). In stark contrast, in the context of a defendant raising a mental-status defense, the prosecution realistically may not have any potentially relevant or effective rebuttal evidence except for a court-ordered mental examination.

Thus, unlike the defendants in *Portash* and *Mincey*, Cheever made a tactical decision to assert a mental-status defense, a decision that was inconsistent with his invocation of the Fifth Amendment privilege with respect to the court-ordered mental examination.

C. The Kansas Supreme Court Improperly Relied On The State Law Label That Court Attached To Cheever's Defense To Determine Whether He Had Waived His Fifth Amendment Privilege, Rather Than Focusing On The Substance Of Cheever's Defense And The Evidence He Actually Presented To Support The Defense.

1. The label state law attaches to a defense does not determine whether a defendant has waived the Fifth Amendment privilege.

A fundamental flaw in the Kansas Supreme Court's decision is that court's reliance on Kansas law to determine whether Cheever had waived his Fifth Amendment privilege against self-incrimination. (Pet. App. 31-35) (relying on a distinction in Kansas law between the state law defenses of mental disease or defect and voluntary intoxication, specifically Kan. Stat. Ann. §§ 22-3219 and 22-3220). That was constitutional error: "The question of a waiver of a federally guaranteed constitutional right is, of course, a *federal question controlled by federal law*." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (emphasis added).

A state could, of course, enact state laws or interpret state constitutional provisions to afford greater protection than the Fifth Amendment provides, *as a matter of state law*. But a state cannot – or more precisely, here, a state supreme court cannot – interpret *the Fifth Amendment* to afford greater protection than the Self-Incrimination Clause actually provides. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free as a matter of its own law to impose

greater restrictions … than those this Court holds to be necessary upon federal constitutional standards. *But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them*.") (emphasis added) (internal citations omitted).

Thus, the Kansas Supreme Court's distinction between the state law defenses of mental disease or defect on the one hand, and voluntary intoxication on the other, may make a difference for state law purposes, but such a state-law distinction has no significance under the Fifth Amendment. Whether a court would have ordered an evaluation of Cheever had the case proceeded entirely under Kansas law – a point pressed by the defense in objecting to Dr. Welner's testimony, (J.A. 88-91.) – is irrelevant to the Fifth Amendment waiver analysis. The fact is Dr. Welner's evaluation of Cheever in the federal case was entirely lawful. Cheever's own deliberate, tactical decision to assert a mental-status defense initiated the court-ordered examination.

The Kansas Supreme Court's other fundamental mistake in this case was its failure to acknowledge that voluntary intoxication is a mental-status defense for Fifth Amendment purposes. That conclusion is inevitable if a court considers both the actual substance of the "voluntary intoxication" defense under Kansas law,[3] and the evidence Cheever introduced to support

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[3] *See* Kan. Stat. Ann. § 21-5205(b): "An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a

the defense. Indeed, there can be no debate in this case that Cheever put on a "mental-status" defense. Although he labeled his defense "voluntary intoxication" rather than "mental disease or defect" or "diminished capacity" or "insanity," the crux of Cheever's defense was that he did not possess the requisite mental state to premeditate and intend the murder of Sheriff Samuels.

The Kansas Supreme Court also turned a blind eye to the circumstances that gave rise to Dr. Welner's rebuttal testimony. The federal court order directing Cheever to undergo a mental examination was based precisely on Cheever's filing of notice in federal court under Fed. R. Crim. P. 12.2 that he would assert a mental-status defense based on his use of methamphetamine.[4] Thus, in the federal case, Dr. Welner's evaluation of Cheever was based on the very same grounds on which Dr. Welner testified in rebuttal in the state prosecution. Had Cheever presented Dr. Evans' testimony in the federal prosecution, there is no doubt that Dr. Welner's testimony would have been admissible in rebuttal. *See e.g. Hernandez v. Johnson*, 248 F.3d 344, 348 (5th Cir. 2001) ("As *Buchanan* teaches, defense counsel was on notice that if he

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necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind."

[4] "On the issue of guilt Mr. Cheever presently intends to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events at the Cooper residence on January 19, 2005, which negated his ability to form specific intent, *e.g.*, malice aforethought, premeditation and deliberation." Pet. App. 70.

attempted to put mental status in play, the State might draw upon the [court-ordered] examination in rebuttal.").

The federal court result is the constitutionally correct result. By asserting a mental-status defense and presenting testimony to support that defense, Cheever acted inconsistently with the invocation of his Fifth Amendment privilege and necessarily waived the privilege with respect to Dr. Welner's testimony regarding Cheever's mental state at the time of the murder.

A fair reading of *Buchanan* leads to the inescapable conclusion that if a defendant makes the tactical decision to put mental state in play at trial, then the defendant waives the Fifth Amendment privilege with respect to evidence of mental state contained in the report of a court-ordered mental examination, *regardless of the label attached to the defense*. The Kansas Supreme Court articulated no principled explanation why Dr. Welner's testimony might have been admissible if Cheever raised a mental disease or defect defense, but was inadmissible for a voluntary intoxication defense. Similarly, it is by no means clear that Cheever's defense was actually a "voluntary intoxication" defense, especially given that his expert testified at length about the long-term effects of methamphetamine usage on the brain, which sounds like testimony addressing "mental disease or defect" territory rather than *temporary* "voluntary intoxication." The only way the Kansas Supreme Court can be correct is if *Buchanan* was wrongly decided.

2. The substance of the defense asserted and the mental-status evidence actually presented determine whether a defendant has waived the Fifth Amendment privilege.

Cheever asserted a mental-status defense and supported it with his own and expert testimony of a "psychiatric pharmacy specialist," the latter of whom opined about Cheever's state of mind at the time of the murder. (J.A. 32, 47-52.) By making these deliberate, tactical choices inconsistent with his continuing invocation of the privilege, Cheever necessarily waived his Fifth Amendment privilege with respect to evidence obtained from Dr. Welner's evaluation of Cheever. *Buchanan* and other federal Fifth Amendment cases make clear that what is determinative for constitutional purposes is not the label state law (or federal statutory law, for that matter) attaches to the defense, but the *substance* of the defense the defendant asserts and the evidence a defendant actually presents in support of that defense. 483 U.S. at 423.

Moreover, the lower federal courts have consistently endorsed the proposition asserted by the State of Kansas here – that when a defendant raises a mental-status defense and supports it with evidence, the Fifth Amendment privilege is waived and the prosecution may use evidence from a court-ordered mental examination to rebut the defense. The admissibility of such evidence does not turn on the label attached to the defense or the titles or qualifications of the witnesses, nor does it matter whether the defense evidence itself is classified as "psychiatric" or "psychological," or something else. What matters is the *substance of the defense asserted* and the evidence actually presented.

For example, in *United States v. Halbert*, 712 F.2d 388, 389-90 (9th Cir. 1983), a pre-*Buchanan* (but post-*Smith*) case, the defendant argued that because he raised a defense of diminished capacity rather than insanity, evidence from a court-ordered mental examination should not have been admitted in rebuttal against him. This argument is substantively indistinguishable from the argument Cheever made here because Cheever argued that he could not form the requisite mental state due to voluntary intoxication, rather than mental disease or defect.

The Ninth Circuit rejected such an arbitrary and artificial distinction. The court held that "Halbert's argument elevates form over substance," and that the psychiatric evidence was admissible as it "related to mental capacity in general," 712 F.2d at 390, an issue that the defendant put into play by asserting a mental-status defense and offering evidence in support of that defense. "Both defenses [] hinge on the workings of a defendant's mind at the time of the offense. No principled reason exists to allow psychiatric probing of these workings when insanity is at issue but to disallow it on the issue of diminished capacity." *United States v. White*, 21 F.Supp.2d 1197 (E.D. Cal. 1998) (citing *Halbert*). This reasoning is both sensible and entirely consistent with *Buchanan*.

Similarly, in *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), the Fourth Circuit considered the Fifth Amendment claim of a defendant who introduced "expert testimony in support of his defense that he suffered from a 'cognitive dysfunction' which made him 'more susceptible to entrapment by government agents' and that this condition was caused by an explosion

resulting in a head injury he received while working in a steel mill ….” *Id.* at 142. The court had ordered a psychiatric evaluation after the defendant gave notice of this defense, and at trial “Curtis introduced testimony from his own psychiatrist and psychologist to support his mental status defense. The government then introduced psychiatric testimony [from the court-ordered evaluation] in rebuttal.” *Id*. at 144.

The Fourth Circuit emphatically rejected the defendant’s challenge to the propriety of the rebuttal evidence, pointing out that the government “called its own experts only to rebut Curtis’s diminished capacity defense,” *id*. at 144, and the “experts’ testimony related solely to the validity of Curtis’s alleged mental condition as to which he introduced psychiatric testimony.” *Id*. The court held that “[w]hen a defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination …. That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal.” *Id*. at 144-45 (quoting *Savino v. Murray*, 82 F.3d 593, 604 (4th Cir. 1996)) (emphasis omitted).

Likewise, in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), the court read *Buchanan* to hold that “a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind.” *Id*. at 575. The court further concluded that it did not matter that the defense witnesses “were not psychiatrists or psychologists, but social workers and counselors.” 835 F.2d at 576. Such testimony was

presented as mental-status evidence within the ambit of *Buchanan*, allowing the State to present expert testimony in rebuttal. *Id*.

Cheever used an expert who testified directly and extensively about Cheever's mental state and Cheever's capacity to commit capital murder. In the Fourth, Fifth, and Ninth Circuits, it is clear that the prosecution would have been allowed to rebut Cheever's expert with Dr. Welner's expert testimony, a result that is fully consistent with the reasoning and holdings of both *Buchanan* and *Smith*. *See also Lee v. Thomas* 2012 WL 1965608, at *27 (S.D. Ala. 2012) ("Numerous courts have construed the *Smith/Buchanan* line of authorities as allowing the prosecution to put on psychiatric evidence where the defendant presents a defense relating to his mental state and utilizes expert testimony to advance it.").

The same would be true in a number of state courts. *See, e.g.*, *Hartless v. State*, 611 A.2d 581, 584 (Md. 1992) (most state courts "have found no constitutional impediment to allowing the State to secure a mental examination of a defendant and to present rebuttal expert testimony in cases involving mental status defenses other than insanity." *** "[T]he underlying concern is that in order for the State to be able to bear effectively its burden of proving guilt, or of meeting an affirmative defense, it must have the means to adequately assess and, if necessary, rebut a defendant's expert psychiatric testimony."); *State v. Fair*, 496 A.2d 461, 463 (Conn. 1985) ("A criminal defendant waives this [Fifth Amendment] privilege when he places his mental status in issue," and it is clear "that a defendant who claims extreme emotional disturbance

places his mental status in issue."); *State v. Hutchinson*, 766 P.2d 447, 452-453 (Wash. 1989) ("[A] defendant who asserts diminished capacity waives both the physician-patient privilege and the privilege against self-incrimination" because "there is no distinction between insanity and diminished capacity in this regard and [] the allowance of a privilege would deprive the State and the jury of important evidence on the defendant's mental condition.").

Thus, the lower federal and state courts generally have interpreted the *Smith* and *Buchanan* decisions correctly to mean that if a defendant raises a mental-status defense at trial and presents evidence to support that defense, such actions are inconsistent with continued invocation of the Fifth Amendment privilege. Indeed, such tactical decisions necessarily waive the privilege with respect to evidence of the defendant's mental state that is lawfully in the prosecution's possession, and the prosecution may use such evidence to rebut the defendant's mental-status defense. That is the correct result for all of the reasons explained above.[5] The Kansas Supreme Court's outlier decision should be reversed.

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[5] Further, Cheever's expert relied on Dr. Welner's report in preparing for his testimony, as Cheever's counsel *expressly acknowledged on the record*. (J.A. 91) (defense counsel responding to trial court's question whether Dr. Evans relied on Dr. Welner's report, "That's true, he did."). That alone should waive Cheever's Fifth Amendment privilege with respect to Dr. Welner's evaluation. *See, e.g., White v. Mitchell*, 431 F.3d 517, 537 (6th Cir. 2006) (use of court-ordered psychiatric report, admittedly relied on by defense expert, to cross-examine that expert did not violate the Fifth Amendment).

II. THE STATE INTRODUCED MENTAL-STATUS EVIDENCE TO REBUT CHEEVER'S DEFENSE.

In support of his mental-status defense, Cheever presented the testimony of Dr. Evans. In particular, Dr. Evans opined that the chronic use of methamphetamine can lead to a "neurotoxic" phase of addiction in which the users develop "paranoid psychosis" that leads to violence. (J.A. 42-43.) He offered his expert opinion that Cheever was suffering from such psychosis, demonstrating "stupid" judgment, and indeed that Cheever on the day of the murder had "no judgment at all." (J.A. 47-49.) Although Dr. Evans admitted that Cheever's "second shot" of Sheriff Samuels – a shot Cheever fired while the Sheriff lay gravely wounded and immobile on the stairs and after Cheever first retreated into the bedroom, spoke to his companion, and then returned to the stairs – was "a hard one" to explain under his opinion on psychosis and lack of judgment (J.A. 50), Evans still opined that Cheever lacked the mental ability to plan or premeditate the crime. (J.A. 51-52)

Only after Dr. Evans so testified did the State offer Dr. Welner as a rebuttal witness. A comparison of the testimony of Dr. Evans and Dr. Welner demonstrates beyond any doubt that the State's evidence was in "rebuttal" to the defense Cheever affirmatively raised and attempted to prove. Dr. Welner testified that, while Cheever was suspicious of the other people at the Cooper house on the day of the murder, he was "not antagonistic, he was not threatening, he was not violent, to any of these characters." (J.A. 122-23.) Dr. Welner opined that there "was nothing irrational"

about Cheever's activities that morning, (J.A. 124.), because:

> Methamphetamine use, if it intoxicates someone, it will cause a change in that person, physiologically, physically, behaviorally, and there were not signs from the history of a remarkable change in Scott Cheever after he used the methamphetamine that morning.

(J.A. 125-26.)

Dr. Welner countered Dr. Evans' opinion that Cheever was exercising "no judgment" that day, pointing out that when asked to stop shooting by Deputy Mullins, Cheever promptly complied: "If he had irrational fears about some sort of threat, it would have been insufficient to merely say 'stop shooting.'" (J.A. 139.) Dr. Welner ultimately concluded, contrary to Dr. Evans, that Cheever had the "ability to control his actions" on the day of the murder. (J.A. 141.)

The State did not use Dr. Welner's testimony in the State's case-in-chief but, rather, only to rebut the defense that Cheever affirmatively raised and sought to prove.[6] Cheever did not have to claim that methamphetamine use affected his ability to premeditate the crime, but he did. His assertion of the defense and presentation of evidence in support of it was a waiver of the Fifth Amendment privilege that

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[6] Again, if there are questions about the scope of the rebuttal testimony, those are not properly before the Court at this time for the reasons explained in footnote 1 above.

may otherwise have existed with respect to the court-ordered and lawfully conducted mental evaluation by Dr. Welner.

When the testimony of Dr. Welner in rebuttal is laid alongside the testimony of Dr. Evans in Cheever's defense, it is apparent that both experts addressed the same central issues regarding Cheever's mental status and opined on the same subjects. In asserting his mental-status defense, Cheever made deliberate, tactical decisions that are inconsistent with his invocation of the Fifth Amendment privilege, at least with respect to evidence regarding his mental status on the day of the murder. Thus, Cheever necessarily waived his privilege, at least to that extent, and the Fifth Amendment did not prohibit the State from responding to Cheever's mental-status defense as it did here. To conclude otherwise would unreasonably deny the jury reliable and crucial information regarding the defendant's culpability on issues the defendant affirmatively raises and introduces into a trial.

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Only by misreading *Buchanan v. Kentucky*, by erroneously relying on Kansas law to determine whether Cheever waived his Fifth Amendment privilege, and by failing to respect fundamental principles of reliability and fairness in our adversarial criminal justice system, could the Kansas Supreme Court find a Fifth Amendment violation in this case. In effect, simply by labeling Cheever's defense as "voluntary intoxication" under Kansas law, the Kansas Supreme Court read the Fifth Amendment to permit Cheever to present an allegedly scientific, mental-

status defense through his own and expert testimony, while immunizing himself from effective rebuttal by the State. That result is error, however, because Cheever's tactical decisions waived his Fifth Amendment privilege, and it would be "unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony." *Powell*, 492 U.S. at 685.

CONCLUSION

The State of Kansas requests that the Kansas Supreme Court's decision be reversed.

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