No. 12-609

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS - PETITIONER

VS.

SCOTT D. CHEEVER - RESPONDENT

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

---

BRIEF IN OPPOSITION

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CAPITAL CASE

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BRIEF IN OPPOSITION

Respondent, Scott Cheever, respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF FACTS

The respondent is in general agreement with the petitioner's factual statement. However, Mr. Cheever disputes the State's assertion that he "ambushed" Sheriff Samuels. (Petition, page 5). Mr. Cheever testified at trial that he shot Sheriff Samuels in a panic; that he was not waiting to ambush him, rather, he was just hiding, and that he did not plan to kill the sheriff:

> 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.
>
> 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.

(Transcript of Testimony of Scott Cheever, Appellate Volume 8, pages 62-63).

With regard to the testimony of Dr. Welner, Mr. Cheever would note that the doctor's testimony went beyond the summary provided by the petitioner. Dr. Welner

addressed the intoxication defense and, as described in the petitioner's statement of the facts, expressed his opinion that Mr. Cheever was able to form the premeditated intent to kill. However, he then went beyond rebutting Mr. Cheever's intoxication defense and testified that Mr. Cheever committed these crimes because he had chosen to be an outlaw:

> A. ...And [I] looked at personality conditions, personality disorders, because personality disorders are conditions but they're conditions not so much – the difference between a condition and a personality disorder is that if you develop, for example, panic disorder, you don't want panic attacks, you seek help for panic attacks. That's a condition. What a personality disorder is is that everybody else doesn=t want you to be that way, but you want to be that way because it suits you. And it=s not just what was mentioned earlier, antisocial. People can have dependent personality. Nobody wants >em to be dependent, but they want to be dependent because it suits them and they are comfortable with it.
>
> So in looking at all of the different possibilities one considers those diagnoses as well. And, lastly, just environment phenomena. Who did he want to be? What was the script of his life as he was laying it out at that time? And I had to consider that in the context of the efforts that he made to make sure he would not go back into custody.
>
> Q. And in that vein did you B did he talk to you during your interview about his fascination with outlaws?
>
> A. We talked about the people who were important to me, and what B what I came to learn in my interview is that Scott Cheever was one of these unusual people who=s actually exposed to a variety of different people in his life. He had people

> who were criminal types. He had people who were not criminal types but who were drug users. He had people who were clean and straight and were athletes. He had people who were not athletes and clean and straight but elders and were responsible people. And because he was, other people perceive different things. According to him his grandmother perceived him to be bright. Other people perceived him to be an extremely talented athlete, and he was, and responded to him as people naturally do to a very talented athlete. And other people found him mannerly, because he was able to be polite with others. So what I found in the interview was that, from him, was that he found himself identifying with and looking up to people that he alternatively described as bad boys or outlaws, and looking up to them and being impressed and awed by them, and in certain instances wanting to outdo them.

(Transcript of Jury Trial, Volume 5, Appellate Volume 27, pages 104-106).

On cross-examination Dr. Welner testified that Mr. Cheever was dependent on methamphetamine in January, 2005, but Ahe was making decisions in keeping with priorities that he had established for himself.@ (Transcript of Jury Trial, Volume 5, Appellate Volume 27, page 127). He stated, AI don=t think methamphetamine affected his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do. I think that it is possible, possible, that methamphetamine made him more aggressive. But it was making a person aggressive who was armed to begin with and who identified not only with outlaws but outlaws who were engaged in fatal shootouts with police officers.@ (Transcript of Jury Trial, Volume 5, Appellate Volume 27, page 127-128).

Dr. Welner's testimony also encompassed more than a rebuttal to the intoxication defense when he testified that Mr. Cheever had no remorse for Sheriff Samuel's death. He

testified that at the time of their interview, Mr. Cheever had A...no sign of depression, no sign of sadness, no sign of preoccupation with the event or its consequences or other people affected by it...@ (Transcript of Jury Trial, Volume 5, Appellate Volume 27, page 86). He returned to a theme of lack of remorse for these crimes later in his testimony:

> Q. Doctor, as part of your interview, did you discuss with Mr. Cheever and 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?
>
> A. Well, in his B 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 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.

(Transcript of Jury Trial, Volume 5, Appellate Volume 27, pages 106-107).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision of the Kansas Supreme Court is not final; this Court should decline jurisdiction under 28 U.S.C. Section 1257(a).

Under 28 U.S.C. § 1257(a) this Court's review of state court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision [on a federal question] could be had." This Court has observed that the language of that statute "would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-477 (1975), *citing* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

The decision rendered by the Kansas Supreme Court in this case did not dispose of all the issues presented on direct appeal. Although the court ruled that error in the admission of Dr. Welner's testimony required reversal of Mr. Cheever's conviction of capital murder, the court found several other errors, without determining whether those errors required reversal of his conviction or his sentence of death. Additionally, two other issues were raised in Mr. Cheever's brief, but not addressed in the opinion. Should this Court grant certiorari, and reverse the decision of the Kansas Supreme Court, the litigation on direct appeal will not be over. Mr. Cheever will request further review in the Kansas Supreme Court on the following issues raised on direct appeal and not finally resolved by that court's opinion:

1. Did the trial court's failure to instruct on felony murder as a lesser included offense of capital murder require reversal of Mr. Cheever's conviction for capital murder? The Kansas

Supreme Court agreed with Mr. Cheever that, under Kansas law, felony murder is a lesser included offense of capital murder, and that, where the facts support it, an instruction on that lesser included offense should be given. State v. Cheever, 284 P.3d 1007, 1013 Syl. ¶ 11 (Kan. 2012). The Court did not determine whether the facts of Mr. Cheever's case required the instruction or whether the trial court's failure to instruct on felony murder required reversal of his conviction of capital murder. 284 P.3d 1028.

2. Did the trial court's comments, informing all potential jurors that Mr. Cheever's case could be reviewed by an appellate court, require reversal of his sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that the court's statements to the venire, regarding appellate review, were improper, but did not determine whether the error required reversal of Mr. Cheever's sentence of death. 284 P.3d 1030.

3. Did the trial court's failure to instruct the jury, as a prerequisite to consideration of the death penalty, that it must find, beyond a reasonable doubt, that Mr. Cheever was at least eighteen years old at the time of the crime require reversal of his sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that the fact that the defendant was eighteen years or older at the time of the offense was a fact necessary for the imposition of the death penalty and that it must be found by the jury beyond a reasonable doubt. 284 P.3d 1013, Syl. ¶¶ 14, 15. The Court did not determine whether the failure to so instruct and submit that question to the jury required reversal of Mr. Cheever's sentence of death. 284 P.3d 1032.

4. Did error in the trial court's instruction regarding mitigating circumstances require reversal of Mr. Cheever's sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that the instruction on mitigating circumstances in this case did not conform to

Kansas law, as it did not inform the jurors that mitigating circumstances need only be proved to the satisfaction of the individual juror and not beyond a reasonable doubt. The Court did not determine whether the error in the instruction required reversal of Mr. Cheever's sentence of death. 284 P.3d 1032.

5. Did prosecutorial misconduct require reversal of Mr. Cheever's sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that certain comments of the prosecutor improperly and erroneously suggested to jurors that they could not consider one of Mr. Cheever's proffered mitigating circumstances as a matter of law, and that such comments could lead a juror to refuse to consider legally relevant mitigating evidence. The Court did not determine whether this error required reversal of Mr. Cheever's sentence of death. 284 P.3d 1036.

6. Did Dr. Welner's testimony exceed the bounds of proper rebuttal and require reversal of Mr. Cheever's conviction of capital murder or his sentence of death? Because the Kansas Supreme Court found that Dr. Welner's testimony was inadmissible, the Court did not address Mr. Cheever's additional argument on this issue. This argument is found on pages 114-121 of his opening brief on direct appeal, and reproduced at Appendix A. Mr. Cheever argued that, should the court find that by raising a voluntary intoxication defense, he waived his Fifth Amendment rights to the extent necessary to rebut that defense, the district court erred when it ruled the prosecution could go beyond rebuttal and offer its alternative theory of the case – that Mr. Cheever committed these crimes because he had a personality disorder or had chosen to be an outlaw.

7. Is K.S.A. 21-3439(a)(5) unconstitutional, in violation of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights as it

fails to properly narrow the class of persons eligible for the death penalty? Mr. Cheever argued that the subsection providing that the intentional, premeditated murder of a law enforcement officer is capital murder is unconstitutional because it does not limit its application to situations in which the killing is related to victim's status or duties as a law enforcement officer. This argument is found on pages 42-85 of Mr. Cheever's opening brief and reproduced in part at Appendix B. It was not addressed by the Kansas Supreme Court in its opinion.

In Johnson v. California, 541 U.S. 428 (2004), this Court granted certiorari to review a decision of the California Supreme Court on a *Batson* issue. After briefing and argument, this Court dismissed the case for lack of jurisdiction. The circumstances were similar to this case. The petitioner's convictions were reversed due to *Batson* error, by the California Court of Appeals. That Court also noted other claims of trial error, but did not rule on them. 541 U.S. 429. Then the California Supreme Court reversed the Court of Appeals on the *Batson* issue, and, like the Court of Appeals, did not address the petitioner's other claims. When this Court granted certiorari it was unaware that there were other claims that had not been resolved. This Court found that, due to those unresolved issues, the California Supreme Court's decision was not final for purposes of 28 U.S.C. § 1257(a). 541 U.S. 431.

In the same manner, Mr. Cheever brought other claims to the Kansas Supreme Court which were not finally decided by that court, but which could require reversal of his conviction and/or sentence regardless of any action this Court takes on the petitioner's claims.

Mr. Cheever acknowledges that in Cox Broadcasting Corp. v. Cohn, supra this Court noted that there are situations in which this Court grants review, even when there are further

proceedings to be had in the lower state courts, without waiting for the proceedings to be complete. Among those are the situation where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. 481. This case arguably falls in that category.

Despite that, this Court should decline to exercise its discretionary jurisdiction to hear this case for the reasons discussed below.

2. The petitioner's constitutional argument was not presented to the Kansas Supreme Court for determination, and should be considered waived by this Court.

In seeking a writ of certiorari in this case, the State's primary argument is that the Kansas court improperly relied on the state statutory definitions of the mental disease/defect and voluntary intoxication defenses to determine the scope of Mr. Cheever's Fifth Amendment rights, and in so doing placed itself in direct conflict with this Court's decision in Buchanan v. Kentucky, 483 U.S. 402 (1987). However, this argument was not made to the Kansas Supreme Court. As described in that Court's opinion, Mr. Cheever argued that his temporary intoxication defense did not act as a waiver of his Fifth Amendment rights with regard to a court-ordered psychological evaluation and relied in part on state statutes and the court's previous interpretations of those statutes. Instead of claiming that Mr. Cheever's argument conflicted with Buchanan, and that it would be improper for the court to look to state law, and state precedent, in resolving the Fifth Amendment question, the State

argued that the fact that the evaluation was legally obtained rendered it admissible. The State's argument is reproduced, in its entirety, at Appendix C. The State was aware of state law precedent and had the opportunity to argue that those cases, in light of Buchanan, were incorrectly decided. The State's decision to instead rely on the fact that the evaluation was properly conducted in the federal prosecution, should be considered a waiver of the current argument. Because the Kansas Supreme Court was never presented with the argument now advanced by the petitioner, this Court should decline jurisdiction.

In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 (1983), this Court stated:

> By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. See, e.g., *Sumner v. Mata,* 449 U.S. 539, 549, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981); *Allen v. McCurry,* 449 U.S. 90, 105, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980); *Swain v. Pressley,* 430 U.S. 372, 383, 97 S.Ct. 1224, 1230, 51 L.Ed.2d 411 (1977). We also noted in *Cardinale* that one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments. 394 U.S., at 439, 89 S.Ct., at 1163.

See also, Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 56, f.n. 4 (2002)(" Brunswick has asserted that federal maritime law governs this case. Because this argument was not raised below, it is waived.")

While it is true that Mr. Cheever raised the question of the scope of his Fifth Amendment rights below, the State did not ask the Kansas Supreme Court to consider the argument now pressed on this Court. Given that court's role as the ultimate expositor of state law, Mullaney v. Wilbur, 491 U.S. 684, 691 (1975), the Kansas court should have been

given the first opportunity to consider Kansas' statutory enactments in light of the argument now advanced by the State.

3. The decision of the Kansas Supreme Court upholds, rather than conflicts with, the holding of Buchanan v. Kentucky. The decision rests on the particular facts of this case and appropriately harmonizes Buchanan with the parameters of the mental disease/defect defense and the voluntary intoxication defense as defined under state law.

This Court framed the issue in Buchanan in this way:

> … the case raises the question whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense.

Buchanan v. Kentucky, 483 U.S. 402, 404 (1987).

The holding of the Kansas Supreme Court can exist in harmony with this Court's decision in Buchanan because Mr. Cheever did not request a psychological examination and he did not raise a mental-status defense as defined by Kansas law.

In Buchanan, the petitioner was attempting to establish the defense of "extreme emotional disturbance" at his trial. 483 U.S. 408. He introduced the results of psychological examinations stating that he had a thought disorder, was depressed, dependent, impulsive, immature, severely emotionally disturbed, very easily confused, easily led, with limited capacity for insight, and on the verge of full-blown schizophrenia. 483 U.S. 409-410, fn 9. The prosecution countered with another psychological report characterizing him as sophisticated and capable of manipulative and conning type behaviors. 483 U.S. 410, fn.10.

This Court found that the admission of the second report did not violate the defendant's Fifth or Sixth Amendment rights, relying on its precedent established in Estelle v. Smith, 451 U.S. 454 (1981) where this Court held:

> "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." *Id.,* at 465, 101 S.Ct., at 1874.
>
> We further noted: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.,* at 468, 101 S.Ct., at 1875. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan, 483 U.S. 422-423.

Mr. Cheever's case presents quite a different situation. No psychological or psychiatric evaluations were offered in this case. No diagnosis of a mental disease or defect was offered. Instead, Dr. Evans, a doctor of pharmacy, testified about the physical effects of methamphetamine use. He testified that long term abuse of that drug can lead to a *temporary* paranoid psychosis, and that Mr. Cheever was showing signs of that type of temporary psychosis. He testified that the effects of the drug affected his ability to plan, form intent and premeditate.

Importantly, the Kansas Supreme Court noted that in situations where drug or alcohol abuse results in permanent impairment, evidence on this impairment would constitute evidence of a mental disease or defect, to which, presumably, the statutory notice provisions, and provisions for prosecutorial access to the defendant for an evaluation would

come into play. "Evidence of permanent mental incapacity due to long-term use of intoxicants, however, may support a mental disease or defect defense." Cheever, 284 P.3d 1023. However, in this case, the court noted, Mr. Cheever did not present evidence that his use of methamphetamine had caused permanent mental impairment. 284 P.3d 1024.

In holding that Mr. Cheever's evidence did not rise to the level of a defense of mental disease or defect, which would waive Mr. Cheever's Fifth Amendment rights with regard to Dr. Welner's previous examination, the Kansas Supreme Court did no violence to this Court's holding in Buchanan. Rather the court appropriately examined the law regarding mental disease/defect as defined by the state legislature, and harmonized that law with this Court's Fifth Amendment jurisprudence.

Under Kansas law, the defense of "lack of mental state" is codified at K.S.A. § 21-5209 (formerly K.S.A. § 22-3220):

> 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 otherwise not a defense.

Before adopting K.S.A. § 22-3220, in 1996, Kansas had two defenses relating to mental disease or defect: insanity and diminished capacity. Criminal insanity was evaluated using the *M'Naghten* test, and a claim of diminished capacity could be used for the limited purpose of negating specific intent. However, K.S.A. 22–3220 abolished the defense of insanity and instead focused on a lack of the mental state required as an element of the offense charged. A criminal defendant can no longer raise insanity or diminished capacity as a defense. State v. White, 279 Kan. 326, 333, 109 P.3d 1199 (2005); State v. Davis, 277 Kan. 309, Syl. ¶ 7, 310, 85 P.3d 1164 (2004).

Under Kansas law, and consistent with this Court's ruling in Buchanan, a defendant offering a defense of mental disease or defect, must provide notice to the prosecution that he or she intends to offer such a defense and must submit to any mental examination ordered by the court. K.S.A. § 22-3219 .

Kansas law draws a sharp distinction between the defense of mental disease or defect and voluntary intoxication. K.S.A. § 21-5205 (formerly K.S.A. § 21-3208) provides:

> (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.

Under Kansas law, the defense of voluntary intoxication is neither an insanity defense, nor the defense of mental disease or defect. The Kansas Supreme Court held in State v. Kleypas, 272 Kan. 894, Syl. & 1, 40 P.3d 139 (2001) *overruled on other grounds,* State v. Marsh, 278 Kan. 520, 535, 102 P.3d 445 (2004):

> Evidence of a defendant's mental disease or defect excluding criminal responsibility is not admissible at 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. K.S.A. 22-3219. However, **insanity and voluntary intoxication are two separate defenses. No notice of an insanity defense is required where the evidence points only to a temporary mental state negating specific intent caused by the voluntary consumption of alcohol.**

(emphasis added).

In Kleypas, the defendant called an expert witness to testify that he had suffered from an alcoholic blackout around the time of the alleged crimes. The State

objected to the witness= proposed testimony, arguing that the defendant had withdrawn his previously filed notice under K.S.A. 22-3219 that he was relying on the defense of mental disease or defect. 272 Kan. 917. The trial court agreed with the State, viewing the evidence as an attempt to assert a defense of mental disease or defect. 272 Kan. 918. The trial court noted that if the notice not been withdrawn, the State could have had the defendant examined by a psychiatrist of its own choosing to rebut the evidence. 272 Kan. 918. The Kansas Supreme Court found that the district court erred when it did not allow the expert to express his opinion as to whether the defendant experienced a blackout at the time of the offenses. 272 Kan. 921.

The court relied on its previous decision in In re Habeas Corpus Petition of Mason, 245 Kan. 111, 113, 775 P.2d 179 (1989). Kleypas, 272 Kan. 920. In Mason, the Court granted the petitioner=s request for a writ of habeas corpus, on the grounds that the district court erred when it declared a mistrial in his first trial, rendering his second trial a violation of his Fifth Amendment right against double jeopardy. The trial court had granted the State=s motion for mistrial, after defense counsel, in opening, told the jury that the defendant was unable to form intent to commit the crimes charged because of his alcohol consumption and the fact that he was experiencing a blackout. Counsel for the defense proposed to offer expert testimony on the effects of alcohol abuse after a period of sobriety, as well as the effects of the medications that the defendant was taking. The district court agreed with the State that defense counsel=s opening was improper and required a mistrial because the defense had not filed a notice that it was presenting an insanity defense under K.S.A. 22-3219. The Kansas Supreme Court disagreed, first noting that the defendant is

only required to give notice, under Kansas law, when asserting the defense of insanity and the defense of alibi. 245 Kan. 112. The court distinguished insanity from voluntary intoxication, holding that the *temporary* mental incapacity produced by voluntary intoxication is not insanity. The court noted that an instruction on insanity might be required where continued use of intoxicants leads to a *permanent* impairment. The court stated:

> To hold that evidence of a temporary mental condition caused by voluntary intoxication requires the defense to plead insanity would be to abolish the distinctions between the two defenses clearly laid out by statute and our cases. No notice of an insanity defense is required where the evidence points only to a temporary mental state negating specific intent caused by the voluntary consumption of alcohol. The trial court thus erred in declaring a mistrial.

245 Kan. 114.

In reaching this conclusion, the Court relied on State v. Seely, 212 Kan. 195, 197, 510 P.2d 115 (1973)(mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense does not reach the level of insanity) and State v. James, 223 Kan. 107, 110, 574 P.2d 181 (1977)(an insanity defense may be warranted where the continued use of intoxicants leads to permanent mental deterioration or disease). See, State v. Sappington, 285 Kan. 158, 164-165, 169 P.3d 1096 (2007)(Imposing an Aarguably inconsistent@ voluntary intoxication defense on defendant who was proceeding under mental disease or defect defense would deny defendant meaningful opportunity to present his theory of defense).

The Kansas Supreme Court's decision rests in part on state law, and this Court normally "defer[s] to the decisions of state courts on issues of state law…" Bush v. Gore, 531 U.S. 98, 112 (2000)(concurring opinion of Chief Justice Rehnquist, joined by Justice Scalia and Justice Thomas). This Court has held that state courts are the ultimate expositors

of state law and that it is bound by their constructions except in extreme circumstances. Mullaney v. Wilbur, 491 U.S. 684, 691 (1975).

Additionally, this Court has held that the individual states are generally free to craft their own legislation for dealing with criminal prosecutions of the mentally ill. In Clark v. Arizona, 548 U.S. 735 (2006), this Court determined that due process did not prohibit the state of Arizona from narrowing its insanity test, from the traditional *M'Naughten* standard to an abbreviated form which applies only to the defendant who, due to a mental disease or defect, did not know that his act was wrong. 548 U.S. 747-749. In holding that the Arizona legislation did not offend due process, this Court found that the *M'Naughten* formula was not a fundamental principle "so as to limit the traditional recognition of a State's capacity to define crimes and defenses." 548 U.S. 749.

The Petitioner asserts as well that the decision of the Kansas Supreme Court conflicts with the decisions of federal circuit courts in United States v. Curtis, 328 F.3d 141 (4th Cir. 2003); Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988); and United States v. Halbert, 712 F.2d 388 (Cal. 1983). However, the decision in this case can be reconciled with Curtis and Halbert. Both those cases involve federal prosecutions under federal law, and the federal rules of criminal procedure.

Under federal law, the traditional *M'Naughten* standard provides a potential defense for those suffering from mental disease or defect. This provides a broader defense than Kansas law:

> **(a) Affirmative defense.**--It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

> **(b) Burden of proof.**--The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C.A. § 17.

The corresponding procedural rules likewise provide for notice and discovery in a broader set of circumstances:

> **(a) Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
>
> **(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.

Federal Rules of Criminal Procedure, Rule 12.2. (emphasis added).

Under subsection (c)(1)(B) of that statute, the prosecution may then request, and the court order, an examination of the defendant. Under the federal rules, therefore, which require notice of "any other mental condition of the defendant," Mr. Cheever was required to give notice that he would introduce evidence regarding his voluntary intoxication, because it was a mental condition bearing on his guilt, even though it did not constitute a mental disease or defect.

Under Kansas law, the mental disease or defect defense is more narrow, as are the corresponding procedural rules.

Schneider v. Lynaugh, presents a different situation, involving a state prosecution in which the reviewing court approved the admission of psychiatric testimony from the

competency evaluation, during a sentencing proceeding, to rebut the testimony of drug treatment counselors that the defendant was capable of rehabilitation. 835 F.2d 571. It is respectfully submitted that the Schneider case stretches the holding of Buchanan beyond recognition, as none of the counselors were psychologists or psychiatrists, none of them offered an opinion regarding insanity or diminished capacity or any mental disease or defect. The Schneider court opined that the defendant had put his mental state at issue with psychological evidence, despite the fact that none of the witnesses professed to be psychologists, and did not attempt to offer evidence of any psychological condition. Rather, they testified that they believed he was sincere in his desire to reform. 835 F.2d 575 -577. This was not a holding required by Buchanan, and Mr. Cheever asserts that the Kansas Supreme Court can follow Buchanan while rejecting Schneider.

Finally, the petitioner argues that, contrary to the Kansas Supreme Court's factual finding, Mr. Cheever's expert witness relied on Dr. Welner's evaluation in reaching his opinion and that therefore, the State should have been allowed to call Dr. Welner in rebuttal. The petitioner claims that defense counsel "stipulated" that Dr. Evans relied on Dr. Welner's report. (Petition, page 28). That is not the case. The prosecutor, when arguing that Dr. Welner should be allowed to testify, misrepresented to the court that Dr. Evans testified that he relied on Dr. Welner's report. Defense counsel compounded the error by agreeing with the prosecutor:

> 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.

(Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 61).

Contrary to the prosecutor's assertion, Dr. Evans made no mention of Dr. Welner in his testimony during direct examination. He testified, during cross-examination, that he did *not* view the video of Dr. Welner=s interview with Scott and that he had *not* read a transcript of the interview. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 30). He reviewed a neuropsychological evaluation conducted by Dr. Randall Price. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 35, 49). It was Dr. Price=s evaluation that he used in forming his own opinions. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 50). He testified that he *may* have seen a report that Dr. Welner prepared, but did not indicate, in any way, that he relied on it in forming his own opinion. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 40). The factual findings of the Kansas Supreme Court on this issue are well-supported by the record.

4. There are independent and adequate state grounds to sustain the decision of the Kansas Supreme Court.

Even if the Kansas Supreme Court erred in finding that Mr. Cheever did not waive his Fifth Amendment rights when he offered his defense of voluntary intoxication, the evidence adduced in this case went far beyond rebuttal. Dr. Welner did not confine his testimony to the effects of methamphetamine on Mr. Cheever at the time of the crime. Dr. Welner testified that the crimes in this case were committed because Mr. Cheever idolized outlaws, particularly those who engaged in fatal shoot-outs with police officers, wished to outdo other outlaws and aspired to an outlaw lifestyle. Portions of the testimony in question

are reproduced in Mr. Cheever's supplement to the factual statement. The erroneous admission of that evidence would still require reversal under Kansas law.

As already noted in this brief, Mr. Cheever made this argument in the Kansas Supreme Court, but the court did not reach it. It provides an independent reason for finding that the admission of Dr. Welner's testimony requires reversal of Mr. Cheever's conviction under state law.

The trial court had initially ruled that the State could use Dr. Welner to rebut Scott=s defense, but warned the prosecutor to Astay targeted on debugging the voluntary intoxication defense.@ (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 61). The prosecutor then argued that he should be allowed to go beyond rebuttal and offer the State=s theory of the case, through Dr. Welner: Ahe=s going to ultimately say most of these actions can be explained by his antisocial personality, rather than by intoxication, which directly rebuts their defense.@ (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 62). The defense protested that the proposed testimony would clearly be beyond the scope of their evidence. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 62). The court decided to allow the testimony, noting that the defense had preserved its objection. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 64).

Should this Court find that by offering evidence of his intoxication, Mr. Cheever waived his Fifth and Fourteenth Amendment rights to the extent required to rebut this evidence, the trial court=s ruling that Dr. Welner could testify that Mr. Cheever committed these crimes because of his bad character, erroneously allowed the prosecution to go beyond proper rebuttal. An involuntary intoxication defense does not, under Kansas law, open the door to evidence of character disorders or, more simply, bad character.

Rebuttal evidence, under Kansas law, is limited to issues placed in conflict by the adverse party. State v. Drach, 268 Kan. 636, 645, 1 P.3d 864 (2000). Rebuttal evidence is that which is presented to deny some fact an adverse party has attempted to prove or has placed in dispute. State v. Burnett, 221 Kan. 40, 43, 558 P.2d 1087 (1976). It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. State v. Willis, 240 Kan. 580, 583, 731 P.2d 287 (1987).

In Kansas, evidence of the defendant=s character is not admissible unless the defendant places his character in issue by offering evidence of good character. K.S.A. 60-447(b); State v. Stokes, 215 Kan. 5, 6-7, 523 P.2d 364 (1974). Neither Mr. Cheever, nor any of his witnesses, placed his character in issue. Mr. Cheever did not offer testimony that he was law-abiding, peaceful, or non-violent. To the contrary, he admitted a history of drug abuse and law violations. This did not open the door to Dr. Welner=s testimony that the crimes occurred because of Mr. Cheever's bad character.

In this case, Dr. Welner did not merely attempt to Adebug@ the voluntary intoxication defense. He told the jury that it was his professional opinion that Mr. Cheever shot Sheriff Samuels and shot at the other law enforcement officers because he had chosen to be an Aoutlaw,@ in other words, a criminal, and that he wanted to outdo all the other outlaws. At this point Dr. Welner was testifying to his opinion that Mr. Cheever was a bad person. His testimony, that Mr. Cheever was not sad about or preoccupied with Sheriff Samuels= death or others affected by it and that he failed to mention violence as a consequence of his use of methamphetamine, exacerbated the prejudice. He portrayed Mr.

Cheever as not only a person of bad character, but a person of bad character with no remorse for his actions.

Such evidence is, under Kansas rules, inadmissible unless the defendant has placed his or her character in issue:

> Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) **in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge under K.S.A. 60-445 if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character.**

K.S.A. 60-447 (emphasis added). See, State v. Sweat, 30 Kan.App.2d 756, Syl. & 10, 48 P.3d 8 (2002)(AIn order for K.S.A. 60-446 and K.S.A. 60-447 to apply, a person's character or a trait of a person's character must be in issue.@). Mr. Cheever testified in his defense, but did not place his character in issue by his testimony. See, State v. Stokes, 215 Kan. 5, Syl. & 1, 523 P.2d 364 (1974)(AA witness who testifies to such identifying biographical data as place of birth, education, address, marital status, length of residence in the community and employment history, does not through such testimony alone place his character in issue.@).

As previously noted, should this Court reverse the decision of the Kansas Supreme Court, Mr. Cheever will seek further review on this issue. The Kansas Supreme Court has independent and adequate state grounds on which to find reversible error in the admission of Dr. Welner's testimony. This Court has stated that its power "is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and

if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125–126 (1945). It is likely any decision in this case on the federal issue will not change the result of Mr. Cheever's direct appeal. This Court should decline jurisdiction.

5. The Kansas Supreme Court did not decide whether evidence from a court-ordered mental evaluation can be used to impeach the defendant's trial testimony. There is no question to adjudicate.

Finally, the petitioner argues that this case presents a question of whether statements used in a court-ordered evaluation can be used to impeach the defendant's trial testimony, asserting a division in authority. The Kansas Supreme Court did not reach that issue:

> 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.

Cheever, 284 P.3d 1025.

This Court does not ordinarily "decide in the first instance issues not decided below." Zivotofsky ex rel. Zivotofsky v. Clinton 132 S.Ct. 1421, 1430 (2012), *citing* National Collegiate Athletic Assn. v. Smith, 525 U.S. 459, 470 (1999). This Court should decline jurisdiction on this issue.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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