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 AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF KANSAS AND WESTERN MISSOURI IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embedded in the Constitution. The ACLU of Kansas and Western Missouri is an affiliate. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as amicus curiae.

Through its Capital Punishment Project (CPP), the ACLU represents individuals charged with capital offenses as well as those who have been convicted and sentenced to death. CPP's staff are trained and experienced in screening individuals for symptoms of mental or psychological disorders or impairments, and they regularly train other attorneys and mitigation specialists in developing, understanding, and litigating mental-health evidence. This case is of central concern to the ACLU and CPP because of its potential consequences for the use of mental-health evidence in capital sentencing.

SUMMARY OF ARGUMENT

Although this case concerns the presentation of expert psychological testimony at a trial's guilt phase, the Court's decision could have important consequences for sentencing in capital cases. In particular, a decision

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[1] Letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

holding that an unrestricted Fifth Amendment waiver results any time a defendant offers mental-state evidence would significantly erode capital defendants' Eighth Amendment rights. The Eighth Amendment guarantees capital defendants the right to present a broad range of mitigating evidence at sentencing. This Court has repeatedly recognized the importance of that right to ensuring the reliability of death sentences because it enables jurors to render a reasoned moral judgment as to whether a sentence of death is appropriate in light of all the circumstances. *See, e.g.*, *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*).

The right to present mitigating evidence includes the right to present expert testimony about the defendant's mental health or abilities that would render him less morally culpable for the crime. Recognizing an unrestricted waiver of the Fifth Amendment privilege against self-incrimination whenever a defendant presents such evidence would jeopardize a capital defendant's Eighth Amendment right to present mental-state evidence in mitigation. A capital defendant wishing to present such evidence could do so only at the expense of a substantial intrusion on his Fifth Amendment right in the form of a prosecution expert using the defendant's own statements from a compelled examination to show the jury that he has an incurable and violent personality disorder. Such a tradeoff impermissibly burdens the exercise of both rights, and this Court has long recognized that it is constitutionally "intolerable" to predicate the exercise of one constitutional right on the forced relinquishment of another. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968). The resulting harm therefore counsels against holding that a capital defendant's introduction of expert psychological testimony in mitigation constitutes a waiver of his Fifth

Amendment right against self-incrimination, in addition to the reasons Respondent gives (at 25-42), with which amici agree. To the extent this Court does recognize a waiver in such a circumstance, any waiver should arise only where a defendant offers expert mental-health testimony based on an in-person examination, and the scope of such a waiver should be carefully limited to the scope of the defendant's statements on which the expert relied.

Practical experience suggests that the harm associated with broad, unrestricted waivers of Fifth Amendment rights in such circumstances is not merely theoretical. Far from promoting reliability of verdicts, as the State contends (at 24-28), the forced tradeoff of rights can and does undercut the reliability of capital sentencing determinations, particularly where the scope of the Fifth Amendment waiver is not carefully policed. Faced with the prospect that exercising their right to offer mitigation evidence would subject them to wide-ranging, intrusive mental examinations conducted by "agent[s] of the State," *Estelle* v. *Smith*, 451 U.S. 454, 467 (1981), some capital defendants may choose to forgo presenting expert mental-state testimony altogether. Such a decision keeps the jury from hearing evidence crucial to rendering the constitutionally required "reasoned moral response to the defendant's background, character, and crime." *Penry I*, 492 U.S. at 319. Conversely, where capital defendants do choose to present mental-health evidence in support of mitigation, they are often subjected to unchecked, State-compelled examinations into their mental processes—and resulting alternative "diagnoses" of "evil" character or personality disorders based on questionable science—that go far beyond the scope of any of the mitigating evidence initially offered. Such testimony,

in addition to being limitless in scope and of dubious reliability, is highly prejudicial to the jury's verdict. The exercise of the Eighth Amendment right to present mitigating evidence should not be conditioned on opening the door to such testimony.

ARGUMENT

I. THE SCOPE OF ANY WAIVER OF A CAPITAL DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION SHOULD BE NARROWLY DEFINED TO AVOID INFRINGING HIS EIGHTH AMENDMENT RIGHTS

A. Capital Defendants Have A Right Under The Eighth Amendment To Present A Broad Range Of Mitigating Evidence At Sentencing

1. This Court has long recognized "the principle that punishment should be directly related to the personal culpability of the criminal defendant," particularly where the defendant is facing death. *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*). In furtherance of that principle, the Eighth Amendment guarantees that a defendant facing a possible death sentence has the right both to introduce mitigating evidence on his behalf and to have a sentencer consider and give effect to that evidence when it counsels in favor of a punishment less than death. *See Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 251 n.13 (2007); *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976) (plurality).

This Eighth Amendment right to present mitigation evidence ensures that capital sentencing is both individualized and reliable—a need that is heightened in capital cases due to the uniquely severe and irrevocable nature of the punishment. *See Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality). It is only

when the jury is able to consider the full range of a defendant's mitigating evidence and "express[] its reasoned moral response to that evidence in rendering its sentencing decision that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Penry* v. *Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) (internal quotation marks, citations, and brackets omitted); *see also Penry I*, 492 U.S. at 317, 328 (Eighth Amendment "mandates an individualized assessment of the appropriateness of the death penalty" and insists upon "'reliability in the determination that death is the appropriate punishment in a specific case'"). Precluding a sentencer "from giving independent mitigating weight to" such evidence, conversely, creates an impermissible "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.

2. For these reasons, the range of mitigation evidence a capital defendant may introduce at sentencing is broad and may include expert psychological testimony about a defendant's social history and mental health. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I*, 492 U.S. at 319.

In applying the Eighth Amendment, this Court has consistently rejected attempts to limit a defendant's ability to present mitigation evidence. *See Payne* v. *Tennessee*, 501 U.S. 808, 822 (1991) ("[V]irtually no limits are placed on the relevant mitigating evidence a cap-

ital defendant may introduce concerning his own circumstances."). For example, the Court has rejected heightened relevance requirements for the admission of mitigating evidence, explaining that the relevance threshold for such evidence in the sentencing phase of a capital case is, as with any other evidence, a low one: Any evidence that is "relevant to mitigation even if it [does] not *excuse* the defendant's conduct" must be admissible and considered by the jury. *McKoy* v. *North Carolina*, 494 U.S. 433, 441 (1990); *see also Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986) ("[T]he sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'"). Similarly, the Court has clarified that evidence offered in mitigation need not have caused or had any other "nexus" to the crime. *Tennard* v. *Dretke*, 542 U.S. 274, 287 (2004). Rather, any evidence tending to show that a defendant should be held less morally culpable should be admitted. *Id.*; *see also Mills* v. *Maryland*, 486 U.S. 367, 375 (1988) ("Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence," any restriction on the defendant's right to present mitigating evidence violates the Eighth Amendment.).[2]

Relatedly, the Court has also rejected attempts to limit a jury's ability to consider and give effect to mitigation evidence. For example, when several States responded to the decision in *Furman* v. *Georgia*, 408 U.S.

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[2] Indeed, given the importance of mitigation evidence in capital sentencing, the Court has also recognized that an unreasonable failure by defense counsel to investigate or present mitigation evidence at sentencing constitutes deficient performance in violation of the Sixth Amendment. *See Wiggins* v. *Smith*, 539 U.S. 510, 533, 538 (2003); *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984).

238 (1972), by enacting mandatory death-penalty statutes, the Court uniformly invalidated those measures. *See, e.g.*, *Woodson*, 428 U.S. at 303-305; *Roberts* v. *Louisiana*, 428 U.S. 325, 333-334 (1976) (plurality). In doing so, a plurality of this Court emphasized that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process inflicting the penalty of death." *Woodson*, 428 U.S. at 304; *see also Jurek*, 428 U.S. at 271 ("A jury must be allowed to consider on the basis of *all* relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." (emphasis added)); *Gregg* v. *Georgia*, 428 U.S. 153 (1976) (plurality) ("[I]t is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."). Consistent with those cases, the Court has since made clear that only sentencing schemes that allow the jury to consider and give full effect to all of the defendant's mitigating evidence will survive Eighth Amendment scrutiny. *See Penry II*, 532 U.S. at 797; *Boyde* v. *California*, 494 U.S. 370, 377-378 (1990); *Penry I*, 492 U.S. at 320-328; *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-115 (1982); *Lockett*, 438 U.S. at 604-605.

B. Exercise Of The Eighth Amendment Right Should Not Be Conditioned On An Unrestricted Relinquishment Of Fifth Amendment Rights

Without narrowly defined limits, the State's position in this case—that a defendant's presentation of any

mental-state evidence in defense or mitigation broadly waives the right against self-incrimination—would impermissibly burden the Eighth Amendment right to present all relevant mitigation evidence to a jury during capital sentencing. Under the State's view, a capital defendant would face an impossible choice: either give up the Eighth Amendment right to present mitigating evidence at sentencing, or subject himself to an unrestricted intrusion on his Fifth Amendment privilege against self-incrimination. But this Court has long recognized that it is constitutionally intolerable to predicate the exercise of one constitutional right on the forced relinquishment of another. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968). Therefore, to minimize the harm to both rights, the scope of any Fifth Amendment waiver should be narrowly tailored to the scope of the defendant's own statements that formed the basis of his expert's mental-health testimony.

1. In several cases, this Court has rejected the notion that the exercise of one constitutional right may be conditioned on the substantial impairment of another. In *Simmons*, the Court held that a criminal defendant cannot be compelled to give up his Fifth Amendment privilege against self-incrimination in order to assert his Fourth Amendment right against illegal searches and seizures. 390 U.S. at 390-394. The defendant in that case moved to suppress a suitcase that he contended had been illegally seized—a piece of evidence that, if shown to have been in his possession, would have tied him to the crime. *Id.* at 391. To establish standing for his suppression motion, however, the defendant was required to testify that the suitcase was his. *Id.* Once his suppression motion was denied, the prosecution used that testimony against the defendant at trial, and he was convicted.

This Court held that the defendant's testimony from the suppression hearing should not have been admissible at trial to establish guilt. *Simmons*, 390 U.S. at 392-393. The Court's analysis rested on the concern that allowing a defendant's suppression-hearing testimony to be used against him at trial would chill the defendant's exercise of his Fourth Amendment rights:

> It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. ... In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

Id. at 393.

In addition to this deterrence concern, the Court also recognized that a rule allowing the admission of suppression-hearing testimony "imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to [assert his Fourth Amendment rights] must do so at the risk that the words which he utters may later be used to incriminate him." *Simmons*, 390 U.S. at 393. For those reasons, the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394; *see also Howard* v. *Walker*, 406 F.3d 114, 129 (2d Cir. 2005) (trial court "offered ... constitutionally-impermissible choice" when it forced defendant "to choose between his Sixth Amendment

right" of cross-examination and "his Sixth Amendment right to exclude [an] unreliable hearsay confession of a co-conspirator"); *Hunt* v. *Mitchell*, 261 F.3d 575, 584 (6th Cir. 2001) (trial court impermissibly imposed "element of coerced choice decried … in *Simmons*" when it forced defendant to choose between his Sixth Amendment right to counsel and his state statutory right to a speedy trial).[3]

Similarly, in *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977), this Court invalidated a New York law that required holders of public office to waive their privilege against self-incrimination if subpoenaed by a grand jury. Under the law, an officeholder who refused to waive that immunity would be immediately removed from office and barred from holding any other office for five years. *Id.* at 802. This Court held that the New York law violated the Fifth Amendment by coercing a waiver through imposition of substantial penalties. *Id.* at 806. That coercion was achieved in part by requiring the officeholder "to forfeit one constitutionally protected right"—*i.e.*, the "[First Amendment] right to partic-

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[3] In *McGautha* v. *California*, 402 U.S. 183, 211 (1971) (cited at U.S. Br. 14, 23), the Court reaffirmed *Simmons*'s holding that the prosecution's use at trial of the defendant's suppression-hearing testimony "created an unacceptable risk of deterring" the exercise of the Fourth Amendment right. The Court also clarified that, although the Constitution does not "always forbid" the forced choice between one constitutional right and another, the Constitution does forbid that choice when "compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.* at 213. Thus, under *Simmons* and *McGautha*, any waiver that results from a defendant's presentation of expert mental-health testimony must be narrowly limited to avoid deterring or substantially impairing the defendant's exercise of his constitutional rights.

ipate in private, voluntary political associations"—as the price for exercising another." *Id.* at 807-808.

Those decisions are consistent with the broader principle that the government may not "burden[] the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2565 (2013). That principle applies even where those benefits are wholly discretionary, rather than constitutionally mandated. *See, e.g.*, *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2328 (2013); *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972); *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-675 (1996). Where, as here, the "benefit" that is threatened is not a discretionary act of legislative grace but instead a benefit "afforded by another provision of the Bill of Rights," the prohibition on unconstitutional conditions should apply with even greater force. *Simmons*, 390 U.S. at 394.

2. These cases counsel against recognizing a waiver in this circumstance—or, at the very least, in favor of narrowly defining the scope of any such waiver when a defendant presents expert mental-health testimony. Under the rule advocated by the State in this case, as in *Simmons* and *Lefkowitz*, capital defendants would be required to give up entirely one constitutional right in order to exercise another: They must either submit to a broad, unrestricted infringement on their Fifth Amendment privilege against self-incrimination in order to exercise their Eighth Amendment right to present mitigating mental-state evidence, or forgo the introduction of vital mitigation evidence to protect themselves from damning, wide-ranging psychological evaluations based on their own compelled statements.

This "choice" impermissibly burdens the exercise of both rights. And it can have dire consequences for the reliability of capital sentencing verdicts. To preserve his Fifth Amendment right against self-incrimination, a capital defendant is not merely forced to forgo a right to *present* evidence; he is forced to forgo his right to a "reliable determination that death is the appropriate sentence." *Penry II*, 532 U.S. at 797. In a case where the ultimate penalty is irreversible, the government should not be entitled to coerce a defendant into giving up his right to a reliable sentencing process. *See Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 303-304.

II. In Practice, Prosecutors' Use Of Expert Psychiatric Testimony Purportedly Based On In-Person Evaluations Of The Defendant Undermines The Reliability Of Capital Verdicts

The State asserts (at 24-28) that finding a broad waiver of the Fifth Amendment right against self-incrimination when a defendant introduces mental-state evidence is necessary to promote the reliability of verdicts. Experience suggests, however, that permitting prosecutors to introduce expert testimony purportedly based on the government's own psychiatric evaluation of the defendant whenever a capital defendant introduces mental-state evidence would undermine the reliability of capital verdicts.

When exercising the Eighth Amendment right subjects a defendant to a wide-ranging, intrusive probing into his mental processes by state agents, a capital defendant can be discouraged from offering such evidence at all, thereby depriving the jury of information vital to a reasoned moral sentencing decision. *See Penry I*, 492 U.S. at 319. And for defendants who proceed with the presentation of mitigation evidence at the expense of

their Fifth Amendment right, a failure to enforce appropriate limits on the scope of any Fifth Amendment waiver can result in examinations and testimony that go far beyond the evidence presented in mitigation (or the defendant's statements on which that evidence is based). In those cases, prosecution experts often render opinions based on the defendant's own statements that bolster the State's affirmative case through alternative "diagnoses" based on questionable science. Such evidence is not only unreliable, but it is highly prejudicial and can unduly influence juries to vote in favor of death.

A. The Prospect Of Opening The Door To Psychiatric Testimony By Prosecution Experts That Is Not Carefully Limited In Scope Can Chill Defendants' Exercise Of Their Eighth Amendment Rights At Sentencing

A holding that a defendant's introduction of expert mental-health testimony effects an unrestricted waiver of a defendant's Fifth Amendment privilege against self-incrimination can create a barrier to the presentation of mitigating evidence during capital sentencing by chilling defendants' exercise of their Eighth Amendment rights. *See Simmons*, 390 U.S. at 394. In a capital case, "the decision to be made regarding [a] psychiatric evaluation is 'literally a life or death matter[.]'" *Estelle* v. *Smith*, 451 U.S. 454, 471 (1981); *see Satterwhite* v. *Texas*, 486 U.S. 249, 254 (1988). As the Court has recognized, this decision requires that a capital defendant and his counsel have "'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing.'" *Smith*, 451 U.S. at 471 (alteration in original). But if a capital

defendant must fear wide-ranging expert testimony based on a compelled "fishing expedition," *United States* v. *Williams*, 731 F. Supp. 2d 1012, 1018 (D. Haw. 2010), the moment he or any of his witnesses say anything at sentencing that touches on his mental condition, the "alternative strateg[y]" will be clear and preordained: Do not testify; do not call experts.

The example of capital defendant Donald Fell bears this out. *See United States* v. *Fell*, No. 2:01-cr-12-01, 2006 U.S. Dist. LEXIS 24707, at *8-15, 22-28 (D. Vt. Apr. 24, 2006) (*Fell I*); *United States* v. *Fell*, ___ F. Supp. 2d ____, 2013 WL 1953320 (D. Vt. 2013) (*Fell II*). Before trial, Fell filed a notice under Rule 12.2(b)(2) of the Federal Rules of Criminal Procedure of "his intent to introduce expert evidence bearing on a mental condition should he be convicted of a capital crime." *Fell II*, 2013 WL 1953320, at *2. Upon receipt of that notice, the government "sought an unrestricted examination" of Fell. *Id.* The court, in turn, ordered Fell to "undergo a complete psychiatric examination" by a government mental-health expert. *Id.* at *3.

Fell was convicted, and, during opening statements at the sentencing phase, his counsel indicated to the jury his intent to call two mental health experts: a psychologist and a medical doctor practicing in psychiatry. *Fell II*, 2013 WL 1953320, at *3. Fell also introduced documentary evidence pertaining to his social history as a child, medical and school records, and so on. *Id.* In response, the government sent the defense a 72-page report prepared by Dr. Michael Welner, the same expert whose testimony is at issue here. *See id.* at *3-4. Although Welner did not perform Fell's examination, he "provided the questions" for it and reviewed a videotape of it. *Id.* at *4. Based on his review, Welner reported that he had scored Fell "on the PCL-R, a scale

for the assessment of psychopathy," *id.*, and concluded that he was a "psychopath"—notwithstanding that no defense expert had attempted to rely upon parallel testing in support of a mitigating factor, *see, e.g.*, Mot. to Exclude Report and Testimony of Michael Welner at 4, *United States* v. *Fell*, No. 2:01-cr-12 (D. Vt. July 6, 2005), ECF 182.[4] The report also included provocative and inflammatory statements about Fell's character. *See, e.g.*, Report of Michael Welner, M.D. at FELL-000000647, *United States* v. *Fell*, No. 2:01-cr-12 (D. Vt. July 5, 2005), ECF 304-12 ("Donald Fell emerged in his teens as a stimulation-seeking, drug-seeking hedonist who did not take to limit setting."); *id.* at FELL-00000688 ("Mr. Fell's sadism and blood lust are unusual and rarely studied.").

Upon receipt of the report, the defense at first moved to exclude it on multiple grounds, including that Welner administered the PCL-R without prior notice to defense counsel, contrary to a prior court order; that psychopathy had no relevance as rebuttal evidence; and that the report detailed "substantial amounts of unreliable hearsay and uncharged misconduct." *Fell I*, 2006 U.S. Dist. LEXIS 24707, at *13. Before the court ruled on that motion, however, the defense "announced that it would rest without calling any of its mental health experts, and withdrew its Rule 12.2 notice." *Fell II*,

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[4] As discussed below, *see infra* pp. 19-22, the PCL-R (or the Psychopathy Checklist—Revised) is a method used to assess psychopathy in a subject based on a checklist of different factors. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Capital Defendants Labeled More Psychopathic Considered More Deserving of Death?*, 23 Behav. Sci. & L. 603, 604 (2005). An individual scoring above a certain threshold on the PCL-R is labeled a "psychopath." *Stitt* v. *United States*, 369 F. Supp. 2d 679, 684, 699 (E.D. Va. 2005).

2013 WL 1953320, at *4. Based on that withdrawal, the defense took the position that "the government would then be unable to call Dr. Welner in rebuttal." *Id.* The prosecution argued to the contrary, "point[ing] out that the defense had introduced evidence concerning [the defendant's] mental condition through lay witnesses and through documents[.]" *Id.* In response, the defense entirely "withdrew the mitigating factor that Fell was under mental and emotional disturbance when the crimes were committed." *Id.*; *see* DeMatteo & Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court*, 12 Psychol. Pub. Pol'y & L. 214, 232-233 (2006) (describing *Fell* as an example "in which a defense team opted to withdraw mental health mitigation evidence to avoid the prosecution calling a rebuttal witness who would testify about PCL-R and other similar instruments"). Unable to consider any expert mental-health evidence in mitigation, the jury unanimously found that the defendant should receive a death sentence on the two capital counts. *Fell II*, 2013 WL 1953320, at *5.[5]

[5] In ruling on post-trial motions, the district court sharply criticized Welner's conduct. The court had previously ordered that Fell submit to an examination by a government expert, but had made clear that Welner could not perform the examination. *See Fell I*, 2006 U.S. Dist. LEXIS, at *8-9. The court had also ordered that no mental-health test could be performed without defense counsel's consent or the court's approval. *See id.* The court ultimately found that Welner "deliberately attempted to use [the government expert who performed the examination] to obtain the interview results he was precluded from obtaining on his own" and that Welner had performed the PCL-R without the "required advance notice to the defense before conducting such testing." *Id.* at *26-27.

B. Where Capital Defendants Do Present Mitigating Mental-Health Evidence, The Prosecution's Use Of Expert Testimony Based On The Government's Examination Of The Defendant Can Lead To Unreliable Verdicts

In cases where a defendant does put his mental-state at issue in mitigation, the admission of expert testimony based on the prosecution's own examination of the defendant can lead to unreliable death verdicts if, as is often the case, the scope of the examination and resulting evidence at trial is not narrowly circumscribed.

As the United States acknowledges, "the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." U.S. Br. 12 (quoting *Doe* v. *United States*, 487 U.S. 201, 212 (1988)); *see also Smith*, 451 U.S. at 462; *Powell* v. *Texas*, 498 U.S. 680, 685 n.3 (1989); *cf. Brown* v. *United States*, 356 U.S. 148, 155 (1958) (defendant waives privilege by testifying "only ... on the matters he has himself put into dispute"). In actual practice, however, the use of State-appointed expert witnesses often fails to observe that limit. Compelled state examinations often allow unrestricted intrusions into a defendant's mental functioning, no differently than if it were a piece of physical evidence. And the results of those examinations are commonly presented to the jury as scientific proof that the defendant has an incurable behavioral disorder, even though such predictions are notoriously unreliable and highly prejudicial. The Eighth Amendment's heightened need for reliability accordingly compels that the scope of any Fifth Amendment waiver be carefully policed.

1. Expert "rebuttal" testimony often rests on unreliable and highly prejudicial psychiatric labeling that ranges far beyond the scope of the defendant's mitigating evidence

Rather than focusing on the particular mental-health evidence presented by a defendant, prosecution experts often label capital defendants as having purportedly incurable personality disorders, even where the defendant has not raised a personality disorder as a mitigating circumstance, and even where the "diagnosis" goes beyond the scope of any of the defendant's statements relied on by the defense expert. These generalized labels—"sociopath," "psychopath," "antisocial"—can obscure and overwhelm all other sentencing factors. *See* Wayland & O'Brien, *Deconstructing Prejudicial Psychiatric Labels: A Guidelines-Based Approach*, 42.1 Hofstra L. Rev. (forthcoming 2013) (manuscript at 36), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279547. Once applied, such labels may be devastating to a case for life, *see id.*, "deriv[ing] unique power over judges and juries from invoking dehumanizing stereotypes masquerading as scientific fact," *id.* (manuscript at 11); *see also* Cunningham & Reidy, *A Matter of Life or Death: Special Considerations and Heightened Practice Standards in Capital Sentencing Evaluations*, 19 Behav. Sci. & L. 473, 479 (2001) (labels "are so profoundly pejorative as to equate with a sentence of death"). As one Texas judge put it in describing the testimony of the late Dr. James P. Grigson (infamously known as "Dr. Death"):

> [W]hen Dr. Grigson speaks to a lay jury, or an uninformed jury, about a person who he characterizes as a "severe" sociopath, which a defendant who has been convicted of capital mur-

> der always is in the eyes of Dr. Grigson, the defendant should stop what he is then doing and commence writing out his last will and testament[.]

Bennett v. *State*, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting).

Moreover, prosecution experts often bolster their claims that the defendant has an incurable personality disorder through purportedly "scientific" techniques that are of dubious reliability. Wayland & O'Brien, 42.1 Hofstra L. Rev. (manuscript at 2-3, 36); *see also* Martens, *The Problem with Robert Hare's Psychopathy Checklist: Incorrect Conclusions, High Risk or Misuse, and Lack of Reliability*, 27 Med. & L. 449, 454 (2008); DeMatteo & Edens, 12 Psychol. Pub. Pol'y & L. at 214; Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 Behav. Sci. & L. 603, 604 (2005). For example, this sort of labeling often occurs through a diagnosis of "psychopathy." The construct of "psychopathy" is "typically operationalized by the Psychopathy Checklist—Revised" ("PCL-R"). Edens et al., 23 Behav. Sci. & L. at 604. Individuals are scored on the PCL-R based on a clinical interview and a review of case history information. Those individuals diagnosed as "psychopaths" based on their scores on the PCL-R test are labeled as "untreatable" and disposed to "actually get worse with help of psychotherapeutic treatment." Martens, 27 Med. & L. at 450.

PCL-R scores are commonly used to assess future dangerousness—a "'super-determining'" aggravating factor at sentencing. Cunningham et al., *Capital Jury Decision-Making*, 15 Psychol. Pub. Pol'y & L. 223, 226

(2009); *see id.* at 225 ("specter" of future violence "is among the most compelling aggravating factors in the jury's death deliberations"); Sandys et al., *Aggravation and Mitigation: Findings and Implications*, 37 J. Psychiatry & L. 189, 215 (2009) ("research indicates that the most persuasive aggravator is juror perceptions of the defendant's future dangerousness").[6] Studies have repeatedly shown, however, that "the use of the PCL-R to predict violent behavior involves substantial and unacceptable rates of error." Freedman, *False Prediction of Future Dangerousness: Error Rates and Psychopathy Checklist—Revised*, 29 J. Am. Acad. Psychiatry L. 89, 91 (2001); *see also* Cunningham & Sorenson, *Improbable Predications at Capital Sentencing: Contrasting Prison Violence Outcomes*, 38 J. Am. Acad. Psychiatry L. 61, 62 (2010); Martens, 27 Med. & L. at 452-454; Edens et al., 23 Behav. Sci. & L. at 605-606. The PCL-R results are plagued, among other things, by "excessive false-positive rates and widely varying positive predictive power." Freedman, 29 J. Am. Acad. Psychiatry L. at 93; *see* Edens et al., 23 Behav. Sci. & L. at 605-606. Indeed, extrapolating from other research, one study concluded that, in a large proportion of cases in which a defendant was sentenced to death based on a prediction of future dangerousness, the prediction may in fact have been wrong. Freedman, 29 J. Am. Acad. Psychiatry L. at 93; *see also* Tex. Defender Serv., *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness* 34

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[6] "Even when it is not overtly argued, the 'future dangerousness' of capital offenders appears to be a primary concern of their sentencing jurors[.]" Cunningham & Reidy, 19 Behav. Sci. & L. at 476. Thus, "[w]hether the law allows it or not, the issue of future dangerousness is the crux of a juror's preference for death." Sandys et al., 37 J. Psychiatry & L. at 216.

(2004) (in review of 155 cases, "state-paid expert predictions [about future dangerousness] were inaccurate 95% of the time").[7]

Despite these problems, studies have shown that juries likely place substantial, if not dispositive, weight on a label of "psychopath" in arriving at a sentence of death. DeMatteo & Edens, 12 Psychol. Pub. Pol'y & L. at 215 ("the term psychopath has the strong potential to impact perceptions of a criminal defendant in a deleterious way" and "may be afforded great weight in … capital sentencing proceedings") (emphasis omitted); *id.* at 232 ("Labeling a criminal defendant as a psychopath can have a pronounced effect on how that person is viewed by laypersons."). One study, for example, found that participants in a mock sentencing "were significantly more likely to vote for death in the psychopathy condition (i.e., 60% … chose the death penalty) compared with those in the no disorder (38%) and psychosis (30%) conditions." Edens et al., 23 Behav. Sci. L. at 614. And reviewing the results of many studies on the issue, a recent article concluded: "The label 'psychopath' has a profound effect on lay persons' views of capital defendants, because it tends to obscure and over-

[7] Some courts have recognized the questionable reliability and validity of the PCL-R and the psychopathy label and have precluded their use. *See United States* v. *Taylor*, 320 F. Supp. 2d 790, 794 (N.D. Ind. 2004) (government prohibited from utilizing PCL-R "due to the uncertainty of the validity and reliability … as it is used in capital sentencing hearings"); *see also United States* v. *Sampson*, 335 F. Supp. 2d 166, 222 n.27 (D. Mass. 2004) (government's expert, Dr. Michael Welner, precluded from using term "psychopath" because of its likely effect on the jury). In one capital case, a government expert conceded the limitations and unreliability of the PCL-R and recanted testimony based upon it. *See Stitt*, 369 F. Supp. 2d at 699-700.

whelm other relevant mental health evidence." Wayland & O'Brien, 42.1 Hofstra L. Rev. (manuscript at 36).

2. Expert testimony based on government examinations of the defendant has resulted in prejudice in many cases

The case of capital defendant Randall Dale Adams illustrates the influence a personality-disorder label can exert at sentencing, particularly where the prosecution expert purports to base that conclusion on a personal interview with the defendant. In 1977, Adams was convicted of murdering a Dallas police officer, a capital crime. *See* Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. Times, June 25, 2011. At sentencing, to establish future dangerousness, the prosecution presented the expert psychiatric testimony of Dr. John Holbrook and Dr. Grigson. *Adams* v. *State*, 577 S.W.2d 717, 731 (Tex. Crim. App. 1979), *rev'd*, *Adams* v. *Texas*, 448 U.S. 38, 40 (1980). Holbrook told the jury that he had "examined [Adams] and determined that [Adams] has the profile and characteristics of a sociopath"; that he "would expect little or no change in this diagnosis in the future"; and that Adams "would commit criminal acts of violence in the future that would constitute a continuing threat to society." *Id.*

Grigson also examined Adams. During the examination, Grigson asked such questions as what it meant to say "'a rolling stone gathers no moss'" or "'a bird in the hand is worth two in the bush.'" Yant, *Presumed Guilty: When Innocent People Are Wrongfully Convicted* 27 (1991). Grigson also asked Adams whether he had any remorse for murdering the police officer, to which Adams responded that he had been framed and that he could not have remorse for a crime he did not commit. *Id.*

Based on that examination, Grigson told the jury at sentencing: "'I would place Mr. Adams at the very extreme, worse or severe end of the scale. You can't get beyond that …. There is nothing known in the world today that is going to change this man; we don't have anything.'" Dorland & Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 Law & Psychol. Rev. 63, 102 (2005). Grigson went on: "'[T]here is no question in my mind that Adams is guilty'" and "'will kill again.'" Tanner, *"Continuing Threat" to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings*, 17 Cap. Def. J. 381, 398 n.133 (2005); *see Gardner* v. *Johnson*, 247 F.3d 551, 556 n.6 (5th Cir. 2001) (Grigson testified that he was "'*one hundred percent certain* Adams would kill again'") (emphasis in original); *Flores* v. *Johnson*, 210 F.3d 456, 467 n.16 (5th Cir. 2000) (Garza, J., concurring).

The jury sentenced Adams to death. *See Adams*, 577 S.W.2d at 719. Shortly before his execution, however, this Court issued a stay and granted certiorari. *See Adams* v. *Texas*, 444 U.S. 990 (1979) (mem.). After this Court reversed the death sentence on the ground that the trial court unconstitutionally excluded members of the venire, *see Adams*, 448 U.S. at 40, it was "'revealed [on remand] that the evidence against Adams was falsified by the police.'" *Gardner*, 247 F.3d at 556 n.6. Adams was subsequently "'released as innocent'" after spending 12 years in prison. *Id.*

Peter Vanderweaghe's case presents a similar example. In *State* v. *Vandeweaghe*, 827 A.2d 1028 (N.J. 2003), the defendant admitted to assaulting the victim, but claimed that self-induced intoxication prevented him from being able to form the requisite *mens rea* for purposeful or knowing murder. *See id.* at 1029-1030.

The defendant called an expert in support of his intoxication defense, and the State, purportedly in rebuttal, called Dr. Welner. *See id.* at 1031.

Welner began by testifying that the defendant was "not unduly influenced by alcohol" and "acted purposely or knowingly." *Vandeweaghe*, 827 A.2d at 1031. But then, as he did in Cheever's case, Welner went on. Relying on his interview with the defendant, Welner opined that the defendant "suffered from antisocial personality disorder," *id.*, and that he "had a history of alcohol and intravenous drug abuse, as well as a record of 'lawbreaking,'" *id.* at 1032. Welner then stated that "a person with antisocial personality 'has a longstanding history of being able to lie and to lie successfully," and concluded, in discussing his assessment of the defendant's remorse and recollection of the crime:

> I felt that [the defendant] sounded sincere all the time. I felt that if I was sitting there and if I would close my eyes and listen to him, or even just open my eyes and listen to him, that I would have found him utterly believable. If I would have sat with [the defendant] and he would have been my entire source of information he would leave me with the impression that everything happened exactly as it did.

Id.

The defendant was convicted of murder, but that conviction was overturned. *See Vandeweaghe*, 827 A.2d at 1029-1030. The New Jersey Supreme Court rejected the state's argument that the defendant's expert had "'opened the door,'" *id.* at 1033, and held that Welner's testimony "was so prejudicial as to clearly produce an unjust result and deny [the] defendant the right to a fair trial," *id.* at 1035.

3. Defendants should not be forced, as Cheever was in this case, to subject themselves to prejudicial and unreliable expert testimony based on their own compelled statements as the price of presenting mitigating evidence

As the above discussion demonstrates, wide-ranging expert testimony for the prosecution invoking labels such as "psychopath" can be as prejudicial as it is unreliable. And that testimony becomes all the more powerful where—as here—a mental-health expert obtains access to a defendant's mind and then recounts to the jury statements that were "'forc[ed] … from'" the defendant's "'own lips,'" *Smith*, 451 U.S. at 462, to support a claim that the defendant's conduct was volitional or reflected an immutable personality disorder or evil character. Indeed, that compelled access distinguishes the analogy that petitioner and the United States press at length: the cross-examination of a testifying defendant. *See* Pet. Br. 23-24; U.S. Br. 13-17. To the extent that any such analogy even applies, *see* Resp. Br. 17-18, it supports Cheever's position, not petitioner's, given the stark differences between an unrestricted mental-health evaluation and a cross-examination in court:

> A defendant who testifies in his or her own defense at trial will be subjected to examination by the government; but the defendant will be protected by the rules of evidence and the presence of counsel. Thus, the questions permitted will ordinarily be limited to those which relate to the subject matter of defendant's direct testimony and are otherwise proper. In contrast, the scope of questions which may be put to a defendant during a government psychiatric examination is apparently limitless and

> … any limits which might be appropriate could not be enforced because the defendant is not represented by counsel at the examination.

White, *The Psychiatric Examination and the Fifth Amendment in Capital Cases*, 74 J. Crim. L. & Criminology 943, 962 (1983).

Dr. Welner's testimony in this case demonstrates the dangers of unchecked expert testimony based on a compelled examination that is loosely restricted in scope. As in *Vandeweaghe*, Welner did not confine his testimony in this case to the mental-state issue that Cheever raised—whether Cheever's long-term methamphetamine addiction rendered him incapable of premeditating. Instead, Welner delved into a wide-ranging analysis of the internal workings of Cheever's mind. Welner discussed "the possibility of a dissociative condition" and "personality disorders" as explanations for Cheever's conduct, even though Cheever had not raised those disorders in his defense. JA 132-133. He opined that "[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." JA 133. And he discussed at length Cheever's alleged "fascination with outlaws[.]" JA 134; *see also* JA 156 ("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."); JA 157 (Cheever "identified not only with outlaws but outlaws who were engaged in fatal shootouts with police officers").

Welner even went so far as to give a "moment-by-moment" narration of Cheever's thoughts, sometimes in the first person. Pet. App. 42. As the Kansas Supreme Court found, this testimony "virtually put words into Cheever's mouth," "giving a moment-by-moment

recounting of Cheever's observations and actual thoughts" that painted Cheever "as a person who had chosen an antisocial outlaw life and who was indifferent to the violence he had committed." Pet. App. 42-43 (citing *State* v. *Vandeweaghe*, 799 A.2d 1 (N.J. Super. Ct. App. Div. 2002), *aff'd*, 827 A.2d 1028 (N.J. 2003)). The ultimate effect of Welner's testimony was "devastating." *Id.* at 42. Far from simply rebutting Cheever's intoxication defense, the state and Welner used a compelled examination "to *prosecute* based upon" Cheever's compelled statements and mental health. *Williams*, 731 F. Supp. 2d at 1020. And, even though Welner's testimony was offered during the guilt phase, the same jury sentenced Cheever to death; it is therefore likely that Welner's testimony had at least some effect on the jury's consideration of whether death was an appropriate punishment.

* * *

As this case and other examples illustrate, permitting the prosecution to introduce unrestricted expert "rebuttal" testimony based on a compelled examination of the defendant does nothing to promote the reliability of verdicts, as the State contends. Instead, it can inject prejudicial and unreliable considerations into capital verdicts that in many cases have either deterred defendants from exercising their Eighth Amendment rights or subjected them to damning consequences for doing so. For that reason, in addition to the reasons Respondent articulates (at 25-42), there should be no waiver of the Fifth Amendment privilege against self-incrimination in such a circumstance. At minimum, to preclude the overreaching that has occurred in many capital cases, the Court should hold that any Fifth Amendment waiver can arise only where a defendant presents expert mental-health evidence based on an in-

person examination and that the scope of such a waiver must be narrowly confined to the statements the defendant made to his own expert.

CONCLUSION

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

Respectfully submitted.

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