No. 12-609

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

This Court's cases establish that, just as a defendant cannot choose to testify and then use the Fifth Amendment as a shield to preclude cross-examination, he cannot present expert testimony about his mental state and use the Fifth Amendment to immunize that testimony from rebuttal. Importantly, whether the Court calls the defendant's tactical decision to present expert testimony a "waiver" or simply defines the Fifth Amendment to prevent distortion of the adversarial process, the bottom line is the same: where a defendant leads, the government must be able to follow.

Cheever's response brief ("Resp.") makes three primary arguments: (1) Dr. Welner's testimony exceeded the proper "scope" of rebuttal regarding whether Cheever's methamphetamine usage affected his mental-state the day of the murder, Resp. 13-25; (2) Cheever's presentation of expert testimony on the effects of his methamphetamine usage (short- and long-term) did not open the door to the State responding with Welner's rebuttal testimony, Resp. 25-48; and (3) Cheever could not have made a "knowing and voluntary" waiver of his privilege because he subjectively believed his Kansas-law "voluntary intoxication" defense would not open the door to Welner's testimony. Resp. 48-55.

Cheever is wrong on all three claims. **First**, the Court need not and should not decide the "scope" argument for three reasons: the Kansas Supreme Court never addressed Cheever's "scope" claim; Cheever argued in his opposition to certiorari that the scope

issue was an independent and adequate state law ground supporting the Kansas court's decision, Cert. Opp. 21-24; and this Court generally does not affirm state court judgments *on state law grounds*. Furthermore, even if the "scope" claim is treated as a federal question and this Court addresses it, all of Welner's testimony was proper rebuttal. His testimony was either essential to a proper psychological evaluation given Cheever's mental-state claims, a direct response to previous testimony by Dr. Evans or Cheever,[1] or both.

Second, Cheever's argument that there is no "waiver" of his Fifth Amendment privilege when he asserts "voluntary intoxication" and presents expert mental-state testimony in support of that defense relies heavily on selective statements in *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984), that question the "waiver" theory. What Cheever ignores, however, is that *Byers* relied on this Court's decisions to *hold* the State was entitled to respond to expert mental-state evidence with evidence from a court-ordered mental examination. Indeed, *Byers* expressly rejects Cheever's main argument: when a defendant argues his mental state "as the reason why he should not be punished for murder, and introduces psychiatric testimony for that

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[1] Although this Court granted certiorari only on the first question presented in the Kansas petition, Cheever's "scope" argument tries to ignore all that occurred at trial before Welner ever testified in rebuttal: (1) Cheever testified at trial before either expert; (2) Cheever's own direct testimony addressed the "outlaw" territory he now complains about; and (3) letters Cheever had written from jail (discussing his "outlaw" lifestyle) already had been introduced into evidence.

purpose, the state must be able to follow where he has led." 740 F.2d at 1113.

Furthermore, to the extent Cheever suggests a "waiver" is limited to affirmative defenses, his argument cannot be squared with this Court's decisions and would be utterly unworkable. Despite Cheever's assertion that he agrees state-law labels do not control the question presented, Resp. 1, he in fact seeks to make the Fifth Amendment's scope depend on state law definitions.

Third, Cheever's argument that his waiver was not "knowing and voluntary" suffers from many of the same flaws as his "no waiver at all" argument. He would make the Fifth Amendment's scope turn on a defendant's subjective knowledge of state law, and in so doing make the analysis depend on the variations in the laws of the States. Furthermore, if the true basis for permitting the State to follow "where the defendant has led" is to prevent distortion of the adversarial process, as this Court's cases and *Byers* indicate, then what matters is what the defendant chooses to do—his objective actions—not what he subjectively believes.

For all of these reasons, Cheever's arguments fail to justify the Kansas Supreme Court's erroneous Fifth Amendment decision.

ARGUMENT

I. CHEEVER'S ARGUMENT THAT DR. WELNER'S TESTIMONY EXCEEDED THE SCOPE OF PROPER REBUTTAL IS NOT ONE THIS COURT SHOULD OR NEED DECIDE AND, IN ANY EVENT, IS MERITLESS.

There is no good reason for this Court to address or consider Cheever's lead argument that Welner's testimony exceeded the scope of proper rebuttal. There are, however, several compelling reasons for the Court not to waste its time and effort on that argument. *See* Part I.A. below. Further, even if the Court were to address the argument, it fails on the merits. *See* Part I.B. below.

A. This Court Need Not And Should Not Decide The "Scope" Issue.

Cheever's argument that Dr. Welner's testimony exceeded the proper scope of rebuttal is a curious way to begin his defense of the decision below. **First**, as Cheever acknowledged in his certiorari opposition (Cert. Opp.), the Kansas Supreme Court never decided this issue: "Mr. Cheever made this argument in the Kansas Supreme Court, but the court did not reach it." Cert. Opp. 21; *see also id*. at 5, 7, 10-11.

Second, contrary to his current assertions that the scope issue is a question of federal law, *see* Resp. 15-16, Cheever argued against granting certiorari by repeatedly characterizing this issue as one of state evidentiary law. *See* Cert. Opp. 20-23. Cheever stated

that "should this Court reverse the decision of the Kansas Supreme Court, Mr. Cheever will seek further review on this issue," *id*. at 23, urging the Court to deny certiorari because the "Kansas Supreme Court has independent and adequate state grounds on which to find reversible error in the admission of Dr. Welner's testimony." *Id*. Only now, in a desperate effort to pull a rabbit out of the hat does Cheever suggest the "scope" issue is actually a federal question. The Court should reject Cheever's merits brief bait-and-switch.

Although this Court has the power to decide *federal* issues raised but not decided below, the Court generally does not use that authority to decide *state law* issues.[2] Ultimately, Cheever's "scope" argument is not properly before the Court.

B. Dr. Welner's Testimony Was Proper Rebuttal Because He Testified Only To Issues Relevant To Cheever's Mental-State Claim And Facts To Which Cheever And Dr. Evans Already Had Testified.

Even if the Court treated Cheever's "scope" argument as raising a federal question and decided to address this claim (which was not addressed below), Cheever's complaints fail on their merits. **First**, Welner engaged in proper psychiatric practice when he

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[2] "If the Court does assume jurisdiction of a case because of a federal question decided in state court, it will generally not proceed further and consider separate questions of state law. *Murdock v. Memphis*, 20 Wall. 590 (1875)." Eugene Gressman, *et al*., *Supreme Court Practice*, at 226 (9th ed. 2007).

evaluated Cheever's methamphetamine use and its potential effect on Cheever's mental state by considering other causes for Cheever's actions the day of the murder. Furthermore, Welner never said that Cheever had an antisocial personality, nor did he render such a diagnosis. **Second**, Cheever himself, as well as Evans, addressed Cheever's fascination with the "outlaw lifestyle." In fact, letters Cheever had written from jail describing himself as an "outlaw" were in evidence before Welner testified. **Finally**, both Cheever and Evans testified specifically about Cheever's version of events regarding the murder.

1. *The Antisocial Personality Claim Is A Red Herring*.

Cheever's argument that Welner suggested antisocial personality disorder as the cause of Cheever's actions is a mischaracterization. Resp. 22. Welner never testified that Cheever suffered from a personality disorder, nor that such a disorder explained Cheever's actions. What he said was that he "considered" a personality disorder as one of many possible explanations. J.A. 132-33.[3]

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[3] Cheever's brief nowhere quotes Welner as actually stating an opinion that Cheever had an "antisocial personality disorder" or even an "antisocial personality." Instead, Cheever only points to statements by prosecutors that they thought Welner would talk about antisocial personality disorder (the entire discussion between prosecutors and the trial court is at J.A. 89-94), and he then asserts "Welner *began* by explaining that one possible diagnosis he considered was antisocial personality disorder." Resp. Br. 22 (citing J.A. 133) (emphasis added). Welner's testimony, however, begins at J.A. 95, forty pages earlier, and Welner *never*

Welner explained he was asked to "assess the relationship of methamphetamine and Scott Cheever's use of it on January 19th, 2005, to his killing Mathew Samuels." J.A. 111. He framed the question as "here's a person who made a choice, which has now brought him trouble, is that something that only happens to people who use methamphetamine or does it happen under other circumstances …." J.A. 132.

Accordingly, Welner reasonably considered multiple circumstances that might have affected Cheever's mental state. Cheever apparently suggests that all Welner could do was evaluate the question "was Cheever affected by methamphetamine or not?" without considering what else might have influenced Cheever's actions. But that is an extraordinarily narrow definition of proper "scope" for rebuttal and flies in the face of "judicial common sense." *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984).

Instead, Welner considered multiple possible explanations for Cheever's actions. J.A. 132-33. Evans opined that Cheever's decisions resulted from using methamphetamine, not other possibilities. J.A. 47-52. Welner responded to Evans' opinion by considering other possible causes, and rejecting methamphetamine usage as *the* cause of Cheever's decision to shoot Sheriff Samuels. Contrary to Cheever's assertions now, Welner's testimony did not include any diagnosis or

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uses the term "antisocial personality disorder" in his testimony. When Welner very briefly discussed personality disorders it was as the fifth of six possible causes he considered for Cheever's behavior. J.A. 131-133.

assertion that Cheever suffered from antisocial personality disorder.

2. *Testimony Regarding Cheever's Fascination With Outlaws Was Proper.*

Cheever's complaint that Welner discussed Cheever's fascination with an "outlaw lifestyle," thereby "smuggl[ing] in character evidence," Resp. 23 is similarly flawed. Cheever's love of "outlaws" was first introduced into the case by Cheever in his direct testimony, when he tried to explain and downplay letters he had written from jail boasting about his exploits and claiming the mantle of "outlaw." (Tr. of Jury Trial, Vol. IV, p. 77-80.)

Furthermore, Evans testified that his evaluation considered Cheever's social history, J.A. 59-60, including Cheever's idolization of and identification with outlaws. J.A. 59-60, 71-72. The prosecutor asked Evans: "In fact, the defendant thought of himself as an outlaw, didn't he?" and Evans answered, "Yes." J.A. 59. Evans also agreed that Cheever idolized outlaws before he ever used methamphetamine, J.A. 60, but he opined Cheever's methamphetamine use, not his social history, was to blame for the murder. J.A. 47-53.

Welner thus was the third witness, not the first, to discuss the "outlaw" evidence. Long before Welner took the witness stand, the jury had heard about Cheever's "outlaw" fascination from both Cheever and Evans. There was no "smuggling" of compelled character evidence; indeed, Cheever first introduced the subject, and Welner's rebuttal was proper.

3. *Cheever And Dr. Evans Both Testified About Cheever's Account Of The Murder.*

Cheever complains that "Welner offered what amounted to a first-person narrative of the shooting from Cheever's perspective," Resp. 21, allegedly forcing Cheever "to testify in detail through the mouthpiece of a state expert." *Id*. at 24. Cheever again fails to acknowledge both that he and his expert had testified at length to Cheever's version of the crime before Welner testified. Even were the merits of this claim before the Court, it is manifest that Welner did not "force" Cheever to tell Cheever's story through Welner. Instead, Welner at most covered ground over which the defendant and his expert already had trod. Furthermore, Welner's rebuttal testimony directly responded to Evans' opinion that Cheever's account of the murder showed that Cheever had no "executive function" when he shot the sheriff and instead acted as a result of methamphetamine-induced paranoia. J.A. 49.

II. WHEN A DEFENDANT INTRODUCES EXPERT MENTAL-STATE EVIDENCE AT TRIAL, THE STATE MAY FOLLOW WHERE THE DEFENDANT HAS LED.

This Court's decisions lead inexorably to the conclusion that where a defendant has led, the State must be permitted to follow. Only such an approach will ensure meaningful adversarial testing of disputed issues before a jury. That long has been the rule when a defendant testifies at trial. The same justifications for holding the Fifth Amendment does not protect a testifying defendant apply with equal force when a

defendant uses expert testimony to support a mental-state defense.

Cheever essentially makes four arguments regarding the Question Presented in the petition: (1) his statements to Dr. Welner were "compelled," and thus cannot be used for any purpose, Resp. 26-28; (2) he should not be required to choose between constitutional rights (self-incrimination and the right to present a defense), making a "waiver" analysis improper, Resp. 27-36; (3) equitable and practical arguments do not support the rule the State seeks, Resp. 37-42; and (4) any "waiver" the Court recognizes should be limited to *affirmative defenses* the defendant interposes at trial. Resp. 42-48. Cheever's arguments fall short on all counts.

A. Introducing Dr. Welner's Testimony Did Not Violate The Fifth Amendment.

1. *Cheever voluntarily participated in the interview with Dr. Welner.*

In arguing that his statements to Welner were compelled and not admissible for any purpose, Cheever ignores his own starring role in the way this case unfolded, including his decision to file a notice in federal court that initiated his mental examination. At bottom, Cheever's argument that his examination was "compelled" and thus cannot be used for any purpose is really an argument that Fed. R. Crim. P. 12.2 is unconstitutional, because every examination under Rule 12.2 is authorized by court order.

When Cheever's counsel filed notice in the federal proceeding that Cheever intended to assert the defense of voluntary intoxication, Pet. App. 69-71, counsel had to have known the notice would result in a court-ordered mental examination. Furthermore, Welner began the interview by informing Cheever that he could discontinue the examination at any time, J.A. 115, and there was no threat of any criminal sanction (such as perjury or contempt charges) if Cheever chose not to cooperate.

Thus, Cheever was not "compelled" to participate in the interview with Welner in the way the Fifth Amendment cases contemplate; he did not face the "cruel trilemma" of self-incrimination, perjury or contempt. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The only consequence of withdrawing from the interview was that Cheever would not be permitted to introduce expert evidence at trial to support his mental-state defense.

Thus, for Fifth Amendment purposes, Cheever's interview with Welner was not "compelled," even if it was court-ordered. Never in any proceeding here has Cheever faced the "cruel trilemma." Cheever was the one who knowingly and voluntarily triggered the court order by filing notice under Fed. R. Crim. P. 12.2. If examinations ordered under Rule 12.2 are "compelled" for Fifth Amendment purposes, then according to Cheever their use by the government is barred for *all purposes*, thus nullifying the very reason for Rule 12.2.

2. *Cheever was not required to make an unconstitutional choice*.

Cheever's tactical decision to use an expert to serve as a mouthpiece for conveying Cheever's account of the crime at trial readily equates to the choice of a defendant to testify on his own behalf. Finding the Fifth Amendment privilege does not apply in this situation "is supported by the long line of Supreme Court precedent holding that the defendant in a criminal or even civil prosecution may not take the stand in his own behalf and then refuse to consent to cross-examination. The justification for this similarly 'coerced' testimony is precisely that which we apply to [expert testimony in support of a mental-state defense]." *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir. 1984). This Court long has recognized the "safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do." *Raffel v. United States*, 271 U.S. 494, 499 (1926).

Cheever argues that he is being forced to make an unconstitutional choice between his privilege against self-incrimination and his right to present a defense, but "demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *Williams v. Florida*, 399 U.S. 78, 84 (1970). Cheever invokes *United States v. Simmons*, 390 U.S. 377 (1968), which held the government could not use in its case-in-chief incriminating statements the defendant made in a pretrial suppression hearing where he unsuccessfully challenged the legality of a

luggage search. *Simmons*, however, provides Cheever no refuge.

In *Simmons*, the Court barred the government from using the evidence in its case-in-chief, but the Court "has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial." *United States v. Salvucci*, 448 U.S. 83, 93-94 (1980). A number of lower courts have held that such evidence is admissible for *impeachment* purposes. *E.g.*, *Gray v. State*, 403 A.2d 853 (Md. 1979); *People v. Sturgis*, 317 N.E.2d 545 (Ill. 1974). *See also Woody v. United States*, 379 F.2d 130, 131–132 (D.C. Cir. 1967) (Burger, J.).

The same considerations that justify admitting such evidence for impeachment apply with equal force to rebuttal. If the Fifth Amendment is not a license to shield a defendant's perjurious statements at trial, it should not be a license to use an expert to present the defendant's untested statements through the expert's testimony about the defendant's mental state. When a defendant provides an interview and information to his expert, he does so with the expectation and hope that his expert will rely upon and necessarily disclose their discussion in the expert's trial testimony. Thus, it is no stretch to hold that a defendant effectively "testifies" at trial through his mental-state expert.

"[T]he core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial." *United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality). That protection is not invaded when a defendant either directly or through his expert *chooses*

to testify. Indeed, the Clause does not provide immunity from adversarial testing of evidence the defendant injects into the trial, and that includes expert mental-state evidence. A contrary conclusion would distort the adversarial process. *See* Part II.A.3 below.

Even accepting for the sake of argument that it is a "fiction" to say "when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights," *Byers*, 740 F.2d at 1113, the bottom line remains the same:

> All of these theories are easy game, but it is not sporting to hunt them. The eminent courts that put them forth intended them, we think, not as explanations of the genuine reason for their result, but as devices—no more fictional than many others to be found—for weaving a result demanded on policy grounds unobtrusively into the fabric of law.

Byers, 740 F.2d at 1113. Whether courts have described the reason for this result "as the need to maintain a 'fair state-individual balance,'" "a matter of 'fundamental fairness,'" "or merely a function of 'judicial common sense,'" they "have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability." *Id*.

3. *Meaningful rebuttal requires that the State's expert have access to the defendant.*

Cheever asserts that the government can always test and challenge a mental-state defense *without examining the defendant*. Resp. 40-42. But his argument contradicts judicial common sense: "Ordinarily the only effective rebuttal of psychiatric testimony is contradictory opinion testimony; and for that purpose … [t]he basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject." *Byers*, 740 F.2d at 1114. Cheever's cavalier suggestion finds no support in precedent.[4]

In *Estelle v. Smith*, this Court recognized that when a defense expert formulates his opinion by relying on the defendant's own explanation of his mental state, especially recollections involving the crime itself, the defendant's "silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." 451 U.S. 454, 465 (1981). The Court also pointed to an American Psychiatric Association brief which informed the Court that "absent a defendant's willingness to cooperate … a psychiatric examination in these circumstances would be meaningless." *Id*. at 456 n. 8. These themes run throughout an unbroken line of the Court's

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[4] Nor does the argument find support in the practices of the mental health professions: "A comprehensive examination on issues of insanity, automatism, or diminished capacity necessitates detailed inquiry into the defendant's thoughts and actions during the time period of the crime." Gary B. Melton, et al., *Psychological Evaluations for the Courts* 4:02(b), at 72 (3d ed. 2007).

decisions involving mental-state issues in criminal cases, decisions in which the Court consistently emphasizes the importance of providing lay juries with the information and opinion testimony necessary to evaluate defendants' mental-state claims.

In *Ake v. Oklahoma*, the Court considered "the pivotal role that psychiatry has come to play in criminal proceedings," 470 U.S. 68, 79 (1985), and recognized that "[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Id*. at 81. Nonetheless, "juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." *Id*. As a result, *Ake* held that the State in some cases must pay for a psychiatric expert for an indigent defendant, precisely because, by "organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth …." *Id*.

Buchanan v. Kentucky, 483 U.S. 402 (1987) and *Powell v. Texas*, 492 U.S. 680 (1989), also recognize these principles, as discussed in the State's opening brief, Kansas Br. 20-21, 27, 43, a discussion not repeated here. Cheever, however, seeks to undermine rather than further the fundamental truth-seeking

purpose emphasized in this unbroken line of cases. He proposes to do so by hamstringing the State's ability to put a defendant's mental-state evidence to meaningful adversarial testing. The result of Cheever's proposal would be distortion of the adversarial process, a result the Fifth Amendment does not require.

B. Limiting Rebuttal To Affirmative Defenses Is Contrary To Precedent And Would Make The Fifth Amendment's Scope Turn On State-Law Labels.

Cheever's proposal to limit any "waiver" to the assertion of *affirmative defenses* flies in the face of the Court's cases. Further, it makes no sense in light of the Fifth Amendment's purposes and it ignores the realities of psychiatric testimony. On top of that, Cheever's suggestion would import state-law labels into the analysis, even though he "agrees that state-law labels do not determine the Fifth Amendment's scope." Resp. 1.

Cheever's main argument in support of his distinction is that the federally required proof beyond a reasonable doubt requirement, *In re Winship*, 397 U.S. 358 (1970), applies only to the elements of state-law crimes, not affirmative defenses, so by analogy his Fifth Amendment privilege can be overcome with respect to an affirmative defense, but not for elements of the crime. The analogy is inapt. In the burden of proof situation, the Court takes state substantive criminal law as a given and simply overlays it with a general federal procedural requirement.

In this case, the issue is not a general burden of proof requirement. Rather, the question is what evidence is available to the State to meet its burden. The key is not what "defense" the defendant is raising, but that he is introducing expert testimony to support his mental-state claim, whatever the nature of that claim. There is no reason to resort to state-law labels in determining the Fifth Amendment's scope here.

Nor do this Court's mental-state cases support the distinction Cheever attempts to draw. *Buchanan* speaks in very general terms about a defendant opening the door to rebuttal evidence when "he requests such an evaluation or presents psychiatric evidence …." 483 U.S. at 422. Likewise, *Estelle* indicates the Fifth Amendment does not protect a defendant who attempts to introduce "psychiatric evidence." 451 U.S. at 468. Neither case suggests rebuttal evidence would be limited to situations involving "an affirmative defense." *Penry v. Johnson*, 532 U.S. 782 (2001), effectively rejects such a distinction, upholding the State's use of evidence from a court-ordered mental examination to rebut a defendant's mental-state argument regarding *a sentencing factor*, not an affirmative defense.[5]

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[5] The only case Respondent really cites in support of his distinction is *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), a case that at most opined there might be "serious—and as yet undecided—constitutional questions" if a court ordered a psychiatric examination under Rule 12.2 when the defendant intends to present expert mental-state testimony but not an affirmative defense like insanity. *Id*. at 1295.

Cheever also argues "[w]hether evidence is admissible does not vary depending on when in the trial the state seeks to introduce it." Resp. 46. Such a statement is false, because numerous decisions of this Court hold otherwise. *See, e.g.*, *Kansas v. Ventris*, 556 U.S. 586 (2009) (collecting and summarizing the cases). The Court frequently has drawn a distinction between the government using unlawfully obtained evidence in its case-in-chief (a use that is barred) and using the evidence for rebuttal or impeachment (a permitted use). The Court has done so for the very reasons the distinction is warranted here – to preclude defendants from gaming the adversary process to present the jury with an incomplete, distorted or false picture.

Furthermore, here there is even less reason to bar Welner's rebuttal testimony than the evidence at issue in *Ventris* and similar cases. Here, unlike those cases, there was no unlawful conduct whatsoever in obtaining the evidence Cheever now challenges. Cheever has never claimed that Welner's examination of him was unconstitutional, nor could he do so unless he is asserting that Fed. R. Crim. P. 12.2(c) is unconstitutional.[6] That Welner's examination was available to Kansas in this state prosecution may have been a fortuitous result of the procedural history of

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[6] Rule 12.2(c) was amended in 2002 to make clear it authorizes court-ordered examinations in "cases where the defendant is not relying on an insanity defense, but intends to offer expert testimony on the issue of mental condition," Advisory Committee Note (2002), in order to reflect the prevailing view that a "defendant waives the [Fifth Amendment] privilege if the defendant introduces expert testimony on his or her mental condition." *Id*.

Cheever's prosecution, but the State did nothing unlawful to obtain that evidence.

III. CHEEVER'S PROPOSED ANALYSIS FOR DETERMINING WHETHER HE KNOWINGLY WAIVED HIS FIFTH AMENDMENT PRIVILEGE IS UNWORKABLE AND WOULD LEAD TO ARBITRARY RESULTS.

Cheever's final argument is that his waiver was not "knowing and voluntary." Resp. 48-55. That argument suffers from the same legal flaws as his prior arguments, as well as factual flaws based on the record. Most fundamentally, this Court has made clear that when a defendant takes the stand and testifies, his waiver is presumptively (indeed, irrefutably) "knowing and voluntary"; the Court does not inquire into what he subjectively believed. There is no good reason to adopt a completely different analysis here.

Cheever again argues that state-law rules control the Fifth Amendment's scope in determining whether he made a knowing waiver of his rights. Resp. 52-53. But using state law as the baseline for determining waiver will only result in a hopelessly complicated and likely confusing analysis that may well create different results in different states on similar facts, even though the fundamental constitutional question remains the same: when a defendant puts on mental-state evidence, is the State entitled to follow where the defendant has led?

A fundamental flaw in Cheever's argument is his misapprehension of the nature and purpose of the

Court's resort to state law in limited categories of cases. These limited situations ultimately lead back to the proposition that the Court permits the States by and large to define crimes for purposes of applying general rules of federal criminal procedure, such as requirements that each element be proven beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), or jury trials be available for serious charges. *Baldwin v. New York*, 399 U.S. 66 (1970).

But that is far different than what Cheever proposes here. Cheever is seeking to use state law to create a federal-law shield from adversarial testing of a defense that he affirmatively introduced into a state trial. Kansas law, however, cannot have informed Cheever whether or not presenting Evans' expert testimony waived Cheever's Fifth Amendment privilege – only federal law could tell Cheever that. The Fifth Amendment, not Kansas law, determines the question presented.

Furthermore, even accepting Cheever's flawed analytical approach, his argument fails on the merits here. He repeatedly labels his defense "voluntary intoxication," but his own expert testified at length about the *long-term* effects of methamphetamine use on Cheever, opining that such use could cause *permanent* effects. A Kansas court reasonably could conclude that such evidence effectively raised a "mental disease or defect" defense that permitted a court-ordered mental examination under Kansas law. Even if the Kansas Supreme Court ultimately disagreed with that

assessment, it nonetheless was a plausible argument at the time Cheever decided to present his defense.[7]

The few cases Cheever cites involving defendants misled by state officials about their rights, Resp. 52-53, are inapposite. In each case, an official in a position of power affirmatively and falsely assured the defendant that there would be no adverse consequences from speaking. Here, by contrast, no Kansas official ever suggested to or assured Cheever that raising his mental-state defense would not subject him to the possibility of a court-ordered mental examination or the State's use of such an examination in rebuttal. *Cf. United States v. Lall*, 607 F.3d 1277, 1283-84, 1290 (11th Cir. 2010) (officer told defendant during initial encounter that any information defendant shared would not be used to prosecute him; when defendant sat for a more formal interview, the officer told him he did not need a lawyer and the officer "wasn't going to be charging him with any of this"); *United States v. Walton*, 10 F.3d 1024, 1030-31 (3d Cir. 1993) (officer told defendant—who had attended school with the officer, wrestled in the same program, and who had no reason to know he was under criminal investigation—that "I've known you for a long time. If you want, you can tell us what happened off the cuff.");

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[7] Further, when Cheever testified (before either Evans or Welner), the State asked to use statements Cheever made to Welner to impeach Cheever. The trial court ruled in the State's favor, making clear that Welner was a proper rebuttal witness for Evans as well. (Vol. IV, Tr. 120-121). Even if Cheever believed those rulings were error (and even if they were), the result was Cheever knew in advance that if he put Evans on the stand, the State could respond with Welner in rebuttal.

United States v. Dohm, 618 F.2d 1169, 1175 (5th Cir. 1980) (en banc) (judge told the defendant that any statements made might be used against him, "but I don't know how it can be done. Technically, they won't use it ….").

Nor does *Halbert v. Michigan*, 545 U.S. 605 (2005), help Cheever. In *Halbert*, the question was whether there is a Sixth Amendment right to appointed counsel on appeal from a guilty plea; until *Halbert* was decided, this Court had not recognized such a right. When the state argued the defendant had waived the right in any event, the Court was skeptical a defendant could knowingly waive a right which federal law had not yet recognized. Here, by contrast, Cheever has always known he has a Fifth Amendment privilege against self-incrimination, and there was an unbroken line of precedent (from *Estelle v. Smith* (1980) through *Penry v. Johnson* (2001)), establishing that a defendant who presents expert testimony to support a mental-state defense loses that privilege.[8]

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[8] Moreover, it is not clear that *Halbert* actually relied on state law at all in concluding there was no "waiver." The Court relied on two grounds: (1) the defendant "had no recognized right to appointed appellate counsel that he could elect to forgo," 545 U.S. at 623; and (2) the trial court did not tell the defendant "that in his case there would be no access to appointed counsel." *Id*. at 624. In a footnote the Court suggests state law was irrelevant to the waiver decision. *See id*. at 623 n. 7 ("Assuming, as Justice Thomas suggests, that whether Michigan law conferred on Halbert a postplea right to appointed appellate counsel is irrelevant to whether Halbert waived a federal constitutional right to such counsel," there is no waiver).

Cheever's last-ditch waiver argument is a state-law claim dressed in poorly-fitting federal clothes. If Cheever is correct the trial court misread Kansas law when it admitted Welner's testimony (and he is not), then he must seek a remedy, if available, in the Kansas courts, not here.

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Only by misreading or ignoring an unbroken line of this Court's decisions, by relying on Kansas-law labels to determine the Fifth Amendment's scope, and by arguing to distort the adversarial process can Cheever and his *amici* contend that the Kansas Supreme Court correctly found a Fifth Amendment violation. Instead, where a defendant has led the State must be permitted to follow. No constitutional values are undermined by upholding the State's use of an expert who conducted a court-ordered mental examination of Cheever to rebut the mental-state defense Cheever himself injected into this case. Such values, however, would be undermined by the result Cheever seeks.

CONCLUSION

The State of Kansas respectfully requests that the Kansas Supreme Court's decision be reversed.

Respectfully submitted,

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