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 FOR RESPONDENT

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QUESTION PRESENTED

Kansas presented the following question in its petition for certiorari:

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

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INTRODUCTION

Petitioner's brief is devoted to arguing issues that are not in dispute. Respondent Scott Cheever agrees that state-law labels do not determine the Fifth Amendment's scope. Pet. Br. 31-40. Likewise, Cheever agrees it would be "unfair to allow the defendant to raise a mental-status defense without granting the State *any* meaningful opportunity to contest the defense[.]" *Id.* at 27. But that does not mean the Kansas Supreme Court's decision should be reversed. Rather, that court's unanimous decision should be affirmed for three independent reasons.

First, even assuming *arguendo* that a defendant waives the Fifth Amendment privilege when he puts on expert mental-state evidence, that waiver is limited: The government may use the defendant's compelled statements from a mental examination only to rebut what the defense expert raised. The

government's rebuttal here went much further. The defense expert testified only that Cheever was intoxicated and could not premeditate. The government's expert "rebutted" that opinion by using Cheever's compelled words to tell the jury Cheever had a bad character and to strongly suggest he had an immutable personality disorder. No waiver justified that testimony. It therefore violated the Fifth Amendment.

Second, there was no waiver in any event. Waivers must be *voluntary*, and a defendant who is forced to "waive" to mount a defense or present mitigating evidence against a possible death penalty is not acting voluntarily. The argument that this Court nonetheless must manufacture an implied waiver because otherwise mental-state defenses will be "immun[e] from rebuttal," U.S. Br. 23, is fallacious. Government experts regularly rebut mental-state defenses without using compelled testimony. And those experts have access to ample data to offer their opinions, as the events of this case illustrate.

At a minimum, if the Court finds that an implied waiver is appropriate in some circumstances, the waiver should be confined to situations where a defendant has introduced expert testimony to prove an affirmative defense. That limit ensures that the government has proven the elements of the crime through its own labors, as the Constitution requires.

Finally, there is no basis to find waiver on the facts here. A waiver must be knowing and intelligent, and Cheever did not knowingly and intelligently waive his rights because Kansas law told him that raising a voluntary-intoxication defense would *not* open the door to rebuttal based on a compelled examination.

The judgment below should be affirmed.

STATEMENT

A. Factual Background

1. Scott Cheever tried methamphetamine for the first time at age 17 and was "instantly hooked." Tr. 13.[1] Methamphetamine is a powerful stimulant that can be manufactured, or "cooked," at home by combing pseudoephedrine and anhydrous ammonia. J.A. 35-37. When injected, it delivers an intense and pleasurable "rush." Tr. 59; J.A. 38. But that sensation is ephemeral, leaving the user "paranoid" and "delusional"—"thinking the whole world's out to get you." Tr. 36. After Cheever's first taste of methamphetamine, it "took control of [his] life." Tr. 13. Cheever was "shooting enormous amounts of meth," and repeating "the same cycle over and over": "gather supplies," "cook," and "shoot." Tr. 37.

On January 19, 2005, Sheriff Matthew Samuels and two deputies drove to a house in Hilltop, Kansas to arrest Cheever. Cheever had been up all night cooking methamphetamine. Regular methamphetamine use makes it difficult to sleep, J.A. 45, and, leading up to the crime, Cheever had been awake for eight or nine days straight. Tr. 43. He was only able to "pass[ ] out" for about six hours the day before the crime by injecting himself with the opioid oxycodone. *Id.* On the morning of January 19, Cheever took a "large shot" of methamphetamine. Tr. 58. A "heavy user" would typically take about 20-30 units; he took 50-80 units that morning—enough to kill a "normal person." *Id.* The shot left Cheever "totally spooked," and "paralyzed with fear, thinking everybody [was] out to get [him]." Tr. 59. Less than an hour after

[1] "Tr." refers to trial transcript volume 4.

Cheever had injected himself, the sheriff and deputies arrived. Cheever was still "extremely high." *Id.*

Cheever hid in a room upstairs. He did not expect to be found because the stairway was concealed by a piece of carpet. Pet. App. 9. But the sheriff discovered the stairway and began to ascend. Cheever testified that at this point—still reeling from the injection of methamphetamine—he "panicked" and shot. Tr. 63-64. He did not plan to shoot the sheriff. *Id.* He retreated briefly to the room where he had been hiding, and then reemerged to shoot Samuels a second time. Pet. App. 9. The deputies pulled the wounded Samuels out of the stairwell, under fire from Cheever, and left the house for several hours.

Cheever, meanwhile, sat motionless upstairs. He testified that, as he waited, he "snapped out of it" and realized "what the heck [wa]s really going on." Tr. 69. He had a "totally emotional breakdown," and started to cry. *Id.* But when a SWAT team arrived, Cheever was convinced they intended to kill him. He fired at the team members, who returned fire. Pet. App. 9. Eventually, they subdued Cheever and arrested him. *Id.*

B. Events Prior To Trial

The resulting prosecution was procedurally tortuous. The case was filed in Kansas trial court. Pet. App. 10. But when the Kansas Supreme Court found the state's death penalty unconstitutional, *Kansas* v. *Marsh*, 102 P.3d 445 (Kan. 2004), the state proceeding was dismissed and federal charges were filed under the Federal Death Penalty Act, 18 U.S.C. § 3591. While the case was in federal court, Cheever filed notice under Federal Rule of Criminal Procedure 12.2(b) that he would be presenting expert evidence "[o]n the issue of guilt * * * relating to his

intoxication by methamphetamine," which "negated his ability to form specific intent." Pet. App. 69. The notice explained, "Cheever does not believe that this notice entitles the government to examine [him] under the provisions of Fed. R. Crim. P. 12.2(c)." *Id.* Nonetheless, the District Court ordered Cheever, pursuant to Rule 12.2(c)(1)(B), to undergo a psychiatric examination with Dr. Michael Welner, a forensic psychiatrist hired by the government. Welner's interview lasted five-and-a-half hours. Pet. App. 11.

Seven days into jury selection the federal case was suspended when Cheever's counsel became unable to proceed. By that time, this Court had restored the death penalty in Kansas, *Kansas* v. *Marsh*, 548 U.S. 163 (2006), so the case was moved back to state court. Cheever was charged with capital murder for killing Sheriff Samuels and attempted capital murder for firing on the other officers. Pet. App. 6. Kansas defines capital murder as the "intentional and premeditated killing of a law enforcement officer." Kan. Stat. Ann. § 21-3439(a)(5) (2005).

C. Cheever's Defense

At trial, Cheever did not shirk responsibility or try to justify his actions. Rather, he admitted he killed Sheriff Samuels. And he admitted the killing was "intentional." Tr. 99. His sole defense was that the short-term and long-term effects of methamphetamine abuse had prevented him from forming the premeditation that is a requisite element of capital murder. In support of this defense, Cheever called Roswell Lee Evans, Jr., a specialist in psychiatric pharmacy, as an expert witness. J.A. 32.

Evans began his testimony with some background information about methamphetamine. He explained that methamphetamine is a "very intense stimulant"

that is a "chemical derivative" of amphetamine. J.A. 36. He explained how the drug is produced and taken. J.A. 37-38. And he described its effects: An initial rush subsides quickly, but the drug lingers in the system for 13 or 14 hours. J.A. 38. "During that period of time," he testified, the user remains "legitimately intoxicated." *Id.*

Evans continued by describing how methamphetamine can change the "structure of the brain." J.A. 41. Neurons "begin to disappear." *Id.* "[G]ray matter in the brain begins to decrease," which "affects other parts of the brain that are more responsible for things like cognition, executive functions, judgment, * * * [and] [d]ecision-making." J.A. 41-42. Evans called this the drug's "neurotoxic" effect, which can interfere with "planning, looking at consequences, abstract reasoning, [and] judgment." J.A. 42. He cited a study showing that 80 percent of patients "develop a paranoid psychosis" from the drug. That makes it "difficult for them to make reasonable judgments because reality is quite distorted." J.A. 43. Violence issues "usually come at that stage of use"—that is, the neurotoxic and psychotic stage. *Id.*

Evans then discussed Cheever's case. Evans had interviewed Cheever, and he found Cheever "to be a sad but typical case of progressive methamphetamine use." J.A. 47. "He had progressed very rapidly to the point where he had developed neurotoxicity." *Id.* And Cheever "was showing symptoms of psychosis pretty consistently." *Id.* He was also demonstrating "really stupid judgment": "running away from perceived threats that were not real, being very suspicious of his friends, even suspicious enough to start carrying a weapon." J.A. 48. When the sheriff

arrived, Cheever was "not only neurotoxic but acutely intoxicated." J.A. 49. And when he saw the sheriff climbing the stairs, he had a reflexive, "hand-on-the-hot-pot reaction," "very much influenced by the meth use," that led him to open fire. *Id.* As Evans put it: "[T]here was no judgment at all. This man just did it." *Id.*

D. The Government's Rebuttal

The state then called Welner, the government-hired psychiatrist whom Cheever had been compelled to talk to under court order. The defense objected on two grounds. First, the defense maintained it had done nothing to trigger a compulsory examination of Cheever under state law, and that Welner should not, therefore, be permitted to testify based on a compelled examination in state proceedings. J.A. 88. Kansas law only authorizes the prosecution to conduct, and subsequently to use evidence from, a compelled examination when a defendant asserts a mental-disease-or-defect defense, and voluntary intoxication is not a "mental disease or defect" under Kansas law. *See infra* at 10. Cheever thus had not opened the door to rebuttal testimony based on the compelled examination.

Second, the defense explained that Welner's testimony would far exceed the scope of any waiver. The prosecution had summarized Welner's intended testimony as follows: "He's going to say that he examined Mr. Cheever and that Mr. Cheever has an antisocial personality, which would * * * explain his actions on that day." J.A. 89. The defense responded: "I don't think Evans presented any psychological view of antisocial personality. He talked about meth, Judge, and how meth, you know, affects an individual and how he thinks it affected Cheever, so I think

to go into antisocial personality disorder and psychological testing is clearly beyond the scope of what we presented." J.A. 92. The court, after telling the defense its objections were "well made * * * in terms of preserving [them] for the record," allowed the testimony. J.A. 94.

Welner briefly offered his opinion on Cheever's methamphetamine use. He said that "there were not signs from the history of a remarkable change in Scott Cheever after he used the methamphetamine" on the morning of the shooting. J.A. 126.

Welner then moved on to "personality disorders" as a possible alternative explanation for Cheever's behavior. According to Welner, "[w]hat a personality disorder is is that everybody else doesn't want you to be that way, but you want to be that way because it suits you." J.A. 133. The prosecution then asked, "in that vein," about Cheever's "fascination with outlaws." J.A. 134. Welner responded:

> [W]hat I came to learn in my interview is that Scott Cheever was one of these unusual people who's actually exposed to a variety of different people in his life. He had people who were criminal types. He had people who were not criminal types but who were drug users. He had people who were clean and straight and were athletes. * * * So what I found in the interview was that, from him, was that he found himself identifying with and looking up to people that he alternatively described as bad boys or outlaws, and looking up to them and being impressed and awed by them, and in certain instances wanting to outdo them.

Id. Later, Welner elaborated on this point:

> I don't think that the methamphetamine affected his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do. I think that it is possible, possible, that methamphetamine made him more aggressive. But it was making a person aggressive who was armed to begin with and who identified not only with outlaws but outlaws who were engaged in fatal shootouts with police officers.

J.A. 156-57.

Welner also gave a detailed narration of the crime itself, sometimes delivered in the first person, as though he were in Cheever's head:

> I make a decision not to shoot, but to be silent, with the hope that this person goes away. The person comes near me but turns, and I'm aware of his movements, and still I am quiet and I don't shoot and I don't move. * * * I shoot him at a point in which he is very much within my range, has passed through that curtain, and I know that he is coming upstairs, and that is when I shoot.

J.A. 130-31. Welner continued in that vein. He then gave another intimate narration of the events of the crime that spanned a whopping six transcript pages, without interruption. J.A. 137-41.

The overall effect of Welner's testimony, as the Kansas Supreme Court recognized, was "devastating": he had "employed a method of testifying that virtually put words into Cheever's mouth," and he had "characterized Cheever as a person who had chosen an antisocial outlaw life style and who was indifferent to the violence he had committed." Pet. App. 42. The jury found Cheever guilty and sentenced him to death. Pet. App. 10.

E. The Appeal

The Kansas Supreme Court unanimously reversed the capital-murder conviction. It noted that Kan. Stat. Ann. § 22-3219 authorizes a court to order a defendant to submit to a mental examination if he files a notice of intent to assert a mental-disease-or-defect defense, and that the "court-ordered examination remains privileged" unless "the defendant presents evidence supporting [such] a * * * defense at trial." Pet. App. 28 (citing *Kansas* v. *Foster*, 910 P.2d 848 (Kan. 1996), and *Kansas* v. *Williams*, 884 P.2d 755 (Kan. App. 1994)). But under Kansas law "[i]t is well established that voluntary-intoxication-induced temporary mental incapacity at the time of the crime is not evidence of a mental disease or defect." Pet. App. 32-33 (citing *Kansas* v. *Kleypas*, 40 P.3d 139 (Kan. 2001), and *In re Habeas Corpus Petition of Mason*, 775 P.2d 179 (Kan. 1989)). Though *permanent* mental impairment caused by drug use can qualify as a mental disease or defect, "Cheever did not present evidence * * * that his use of methamphetamine had caused permanent mental impairment." Pet. App. 34.

The court concluded that because Cheever had raised only a voluntary-intoxication defense, he did not present mental-disease-or-defect evidence that would waive his privilege in the compelled examination. Pet. App. 28. Therefore "allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's rights under the Fifth and Fourteenth Amendments." Pet. App. 35.

SUMMARY OF ARGUMENT

Scott Cheever admitted killing Sheriff Samuels and put forth just one defense to avoid the death penalty: He argued he was too intoxicated to premeditate. According to Petitioner, Cheever—and every defendant—must pay a steep price for advancing this or any mental-state defense. When a defendant does so, Petitioner says, the prosecution can compel testimonial statements from the defendant. And then, the prosecution's expert can use those compelled statements against him at trial. Indeed, the expert is not even confined to rebutting the mental-state defense that justified this wholesale retreat from the Fifth Amendment, but instead can use those compelled statements to put damning character evidence before the jury.

That position is extraordinary; nowhere else in the criminal law is a defendant punished so harshly for simply advancing a defense. This Court should reject it for three reasons.

1. To begin with the narrowest ground: Even accepting *arguendo* that a defendant's presentation of expert mental-health testimony can waive the Fifth Amendment privilege, that waiver is not unlimited; the government's expert can use compelled statements only to rebut the mental-status defense actually raised. *Buchanan* v. *Kentucky*, 483 U.S. 402, 424 (1987). Here, the government blew past that limitation. Cheever's expert testified that Cheever was intoxicated and could not form the specific intent necessary for capital murder. In "rebuttal," the government's expert used Cheever's compelled words to (1) suggest Cheever had a personality disorder, (2) smuggle in character evidence about Cheever's

admiration of outlaws and life of crime, and (3) offer a long narrative of Cheever's inner experience of the crime, speaking as if he were in Cheever's head. By far exceeding the bounds of any "limited rebuttal purpose," *id.*, that testimony violated the Fifth Amendment.

2. If the Court were to reach Petitioner's broader argument, it should reject it. *Buchanan* does not stand for the broad waiver principle Petitioner espouses. *Buchanan*, in fact, is not a waiver case at all; it establishes instead that an "examination that the defendant requested" is not compelled, and thus that the Fifth Amendment is not implicated. *See* 483 U.S. at 422-23. The Court has never squarely accepted Petitioner's waiver rationale and should not do so here. As then-Judges Scalia and Ginsburg have recognized, to say a defendant "waives" his Fifth Amendment rights merely by mounting a mental-state defense is "at best a fiction." *United States* v. *Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (plurality op.).

Nor should the Court accept Petitioner's request to manufacture a waiver on policy grounds. The Court lacks "the authority to do so," *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 325 (2009), and in any event there is no need. Despite *amici*'s hyperbole, a defendant's mental-state evidence is not "immun[e] from rebuttal" if compelled statements are not used against him. U.S. Br. 23. Far from it: The prosecution still can put on a rebuttal expert, and that expert can draw from a wealth of data, including the defense expert's report, the transcript of that expert's examination, police reports, physical evidence, and witness interviews. Any claim that that is not sufficient would be wrong. Prosecutors regu-

larly introduce, and courts allow, expert opinions based on such sources. And this Court has blessed that approach.

At a minimum, even if this Court implies a waiver, it should limit that waiver to situations where the defendant raises an affirmative defense. That will ensure the prosecution "shoulder[s] the entire load" by proving every element of the crime, as the Constitution demands. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (quotation marks omitted).

3. In any event, on the facts of this case Cheever did not knowingly and intelligently waive his rights. Kansas law provided that by raising a voluntary-intoxication defense Cheever would *not* open the door to rebuttal based on a compelled examination. Pet. App. 28. That law does not, of course, change the meaning of the Fifth Amendment. But it *is* a fact relevant to waiver analysis, since one can only waive a constitutional right if "he knows what he is doing and his choice is made with eyes open." *Adams* v. *U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942). Here Cheever's eyes were not open because the cases told him his action would not constitute a waiver.

ARGUMENT

I. THE STATE EXPERT'S TESTIMONY FAR EXCEEDED THE SCOPE OF ANY WAIVER.

The simplest problem with Petitioner's claim that introducing mental-state evidence waives the Fifth Amendment privilege is that even if it were correct, it does not mean the Kansas Supreme Court should be reversed. Such a waiver would not be limitless. Instead, the state could only introduce expert testimony based on a compelled examination for a "limited rebuttal purpose." *Buchanan*, 483 U.S. at 424. On this point there is no dispute; Petitioner agrees

that waiver should be recognized only "for the very limited purpose of rebutting [a] mental-status defense[.]" Pet. Br. 30. That concession costs Petitioner the case, because a "very limited" rebuttal is not what happened here. Welner's use of compelled statements to attack Cheever's character exceeded the scope of any waiver and violated the Fifth Amendment.

A. This Issue Is Properly Before The Court.

Apparently apprehensive of what this Court will find if it examines the scope issue, Petitioner and the United States both pre-emptively argue that the issue is not presented. Their efforts are ineffective—and in the case of the United States, inaccurate.

1. Petitioner first declares, without analysis, that "[a]ny issues regarding the scope of Dr. Welner's testimony * * * are not fairly subsumed within the Question Presented." Pet. Br. 15 n.1. That is wrong. The question presented, as Petitioner phrased it in the petition (and before Petitioner's merits brief tried to reword it), is whether the state "violate[d] [Cheever's] Fifth Amendment privilege * * * by rebutting [his] mental state defense with evidence from a court-ordered mental evaluation." Pet. i. The answer is: Yes, because the content of that rebuttal exceeded the bounds of any waiver. That is "a reply well within the question's scope." *U.S. Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 n.7 (2013). The Fifth Amendment issue at the heart of this case cannot be answered in the abstract; it turns on what Welner actually said at trial. At a minimum, the scope issue is a "subsidiary question fairly included" in the question presented, S. Ct. R. 14.1(a), because the scope of Welner's testimony informs whether the rebuttal "violate[d] [Cheever's] Fifth Amendment

privilege." Pet i. *See United States* v. *Mendenhall*, 446 U.S. 544, 552 n.5 (1980) (question is fairly included where its determination "is essential to the correct disposition of the other issues in the case").

Petitioner's second argument—that the issue is "not properly before this Court" because "the Kansas Supreme Court did not rely on any such rationale," Pet. Br. 15 n.1—fares no better. The scope argument was raised and preserved below, as Petitioner and the United States concede. Pet. Br. 15 n.1; U.S. Br. 29 n.6. And Cheever identified it in the brief in opposition. BIO 7. This Court's cases are clear that a prevailing party may defend the judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered" by the courts below. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). That the Kansas Supreme Court did not reach the scope issue is no obstacle to review.

The United States tries a different tactic: It asserts that Cheever, in his brief in opposition to certiorari, "characterized" the scope issue "as a state-law issue appropriately left for remand." U.S. Br. 29 n.6 (citing BIO 5, 7, 10-11). The United States does not and cannot quote any specific language to support that claim, because it is wrong. In fact, the brief in opposition clearly characterized the scope issue as one of federal law on one of the very pages the United States cites: "[S]hould the court find that by raising a voluntary intoxication defense, [Cheever] waived his Fifth Amendment right to the extent necessary to rebut that defense, the district court erred when it ruled that the prosecution could go beyond rebuttal and offer its alternative theory of the case." BIO 7. The argument is that the Fifth

Amendment waiver is limited, and by exceeding the limited waiver, the state violated the Fifth Amendment. There is certainly nothing there to suggest that whether Welner exceeded the scope of rebuttal is an issue of state law.[2]

The United States also points to a later section of the brief in opposition. That section—pages 10 to 11—noted that the argument Kansas was advancing in its petition was not made below. Specifically, though Kansas' petition was based on Fifth Amendment waiver, the prosecution had argued below that "the fact that the evaluation was legally obtained rendered it admissible." BIO 10. The brief in opposition characterized *that* argument, advanced by the *prosecution*, as grounded in state law. *Id.* at 10-11. The United States' mischaracterization of the brief in opposition should not stop this Court from considering an issue comprehended by the question presented.

B. Welner's Testimony Exceeded the Scope of Any Waiver.

This Court should answer the Question Presented in the affirmative, and hold that the government's use of Cheever's compelled testimony exceeded the scope of any waiver.

1. The logic of the implied waiver Petitioner posits has its roots in parity: "the State must be permitted to present rebuttal evidence * * * once a defendant has raised a mental-status defense." Pet. Br. 27. Parity means parity; any waiver the Court might choose to imply should be no broader than the men-

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[2] Cheever's brief in the Kansas Supreme Court also framed the scope issue as one of federal law. *See* Cheever Appeal Br. 116 (Kan.), 2010 WL 7196356.

tal-status defense the prosecution seeks to rebut. And indeed, that is both the law and the position of the parties. In *Buchanan*, the Court approved use of an expert report only for a "*limited* rebuttal purpose," and it noted that the report did "not describe *any* statements by [the defendant] dealing with the crimes for which he was charged," but only "set forth * * * general observations about the mental state of" the defendant. 483 U.S. at 423-24. No more was admitted than what was strictly necessary for rebuttal. Likewise, in *Powell* v. *Texas*, 492 U.S. 680 (1989), the Court noted that a defendant would not "open[ ] the door to the admission of psychiatric evidence on *future dangerousness* by raising an *insanity* defense." *Id.* at 685 n.3 (emphases added). In other words, any waiver must be confined to the issue raised. Petitioner and its *amici* appear to agree. *See* Pet. Br. 30 (State may use "the results of [a court-ordered] examination for the very limited purpose of rebutting [a] mental-status defense at trial."); States' Br. 14 (permissible rebuttal defined as "only what is necessary to maintain a level playing field between the state and the defense").

The proper scope of any waiver is further illuminated by this Court's decisions on cross-examination of a testifying defendant—an analogy Petitioner and its *amici* press at length. Pet. Br. 24-25; U.S. Br. 12-17.[3] When a defendant elects to take the stand, he has "waived" his privilege insofar as he must submit

[3] For reasons we explain *infra* at 34-37, the testifying-defendant analogy is unhelpful in analyzing whether asserting a mental-state defense waives the privilege in the first place. But the scope argument advanced in this Part assumes *arguendo* that there actually *is* a limited waiver. If that is so, Petitioner and its *amici* should be willing to live with the analogy they pressed to prove that point.

to cross-examination. But the resulting waiver is not limitless. Rather, he has waived the privilege "only * * * on *the matters he has himself put into dispute*." *Brown* v. *United States*, 356 U.S. 148, 155 (1958) (emphasis added); *accord Mitchell* v. *United States*, 526 U.S. 314, 321 (1999) ("The privilege is waived for the matters to which the witness testifies[.]"). That rule allows the defendant "himself * * * to determine[ ] the area of disclosure and therefore of inquiry." *Brown*, 356 U.S. at 155-56. The cross-examination questions must stay "within [the] scope" of the defendant's own testimony, *Mitchell*, 526 U.S. at 321, and a testifying defendant cannot be "compelled to furnish original evidence against himself." *Fitzpatrick* v. *United States*, 178 U.S. 304, 316 (1900).

Thus, for example, a defendant who takes the stand and testifies only that he never met an alleged co-conspirator cannot be asked on cross-examination whether he had a "conversation with respect to heroin" on a particular date. *Enriquez* v. *United States*, 293 F.2d 788, 794 (9th Cir. 1961). That is so because the question goes "far beyond the scope," *id.* at 793; it does not pertain to matters the defendant "himself put into dispute." *Brown*, 356 U.S. at 155. As one court put it more than a century ago: "[H]ere is the limitation of the waiver by an accused person of his constitutional privilege * * * by testifying. * * * He may be cross-examined upon the subjects of his direct examination, but not upon other subjects." *Harrold* v. *Territory of Okla.*, 169 F. 47, 51 (8th Cir. 1909). The treatises are in accord: They say the waiver is limited to cross-examination questions "necessary to provide the prosecution with a reasonable opportunity to test the defendant's assertions on

direct." 1 McCormick on Evid. § 129 (7th ed.); *accord* C.A. Wright *et al.*, *Federal Practice & Procedure* § 6166 (2d ed. 2013) (waiver's scope "should be fixed * * * by the extent to which cross-examination is necessary to test the truth of the accused's direct examination").

If anything, that limitation should be even more strictly observed in the context of rebuttal based on a compelled mental examination. The prosecution already will have had the opportunity to test the "assertions on direct," 1 McCormick on Evid. § 129, by cross-examining the person making those assertions: the defense expert. As a result, the danger of " 'distortion of facts by permitting a witness to select any stopping place in the testimony' "—which danger is the primary "justification[ ] for the rule of waiver in the testimonial context"—is minimal. *Mitchell*, 526 U.S. at 322 (quoting *Rogers* v. *United States*, 340 U.S. 367, 371 (1951)). *See infra* at 35. Moreover, for reasons discussed at length *infra* at 27-30, the implied waiver in this context rests on a much more tenuous rationale than testimonial waiver. It is a policy-driven "waiver" in derogation of the Fifth Amendment, and for that reason alone it should be construed narrowly if recognized at all.

2. Accordingly, this Court should hold that when a defendant introduces expert evidence regarding a mental-status defense, the prosecution may introduce expert evidence based on a compelled examination of the defendant only to the extent it is "necessary" to provide a "reasonable opportunity" to rebut the specific defense raised. 1 McCormick on Evidence § 129; *accord* States' Br. 14.

Some lower courts have offered specific guidance implementing this limitation. As one put it, the

prosecution "may *rebut* Defendant's mental status defense," but it may "not *prosecute* based upon Defendant's mental health." *United States* v. *Williams*, 731 F. Supp. 2d 1012, 1020 (D. Haw. 2010). Accordingly, "a defendant's decision to raise a mental status defense" does not "open[ ] the door" for the prosecution to use compelled testimony "to assert diagnoses or defects other than to rebut those specifically placed at issue by the defendant." *Id.* at 1019. Thus, for example, where the defendant asserted the mental condition of borderline intellectual function, the prosecution was limited to disproving that diagnosis; its experts could not use their compelled examination to "affirmatively assert that Defendant suffers from psychosis or Anti-Social Personality Disorder." *Id.* at 1020. Similarly, where the defendant asserted that his mental state was affected by substance abuse, the prosecution's experts could not use his compelled statements to determine whether he had a personality disorder. *United States* v. *Taylor*, 320 F. Supp. 2d 790, 794 (N.D. Ind. 2004). And where the defendant asserted the defense of mental retardation, the prosecution expert's tests had to "bear some reasonable relation to measuring mental retardation * * *. Otherwise, there is a danger that defendants will be improperly subjected to mental examinations beyond the scope of the precise issue they have tendered and their resulting waiver of constitutional rights." *Centeno* v. *Superior Court*, 117 Cal. App. 4th 30, 45 (2004). In cases such as these, positing alternative diagnoses and conditions was not *necessary* to provide a *reasonable opportunity* to rebut the specific defense the defendant advanced.

3. Welner's testimony exceeded the scope of proper rebuttal in three respects. First, Welner suggested a "personality disorder" as the cause of Cheever's actions, even though the defense expert had offered no opinion whatsoever on any alleged personality disorders. Second, Welner opined that Cheever was fascinated with and attached to the "outlaw" life-style—an attempt to launder character evidence through psychiatry. Finally, Welner offered what amounted to a first-person narrative of the shooting from Cheever's perspective, even purporting to inhabit Cheever's head. This testimony relied on Cheever's compelled statements. And none of it was necessary to provide Welner a reasonable opportunity to rebut the testimony of Cheever's expert, Evans, regarding voluntary intoxication.[4]

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[4] These discussions of personality disorders and the like are a regular feature of Welner's testimony. *See United States* v. *Mitchell*, 706 F. Supp. 2d 1148, 1192 (D. Utah 2010) (opining that defendant "suffers from one or more personality disorders"); *Commonwealth* v. *Baumhammers*, 960 A.2d 59, 90 (Pa. 2008) (opining that defendant "suffers from a personality disorder" and demonstrated a "lifetime pattern of irresponsibility"); *New Jersey* v. *Fortin*, 843 A.2d 974, 1017 (N.J. 2004) (antisocial personality disorder); *Francis S.* v. *Stone*, 995 F. Supp. 368, 387 n.118 (S.D.N.Y. 1998) (same); *Lanni* v. *New Jersey*, 177 F.R.D. 295, 302 (D.N.J. 1998) (narcissistic personality disorder). The Supreme Court of New Jersey has sharply criticized the prosecution's use of Welner in circumstances similar to this case. In *New Jersey* v. *Vandeweaghe*, the defense expert testified that the defendant was intoxicated and unable to form intent to kill. 827 A.2d 1028, 1031 (N.J. 2003). Welner then testified—purportedly in rebuttal—that the defendant had a "record of lawbreaking," "a longstanding history of being able to lie and lie successfully," and an "antisocial personality." *Id.* at 1031-32. The court found that the defendant's expert had not "opened the door" to Welner's testimony and that its admission was plain error requiring reversal. *Id.* at 1033-35.

a. As set forth *supra* at 6-7, Evans' testimony hewed closely to the issue at hand—voluntary intoxication. He talked about the drug's chemistry and its effects on a typical user. J.A. 36-38. And he opined on how the drug affected Cheever, generally and on the day in question. J.A. 47-49.

Welner, in rebuttal, did discuss methamphetamine use. J.A. 126. But, over the defense's objection, he then strayed far afield of anything in Evans' testimony. Most obviously, Evans never once discussed the possibility that Cheever had a personality disorder. As defense counsel put it, Evans "talked about meth," and how it "affects an individual." J.A. 92. In sharp contrast, the thrust of Welner's testimony—as summarized by the prosecution itself—was "that Mr. Cheever has an antisocial personality." J.A. 89. Welner began by explaining that one possible diagnosis he considered was antisocial personality disorder, *i.e.*, a disorder where "everybody else doesn't want you to be that way, but you want to be that way because it suits you." J.A. 133. Welner then explained, "in that vein," that Cheever had good role models (athletes and leaders) and bad ones (criminals and drug users) and chose to follow the latter. J.A. 134. By connecting those facts—drawn straight from Cheever's compelled statements—to a personality disorder, the testimony suggested that this was a trait immutable in Cheever.

Plainly, none of this discussion was "necessary" to give the prosecution a "reasonable opportunity" to rebut the defense Cheever actually advanced—voluntary intoxication. 1 McCormick on Evidence § 129. Cheever did not "open[ ] the door" to use his compelled statements to assert other diagnoses. *Williams*, 731 F. Supp. 2d at 1020. The prosecution

shoved that door open and, in so doing, violated the Fifth Amendment.

b. Welner also used compelled testimony to smuggle in character evidence irrelevant to anything put in issue by Cheever. He opined that Cheever chose to "look[ ] up to" to "bad boys" or "outlaws." J.A. 134. And he said Cheever was "impressed" and "awed" by outlaws and wanted to "outdo" them. *Id.* This was character evidence, plain and simple. It was intended to show that Cheever committed the crimes because he was attached to a particular way of life.

It is, of course, axiomatic that in a criminal case "character is not an issue * * * unless the prisoner chooses to make it one." *Greer* v. *United States*, 245 U.S. 559, 560 (1918) (Holmes, J.). That is so because character evidence is "said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record." *Michelson* v. *United States*, 335 U.S. 469, 476 (1948). Here, the state used a compelled interview to elicit damaging facts about Cheever's character. It then laundered those facts through the testimony of its expert. That had nothing to do with the defense Cheever raised through his expert, and it far exceeded the "limited rebuttal purpose" the Fifth Amendment permits. *Buchanan*, 483 U.S. at 423-24.[5]

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[5] The prosecution asked Evans on cross-examination whether the "defendant thought of himself as an outlaw," J.A. 59, and Evans assented. This does not change the scope analysis, for two reasons. First, Evans never connected this point to the concept of a personality disorder, as Welner did. It was clear Welner was suggesting this trait was innate—a fact that may have influenced the jury on guilt and at the penalty phase. Second, the *defense*, not the prosecution, "determines the area of * * * inquiry." *Brown*, 356 U.S. at 155-56. To say the "outlaw" material was within the scope because Evans was

c. Finally, Welner's extended narration of the crime essentially forced the defendant to testify in detail through the mouthpiece of a state expert. As the court below put it, Welner "g[ave] a moment-by-moment recounting of Cheever's observations and actual thoughts to rebut the sole defense theory that he did not premeditate the crimes." Pet. App. 42. Much of this narrative was in the first person—highlighting the privileged access Welner had been given to the "private enclave" of Cheever's personality. *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966) (quotation marks omitted). The state used that privileged access to establish premeditation, an element of capital murder in Kansas.

Courts have been especially vigilant about protecting the Fifth Amendment privilege when an expert ventriloquizes for the defendant like this. Indeed, *Buchanan* noted that the challenged report did "not describe[] *any* statements by [the defendant] dealing with the crimes for which he was charged." 483 U.S. at 423. That fact influenced the Court's analysis. And lower courts have held that a defendant who raises a mental-status defense may "waive[ ] his Fifth Amendment right to silence regarding mental health issues, but does not waive his right to remain silent regarding the details of the crime." *Lewis*

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asked about it on cross-examination would mean the *prosecution* can bootstrap new topics within the area of inquiry by asking particular questions of the defense expert.

Nor does Evans' assent to the outlaw question make the error harmless. As noted, Welner linked the identification with outlaws to a personality disorder, making it seem innate and immutable; Evans agreed to no such thing. Moreover, Cheever himself *denied* he shot the sheriff because he thought of himself as an outlaw. Tr. 147-48. Welner thus contradicted Cheever on a point crucial to the prosecution's case.

v. *State*, 970 P.2d 1158, 1171 (Okla. Crim. App. 1998); *see also State* v. *Rodriguez*, 807 N.W.2d 35, 38-39 (Iowa 2011); *Noggle* v. *Marshall*, 706 F.2d 1408, 1416 (6th Cir. 1983).

The Fifth Amendment, in short, "proscribes state intrusion" into the defendant's mind "to extract self-condemnation." *Couch* v. *United States*, 409 U.S. 322, 327 (1973). That is just what happened here.[6]

II. INTRODUCING EXPERT TESTIMONY ABOUT DEFENDANT'S MENTAL STATE DOES NOT WAIVE THE FIFTH AMENDMENT PRIVILEGE.

If the Court does not affirm on scope grounds, it must then confront the broader issue of whether a defendant waives his Fifth Amendment rights merely by putting on a mental-state expert. A defendant does not, for it is "at best a fiction to say that when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights." *Byers*, 740 F.2d at 1113. And this Court "may not disregard" that reality by "relax[ing]" the Fifth Amendment's requirements to accommodate perceived "necessities of trial and the adversary process." *Melendez-Diaz*, 557 U.S. at 325. The arguments advanced by Petitioner and its *amici* do not overcome this straightforward analysis.

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[6] That Cheever testified and admitted to the basic facts of the crime does not change this conclusion. If anything, it made this an even more obvious Fifth Amendment violation: The state had ample opportunity to test Cheever's story by cross-examining him, so there was no need to force him to speak to an agent of the state to extract a separate narrative. *Cf. Buchanan*, 483 U.S. at 423 (fact that defendant did *not* testify weighed in favor of allowing the state's psychiatric evidence because state could not cross-examine defendant).

A. Using A Compelled Expert Examination Against The Defendant At Trial Violates The Fifth Amendment.

As a preliminary matter, it is common ground that, absent a waiver, introducing testimony based on a compelled psychiatric examination violates the Fifth Amendment. *Estelle* v. *Smith*, 451 U.S. 454 (1981), so holds, and Petitioner does not argue otherwise.

The text of the Fifth Amendment provides that no person "shall be compelled in a criminal case to be a witness against himself." The privilege "is a bar against compelling 'communications' or 'testimony[.]' " *Schmerber* v. *California*, 384 U.S. 757, 764 (1966); *accord Fisher* v. *United States*, 425 U.S. 391, 408 (1976). Ordering a defendant to speak to a government expert, and then using his words against him at trial, violates that privilege. After all, communications are "compelled" from a defendant when he is ordered to undergo an examination and told he must participate or lose the right to put on a defense. *Estelle*, 451 U.S. at 468; *South Dakota* v. *Neville*, 459 U.S. 553, 561 n.12 (1983) (describing "disclosures during a court-ordered psychiatric examination" as "compelled"). Those communications are testimonial, at least where—as here—"the State use[s] as evidence against [the defendant] the substance of his disclosures during the pretrial psychiatric examination." *Estelle*, 451 U.S. at 464-65. The compelled testimonial statements are used at trial for an "objective that [i]s plainly adverse" to the defendant. *Id.* at 465. And on the topic of compelled incriminating statements, this Court is categorical: They are "inadmissible" for "*all* purposes." *Michigan* v. *Harvey*, 494 U.S. 344, 351 (1990) (citing *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979)). It is therefore

unsurprising that this Court has held that the "Fifth Amendment privilege * * * is directly involved" in circumstances like this one. *Estelle*, 451 U.S. at 464.

The question in this case accordingly is not whether Welner's testimony violated the Fifth Amendment absent a waiver; all agree it did. *See* Pet. Br. 29 (Cheever had a "Fifth Amendment privilege with respect to the mental examination"). Rather, the question is whether Cheever "waived" his privilege.

B. Putting On Expert Mental-State Evidence Does Not Amount To A Waiver.

1. This Court should hold that there was no waiver, for reasons succinctly explained by then-Judge Scalia—joined by then-Judge Ginsburg and four others members of the D.C. Circuit sitting en banc—in *Byers*. There, as here, the government argued that defendants waive the privilege "by voluntarily making psychiatric evaluation an issue in the case." 740 F.2d at 1111. Judge Scalia rejected that argument, calling it "easy game." *Id.* at 1113. He wrote: "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." *Id.* at 1113. In so concluding, he rejected the significance of a point *amici* now emphasize: that the criminal process "is replete with situations requiring * * * difficult judgments as to which course to follow." U.S. Br. 23. He wrote: "[A]lthough the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights, it is doubtful

whether such a 'waiver' could meet the high standard required for a voluntary, 'free and unconstrained' relinquishment of the Fifth Amendment privilege." *Byers*, 740 F.2d at 1113 (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961)).

Just so. There is no colorable case that Cheever "waived" his Fifth Amendment rights without emptying that word of its meaning.

"The ultimate test" of whether a valid waiver has occurred "remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness." *Culombe*, 367 U.S. at 602; *accord Colorado* v. *Spring*, 479 U.S. 564, 566 (1987) (Fifth Amendment waiver "is valid only if it is made voluntarily, knowingly, and intelligently"). Waiver must be "voluntary in the sense that it was *the product of a free and deliberate choice* rather than intimidation, coercion, or deception." *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2260 (2010) (emphasis added) (quotation marks omitted).

There is no sense in which a defendant in Cheever's position makes a "free and deliberate choice" to incriminate himself. Instead, the defendant is *forced* to 'waive' the privilege in order to mount a defense or present mitigating evidence against a possible death sentence. If the defendant declines, his mental-state evidence is foreclosed. *See* Fed. R. Crim. P. 12.2.

This Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968), underscores why that cannot be understood as a free choice. In *Simmons*, the Court considered whether testimony by a defendant at a suppression hearing could later be used to establish his guilt at trial. Though lower courts had allowed the testimony over Fifth Amendment objection on the ground that it was "voluntary," this Court reject-

ed that approach. *Id.* at 393-94. "[T]he assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created." *Id.* at 394. "Thus, in this case [the defendant] was obliged either to give up * * * a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege * * *. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.*

So it is here. Defendants have a "fundamental constitutional right to a fair opportunity to present a defense." *Crane* v. *Kentucky*, 476 U.S. 683, 687 (1986). That right "would be an empty one if the State were permitted to exclude competent, reliable evidence" bearing on the defendant's mental state. *Id.* at 690. And yet if Petitioner prevails, defendants would be "obliged either to give up" that right or to "waive" the Fifth Amendment privilege. *Simmons*, 390 U.S. at 394. That is exactly the kind of choice this Court found "intolerable" in *Simmons*.

Indeed, the scope of the rule Petitioner seeks only exacerbates the problem. Note that Petitioner does not just argue for a waiver whenever a defendant puts on *expert* mental-state evidence; Petitioner argues for a waiver whenever a defendant puts on *any* mental-state evidence. *See* Pet. Br. 12 ("[W]hen 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 * * * .") (emphasis added). But if a defendant must fear a compelled-testimony free-for-all the

moment he or his witnesses say anything touching on mental state, the result is easy to predict: Many defendants will choose not to testify and will refuse to call experts. This Court should reject a rule that would "chill some defendants from presenting their best defense—and sometimes any defense at all[.]" *James* v. *Illinois*, 493 U.S. 307, 314-15 (1990).

Cheever did not waive his privilege by putting on a mental-state defense. The constitutional violation certainly was not harmless, *see supra* at 8-10, and Petitioner has not argued otherwise. The decision ordering a new trial should be affirmed.[7]

C. Petitioner's Contrary Arguments Are Meritless.

Petitioner and the United States advance three arguments in response: (1) *Buchanan* controls this case; (2) offering expert mental-state evidence creates a waiver because, like a defendant choosing to testify, it is inconsistent with invocation of the privilege; and (3) this Court must imply a waiver or prosecutors will be unable to rebut mental-state defenses. None withstands examination.

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[7] The same outcome would obtain if one were to view this case through the lens of "forfeiture," instead of waiver. Kansas did not raise a forfeiture argument and cannot do so now. And in any event, the doctrine has no application here because forfeiture, like waiver, must be *voluntary*. *See Salinas* v. *Texas*, 133 S.Ct. 2174, 2180 (2013) ("[A] witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary."); *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991) ("Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."). Cheever's decision to "give up" his right not to have compelled statements used against him was not voluntary, as already discussed. *Supra* at 28-29.

1. *Buchanan.* Petitioner's brief never mentions the "voluntarily, knowingly, and intelligently" waiver test. Instead, Petitioner tries to skip that step by asserting that *Buchanan* already held that "when a defendant presents a mental-status defense, the Fifth Amendment privilege is waived[.]" Pet. Br. 13. That is incorrect. In fact, this Court has never squarely endorsed the waiver rationale; if it did so now, it would be breaking new ground.

In *Buchanan*, the defendant "attempted to establish the affirmative defense of 'extreme emotional disturbance' " at trial. 483 U.S. at 408. His sole witness was a social worker who read "reports and letters dealing with evaluations of petitioner's mental condition." *Id.* at 409. On cross-examination, the prosecution asked the social worker to read from a report of *another* evaluation made pursuant to a joint motion by the defendant and prosecution. *Id.* at 410. The trial court allowed parts of that report into the record, and the jury found the defendant guilty.

This Court affirmed over a Fifth Amendment challenge. It held that "if a defendant requests [a psychiatric] 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.*" *Id.* at 422-23 (emphasis added). The Court emphasized that the defense had "joined in a motion" for the report at issue, and that the report itself set forth only "general observations about the mental state" of the defendant but did "not describe *any* statements by petitioner dealing with the crimes[.]" *Id.* In those circumstances, "introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation." *Id.* at 423-24.

The word "waiver" appears nowhere in *Buchanan*. Rather, the crucial feature of *Buchanan* seems to be that the examination in question was *jointly* requested. Thus any testimonial communications by the defendant in *Buchanan* were not "compelled," U.S. Const. amend. V, the Fifth Amendment was not violated, and no question of "waiver" was presented at all. *See United States* v. *Doe*, 465 U.S. 605, 611-12 (1984) (defendant's records "cannot be said to contain compelled testimonial evidence" when their preparation was "wholly voluntary," and thus prosecution can subpoena them without a Fifth Amendment violation); *State* v. *Worthington*, 8 S.W.3d 83, 92 (Mo. 1999) ("[S]ince Worthington initiated the examination, he was not compelled to testify against himself" and there was no Fifth Amendment issue); 1 McCormick on Evidence § 137. *Buchanan* does not support the broad waiver principle Petitioner urges.

The only time the Court has mentioned "waiver" in this context is in some language in dicta in *Powell*, *supra*, a short per curiam disposition of a Sixth Amendment case. In *Powell*, the trial court had ordered the defendant, at the state's request, to undergo a psychiatric examination, and neither the defendant nor his attorney was notified. 492 U.S. at 681-82. The Court held that the examination "was taken in deprivation of petitioner's right to assistance of counsel," and that there was "no basis for concluding that [the defendant] had waived his Sixth Amendment right." *Id.* at 686. The Court therefore reversed the conviction.

In the course of its analysis, the Court noted that language in *Estelle* and *Buchanan* "provides some support" for the idea that introducing psychiatric testimony is a Fifth Amendment waiver. *Id.* at 684.

After this non-committal characterization, the Court also described *Buchanan* as holding: "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." *Id.*

As explained above, that characterization is questionable; *Buchanan* did not discuss, let alone hold, anything about waiver. Moreover, *Powell*'s mention of waiver was dicta; the Court held that the *Sixth* Amendment had been violated. *Id.* at 685-86. No Fifth Amendment question was presented. And this Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006). That is especially true of dicta in a per curiam opinion, issued without benefit of merits briefing and argument. *See U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) ("This seems to us a prime occasion for invoking our customary refusal to be bound by dicta, and our customary skepticism toward per curiam dispositions that lack the reasoned consideration of a full opinion.").

This Court thus has never held that a defendant waives his Fifth Amendment privilege by the bare act of introducing mental-state expert testimony, and it should not do so now. *Buchanan* is best understood to hold that when a defendant undergoes a psychiatric examination at his own request, his statements in that examination are not compelled, and no Fifth Amendment issue arises. Under *Buchanan*, if the defendant puts on mental-state expert testimony, the prosecution may rebut "with evidence from the reports of the examination that the defend-

ant requested." 483 U.S. at 422-23. Indeed, the prosecution may even obtain the full *transcript* of that examination and use it to prepare expert rebuttal. *See infra* at 39. Cheever has no quarrel with those principles. Both are a far cry from the much broader holding Petitioner requests: that if a defendant mounts a particular defense, the Fifth Amendment evaporates and the government may compel him to speak and use his statements against him.

2. Cross-Examination Analogy. Petitioner next argues that Cheever waived his rights because by advancing a mental-state defense, he "acted inconsistently with the assertion of his Fifth Amendment privilege." Pet. Br. 24. This supposed inconsistency is based on a "close analogy": Just as a defendant who takes the stand waives the privilege insofar as he can be cross-examined, so too a defendant who presents expert mental-status testimony waives the privilege insofar as the state can introduce testimony from a compelled mental examination. *Id.* at 23; *see also* U.S. Br. 12-17.

The analogy breaks down under scrutiny. For starters, the text of the Fifth Amendment says the accused cannot "be compelled * * * to be a witness[.]" The implication of this language is that once a defendant *has* become a "witness," voluntarily, the privilege no longer applies. To be a "witness" at trial is "inconsistent[ ]" with the privilege, Pet. Br. 24, in a literal way. Similarly, a defendant can waive his right to remain silent by *speaking* after receiving *Miranda* warnings; once again, it is impossible both to speak and to remain silent. *See Berghuis*, 130 S. Ct. at 2262. That is precisely why there is a limited waiver. *See Fitzpatrick*, 178 U.S. at 315 ("Where an accused party *waives his constitutional privilege of*

silence, takes the stand in his own behalf and *makes his own statement*, it is clear that the prosecution has a right to cross-examine * * * .") (emphases added).

The same cannot be said of inviting an expert to testify about the defendant's mental state. The United States asserts that when a defendant does so, he is "present[ing] *his own statements* at trial," just as if it were "his own testimony." U.S. Br. 22 (emphasis added). That description is not accurate. The defendant is not presenting his own statements, and he has not become a "witness." Indeed, he has not chosen to speak at all, except to the extent he speaks in private to his own expert witness to help the witness form an opinion.

There is another deep flaw with the analogy. The rationale for waiver when the defendant takes the stand is that "a contrary rule 'would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony.' " *Mitchell*, 526 U.S. at 322 (citation omitted). If a witness could "pick and choose" what facts to discuss it would "diminish[ ] the integrity of the factual inquiry." *Id.* Cross-examination is needed so the defendant's story can be subjected to the "antiseptic test of adversary process." *Brown*, 356 U.S. at 155.

These concerns are absent here. That is because the core of an expert's testimony is his *opinion*. *Williams* v. *Illinois*, 132 S. Ct. 2221, 2239-40 (2012). And when a defense expert testifies, the prosecution can cross-examine the expert on that opinion, attacking the opinion itself as well as the facts that undergird it. The expert's testimony is subjected to the full "adversary process." *Brown*, 356 U.S. at 155.

The United States argues that the decision whether to put on mental-health evidence and risk rebut-

tal, like the decision whether to testify and face cross-examination, is merely a " 'choice of litigation tactics,' not an impermissible burden on the defendant's Fifth Amendment privilege." U.S. Br. 23 (quoting *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980)). That argument elides the underlying question at issue: Is there a waiver? In the cross-examination context, there is; a defendant who becomes a witness has acted inconsistently with the privilege. That fact creates a tactical choice for a defendant who wishes to testify; he knows that if he testifies he will waive his rights, and he can choose whether to do so. Here, by contrast, *there is no waiver in the first place*; the defendant who advances mental-state evidence has not chosen to speak to the government or to be a witness. The "tactical choice" thus arises only if a court proclaims, by judicial fiat, that presenting a mental-state defense will cost the defendant his constitutional rights. That is "a decree that remains to be justified." *Byers*, 740 F.2d at 1113.

The United States also argues that letting the prosecution use compelled testimony in this circumstance is no different than letting it impeach a testifying defendant using other evidence that "would not otherwise be available to the prosecution," such as evidence obtained in violation of *Miranda*. U.S. Br. 25-26. That is incorrect for two reasons. First, as the United States concedes (at 26 n.4), "compelled incriminating statements are inadmissible" for "*all* purposes," including "impeachment purposes." *Harvey*, 494 U.S. at 351. Cheever's statements in this case were compelled. *See supra* at 26-27. The fact that prosecutors can impeach using statements that were *not* compelled, but merely obtained in violation of *Miranda*'s prophylactic rule,

is irrelevant. Second, every case the United States cites takes pains to distinguish between *substantive* use of evidence and use for *impeachment*. *See Kansas* v. *Ventris*, 556 U.S. 586, 593 (2009) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can * * * provide himself with a shield against contradiction of his untruths."); *United States* v. *Havens*, 446 U.S. 620, 628 (1980); *Harris* v. *New York*, 401 U.S. 222, 224 (1971). Thus the United States' concession that the compelled evidence here was used "substantively as opposed to only for impeachment purposes," U.S. Br. 26, is fatal to its analogy.[8]

3. Policy Arguments. Finally, Petitioner argues that this Court simply *must* manufacture an implied waiver, because absent the use of compelled testimony the government will have no "meaningful opportunity to contest the defense." Pet. Br. 27. The United States doubles down on this policy argument, asserting more than a dozen times that absent an implied waiver, the defendant will be able to present a "one-sided" mental-state defense, "free from challenge" and "immun[e] from rebuttal" because the prosecution will have no "opportunity to respond." U.S. Br. 7-12, 16-17, 20, 22-24, 26. This argument should be rejected for two reasons: First, it cannot overcome the Fifth Amendment. Second, it is factually incorrect.

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[8] Nor does it matter that the prosecution used Cheever's compelled statements in rebuttal instead of its case in chief. *See id.* The relevant question is not case-in-chief versus rebuttal; it is whether the prosecution used the evidence during its "direct case, *or otherwise*, as substantive evidence of guilt." *Havens*, 446 U.S. at 628. Here it did.

a. "The language of the Fifth Amendment * * * is unequivocal and without exception," *In re Gault*, 387 U.S. 1, 47 (1967), and courts cannot "relax the requirements" of the Amendment "to accommodate the necessities of trial and the adversary process." *Melendez-Diaz*, 557 U.S. at 325. In *Melendez-Diaz*, the government made just such a request to "relax" the Bill of Rights. This Court answered in terms equally applicable here:

> It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury *and the privilege against self-incrimination*. The Confrontation Clause—*like those other constitutional provisions—is binding, and we may not disregard it at our convenience*.

Id. (emphases added). So too here. Petitioner seeks to compel a defendant to give evidence against himself because it is "expedient[ ]" for Petitioner—precisely what this Court has pledged to "jealously guard[ ]" against. *United States* v. *Mandujano*, 425 U.S. 564, 588 (1976). There is no warrant for overriding the Fifth Amendment on grounds of "fairness" to the prosecution. "[T]he privilege is premised on an *a priori* belief that a 'fair state-individual balance' is one in which incriminating testimony is not compelled. The value [of fairness] underlies the privilege; it does not condition its application." *Byers*, 740 F.2d at 1159 (Bazelon, J., dissenting).

b. In any event, the unfairness argument is factually inaccurate; mental-state defenses are not "immun[e] from rebuttal" if the government cannot use compelled testimony. U.S. Br. 23. In fact, the state could—and would—call a rebuttal expert even under

Cheever's proposed rule. And that expert would have a wealth of materials with which to develop his rebuttal opinion.

For starters, under *Buchanan* the state could obtain "the reports of the examination that the defendant requested." 483 U.S. at 422. But the state—and thus its expert—also could obtain much more. First, it could obtain a "summary" of the "bases and reasons" for the defense expert's opinion. Fed. R. Crim. P. 16(b)(1)(C). Second, it could seek the "facts or data" underlying that expert's opinion "on cross-examination." Fed. R. Evid. 705. Third, the state's expert would have access to the data the state itself had collected—police and toxicology reports, the defendant's papers, interviews with friends and family of the accused, interviews with witnesses, and so on. Finally—and importantly—there would be no Fifth Amendment impediment to the state obtaining the transcript of the defense expert's interview itself. After all, *Buchanan* stands for the proposition that statements made in that interview were not compelled. 483 U.S. at 422-23; *see Doe*, 465 U.S. at 611.

Indeed, this case exemplifies how much data is available to the state without a compelled examination. As Welner himself described his process:

> I asked for the police reports, I asked for all witness interviews, I asked for all reports that had been provided by any doctors who had evaluated Mr. Cheever, I asked for any history about previous criminal behavior or previous behavioral incidents; I asked for any history that was available about his substance abuse or substance dependence, so that I might learn about how effects manifested themselves in Mr. Cheever; and asked to review any available information from people that

> he knew that might shed light, to me, on their observations of him when he was using, when he was not using.
>
> Once I reviewed those materials, then it led me to ask for * * * letters that he wrote in which he was more expressive and were a window of history to help me become more informed, incident reports from custody * * * [and] a number of other sources that were also inspired by that first pass, including * * * the neuropsychological testing of Dr. Price and the report of Dr. Evans[.]

J.A. 112-13. In short, the state's expert would have ample data. The only thing the state's expert could *not* do is use the state's sovereign power to force words from the defendant's lips. The proposition that the state would lack "*any* meaningful opportunity to contest" Cheever's voluntary-intoxication defense, Pet. Br. 27, is self-refuting.

Petitioner may respond that government experts cannot present rebuttal without conducting their own personal examination. Not so. In fact, prosecutors regularly offer—and courts regularly accept—diagnoses and rebuttals from mental-health experts who have not conducted personal interviews. *See, e.g.*, *California* v. *Clark*, 261 P.3d 243, 307 (Cal. 2011) (prosecution expert diagnosed defendant without personal interview); *Underwood* v. *Oklahoma*, 252 P.3d 221, 245 (Okla. Crim. App. 2011) (prosecution expert rebutted defense expert's mental-state diagnosis without personal interview); *United States* v. *Davis*, 611 F. Supp. 2d 472, 497 (D. Md. 2009) (expert diagnosed defendant as mentally retarded based on review of other experts' reports); *Woodward* v. *Mississippi*, 843 So.2d 1, 11 (Miss. 2003) (prosecution expert rebutted defense's mental-

state diagnosis based on transcripts of defense expert's interview); *Cook* v. *State*, 858 S.W.2d 467, 475 (Tex. Crim. App. 1993) (based on hypothetical, government psychiatrist testified as to defendant's future dangerousness); *North Carolina* v. *Bonney*, 405 S.E.2d 145, 151-52 (N.C. 1991) (prosecution expert rebutted defense's mental-state diagnosis without personal interview). And this Court has approved the practice: It held that psychiatric experts "may give their opinions not only to the state of a patient they may have visited * * * but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses[.]" *Barefoot* v. *Estelle*, 463 U.S. 880, 903 (1980); *accord United States* v. *Davis*, 93 F.3d 1286, 1294 (6th Cir. 1996) (prosecution can "meet expert defense evidence in a variety of ways," including "review of evidence relied upon by the defense expert").

Indeed, Petitioner itself routinely defends against claims that a compelled psychiatric examination is the only way to test the veracity of a key witness, and routinely prevails. In Kansas, defendants often claim that the complaining witness in a sex-crime case should be subject to a compelled psychiatric examination. *See, e.g.*, *Kansas* v. *Price*, 61 P.3d 676, 680-84 (Kan. 2003). The Kansas Supreme Court regularly rejects that argument. *See id.*; *accord*, *e.g.*, *Kansas* v. *McIntosh*, 58 P.3d 716, 722 (Kan. 2002). And the court's explanation mirrors Cheever's: Defendants have access to videotapes of the prosecution expert's examination, among other data, and are free to "put forth [their] own experts to testify as to whether [the prosecution's expert]'s conclusions [are] accurate." *McIntosh*, 58 P.3d at 722.

Petitioner may say that while an expert *can* rebut a mental-state defense without a compelled examination, that rebuttal will not be quite as weighty as it would be if its expert could tell the jury he conducted such an examination. But such an attenuated policy claim is no match for the Fifth Amendment. It is one thing to say the Court must ignore *Melendez-Diaz* and manufacture a waiver because otherwise the government will have *no* opportunity for rebuttal. It is quite another to say the Court must do so because otherwise the government will not have exactly the rebuttal it desires. The Fifth Amendment "may make the prosecution of criminals more burdensome"; it is "binding" nonetheless. *Melendez-Diaz*, 557 U.S. at 325.[9]

There was no waiver here. The Kansas Supreme Court was right to reverse Cheever's conviction and remand for a new trial.

D. At A Minimum, Any Implied Waiver Should Be Limited To Affirmative Defenses.

Even if the Court agrees with Petitioner that presentation of expert mental-status evidence waives the Fifth Amendment privilege, that waiver should be limited to *affirmative* defenses. The reason is simple: As the United States acknowledges, "the government cannot meet its burden of proof 'by the simple cruel expedient of forcing [the necessary evidence] from [the defendant's] own lips.' " U.S. Br. 21 (quoting *Estelle*, 451 U.S. at 462). When the

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[9] The Court could further eliminate any risk of unfairness in federal trials by instructing that defense counsel may not comment upon the fact that the government expert did not conduct a personal examination. *See Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) (Court has "supervisory authority" over federal-court "evidence and procedure").

prosecution uses a compelled examination of the accused to prove an element of the crime, that principle is violated. That is what happened here.

1. The "basic pupose[ ]" of the Fifth Amendment privilege is to ensure that "the guilty are not * * * convicted unless the prosecution 'shoulder[s] the entire load.' " *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 415 (1966). At a minimum, the prosecution's "load" is to "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson* v. *New York*, 432 U.S. 197, 210 (1977); *In re Winship*, 397 U.S. 358, 364 (1970). The state only carries that burden if it proves those elements "by the independent labor of its officers," *Culombe*, 367 U.S. at 582; it "must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949). Thus, to quote the United States again, the government cannot use a compelled mental-health examination "as affirmative evidence." U.S. Br. 21. Petitioner makes a similar concession: Waiver is only operative when "the defendant has *affirmatively* and deliberately injected [a matter] into the trial." Pet. Br. 26 (emphasis added).

The state, then, may not use testimony from a compelled psychiatric examination to prove an element of a crime. When a defendant raises an affirmative defense, however, he has "interjected" a new issue into the case. *Estelle*, 451 U.S. at 465. By definition, it is the *defendant* who must "shoulder the load" on an affirmative defense, not the state. It thus does less violence to the Fifth Amendment to imply waiver in the affirmative-defense context,

because it does not relieve the prosecution of the obligation of proving "all of the elements included in the definition of the offense of which the defendant is charged." *Patterson*, 432 U.S. at 210.

2. This Court has implicitly recognized the distinction between using a compelled examination to prove guilt and to rebut an affirmative defense. The dicta in *Estelle* which, according to Petitioner, suggested the waiver concept, reads: "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." 451 U.S. at 465 (emphasis added). It is notable that *Estelle* specifies the insanity defense—an affirmative defense under Texas law, Tex. Pen. Code § 8.01—as the trigger for a compelled examination. The sentence could just as easily have begun: "When a defendant introduces psychiatric testimony." In *Buchanan*, similarly, the Court specifically noted that "extreme emotional disturbance" was an "affirmative defense," and that the "defendant has the burden of production on this defense." 483 U.S. at 408 n.8.

Moreover, *Estelle* speaks of an issue that the defendant has *interjected*. An affirmative defense is truly "interjected" by the defendant because the issue would not be part of the trial unless raised by him. It would be wrong to say, however, that a defendant "interjects" the issue of an element of the crime, since that is always part of the criminal case. It is the state that "interjects" it by bringing the prosecution in the first place.

3. Lower courts have adopted this distinction. The Sixth Circuit, for example, has distinguished be-

tween introducing a court-ordered mental examination to prove an element of a crime and to rebut an affirmative defense that the defendant "interject[ed]" into the case. *Davis*, 93 F.3d at 1295 & n.8. Citing the passage from *Estelle* discussed above, the court wrote: "The defendant who claims insanity interjects a new issue into the proceedings on which he or she bears the burden of proof. The privilege is not violated by an examination, because the examination does not concern an element of the crime." *Id*. (citation omitted). By contrast, when "the defendant claims 'diminished capacity' * * * he or she seeks to undercut the government's proof of an element of the offense. Therefore, any compelled examination will necessarily involve self-incrimination." *Id*.

Other courts have come to the same conclusion. *E.g.*, *State* v. *Vosler*, 345 N.W.2d 806, 812-13 (Neb. 1984) ("While * * * a court may have the inherent power to order a psychiatric examination of a defendant who places his sanity in issue * * * such is not the case when a defendant is only attempting to rebut evidence of the intent element of a crime with which he is charged." (citations omitted)). And others have held that there is a "sharp distinction between the use of the results of compulsory psychiatric examinations on the issue of sanity and the use of an incriminating statement made during a compulsory examination on the issue of guilt"—"[t]he former is permissible; the latter is constitutionally forbidden." *Gibson* v. *Zahradnick*, 581 F.2d 75, 78 (4th Cir. 1978); *accord Noggle*, 706 F.2d at 1416 ("Evidence of a defendant's inculpatory statements during a psychiatric examination cannot be admitted to prove guilt."); *Arizona* v. *Tallabas*, 155 Ariz. 321, 325-36 (Ct. App. 1987) (same); *Connecticut* v. *Fair*,

197 Conn. 106, 110-11 (1985) (state can use compelled mental-state examination to rebut affirmative defense but "may not rely" on statements from that examination "to meet its affirmative burden of proving the defendant's guilt"). Indeed, then-Judge Scalia recognized this principle in *Byers*, noting that "[w]here testimony to a defendant's statement during a compelled examination is introduced not on the defendant's sanity but to prove that he committed the criminal act in question, of course a different issue is presented." 740 F.2d at 1111 n.8. Though *Byers* speaks in terms of *actus reus*, the same would apply to proving *mens rea*; both ultimately touch on the issue of guilt.

The bottom line: There is broad agreement that testimony based on a compelled psychiatric examination cannot be used to establish the defendant's guilt. "To hold otherwise would make the privilege against self-incrimination illusory." *Noggle*, 706 F.2d at 1416. In practice, that means the government cannot use evidence from a compelled examination to prove an element of the crime. If this Court ultimately decides some form of implied waiver is appropriate when a defendant introduces expert psychiatric evidence, it should be confined to situations where the defendant does so to prove an affirmative defense.

4. Petitioner emphasizes that in this case the evidence was only used for rebuttal, and not in its "case-in-chief." Pet. Br. 41. That does not matter. Whether evidence is admissible does not vary depending on *when* in the trial the state seeks to introduce it. The crucial point is that the state is using the evidence to prove an element of the crime, rather than to rebut an affirmative defense that the defendant has "inter-

jected" into the case. *Estelle*, 451 U.S. at 465. Suppose, for example, that a defendant called a third-party witness to testify in support of an alibi defense. The state would not be permitted to rebut that testimony with compelled statements of the defendant—or by forcing the defendant to take the stand—just because this "rebuttal" evidence is not part of its case-in-chief.

5. It might be argued that a federal constitutional right should not turn on the state-law distinction between affirmative defenses and elements of the crime. But there is nothing formalistic about a focus on elements. The elements are the "fact[s] necessary to constitute the crime"; they demarcate the conduct the state chooses to punish. *In re Winship*, 397 U.S. at 364. And indeed, this Court has already tied a federal constitutional right to this *exact* state-law distinction: *In re Winship* held that a defendant has a due-process right to have the state prove every element of a crime beyond a reasonable doubt. But under *Patterson*, whether a particular fact falls within the ambit of this right depends upon whether a state chooses to define it as an element or an affirmative defense. 432 U.S. at 210. *See also Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) (due process not violated where defendant bore burden of proving affirmative defense because he was not seeking to negate an element of the crime).

6. If the Court agrees that waiver should only be operative when a defendant has introduced mental-health evidence regarding an affirmative defense, the outcome of this case is clear. Voluntary intoxication is not an affirmative defense under Kansas law. Instead, evidence relating to voluntary intoxication can be "taken into consideration" only to determine

whether a defendant has a "particular intent or state of mind [that] is a necessary element to constitute a particular crime." Kan. Stat. Ann. § 21-5205. Cheever raised voluntary intoxication to negate premeditation, an element of capital murder. *See id.* § 21-3439(a)(5) (2005). Because Cheever only sought to "undercut the government's proof of an element of the offense[,] * * * any compelled examination * * * necessarily involve[d] self-incrimination." *Davis*, 93 F.3d at 1295 n.8. Admitting Welner's testimony therefore violated Cheever's Fifth Amendment rights. Any waiver this Court might choose to imply should not reach so far as to immunize that violation.

III. CHEEVER DID NOT KNOWINGLY WAIVE THE PRIVILEGE GIVEN THE PARAMETERS OF KANSAS LAW.

Finally, this Court could accept Petitioner's waiver argument—or leave the question for another day—and still affirm on a different ground: that Cheever's purported waiver was not "knowing" because Kansas law led him to believe his actions would not waive the privilege.

1. A "waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently." *Spring*, 479 U.S. at 566. For such a waiver to be "knowing[ ]," the defendant must voluntarily forgo his privilege "with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Put another way, a defendant can only waive his self-incrimination right if "he knows what he is doing and his choice is made with eyes open." *Adams*, 317 U.S. at 279. That is necessarily a fact-specific inquiry that "depends in each case upon 'the particular facts

and circumstances surrounding the case.' " *Edwards* v. *Arizona*, 451 U.S. 477, 482-483 (1981).

Facts demonstrating waiver were not present here. As the Kansas Supreme Court explained, it is "well established" under Kansas law that "voluntary-intoxication-induced temporary mental incapacity at the time of the crime is not evidence of a mental disease or defect." Pet. App. 32-33 (citing *Kleypas*, 40 P.3d at 162, and *Mason*, 775 P.2d at 181-182). And under Kansas law, the consequence of asserting a defense that is *not* a mental disease or defect is equally well-established: Petitioner cannot introduce the fruits of a compelled psychiatric examination at trial. Pet. App. 31 (citing *Foster*, 910 P.2d at 857, and *Williams*, 884 P.2d at 759-60). Against this background, Cheever did not know that the "act" of introducing Evans' testimony in a Kansas trial-court proceeding "entail[ed] the consequence" of Petitioner using Cheever's compelled statements on rebuttal. *Byers*, 740 F.2d at 1113. Cheever, in other words, did not know he was surrendering his privilege—"an awareness that the doctrine of waiver * * * normally require[s]." *Id.*; *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (a waiver "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it").

2. Petitioner and the United States argue that Cheever nonetheless knew the consequences of his actions given Federal Rule of Criminal Procedure 12.2 and *Buchanan*. Pet. Br. 29, 33-34; U.S. Br. 22-23 n.3. Not so.

a. Recall that Cheever filed a Rule 12.2 notice because, at the time, his case was in federal court. *Supra* at 5. Petitioner argues that when Cheever

filed that notice, his "counsel certainly knew the effect * * * was likely to be a court-ordered mental examination." Pet. Br. 29. Thus, says Petitioner, Cheever "made a deliberate decision * * * inconsistent with maintaining his Fifth Amendment privilege." *Id.*

That argument fails to understand this Court's teachings. Under *Powell* and *Buchanan*, the time of any possible waiver is at trial, when a defendant actually *presents* a mental-state defense supported by expert testimony, not when he gives notice that he plans to do so. *See Powell*, 492 U.S. at 684; *Buchanan*, 483 U.S. at 423; *Battie* v. *Estelle*, 655 F.2d 692, 702 (5th Cir. 1981) ("Submitting to a psychiatric or psychological examination does not itself constitute a waiver of the fifth amendment's protections."). Even the United States agrees. U.S. Br. 21 ("[W]hether the defendant waives the privilege depends on the choices he makes at trial."). Thus the question is not whether Cheever was aware that asserting a mental-state defense in federal court might subject him to a court-ordered mental examination. It is whether Cheever was aware during his subsequent trial in *state* court, when he went ahead and put on expert voluntary-intoxication testimony, that that would allow the prosecution to use the compelled examination against him. Rule 12.2, a federal rule with no application to state-court proceedings, had nothing to say about that latter issue.

b. The United States, for its part, asserts that Cheever "ha[d] ample notice of the consequences of his decision to present such mental health testimony." U.S. Br. 22 n.3. But for that proposition it cites a line from *Buchanan*: "Given our decision in [*Estelle*], * * * counsel was certainly on notice that if

* * * he intended to put on a 'mental status' defense for [the defendant], he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* (quoting 483 U.S. at 425). That argument is an anachronism because it relies on *Estelle*—a case that merely *suggested* how the Court might handle compelled examinations—and ignores the rule the Court actually adopted in *Buchanan*: "[I]f a defendant requests [a psychiatric] 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*." *Id.* at 422-23 (emphasis added); *accord Powell*, 492 U.S. at 684 (prosecution can use the examination that "a defendant requests"). Cheever thus may have been on notice that an examination he *requested* would come in under *Buchanan* once he put on mental-state evidence. But that is irrelevant, because he did not request the examination at issue in this case. *See supra* at 5. The binding precedent that informed Cheever and his counsel about what would happen on the facts presented here was Kansas precedent. And it taught that Cheever could put on a voluntary-intoxication defense without opening the door to use of the compelled examination against him.

There is no basis to conclude that Cheever knowingly waived his Fifth Amendment privilege when he put on a voluntary-intoxication defense. Particularly given that this Court "indulge[s] every reasonable presumption against waiver" of constitutional rights, *Barker* v. *Wingo*, 407 U.S. 514, 525 (1972) (quotation marks omitted), it should so hold.

3. Petitioner and the United States object that any reference to Kansas law in the waiver analysis

improperly allows Kansas law to dictate the scope of the Fifth Amendment. Pet. Br. 31-34; U.S. Br. 27-31. They are wrong.

a. Cheever agrees that the "question of waiver of a federally guaranteed constitutional right is * * * a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). But the *federal* rule is that a defendant's waiver "must be [a] knowing, intelligent act[ ] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748. And in judging whether a waiver was made with the necessary awareness, state law can be part of the relevant "circumstances" and "consequences."

That is not a novel or controversial position; the application of a federal constitutional standard often hinges on underlying issues of state law. "The federal law which governs the exercise of state authority is obviously interstitial law, assuming the existence of, and depending for its impact on, the underlying bodies of state law." H. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 498 (1954). So, for example, whether a warrantless arrest is lawful under the Fourth Amendment is determined by what conduct a state has chosen to criminalize, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), and whether a defendant has a right to a jury trial for a specific offense under the Sixth Amendment is determined by what penalty the state has chosen for that offense, *Baldwin* v. *New York*, 399 U.S. 66, 73-74 (1970). This is not to say state law "alter[s] the substantive scope" of the Fourth or Sixth Amendments. U.S. Br. 30. Rather, circumstances of state law can affect the

application of a federal standard to particular defendants.

So too with waiver. Although waiver is a question of federal law, the question whether a particular defendant has waived turns on whether his choice was "knowing" on the facts presented, and those facts can include circumstances of state law. Indeed, this Court said as much in *Halbert* v. *Michigan*, 545 U.S. 605 (2005). The Court held that a defendant could not "elect to forgo" his constitutional right to appointed counsel because Michigan law told him he had no such right. *Id.* at 623-24. In so holding, the Court rejected the dissent's argument that state law was "irrelevant" to the federal waiver analysis. *Id.* at 640 (Thomas, J., dissenting).

Here Cheever's supposed waiver was not "knowing" given the circumstances of Kansas law. Cheever and his counsel correctly understood that under Kansas law, Cheever could introduce Evans' testimony without opening the door to Welner's. Pet. App. 31-33. As a consequence, Cheever could not have knowingly and intelligently consented to the introduction of Welner's testimony.

b. In this regard, the effect of Kansas law on Cheever's waiver is no different than other factual circumstances that can vitiate the knowingness of a Fifth Amendment waiver. For instance, the courts of appeals have held that when an officer tells a defendant there will be no negative repercussions if he waives his Fifth Amendment privilege, that renders the resulting waiver invalid. *See*, *e.g.*, *United States* v. *Lall*, 607 F.3d 1277, 1283-84 (11th Cir. 2010); *United States* v. *Walton*, 10 F.3d 1024, 1030-31 (3d Cir. 1993). Likewise, where a judge told the defendant that "[t]echnically, [the Government] won't use"

his bail-hearing testimony against him at trial, the resulting waiver was invalid. *United States* v. *Dohm*, 618 F.2d 1169, 1175 (5th Cir. 1980) (en banc). In this case, because Cheever had been given assurances that his decision to mount a mental-state defense would not entail the consequence of his compelled statements being used against him, he could not "knowingly[ ] and intelligently" waive the privilege. *Spring*, 479 U.S. at 566. That those assurances came from state-court rulings, as opposed to the mouth of a police officer or an individual judge, makes no analytical difference.

c. To be sure, a defendant's waiver is not vitiated every time he fails to appreciate every potential consequence of his actions. For instance, this Court has held that a defendant's waiver was valid even though he did not know the precise questions the police would ask. *Spring*, 479 U.S. at 573-575. Similarly, a defendant can validly waive his right to a trial even when he "misapprehended the quality of the State's case." *Brady*, 397 U.S. at 757.

But these precedents only underscore how different the situation is here. In the cases just cited, even though the defendant may have not understood the precise consequences that would flow from his waiver, he understood, in general, what he was giving up. In *Spring*, the defendant understood that if he answered the officers' questions, those answers could be used against him. 479 U.S. at 573-75. And in *Brady*, the defendant understood that his guilty plea would mean the state's case would go untested. 397 U.S. at 757.

Here, by contrast, Cheever was not aware of the most important consequence of introducing mental-state evidence: that it would open Cheever up to

Welner's testimony in rebuttal. That is no minor misunderstanding. Welner's testimony was "extensive and devastating" to Cheever's case. Pet. App. 43. Cheever's lack of awareness of this all-important consequence rendered any supposed waiver of his Fifth Amendment privilege invalid.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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July 2013