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 AMICI CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION, MISSOURI PROSECUTING ATTORNEYS ASSOCIATION, DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK, AND OKLAHOMA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a criminal defendant has presented expert evidence as to the defendant's mental state at the time of the commission of a crime, based in part on the defense expert's interview of the defendant, does the Fifth Amendment privilege against self-incrimination permit the state to respond with rebuttal evidence from a different mental state expert who has conducted an examination and interview of the defendant that was compelled by court order?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST

This brief is submitted by the National District Attorneys Association (NDAA), the California District Attorneys Association, the Kansas County and District Attorneys Association, the Missouri Prosecuting Attorneys Association, the District Attorneys Association of the State of New York, and the Oklahoma District Attorneys Association, as amici curiae in support of petitioner the state of Kansas.[1]

NDAA is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

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[1] Pursuant to Supreme Court Rule 37.2(a), amici state that all parties have consented in writing to the filing of this brief in letters on file with the Clerk of the Court. Pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amici, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief.

The California District Attorneys Association, the Kansas County and District Attorneys Association, the Missouri Prosecuting Attorneys Association, the District Attorneys Association of the State of New York, and the Oklahoma District Attorneys Association, are the professional associations for prosecuting attorneys in their respective states. They share goals and missions similar to those of NDAA, including maintaining high professional standards and ethics, training and education of prosecutors, and advocating for the interest of prosecutors in cases of significant national interest and impact.

This case raises matters of concern to prosecutors nationwide. The issue before the Court concerns the manner in which the prosecution may rebut evidence relating to mental state that a criminal defendant has put forward at trial to reduce or negate culpability for a crime. The decision by this Court will define the parameters concerning waiver of the Fifth Amendment privilege against self-incrimination when a criminal defendant has put forward evidence as to his mental state through the testimony of an expert who has examined the defendant in the context of a mental state evaluation.

Amici have expertise in the matters pending before the Court in this case, and believe that this brief will be helpful to this Court in its consideration of these matters.

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 2005, Sheriff Matt Samuels, with two deputies, went to a house to arrest respondent Scott Cheever on a warrant. Cheever became aware of the approach of the officers, and hid in an upstairs room. As Sheriff Samuels came up the stairs, Cheever ambushed him with two gunshots to the chest. Cheever then shot at the other officers, and eventually at SWAT officers who responded, before finally surrendering. Sheriff Samuels died from his wounds.

Because of legal questions in 2005 about the constitutionality of the Kansas death penalty law, Cheever was prosecuted in federal court. In federal court, after the defense gave notice of intent to present expert mental state evidence, Cheever was ordered to submit to a psychiatric examination by Dr. Michael Welner.

Later, in June 2006, the Kansas death penalty law was declared constitutional by this Court. In September 2006, a mistrial occurred on the federal court prosecution. At that point, the state authorities returned the prosecution to state court. When the state prosecution went to trial, the defense presented evidence from an expert psychiatric pharmacist, Dr. R. Lee Evans, that respondent suffered from methamphetamine intoxication at the time of the murder, making him unable to premeditate and intend to kill. The prosecution then sought to present, and the trial court permitted, the testimony of Dr. Welner in rebuttal.

On appeal, the Kansas Supreme Court held that the presentation of Dr. Welner's testimony violated respondent's privilege against self-incrimination under the Fifth Amendment. The state sought review from this Supreme Court, which granted certiorari.

SUMMARY OF ARGUMENT

The unusual procedural posture of this case led to the appointment of a mental state expert psychiatrist in federal court to examine respondent under circumstances that would not have been permitted under Kansas law. The Kansas Supreme Court linked its analysis of the Fifth Amendment privilege against self-incrimination to state law rules, which are not relevant to the operation of the Fifth Amendment privilege against self-incrimination. Under principles accepted by this Court, a defendant who presents expert mental state evidence waives the privilege against self-incrimination, to the extent that he must submit to a psychiatric examination, including an interview, and the prosecution may present the results of that examination in rebuttal once the defense has presented its own expert mental state evidence. In this case, the examination and testimony of the prosecution's mental state evidence were directly comparable to the defense evidence, and thus well within the operation of these Fifth Amendment principles.

ARGUMENT

I. THE PROCEDURAL STEPS LEADING TO THE APPOINTMENT OF DR. WELNER AND THE RELATIONSHIP OF THOSE STEPS TO KANSAS STATE PROCEDURES ARE NOT RELEVANT FOR FIFTH AMENDMENT PURPOSES

What the Kansas Supreme Court perceived to be a Fifth Amendment violation arose from the unusual procedural background of this case. The issue relates to the appointment of Dr. Welner to conduct a compelled mental examination of respondent, and Dr. Welner's later testimony in rebuttal for the prosecution at respondent's trial. The facts surrounding the appointment of Dr. Welner and his examination of respondent do not reflect any infringement of respondent's constitutional rights.

After respondent committed the murder of Sheriff Samuels and the attempted murder of the peace officers in January 2005, the case was originally, briefly, filed in Kansas state court. However, because at that time the viability of the death penalty in Kansas was in question due to an unfavorable Kansas Supreme Court decision, Kansas authorities sought cooperation from federal prosecutors to pursue the case in federal court, which was done. While the case was in federal court, on December 22, 2005, respondent's counsel filed a notice of intent "to introduce expert evidence relating to a mental disease or defect or any other mental condition" as required under Federal Rule of Criminal Procedure 12.2. The

notice specifically stated that the expert evidence would "relat[e] 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." In response to that notice the federal court appointed Dr. Welner under Rule 12.2(c), and he conducted his examination of respondent. (Cert. Petn., p. App. 69-70.)

Six months later, this Court overruled the Kansas Supreme Court and held the Kansas death penalty was constitutional. (*Kansas v. Marsh*, 548 U.S. 163 (2006), decided June 26, 2006). Three months after that (September 2006), a mistrial was declared in respondent's federal trial. At that point, the federal case was dismissed, and the prosecution was again commenced in state court.

The Kansas statute for declaring intent to present mental state evidence (K.S.A. 22-3219) and appointing a psychiatrist for a compelled examination applies only when a defendant will present evidence of "mental disease or defect." This is narrower than Federal Rule 12.2, which as noted above applies when the defendant will present evidence of "mental disease or defect *or any other mental condition*." It was the position of respondent at trial, and implicit in the holding of the Kansas Supreme Court below, that had all the proceedings taken place in Kansas state court under the Kansas statutes, respondent would not have been required to give notice or undergo a compelled examination, because his defense was related

to methamphetamine intoxication, not mental disease or defect. (Joint Appendix [hereafter J.A.] 88-91; *State v. Cheever*, 295 Kan. 229, 247-251, 284 P.2d 1007 (2012)). The Kansas Supreme Court expressly held that by putting on only evidence of mental state related to voluntary intoxication, respondent had not waived his Fifth Amendment rights as to the Dr. Welner examination:

> Cheever's voluntary intoxication defense was based on evidence that his mental state at the time of the crime was a product of a combination of immediate voluntary ingestion of methamphetamine and long-term use of the drug. Cheever did not present evidence, however, that his use of methamphetamine had caused permanent mental impairment. . . . 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 Amendment to the United States Constitution.

(*State v. Cheever*, supra, 295 Kan. at 251.)

With all due respect to the Kansas Supreme Court, this focus on Kansas procedural requirements led the analysis astray. Whether Dr. Welner's appointment complied with Kansas state procedure is irrelevant for Fifth Amendment purposes. Proper analysis of whether there has been a Fifth Amendment violation must begin with the Fifth Amendment, not with state law.

II. DEFENDANT WHO PLACES HIS MENTAL STATE IN ISSUE HAS WAIVED HIS FIFTH AMENDMENT RIGHTS AS TO A COMPELLED OR COURT ORDERED MENTAL STATE EXAMINATION

A. *Estelle v. Smith* and *Buchanan v. Kentucky*, and Their Progeny, Establish That a Defendant Who Proffers or Presents Mental State Evidence Has Waived His Self-Incrimination Privilege with Respect to Evidence from a Compelled or Court Ordered Mental State Examination

This Court has long recognized that when a criminal defendant places his mental status at issue, the prosecution may be permitted to rebut the mental status evidence with evidence from a court ordered mental examination of defendant without violating his Fifth Amendment privilege against self-incrimination. Both *Estelle v. Smith*, 451 U.S. 454 (1980) (*Estelle*) and *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (*Buchanan*) discuss the issue in detail.

Estelle concerned the admission of a psychiatrist's testimony during the penalty phase of a capital murder trial. The psychiatrist had examined the defendant to determine his competency to stand trial. *Buchanan* involved the State's use of psychiatric information about defendant to rebut defendant's claim that his "extreme emotional disturbance" impacted his ability to form a criminal intent. The only reasonable way to resolve the instant case consistent with this Court's pronouncements in *Estelle* and *Buchanan* is to settle the issue in favor of petitioner, the State of Kansas.

In *Estelle*, the defendant underwent a court-ordered pre-trial competency examination without notice to defense counsel. Although it was ordered for purposes of determining the defendant's competency, the examination results were later used in the penalty phase of trial to prove defendant's future dangerousness. (451 U.S. at 463, 464-465.) Affirming the Fifth Circuit Court of Appeals' conclusion that " 'Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination[,]' " (*Estelle*, 451 U.S. at 461, quoting *Smith v. Estelle*, 602 F.2d 694, at 709 (5th Cir. 1979)), this Court found that the State violated the defendant's Fifth Amendment privilege against self-incrimination when it used information from the examination to prove the

defendant's dangerousness and obtain a verdict of death. This Court based its decision on the failure to advise the defendant of his Fifth Amendment right to remain silent prior to his participation in the examination. (451 U.S. at 467-468.)[2] Additionally, there was discussion about the fact that the information was gathered for one purpose – to determine competency – and ultimately used for the vastly different purpose of determining punishment. (*Id*. at 468-469.)

Estelle's holding regarding the reach of the Fifth Amendment privilege was limited to cases in which the defendant neither initiated a psychiatric evaluation nor attempted to introduce any psychiatric evidence of his own. (451 U.S. at 454.) However, *Estelle* indicated that psychiatric evidence obtained from a compelled mental examination might not violate a defendant's Fifth Amendment privilege against self-incrimination in certain circumstances. Indeed, *Estelle* approved of the Fifth Circuit's "carefully le[aving] open 'the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state.'" (*Id*. at 466, fn. 10.) More broadly, the *Estelle*

[2] This Court also held on the facts of *Estelle* that the examination had violated defendant's Sixth Amendment constitutional right to counsel. As no Sixth Amendment issue is before the Court in the instant case, that aspect of *Estelle* will not be addressed further.

court understood that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence [in a court ordered mental state examination] may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." (*Id*. at 465.)

Estelle did not explicitly reach the issue of whether the State has the right to rebut defense mental state evidence with evidence obtained from a compelled mental examination. But the reasoning of *Estelle*, forbidding the prosecution from using in the penalty phase evidence from the competency examination, rested in significant measure on distinguishing cases where the defendant did not introduce psychiatric or mental state evidence (as was the case in *Estelle*), from cases where the defendant did introduce such evidence. (451 U.S. at 465-466.) In so doing, *Estelle* indicated the receptiveness of this Court to the rule previously adopted by many courts that a defendant who does introduce his own mental state evidence may be required to submit to an examination by the prosecution's psychiatrist. (*Id.*) Justice Rehnquist's concurring opinion went so far as to state that he would decline to extend the privilege against self-incrimination to psychiatric examinations. (*Id.* at 475-476, Rehnquist, J., concurring.)[3]

[3] Justice Rehnquist did find a Sixth Amendment violation, as the defense attorney in *Estelle* had not been informed prior to the examination taking place, an issue not presented here.

Justice Brennan and Justice Marshall filed separate concurrences in *Estelle.* Each declined to join the majority on the constitutionality of the death penalty. Justice Brennan otherwise joined the opinion of the Court in full, including part II-C of the majority opinion, which included the cited discussion about compelled examination by a prosecution psychiatrist. (451 U.S. at 474, Brennan, J., concurring.) While Justice Marshall declined to join in part II-C of the opinion of the Court, he made it clear his disagreement was with the implicit holding in the Court's opinion that the death penalty could be constitutionally imposed. (*Id.*, Marshall, J., concurring.) As will be seen, Justice Marshall's view did not involve any disagreement with the rule that the defendant, by putting on mental state evidence, would open the door to a compelled examination by a prosecution psychiatrist.

Seven years after *Estelle*, when this Court decided *Buchanan v. Kentucky*, it identified a circumstance in which the prosecution could rebut a mental defense with evidence from a compelled psychiatric examination without violating the defendant's Fifth Amendment privilege against self-incrimination. *Buchanan* held that, where a defendant requests a psychological evaluation or presents psychiatric evidence to support a mental defense (in *Buchanan*, the defense was "extreme emotional disturbance"), the prosecution may rebut this defense with the report of the court ordered examination without

implicating the defendant's Fifth Amendment privilege against self-incrimination.

In *Buchanan*, the defense drew on information obtained prior to defendant's arrest in that case. The prosecution then introduced evidence from a court-ordered mental examination jointly requested by both the prosecution and the defense after the defendant's arrest. In holding that the use of this evidence did not violate defendant's Fifth Amendment privilege against self-incrimination, this Court upheld the lower court's determination that defendant had opened the door to this evidence when he placed his mental state in issue. (483 U.S. at 414, quoting *Buchanan v. Commonwealth*, 691 S.W.2d 210, 213 (1985).) The examination used by the State in rebuttal had been jointly requested. Also, Buchanan's "entire defense strategy was to establish the 'mental status' defense of extreme emotional disturbance," (*Id*. at 423) further distinguishing it from *Estelle* – and likening it to the instant case.

Taken together, *Estelle* and *Buchanan* make it clear this Court has long subscribed to the view that when the defense places the defendant's mental state at issue by introducing evidence from a forensic mental state expert who examined the defendant, it opens the door to the prosecution putting on psychiatric evidence in rebuttal, including psychiatric evidence from a compelled examination. Indeed, examining the opinions of the various justices in the two cases, one can find little dissension on this point. Not one justice dissented in *Estelle*, although Justice Marshall

declined to sign on to Part II-C of the opinion for reasons, as he noted, related to the death penalty, and not to the Fifth Amendment. (451 U.S. at 474, Marshall, J., dissenting.) Justice Marshall made his position crystal clear in his later dissenting opinion in *Buchanan*, (with Justice Brennan joining). Justice Marshall there explained that his disagreement with the *Buchanan* majority was its approval of the prosecution's rebuttal use of the specific exam that had been conducted in that case, an exam which was related to the issue of competence to stand trial, and thus in Justice Marshall's view had therapeutic goals that would be thwarted if it could be used in the guilt determination.[4] (483 U.S. at 426, Marshall, J., dissenting.) In so stating, however, Justice Marshall actually endorsed the proposition advanced in the case at bar by the State of Kansas and this amicus brief:

> The Commonwealth is free, of course, to compel a *separate* examination specifically inquiring as to the mental condition of the defendant at the time of the alleged offense, once put on notice that the defendant will place this mental condition in issue. [citing *Estelle* at 465.] Given notice, the Commonwealth bears full responsibility for being prepared at trial to rebut a mental status defense.

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[4] In the instant case, the psychiatric examination was not alleged to have been obtained for therapeutic reasons; it is clear that the examination was obtained pursuant to federal court order (J.A. 90.)

(*Buchanan*, supra, 483 U.S. at 433, fn. 5, Marshall, J., dissenting)

Thus, Justice Marshall's view of the issue presented in the case at bar did not diverge from that of the other justices. Since Brennan joined Marshall's dissent, eight of the nine justices deciding *Buchanan* indicated that the Fifth Amendment's protections would allow the prosecution to use psychiatric evidence from a court ordered examination in a rebuttal case where the defense had placed his mental status in issue. The ninth vote, Justice Stevens, joined only the first part of Justice Marshall's dissent in *Buchanan*; he did not file or sign any other opinion, and therefore did not register his view on the topic in *Buchanan*. However, Justice Stevens did join the majority opinion in *Estelle*, which included the discussion about compelled psychiatric examination described above.

In the wake of *Buchanan*, decisions from a broad range of Circuit Courts of Appeals, citing that case, have held that when a criminal defendant puts on or gives notice of an intent to present mental state evidence, he can be compelled to submit to an examination by a psychiatrist for the prosecution, and that the prosecution can put on such evidence in rebuttal, without violating the defendant's Fifth Amendment right against self-incrimination. *Muhammed v. Kelly*, 575 F.3d 359, 372-374 (4th Cir. 2009); *Savino v. Murray*, 82 F.3d 593, 604 (4th Cir. 1996); *United States v. Curtis*, 328 F.3d 141, 144-145 (4th Cir. 2003); *Silagy v. Peters*, 905 F.3d 986, 1005-1006 (7th Cir.

1990); *Pawlyk v. Wood*, 248 F.3d 815, 828 (9th Cir. 2001); *Strickland v. Linahan*, 72 F.3d 1531, 1533-1537 (11th Cir. 1996); *Isley v. Dugger*, 877 F.2d 47 (11th Cir. 1989).

Likewise, a wide variety of state courts have held, following *Buchanan*, that when a defendant tenders his mental state as an issue in a criminal case, he has waived his Fifth Amendment privilege against self-incrimination, "to the extent necessary to permit a proper examination of that condition." *People v. Carpenter*, 15 Cal.4th 312, 412, 935 P.2d 708 (1997). See also *Maldonado v. Superior Court*, 53 Cal.4th 1112, 1113, 274 P.3d 1110 (2012).

In addition to this pronouncement from the California Supreme Court, and not considering pronouncements from state intermediate appellate courts, at least a dozen other state supreme courts have enunciated such a rule: *State v. Ross*, 269 Conn. 213, 295-296, 849 A.2d 648 (Conn. 2003); *Re v. State*, 540 A.2d 423, 429-430 (Del. 1988); *Durham v. State*, 281 Ga. 208, 210, 636 S.E.2d 513 (Ga. 2006); *State v. Payne*, 146 Idaho 548, 570-571, 199 P.3d 123 (Idaho 2008); *People v. Pulliam*, 206 Ill.2d 218, 246-248, 794 N.E.2d 214 (Ill. 2002); *Hartless v. State*, 327 Md. 558, 563-572, 611 A.2d 581 (Md. 1992); *State v. Briand*, 130 N.H. 650, 652-658, 547 A.2d 235 (N.H. 1988); *Mitchell v. State*, 124 Nev. 807, 810-816, 192 P.3d 721 (Nev. 2008); *Lockett v. State*, 53 P.3d 418, 426 (Okla. 2002); *Commonwealth v. Rosen*, 42 A.3d 988 (Pa. 2012); *State v. Martin*, 950 S.W.2d 20, 23-25 (Tenn. 1997); *State v. Herrera*, 895 P.2d 359, 369-371 (Utah

1995); *State v. Baker*, 180 W.Va. 233, 237-240, 376 S.E.2d 127 (W.Va. 1988).

Among these cases, the New Hampshire Supreme Court set out a straightforward theoretical and practical explanation for this rule in *Briand*, supra:

> . . . [I]t is a defendant's voluntary act of taking the stand and giving testimony that is sufficient to constitute the waiver and subject the defendant to enquiries [through cross examination] he would not otherwise be compelled to answer.
>
> A defendant performs a functionally similar voluntary act when he calls a psychologist or psychiatrist to testify on his behalf, based on a personal interview with him. This is so because the expert witness depends upon the defendant's own statements of relevant facts as the foundation for the expert's opinion. Presumably, the witness would lack an adequate foundation to form and express such an opinion, and would therefore be barred from giving one, without the defendant's account of the relevant events of his own history and state of mind. Because the expert's testimony is thus predicated on the defendant's statements, the latter are explicitly or implicitly placed in evidence through the testimony of the expert during his direct and cross-examination. Since a defendant would waive his privilege against compelled self-incrimination if he took the stand and made those same statements himself, his decision to introduce his account of relevant

> facts indirectly through an expert witness should likewise be treated as a waiver obligating him to provide the same access to the State's expert that he has given to his own, and opening the door to the introduction of resulting State's evidence, as the State requests here, to the extent that he introduces comparable evidence on his own behalf. Just as the State may not use a compelled psychological examination to circumvent the privilege against self-incrimination, . . . neither may a defendant voluntarily employ a psychological witness wholly to negate the waiver that his direct introduction of personal testimony would otherwise effect.

(*State v. Briand*, supra, 130 N.H. at 655-656, 547 A.2d at 239.)

Thus, under the Fifth Amendment principles enunciated by this Court in *Estelle* and *Buchanan*, and by many other courts, when a defendant places his mental status at the time of the crime at issue in the case, the prosecution is entitled to rebut the defense evidence. The prosecution may, for that purpose, seek and use a compelled mental state examination of the defendant, conducted by a court appointed expert or the prosecution's expert.

B. The Scope of the Defendant's Waiver and the Prosecution Right to Respond When the Defendant Presents Mental State Evidence is Governed by the Breadth of the Federal Constitutional Rule

The scope of the waiver, and the response permissible under the Fifth Amendment on the part of the prosecution, can be understood by making reference to *Buchanan*. In that case, the defendant was charged with murder. Under Kentucky law, it was a defense if the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." (483 U.S. at 406, fn. 3.) The defense had the burden of production for this defense, and the defense could not be established just by a showing of mental illness. (*Id.* at 408, fn. 8.) Indeed, Kentucky courts have held that extreme emotional disturbance and mental illness are not one and the same, and mental illness, alcohol intoxication or drug intoxication may factor into the analysis. See *Wellman v. Commonwealth*, 694 S.W.2d 696 at 697 (Ky. 1985), the same case this Court cited to in *Buchanan* when discussing Kentucky law on this point. At trial in *Buchanan*, the defense brought forward evidence of the defendant's extreme emotional disturbance by calling as a witness Martha Elam, a social worker who had been assigned to the defendant's case. On direct examination by the defense, Elam read from certain reports, including a psychological evaluation of the defendant that had been undertaken following his arrest for burglary as a

juvenile. On cross-examination, the prosecutor sought to question Elam about a report by Dr. Lange, who had been appointed to examine the defendant after his arrest in that instant case. The defense objected on Fifth Amendment grounds, but the trial court ruled, and this Court held, that by putting forward mental state evidence as to certain reports through Elam, the prosecution was entitled to explore the mental state evidence in other (Dr. Lang's) reports. (*Buchanan*, supra, 483 U.S. at 408-412, 421-424.)

When *Buchanan* is viewed in its factual context, one can readily see that regardless of whether the defendant's evidence of mental state specifically relates to a theory of mental disease or defect, voluntary intoxication, or some other theory of mental shortcoming vitiating defendant's ability to form a criminal intent, the prosecution is entitled under the Fifth Amendment to put on rebuttal evidence derived from a compelled mental state examination of the defendant. Certainly under Kentucky law, the extreme emotional disturbance could have been related to either mental disease or intoxication. Likewise, the report the defense initially put forth related to a mental exam of Buchanan derived from an earlier arrest for a burglary, and the material the prosecution was allowed to use in rebuttal was derived from a later examination by a different examiner for the murder that was the subject of the prosecution at hand. Further, the reports were entered through the testimony of a social worker who had been assigned to the defendant's case.

To rule that the Fifth Amendment waiver is controlled based on a state law procedural classification (as the Kansas Supreme Court did here), would lead to nonsensical, incongruous results. In the case at bar, the Kansas Supreme Court held that defendant/respondent had not waived his Fifth Amendment right against self-incrimination, because he had not given notice under Kansas law that he would present evidence of mental disease or defect, and in his defense, he presented evidence as to his mental state related only to intoxication, not mental disease or defect. See Kansas Statutes Annotated 22-3219, 22-3220; *State v. Cheever*, supra, 259 Kan. at 248-251. The linchpin for the Kansas court's analysis is the Kansas statute, which defines when a defendant must give notice of mental state evidence, the type of mental state evidence covered by that notice requirement, and the type of examination that may be ordered in response.

Not all jurisdictions follow the Kansas rules, however. For instance, under California law, the court may order the defendant to submit to examination by "a prosecution-retained mental health expert" "whenever a defendant . . . places in issue his or her mental state at any phase of the criminal action. . . ." California Penal Code § 1054.3(b). Similarly, the Federal Rules of Criminal Procedure provide that a defendant must give notice if he intends to "introduce expert evidence relating to a mental disease or defect *or any other mental condition*" [emphasis added] bearing on guilt (or punishment in a capital case), and the court

may then order an examination of the defendant, although "No statement made by a defendant in the course of any examination made under this rule . . . [and] no testimony by the expert based on the statement [of the defendant] . . . may be admitted into evidence against the defendant . . . except on an issue regarding mental condition on which the defendant has introduced evidence" of which he was required to give notice. Federal Rule of Criminal Procedure 12.2. The California statute and the federal rule apply to a broader class of cases than K.S.A. 22-3219 – they include "mental state," or "any other mental condition," not just "mental disease or defect."

Applying the reasoning of the Kansas Supreme Court, a defendant who presents evidence of intoxication affecting the formation of mens rea in a California or federal proceeding would be deemed to have waived his Fifth Amendment rights, and subject to a compelled mental exam and rebuttal evidence from such, because the rules in those jurisdictions embracing "any mental condition" or "mental state" are broad enough to encompass intoxication. Certainly, such a result is well within the reasoning and application of the principles this Court enunciated in *Buchanan*. But the same defendant in Kansas, presenting the same evidence, would (according to the Kansas court) not have waived his Fifth Amendment right, because the Kansas statute only covers "mental disease or defect." It would be an odd inversion of our hierarchy of laws if a state law classification worked

a change, from state to state, as to the application of a federal constitutional right.[5]

The Kansas Supreme Court was not just splitting hairs when it differentiated between a "mental disease or defect" and voluntary intoxication and/or neurotoxicity so serious as to impede the actor's ability to form a criminal intent. It was invoking the Fifth Amendment to erect a limit on evidence that the Fifth Amendment simply does not impose.

III. THE EXAMINATION OF RESPONDENT BY THE PROSECUTION MENTAL STATE EXPERT, BEING FORENSICALLY COMPARABLE TO THE EXAMINATION CONDUCTED BY THE DEFENSE EXPERT, WAS PROPERLY WITHIN THE RANGE OF THE WAIVER AS TO MENTAL STATE EVIDENCE THAT RESPONDENT MADE WHEN HE PRESENTED THE EVIDENCE OF DR. EVANS

The Fifth Amendment privilege against self-incrimination comes into play here because the prosecution expert Dr. Welner gave testimony based in part upon his examination of respondent, which included an interview, conducted by court order. (J.A. 88-90.) Had Dr. Welner simply rendered an expert opinion based on his observations of the defendant

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[5] Cf. *United States v. Scheffer*, 523 U.S. 303, at 311, fn. 7 (1998).

and a review of police reports, there would have been no discussion about the Fifth Amendment privilege. But what Dr. Welner did in terms of his examination and interview of respondent, and what the defense witness Dr. Evans did, were directly comparable. Thus, Dr. Welner's evidence fit within the scope of the waiver the defense made when it presented the testimony of Dr. Evans.

A forensic mental state examination includes what amounts to an oral interview of the subject. Meloy, "The Forensic Interview," *Clinical and Diagnostic Interviewing, 2d Ed.*, Robert J. Craig, Ph.D., Editor, Rowan & Littlefield Publishers, Inc., 2005, at p. 422; Goldstein and Bursztan, "Capital Litigation: Special Considerations," *Handbook of Forensic Assessment: Psychological and Psychiatric Perspectives*, Drogin et al., Editors, Wiley Publishing, 2011, at p. 156. That is what both Dr. Evans and Dr. Welner did here. (J.A. 35, 47, 114). For Fifth Amendment purposes, their interactions with respondent were identical: talking to him and then using their expertise to reach an opinion as to the defendant's mental processes when he shot and killed Sheriff Samuels, then shot at several other officers. (as to Dr. Evans, J.A. 35, 47-52, 57-58, 64; as to Dr. Welner J.A. 114, 134-141.)

Dr. Evans' testimony focused on the effects of methamphetamine on the body generally, and on respondent in the crime situation in particular. (J.A. 38-85.) According to Dr. Evans, that neurotoxicity, as well as defendant's acute intoxication due to recent

methamphetamine ingestion, impacted the defendant's ability to plan, make decisions and "look[ ] at consequences, abstract reasoning, judgment[.]" when he killed the sheriff. (J.A. 42, 49.)

The testimony of Dr. Welner, from the point of view of how it was forensically derived, and what it covered, was comparable to that of Dr. Evans. He had reviewed comparable material, and had interviewed the defendant. (J.A. 112-115.) Dr. Welner's opinion was not restricted to testimony about fixed mental disease or defect (on which the Kansas Supreme Court was fixated, due to its focus on Kansas statutes 22-3219 and 22-3220). It extended to whether the methamphetamine intoxication affected respondent's mental ability to form the mental states at the time of the murder, in direct rebuttal to the testimony of Dr. Evans. (J.A. 124-141.) Dr. Welner opined that methamphetamine intoxication did not lead to respondent's violence; that it did not impair his perceptions, his decision-making abilities, or his ability to control his actions. (J.A. 136-141.)

Certainly, Dr. Evans and Dr. Welner had different qualifications. Dr. Evans was a Ph.D. in pharmacy, with a psychiatric pharmacy specialist. (J.A. 32-33.) Dr. Welner was an M.D. and psychiatrist, with board certifications in psychiatry, forensic psychiatry, and disaster medicine, and a background that included work on cases involving methamphetamine. (J.A. 95-99, 109.) Both experts held major academic positions, and both had extensive experience in forensic case work. It is not at all uncommon to see mental

experts from varying disciplines employed and providing evidence in criminal litigation – psychiatrists, psychologists, psychiatric social workers, and as in this case, psychiatric pharmacists. It certainly cannot be the case that the difference in academic credentials for these two experts is of any constitutional significance. While Dr. Welner's opinion on the role of methamphetamine in respondent's crime was at odds with Dr. Evans' opinion, both considered much of the same information, and interacted with respondent on a personal level in much the same way, in reaching their respective conclusions.

Because the forensic procedures and examinations of the two experts were entirely comparable, it follows within the symmetry of the Fifth Amendment waiver principles discussed above that it was within the scope of respondent's waiver to allow the rebuttal testimony of Dr. Welner. Dr. Evans' testimony, based in part on the voluntary interview respondent gave to him, was then voluntarily put before the jury when the defense called Dr. Evans to testify. That testimony interjected defendant's mental state into the case, and established a Fifth Amendment waiver as to the comparable evidence derived from the mental state compelled examination conducted by Dr. Welner. (See *Buchanan*, supra, 483 U.S. at 422-423.)

CONCLUSION

This Court has long recognized that a criminal defendant who submits to an examination and interview by his own mental state expert, and who then presents the testimony of that expert at trial, has waived the privilege against self-incrimination to the extent that the prosecution is allowed a comparable examination and interview by its own mental state expert, and the right to present testimony of that prosecution expert in rebuttal. Other courts have accepted and applied these principles. In the case at bar, the Kansas Supreme Court failed to properly apply these principles when it became fixated on principles of Kansas state procedural law. The unusual procedural posture of this case gave rise to a court ordered psychiatric examination that might not have been required or permitted under Kansas law. But the Kansas procedural rules do not govern the operation of the Fifth Amendment. The evidence presented in this case in no way violated Scott Cheever's Fifth Amendment privilege against self-incrimination. The Kansas Supreme Court, in ruling for respondent, erroneously gave Kansas procedural law constitutional standing. Your amici respectfully urges this Court to reverse.

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Respectfully submitted,

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