No. _____

In the Supreme Court of the United States

STATE OF KANSAS,
Petitioner,

v.

SCOTT D. CHEEVER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. 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?

2. When a criminal defendant testifies in his own defense, does the State violate the Fifth Amendment by impeaching such testimony with evidence from a court-ordered mental evaluation of the defendant?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a Writ of Certiorari to review the judgment of the Kansas Supreme Court.

OPINION BELOW

The opinion of the Kansas Supreme Court is reported at *State v. Cheever*, 284 P.3d 1007 (Kan. 2012), and is reproduced as Appendix A to this petition. App. 1-68.

JURISDICTION

The Kansas Supreme Court decided this case August 24, 2012. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ." U.S. Const. amend. XIV.

Kan. Stat. Ann. § 22-3219 states, in pertinent part:

> **(1)** Evidence of mental disease or defect excluding criminal responsibility is not admissible upon a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice of such defendant's intention to assert the defense that the defendant, as a result of mental disease or defect lacked the mental state required as an element of the offense charged.
>
> **(2)** A defendant who files a notice of intention to assert the defense that the defendant, as a result of mental disease or defect lacked the mental state required as an element of the offense charged thereby submits and consents to abide by such further orders as the court may make requiring the mental examination of the defendant and designating the place of examination and the physician or licensed psychologist by whom such examination shall be made. . . . A report of each mental examination of the defendant shall be filed in the court and copies thereof shall be supplied to the defendant and the prosecuting attorney.

Kan. Stat. Ann. § 21-5209 (formerly § 22-3220) states:

> It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime

> charged. Mental disease or defect is not otherwise a defense.

Kan. Stat. Ann. § 21-5205 (formerly § 21-3208) states:

> **(a)** The fact that a person charged with a crime was in an intoxicated condition at the time the alleged crime was committed is a defense only if such condition was involuntarily produced and rendered such person substantially incapable of knowing or understanding the wrongfulness of such person's conduct and of conforming such person's conduct to the requirements of law.
>
> **(b)** An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Federal Rule of Criminal Procedure 12.2 provides, in pertinent part:

> **(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must--within the time provided for filing a pretrial motion or at any later time the court sets--notify an attorney for the

government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) . . . If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(4) Inadmissibility of a Defendant's Statements. No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

> **(A)** has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or . . .

STATEMENT OF THE CASE

On January 19, 2005, Greenwood County Sheriff Matt Samuels, accompanied by two deputies, went to the Cooper home in a rural part of Greenwood County, Kansas, known as "Hilltop" (and known for illegal drug activity) to execute a warrant for Scott Cheever's arrest. Cheever was in fact at the Cooper home that day. At some point prior to or during the arrival of the law enforcement officers, Cheever apparently realized that they were coming for him, and so he hid in an upstairs room, armed with a pair of handguns.

When Sheriff Samuels arrived at the Cooper house, Darrell Cooper lied and told the Sheriff that Cheever was not there. The Sheriff asked if he could look around the house anyway. Cooper consented, and the Sheriff entered the house. As Sheriff Samuels started up the stairs, Cheever ambushed him with a .44 caliber revolver, shooting the Sheriff twice in the chest at close range.

Sheriff Samuels lay mortally wounded at the foot of the stairs when Deputy Sheriff Michael Mullins attempted to provide first-aid, but Cheever shot at Deputy Mullins as well. Cheever abated fire only after Mullins yelled at Cheever to stop so that the deputies could get the Sheriff out of the house. Mullins started CPR on the Sheriff while another deputy, Tom Harm, radioed for help. Sheriff Samuels was taken to a hospital but his wounds were fatal.

After the shooting, State and local law enforcement officers surrounded the Cooper house. After roughly seven hours, a Kansas Highway Patrol (KHP) special response team entered the house and rushed the stairs through a hail of gunfire from Cheever. Only when the response team cleared the top of the stairs and began returning fire did Cheever stop shooting and surrender.

Cheever was charged in state court with capital murder for the killing of Sheriff Samuels, with attempted capital murder for shooting at Deputies Mullins and Harm, and with attempted capital murder for shooting at two of the KHP response team officers who took him into custody. Cheever also was charged with manufacturing methamphetamine, conspiracy to manufacture methamphetamine, and criminal possession of a firearm.

However, because the Kansas Supreme Court recently had held Kansas' death penalty statute unconstitutional, *see State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *reversed*, *Kansas v. Marsh*, 548 U.S. 163 (2006), and that decision was still under review by this Court, the State asked federal authorities to prosecute Cheever under the Federal Death Penalty Act. Cheever then was indicted on thirteen federal counts, including capital murder. USDC Case No. 05-10050-01-MLB; *See also United States v. Cheever*, 423 F. Supp. 2d 1181 (D.Kan. 2006).

In the federal case, Cheever filed notice, pursuant to Federal Rule of Criminal Procedure (FRCP) 12.2(b), that he intended "to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events on January 19, 2005, which negated his

ability to form specific intent, *e.g.,* malice aforethought, premeditation and deliberation." (USDC Case No. 05-10050-01-MLB, Doc. 205). App. 69-71. Pursuant to FRCP 12.2(c), the district court ordered a psychiatric evaluation of Cheever by Dr. Michael Welner, a forensic psychiatrist and clinical pyschopharmacologist, to assess (1) "the relationship of methamphetamine and [Cheever's] use of it on January 19th, 2005, to his killing Matthew Samuels," (2) the effects of Cheever's ongoing methamphetamine use, and (3) "to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels." App. 72-73.

In September, 2006, Cheever's case proceeded to jury trial in federal court. However, several days into the trial, a mistrial was declared after Cheever's defense counsel became unable to proceed. In the meantime, this Court reversed the Kansas Supreme Court in *Kansas v. Marsh* and held that the Kansas death penalty statute is constitutional. The federal case was then dismissed without prejudice, and Kansas recommenced the state prosecution.

At trial, the State presented the testimony of the various law enforcement officers involved in the events of January 19, 2005. Cheever himself testified in his own defense and admitted that he shot and killed Sheriff Samuels, that he shot at Deputies Mullins and Harm, and that he shot at two KHP Troopers when they entered the house. Cheever also admitted to manufacturing methamphetamine, that he previously had pled guilty to robbing a grocery store and assaulting a clerk, and that at the time he shot Sheriff

Samuels he (Cheever) was a felon in unlawful possession of a firearm (multiple firearms actually).

Cheever's defense was "voluntary intoxication" – that because of his use of methamphetamines he lacked the mental ability to "premeditate" the murderous crimes he committed on January 19, 2005. Relying on both his own testimony and the expert testimony of Dr. R. Lee Evans, a psychiatric pharmacist, Cheever argued that methamphetamine use made him incapable of forming the necessary intent (premeditation) for the capital charges.

Dr. Evans described the effects of methamphetamine on the brain. He testified that, over time, such drug abuse inhibits brain functions, including decision-making, and it causes side effects such as paranoia and violence. Dr. Evans further testified that, on the day of the murder, Cheever was under the intoxicating effects of methamphetamine and was incapable of rational thought. He testified that Cheever's shooting of Sheriff Samuels was a drug-induced reaction to a perceived threat, and not the result of any thought process. Dr. Evans stated that it was his expert opinion that Cheever's use of methamphetamine affected Cheever's ability to premeditate the capital crimes. App. 75-84.

In rebuttal, the State called Dr. Welner, the psychiatrist who evaluated Cheever in the federal case after Cheever filed a notice of his intent to rely on the same defense in that proceeding. Dr. Welner testified that no information he received or reviewed "demonstrated a change in [Cheever's] behavior" from the time that he [Cheever] went to the Cooper

residence, before he used methamphetamine, or to the time after he injected himself the morning of the murder. Dr. Welner further testified, "there were not signs from the history of a remarkable change in [Cheever] after he used the methamphetamine that morning." App. 85-87.

Dr. Welner also explained that Cheever's perceptions and awareness of his surroundings on January 19, 2005, were unimpaired, pointing out that Cheever engaged in a series of decisions once the police arrived, decisions that demonstrated functioning thought processes and an ability to control his actions. Dr. Welner ultimately testified that, in his professional opinion, on the morning of the murder Cheever retained the ability to think before acting, and Cheever was able to form the premeditated intent to kill. App. 91-95.

The jury found Cheever guilty on all counts, and Cheever was sentenced to death for capital murder. On direct appeal, the Kansas Supreme Court reversed the capital murder and attempted capital murder convictions and the death sentence, holding that the admission of Dr. Welner's rebuttal testimony violated Cheever's Fifth Amendment privilege against self-incrimination. The court observed that "Cheever relies primarily on *Estelle v. Smith*, 451 U.S. 454 (1981), *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and several related cases to argue that because he had not waived the privilege by presenting evidence of a mental disease or defect at trial, the State was precluded by the Fifth Amendment from using statements he made during Welner's examination, conducted as part of the federal case, against him." App. 22.

The court determined that, under Kansas law, Cheever's defense of "voluntary intoxication" was not the same or the equivalent of a claim of "mental disease or defect" as defined by Kansas statutes. As a result, the court opined that Cheever's intoxication defense would not—under Kansas law—have justified a court-ordered mental examination. Thus, the Fifth Amendment was violated because Cheever's assertion of a "voluntary intoxication" defense did not waive his Fifth Amendment privilege or open the door to the use of Dr. Welner's testimony as rebuttal. App. 30-35.

Instead,

> we find that Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial.

App. 34-35.

The court further discussed whether it was error to allow the State to introduce evidence from the federal, court-ordered mental examination to *impeach Cheever's own testimony*. The court opined that there is a split of authority on this question in the Circuits. App. 35-38 (citing *United States v. Leonard*, 609 F.2d 1163, 1165-67 (5th Cir. 1980) (statements admissible solely on the issue of sanity) and *United States v. Castenada*, 555 F.2d 605, 609 (7th Cir. 1977) (statements admissible

for impeachment of defendant's own testimony)). The court then went on to reject the State's argument that such evidence is admissible for impeachment purposes under cases such as *Harris v. New York*, 401 U.S. 222 (1971), and *Kansas v. Ventris*, 556 U.S. 586 (2009), although the court opined that it need not conclusively decide the impeachment issue because the court already had determined that the admission of Dr. Welner's testimony as rebuttal of Cheever's expert was reversible constitutional error. App. 37-38.

REASONS FOR GRANTING THE WRIT

The Kansas Supreme Court's holding that the Fifth Amendment is violated when the State presents rebuttal evidence from a court-ordered mental examination of the defendant *after* the defendant first affirmatively introduces expert evidence that he lacked the mental state to commit capital murder warrants this Court's review for several reasons:

1. The Kansas Supreme Court's decision conflicts with this Court's decision in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), as well as the Fourth Circuit's decision in *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), the Fifth Circuit's decision in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), the Ninth Circuit's decision in *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983), and the majority of decisions from other lower courts on this issue. By its decision, the Kansas Supreme Court takes the side of a minority of courts that have found a Fifth Amendment violation. This clear split of authority on an important and recurring constitutional question warrants an exercise of this Court's plenary review.

2. The Kansas Supreme Court incorrectly determined the scope of Cheever's Fifth Amendment right—a federal question, not a question of state law, *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)—by reliance on state statutory definitions of mental disease/defect and voluntary intoxication defenses, rather than the fact that Cheever affirmatively and deliberately made his mental state an issue through his own and his expert's testimony about the alleged effects of Cheever's methamphetamine usage. The Kansas Supreme Court's purported Fifth Amendment distinction between mental disease/defect on the one hand, and voluntary intoxication on the other, is based *solely on Kansas law*, not the Fifth Amendment or this Court's cases, nor is the distinction substantively meaningful or correct.

In essence, the Kansas Supreme Court allowed Cheever to present an allegedly scientific, mental-state defense through his own and expert testimony while at the same time shielding himself from effective rebuttal evidence. The court reached that erroneous result by labeling Cheever's denial that he had the requisite mental state as "voluntary intoxication" rather than "mental disease or defect," undermining fundamental fairness in the adjudicative process and creating a nonsensical anomaly.

This Court long has recognized that "it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony," *Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*), which is precisely what happened in this case. Furthermore, under cases such as *Harris v. New York*, 401 U.S. 222 (1971), and

Kansas v. Ventris, 556 U.S. 586 (2009), the State is allowed to use even *unlawfully* obtained evidence for purposes of *impeachment or rebuttal*. But, here, the Kansas Supreme Court barred the State from using *lawfully* obtained evidence for *any* purpose, even when the defendant himself put his mental state into play.

3. There also is a division of authority on the interrelated question of whether evidence from a court-ordered mental evaluation may be used to *impeach* the defendant's own trial testimony. Compare *United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980) (holding such statements are admissible solely on the issue of sanity) with *United States v. Castenada*, 555 F.2d 605 (7th Cir. 1977) (holding such statements are admissible for impeachment purposes). That question also is squarely presented here.

I. The Kansas Supreme Court's decision conflicts with decisions of this Court, as well as with the decisions of several Circuits and a majority of state courts of last resort.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that evidence from a court-ordered competency examination of a defendant could not be used against the defendant when he had neither initiated the examination nor put his mental state into issue at trial. In *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987), the Court clarified the scope of *Smith*, holding that the *Smith* rule does not apply "if a defendant requests such an evaluation or presents psychiatric evidence …." Rather, when a defendant asserts a mental status defense – such as the "extreme emotional disturbance"

defense at issue in *Buchanan* – giving rise to a court-ordered mental evaluation, and then presents evidence at trial to support the defense, "at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Id*. at 422-23. *See also Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*) ("it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony"); *id*. ("In that case [*Buchanan*], the Court held that the defendant waived his Fifth Amendment privilege by raising a mental-state defense.").

The Kansas Supreme Court here reached a result that is contrary to the reasoning of both *Smith* and *Buchanan*, even if this case in some sense might be distinguishable because there was no court-ordered mental examination in the state prosecution (although there was in the earlier federal prosecution, and that evaluation was ordered on the basis of the same defense—voluntary intoxication—that the defendant raised in the state prosecution). The essential rationale of *Buchanan* appears to be the notion that a defendant cannot have his cake and eat it too, by asserting a mental state defense but then trying to immunize himself at trial from contrary rebuttal evidence that is lawfully in the State's possession.

A. Importantly, the Kansas Supreme Court's technical reliance on state law labels attached to the defense asserted, and the type of expert evidence presented, to determine the scope of Cheever's Fifth

Amendment privilege conflicts sharply with the decisions of several circuits and a number of state courts. For example, in *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), the Fourth Circuit considered the Fifth Amendment claim of a defendant who introduced "expert testimony in support of his defense that he suffered from a 'cognitive dysfunction' which made him 'more susceptible to entrapment by government agents' and that this condition was caused by an explosion resulting in a head injury he received while working in a steel mill …." *Id.* at 142. The court had ordered a psychiatric evaluation after the defendant gave notice of this defense, and at trial "Curtis introduced testimony from his own psychiatrist and psychologist to support his mental status defense. The government then introduced psychiatric testimony [from the court-ordered evaluation] in rebuttal." *Id*. at 144.

Phrasing the question as "whether the government violated Curtis's constitutional rights when it introduced psychiatric testimony based on interviews conducted with Curtis pursuant to the government's motion for a competency evaluation," *id*. at 143, the Fourth Circuit emphatically rejected the defendant's claim. The Fourth Circuit pointed out that the government "called its own experts only to rebut Curtis's diminished capacity defense," *id*. at 144, and the "experts' testimony related solely to the validity of Curtis's alleged mental condition as to which he introduced psychiatric testimony." *Id*. The court held that

> [w]e have addressed this issue and found that "[w]hen a defendant asserts a mental status

> defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination …. That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal."

Id. at 144-45 (quoting *Savino v. Murray*, 82 F.3d 593, 604 (4th Cir. 1996)) (emphasis omitted).

Similarly, in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), the Fifth Circuit approved the state's use of psychiatric evidence to rebut the testimony of various non-psychiatric defense witnesses regarding the defendant's mental state. *Id*. at 575-77. The *Schneider* court read *Buchanan* to hold that "a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind." *Id*. at 575. Rather, the *Buchanan* principle reflects a "fair state-individual balance." *Id*. at 576. "It is unfair and improper," the Fifth Circuit held, "to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony." *Id*. *See also Hernandez v. Johnson*, 248 F.3d 344, 348 (5th Cir. 2001) ("As *Buchanan* teaches, defense counsel was on notice that if he attempted to put mental status in play, the State might draw upon the [court-ordered] examination in rebuttal.")

Nor did it matter to the Fifth Circuit in *Schneider* that the defense witnesses "were not psychiatrists or

psychologists, but social workers and counselors." 835 F.2d at 576. Such testimony went beyond "lay testimony," and in effect was presented as expert mental-status evidence within the ambit of *Buchanan*, allowing the State to present expert testimony in rebuttal. *Id*. Here, Cheever used an expert who testified directly and extensively about Cheever's mental state and Cheever's capacity to commit capital murder. In the Fourth and Fifth Circuits, it is clear that the prosecution would have been allowed to rebut Cheever's expert with Dr. Welner's expert testimony, and that conclusion is fully consistent with the reasoning and holdings of both *Buchanan* and *Smith*.

Likewise, the Kansas Supreme Court's reliance on what constitutes a mental disease/defect defense under Kansas law to determine the scope of Cheever's Fifth Amendment privilege conflicts with the Ninth Circuit's decision in *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). Defendant Halbert argued that because he raised a defense of diminished capacity rather than insanity, evidence from a court-ordered mental examination should not have been admitted in rebuttal against him. *Id*. at 389-90. This argument is indistinguishable from the argument Cheever made to the Kansas Supreme Court in this case.

The Ninth Circuit, however, contrary to the Kansas Supreme Court, held that "Halbert's argument elevates form over substance," and that the psychiatric evidence was admissible as it "related to mental capacity in general," 712 F.2d at 390, an issue that the defendant put into play with his own evidence. After all, "[b]oth defenses thus hinge on the workings of a defendant's mind at the time of the offense. No principled reason

exists to allow psychiatric probing of these workings when insanity is at issue but to disallow it on the issue of diminished capacity." *United States v. White*, 21 F. Supp. 1197 (E.D. Cal. 1998). *See also White v. Mitchell*, 431 F.3d 517, 536-37 (6th Cir. 2005) (finding no Fifth Amendment violation when the prosecution used evidence from court-ordered mental exam in rebuttal after the defendant presented expert evidence regarding his mental state, even though he had withdrawn his insanity defense); *United States v. Madrid*, 673 F.2d 1114, 1121 (10th Cir. 1982) (the State's rebuttal evidence did not violate the Fifth Amendment when the defendant either initiated the court-ordered evaluation and/or introduced psychiatric evidence at trial); *Lee v. Thomas*, No. 10-0587-WS-M, 2012 WL 1965608, at *27 (S.D. Ala. May 30, 2012) ("Numerous courts have construed the *Smith* / *Buchanan* line of authorities as allowing the prosecution to put on psychiatric evidence where the defendant presents a defense relating to his mental state and utilizes expert testimony to advance it.")

B. A number of state courts have come to similar conclusions as the federal Circuits. For example, in *Commonwealth v. Ostrander*, 805 N.E.2d 497, 504-06 (Mass. 2004), the Supreme Court of Massachusetts held that where a defendant challenges the voluntariness of his confession through expert neuropsychological testimony, evidence from a court-ordered psychiatric evaluation is admissible without violating the Fifth Amendment. The court identified two reasons for its conclusion: (1) "a defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial

evidence in essentially the same way as if he had testified'" (quoting *Blaisdell v. Commonwealth*, 364 N.E.2d 191 (Mass. 1977)); and (2) "where a defendant places at issue his mental state at a critical time, the jury should have the benefit of 'countervailing expert views, based on similar testimonial statements of a defendant' in order to reach a fair result …." (quoting *Blaisdell*, *supra*). 805 N.E.2d at 504-505. The court rejected "the defendant's narrow interpretation of the relevant case law, because it does not take into account that it is the defendant who is placing his mental state at issue, and the challenged mental state does not concern a collateral issue, but rather a defense set forth by the defendant." *Id*. at 505.

In *State v. Fair*, 496 A.2d 461 (Conn. 1985), the Supreme Court of Connecticut held that when a criminal defendant asserts a mental-status defense, he waives his Fifth Amendment privilege and the State may use evidence from a court-ordered mental evaluation in rebuttal, even when the defendant relies only on lay testimony: "A criminal defendant waives this [Fifth Amendment] privilege when he places his mental status in issue" and it is clear "that a defendant who claims extreme emotional disturbance places his mental status in issue." 496 A.2d at 463. The court further held that treating such decisions as a waiver of the Fifth Amendment privilege "strikes a balance between the legitimate needs of the state and the cognizable rights of the defendant." *Id*. at 464. Moreover, it makes no difference whether the defendant puts emotional disturbance in issue by his own testimony or through expert testimony:

> It would be anomalous to hold that a defendant can put his mental status in issue only through expert testimony when he can also meet his burden of proof on the issue of extreme emotional disturbance simply by offering his own testimony or the testimony of lay witnesses. Any defendant who asserts the defense of extreme emotional disturbance, whether or not he resorts to offering psychiatric testimony, raises the issue of his mental status and hence relinquishes his privilege against submitting to court-ordered psychiatric examination.

Id.

The Washington Supreme Court held in *State v. Hutchinson*, 766 P.2d 447 (Wash. 1989), that the Fifth Amendment does not prohibit a compelled mental examination of a defendant raising a mental status defense other than insanity, nor the use of evidence from that examination by the prosecution in rebuttal. "If a defendant asserts a lack of mental capacity, whether it is called diminished capacity or insanity, he is required to undergo a court ordered psychiatric examination." *Id*. at 452. Indeed, the court went on to emphasize that "a defendant who asserts diminished capacity waives both the physician-patient privilege and the privilege against self-incrimination" because "there is no distinction between insanity and diminished capacity in this regard and [] the allowance of a privilege would deprive the State and the jury of important evidence on the defendant's mental condition." *Id*. at 453.

Finally, Maryland's highest court held in *Hartless v. State*, 611 A.2d 581, 584 (Md. 1992), that, consistent with *Buchanan*, most state courts "have found no constitutional impediment to allowing the State to secure a mental examination of a defendant and to present rebuttal expert testimony in cases involving mental status defenses other than insanity." The Maryland Court of Appeals emphasized that "the underlying concern is that in order for the State to be able to bear effectively its burden of proving guilt, or of meeting an affirmative defense, it must have the means to adequately assess and, if necessary, rebut a defendant's expert psychiatric testimony." *Id*.

Similar to this case, the defendant in *Hartless* sought to present expert testimony that he lacked "the specific intent required for premeditated murder," *id*. at 585, while precluding the State from responding with evidence from a court-ordered mental evaluation, but the court flatly rejected the defendant's ploy: "there is substantial authority supporting the position that the State constitutionally may be permitted to have access to evidence on an issue the defendant has introduced and that, for rebuttal purposes, 'the state must be able to follow where [the defendant] has led.'" *Id*. at 586 (quoting *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984)). *Cf. Arnold v. Commonwealth*, 192 S.W.3d 420, 423-25 (Ky. 2006) (no error in permitting the State to use psychiatric evidence to rebut defendant's claim that he was voluntarily intoxicated and lacked the mental state necessary to commit the charged offense).

C. Nevertheless, some courts and commentators have suggested that "[f]ederal case law has not been

uniform … with respect to the admissibility of expert testimony on the issue of intent when the defense of insanity is not raised." *Troiani v. Poole*, 858 F. Supp. 1051, 1056 (S.D. Cal. 1994); *see also United States v. Vazquez-Pulido*, 155 F.3d 1213, 1217-19 (10th Cir. 1998) ("We are unwilling to adopt a per se rule making all test results arising from pretrial competency evaluations inadmissible at trial …. We think the better approach … is to evaluate the evidence on a case-by-case basis for relevance, prejudice or confusion of the issues."); *United States v. Childress*, 58 F.3d 693, 727-30 (D.C. Cir. 1995) (discussing admissibility of mental condition evidence following Insanity Defense Reform Act of 1984); *United States v. Cameron*, 907 F.2d 1051, 1062-67 (11th Cir. 1990) (discussing the "persistent confusion surrounding the precise definition of the terms 'diminished capacity' or 'diminished responsibility,'" and various approaches taken by federal courts in determining admissibility of psychiatric evidence); Wright, Miller, *et al*., 1A *Federal Practice and Procedure* § 208 ("While the issue is not free from doubt, it appears that no statement made by the defendant in the course of the mental examination may be admitted into evidence against him or her on the issue of guilt, although at least two courts have indicated that the statements may be used to impeach or for rebuttal."); *see also Hartless*, *supra*, 611 A.2d at 584 ("The [*Buchanan*] Court did not expressly define what means of rebuttal are constitutionally permissible.").

This would be an appropriate case for the Court to clear up any remaining confusion.

D. A few state supreme courts, like the Kansas Supreme Court, have found a Fifth Amendment violation in circumstances similar to those presented here. For instance, in *State v. Vosler*, 345 N.W.2d 806 (Neb. 1984), the defendant gave notice that at trial he would claim and present expert testimony that he shot his wife's paramour because of an "irresistible impulse." The State then sought and obtained a psychiatric evaluation of the defendant, but when the State used that evidence at trial, the Nebraska Supreme Court found a Fifth Amendment violation.

The Nebraska Supreme Court held that where a defendant introduces psychiatric evidence of his mental condition in order to contest that he acted with the requisite criminal intent rather than to assert an insanity defense, the Fifth Amendment precludes the State from introducing evidence from a court-ordered mental evaluation. The Nebraska court found a constitutional distinction between a defendant denying he had the requisite mental state and a defendant asserting an insanity defense, because "a person who introduces evidence of his mental condition to rebut the presumption that the act he performed was coupled with the requisite intent makes no admission of the crime." *Id*. at 813. Thus, "[i]n such a situation the fifth amendment requires that the State prove its case without compelling the defendant to submit to interviews by those in its employ." *Id*. Such reasoning would seem to support the decision of the Kansas Supreme Court in this case.

Similarly, in *State v. Lefthand*, 488 N.W.2d 799, 800-01 (Minn. 1992), the Minnesota Supreme Court held that a defendant's assertion of a "voluntary

intoxication" defense does not sufficiently put his mental state at issue to justify the State using evidence from a court-ordered mental evaluation in rebuttal. Instead, such a defense (the very defense Cheever purported to assert here) "is directed solely to refuting certain elements of the crimes with which he had been charged, not to advance a defense of mental illness or mental deficiency." *Id*. at 800-01. Under such circumstances, a court-ordered psychiatric evaluation violated a provision of Minnesota law which itself "secur[ed] the defendant's Fifth Amendment right against self-incrimination." *Id*. at 801.

The Kansas Supreme Court's decision here deepens the split of authority, and takes the wrong side in the debate. The better view is that the "5th amendment does not prohibit the use of a defendant's statements which are made during a court-ordered or court approved mental examination so long as they are offered strictly to rebut the defendant's state of mind at the time the offense was committed." *Troiani*, 858 F. Supp. at 1056 (citations omitted); Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure*, § 20.4(e) at 907 (2d ed. 1992) ("The defendant, in choosing to use his own expert testimony, is taken as agreeing to submit the subject of that testimony to the other side for the same use as has been made by his experts."). Nor can the scope of the Fifth Amendment privilege turn upon technicalities of state law defenses: "The admissibility of such evidence is not limited to evidence of mental disease or defect bearing upon the affirmative defenses of insanity or diminished capacity; testimony which bears upon the existence of the mental state required by the offense charged is also admissible." *Troiani*, 858 F. Supp. at 1056.

The reasoning of *Buchanan*, as correctly understood by the Fourth, Fifth, and Ninth Circuits, as well as a number of lower federal courts and state courts of last resort, is sound. The Kansas Supreme Court's contrary reasoning is not, and deepens a split of authority on the first question presented.

II. The Kansas Supreme Court incorrectly relied on state law to define the scope of the Fifth Amendment.

A. Perhaps the most fundamental flaw in the Kansas Supreme Court's decision is that court's reliance on state law to determine the scope of the Fifth Amendment privilege against self-incrimination. App. 31-35 (relying on a distinction in Kansas law between the state law defenses of mental disease/defect and voluntary intoxication, specifically Kan. Stat. Ann. §§ 22-3219 and 22-3220). That was constitutional error: "The question of a waiver of a federally guaranteed constitutional right is, of course, a *federal question controlled by federal law*." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (emphasis added).

Furthermore, the Kansas Supreme Court's distinction between state law defenses of mental disease/defect and voluntary intoxication is both substantively artificial and contrary to precedent. Indeed, federal precedent makes clear that what is determinative for constitutional purposes is not the label state law (or federal statutory law, for that matter) attaches to the defense, but the *substance* of the evidence a defendant actually presents regarding his mental state and potential criminal culpability. *See, e.g., Curtis*, 328 F.3d at 143-45; *Schneider*, 835 F.2d at

575-77; *Halbert*, 712 F.2d at 389-90; *White*, 21 F. Supp. 2d at 1200-01; *Troiani*, 858 F. Supp. at 1055-56. If a defendant puts his mental state in play at trial, then he has waived the Fifth Amendment privilege with respect to evidence of his mental state.

The Kansas Supreme Court's error in relying on Kansas law to determine the scope of the Fifth Amendment is further illustrated by the facts that (1) the Kansas statutes on which that court relied are in reality intended to *protect the prosecution* from unfair surprise at trial by a defendant who decides to raise a belated mental state defense, and that (2) voluntary intoxication is plainly a "mental-state" defense. For instance, K.S.A. § 22-3219 makes clear that its purpose is to ensure fairness: "Evidence of mental disease or defect excluding criminal responsibility *is not admissible upon a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice* of such defendant's intention to assert the defense that the defendant, as a result of mental disease or defect lacked the mental state required as an element of the offense charged …." Moreover, under Kansas law, a defense of "voluntary intoxication" is a defense *only if* the asserted intoxication bears directly on "a particular *intent or other state of mind* [that] is a necessary element to constitute a particular crime." K.S.A. § 21-5205(b) (emphasis added).

Thus, the Kansas Supreme Court erred in relying on state rather than federal law in determining whether Cheever had waived his Fifth Amendment privilege, and it also flipped on their heads the Kansas statutes on which the court purported to rely. In fact,

the Kansas statutes do not purport to determine the scope of the Fifth Amendment, nor do they support the court's result.

B. The Kansas Supreme Court also turned a blind eye to the circumstances that gave rise to Dr. Welner's rebuttal testimony. The federal court order directing Cheever to undergo a mental examination was based precisely on Cheever's filing of notice in federal court under Fed. R. Crim. P. 12.2 that he would assert a defense of *voluntary intoxication*. Thus, in the federal case, Dr. Welner conducted his evaluation of Cheever on the very same grounds on which Dr. Welner testified in rebuttal in the state prosecution. Had Cheever presented the same testimony of Dr. Evans in the federal prosecution, there is no doubt that Dr. Welner's testimony would have been admissible in rebuttal. It is truly elevating for(u)m over substance to hold that the Fifth Amendment requires different results, depending on whether the prosecution occurs in a federal or a state court.

With all due respect, the federal court result is the constitutionally correct result. By presenting expert testimony that put into play his mental state at the time of the crimes, Cheever waived his Fifth Amendment privilege. The Kansas Supreme Court, however, either ignored or misunderstood the significance of Cheever's federal proceedings. That court instead found under Kansas law a constitutionally determinative distinction between the defenses of mental disease/defect and voluntary intoxication, a distinction that does not exist in the Fifth Amendment, or in this Court's cases interpreting that amendment.

C. The Kansas Supreme Court also disregarded the fact that Cheever's expert witness relied in part *on Dr. Welner's report from the federal proceeding* in reaching his own opinion. It is the epitome of unfairness and inconsistency to permit a defendant to use an expert who in turn is relying on the work of an expert that the state wants to use in rebuttal, but not permit the state to present its expert as a rebuttal witness. That is a one-way street with a vengeance.

Nor is there any merit to the Kansas Supreme Court's curious conclusion that nothing in the record established that Dr. Evans relied on Dr. Welner's report, App. 38-39, because defense counsel *stipulated* that Dr. Evans relied on Dr. Welner's report. App. 106 (defense counsel responding to trial court's question whether Dr. Evans relied on Dr. Welner's report, "That's true, he did."). Thus, even apart from putting his mental state in play, Cheever also waived any Fifth Amendment privilege with regard to Dr. Welner's report when Cheever's own expert relied on that very report.

Only by ignoring these multiple waivers, and instead relying upon a questionable interpretation of Kansas law, could the Kansas Supreme Court find a Fifth Amendment violation in this case. In effect, by labeling Cheever's mental state defense "voluntary intoxication" rather than "mental disease/defect," the Kansas Supreme Court allowed Cheever to present an allegedly scientific, mental-state defense through his own and expert testimony, while at the same time immunizing that defense from effective rebuttal or impeachment evidence. That result is both constitutional error and manifestly unfair, as any

number of courts including this one have recognized. *See, e.g.*, *Powell*, 492 U.S. at 685 ("it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony").

D. Finally, the Kansas Supreme Court's decision also creates a legal anomaly in a more general sense. In both *Harris v. New York*, 401 U.S. 222 (1971), and *Kansas v. Ventris*, 556 U.S. 586 (2009), the Court ruled that evidence obtained in violation of the Constitution still could be used for impeachment, in part to keep defendants honest and in part to ensure that juries can consider all probative evidence. Yet, under the Kansas Supreme Court's ruling here, the State cannot use some evidence indisputably obtained through *lawful* means either to rebut or impeach defense evidence. This contradiction presents yet another reason why the Court should grant review to resolve the split of authority and clear up any remaining confusion.

III. There is a split of authority on the closely related question of whether evidence from a court-ordered mental evaluation may be used to impeach a defendant's own trial testimony.

On the issue of whether statements Cheever made to Dr. Welner could be used for purposes of *impeaching* Cheever's own trial testimony, the Kansas Supreme Court correctly noted that there is a split in authority. In *United States v. Leonard*, 609 F.2d 1163, 1165-67 (5th Cir. 1980), the Fifth Circuit held that mental evaluation evidence is admissible *solely* on the issue of *sanity*. But, in *United States v. Castenada*, 555 F.2d

605, 609 (7th Cir. 1977), the Seventh Circuit held that a defendant's trial testimony may open the door to the use of evidence from a court-ordered mental evaluation for general impeachment purposes.

Some state courts have followed *Leonard*, and prohibited the use of a defendant's statements made during a psychiatric examination for impeachment purposes. *See Smith v. Commonwealth*, ___ S.W.3d ___ (Ky. 2012) (2012 WL 4222211 at *2-3) (limiting evidence to expert opinion on psychiatric condition and excluding defendant's statements to the expert); *People v. Pokovich*, 141 P.3d 267, 276 (Cal. 2006) (holding that the Fifth Amendment prohibits the prosecution from using statements made during a court-ordered competency examination for impeachment purposes); *State v. Lefthand*, 488 N.W.2d 799, 801 (Minn. 1992) (holding admission of statements for impeachment would violate the Fifth Amendment); *People v. Jacobs*, 360 N.W.2d 593, 595-96 (Mich. Ct. App. 1984) (same; citing *Leonard*).

Several other courts, however, have found the reasoning of *Castenada* persuasive and held that a defendant's statements made in a court-ordered evaluation may be used for impeachment purposes when a defendant puts his mental state in play at trial. *See Booker v. Wainwright*, 703 F.2d 1251, 1258 (11th Cir. 1983) (citing *Harris v. New York*); *State v. Holland*, 656 P.2d 1056, 1064 (Wash. 1983) (same); *United States v. Issaghoolin*, 42 F.3d 1175, 1177 (8th Cir. 1994) (permitting information from a defendant's pretrial services report to be used for impeachment); *State v. Tryon*, 431 N.W.2d 11, 17 (Iowa Ct. App. 1988) (evidence properly admitted for rebuttal). Interestingly,

in *Felde v. Blackburn*, 795 F.2d 400, 404 (5th Cir. 1986), a case that never cites or mentions *Leonard*, the Fifth Circuit itself held that statements made during a psychiatric examination could be used for impeachment and rebuttal purposes.

In this case, Cheever testified that he did not know that Sheriff Samuels was coming up the stairs, that he thus was caught by surprise when the Sheriff appeared, and that he simply panicked and fired at the Sheriff without thinking. App. 107-111. On cross-examination, Cheever denied hearing the Sheriff say that he was going to look upstairs. It was at that point that the State used contrary statements Cheever made to Dr. Welner (about Cheever's realization that the Sheriff was looking for him and coming up the stairs) to impeach Cheever. App. 112-26. On appeal, Cheever argued that this impeachment violated his Fifth Amendment privilege.

Although the Kansas Supreme Court ostensibly avoided giving a conclusive answer to this particular question, App. 37-38, the court's reasoning in rejecting the State's use of Dr. Welner to rebut the testimony of Cheever's expert implicitly rejected the State's arguments in favor of using Cheever's statements to Dr. Welner for impeachment. Furthermore, the Kansas Supreme Court rejected the State's analogy to *Harris v. New York* and *Kansas v. Ventris* as a basis for admitting the evidence as impeachment. App. 36.

The impeachment use of such evidence is inextricably bound up with and logically follows from the use of such evidence to rebut testimony of a defendant's expert. In these circumstances, the Court

certainly may and should grant review of both of these closely-related Fifth Amendment questions in order to resolve the splits of authority that exist.

CONCLUSION

The State of Kansas respectfully requests that the Petition for a Writ of Certiorari be granted or, in the alternative, that the Court grant review and summarily reverse the erroneous decision of the Kansas Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 99,988

[Filed September 10, 2012]

STATE OF KANSAS, *Appellee*,	)
v.	)
SCOTT D. CHEEVER, *Appellant*.	)

SYLLABUS BY THE COURT

1. Under K.S.A. 21-4627, in death penalty appeals, the Supreme Court of Kansas must consider any errors asserted in the review and appeal regardless of whether the issue was preserved below. This provision creates a mandatory exception to the various statutes and rules barring consideration of unpreserved issues and supersedes the contemporaneous objection rule of K.S.A. 60-404.

2. Unassigned errors in a death penalty appeal under K.S.A. 21-4627 are errors that have not been raised by the parties, but are noticed by the court on its

own during its review of the record. Review of unassigned errors under K.S.A. 21-4627 is permissive and subject to conditions: The error must be apparent from the record and addressing it serves the ends of justice.

3. A claim that admission of evidence violated a constitutional right is reviewed de novo.

4. The prosecution's use of a court-ordered mental examination of a defendant to establish an element necessary for conviction or punishment implicates the United States Constitution's Fifth Amendment privilege against compelled self-incrimination when the defendant neither initiated the examination nor introduced a mental-state defense at trial.

5. When a defendant files a notice of intent to assert a mental disease or defect defense under K.S.A. 22-3219, the Fifth Amendment privilege against compelled self-incrimination does not prevent the court from ordering the defendant to submit to a mental examination. The filing of such a notice constitutes consent to a court-ordered mental examination by an expert for the State. Consent to the examination, however, does not waive the defendant's Fifth Amendment privilege so as to entitle the State to use the examination against the defendant at trial. Waiver does not occur unless or until the defendant presents evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect. If that occurs, the State may use the examination for the limited purpose of rebutting the defendant's mental disease or defect defense.

6. Evidence that voluntary intoxication caused defendant's temporary mental incapacity at the time of the crime is not evidence of a mental disease or defect.

7. Evidence of defendant's permanent mental incapacity due to long-term use of intoxicants may support a mental disease or defect defense.

8. An error that violates a criminal defendant's constitutional rights requires reversal unless the party who benefitted from the error proves beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict. The question is not whether the legally admitted evidence was sufficient to support the verdict, but, rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

9. The generic crime of homicide, of which murder is the highest and most criminal species, is of various degrees, and encompasses every mode by which the life of one person is taken by the act of another.

10. Capital murder is first-degree murder, with one or more specific elements beyond those required to prove premeditated murder. It follows that capital murder is the highest degree of homicide in Kansas.

11. With capital murder as the highest degree of homicide in Kansas, first-degree murder is a lesser degree of capital murder under K.S.A. 21-3107(2)(a) and is therefore a lesser included crime of capital

murder. Because first-degree murder encompasses the two alternative means of premeditated murder and felony murder, felony murder is a lesser included crime of capital murder.

12. Remarks by a prosecutor or trial judge that lead a capital sentencing jury to believe that responsibility for determining the appropriateness of a death sentence ultimately rests with the appellate courts undermines the demand of the Eighth Amendment to the United States Constitution for heightened reliability in the jury's determination that death is the appropriate sentence in a specific case.

13. When a trial judge tells jurors, even prospective jurors, that the exhibits and transcripts of the proceedings will be reviewed by an appellate court in deciding issues raised in the event of an appeal, error has occurred.

14. The Eighth and Fourteenth Amendments to the United States Constitution forbid the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. A capital defendant's age of 18 years or older at the time of the offense is an eligibility requirement for the death penalty.

15. Because a death sentence cannot be imposed in Kansas based solely on the fact of conviction for capital murder under K.S.A. 21-4624, the Sixth Amendment to the United States Constitution demands that any additional fact necessary for imposition of the death penalty must be found by a jury beyond a reasonable

doubt. This includes the fact that a defendant was 18 years old or older at the time of the capital crime.

16. The Eighth Amendment requires two things of a death sentence: (1) The sentencer must not have unbridled discretion in determining the fate of the defendant, and (2) the defendant must be allowed to introduce any relevant mitigating evidence of his or her character or record or circumstances of the offense. A mercy instruction per se is not required as part of this equation by federal or state law, nor is a specific type of mercy instruction.

17. Kansas law does not require that jurors in a death penalty case be instructed that they have the power to exercise mercy after weighing aggravators and mitigators.

18. To satisfy the Eighth Amendment's concern for reliability in the determination that death is the appropriate sentence in a specific case, a capital sentencing jury must not be precluded from considering and giving effect to relevant mitigating evidence. It is not relevant under the Eighth Amendment whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by an evidentiary ruling, by jury instructions, or by prosecutorial argument.

19. The Eighth Amendment is violated only where the jury is prevented, as a matter of law, from considering mitigating evidence. The Eighth Amendment does not prohibit a capital sentencing jury from assessing the weight of mitigating evidence and finding it wanting as a matter of fact; thus, it is

constitutionally permissible for a prosecutor to argue that, based on the circumstances of the case, the defendant's mitigating evidence is entitled to little or no weight.

Appeal from Greenwood District Court; MICHAEL E. WARD, judge. Opinion filed August 24, 2012. Affirmed in part, reversed in part, and remanded with directions.

Debra J. Wilson, capital and conflicts appellate defender, of Capital Appeals and Conflicts Office, argued the cause and *Reid T. Nelson*, capital and conflicts appellate defender, was with her on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Clay Britton*, assistant attorney general, and *Steve Six*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

Per Curiam: A jury convicted Scott D. Cheever of capital murder for the killing of Greenwood County Sheriff Matthew Samuels (K.S.A. 21-3439[a][5]), four counts of attempted capital murder of law enforcement officers Robert Keener, Travis Stoppel, Mike Mullins, and Tom Harm (K.S.A. 21-3439[a][5]; K.S.A. 21-3301[a]), criminal possession of a firearm based on a previous felony conviction for aggravated robbery (K.S.A. 21-4204[a][3]), and manufacture of methamphetamine (K.S.A. 65-4159[a]). Cheever was sentenced to death on the capital offense. In addition, he was given a controlling sentence of 737 months for

the attempted capital murder convictions, which included concurrent sentences of 146 months for the manufacturing conviction and 8 months for the firearm conviction. Cheever filed a timely appeal of his convictions and sentences. We have jurisdiction under K.S.A. 21-4627(a) ("A judgment of conviction resulting in a sentence of death shall be subject to automatic review by and appeal to the supreme court of Kansas.").

We conclude that allowing the State's psychiatric expert, Dr. Michael Welner, to testify based on his court-ordered mental examination of Cheever, when Cheever had not waived his privilege under the Fifth Amendment to the United States Constitution in that examination by presenting a mental disease or defect defense at trial, violated Cheever's privilege against compulsory self-incrimination secured by the Fifth and Fourteenth Amendments to the United States Constitution. Because we are unable to conclude beyond a reasonable doubt that Welner's testimony did not contribute to the capital murder and attempted capital murder verdicts obtained in this case, this constitutional error cannot be declared harmless. Consequently, Cheever's convictions for capital murder and attempted capital murder must be reversed and remanded for a new trial.

Cheever did not challenge his convictions and sentences for manufacture of methamphetamine and criminal possession of a firearm. We affirm those convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

On January 19, 2005, Scott D. Cheever shot and killed Greenwood County Sheriff Matthew Samuels at Darrell and Belinda Coopers' residence near Hilltop, Kansas. Samuels, acting on a tip, had gone to the Coopers' residence, along with Deputy Michael Mullins and Detective Tom Harm, to attempt to serve an outstanding warrant for Cheever's arrest. Cheever, along with the Coopers, Matt Denney, and Billy Gene Nowell, had been cooking and ingesting methamphetamine in the early morning hours prior to Samuels' arrival. In the ensuing attempts to remove the wounded Samuels from the residence and arrest Cheever, Cheever also shot at Mullins, Harm, and two state highway patrol troopers, Robert Keener and Travis Stoppel.

At trial, the facts surrounding the shootings were recounted by several witnesses including the Coopers, the surviving law enforcement officers, and by Cheever himself. There was little discrepancy in the pictures painted by the various accounts.

Shortly before Samuels, Mullins, and Harm arrived at the Coopers, Belinda had received a telephone call informing her that the police were on their way to the house to look for Cheever. Belinda told Cheever the police were coming and asked him to get his stuff together and leave, but Cheever's car had a flat tire.

When Samuels arrived at the Cooper's house, Cheever and Denny were hiding in an upstairs bedroom. Cheever had two guns with him – a .44 caliber Ruger revolver and a .22 caliber semi-automatic

pistol. As he hid upstairs, Cheever heard the officers pull up to the house and heard Darrell yell that the cops were there and that he was going to tell them Cheever was not there. Cheever also heard Darrell answer the door and tell Samuels Cheever was not there. Cheever heard Darrell agree to allow Samuels inside to look around.

Cheever heard Samuels calling out his name as he looked for Cheever on the first floor. The doorway to the upstairs had a piece of carpet covering it and Samuels asked Belinda where the doorway led. Belinda said it went upstairs. Samuels pulled the carpet back and yelled for Cheever. Cheever looked over at Denny and told him, "Don't move, don't make a sound, just stay right where you are." Samuels then went through the doorway to go upstairs.

Cheever heard Samuels' steps on the stairs. Cheever had the loaded and cocked .44 in his hand when he stepped out of the bedroom and looked down the stairway. Cheever saw Samuels coming up the stairs. Cheever pointed his gun and shot Samuels. Cheever then stepped back into the bedroom and told Denny not to go out of the window because they would shoot him. Cheever returned to the stair railing, looked down the stairs, saw Samuels, and shot him again. Cheever stepped back into the bedroom and saw that Denny had left through the window. Cheever then shot at Mullins and Harm as they tried to get the wounded Samuels out of the stairwell. Later, he shot at Keener and Stoppel, who were part of the SWAT team that entered the house to arrest Cheever.

Cheever asserted a voluntary intoxication defense, based on the theory that methamphetamine use had rendered him incapable of forming the necessary premeditation to support the murder and attempted murder charges. Cheever's evidence in support of his defense consisted of his own testimony and the testimony of his expert witness, Dr. Roswell Lee Evans, Jr., a doctor of pharmacy with a specialty in psychiatric pharmacy.

The jury found Cheever guilty on all counts as charged. At the penalty phase, the jury unanimously found beyond a reasonable doubt that the three alleged aggravating circumstances had been proven to exist and that they were not outweighed by any mitigating circumstances found to exist and therefore sentenced Cheever to death. The trial court subsequently accepted the jury's verdict and imposed a sentence of death.

While the facts of the case are relatively straightforward, the procedural history of the case is less so. The case was originally filed in Greenwood County District Court shortly after the crime. At about the same time, this court found the Kansas death penalty scheme unconstitutional in *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *rev'd and remanded by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). The state proceeding was dismissed after federal authorities initiated prosecution in the United States District Court under the Federal Death Penalty Act, 18 U.S.C. § 3591 *et seq.* (2006).

The federal case went to jury trial in September 2006, but 7 days into jury selection, the case was

suspended when Cheever's defense counsel became unable to proceed. The federal case was subsequently dismissed without prejudice and the state case was refiled, went to trial, and resulted in the convictions and sentences before us in this appeal. Additional facts will be included in the discussion where relevant to the issues.

I. COURT-ORDERED MENTAL EXAMINATION

During the course of the federal proceedings, Judge Monte Belot ordered Cheever to undergo a psychiatric examination with Dr. Michael Welner, a forensic psychiatrist hired by the government. While the precise circumstances leading to Judge Belot's order are not in the record before us, the record is sufficient to show that the mental examination was ordered because Cheever had raised the possibility that he would assert a defense based on mental condition. As a result of that order, Cheever submitted to examination by Welner. Welner's interview of Cheever lasted 5 and ½ hours, was videotaped, and resulted in a 230-page transcript.

Welner's examination first became an issue at trial during the State's cross-examination of Cheever. The State sought to use the transcript of Cheever's interview with Welner to impeach Cheever's testimony that he did not hear Samuels ask if he could go upstairs. Defense counsel objected, arguing that because the defense had not filed a notice of intent to rely on a mental disease or defect defense, the State was not entitled to use Welner's examination of Cheever. The trial court allowed the impeachment as "a prior inconsistent statement given to a witness who will testify" after the State confirmed Welner would be

called as a rebuttal witness to Cheever's voluntary intoxication defense.

Cheever's expert witness in support of his voluntary intoxication defense was Dr. Roswell Lee Evans, Jr., a doctor of pharmacy, who specialized in psychiatric pharmacy, the pharmacological effects of drugs, including illegal drugs such as methamphetamine. Evans testified that methamphetamine is a very intense stimulant drug that has three pharmacological phases: the initial rush, the long-term intoxication, and the neurotoxic phase. Evans explained that the initial rush is a virtually instantaneous very extreme high that lasts approximately 30 minutes. Following the initial rush is the long-term intoxication period. He testified that the intoxication lasts about 13 to 14 hours, during which the user is still under the influence of the drug.

Evans testified that while methamphetamine is not pharmacologically addictive, the intense pleasure of the initial rush makes the drug psychologically addictive. Users seek that intense high and therefore, once that starts, they do not have much control over whether they continue to use the drug. However, methamphetamine users develop a tolerance to the initial rush, leading them to increase the frequency of use or the dosage, which then extends the long-term intoxication stage.

The neurotoxic phase, Evans testified, develops in chronic, long-term users. He said that the neurotoxic effect of long-term use can change the structure of the brain, resulting in the loss of gray matter and consequential loss of brain function, including loss of

cognitive functions that deal with planning, assessing consequences, abstract reasoning, and judgment. Evans testified that long-term use can cause paranoid psychosis which, due to impairment of the brain functions responsible for judgment and impulse control, can result in violence. According to Evans, chronic users in a state of paranoid psychosis begin to react – just like the natural reaction to touching a hot stove – to all sorts of stimuli based on their paranoid ideations. While Evans testified that neurotoxic changes could potentially be permanent, his testimony primarily indicated that these changes persist only as the result of continued drug use and would abate after a period of nonuse ranging from 4 to 6 months.

Testifying about Cheever specifically, Evans said that at the time of the crimes, Cheever's drug use had progressed to the point that he had developed neurotoxicity and was showing symptoms of psychosis, evidenced by doing "really stupid judgment kind of stuff." Evans noted that Cheever had progressed to the point where he had become so suspicious of people he was carrying a gun and was reacting to perceived threats that were not real.

Ultimately, Evans testified it was his opinion that at the time Cheever committed these crimes, Cheever was both under the influence of recent methamphetamine use and impaired by neurotoxicity due to long-term methamphetamine use, which affected his ability to plan, form intent, and premeditate the crime. With respect to shooting Samuels, Evans testified that there "was no judgment. There was no judgment at all. This man just did it."

On cross-examination, the State made clear that Evans was not a medical doctor, not a psychiatrist, not a neurologist, and not a psychologist. The State characterized Evans as a "pharmacist."

At the conclusion of Evans' testimony, the defense rested. The State then sought to present Welner as a rebuttal witness. Defense counsel objected, arguing that because Cheever had not asserted a mental disease or defect defense in this case, the State could not use Welner's examination. The State contended that Welner's testimony was proper rebuttal to Cheever's voluntary intoxication defense. Further, the State suggested that Welner's testimony was proper rebuttal because Evans had testified he relied upon Welner's report. The trial court ruled that Welner's testimony was admissible as rebuttal to the voluntary intoxication defense.

Welner's testimony began with a long discourse on his qualifications, his substantial fee, and the extensive methodology he applies to cases under his review. Welner also described in detail the materials he reviewed prior to interviewing Cheever, the 5 and ½ hour interview process, and the psychological testing that was conducted on Cheever.

Welner testified that based on his examination, it was his opinion that on January 19, 2005, Cheever's perceptions and decision-making ability were not impaired by methamphetamine use. Welner told the jury that Cheever had the ability to control his actions, he had the ability to think the matter over before he shot Samuels, and he had the ability to form the intent to kill.

Addressing the relationship between Cheever's level of suspicion on the day of the crimes and his use of methamphetamine, Welner testified that while Cheever was suspicious that morning, his suspicions were reality based – given that Cheever was involved with several people in making illegal drugs and that he knew law enforcement officers were looking for him because he had violated parole. Welner testified that this demonstrated Cheever's suspicions were not irrational. Welner also concluded that there was no change in Cheever's level of suspicion after he used methamphetamine.

Addressing the relationship between Cheever's level of suspicion and violence, Welner testified that Cheever's conduct demonstrated that his suspicions were not a trigger for violence. He considered it significant that, although Cheever had suspicions about the others taking his manufacturing supplies or swindling him in some way, Cheever did not react with violence. Instead, Cheever attempted to gain control over the situation and defuse the perceived threats by giving Denny a walkie-talkie to monitor the area and personally engaging with Nowell, whom he did not trust. Welner testified that Cheever's reactions did not change after he used methamphetamine. Upon learning that the police were on their way, Cheever's response, "Well, I hope everyone is happy," was consistent with his suspicion that everyone at the house was out to get his methamphetamine. Yet despite that suspicion, Cheever did not become hostile or react with threats or violence.

Welner also addressed whether Cheever had suffered any "longstanding-effects" or "brain damage"

as a result of methamphetamine use. He noted that neuropsychological testing conducted by another doctor showed Cheever had high-average executive functioning and response inhibition. Welner testified that Cheever's thought processes and decisions on the day of Samuels' killing were consistent with that finding, demonstrating that Cheever's executive decision-making abilities were not impaired by methamphetamine. To support that conclusion, Welner went through each and every step of the events, describing what Cheever had perceived, every decision Cheever had made, and every resulting action of those decisions:

> "Within that look at executive functioning, Dr. Price found that Mr. Cheever had high average what is known as response inhibition . . . . The reason that that is significant is that it is testing that looks at complex tasks of thinking and processing and also inhibiting response. And when I think about the decisions and processing that he was making all through that day, ['I'm suspicious of these people, I'm armed, this person is hostile to me, I'm giving him drugs without threat, I'm suspicious of this person, he is unarmed, I am armed, I don't threaten him, I'm not intimidating him,'] I'm talking about Matthew Denny. ['I hear police. I recognize the voice of this person as someone that I have had positive experiences with. 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. And I don't jump out the window the way

> my confederate later does. And when I do shoot, I don't shoot before Matthew Samuels walks through the curtain in such a way that I might scare him, the way my later shots frightened the deputies that came to pull him away, but 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. And then I stop shooting when someone says stop shooting. And then I continue not to shoot the entire day, not until I know that a SWAT team is making its way up and then I fire shots, and as soon as my bullets expire, I throw my hands up and say I surrender.['] And so this is a whole range of executive decision-making that reflects go, no go, act, don't act. And so it is – his history is consistent with what was found in Dr. Price's testing of, certainly, unimpaired, but what Dr. Price found was that he had high-average response inhibition to his cognitive functioning."

Focusing specifically on the shooting of Samuels, Welner described Cheever's decision-making process:

> "The decision-making ability, as I've – as I've assessed it in this case, began with his – his decision-making once it became clear that the police were there. He made a decision not to try to flee, not to try to run. He made a decision to keep himself where he kept himself, as opposed to another part of the house. He made a decision to stay quiet lest any kind of disturbance aroused suspicion from Matthew Samuels downstairs. He made a decision to hold his fire

> when he did, even though he was armed. He made a decision to hold his fire even after Matthew Samuels approached the first time. And he made a decision to hold his fire even though he knew Matthew Samuels was outside and preparing to come back, that he did not shoot out the window or do anything of a provocative and intimidating way to say, 'Stay away, because I will shoot.' And he made a decision to shoot when he did.
>
> "And then he engaged Matthew Denny and then went back and made a decision to shoot again. And then when he stopped shooting he made a decision to stop shooting."

Welner testified he considered and ultimately discounted other factors that could possibly explain Cheever's crimes, such as psychiatric conditions or disorders. He also considered and ultimately discounted environmental phenomena that could influence Cheever's efforts to avoid being taken into custody. Welner told the jury that Cheever identified with and looked up to people that he described as bad boys or outlaws and that he wanted to outdo them. Welner opined that, while it was possible methamphetamine made Cheever more aggressive, it did not affect "his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do."

Cheever argues that his Fifth Amendment privilege against compulsory self-incrimination was violated when the trial court allowed the State to use the court-ordered mental examination by Welner when

Cheever had not waived his privilege in that examination by asserting a mental disease or defect defense at trial.

A. *Preservation / Standard of Review*

The State argues that Cheever's constitutional challenge to the admission of evidence from the court-ordered examination was not properly preserved for review because he did not object on Fifth Amendment grounds at trial. See K.S.A. 60-404 (a timely and specific objection is required to preserve evidentiary issues for appeal); *State v. Richmond*, 289 Kan. 419, Syl. ¶ 4, 212 P.3d 165 (2009) ("A defendant cannot object to the introduction of evidence on one ground at trial and then assert another ground on appeal.").

Although Cheever disputes the State's contention that his objection was insufficient to preserve his constitutional claim, he argues alternatively that preservation is not fatal to his claim. In support, Cheever relies on the following language of K.S.A. 21-4627(b):

> "[in a death penalty case] [t]he supreme court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and *shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby*." (Emphasis added.)

Cheever asserts that because Welner's testimony played a large role in the guilt and penalty phases, it

serves the ends of justice to determine whether the use of that evidence violated his constitutional privilege against compelled self-incrimination.

We hold that lack of preservation is not an obstacle to our review, but not because of our authority to notice *unassigned* errors under K.S.A. 21-4627(b), as Cheever argues. K.S.A. 21-4627(b) provides two distinct exceptions in death penalty cases to general rules concerning appellate review: It requires the court to consider all errors asserted on appeal, and it authorizes the court to notice unassigned errors appearing in the record if doing so serves the ends of justice.

The first exception applies to errors raised by the parties. The statute mandates that we consider any errors the parties raise on appeal, whether preserved for review or not. *State v. Kleypas*, 272 Kan. 894, 952, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), *abrogated on other grounds by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (K.S.A. 21-4627[b] requires the court to consider the defendant's claims of prosecutorial misconduct "whether or not objected to at trial."). Thus, the statute imposes a mandatory exception in death penalty appeals to the various statutes and rules barring consideration of unpreserved issues. See, *e.g.*, *State v. Bornholdt*, 261 Kan. 644, 651, 932 P.2d 964 (1997), *disapproved on other grounds by State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *rev'd and remanded on other grounds by Kansas v. Marsh*, 548 U.S. 163 (2006) (construing identical language in K.S.A. 1993 Supp. 21-4627, which applied in hard 40 appeals, the court held the requirement that the court review any error asserted on appeal supersedes the contemporaneous

objection rule of K.S.A. 60-404); *State v. Collier*, 259 Kan. 346, Syl. ¶ 1, 913 P.2d 597 (1996) (special review provision of K.S.A. 1993 Supp. 21-4627 requires court to "consider and reach" each issue raised on appeal, "even if the defendant fail[ed] to raise objections in the trial court").

The second exception applies to unassigned errors. An unassigned error is one *not* raised by the parties but noticed by the court on its own during its review of the record. *Cf. State v. Hayes*, 258 Kan. 629, 637, 908 P.2d 597 (1995) (because defendant did not receive a hard 40 sentence, the court would not search the record for unassigned errors under the special review provision of K.S.A. 1993 Supp. 21-4627). In contrast to our duty to consider all asserted errors, our review of unassigned errors is permissive and conditional. K.S.A. 21-4627(b) (The court "shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.").

On this issue and throughout his brief, Cheever misses the distinction between these two provisions. Because Cheever raises the Fifth Amendment issue in his brief, it is not an unassigned error; it is an asserted error. Accordingly, we must review Cheever's constitutional claim, notwithstanding the State's contention that Cheever's failure to raise that specific ground at trial precludes appellate review.

Having determined that this issue is reviewable, we next address the standard of review. Because Cheever challenges the legal basis for the admission of this evidence, our standard of review is de novo. *State v. Appleby*, 289 Kan. 1017, 1054-1055, 221 P.3d 525

(2009) (claim that admission of evidence violated the Sixth Amendment's Confrontation Clause reviewed de novo); *State v. White*, 279 Kan. 326, 331-33, 109 P.3d 1199 (2005) (appellate court has unlimited review of claim that evidentiary ruling violated constitutional rights).

B. *Analysis*

Cheever relies primarily on *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), and several related cases to argue that because he had not waived the privilege by presenting evidence of a mental disease or defect at trial, the State was precluded by the Fifth Amendment from using statements he made during Welner's examination, conducted as part of the federal case, against him. The State responds that its use of Welner's examination was proper rebuttal and impeachment.

In *Smith*, the United States Supreme Court held that a court-ordered pretrial psychiatric examination implicated the defendant's rights under the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, when the defendant neither initiated the exam nor put his mental capacity into issue at trial.

In *Smith*, the trial court ordered a competency examination of the defendant. Defense counsel had not raised an issue of competency or sanity and was unaware that the examination was ordered. 451 U.S. at 456-57 n.1. The psychiatrist interviewed the defendant

and provided a report to the trial court in which he concluded the defendant was competent to stand trial. 451 U.S. at 457-58. During the penalty phase of the defendant's capital trial, the State called the psychiatrist to testify as to the defendant's future dangerousness – one of three factors the State was required to establish to obtain the death penalty under Texas law. The psychiatrist's testimony included his conclusions that the defendant was a "severe sociopath" with no regard for property or human life, that he would continue his criminal behavior if given the opportunity, and that he had no remorse for his actions.

The Court determined that under the "distinct circumstances" of the case, the Fifth Amendment privilege applied to the examination. 451 U.S. at 466. The Court emphasized that the Fifth Amendment is not implicated by an order requiring a criminal defendant to submit to a competency examination "for the limited, neutral purpose of determining . . . competency to stand trial." 451 U.S. at 465. Further, as long as the examination is conducted consistent with that limited purpose and used for that neutral purpose, there is no Fifth Amendment issue. 451 U.S. at 465, 468-69.

The Court noted that although the scope of the examination went beyond the question of competency, it was not the conduct of the examination that triggered the Fifth Amendment, but its use against the defendant at trial to establish an element necessary to obtain a verdict of death. 451 U.S. at 462, 465, 466 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 [1961]) (the Fifth

Amendment requires "'that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips'"). The Court observed that there would have been no Fifth Amendment issue if the psychiatrist's findings had been used solely for the purpose of determining competency. 451 U.S. at 465. But because "the State used [Smith's] own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty[,]" the Fifth Amendment privilege applied. 451 U.S. at 466.

The Court made clear that its ruling applied only to situations in which the defendant "neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence" at trial. 451 U.S. at 468. The Court explained that where a defendant has placed his or her mental state in issue, a court-ordered psychiatric examination may be the only way the State can rebut the defense:

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

> psychiatrist. [Citations omitted.]" 451 U.S. at 465.

In *Buchanan*, the Court addressed the situation it had distinguished in *Smith*. In *Buchanan*, the defense joined with the prosecution in requesting a court-ordered mental examination of the defendant and presented evidence supporting a mental-state-based defense at trial. The Court held that under those circumstances, allowing the State to use the results of the mental examination for the limited purpose of rebutting that defense did not violate the defendant's Fifth Amendment privilege. 483 U.S. at 423-24.

In addition to the *Smith*/*Buchanan* line of precedent, Cheever also relies on *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981) and *Gibbs v. Frank*, 387 F.3d 268 (3rd Cir. 2004). In *Battie*, the Fifth Circuit Court of Appeals rejected the argument that a defendant waives his or her Fifth Amendment privilege by requesting or submitting to a psychiatric examination to determine sanity at the time of the crime. The court explained that waiver occurs when the defense introduces psychiatric testimony, in the same manner as would the defendant's election to testify at trial. 655 F.2d at 701-02 n. 22. See also *Powell v. Texas*, 492 U.S. 680, 684, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989) (stating that the Fifth Circuit's discussion of waiver in *Battie* is supported by *Smith* and *Buchanan*).

We explore *Gibbs* in some depth, because the Third Circuit Court of Appeals examined and applied the *Smith* and *Buchanan* line of precedent to a situation with similarities to Cheever's case.

The defendant in *Gibbs* was tried twice for the 1984 murder of a security guard in Pennsylvania. In the first trial, the defense requested that an expert be appointed for the purpose of determining whether to raise a mental infirmity defense. After the examination, the defense notified the State of its intent to raise such a defense and, consequently, the State secured an order for its own psychiatric examination. The State's psychiatrist gave the defendant *Miranda* warnings, and the defendant made several inculpatory statements. At trial, Gibbs offered expert testimony to establish a diminished capacity defense, and the State called its own expert witness to rebut the testimony. The defendant was found guilty and sentenced to death, but his conviction was ultimately reversed.

At his second trial, the defendant presented an identity defense, not a mental-state-based defense. Nevertheless, the State was permitted to call its expert psychiatric witness to testify about the inculpatory statements the defendant had made during his examination. The defendant was convicted, and the conviction was affirmed on direct appeal. On federal habeas review, the Third Circuit addressed the defendant's claim that his Fifth Amendment privilege was violated when the State was permitted to introduce its psychiatrist's testimony despite the fact that the defendant did not raise the diminished capacity defense at his second trial. 387 F.3d at 271.

The Third Circuit examined and synthesized the Supreme Court's precedent to determine the applicable rules for resolving the issue:

> "If we lay these decisions out, the following landscape emerges. A compelled psychiatric interview implicates Fifth and Sixth Amendment rights (*Smith*). Before submitting to that examination, the defendant must receive Miranda warnings and (once the Sixth Amendment attaches) counsel must be notified (*Smith*). The warnings must advise the defendant of the 'consequences of foregoing' his right to remain silent (*Smith*). The Fifth and Sixth Amendments do not necessarily attach, however, when the defendant himself initiates the psychiatric examination (*Buchanan*, *Penry*). Similarly, the Fifth – but not Sixth – Amendment right can be waived when the defendant initiates a trial defense of mental incapacity or disturbance, even though the defendant had not been given Miranda warnings (*Buchanan*, *Powell*). But that waiver is not limitless; it only allows the prosecution to use the interview to provide rebuttal to the psychiatric defense (*Buchanan*, *Powell*). Finally, the state has no obligation to warn about possible uses of the interview that cannot be foreseen because of future events, such as uncommitted crimes (*Penry*)." 387 F.3d at 274.

Applying this synthesis, the Third Circuit held that while the psychiatrist's testimony was admissible in the first trial at which the defendant had presented a mental capacity defense, it was not admissible at the subsequent trial. The defense had not provided notice of intent to raise a mental capacity defense, the interview was court-ordered and conducted by the State's expert, the defense had not presented

psychiatric testimony at trial, and the report was not used for rebuttal; indeed, the report was not even used for psychiatric purposes. 387 F.3d at 274-75.

Kansas statutes and caselaw are consistent with *Smith*, *Buchanan*, *Battie*, and *Gibbs*. Under K.S.A. 22-3219(1), in order to present a mental disease or defect defense at trial, a criminal defendant must file a pretrial notice of the intent to do so. Filing such a notice is deemed to be consent to a court-ordered mental examination. K.S.A. 22-3219(2) ("A defendant who files a notice of intention to assert [a mental disease or defect defense] thereby submits and consents to abide by such further orders as the court may make requiring the mental examination of the defendant . . . ."). See also *State v. Ji*, 251 Kan. 3, 23, 832 P.2d 1176 (1992) (State was entitled to use court-ordered examination of defendant to rebut defendant's insanity defense, despite the fact the examination was conducted without the benefit of *Miranda* warnings; under K.S.A. 22-3219, the defendant's notice of intent to assert insanity defense was consent to the examination, and the defendant presented evidence supporting insanity defense).

Moreover, although filing a notice of intent under K.S.A. 22-3219(1) constitutes consent to a court-ordered examination, the mere fact the defendant submitted to the examination is not a waiver of the privilege so as to allow the State to use that examination against the defendant at trial. The court-ordered examination remains privileged unless and until the defendant presents evidence supporting a mental disease or defect defense at trial. *Cf. State v.*

Foster, 259 Kan. 198, 910 P.2d 848 (1996); *State v. Williams*, 20 Kan. App. 2d 185, 884 P.2d 755 (1994).

In *Williams*, the defendant filed a notice of intent to raise an insanity defense and then scheduled and paid for a psychiatric examination of the defendant. The State filed a motion to compel discovery of the report, arguing that K.S.A. 22-3219 required its release. The district court ordered the defendant to produce the report. The defendant then withdrew the notice of intent to use the insanity defense and asked the district court to vacate its order. The district court refused, stating the report had to be produced, regardless of whether it was going to be used. Defense counsel refused to comply, arguing that because the notice was withdrawn, the defendant retained his Fifth Amendment privilege in the report. Defense counsel was held in contempt and they appealed.

A panel of the Court of Appeals reversed the contempt order and held that the trial court's *initial order* to produce the report was consistent with K.S.A. 22-3219(2), because the defendant had filed a notice of intent to assert an insanity defense. 20 Kan. App. 2d at 190. After the defendant withdrew his intent to assert an insanity defense, however, the district court's refusal to reconsider its order to produce was erroneous:

> "K.S.A. 1993 Supp. 22-3219(1) *prohibits* admission of any evidence concerning an insanity defense unless a notice of intent to plead insanity has been timely filed or accepted by the court. After appellants withdrew defendant's insanity notice, they became

> estopped from attacking the presumption of sanity surrounding defendant. K.S.A. 1993 Supp. 22-3219 no longer controlled the discovery of defendant's psychiatric report after defendant's notice of intent to plead insanity was withdrawn." *Williams*, 20 Kan. App. 2d at 191.

In *Foster*, 259 Kan. 198, the defendant argued that the prosecutor committed misconduct by cross-examining him about statements he made during a psychological evaluation to determine sanity. The defendant had filed a notice of intent to assert an insanity defense, but the defendant's psychologist had not testified at the time the prosecutor asked the question. Citing *Williams*, this court held that the defendant's conversations with the psychologist remained privileged until the psychologist testified. 259 Kan. at 210 (citing *Williams*, 20 Kan. App. 2d at 191).

We note that the defendant's objection at trial and the trial court's ruling in *Foster* were based upon the psychologist-client privilege, not the Fifth Amendment privilege and that our analysis in *Foster* does not mention the Fifth Amendment. Nevertheless, our cite to *Williams* for the proposition that the defendant's conversations with the psychologist remained privileged suggests that we recognized the situation implicated the Fifth Amendment privilege.

In summary, we hold that K.S.A. 22-3219 and our caselaw are in harmony with the scope of the Fifth Amendment privilege as construed in the *Smith* and *Buchanan* line of precedent. Read together, the following rules apply.

Where a defendant files a notice of intent to assert a mental disease or defect defense under K.S.A. 22-3219, the Fifth Amendment does not prevent the court from ordering the defendant to submit to a mental examination. *Buchanan*, 483 U.S. at 423-24; *Smith*, 451 U.S. at 465. The filing of such a notice constitutes consent to a court-ordered mental examination by an expert for the State, making *Miranda* warnings unnecessary. K.S.A. 22-3219(2); *Ji*, 251 Kan. at 23. Consent to the examination, however, does not waive the defendant's Fifth Amendment privilege so as to entitle the State to use the examination against the defendant at trial. Waiver does not occur unless or until the defendant presents evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect. *Cf. Foster*, 259 Kan. at 210; *Williams*, 20 Kan. App. 2d at 191. See also *Battie*, 655 F.2d at 702 (submitting to examination does not waive the privilege, waiver occurs when the defendant presents mental-state defense at trial). If the defendant withdraws the notice to assert a mental disease or defect defense or does not present evidence supporting that defense at trial, the Fifth Amendment privilege remains intact and the State may not use the mental examination as evidence against the defendant. *Foster*, 259 Kan. at 210; *Williams*, 20 Kan. App. 2d at 191 (defense withdrew notice of intent to assert insanity defense). If, however, the defendant presents evidence supporting a mental disease or defect defense, the State may use the court-ordered examination for the limited purpose of rebutting the defendant's mental disease or defect defense. 483 U.S. at 423-24.

Applying these rules to Cheever's case, Cheever retained a Fifth Amendment privilege in the Welner examination. Cheever could waive his privilege and allow use of the report under the proper circumstances. Absent such a waiver, however, the report was privileged under the Fifth Amendment.

1. *Did Cheever waive the privilege, thus entitling the State to use the examination for rebuttal?*

The State contends that Cheever presented expert testimony at trial regarding his mental state, and therefore it was entitled to use the examination to rebut that defense. Cheever contends that he did not present evidence of a mental disease or defect defense. Cheever argues his evidence was limited to showing voluntary intoxication, which is not a mental disease or defect under Kansas law and, therefore, the State was not entitled to use the examination for rebuttal.

The only mental capacity defense recognized in Kansas is the mental disease or defect defense, as defined by K.S.A. 22-3220:

> "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense." (Amended L. 2010, ch. 136, sec. 20; now K.S.A. 2011 Supp. 21-5209).

It 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. *Kleypas*, 272 Kan. 894, Syl. ¶ 1; *In re Habeas Corpus Petition of Mason*, 245 Kan. 111, 113, 775 P.2d 179 (1989). Evidence of permanent mental incapacity due to long-term use of intoxicants, however, may support a mental disease or defect defense. *Petition of Mason*, 245 Kan. at 114.

In *Kleypas*, the defendant attempted to introduce expert witness testimony that he had experienced a blackout at the time of the offenses due to voluntary intoxication and chronic cocaine use. The State objected that the defendant was attempting an end run around the procedural and substantive consequences of asserting a mental defect defense after having withdrawn his previously filed notice of intent to assert such a defense. The trial court agreed. On appeal, we held that the defendant's expert testimony did not relate to a mental disease or defect but solely to voluntary intoxication, and thus the trial court erred in refusing to allow the defendant to present that evidence. 272 Kan. at 921.

Our *Kleypas* decision was based on *Petition of Mason*, 245 Kan. 111. In *Mason*, the trial court ordered a mistrial after defense counsel told the jury during opening statement that the defense would present evidence that the defendant was in an alcohol-induced blackout at the time of the offense, due, in part, to long-term alcohol abuse. The trial court found that the evidence described would constitute evidence of insanity, not voluntary intoxication, and thus ordered a mistrial because the defendant had not filed notice of an insanity defense. 245 Kan. at 113.We reversed, holding that evidence of *temporary* mental incapacity caused by voluntary intoxication is not evidence of

insanity. 245 Kan. at 113 (discussing *State v. Seely*, 212 Kan. 195, 510 P.2d 115 [1973]). We noted we had previously held that evidence that continued use of intoxicants had caused "*permanent* mental deterioration or disease" may constitute insanity. *Petition of Mason*, 245 Kan. at 114 (discussing *State v. James*, 223 Kan. 107, 574 P.2d 181 [1977]). But because the defendant was not claiming that his alcohol-induced blackout at the time of the crime was "anything . . . other than temporary," the trial court erred in finding that the evidence described in the defendant's opening statement would be evidence of insanity, rather than voluntary intoxication. 245 Kan. at 113.

Cheever's voluntary intoxication defense was based on evidence that his mental state at the time of the crime was a product of a combination of immediate voluntary ingestion of methamphetamine and long-term use of the drug. Cheever did not present evidence, however, that his use of methamphetamine had caused permanent mental impairment. Evans testified that while neurotoxic changes could potentially be permanent, in most cases, those changes abate after a 4- to 6-month period of nonuse. Evans did not testify that Cheever had sustained permanent damage. In fact, he testified that psychological testing done on Cheever some 6 months after his arrest was unlikely to be useful for determining his mental state at the time of the crime because he would no longer have been suffering the effects of the drug.

Accordingly, we find that Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not

evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial. Therefore, we conclude that allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. *Impeachment*

Cheever also argues that allowing the State to use statements he made to Welner to impeach his testimony at trial violated his Fifth Amendment privilege. The State contends that because there is no evidence Cheever's statements to Welner were unlawfully coerced and Cheever does not make such a claim, there was no reason to exclude that evidence. In its brief, the State argues:

> "Whether viewed as a constitutional claim or otherwise, there is no basis for exclusion of Dr. Welner's testimony. The exclusion of relevant evidence obtained by the State in a criminal prosecution is a judicially created remedy designed to safeguard the rights of defendants through its deterrent effect. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 371, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). The 'primary purpose of the exclusionary rule "is to deter future unlawful police conduct."' When there is no government misconduct, there is no basis for applying the exclusionary rule. Because there was no allegation of government

misconduct here, the exclusion of Dr. Welner's testimony by the trial court was not warranted."

At oral argument, Cheever noted the State's argument appeared to be based on the rationale of *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (defendant's statements, inadmissible in prosecution's case-in-chief as a sanction for failing to provide *Miranda* warnings, may be used to impeach defendant's testimony at trial; the benefits of allowing the prosecution to use the truth-testing device of impeachment outweigh the minimal deterrent value of excluding tainted evidence for all purposes).

We hold the exclusionary rule argument has no relevance here. Cheever's statements to Welner are not excluded as a sanction for governmental misconduct; they are inadmissible because they are protected by the Fifth Amendment privilege against compelled self-incrimination. *Cf. Kansas v. Ventris*, 556 U.S. 586, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009) (evidence protected by Fifth Amendment privilege is inadmissible to prevent violation of the substantive protection of the Fifth Amendment privilege; evidence inadmissible under the exclusionary rule is excluded as a sanction for a constitutional violation that has already occurred).

Although not argued by the parties, we note there is conflicting federal caselaw on the question of whether a defendant's statements made during a court-ordered mental examination, while not admissible to rebut a mental-state defense, may nevertheless be used to impeach the defendant's trial testimony. Compare *United States v. Leonard*, 609 F.2d

1163 (5th Cir. 1980) (construing Fed. R. Crim. Proc. 12.2[c]; defendant's statements during a court-ordered mental examination are admissible *solely* on the issue of sanity and may not be used for impeachment); and *United States v. Castenada*, 555 F.2d 605 (7th Cir. 1977) (holding that statements made during court-ordered mental examination under 18 U.S.C. § 4244 (1976) that are inadmissible on the issue of guilt, are admissible for impeachment because they go to credibility, not guilt).

We recognize there are compelling, but conflicting, policy rationales for the competing positions. On one hand, prohibiting use for impeachment promotes the candid conversation with the expert that is necessary to produce reliable psychiatric testimony for the government or defendant, as the case may be. 609 F.2d at 1165-66. On the other hand, allowing impeachment of a testifying defendant's inconsistent testimony "protect[s] the integrity of the fact-finding process" by preventing a defendant from "'pervert[ing]'" the shield provided by the statute "'into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.'" *Castenada*, 555 F.2d at 610 (quoting *Harris v. New York*, 401 U.S. 222, 226, 91 S. Ct. 643, 28 L. Ed. 2d 1 [1971]).

We conclude that under the circumstances, resolution of this issue must await another day. The important considerations that underlie this issue have not been appropriately raised, briefed, and argued. In addition, as discussed below, the erroneous admission of Welner's testimony requires reversal and remand of the capital murder and attempted capital murder convictions. Thus, even if we were also to determine

that Cheever's statements were properly admitted for impeachment, that determination would not change the outcome in this case.

Last, we address an additional point about the admissibility of Welner's testimony. The trial court suggested that Welner's testimony was admissible for rebuttal because Evans relied on Welner's report in reaching his conclusions. During the arguments over Cheever's objection to the State calling Welner to testify in rebuttal to Evans, the State interjected that Evans had testified he relied on Welner's report. Defense counsel confirmed the State's representation. The trial court then stated "that fact standing alone probably allows the State to call him to give his own point of view."

Although defense counsel confirmed the State's representation, the record does not. Evans never stated that he relied upon Welner's report. Evans specifically testified that he did not watch the video of Welner's interview or read the transcript of the interview. The only reference he made to Welner's report is in an exchange between the State and Evans, in which the State commented: "That's what he [Cheever] told Dr. Welner. I guess if you'd read that interview, you'd know that." Evans responded: "I don't remember that piece of Mr. Welner's report."

The trial court did not provide a legal basis for its statement that Evans' reliance on Welner's report supported allowing Welner to testify in rebuttal. Cheever identifies it as a hearsay ruling and focuses his argument on his contention that Evans did not rely on Welner's report. In any event, we need not speculate

about the legal basis for the trial court's suggestion that Evans' reliance upon Welner's report provided an alternate ground for allowing Welner to testify, because the record plainly fails to establish that Evans actually did rely upon Welner's report to arrive at his own opinions.

C. *Harmless Error Analysis*

Because the admission of Welner's testimony violated Cheever's Fifth Amendment privilege against compelled self-incrimination, we apply the federal constitutional harmless error test of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967). Under *Chapman*, an error that violates a criminal defendant's constitutional rights requires reversal unless the party who benefitted from the error – here, the State – "proves beyond a reasonable doubt that the error complained of . . . did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012); *Kleypas*, 272 Kan. at 1084 (State must prove beyond a reasonable doubt that federal constitutional error did not contribute to the verdict obtained).

In *Satterwhite v. Texas*, 486 U.S. 249, 258, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988), the United States Supreme Court considered whether the erroneous admission of the defendant's court-ordered psychiatric examination was harmless error under *Chapman*. Because of parallels with Cheever's case, we set out in

detail the Court's discussion of the evidence at issue and its effect on the outcome:

> "Dr. Grigson [who conducted the examination of the defendant] was the State's final witness. His testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message. Dr. Grigson was the only licensed physician to take the stand. He informed the jury of his educational background and experience, which included teaching psychiatry at a Dallas medical school and practicing psychiatry for over 12 years. He stated unequivocably [*sic*] that, in his expert opinion, Satterwhite 'will present a continuing threat to society by continuing acts of violence.' He explained that Satterwhite has 'a lack of conscience' and is 'as severe a sociopath as you can be.' To illustrate his point, he testified that on a scale of 1 to 10 – where 'ones' are mild sociopaths and 'tens' are individuals with complete disregard for human life – Satterwhite is a 'ten plus.' Dr. Grigson concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation.
>
> "The District Attorney highlighted Dr. Grigson's credentials and conclusions in his closing argument:
>
> > 'Doctor James Grigson, Dallas psychiatrist and medical doctor. And he

> tells you that on a range from 1 to 10 he's ten plus. Severe sociopath. Extremely dangerous. A continuing threat to our society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite.'
>
> "The finding of future dangerousness was critical to the death sentence. Dr. Grigson was the only psychiatrist to testify on this issue, and the prosecution placed significant weight on his powerful and unequivocal testimony. Having reviewed the evidence in this case, we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury." 486 U.S. at 259-60.

Satterwhite involved the admission of evidence in the penalty phase of a capital murder proceeding, while here, Welner's testimony was admitted in the guilt stage. As the Court recognized in *Satterwhite*, assessing the prejudicial effect of error in the sentencing phase can be more difficult because of the discretion the jury has in determining whether death is the appropriate punishment. 486 U.S. at 258. That difference notwithstanding, we find the Court's analysis of the prejudicial effect of the error in admitting psychiatric evidence instructive for the ways in which it parallels Cheever's case.

As with Grigson's testimony in *Satterwhite*, Welner's "testimony stands out both because of his qualifications . . . and because of the powerful content

of his message." 486 U.S. at 259. Welner's background and qualifications were significantly more impressive than Evans'. Welner testified about his board certifications in psychiatry, forensic psychiatry, and advanced clinical psychopharmacology. His experience included private practice and teaching, both as an associate professor of psychiatry at New York University School of Medicine and as an adjunct professor of law at Duquesne University School of Law at the University of Pittsburgh. He testified at length about his background, including an American Psychiatric Association award, keynote speaking engagements, research work, publications, and testimony before state legislatures on psychiatry and the law.

Evans' credentials were simply not on the same level – a point the State highlighted during its cross-examination of Evans. Through its questions, the State obtained Evans' acknowledgment that he was not a medical doctor or a psychiatrist.

The content of Welner's testimony also stands out. Welner was the last witness the jury heard during the guilt phase of the trial, and his testimony was extensive and devastating. He employed a method of testifying that virtually put words into Cheever's mouth. He focused on the events surrounding the shootings, giving 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. He characterized Cheever as a person who had chosen an antisocial outlaw life style and who was indifferent to the violence he had committed. *Cf. State v. Vandeweaghe*, 351 N. J. Super. 467, 799 A.2d 1

(2002), *aff'd* 177 N.J. 229, 827 A.2d 1028 (2003) (Welner's testimony that defendant had antisocial personality disorder and was a liar, presented in rebuttal to intoxication defense, was highly prejudicial plain error, requiring reversal).

Arguably, it is possible the jury might have convicted Cheever even without Welner's testimony; however, that is not the standard we must apply under *Chapman*. "The question . . . is not whether the legally admitted evidence was sufficient to support" the verdict, "but, rather, whether the State has proved 'beyond a reasonable doubt that the error complained of *did not* contribute to the verdict obtained.'" *Satterwhite*, 486 U.S. at 258-59 (quoting *Chapman*, 386 U.S. at 24).

Because this error violated Cheever's federal constitutional rights, we must reverse unless we can say with "the highest level of certainty that the error did not affect the outcome." *Ward*, 292 Kan. at 564. After reviewing the entire record, we do not have that level of certainty; we cannot conclude beyond a reasonable doubt that Welner's testimony did not contribute to the verdict in this case. Consequently, the error is not harmless, and Cheever's convictions for capital murder and attempted capital murder must be reversed and remanded for a new trial.

Our decision reversing Cheever's convictions for capital murder and attempted capital murder make it unnecessary to resolve the other issues Cheever has raised. Nevertheless, because we are remanding the case for a new trial, we will address those issues that are likely to arise on remand in order to provide

guidance to the trial court. *State v. Scott*, 280 Kan. 54, 107, 183 P.3d 801 (2008); *Kleypas*, 272 Kan. at 1057.

II. FELONY MURDER AS A LESSER INCLUDED OFFENSE OF CAPITAL MURDER

The trial court instructed the jury on first-degree premeditated murder as a lesser included offense of capital murder. On appeal, Cheever argues that the first-degree murder instruction should have included the alternative theory of felony murder as a lesser included offense of capital murder. Cheever acknowledges he did not request such an instruction or object to its absence in the district court; thus the trial judge did not have an opportunity to address this issue.

Cheever argues that capital murder and first-degree murder are different degrees of the crime of homicide under K.S.A. 21-3107(2)(a); therefore, first-degree murder, which includes felony murder, is a lesser included crime of capital murder. We agree.

K.S.A. 21-3107(2) sets out the definition of lesser included crimes:

> "(2) . . . A lesser included crime is:
> (a) A lesser degree of the same crime;
> (b) a crime where all elements of the lesser crime are identical to some of the elements of the crime charged;
> (c) an attempt to commit the crime charged; or
> (d) an attempt to commit a crime defined under subsection (2)(a) or (2)(b)."

Kansas has long-recognized that the generic crime of homicide, "'of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term . . . is generic, embracing every mode by which the life of one man is taken by the act of another.'" *State v. Gregory*, 218 Kan. 180, 182-83, 542 P.2d 1051 (1975) (citing *State v. Ireland*, 72 Kan. 265, 270, 83 Pac. 1036 [1905] [quoting *Commonwealth v. Webster*, 59 Mass. 295, 1850 WL 2988 [1850]). Thus, in *Gregory*, we held that involuntary manslaughter is a lesser degree of second-degree murder and is therefore a lesser included crime under K.S.A. 21-3107(2)(a). We explained that while it appears murder and manslaughter are different crimes, "'they involve but one crime and are only degrees of felonious homicide.'" 218 Kan. at 183 (quoting Warren on Homicide, § 83, p. 415-16).

To date, our caselaw has recognized the following homicide degree crimes, in descending order: first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. See *State v. Garcia*, 272 Kan. 140, 150, 32 P.3d 188 (2001), *disapproved on other grounds by State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006). Before the capital murder statute was enacted in 1994, first-degree murder was recognized as the highest degree of our homicide crimes. See *State v. Bradford*, 219 Kan. 336, 343, 548 P.2d 812 (1976) ("First-degree murder, whether felony murder or not, is the highest degree of homicide."). We have not had occasion to consider whether capital murder is part of the homicide-degree-crime structure for purposes of K.S.A. 21-3107(2)(a).

Capital murder is first-degree murder, with "one or more specific elements beyond intentional premeditated murder" that function as part of the constitutionally required narrowing process. *Marsh*, 548 U.S. at 175-76. It logically follows, and we hold, that capital murder is now the highest degree of homicide in Kansas.

With capital murder as the highest degree of homicide, first-degree murder is a lesser degree of capital murder under K.S.A. 21-3107(2)(a) and is therefore a lesser included crime of capital murder. The crime of first-degree murder may be committed in two ways: premeditated murder and felony murder. See *State v. Hoge*, 276 Kan. 801, 810, 80 P.3d 52 (2003) (premeditated murder and felony murder are alternate means of committing the same crime and are not separate and distinct crimes); *State v. McKinney*, 265 Kan. 104, 110, 961 P.2d 1 (1998) ("Felony murder is not a lesser degree of murder than premeditated murder. Felony murder is first-degree murder; premeditated murder is first-degree murder."). Accordingly, felony murder is a lesser included crime of capital murder and, where facts support it, should be included in instructions on lesser included crimes in capital murder cases.

We note that K.S.A. 21-3107 has been amended recently to eliminate lesser degrees of the crime of felony murder. See K.S.A. 2011 Supp. 21-5109(b)(1), as amended by L. 2012, ch. 157, sec. 2 (A lesser included crime is "[a] lesser degree of the same crime, except that there are no lesser degrees of murder in the first degree under subsection [a][2] [felony murder] of K.S.A. 2011 Supp. 21-5402"). This amendment has no bearing

on our analysis. The issue at hand concerns whether felony murder is a lesser degree of the crime of capital murder, not whether some other offense is a lesser degree of felony murder.

III. VOIR DIRE COMMENTS MENTIONING APPELLATE REVIEW

The trial court divided the prospective jurors into seven panels for voir dire. The trial court's introductory remarks to each panel were substantially similar and began by introducing the parties, their counsel, and court personnel, including the court reporter. In explaining the role of the court reporter, the trial court told the prospective jurors that the court reporter's written record of the proceedings served two purposes: for reference during the trial and for appellate review should the case be appealed.

The following remarks made to the seventh panel are representative of those made to all of the panels:

> "Almost everything is on the record that we do in here.
>
> > "We refer back to that record from time to time during the trial to see what someone said, whether a question's already been asked, things of that nature, and if this case should go up on appeal to the appellate courts in Kansas in Topeka, a transcript is made of everything we do and that transcript is sent to the appellate court, along with the exhibits, and the appellate court decides all issues on appeal based on that record that we've made here in the trial court."

Cheever argues that the trial court's remarks violated the Eighth Amendment to the United States Constitution as applied in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) (holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"). Cheever contends the trial judge's remarks in this case created the risk that the jurors would believe that the ultimate responsibility for Cheever's sentence rested with the appellate courts, thereby undermining the heightened reliability the Eighth Amendment demands of a jury's determination that death is the appropriate punishment.

In *Caldwell*, the prosecutor argued to the jury that a decision to impose the death sentence would not be final because it was subject to review by the appellate court. The Supreme Court held the remarks rendered the death sentence unconstitutional. The Court explained that remarks that "[seek] to minimize the jury's sense of responsibility for determining the appropriateness of death" undermine the reliability of the jury's death sentence in violation of the Eighth Amendment. 472 U.S. at 341. See also *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (*Caldwell* is "'relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'") (quoting *Darden v. Wainwright*, 477 U.S. 168, 183 n.15, 106 S. Ct. 2464, 91 L. Ed. 2d 144 [1986]).

State v. Nguyen, 251 Kan. 69, 833 P.2d 937 (1992), provided this court with an opportunity to consider whether a trial judge commits judicial misconduct by mentioning to a jury the possibility that the case before it could be appealed. In explaining the process for the jury to submit questions or request readbacks during deliberations, the judge said:

> "'I explained to you that if I get a question, and that will be through my bailiff, Ms. Mies, the foreman will write it down and date it. And I would request also that he write the time – he or she write the time on there. That question will be preserved, 'cause defense, regardless, would have a right to appeal. As I told you, that a judge is under a microscope and that [to] be sure that any defendant receives the correct legal decisions. I can be challenged. And I welcome the challenges.'" 251 Kan. at 78-79.

The defendant argued that mentioning the right to appeal was improper because the remarks "lessened the jury's sense of responsibility in the correctness of its decision and the jury's belief in the importance of its decision[,] . . . might have given the jurors the impression that a mistake in their findings of fact also would be correctable by appeal[, and]. . . created the impression the court believed he was guilty." 251 Kan. at 79. Although we found the comments were not prejudicial, we unequivocally stressed that "[a] trial court should not mention a defendant's right to appeal." 251 Kan. at 80.

Nguyen was not a death penalty case; however, the reasoning is consistent with *Caldwell*. Accordingly, we

take this opportunity to reiterate our general directive: It is improper for a trial court to make comments to the jury regarding appellate review. Moreover, we emphasize that the life-or-death stakes in a capital murder proceeding require extra vigilance on the part of the trial court to abide by this directive. We note the remarks in this case are not analogous to those that required reversal in *Caldwell*. Nevertheless, under *Nguyen*, it is error for the trial judge to tell jurors, even prospective jurors, that the exhibits and transcripts of the proceedings will be reviewed by an appellate court. Whether that error would be held to be prejudicial depends on the specific circumstances of the particular case; however, because it is error that is entirely within the judge's power to avoid, it should be avoided.

IV. CHEEVER'S AGE AT THE TIME OF THE OFFENSE

Cheever argues that his death sentence was imposed in violation of his right to jury trial under the Sixth and Fourteenth Amendments to the United States Constitution because the jury did not find beyond a reasonable doubt that he was at least 18 years old at the time of the crime, a fact that he contends is necessary to render him eligible for the enhanced sentence of death. Cheever does not dispute that he was at least 18 years old at the time of the capital offense.

The Sixth Amendment right to jury trial requires that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New*

Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court extended the holding of *Apprendi* to capital sentencing proceedings. There, the Court held that Arizona's sentencing scheme violated the Sixth Amendment right to jury trial because it permitted a judge to find the existence of statutory aggravating factors necessary to impose the death penalty. 536 U.S. at 609 (overruling *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 [1990]). Under *Ring*, all facts necessary for imposition of the death penalty must be found by a jury beyond a reasonable doubt. 536 U.S. at 602, 609.

Resolution of this issue therefore hinges on whether the fact Cheever was at least 18 years of age at the time of the crime is a fact necessary for imposition of the death penalty. Cheever argues that it is, relying primarily on *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). Cheever points out that *Roper* held that being 18 years or older at the time of the offense is an *eligibility requirement* for the death penalty. 543 U.S. at 574 (18 is "the age at which the line for death eligibility ought to rest"). Moreover, he notes, the Court specifically rejected the suggestion that youth should be considered as a mitigating factor on a case-by-case basis and instead "[drew] the line at 18 years of age" as a "categorical rule[]." 543 U.S. at 574.

Cheever also points to K.S.A. 21-4622 of our capital sentencing statutes. That statute provides:

> "Upon conviction of a defendant of capital murder and a finding that the defendant was less than 18 years of age at the time of the commission thereof, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder."

Cheever contends that under this statute, it is a prerequisite to the imposition of the death penalty that the defendant be 18 years of age or older at the time the capital murder offense was committed.

Cheever also cites our Jessica's Law cases. In them, we addressed the question of age as an element of the offenses designated for enhanced sentencing under K.S.A. 21-4643 (requiring life sentence with mandatory minimum of 25 years for a defendant convicted of specified offenses and who was at least 18 years old at the time of the offense). Applying *Apprendi*, we have held that when a defendant is charged with the more serious off-grid version of the crime subject to enhanced sentencing, the defendant's age at the time of the offense is a fact that must be submitted to the jury and proved beyond a reasonable doubt. See *State v. Gonzales*, 289 Kan. 351, Syl. ¶ 11, 212 P.3d 215 (2009); *State v. Bello*, 289 Kan. 191, Syl. ¶ 4, 211 P.3d 139 (2009); *State v. Morningstar*, 289 Kan. 488, 495, 213 P.3d 1045 (2009); *State v. Reyna*, 290 Kan. 666, 676, 234 P.3d 761 (2010).

Tying these together, Cheever argues that because the death penalty cannot be imposed unless the defendant was at least 18 years old at the time the crime of capital murder was committed, the defendant's age is a fact necessary to the imposition of a death sentence, just as a defendant's age at the time of the offense is a fact necessary to the imposition of the enhanced sentencing provision of Jessica's Law. Therefore, the Sixth Amendment requires that the fact that he was at least 18 years old at the time of the crime be submitted to and found by a jury beyond a reasonable doubt.

The State responds that the defendant's age is not within the scope of *Apprendi* because it is not a fact that increases the statutory maximum sentence. According to the State, death is the maximum authorized sentence under our capital sentencing statutes, with the defendant's age merely a fact that mitigates that sentence to life in prison. The State cites K.S.A. 21-4622, which provides that upon a finding that the defendant was "less than" age 18, the defendant shall not be sentenced to death. The State argues that because the finding as to the defendant's age does not increase the severity of the maximum sentence, it is not a fact that must be found by a jury beyond a reasonable doubt.

We deem the State's arguments unpersuasive. First, we disagree that death is the maximum authorized sentence. The statutory maximum penalty for Sixth Amendment purposes is determined by the facts reflected by the jury's verdict. *Ring*, 536 U.S. at 602 (the Sixth Amendment prohibits exposing a defendant "'to a penalty exceeding the maximum he would receive

if punished according to the facts reflected in the jury verdict alone.'" Under K.S.A. 21-4624(e), life in prison without parole – not death – is the maximum sentence that can be imposed based *solely* on a jury's verdict finding a defendant guilty of capital murder. K.S.A. 21-4624(e) ("the defendant shall be sentenced to life without the possibility of parole" *unless* "by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the [statutory] aggravating circumstances . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist").

Second, the Supreme Court in *Roper* explicitly rejected the idea that the Eighth Amendment could be satisfied by treating the defendant's youth as a mitigating circumstance. Instead, the Court drew a bright line, holding that the age of 18 or older is a requirement for death eligibility. 543 U.S. at 574.

Third, under our statutory scheme, the fact the defendant was at least 18 is a prerequisite to imposition of the death penalty. Although K.S.A. 21-4622 refers to a finding that the defendant was *under* age 18, it is clear that a capital sentencing proceeding *does not even occur* if a defendant is found to be less than 18 years of age at the time of the commission of the capital murder. See K.S.A. 21-4624(b) ("*Except as provided in K.S.A. 21-4622* . . . upon conviction of a defendant of capital murder, the court, upon motion of the county or district attorney, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death." [Emphasis added.])

Accordingly, we conclude that the fact the defendant was at least 18 years old at the time of the crime is a fact necessary to subject the defendant to the death penalty and therefore within the scope of Sixth Amendment protection.

Because we are addressing this issue only for guidance on remand, we need not address Cheever's arguments that the same conclusion is dictated by our Jessica's Law jurisprudence. We hold only that it is required by *Ring* and *Roper*. Similarly, we need not decide whether the failure to instruct the jury to find the defendant's age was harmless under the facts of this case. See *State v. Colston,* 290 Kan. 952, 975, 235 P.3d 1234 (2010) (citing *Reyna*, 290 Kan. 666, Syl. ¶ 10) (harmless error analysis applies to error in omitting element of defendant's age where age was uncontested and supported by overwhelming evidence).

Additionally, we decline to address, and express no opinion on, whether the lack of a jury finding that Cheever was at least 18 years of age at the time of the crime is a determination on the sufficiency of the evidence for purposes of double jeopardy. *Cf. State v. Hernandez*, 294 Kan. 200, 209-10, 273 P.3d 774, 780 (2012) (declining to address whether an *Apprendi* error in a noncapital case is equivalent to a determination that the evidence was insufficient to support the conviction for double jeopardy purposes when the issue was not raised, briefed, or argued on appeal). As we noted in *Hernandez*, the parties are free to raise such an issue on remand. 294 Kan. at 211.

V. PENALTY-PHASE INSTRUCTIONS ON MITIGATING CIRCUMSTANCES

State v. Kleypas contained the following directive concerning instruction of juries on mitigating circumstances in death penalty cases:

> "[A]ny instruction dealing with the consideration of mitigating circumstances should state (1) they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt and (2) mitigating circumstances do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision." 272 Kan. 894, 1078, 40 P.3d 139 (2001).

The penalty-stage jury instructions in this case did not state that mitigating circumstances need not be proved beyond a reasonable doubt. Cheever argues that as a result, the instructions did not conform to Kansas law.

We note that the instruction at issue followed PIK Crim. 3d 56.00-D (2003 Supp.). That pattern instruction did not conform to our directive in *Kleypas*. In 2008, PIK Crim. 3d 56.00-D was amended to inform the jury that mitigating circumstances do not need to be proved beyond a reasonable doubt. In any retrial of this case, the most current version of the PIK Crim. 3d instructions on mitigating evidence should be used.

VI. MERCY INSTRUCTION

Cheever challenges the mitigating circumstances instruction on another ground, specifically, the following part:

> "Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.
>
> "The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed."

Cheever argues that by characterizing mercy as a mitigating circumstance and placing it in the context of the weighing equation, the instruction prevents the jurors from being able to give full effect to mercy as a basis for a sentence less than death, in violation of the Eighth Amendment. Cheever argues that the jurors must be allowed the opportunity to extend mercy and impose a life sentence *after* determining that the mitigators do not outweigh the aggravators and death is the appropriate sentence by law. He suggests the following language would properly allow jurors who choose to exercise mercy to give effect to that decision:

> "Whether or not the mitigating circumstances outweigh the aggravating circumstances, you

> may recommend mercy for the Defendant and sentence him to life imprisonment."

This same argument was made and rejected in *Kleypas*:

> "Kleypas argues that while the instruction introduces the concept of exercising mercy to the jury, it does so in a legally insufficient manner. Kleypas argues that mercy, if it is to be exercised, must be exercised only after the jury has weighed aggravating and mitigating circumstances and determined that a sentence of death is warranted. According to Kleypas, only *after* the jury has decided that Kleypas should be put to death can it truly exercise mercy and instead impose a nondeath sentence, thus mercy itself should not be characterized as a mitigator." 272 Kan. at 1035-36.

We found the argument was not persuasive. First, we held the defendant was not entitled to a mercy instruction under federal or state law:

> "[T]he United States Supreme Court has held that the Eighth Amendment requires two things of a death sentence: (1) The sentencer must not have unbridled discretion in determining the fate of the defendant, and (2) the defendant must be allowed to introduce any relevant mitigating evidence of his character or record or circumstances of the offense. *California v. Brown*, 479 U.S. 538, 541, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987). A mercy instruction per se is simply not required as part of this equation by

> federal or state law, nor is a specific type of mercy instruction." 272 Kan. at 1036.

Second, we held that the instruction, as given, properly and adequately informed the jury of the role of mercy in the weighing process. 272 Kan. at 1036.

Cheever argues, however, that the United States Supreme Court's decision in *Marsh*, 548 U.S. 163, provides grounds for reconsideration of that holding in *Kleypas*. According to Cheever, the Court's interpretation of the weighing process as *the decision* for life or death and its recognition that Kansas' mercy instruction "'eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty,'" provides new support for his argument. Neither party mentions that in *Scott*, we addressed and rejected this argument, concluding that nothing in *Marsh* required such an instruction:

> "We do not find Scott's arguments to support additional instructions persuasive. *Kansas v. Marsh* cannot be read to require an additional step beyond weighing. In fact, the United States Supreme Court specifically reasoned a decision that the aggravating and mitigating factors are in equipoise is a decision supporting imposition of the death penalty[.]" 286 Kan. at 98.

Cheever's argument is the same argument we considered and rejected in *Kleypas*, and his further argument that the *Marsh* decision justifies a different conclusion was resolved against him by our decision in *Scott*. Cheever offers nothing new to support revisiting the decisions in those cases.

VII. PROSECUTORIAL MISCONDUCT DURING PENALTY STAGE

Cheever contends that certain comments concerning consideration of mitigating circumstances made by the prosecutor during the penalty-stage closing argument constitute prosecutorial misconduct.

The first comment at issue was made during the State's closing argument rebuttal:

> "Ladies and gentlemen, let's start off by looking at these mitigating circumstances offered to you by the defendant, which Judge Ward has contained in the instructions. First of all, it's important to remember that these are contentions only. The judge, by instructing you about these, is not suggesting to you that they are true. What he's telling you is that the defendant has put these before you, *you can consider them if you choose, but you don't have to*. Or you can give them as little weight as you choose to give them." (Emphasis added.)

Cheever contends the highlighted remark told the jury that it did not have to consider mitigating circumstances. Cheever argues that because the Eighth Amendment is violated when a capital sentencing jury is precluded from considering relevant mitigating evidence that might serve as a basis for a life sentence, the remark was improper.

The Eighth Amendment's concern for "'reliability in the determination that death is the appropriate punishment in a specific case" requires that a capital

sentencing jury not be precluded from considering and giving effect to mitigating evidence offered by a defendant as a basis for a sentence less than death. *Penry v. Lynaugh*, 492 U.S. 302, 328, 1095 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 [1976]). In *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the Supreme Court considered an Ohio death penalty statute that allowed only three specific factors set out in the statute to be considered in mitigation. The Court held that under its decisions in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), and *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976), to satisfy the Eighth Amendment's individualized sentencing requirement, "a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. at 608. The Court explained:

> "[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. at 605.

Although *Lockett* involved a statute, it applies "whether the barrier to the sentencer's consideration of

all mitigating evidence is interposed by statute," by a trial court's evidentiary ruling, by jury instructions, or by prosecutorial argument. *Mills v. Maryland*, 486 U.S. 367, 375, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). See also *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259 n.21, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007) (recognizing that prosecutorial argument that prohibits a jury from being able to consider relevant mitigating evidence can violate the Eighth Amendment).

It is important to understand the scope of the *Lockett* rule, however. It is violated only when the jury is prevented, *as a matter of law*, from considering mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). It does not prohibit a capital sentencing jury from assessing the weight of mitigating evidence "and find[ing] it wanting as a matter of fact[.]" 455 U.S. at 113.

In *Eddings*, the sentencing court had determined that it could not consider the defendant's evidence of his violent upbringing and resulting emotional problems as mitigation because it was not mitigating under the law. The Oklahoma Court of Criminal Appeals agreed, concluding that evidence must tend to provide a legal excuse for criminal conduct in order to be legally relevant to mitigation. In reversing the Oklahoma decision, the Supreme Court recognized the constitutional distinction between considering and rejecting relevant mitigating evidence based on the circumstances of the case and being legally precluded from or refusing to consider such evidence as a matter of law.

We recognized this distinction in *Kleypas*. Based on *Eddings* and subsequent cases, we held that a *Lockett*-based constitutional violation occurs only when the State "'"cut[s] off in an absolute manner"'" the sentencer's consideration of mitigating evidence. 272 Kan. at 1074 (quoting *Johnson v. Texas*, 509 U.S. 350, 361, 113 S. Ct. 2658, 125 L. Ed. 2d 290 [1993]) (addressing defendant's challenge to the mitigating circumstances instruction). Thus, we held it is constitutionally permissible for a prosecutor to argue, based on the circumstances of the case, that certain circumstances should not be considered as mitigating circumstances. 272 Kan. at 1102-03.

The prosecutor's comment in this case was part of an argument that the mitigating circumstances identified in the instructions were only contentions and, as such, the jury did not have to accept them as established simply because they were listed in the instructions. That comment was not an effort to "cut off in an absolute manner" the jury's consideration of Cheever's mitigating evidence. 272 Kan. at 1074. The larger argument, moreover, was consistent with the law and the instructions. See PIK Crim. 3d 56.00-D ("The defendant *contends* that mitigating circumstances include, but are not limited to, the following . . . ."). See also K.S.A. 21-4624(e); PIK Crim. 3d 56.00-D ("The determination of what are mitigating circumstances is for you as individual jurors to decide under the facts and circumstances of the case."). It was not improper.

Cheever raises the same claim concerning two other comments made during the State's penalty-stage rebuttal argument. The first of these related to

Cheever's mitigating circumstance that he was exposed to drug use in the home:

> "Now, perhaps there was marijuana use at the home. We don't contend there wasn't. But what it boils down to, ladies and gentlemen, is that a mitigator, is that a mitigator which is sufficient to outweigh the aggravating factors we put before you? Marijuana use in the home, that's a bad thing. No question about it. *But does that, as Mr. Evans say*[*s*]*, excuse what he did*? Is that – does that outweigh the aggravating factors? *We contend it does not and it cannot*." (Emphasis added.)

The second comment concerned Cheever's mitigating circumstance that he "was addicted to methamphetamine and he was under its influence at the time of the crime." The prosecutor argued:

> "The defendant tells us he was addicted to methamphetamine, and that's the reason, that's a mitigator. Well, tell that to Robert Sanders 'cause he wasn't on methamphetamine that night. Now, you've already decided methamphetamine did not play a role in the capital murder of Matt Samuels. And you should reject it now, too."

Cheever argues these comments told the jury that it did not have to consider mitigating evidence if it did not excuse the crime or have a causal link to the crime. In support, Cheever relies on *Kleypas*, where we held: "A prosecutor who argues that mitigating

circumstances must excuse or justify the crime improperly states the law." 272 Kan. at 1103.

The prosecutor in *Kleypas* made several arguments, discussed at length in the opinion, which we found violated this rule. We reached a different conclusion on a similar claim in *Scott*. There, we acknowledged that while there was some suggestion in the "comments that the defendant's "mental illness did not excuse his culpability," read in context, the comments were an argument "that [the defendant's] mental illness was not as severe as he made it out to be, because it did not 'prevent' him from committing the crimes." 286 Kan. at 118.

The difference between the outcomes in *Kleypas* and *Scott* lies in the distinction recognized in *Eddings*: comments that cut off in an absolute manner the jury's consideration of certain mitigating evidence run afoul of *Lockett*, but comments that the defendant's mitigating evidence is entitled to little or no weight based on the circumstances of the case are constitutionally permissible. 272 Kan. at 1074.

Addressing the "excuse" comment first, we find the comment, considered in context, was permissible. As with the comments in *Scott*, there is some suggestion in the remark that marijuana use in the home did not excuse Cheever's culpability. See *Scott*, 286 Kan. at 118. That remark, however, was followed with: "[D]oes that outweigh the aggravating factors? We contend it does not and it cannot." Viewed in context, the prosecutor's comments did not tell the jury that to be considered in mitigation, evidence of the marijuana use in the home had to excuse or justify the crime as a

matter of law. Instead, the remarks were directed at the weight the jury should give that evidence in deciding whether the mitigating circumstances outweigh the aggravating factors.

Cheever argues that the comment "tell that to Robert Sanders 'cause he wasn't on methamphetamine that night," improperly suggested that his mitigation evidence had to have a causal link to the crime in order to be considered. We disagree. Viewed in context, the comment was part of the State's argument addressing evidence concerning a specific mitigating circumstance: that Cheever was under the influence of methamphetamine at the time of crime. We note that that particular mitigating circumstance *alleged* a causal relationship between the crime and methamphetamine use. Cheever cannot now complain if the State responded to that contention. In any event, the *Eddings* distinction is determinative. The point of the prosecutor's comment was simply that because the evidence showed Cheever committed a violent criminal act when he was not under the influence of methamphetamine, the jury should give little weight to Cheever's mitigating circumstance that he was under the influence of methamphetamine at the time of the crime. As such, it was not improper.

The last comment at issue concerned the jury's rejection of Cheever's voluntary intoxication defense in the guilt stage: "[Y]ou've already decided methamphetamine did not play a role in the capital murder of Matt Samuels. And you should reject it now." According to Cheever, this remark suggested to the jury that because it rejected the voluntary intoxication defense at the guilt stage, it could reject Cheever's

mitigating circumstance that he was under the influence of methamphetamine at the time of the crime. Although the prosecutor said "you *should* reject it," the remark crossed the line between comment on the weight of the evidence as it relates to specific mitigating circumstances and argument to the jury that it *could not* consider a mitigating circumstance *as a matter of law*. Not only is such an argument an incorrect statement of the law, it could lead a juror to refuse to consider legally relevant mitigating evidence, in violation of the Eighth Amendment. We strongly suggest the State avoid this argument on remand.

The convictions and sentences for manufacture of methamphetamine and criminal possession of a firearm are affirmed. The convictions for capital murder and attempted capital murder are reversed, and the case is remanded for a new trial.

* * *

ROSEN, J., concurring: I concur with the majority but write separately only to comment on Cheever's argument that jurors be allowed the opportunity to consider mercy after finding a determination of death is warranted.

As a result of our decision in *State v. Stallings*, 284 Kan. 741, 163 P.3d 1232 (2007), capital defendants are denied the statutory right of allocution to the sentencing jury. See K.S.A. 22-3424(e) (defendant must be given opportunity to address the court, make a statement on the defendant's own behalf, and present evidence in mitigation of punishment). Thus, a capital defendant is deprived of any meaningful opportunity to

make a plea for mercy, indeed for his or her very life, before the sentencing jury makes a decision whether the defendant is to be put to death. I dissented from the decision in *Stallings* and write here to make clear my opinion that Cheever, like all criminal defendants, should be afforded an opportunity to offer a direct allocutory statement in mitigation to his sentencer.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 05-10050-01-MLB

[Filed December 22, 2005]

UNITED STATES OF AMERICA,	)
	)
PLAINTIFF,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
DEFENDANT	)
	)

NOTICE PURSUANT TO FED. R. CRIM. P. RULE 12.2(b)

Mr. Cheever, through undersigned counsel, hereby notifies the plaintiff, United States Government as follows:

(1) On the issue of guilt Mr. Cheever presently intends to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events at the Cooper residence on January 19, 2005, which negated his ability to form specific intent, *e.g.*,

malice aforethought, premeditation and deliberation. The experts will be a psychologist experienced in substance abuse diagnosis and treatment, and a social worker.

(2) On the issue of punishment Mr. Cheever intends to introduce expert evidence further relating to his addiction to methamphetamine and marijuana; his abuse of oxycontin and alcohol; and the social, environmental and biological factors which increased his risk of addiction and diminished his ability to achieve or maintain sobriety, all of which will be presented by qualified psychologists, substance abuse treatment professionals, and a social worker.

Mr. Cheever does not believe that this notice entitles the government to examine Mr. Cheever under the provisions of Fed. R. Crim. P. Rule 12.2(c), except to perhaps evaluate him for substance abuse or addiction.

Respectfully submitted,

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[*Certificate of Service omitted for purposes of this Appendix*]

APPENDIX C

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 80-81]

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* * *

Q. What were you asked to evaluate in this particular case?

A. In this particular case I was asked, among other

[p. 81]

things, but I was asked to assess the relationship of methamphetamine and Scott Cheever's use of it on January 19th, 2005, to his killing Matthew Samuels. I was also asked to evaluate and assess Scott Cheever's ongoing methamphetamine use and his -- and the effects of that use, and to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels.

I was also asked to offer an opinion about his perceptions, his decision-making, his ability to control his actions on January 19th, 2005, and to what degree the available information that I could gather from a variety of sources would inform my understanding of his capabilities or his impairments, either in perception, ability to control or make decisions at that time.

I was also asked that, given his history and his explanations, his choices, what alternative explanations, including diagnoses, would account

for what he did, in addition to or as an alternative to, possibly, the role of methamphetamine.

* * *

APPENDIX D

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: R. Lee Evans, Pharm.D., pages 14-26]

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* * *

Q. You're saying that as the drug use continues, certain parts of the brain have some long-term effects; is that right?

A. Yes.

Q. Tell the jury about that.

A. Well, our brain is a pretty interesting organ. Both white matter and gray matter have neurons, which are responsible for transmission of messages. That's how we think and that's how we learn to do things and that's how we maintain memory and all of those kind of things. As you use methamphetamine, what we know is that the actual structure of the brain changes. The brain adapts.

As we begin to use the drug -- and the way the drug works, let's just back up just a moment. The way the drug works is it causes a depletion of dopamine and some other transmitters from presynaptic neurons. A neuron is conceptually a gap, okay, and there's a pre-gap or presynaptic and the gap is called the synapse and then there's a post-synaptic part of the neuron. And so it stimulates the release of the drug from the post-synaptic neuron and also prevents the drug from

[p. 15]

being taken back up by the presynaptic neuron, so it has more of an impact on the post-synaptic neuron which is where we get that high and all those other side effects or effects of the drug.

Well, after awhile those neurons change. They begin to disappear. As a matter of fact, you look at morphological studies from postmortem studies and from PET scans and MRI, what we begin to see is their gray matter in the brain begins to decrease in terms of concentration of those receptors, so the brain size even begins to decrease.

And so there's less function there. You know, that gray matter's part of the limbic system, affects other parts of the brain that are more responsible for things like cognition, executive functions, judgment, you name it.

Q. Decision-making?

A. Decision-making, yes. And as the addiction and the use of methamphetamine goes on, that continues to increase.

Well, when we get to that point, we basically begin to have induced a neurotoxic effect of the drug. All those neurons that we've talked about begin to decrease, and that's a toxic effect,

[p. 16]

side effect of the drug. And that lasts for quite awhile. It lasts forever, as long as somebody's using the substance.

So that really is perhaps, you know, three kind of phases of the pharmacology of the drug, you know, the acute intoxication, the long-term intoxication, the 13 or 14 hours after a dose, and then the chronic piece, which is more neurotoxic in nature. And so it's -- it becomes a very, very dangerous drug.

Q. Would it affect an individual that was suffering from chronic toxicity, chronic use, would it affect that individual's ability to plan?

A. Yeah, those things, all of those cognitive functions that deal with planning, looking at consequences, abstract reasoning, judgment, all of that stuff can be very much affected by the changes in the -- not only the acute stuff, but especially the chronic, the chronic use in the neurotoxic piece.

We even -- we even begin to see -- now, Japan has more of a problem with methamphetamine than we do. And they've had it for a long time. And so a lot of the new research and stuff that's been done on this drug has been done in Japan, and some pretty sophisticated work.

[p. 17]

They see that 80 percent of patients in -- that they study develop a paranoid psychosis, which is just a side effect, a drug-induced side effect, of this drug, which is a horrible, horrible situation to have, because once somebody has reached that, it's even more difficult for them to make reasonable judgments because reality is quite distorted. And they have, you know, a lot of -- a lot of impact from that, in terms of violence. The violence issues with methamphetamine usually come at that stage of use. When they get into the neurotoxic piece and they become -- they develop a psychosis, drug-induced psychosis, that's when we see the most violence with this particular drug.

Q. Why is that? Why does meth lead to violence?

A. Well, there is some -- there is some thought that what happens is that there's so much damage to the parts of the brain that are responsible for the judgment issues and impulse, that it's just a natural consequence. It almost --

Q. Just what?

A. A natural consequence of the use of the drug. It's almost like, you know, if you grabbed a -- they begin to react as if you were grabbing a hot pot on the stove, your natural reaction is to pull back and

[p. 18]

to react to that. Well, their natural reaction to all sorts of stimuli, their paranoid ideation, the thoughts that someone's harming them or coming to get them or whatever the case may be, somebody's trying to steal stuff from them, the KBI is outside, you know, trying to get them, they oftentimes will react to that paranoid thought, whether it's real or not real, and that's what gets them in lots of difficulty and the danger of being violent.

* * *

[p. 20]

* * *

Q. Do you have an opinion about how the use of methamphetamine affected Scott in this case?

[p. 21]

A. Well, I found Scott to be a sad but typical case of progressive methamphetamine use. He had progressed very rapidly to the point where he had developed neurotoxicity. He was showing symptoms of psychosis pretty consistently after he started using it, and periods of time when he was incarcerated things cleared up a little bit, but even then when he was incarcerated people were able to notice and to say that he was -- he was psychotic at the time, after admission or incarceration. And he would immediately go back to using, using the drug after he was released, broke parole, and basically

was out of halfway houses without following through with the plan, and all in terms of seeking the drug, and even with intents, perhaps, to not use, he would end up using.

And it's very difficult for them not to use when the stuff's around, they're back in an environment when other people are using. So Scott basically was on a downhill course with his drug, and the neurotoxicity had set in. He was using all he could get, all he could -- later all he could manufacture, he was using. Even to the point of doing some really stupid things, like crawling, you know, obtaining anhydrous and becoming intoxicated

[p. 22]

or toxic from the effects of that substance, which is a very basic caustic substance. None of us would go crawling in a tank or being in a car with an open anhydrous can.

You know, so he was demonstrating all along really stupid judgment kind of stuff. And the issue of reacting to stimuli or potential threats, running away from perceived threats that were not real, being very suspicious of his friends, even suspicious enough to start carrying a weapon. So the drug has had a hard -- a very, very impactful -- a huge impact on him, in terms of the toxic piece. And he continued to use.

The night in question?

Q. Yes, 1-19 of '05.

A. 1-19, in the wee hours of the morning cooking meth in quote/unquote a friend's house, although I'm not sure that that was truly the case, a threat again appeared, a threat that the sheriff and the police or whomever are on its way, not being comfortable with the people he was with necessarily, feeling like they were going to steal stuff, and lo and behold the sheriff shows up.

Scott, Scott was both not only neurotoxic but acutely intoxicated on top of it all, and I

[p. 23]

think that was pretty much a state of affairs for him for a long time. When the sheriff showed, that was -- he had that hand-on-the-hot-pot reaction, and basically, in his own grandiose, indestructible mechanism or way of thinking, was going to shoot it out with the sheriff.

Q. That was influenced by his meth use; is that right --

A. Yes, I think it was --

Q. -- in your opinion?

A. -- very much influenced by the meth use. It was, you know, it was incredibly -- there was no judgment. There was no judgment at all. This man just did it. And, you know, it's -- I've seen it over and over and over again in people like -- like Scott. There isn't -- there is no thought. It's an action, and it's reaction to a threat, real or imagined. It doesn't seem to matter sometimes.

Q. Let me stop you there, doc.

A. Yeah.

Q. There was a second shot in this case.

A. Yes.

Q. Perhaps the jury might be wondering about the second shot and how meth would have influenced that. Do you have some opinion on that?

[p. 24]

A. Yeah. That's a hard one. My sense about these things, and I see that happen as well, and once it starts, it just continues. It's almost like it's a showdown at the OK Corral. People just automatically begin to do those things. Again, there was a perceived threat. He kept shooting. I don't have -- I get the sense, when I talk to Scott and to other people like him, that they never really think about the consequences. There are no consequences. They're terribly grandiose, and, again, infallible. The whole idea that you would sit there and shoot it out with people from a SWAT -- with a SWAT team, I mean that shows absolutely no judgment whatsoever.

So, yeah, I think it's pretty much drug-induced kind of thinking. Their ability to synthesize all this information and to turn that into a rational piece of judgment is just not there at this point.

* * *

[p. 25]

Q. In your opinion, was Scott intoxicated by meth at the time of the sheriff's shooting?

A. Yes.

Q. Did that affect his ability to plan, to premeditate

[p. 26]

this crime?

A. Yes.

* * *

APPENDIX E

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 95-97]

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Q. Now, he had used meth before this?

A. He did.

Q. And how does that impact on your opinion or your findings, your thoughts?

A. Well, in my professional experience, individuals who are engaged in illegal activity with other people who are engaged in illegal activity are often suspicious, and for good reason. Vigilance is a developed and cultivated trait, not only about what you're doing in getting away with it and continuing to get away with it, but also with your confederates and the people that you're hanging out with, to make

[p. 96]

sure that they don't in some way deceive you or take advantage.

So suspiciousness may have nothing to do with a drug, let alone methamphetamine. On the other hand, suspiciousness may also relate to drugs themselves, because they're such a commodity, because they are something to be guarded because everybody wants them. So it's something that not only relates itself to the criminal culture, but also to

the drug culture. And then it relates to the drug itself. How does it relate to the methamphetamine? The question is, were there any signs of intoxication? And no information that I received in reviewing demonstrated a change in his behavior from the time that he made his way there, before he used methamphetamine and had not used it for some time, and was acting on suspicions and giving a walkie-talkie to Matthew Denny before any methamphetamine was used and how he was carrying himself inside the house once police were on his way that he was aware. He was packing up his things, and he was waiting for the tire to be fixed when police came sooner than he anticipated.

So how does it relate to methamphetamine? Methamphetamine use, if it intoxicates someone, it

[p. 97]

will cause a change in that person, physiologically, physically, behaviorally, and there were not signs from the history of a remarkable change in Scott Cheever after he used the methamphetamine that morning.

* * *

APPENDIX F

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 106-113]

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[p. 106]

* * *

Q. Doctor, as part of your interview, did you discuss with Mr. Cheever the consequences of his use of methamphetamine and its effects on him?

A. I did.

Q. And what did he tell you were the consequences of his use of methamphetamine?

Q. Well, in his -- in his reflection, the greatest consequences of his methamphetamine use was that he alienated other people in his life because he was so absorbed in all of the activities of getting the materials, cooking the drug, using it, and just continuing in that life. And because it was such a priority for him, he ignored and was inconsiderate to other people and that was his greatest regret

[p. 107]

about methamphetamine influence on him.

Q. It wasn't violence?

A. He did not mention violence and he did not mention suspiciousness. He mentioned that he was essentially inconsiderate and not respectful of people that he would have otherwise liked and cared about and alienated those relationships.

Q. Doctor, what did you ultimately conclude with respect to the role of methamphetamine in this case with Scott Cheever?

A. With respect to methamphetamine, what I came to learn was that Scott Cheever had used many -- had used methamphetamine on a number of occasions time and again, injected, injected, injected, continuous injections or what would have been described what you probably heard as "runs," and on those instances did not become homicidally violent, and he became violent in the aftermath of methamphetamine use of a far smaller scale.

I would also note that, given what we understand is tolerance, tolerance says that if we go out to a bar and I have three beers, four beers, on this day, I will fall under the table and if I keep drinking those four beers for the next two years you and I will go out in two years and I will

[p. 108]

not fall under the table, it will take more to affect me. And so it goes with different kinds of drugs, that over time if you use more and more, you're not going to be affected to the same degree that you have been at an earlier stage of your drug use, and that tolerance was something that Mr. Cheever appreciated in himself, and so not only were we dealing with a situation where Mr. Cheever, on that day, at that time, when he killed Matthew Samuels, that he used far less, but he was using far less as a person with a tolerance for methamphetamine.

Q. And with that, do you believe that the methamphetamine had an influence or had an impact on his ability to perceive and make decisions and control his actions?

A. I need to actually break that down, perhaps start with perception.

Q. All right.

A. And then the decision and the control, handle them separately.

His perceptions were acute enough that he talked about hearing the gravel when the police car drove up. His perceptions were enough that he could discern that it was Matthew Samuels who came. His

[p. 109]

perceptions were acute enough that he heard the dialogue downstairs and he made it out, not just people talking but what was being said. He was aware of where Matthew Samuels was in relation to him, was aware of him approaching the curtain, so he was aware of what he saw, what he couldn't see, aware of what he heard.

He was aware of his surroundings. He was aware of a window nearby. He was aware of Matthew Denny being there with him and was in a position to play off that both should make sure that the other should keep quiet. He was aware of the fragility of the structure that he wondered about

what would happen if either of them would go out the window and go onto the roof, whether the roof could withstand weight of a person.

He was aware, heard, of Matthew Samuels leaving, going, and knowing that Matthew Samuels was going to come back. And when Matthew Samuels was coming up the stairs, he was aware that he was coming up the stairs. He was also considering, this is venturing into decision-making area, that the curtain, an access to that upper area, was relatively recent and was aware that a number of people might, theoretically, not even notice the

[p. 110]

curtain to go behind and to go up.

So his perceptions of what he saw were unimpaired by all of the information available to me, and even beyond that, what he heared (sic) and of his surroundings were intact, and then he shot, and his awareness was such that even though he engaged Matthew Denny after he shot, he was aware enough that he went back to Matthew Samuels to shoot him again.

So he didn't get diverted and lose track of the surroundings, but went right back and reengaged with a person he had shot and shot him again, and the shots were accurate, which is also an awareness. Not firing wildly, but firing not only shots that hit but lethal shots.

And then after the deputy came in and was removing the sheriff, even before he did, he continued to shoot, and he was aware that there were other police in the area. The information of Deputy Mullins was that he experienced a bullet whizzing by his head, and so that's an accurate shot. And that's a person shooting at a blind target and being accurate enough that a person feels a bullet whizzing by. He was -- his perceptions were acute enough that he only needed to be told once to stop

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shooting and he stopped shooting. And he stopped shooting under the circumstances of an explanation from Mr. Mullins that he was taking Matthew Samuels out.

And this is especially important in light of this whole question of suspiciousness. If he had irrational fears about some sort of threat, it would have been insufficient to merely say "stop shooting," especially because an emotional Deputy Mullins was screaming and cursing downstairs when he saw that Matthew Samuels had been shot, that in spite of the emotional pitch that was now part of the scene, he stopped on a dime, and so his awareness of his surroundings, by all of the information that's available to me, was either intact or even heightened.

Q. Let's talk about his decision-making ability.

A. The decision-making ability, as I've -- as I've assessed it in this case, began with his -- his decision-making once it became clear that the police were there. He made a decision not to try to flee, not to try to run. He made a decision to keep himself where he kept himself, as opposed to another part of the house. He made a decision to stay quiet lest any kind of disturbance aroused suspicion from

[p. 112]

Matthew Samuels downstairs. He made a decision to hold his fire when he did, even though he was armed. He made a decision to hold his fire even after Matthew Samuels approached the first time. And he made a decision to hold his fire even though he knew Matthew Samuels was outside and preparing to come back, that he did not shoot out the window or do anything of a provocative and intimidating way to say, "Stay away, because I will shoot." And he made a decision to shoot when he did.

And then he engaged Matthew Denny and then went back and made a decision to shoot again. And then when he stopped shooting he made a decision to stop shooting. And when he held his fire, he made a decision to hold his fire. And at junctures over the course of the day, when the SWAT team tried to engage him, and in his communications with them, how he handled that, he was not belligerent, he was not provocative. He asked for more minutes. And so this is how he was handling the stress of the moment.

He was quiet and only acted once they came upstairs, but not before he told them, "Don't come up." And so, again, did he say "Don't come up" to Matthew Samuels earlier? No. But when there were

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many people downstairs and they were all about to rush up and with tear gas, he made that decision, not to shoot, but to say, "Don't come up." And then after they came up, that was when he began to shoot. And I might add, referencing the perception issue, to shoot accurately, to hit body shields where the body shields actually were present, and made a decision, when he ran out of ammunition, to immediately surrender, not run for the window, not to jump on someone, but to -- but to surrender and then to, as he put it, to play possum, which is a -- which is a position of complete harmlessness. Not only not to shoot, but to carry himself in a way in which he would convey the greatest sense of harmlessness to people who had just been shot at and who are heavily armed.

Q. And all these things also you talked about demonstrate his ability to control his actions along all these?

A. That's correct.

* * *

APPENDIX G

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., page 116]

* * *

* * *

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* * *

Q. Now, Dr. Welner, have you formed an opinion as to whether the defendant, after injecting methamphetamine on January 19th, 2005, had the ability to think the matter over before acting on the matter?

A. I do have that opinion.

Q. And does he have that ability?

A. In my professional ability, he did.

Q. He did. And have you formed an opinion as to whether the defendant, again after injecting methamphetamine on January 19th, 2005, had the ability to form the intent to kill before the act?

A. I do have an opinion.

Q. Did he have that ability?

A. In my professional opinion, he had that ability.

* * *

APPENDIX H

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 125-130]

* * *

* * *

[pg. 125]

* * *

Q. You heard Dr. Evans testify today, right? You sat in the back and listened to his testimony?

A. Yes, sir.

Q. He talked about the effects of meth versus the effects of alcohol, much different. Did you hear that?

A. I did.

Q. Do you agree?

A. He offered a number of opinions and I prefer to really focus on each of his opinions, because there's some opinions that I agree with and there are some opinions that I don't agree with.

Q. See, I'm asking you about that alcohol/meth opinion. Do you agree with that?

A. I think he offered a number of opinions in that regard, and I'd really appreciate it if you could focus me on a specific point that he raised.

Q. Specifically he was asked about the effects of alcohol, the blackouts, the not remembering, and asked to contrast that with methamphetamine intoxication.

A. Of whether people blackout on methamphetamine, and

[p. 126]

he contrasted it with alcohol. Yes, I would agree with that.

Q. You don't contest that Scott used methamphetamine on January the 19th, the day of this homicide, do you?

A. No, I do not.

Q. You don't contest that he was methamphetamine dependent at this time in his life, do you?

A. Yes, I agree with that. (Nods head.)

Q. You agree that he was meth dependent?

A. I agree that he met criteria for a diagnoses of methamphetamine dependence.

Q. Do you agree that the meth on January 19 was affecting him in some way?

A. I think it's quite possible that he was affected by the methamphetamine that day.

Q. Do you agree that the meth that he had done prior to January 19th could still be affecting him on January the 19th of 2005 in some way?

A. No. I think that the -- looking specific -- if --looking specifically at the event that's brought us here, the answer is no. If I would say, in an indirect way, Well, if he was -- if he was not methamphetamine dependent, would he have gone to cook methamphetamine? Well, of course not. So focusing on the event itself of these charges, I

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have to say no, even though I acknowledge that he's methamphetamine dependent, that if there is any influence of methamphetamine, that it would have been the methamphetamine that he did that morning.

Q. You're not telling the jury that he was making good decisions on January 19th of 2005, are you?

A. No. But I am telling the jury that he was making decisions in keeping with priorities that he had established for himself. They are decisions that we might not necessarily agree with, and they're decisions that we would certainly not recommend that others take, but they are decisions that he charted out in -- consistent with other decisions that he was making and the path that he had placed and maintained himself on.

Q. You're not saying the meth didn't affect those decisions, are you?

A. 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

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police officers. And so that's a very-- it's a very hued area, because one of the most striking things about Scott Cheever from that morning is that the choices that he was making and the efforts that he was making to avoid capture were pathways that he was embarking on sober as well as under the influence of methamphetamine. And I can't separate that in answering your question.

Q. Did shooting the sheriff help him avoid capture? Didn't it guarantee that he'd be sitting right where he's sitting right now?

A. I need to answer your first question.

Q. Okay.

A. I just need a moment to really think about it. I mean, quite obviously, as we reflect on it, no. But I'm-- I'm pondering what his expectations were. You know, I would agree with Dr. Evans about one point, just -- I wouldn't confine this to people who are methamphetamine users. You know, in my experience of interviewing many, many people who do things that they later come to appreciate that

they're in a whole lot of trouble for, they just don't think --

MR. EVANS: Objection, Your Honor. I don't think this is responsive.

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THE COURT: I don't either. I'll sustain the objection.

BY MR. EVANS:

Q. Let me ask the question. I'll try to ask one question at a time, I promise.

A. All right.

Q. I'll try. Do you think him shooting the sheriff, killing the sheriff, that was not a good decision, was it?

A. Absolutely not.

Q. If his idea was to leave, to get away from the scene, that did not help him get away from the scene, did it?

A. It helped him from being apprehended. And he was thinking, as I was saying a moment ago, he was thinking in the moment, which is not uncommon in many people who carry out ill-advised crime.

Q. Not uncommon for meth users either, is it?

A. Meth users and other people who are not under the influence, but people who act in the moment, think in the moment, and live in such a way that reflects their indifference to the consequences of their actions and indifference to the predicament because they're ready for come what may.

And in keeping with that, I did think that

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it was clinically notable for him to write to an associate that he'd do it again in a heartbeat, and he wrote that sober.

MR. EVANS: Nothing further.

MR. LIND: No redirect.

THE COURT: Thank you, Dr. Welner. And you may step down.

* * *

APPENDIX I

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[Discussion among the lawyers and the judge, page 61]

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* * *

MR. DISNEY: And their expert that just testified relied upon Welner's report. He testified, "I relied upon Welner's report," and this is Welner.

THE COURT: So Dr. Evans, who just testified, relied to a certain extent on Dr. Welner's report?

MR. EVANS: That's true, he did.

MR. DISNEY: Yes.

* * *

APPENDIX J

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 26, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME IV
[APPELLATE VOLUME 26]

[WITNESS: Scott D. Cheever, pages 62-65]

* * *

* * *

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* * *

Q. And you're up there hiding with Denny on the second floor?

A. Yeah.

Q. Got the gun in your hand?

A. Yeah.

Q. And you heard the sheriff ask, "Where does this lead," words to that effect?

A. Yeah, in hind --

Q. Did you know he was talking about the upstairs?

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A. No, at that point I didn't because in hindsight, I mean, I can look back and say, 'cause Kay, you know, said, "Hey, he's up there," but at this time I didn't know all that was going on. So he's saying, "Where does this lead," and I'm not even thinking he's talking about the upstairs. And she was like, "Well, it's dark." So he goes outside, I guess, and gets his flashlight. I don't know all this is going on. But I look over at Denny and I'm telling him, "Don't move, don't make a sound, just stay right where you are." And about that time I can hear the steps on

the stair and I look out the door and that's when he was on that first landing. And he was right there.

Q. You had the gun in your hand?

A. Yeah, it was cocked and loaded.

Q. Were you planning to shoot the sheriff at this point?

A. Right at that point is probably when I -- I just see him and I just kinda reached out and I pull the trigger and shot him (indicating), and, I don't know, it just -- I panicked, I guess.

Q. Were you waiting for the sheriff to get up there so you could ambush him?

A. No. Just hiding

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Q. As the sheriff was talking to Darrell Cooper at the front door, were you planning to shoot the sheriff as he came upstairs?

A. No.

Q. No?

A. No.

Q. Scott, why'd you have the gun in your hand?

A. I always had the gun in my hand, all the time. Always did.

Q. Had you thought about what was going to happen if the sheriff tried to come upstairs?

A. No. I never thought he'd come upstairs. (Shaking head.) I mean, nobody knew the upstairs is accessible. He wouldn't have known it was either unless Kay, I mean, told him it was, I mean, he'd have never known.

Q. You hear him start to come up the stairs and what happens?

A. That's when I look out the door and he's like right there, and I pull the trigger and shoot him and then as soon as I do that I jump back in the room and I look over at Denny and he's kind of looking at me like "What the hell do I do?" And I tell him, I'm like, "Don't go out the window. They'll shoot you." I said, "Don't go out the window, man. They're

[p. 65]

gonna shoot you." And he's like, "All right, all right." And I turn around and look and I don't see Matt anywhere, and I walk over by the railing and I look down and I see him again, and I pull the trigger again and shoot him. Then I jump back and go back into the room. And I look for Denny and he wasn't there. He'd jumped out the window or something. And --

Q. Before the first shot, you look down, do you see that it's Matt Samuels?

A. Yeah.

Q. So you knew it was Matt Samuels when you shot?

A. Yeah.

Q. Tell me again, why did you shoot?

A. I don't know.

Q. Is this a plan that you'd had?

* * *

APPENDIX K

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 26, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME IV
[APPELLATE VOLUME 26]

[WITNESS: Scott D. Cheever, page 119-129]

* * *

* * *

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* * *

Q. You knew that the sheriff came in the house, correct?

A. Yes, sir.

Q. And then you knew he left to go get the flashlight?

A. No, sir.

Q. You heard him leave -- you heard him ask, "Where does this lead to"?

A. Yes, sir.

Q. You knew he had to go get the flashlight, correct?

A. No, sir.

(Whereupon, a sotto voce discussion was had between Mr. Disney and Mr. Lind.)

Q. You hear the cop come in, correct?

A. Yes, sir.

Q. The sheriff come in?

A. Yes, sir.

Q. And he asked if you were there, correct?

A. Yes, sir.

Q. And Darrell said no?

A. Yes, sir.

Q. And then the sheriff said, "Do you mind if I look

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around?" Correct?

A. Yes.

Q. And Darrell said, "Yeah, go ahead"?

A. Yes.

Q. And then the sheriff said, "Do you mind if we go upstairs?"

A. No, sir.

MR. DISNEY: Your Honor, can we approach?

THE COURT: Yes, you may.

(Bench conference was held as follows:)

THE COURT: Is this an interview with the defendant?

MR. DISNEY: No, this is an interview done with -- by Dr. Welner of the defendant, and I want to impeach him.

MR. EVANS: I object to using Welner, Judge. This is my reason. Had we -- had the case never gone to federal court -- and you heard a similar motion for Mr. Frieden. We've done nothing that would have triggered Dr. Welner's ability to preinterview Mr. Cheever. We didn't file a Notice of Intent of mental defect or defense. There would be no way that Welner would have been talking to Mr. Cheever pretrial in this setting. And I don't think they should be able to

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use this material in this context, because we've done nothing, Mr. Cheever's done nothing, to -- that would allow Welner's role in this at this point.

THE COURT: Is Welner going to be your rebuttal witness to their Monday witness?

MR. DISNEY: Uh-huh.

THE COURT: So he will testify?

MR. DISNEY: He will testify.

MR. EVANS: We're going to interpose the same objection, Judge --

THE COURT: Right.

MR. EVANS: -- at that time.

THE COURT: Well, this is a prior inconsistent statement given to a witness who will testify and I will allow it. You need --

MR. DISNEY: I thought that was going out there --

THE COURT: So I will -- your objection is noted and overruled.

MR. EVANS: Yes, sir.

THE COURT: And you may proceed on that basis.

MR. DISNEY: Thank you.

(Thereupon, the following proceedings

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continued in the hearing of the jury, with the defendant present.)

BY MR. DISNEY:

Q. Sir, do you recall being interviewed on July 12th, 2006, by an individual by the name of Mike Welner?

A. Yes, sir.

Q. And do you recall a conversation that you had with him regarding the conversation between Darrell and the sheriff?

A. Yes, sir.

Q. And do you recall what you told Mr. Welner about what the sheriff said about coming upstairs?

A. No, sir.

Q. Would it help if you could read that portion of the interview to refresh your memory?

A. Yes, sir.

Q. I'm going to give you just a few moments. Why don't you just read this whole page.

A. (The witness complies.) (Nods head.)

Q. You had the opportunity to read that?

A. Yes, sir.

Q. Does that refresh your memory about what you told Mr. Welner about the conversation Darrell and the sheriff had?

A. Yes, sir.

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Q. And you told Mr. Welner that the sheriff comes in, correct?

A. Yes, sir.

Q. And he asks if he could look around, correct?

A. Yes, sir.

Q. And Darrell said, "Yeah, go ahead," correct?

A. Yes, sir.

Q. And you said that the sheriff then came in and looked around, correct?

A. Yes, sir.

Q. And then you, yourself, told Mr. Welner that Darrell said, "Do you mind if we look upstairs?"

A. Who said that?

Q. You said it to Dr. -- to Mr. Welner, correct?

A. Yes, sir.

Q. You told Mr. Welner that you heard Darrell say, "Do you mind if we look upstairs," correct?

A. Darrell?

Q. You told Mr. Welner that's what Darrell said, isn't it?

A. I might have told Welner that, but that's not what happened.

Q. I want to show you a portion of an interview that you had.

A. All right.

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MR. DISNEY: If I can have just a moment, Your Honor.

THE COURT: Are we talking about State's Exhibit 150A? I know it's not been admitted, but is that the document you're referring to?

MR. DISNEY: Yes.

THE COURT: Okay.

MR. DISNEY: We're on page 64.

THE COURT: You might refer to it by page number for the record.

MR. DISNEY: Okay, we're on page 64.

THE COURT: All right.

BY MR. DISNEY:

Q. I want to play a portion of that interview for you.

A. All right.

THE COURT: Just a minute.

MR. EVANS: Same objection, judge.

THE COURT: It's not in evidence yet.

MR. DISNEY: I'm using it to refresh his memory, Your Honor.

THE COURT: You're going to play the oral interview?

MR. DISNEY: Yes.

THE COURT: Is that what you want to do?

MR. DISNEY: Yes.

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THE COURT: Okay. Well --

MR. DISNEY: I'm not asking that be admitted.

THE COURT: Well, has he seen the written transcript of the oral interview?

MR. DISNEY: He has.

THE COURT: And that's at page 64?

MR. DISNEY: Yes, sir.

THE COURT: How do you propose to narrow what you're going to play to what we've talked about so far?

MR. DISNEY: We will play just the time slots regarding that.

THE COURT: Which are what?

MR. DISNEY: From -- I would propose playing from the top of the page down to 3:34:36.

THE COURT: All right. Your objection is noted, Mr. Evans, and I will allow the State to play that portion of the --

MR. DISNEY: I just want to make sure I have it set up.

THE COURT: Okay. Of the State's Exhibit 150A.

MR. EVANS: Judge, may I ask a voir dire question first?

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THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. EVANS:

Q. Scott, are you denying you told Welner this?

A. No, sir.

Q. You admit that you told Welner this?

A. Yeah. A lot of that conversation was in hindsight. 'Cause when you go back and you can look at what really happened, and then you can say, oh, this is, you know, I mean, but --

Q. You told Welner about the flashlight, the sheriff's going to get the flashlight?

A. Yeah, but I didn't even know it at the time. I mean, it would be impossible for me to know.

Q. But now you don't think that happened?

A. No, it couldn't have happened.

MR. EVANS: I don't think it's impeachment, Judge. I would interpose another -- that objection as well.

THE COURT: Okay. Well, I think it is prior inconsistent statement that is -- he can be impeached with, so I will permit it.

MR. DISNEY: Are you going to be able to get it?

LEGAL ASSISTANT: I'm hoping to.

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CONTINUED CROSS-EXAMINATION

BY MR. DISNEY:

Q. Sir, let's do it this way, just tell me if I read this right.

The words I'm about to read are your words, correct, at -- starting at 3:33:54?

A. Yes, sir.

Q. You told Mr. Welner , "And Darrell said, 'No.' He's, like" -- "he" being Sheriff Samuels, correct, correct?

A. Yes, sir.

Q. "Sheriff Samuels says, 'Do you mind if I look around for him?' And Darrell said, 'Yeah, go ahead.' So he comes in and looks around and he said, 'Do you mind if we look upstairs?' And Darrell said, 'Go ahead.' And he starts to come upstairs and he said, 'Well, I better go get a flashlight. It's kinda dark up there.' So he goes back out and he gets a flashlight, and I'm looking at Denny and he's over by the window and he's looking at me like 'What do I do?' And I'm like, 'I don't know, man.' And I turn around and look and he's right there."

Does what I read accurately describe what you told Mr. Welner?

A. Dr. Welner, yes, sir.

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Q. You told this to Welner back in July of 2006, correct?

A. Yes, sir.

Q. You hadn't used meth in quite awhile, had you?

A. No.

Q. Not since that January 19th day?

A. Yes, sir.

Q. You weren't delusional or paranoid when you talked to Mr. Welner, were you?

A. Maybe a little intimidated.

Q. Maybe a little intimidated by -- you know, you were in a custodial situation.

A. Yes, sir.

Q. You were trying to tell him the truth?

A. Yes.

Q. And you believed what you told him?

A. At that time, yes.

Q. You knew the sheriff was coming upstairs?

A. After a time, yes.

Q. What do you mean "after a time"?

A. After I heard footsteps coming upstairs.

Q. You heard the sheriff say, "Do you mind if I go look upstairs?"

A. No, sir.

Q. That's what you told Dr. Welner?

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A. Yeah, that was in hindsight.

Q. I don't understand what this "in hindsight" means. Explain that.

A. It means -- I mean, I can look at the testimonies, you know, and previous hearings, you know, by KBI and everybody else, you know, I can see pictures later, I can see the flashlight and he went and got his flashlight, but at the time how was I to know that? I mean --

Q. You're just describing to Welner what you remembered, right?

A. No, I was describing what happened.

Q. And what happened was that the sheriff said he's gonna go get his flashlight so he could come upstairs, correct?

A. No, he didn't say that.

Q. Huh?

A. He didn't say that.

Q. You told Dr. Welner he did?

A. Yes.

* * *