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 THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

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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INTEREST OF AMICUS CURIAE

The Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities.[1] The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, education, and training, the Center works to promote the rights of individuals with mental disabilities to participate equally in society. The Center has filed briefs with the Court in most of its cases concerning the rights of individuals with mental disabilities as well as other important topics.[2]

This case presents the Court with an opportunity to clarify the concept of waiver in the context of the Fifth Amendment privilege against compelled self-incrimination. Here, the Kansas Supreme Court correctly held that admission of Scott Cheever's compelled psychiatric examination violated his privilege against self-incrimination—a privilege it held he did not forfeit merely by undertaking to defend the charges against him with evidence going to his mental state at the time of the crime. If Petitioner's challenge pre-

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[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution intended to fund the preparation and submission of this brief.

[2] *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012); *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Clark v. Arizona*, 548 U.S. 735 (2006); *Barnhart v. Walton*, 535 U.S. 212 (2002).

vails, a defendant who seeks to assert a mental status defense will be presented with the intractable choice of either (1) not introducing expert testimony in support of that defense, and thus effectively abandoning it at trial, or (2) offering such testimony, but at the cost of being compelled to undergo a psychiatric interview, and risking the government's use of any statements made during that interview against the defendant himself. That is no choice at all, and certainly not one that comports with the fundamental right not to be compelled to become a witness against oneself.

Defendants suffering from mental health problems should not have to choose between their right to raise a credible mental status defense and their privilege against self-incrimination. Imposition of that no-win decision on an individual who wants to raise an affirmative defense disserves the interests enshrined in the Fifth Amendment.

The Bazelon Center takes a special interest in this case as it presents an issue on which Judge Bazelon, its namesake, himself opined in the prominent case of *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (en banc). In *Byers*, the District of Columbia Circuit held that when a defendant asserts and supports through expert testimony an insanity defense, the Fifth Amendment is not violated by a government psychiatrist's testimony about statements made by the defendant during a court-ordered examination. In dissent, Judge Bazelon maintained that such an examination "implicates all of the fundamental values that lie at the heart of the Fifth Amendment." *Id.* at 1150-51 (Bazelon, J., dissent-

ing). Indeed, the Judge contended that the prospect of that examination places the defendant "into precisely that situation which the privilege is designed to prevent," that is, the "cruel trilemma" of "confessing responsibility, feigning insanity or forfeiting the affirmative defense." *Id.* at 1153-54. Judge Bazelon reasoned that the mandatory trade-off between raising the defense and the compelled interview violated the Self-Incrimination Clause, even if certain safeguards might be adopted to lessen the tension. *Id.* at 1155-59.

SUMMARY OF ARGUMENT

Disclosures made by a defendant to a psychiatrist during a court-ordered examination are protected by the Fifth Amendment privilege against self-incrimination. Any waiver of this constitutional right must be knowing, intelligent, and voluntary. Absent waiver, a defendant's statements may not be used against him. There is no precedent or historical basis for the proposition that a defendant waives this right by raising a mental status defense and introducing supporting expert psychiatric testimony.

Petitioner seeks to put the defendant in the impossible position of mounting a defense and forfeiting his constitutional right not to incriminate himself *or* dropping the defense altogether. That argument rests upon the untenable "fiction" that a defendant "waives" his Fifth Amendment right when he invokes his constitutionally protected right to assert a defense—here, lack of premeditation due to voluntary intoxication. But that posi-

tion is insupportable as a strict matter of doctrine. "What occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment . . . [as] his acceptance of it could hardly be called unconstrained." *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (plurality opinion) (Scalia, J.).

There was no true waiver in this case. Cheever's purported relinquishment of his right against self-incrimination was not intelligent or knowing—and in particular, it was not voluntary. Rather, his "choice" had heavy strings attached, strings that eventually proved "devastating" to his defense. Cheever should not have been subject to that dilemma, which violated his Fifth Amendment rights.

ARGUMENT

INTRODUCTION OF A MENTAL STATUS DEFENSE AND SUPPORTING EXPERT TESTIMONY DOES NOT CONSTITUTE A WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Origin And Purpose Of The Fifth Amendment's Privilege Against Compulsory Self-Incrimination.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Court has recognized this right as "the mainstay of our adversary system of criminal justice." *Michigan v. Tucker*, 417 U.S. 433, 439 (1974)

(quotation omitted). Indeed, it is "one of the great landmarks in man's struggle to make himself civilized." *Id.* (quoting *Ullmann v. United States*, 350 U.S. 422, 426 (1956)).

The common-law privilege against self-incrimination arose as a response to "certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.'" *Andresen v. Maryland*, 427 U.S. 463, 470 (1976) (quoting *Tucker*, 417 U.S. at 440). Those practices subjected defendants to the "cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). Over time, the idea of prosecution based on compelled confession became "so odious" as to "give rise to a demand for [its] total abolition," leading to a fundamental change in English criminal procedure. *Brown v. Walker*, 161 U.S. 591, 596-97 (1896). And when it came to establishing criminal procedure in this country, these inequities had so deeply "impress[ed] themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law . . . clothed in this country with the impregnability of a constitutional enactment"—namely, the Fifth Amendment. *Id.* at 597.

The privilege against self-incrimination protects some of our society's most deeply held values, *see Murphy,* 378 U.S. 52, among them a deep reluctance to force individuals to supply the evidence of their own guilt from their own lips. Indeed, the Amendment itself speaks in terms of a prohibition

on compulsion. U.S. CONST. amend. V; *see also Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) ("The ultimate test [for the Fifth Amendment] remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness.").

Reflecting the importance of this value, the Court has spread the reach of the privilege far beyond the confines of the courtroom. *Tucker*, 417 U.S. at 440 ("Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The Court has clearly established that the privilege extends to statements made during a court-ordered psychiatric examination. *Estelle v. Smith*, 451 U.S. 454, 464-69 (1981); *see also Byers*, 740 F.2d at 1112-13.[3] Such statements, despite not being made in the courtroom itself and being conveyed through the mouth of another, so implicate the values underlying the privilege that they must be similarly protected. *See Byers*, 740 F.2d at 1151 (Bazelon, J. dissenting).

Thus, absent a legitimate waiver, the introduction at trial of statements made by the defendant during a court-ordered psychiatric examination violates a critical value that the Fifth Amendment was designed to preserve and that the Court has

[3] There has been no serious contention to the contrary during these proceedings; indeed, Petitioner itself agrees that Cheever had a "Fifth Amendment privilege with respect to the mental examination." *See* Petr. Br. at 29.

since consistently and fervently endeavored to protect.

B. Any Waiver Of The Privilege Must Be Voluntary, Knowing, And Intelligent.

"To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the 'high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst*.'" *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010) (alteration in original) (quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938)). This strict standard is particularly important in the criminal context, as it ensures that a defendant is "accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973). Conversely, "[a]ny trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided." *Id.* As the Court has repeatedly recognized, the required showing that the defendant has freely relinquished his privilege is a "heavy burden" that rests squarely with the government. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2268 (2010) (quoting *Miranda*, 384 U.S. at 475).

The clearest and simplest method of effectuating a waiver is, of course, for the defendant expressly to announce his intention to relinquish the right at issue—as, for example, occurs in a guilty plea colloquy. *See* Fed. R. Crim. P. 11. Alternately, and more relevant in this context, the law may presume that "an individual who, with a full under-

standing of his or her rights, acts in a manner *inconsistent with* their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis*, 130 S. Ct. at 2262 (emphasis added). In *Berghuis*, for example, the act giving rise to the "inconsisten[cy]" was the defendant's decision to respond to police interrogation. The Court held that where *Miranda* warnings were given and understood, an accused's uncoerced statement established an "implied waiver" of his right to remain silent. *See id.* at 2260-62.

The voluntary nature of an act of waiver, however, may not be lightly presumed. To be voluntary, a waiver of a constitutional right must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). This high standard naturally flows from the importance of the values animating the Fifth Amendment; to require any less would be to demean a privilege that the Court itself has fought to safeguard and strengthen since its inception.

C. Introduction Of A Mental Status Defense And Supporting Expert Testimony Does Not Give Rise To A Voluntary Waiver

As a strict doctrinal matter, the introduction of a mental status defense, along with supporting expert testimony, should not constitute a waiver of the right against self-incrimination. It is plainly not a "free and unconstrained" choice to abandon the privilege. *Culombe*, 367 U.S. at 602. Nor is the defendant undertaking any act that is inconsistent with the privilege's retention.

Faced with a factually identical situation, two current Members of this Court previously acknowledged that "[i]t seems . . . 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 (plurality opinion) (Scalia, J., joined by Ginsburg, J.). The reasons are plain. The defendant who wishes to raise a mental status defense is not voluntarily relinquishing anything. If he must be subjected to a court-ordered examination, it is not because he has chosen that outcome in any meaningful sense, but rather only because it is "the court's decree that the act" (i.e., introducing his own expert testimony) "entails the consequence" (i.e., that he must be examined*). Id.* And that is a "decree that remains to be justified." *Id.*

Moreover, there is an independent reason to reject the "fiction" of waiver here. The Court has held that in situations where two different constitutional rights are at issue, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 393-94 (1968). Accordingly, merely because a defendant decides to present exculpatory evidence at trial—indisputably a fundamental right, *see Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)—he should not thereby sacrifice his right against self-incrimination.

The main response of Petitioner and its amici to this argument is to analogize the instant case to the situation in which a defendant takes the stand in his own defense and thereby subjects himself to compulsory cross-examination. *See* Pet. Br. at 22-24. They observe that no constitutional violation

inheres in the latter scenario, despite the fact that the choice to testify leads automatically to a process that may elicit incriminating statements from the defendant's own mouth. *See Brown v. United States*, 356 U.S. 148 (1958). Although they argue that the same should be true here, the analogy is flawed in at least two respects.

First, the reason that testifying is deemed to constitute a waiver of the privilege against self-incrimination is that it is an act "inconsistent with" the invocation of that right. Had the defendant decided to remain silent, the prosecution could not force him to testify in any manner. As the United States points out, the Self-Incrimination Clause provides the defendant with a right not even to be sworn as a witness at his own trial. *See* U.S. Br. at 13 (citing *Wilson v. United* States, 149 U.S. 60, 66 (1893)). Once he *chooses* to testify, on the other hand, he makes himself into a witness and therefore necessarily relinquishes the right. *See Brown*, 356 U.S. at 155-56 ("He cannot reasonably claim that the Fifth Amendment gives him not only this choice [to not testify] but, if he elects to testify, an immunity from cross-examination on the matters he himself has put in dispute."); *accord Mitchell v. United States*, 526 U.S. 314, 322 (1999). It is inconsistent to elect to speak and yet also to insist that one cannot be compelled to answer questions. *See Berghuis*, 130 S. Ct. at 2262.[4]

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[4] As Cheever argues, this idea is reflected in the text of the Fifth Amendment itself. The Amendment provides that the accused cannot be "compelled . . . to be a witness . . . . " Resp. Br. 34 (quoting U.S. Const. amend. V). But if he chooses to testify, then he has decided on his own to "be a witness."

That "inconsisten[cy]" is not present here. A defendant who seeks to introduce mental status evidence does not thereby automatically decide to become a witness. He may choose not to testify at all, and even if he offers expert testimony, the expert need not relate any of the defendant's actual statements in order to convey his own expert opinion. (Indeed, it would be inadmissible hearsay for the expert to relate statements that were made to him for their truth.) To be sure, the expert may form his opinion *on the basis* of statements made to him by the defendant, but that is a far cry from introducing the statements themselves in his own defense—either directly or through the expert. Hence, the defendant has done nothing that is inconsistent with his decision not to talk.

Second, the burden associated with waiver is much greater in the context of a compelled psychiatric interview than in cross-examination. As Petitioner itself emphasizes, a testimonial waiver is not unlimited. The rule is that when a testifying defendant is questioned by the prosecutor, "the breadth of his waiver is determined by the scope of relevant cross-examination." Petr. Br. at 11 (quoting *Brown v. United States*, 356 U.S. 148, 154-55 (1958)) (emphasis omitted). Put simply, whatever topics the defendant has testified about, he may be questioned on the same. But as the record here indicates, there are no similar limitations on a court-ordered psychiatric interview. For example, although Cheever's expert did not introduce statements from Cheever, the government's expert did precisely that, telling the jury what he learned "in the interview . . . from him," J.A. 134, about the way Cheever viewed himself and charac-

terized his own motivations for the shooting. *See generally* Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. Crim. L. & Criminology 943, 962-63 (1983) [hereinafter White, *The Psychiatric Examination*] (comparing testimonial waiver with waiver by introduction of mental status). As the "price" of raising a mental status defense goes up, so does the degree to which the defendant's so-called "choice" is a constrained and no longer free one.[5]

Petitioner also argues that *Buchanan v. Kentucky,* 483 U.S. 402 (1987), settles the applicability of the waiver doctrine here. Petr. Br. at 22. There are, however, critical differences between the cases. In *Buchanan*, the defendant's counsel affirmatively joined in a motion for a psychiatric examination, *id.* at 424, and the state psychiatrist's report offered at trial contained no statements made by the defendant. *Id.* Here, on the other hand, Cheever did not volunteer for nor request a psychiatric examination; in fact, he took

[5] The burden of a psychiatric interview on Fifth Amendment rights is greater in other respects, as well. In conducting her interview, the psychiatrist is not constrained by time, counsel, the rules of evidence, a judge, or any other factor that may balance the interviewee's rights and interests. *See* White, *The Psychiatric Examination* at 962-63. Moreover, as Judge Bazelon explained, techniques employed by psychiatrists during compelled examinations may "uncover aspects of the personality which the individual ordinarily does not reveal to others and which he may not consciously perceive. The information elicited—thoughts, dreams, fantasies, anxieties—is often that which the conscious mind tries to repress." *Byers*, 740 F.2d at 1151 (Bazelon, J., dissenting).

exception to it when confronted with the federal disclosure requirement. Rather, he was compelled by court order to submit to an examination that was not limited to probing his voluntary intoxication defense, and resulted in statements being offered at trial on subjects beyond which he or his expert testified, all as a consequence of having elected to assert a mental status defense. That is an untenable result, for as the Court observed in *Culombe*, "persons accused of crime cannot be made to convict themselves out of their own mouths." 367 U.S. at 571.

D. Cheever Did Not Voluntarily Waive His Privilege Against Self-Incrimination

The record indicates that the sole ground on which Cheever sought to defend himself was his mental state at the time of the crime. He did not deny that he shot Sheriff Matthew Samuels, nor that he did so intentionally. Tr. 99. His only defense was that his prolonged and contemporaneous use of methamphetamine negated his ability to act with premeditation, the necessary *mens rea* for capital murder. Toward that end, he testified as to his drug use and also called an expert who could speak about the properties of methamphetamine and its effect on Cheever. Without that evidence, it would have been exceedingly difficult for Cheever to mount his defense effectively. *See Ake v. Oklahoma,* 470 U.S. 68, 80 (1985) (highlighting importance of expert testimony in conveying to the jury the nature of a mental impairment).

In these circumstances, the "choice" available to Cheever was far from free and unconstrained. Rather, it came at a heavy price. By invoking his right to present that evidence, Cheever was compelled to trigger a chain reaction that ended with the government expert using Cheever's own answers not merely to rebut his defense, but affirmatively to establish his guilt. As the Kansas Supreme Court recognized, the overall effect was "devastating." Pet. App. 42. Had Cheever understood the consequences of his "choice," he may well not have chosen it in the first place. But more to the point, the disastrous consequences of Cheever's decision illustrate the extent to which his choice was not free and unconstrained in the first place. For that reason alone, the Fifth Amendment did not tolerate the government to take words Cheever was compelled to speak and use them against him to convict.

CONCLUSION

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

Respectfully submitted,

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