No. 12-609

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

When a criminal defendant asserts a mental-status defense and offers evidence to support that defense at trial, including expert testimony based on an examination of the defendant, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defense with evidence from a court-ordered mental evaluation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules of Court

Secondary Authorities

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

SCOTT D. CHEEVER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Kansas Supreme Court has misinterpreted the Fifth Amendment in a manner that would

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

permit defendants to present to juries a skewed version of the facts, distorting the truth-finding function of trials and leading to more miscarriages of justice. Specifically, in any case where a defendant claims a mental impairment short of a "disease or defect," the defendant would be able to put on expert testimony based on a mental evaluation of the defendant, while the prosecution would be barred from countering this testimony with its own evaluation. This would include cases such as the present case, where the defendant's claimed impairment is the result of his own voluntary intoxication. Such a distortion of the truth is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Scott Cheever was a methamphetamine cooker, as well as a user of that drug. On January 19, 2005, Cheever shot and killed Greenwood County Sheriff Matthew Samuels, who was serving a warrant for his arrest, and he also shot at four other law enforcement officers. See *State* v. *Cheever*, 295 Kan. 229, 233, 284 P. 3d 1007, 1014 (2012).

The State of Kansas began prosecution in state court. However, the Kansas Supreme Court in another case erroneously declared the state's death penalty to be unconstitutional. See *State* v. *Marsh*, 278 Kan. 520, 102 P. 3d 445 (2004), rev'd and remanded by *Kansas* v. *Marsh*, 548 U. S. 163 (2006). In the interval between the erroneous decision and its correction by this Court, the state proceedings were dismissed, and a federal prosecution was commenced. See *Cheever*, 295 Kan., at 235, 284 P. 3d, at 1015.

In federal court, Cheever gave notice pursuant to Federal Rule of Criminal Procedure 12.2(b) that he intended to introduce expert evidence that his metham-

phetamine intoxication impaired his ability to form the mental state required for the crime, and the district court ordered an examination pursuant to subdivision (c) of that rule. See Brief for Petitioner 4. "As a result of that order, Cheever submitted to examination by [Dr. Michael] Welner. Welner's interview of Cheever lasted 5 and 1/2 hours, was videotaped, and resulted in a 230-page transcript." *Cheever*, 295 Kan., at 235, 284 P. 3d, at 1015.

The federal case was suspended when defense counsel was unable to proceed, and it was subsequently dismissed. See *ibid*. The state case was refiled, see *ibid*., the state's death penalty having been restored by this Court in the interim.

Cheever introduced expert testimony in the state case, as he had planned to do in the federal case. His expert, Dr. Roswell Lee Evans, Jr., a doctor of pharmacy, had examined Cheever as part of the basis of his testimony. Just as Dr. Welner had done, he interviewed Cheever for multiple hours. See J. A. 35. "With respect to shooting Samuels, Evans testified that there 'was no judgment. There was no judgment at all. This man just did it.' " *Cheever*, 295 Kan., at 237, 284 P. 3d, at 1016.

Dr. Welner testified in rebuttal, including a detailed examination of Cheever's actions during the crime. "Welner told the jury that Cheever had the ability to control his actions, he had the ability to think the matter over before he shot Samuels, and he had the ability to form the intent to kill." *Id*., at 238, 284 P. 3d, at 1017.

The Kansas Supreme Court reversed on the ground that the Fifth Amendment only permits compelled mental examinations to be introduced as evidence if the defendant makes a "mental disease or defect" defense.

> "Accordingly, we find that 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. Therefore, we conclude that allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution." *Id*., at 251, 284 P. 3d, at 1024.

This Court granted certiorari, limited to this question.

SUMMARY OF ARGUMENT

In *Buchanan* v. *Kentucky*, this Court distinguished *Estelle* v. *Smith* and held that introduction of a compelled psychological examination was consistent with the Fifth Amendment when the defendant had introduced his own mental evidence to support a claim of "extreme emotional disturbance." This holding was based on the defendant's introduction of evidence and not on classification of his defense as a "mental disease or defect," a classification the Kansas Supreme Court deemed essential. The underlying policy of the *Buchanan* rule is one of fair access to evidence, not classification of defenses. The defendant has access to essential evidence in that his expert can conduct a mental examination, and the prosecution must have comparable access to protect the integrity of the truth-finding function of the trial.

Although the rule is well established, the constitutional justifications for it have been sparse. *Amicus*

suggests that the rule is analogous to the rule that a defendant who chooses to testify cannot refuse to submit to cross-examination. *Estelle* v. *Smith* rejected the idea that submitting to a mental examination is nontestimonial. Hence, a defendant who submits to such an examination by his own expert, who then testifies at trial, has chosen to be a witness in his own case to a limited extent. By analogy to the cross-examination rule, the choice to be a witness in the mental examination context includes examination by the other side's expert as an inseparable part of the package.

ARGUMENT

I. Fair access to evidence, not a particular type of defense, is the basis of the *Buchanan* rule.

In *Estelle* v. *Smith*, 451 U. S. 454, 465-466 (1981), the Court held that the use of psychiatric testimony based on an interview with the defendant violated the Fifth Amendment in the circumstances of that case, but it took care to distinguish a different situation:

> "Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [Citations.]

> "Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so."

Buchanan v. *Kentucky*, 483 U. S. 402, 423 (1987), "present[ed] one of the situations that we distinguished from the facts in *Smith*." Buchanan asserted a defense of "extreme emotional disturbance." See *ibid*. If established, this partial defense would reduce the crime from murder to manslaughter. See *id*., at 406, n. 3. It is not a mental defense as such but rather a modern replacement for the problematic concepts that traditionally distinguished the two main degrees of homicide. See *Gall* v. *Commonwealth*, 607 S. W. 2d 97, 108 (Ky. 1980), overruled on other grounds, *Payne v. Commonwealth*, 623 S. W. 2d 867, 870 (Ky. 1981) (describing change); see also *Patterson* v. *New York*, 432 U. S. 197, 207 (1977). Buchanan introduced psychological reports in support of this defense, and the Commonwealth introduced another psychological report from an earlier examination for the purpose of involuntary commitment. See *Buchanan*, *supra*, at 423, and n. 20.

What the *Buchanan* opinion does not say may be as important as what it says. The *Buchanan* Court placed no emphasis on the nature of the defense involved. The Court saw no need to go into a discourse as to whether the new defense was classifiable as a mental disease or defect. The Court referred to it broadly as a " 'mental status' defense," with no indication such defenses need to be classified in any detail, and no indication that there is a constitutional distinction between transient and chronic conditions. See 483 U. S., at 423; cf. *State* v. *Cheever*, 295 Kan., at 251, 284 P. 3d, at 1024. The dispositive fact was that the defendant had introduced psychological evidence. "In such circumstances, with petitioner not taking the stand, the Commonwealth

could not respond to this defense unless it presented other psychological evidence." 483 U. S., at 423.

The essential problem here is the unfairness and the threat to the truth-finding function of allowing one side to have access to essential evidence, picking and choosing which elements to present, while the other side is denied access and kept in the dark. The more thoughtful opinions applying *Smith* and *Buchanan* have regularly cited this unfairness and the integrity of the fact-finding process as primary concerns. See, *e.g.*, *Pope* v. *United States*, 372 F. 2d 710, 720-721 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U. S. 651 (1968); *United States* v. *Byers*, 740 F. 2d 1104, 1113 (DC Cir. 1984) (plurality opinion); *Blaisdell* v. *Commonwealth*, 372 Mass. 753, 766, 364 N. E. 2d 191, 200 (1977) ("so that the jury might have the benefit of countervailing expert views, based on similar testimonial statements of a defendant").

This rule may be seen as part of an overall policy to avoid at least the grossest disparities in the parties' access to evidence. The prosecution must disclose material exculpatory evidence in its possession. See *Strickler* v. *Greene*, 527 U. S. 263, 280-281 (1999). Under typical discovery rules, the defendant has the right to inspect documents, tangible objects, and tests in the prosecution's possession, see Fed. Rule Crim. Proc. 16(a)(1)(E) and (F), and to exercise that right he must grant reciprocal access. See Fed. Rule Crim. Proc. 16(b)(1)(A) and (B).

In the evolution of Rule 12.2 of the Federal Rules of Criminal Procedure, we can see the recognition that parity of access, not nature of the defense, is the key consideration. The history is presented in Criminal Justice Legal Foundation, History of Rule 12.2 of the Federal Rules of Criminal Procedure (2013), available at http://www.cjlf.org/pubs/Rule12.2.pdf. As originally

promulgated by the Court in 1974, even before *Smith*, the rule required notice to the prosecution of either an insanity defense (subd. (a)) or a defense of a mental disease or defect inconsistent with the *mens rea* of the crime (subd. (b)), and it provided for a psychiatric examination on the motion of the government (subd. (c)). See *id*., at 1. Congress added problematic language saying that the defendant's statements in the examination were not admissible on "the issue of guilt," but of course the *mens rea* element of guilt was the whole point of the examination in a case under subdivision (b).

In 1983, the language about other conditions was extended beyond the mental state required for the offense to any condition "bearing upon the issue of his guilt." See *id*., at 7. The Advisory Committee Note confirms that the intent was to broaden the rule to "all circumstances in which the defendant intends to offer expert testimony regarding his mental condition at the time of the crime charged . . . ." See *id*., at 8. The problematic language about inadmissibility on the issue of guilt was changed to make the defendant's statements in the examination inadmissible on issues other than mental condition.

In the 2002 rewrite, the rule was further broadened to expressly include evidence in the penalty phase of a capital case. See *id*., at 13. Because of the wide-open rules in these proceedings, the defendant can introduce any mental condition he chooses, far beyond diagnosable mental disorders. See, *e.g.*, *People* v. *San Nicolas*, 34 Cal. 4th 614, 672-673, 101 P. 3d 509, 549 (2004) (lack of emotional maturity). Doing so triggers the notice and examination requirements of Rule 12.2, as amended. Yet the constitutionality of the expansion of Rule 12.2 to this evidence was so clear that the change was not even controversial. See Judicial Conference of

the United States, Report of the Advisory Committee on Criminal Rules, Appendix C, Summary of Public Comments on Substantive Amendments (May 10, 2001), available at http://www.us.courts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2001.pdf (pages 321-322 of the PDF file).

Since it was first enacted nearly four decades ago, the federal rule has extended beyond mental defenses as such to include psychologically-based claims that the defendant lacks the *mens rea* required for the crime, whether based on a "mental disease or defect" or not. Many state rules are similarly extensive, although some states do limit them to mental defenses. See 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 20.5(c), p. 480 (3d ed. 2007). If the Kansas Supreme Court were correct that the Fifth Amendment is violated by the use in evidence of a required psychological examination when the defendant does not make a "mental disease or defect" defense as such, then the federal rule and all of the comparably extensive state rules would be unconstitutional. Yet these attacks have been uniformly rejected. See 1A C. Wright & A. Leipold, Federal Practice and Procedure § 205, pp. 480-482, and n. 13 (4th ed. 2008); LaFave, *supra*, § 20.4(e), p. 462, n. 78.

The unfairness of only one side having access to a full mental examination, which necessarily includes the participation of the subject, does not depend on the classification of the defense being asserted by the defendant. The *Buchanan* rule cannot be so limited.

An additional policy consideration warrants mention here. Cheever's defense was that he was too intoxicated to form the requisite mental state. *Montana* v. *Egelhoff*, 518 U. S. 37 (1996), established that the legislature can forbid this defense altogether, if it chooses to do so. See *id*., at 56 (plurality opinion); *id*., at 56-57

(Ginsburg, J., concurring in the judgment). The defense is usually, if not always, bogus. See *id*., at 50-51 (plurality opinion); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Montana* v. *Egelhoff*, No. 95-566, pp. 8-13. If the prosecution is unfairly handicapped in its ability to refute this dubious defense, the case for banning it altogether is markedly strengthened. Although *amicus* CJLF favors such a ban, we believe the decision should be considered on its intrinsic merits. States that wish to keep the defense and decide its validity in individual cases should not be forced to choose between complete abolition and a procedure that unfairly tilts the process in favor of the defendant. Cf. *Patterson* v. *New York*, 432 U. S., at 207-208.

Yet policy considerations alone would not authorize a court to carve out an exception that the Constitution does not authorize. See *Davis* v. *Washington*, 547 U. S. 813, 832-833 (2006). The explanations offered for the *Buchanan* rule have been less than convincing. See *Byers*, 740 F. 2d, at 1114. To this question we now turn.

II. A defendant who chooses to introduce expert testimony based on a mental examination has chosen to "be a witness" to that extent, analogous to taking the stand.

The plurality opinion in *United States* v. *Byers*, 740 F. 2d 1104, 1111-1113 (DC Cir. 1984), reviewed the justifications for compelled mental examinations and found them all wanting. The "nontestimonial" explanation was rejected in *Estelle* v. *Smith*, 451 U. S. 454, 463-465 (1981). A distinction based on a belief that the Fifth Amendment privilege does not extend to issues of sanity is also no longer sustainable, if it ever was. See *Byers*, *supra*, at 1112.

That leaves "waiver" and its variants. The *Byers* plurality notes,

> "It seems to us at best a fiction to say that when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights. What occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment, but rather merely the product of the court's decree that the act entails the consequence—a decree that remains to be justified." 740 F. 2d, at 1113.

Even so, waiver has become the predominant explanation in the years since. In *Powell* v. *Texas*, 492 U. S. 680, 683-684 (1989), the Court explained (emphasis added):

> "The principal support found in the Court of Criminal Appeals' decision for the proposition that petitioner waived the right to object to the State's use of the Coons and Parker testimony is the Fifth Circuit's opinion in *Battie* v. *Estelle*, 655 F. 2d 692 (1981). In that case, the Court of Appeals suggested that if a defendant introduces psychiatric testimony to establish a mental-status defense, the government may be justified in also using such testimony to rebut the defense notwithstanding the defendant's assertion that the psychiatric examination was conducted in violation of his right against self-incrimination. *Id*., at 700-702. In such circumstances, the defendant's use of psychiatric testimony might constitute a waiver of the Fifth Amendment privilege, *just as the privilege would be waived if the defendant himself took the stand*. *Id*., at 701-702, and n. 22. The Court of Appeals explained that 'any burden imposed on the defense by this result is justified by 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.' *Id*., at 702 (footnote omitted).
>
> "Language contained in *Smith* and in our later decision in *Buchanan* v. *Kentucky*, 483 U. S. 402 (1987), provides some support for the Fifth Circuit's discussion of waiver. 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.' 451 U. S., at 465. 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. 483 U. S., at 422-423."

The analogy to the defendant taking the stand is indeed the correct way to view this situation, *amicus* submits. However, we would view that situation not as a waiver but rather as a defendant *choosing* to be a witness and not being *compelled* to be a witness, which is what the Fifth Amendment actually protects against. When a defendant chooses to be a witness, his constitutional right not to be compelled to be a witness remains intact, neither waived nor violated.

As we explain in more detail in our brief in *Salinas* v. *Texas*,[2] the choice to be a witness or not be a witness is a binary one. A defendant who chooses to be a witness on direct examination cannot refuse cross-examination. "The immunity from giving testimony is

---

2. Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Salinas* v. *Texas*, No. 12-246, available at http://www.cjlf.org/briefs/SalinasG.pdf.

one which the defendant may waive by offering himself as a witness." *Raffel* v. *United States*, 271 U. S. 494, 496 (1926). "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Id*., at 497. "*The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do.*" *Id*., at 499 (emphasis added).

From *Estelle* v. *Smith*'s rejection of the idea that participation in a mental examination is nontestimonial, it follows that a defendant who is examined by his own expert and introduces that expert's testimony based on the examination has chosen to become a witness in his own behalf to a limited extent. Just as with a decision to testify in person at trial, he has to that extent "cast aside the cloak of immunity."

Examination by an expert appointed by the court or designated by the prosecution is analogous to cross-examination. It is part of the package that the defendant must accept when he chooses to be a witness to the extent of introducing his own expert's examination-based testimony.

In the present case, Cheever *chose* to be a witness in his own case, and was not *compelled* to be one, when he submitted to a mental examination by his own expert and introduced that expert's testimony. See J. A. 35 (defense expert examined defendant).[3] Introduction of testimony based on a court-ordered examination therefore does not violate the Fifth or Fourteenth Amendments to the Constitution of the United States.

---

3. Defendant further chose to be a witness by testifying, but this Court declined to consider the implications of that aspect of this case when it limited the grant of certiorari to Question 1, so *amicus* CJLF will not brief it.

CONCLUSION

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

May, 2013

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation