No. 17-6252

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT D. CHEEVER - PETITIONER

VS.

STATE OF KANSAS - RESPONDENT

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

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSTION

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I. The first question presented was pressed and passed on below and it is properly before this Court.

This Court has held that under 28 U.S.C. § 1257, the Court has no jurisdiction over a federal question that has not been pressed or passed on by the state court below. *Illinois v. Gates*, 462 U.S. 213, 217–18, 76 L.Ed. 2d 527, 103 S.Ct. 2317 (1983). This rule, operates "in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41, 118 L.Ed. 2d 352, 112 S.Ct. 1735 (1992).

The first question presented was raised below.

The first question presented in the Petition for Writ of Certiorari is: Does the prosecution's use of the defendant's compelled statements, given during a court-ordered psychiatric evaluation, to impeach or rebut the defendant's trial testimony violate the defendant's Fifth Amendment privilege against self-incrimination?

In its first review of this case, this Court noted that Petitioner had argued that the testimony in question, if not inadmissible in its entirety, exceeded constitutional limitations. This Court declined to address that question because it had not been decided by the Kansas Supreme Court. *Kansas v. Cheever*, ___ U.S. ___, 187 L.Ed. 2d 519, 134 S. Ct. 596, 603 (2013).

On remand to the Kansas Supreme Court, in his supplemental briefing, Petitioner argued again that the testimony in question exceeded constitutional limitations. He argued that the results of the court-ordered examination could be used *only* to rebut his expert psychiatric testimony that methamphetamine intoxication rendered him unable to premeditate or form the intent to kill. He argued that Dr. Welner's testimony labeling him a remorseless outlaw with aspirations to kill law enforcement officers, and purporting to narrate the crimes from his point of view were far beyond the limited rebuttal allowed under *Buchanan v. Kentucky,* 483 U.S. 402, 97 L.Ed.2d 336, 107 S.Ct. 2906 (1987). He supported his argument with cases from this Court discussing the scope of the Fifth Amendment and waiver of Fifth Amendment protections, as well as cases from federal and state courts. The relevant portion of Petitioner's supplemental brief on remand is reproduced as an Appendix to this reply.

This argument, that the results of the examination may be used only to rebut the mental status defense, encompasses the argument that those results may not be used for impeachment of or rebuttal to the defendant's trial testimony. If the first proposition is true, the second proposition is true as well.

The Petitioner did not specifically argue that the results of the compelled examination could not be used to impeach or rebut his testimony, because it was neither offered nor admitted at trial for that purpose. As already set out in his Petition for Writ of Certiorari, the prosecutor offered Dr. Welner's testimony, describing Petitioner as an aspiring "outlaw" with aspirations to kill law enforcement officers, and insinuating that he had anti-social personality disorder, to promote the state's theory of prosecution. The trial court allowed its admission on those grounds.

This issue was ruled on below.

In its modified opinion of July 20, 2017, the Kansas Supreme Court approved admission of all Dr. Welner's testimony:

> On remand, we asked the parties to address the scope-of-rebuttal issue. Briefs were received and arguments heard. After consideration, we hold that Welner's testimony, while questionable in form, did not, in substance, exceed the proper scope of rebuttal, either **constitutionally** or under state evidentiary rules. We further hold that none of the remaining issues raised on appeal require reversal or remand, and, accordingly, we affirm Cheever's convictions and sentences.

State v. Cheever, ___Kan. ___, 402 P.3d 1126, 1132 (2017)(emphasis added).

> ***Proper Rebuttal Testimony***
>
> Cheever's objections to the content of Welner's testimony revolve primarily around Welner's statement that Cheever emulated an outlaw lifestyle and his alleged implication that Cheever had an antisocial personality disorder. Taking as our standard both the guidance set out in the United States Supreme Court's decision and our own oft-stated rubric for reviewing challenges regarding the appropriate scope of rebuttal, see, *e.g.*, *State v. Sitlington*, 291 Kan. 458, 464, 241 P.3d 1003 (2010) (trial judge has broad discretion in determining use, extent of relevant evidence in rebuttal), we hold that the trial judge's admission of Welner's testimony was within the broad discretion granted him.
>
> First, and significantly, our measure of the appropriate scope of rebuttal in this case must take into account not just the testimony presented by Cheever's expert on the topic of his methamphetamine intoxication, but also Cheever's own

> testimony concerning his past use of the drug and the events leading to and constituting the crimes. Much of Welner's testimony concerning details of the crimes, and Cheever's actions constituting them, was responsive to Cheever's own testimony. Having taken the stand, Cheever opened himself to rebuttal testimony just as he opened himself to cross-examination concerning both the substance of his testimony and his credibility as a witness. *Cheever*, 134 S.Ct. at 601.

State v. Cheever, 402 P.3d 1132–34.

Although the Kansas Supreme Court provided no federal analysis, the court clearly stated that Dr. Welner's testimony did not exceed constitutional limitations and used Petitioner's decision to testify as the rationale. This holding rejected Petitioner's Fifth Amendment argument that the compelled examination could be used only to rebut the mental status defense.

Throughout this appeal, there has been a "real contest" as to whether the evidence derived from the compelled examination must be limited to rebutting the mental status defense. See *Morrison v. Watson,* 154 U.S. 111, 14 S.Ct. 995, 138 L.Ed. 927 (1894)(no jurisdiction over holding of state court when there had never been a real contest upon the point). By finding the evidence admissible to impeach or rebut the defendant's trial testimony, the Kansas Supreme Court has answered that question with a "no." The issue is properly before this Court.

II. Petitioner did not introduce the subject of an "outlaw lifestyle," rather he responded to evidence introduced by the prosecution.

The Respondent has argued that the Petitioner introduced the subject of an "outlaw lifestyle" and that Dr. Welner's testimony on that subject was a proper response: "For example, the 'outlaw lifestyle' evidence began with Cheever's direct testimony when his

counsel asked him questions regarding some letters he had written while in jail in which he boasted of his exploits and his status as an outlaw." Brief in Opposition, page 10. "Indeed, Cheever himself introduced the outlaw topic into the trial. When Dr. Welner subsequently took the stand, that topic was a proper subject for his comments." Page 11-12. "Cheever himself initially broached the 'outlaw' subject and then admitted on cross-examination, without objection, that he liked to think of himself as an outlaw and idolized outlaws. … Cheever opened the door to that subject and then his own expert discussed it." Page 12.

These assertions are not true.

The letters referred to by the Respondent were introduced by the Respondent, during its case in chief. (R. XXIV, 138, 145, R. XXVI, 77-78). On cross-examination, the Respondent used the letters to obtain admissions from the Petitioner that, when he wrote them, he was "a pretty wild guy," and a bad boy who liked to think of himself as an outlaw and idolized the outlaw image. (R. XXVI, 86-88). It was the Respondent who pursued the "outlaw" theme throughout cross-examination:

> Q. And you told Crystal Mackey, "They don't know I'm a shy, quiet guy without a pistol."
>
> A. Yes, sir.
>
> Q. Is that how you see yourself without a pistol, shy and quiet?"
>
> A. Pretty much.
>
> Q. And with a pistol you're what?
>
> A. I don't know.

Q. What?

A. I don't know.

Q. An outlaw?

A. I suppose.

Q. Is that how you see yourself with a pistol?

A. Back then, yes.

Q. Mike Gilligan?

A. No, sir.

Q. You the outlaw of Greenwood County?

A. No, sir.
(R. XXVI, 142-143).

And:

Q. You shot the sheriff 'cause you considered yourself an outlaw?

A. No, sir.

Q. And that's what outlaws do?

A. No, sir.

Q. They shoot the sheriffs, don't they?

A. Outlaws, yes, sir.

Q. And you considered yourself an outlaw?

A. Somewhat, yes, sir.

Q. And you honored Mike Gilligan by the tattoo on your face?

A. Yes, sir.

Q. You told your friends you're "an outlaw till they bury me"?

A. Yes, sir.
(R. XXVI, 147-148).

Petitioner's expert, Dr. Evans, did not testify on direct about this alleged outlaw fascination or Petitioner's character. Rather, on cross-examination the prosecutor introduced these topics. It was the prosecutor who obtained Dr. Evan's agreement that Petitioner was a risk-taker and that he thought of himself as an outlaw, and idolized outlaws. (R. XXVII, 31-34). It was the prosecutor who asked the witness about grandiosity and bravado. It was the prosecutor, who, over defense objection that he was exceeding the scope of direct, continued to ask questions about Petitioner's bravado, as demonstrated by his letters from jail. (R. XXVII, 44-45). It was the prosecutor who introduced the topic of personality disorders:

> Q. In your report you say violence is not unusual for methamphetamine addicts. That's what you said, correct?
>
> A. Yes.
>
> Q. It's also not unusual for somebody with an antisocial personality, correct?
>
> A. True.

(R. XXVII, 45).

The Respondent did not, through Welner's testimony, expand on or address themes introduced by the Petitioner. Welner's testimony was used to buttress the evidence that the Respondent introduced through cross-examination.

Respectfully submitted,

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Date: November 15, 2017

APPENDIX

Supplemental Issue No. I: Dr. Michael Welner's rebuttal testimony exceeded the scope of testimony permitted by the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights.

Introduction and Standard of Review

When a defendant offers testimony, from an expert who has examined him, in support of a mental state defense, the prosecution may rebut that testimony with evidence obtained from the defendant during a court-ordered evaluation. The use of the defendant's compelled statements does not violate the defendant's right against self-incrimination, as long as the evidence is limited to rebuttal. In this case, the prosecution dramatically exceeded that limit when it used Scott Cheever's compelled statements to establish a motive for the crimes charged, prove his bad character and construct a moment-by-moment recreation of the events in question, purportedly from Scott's point of view. Scott's expert witness testified that his methamphetamine use impaired his ability to premeditate, and form the intent to kill. The State's expert disagreed, responding that Scott was thinking clearly. Then, the expert further testified that Scott was a remorseless sociopath, who idolized outlaws and sought to emulate those who killed law enforcement officers. Finally, the expert became a fact witness, stepping into Scott's shoes at the time of the shootings and narrating his actions and thoughts from a first person point of view. This testimony far exceeded the limited rebuttal allowed by the Fifth Amendment for compelled statements as well as Section 10 of the Kansas Constitution Bill of Rights.

The admission of expert testimony is usually reviewed for abuse of discretion. State v. Brice, 276 Kan. 758, 775, 80 P.3d 1113 (2003). However, "[a] district court by definition abuses its discretion when it makes an error of law.... The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." State v. White, 279 Kan. 326, 332, 109 P.3d 1199 (2005) (quoting Koon v. United States, 518 U.S. 81, 100, 135 L.Ed.2d 392, 116 S.Ct. 2035 [1996]).

When the issue concerns a claimed violation of the defendant's Fifth Amendment right against self-incrimination, this Court reviews any factual findings made by the district court using a substantial competent evidence standard, but the ultimate legal conclusion is reviewed as a question of law using an unlimited standard of review. State v. Carapezza, 293 Kan. 1071, 1080, 272 P.3d 10 (2012)(Carapezza II).

Discussion

When a defendant raises a mental status defense and offers expert testimony in support of that defense, he waives his rights against compelled self-incrimination under the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights only to the issues raised by his evidence.

In a Kansas courtroom, the defendant's right against self-incrimination is protected by both the Fifth Amendment to the United States Constitution ("No person ... shall be compelled in any Criminal Case to be a witness against himself.") and Section 10 of the Kansas Constitution Bill of Rights ("No person shall be a witness against himself."). The purpose of both provisions is to prohibit the compelling of self-

incriminating testimonial or communicative acts from a party or witness. Bankes v. Simmons, 265 Kan. 341, 349, 963 P.2d 412 (1998). The Fifth Amendment – and thus Section 10 - is implicated when the prosecution uses the defendant's disclosures during a court-ordered psychiatric examination as evidence against him. Estelle v. Smith, 451 U.S. 454, 463-465, 466, 68 L.Ed.2d 358, 101 S.Ct. 1866 (1981).

As the Supreme Court noted in Cheever, under its previous decision in Buchanan, the defendant's compelled statements made during a psychiatric evaluation are admissible for a limited rebuttal purpose.

> …where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the *limited* purpose of rebutting the defendant's evidence.

134 S.Ct. 603 (emphasis added).

In Buchanan, the defendant raised the affirmative defense of extreme emotional disturbance. In support of this defense, he called a social worker who read from several reports and evaluations of the defendant's mental condition, made prior to the crime. Buchanan, 483 U.S. 408-409. On rebuttal, the prosecution had the witness read from a court-ordered evaluation conducted after his arrest. 483 U.S. 410-411. The Supreme Court approved the admission of this testimony, finding that when a defendant presents psychiatric evidence, the prosecution may rebut it with psychiatric evidence. 483 U.S. 422-423. The Court noted that the evidence was limited to the psychiatrist's general observations about the defendant's mental state, "but had not described *any* statements by petitioner dealing with the crimes for which he was charged. The introduction of such a

report for this limited rebuttal purpose does not constitute a Fifth Amendment violation." 483 U.S. 423-424. Buchanan suggests that when the defendant raises a mental status defense, and offers expert testimony on the subject, he waives his Fifth Amendment rights *only* on the subjects that he has placed in issue and not to any of his statements or communications regarding the crimes charged.

Two years after Buchanan, the Supreme Court decided Powell v. Texas, 492 U.S. 680, 683-686, 106 L.Ed.2d 551, 109 S.Ct. 3146 (1989). Powell concerned the defendant's Sixth Amendment rights, rather than Fifth, in the context of a court-ordered mental evaluation. However, in that decision, the Court reaffirmed that the Fifth Amendment waiver occasioned by the admission of expert testimony in support of a mental status defense is limited to the issues raised by the defendant's evidence, stating, "Nothing in [*Estelle v. Smith*], or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial." 492 U.S. 686, fn 3. See, Gibbs v. Frank 387 F.3d 268, 274 (3rd Cir. 2004)(under Buchanan and Powell, the waiver that accompanies a mental status defense is not limitless: "it only allows the prosecution to use the interview to provide rebuttal to the psychiatric defense.")

The waiver occasioned by the defendant's introduction of psychiatric evidence is similar to the waiver occasioned by the defendant's decision to testify. See, Battie v. Estelle, 655 F.2d 692, 701–02 (5th Cir.1981)("the introduction by the defense of psychiatric testimony constitute[s] a waiver of the defendant's Fifth Amendment privilege

in the same manner as would the defendant's election to testify at trial."). United States Supreme Court decisions hold that the waiver that occurs when the defendant testifies reaches only to subjects placed in issue by his evidence. In Harrison v. United States, 392 U.S. 219, 222, 20 L.Ed.2d 1047, 88 S.Ct. 2008 (1968), the Court noted that "[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination *with respect to the testimony he gives*…" 392 U.S. 222 (emphasis added). In Brown v. United States, 356 U.S. 148, 154-155, 2 L.Ed.2d 589, 78 S.Ct. 622 (1958), the Court stated that, when a defendant testifies, the scope of his waiver of his Fifth Amendment rights "is determined by the scope of relevant cross-examination." The defendant cannot claim that the Fifth Amendment gives him immunity from cross-examination "on the matters he has himself put in dispute." 356 U.S. 155-156.

In Fitzpatrick v. United States, 178 U.S. 304, 315-316, 44 L.Ed. 1078, 20 S.Ct. 944 (1900), the Court distinguished between cross-examining a defendant regarding the content of his testimony (permissible under the Fifth Amendment) and compelling a defendant to present original evidence against himself (not permissible under the Fifth Amendment):

> Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. … he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. …

> If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State* v. *Lurch*, 12 Or. 99, 6 Pac. 408, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. *State* v. *Saunders*, 14 Or. 300, 12 Pac. 441, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.

The United States Supreme Court has not defined the limits of the Fifth Amendment waiver occasioned by the mental status defense, but several other courts have confronted the question.

In United States v. Williams, 731 F.Supp.2d 1012, 1016 -1024 (D.Hawai'i 2010), a federal district court considered the question of the proper scope of psychiatric rebuttal testimony obtained from a compelled psychiatric examination conducted under Federal Rule 12.2(b). The defendant had filed notice that he planned to offer a mental status defense, specifically that he suffered from BIF (borderline intellectual functioning), and the parties disagreed as to the proper scope of the Government's examination. The defendant argued that the Government's doctors should be limited to testing the defendant for BIF, while the Government contended that its experts should be allowed to identify and testify to any other possible motive, condition or disease that might have caused the defendant to kill the victim. 731 F.Supp.2d 1016. The court held that the Government's witnesses should be limited to rebutting the mental status evidence and should not be allowed to ascertain other possible motives for the defendant's actions. 731 F.Supp.2d 1017.

The court noted that "When a defendant raises a defense that relies on an expert examination of his mental condition, the Fifth Amendment does not protect him from being compelled to submit to a *similar examination* conducted on behalf of the prosecution or from the introduction of evidence from that examination for the purpose of *rebutting* the defense." 731 F.Supp.2d 1017 (emphasis in the original). The court defined the issue in the case as "what it means 'to rebut the defense.'" 731 F.Supp.2d 1018.

The court stated "It is well founded that when a defendant waives his Fifth Amendment right against self-incrimination by voluntarily providing testimony in his own defense, he does so only on the matters raised by his own testimony on direct examination." 731 F.Supp.2d 1018. The court observed that the Government had provided no case law holding that when a defendant raises a mental status defense he opens the door to allow the prosecution to assert diagnoses or defects other than to rebut those specifically placed at issue by the defendant. 731 F.Supp.2d 1019.

The court specifically prohibited the Government's experts from going beyond rebutting the defendant's evidence of BIF or asserting that the defendant was suffering from psychosis or antisocial personality disorder and that either of these conditions caused him to commit the charged acts. The court explained:

> The Government may *rebut* Defendant's mental status defense, not *prosecute* based upon Defendant's mental health.

731 F.Supp.2d 1020 (emphasis in original).

The court also considered whether the Government would be allowed to admit, during the guilt phase, evidence obtained by one of the Government doctors using a "psychopathy checklist," while trying to determine if the defendant suffered from antisocial personality disorder. 731 F.Supp.2d 1021. The Government had argued that if the expert could determine that the defendant killed the victim because he was a psychopath, or had antisocial personality disorder, this could be used to rebut his defense that, due to his BIF, he could not form the intent to cause pain to the victim. 731 F.Supp.2d 1022. The court repeated, "Here, any diagnosis which requires a broader examination of Defendant, or *which is used to assert a theory of prosecution* not just to rebut the Defendant's mental status defense, is inadmissible." 731 F.Supp.2d 1022 (emphasis added). The court found "not tenable" the Government's argument that evidence that the defendant is a psychopath or has antisocial personality disorder is appropriate to rebut his evidence of low intelligence or brain damage. 731 F.Supp.2d 1023. The court found that the use of the psychopathy checklist exceeded the scope of an examination necessary to rebut the assertion of BIF and not admissible at trial. 731 F.Supp.2d 1024.

The federal district court reached a similar conclusion in United States v. Taylor, 320 F.Supp.2d 790, 791 (N.D. Ind. 2004). In Taylor, the defendant notified the prosecution that he planned to present expert evidence, during a potential penalty phase, regarding his mental condition and developmental history, specifically with regard to substance abuse, and that his expert had performed certain tests regarding substance

abuse. The defendant objected to the testing proposed by the prosecution. 320 F.Supp.2d 791-792. Those tests were the Minnesota Multiphasic Personality Inventory, the Personality Assessment Inventory, the Millon Clinical Multiaxial Inventory, and the Interview Schedule for the Psychopathy Checklist, Revised. The defendant argued that those tests were designed to detect personality disorders, not mental conditions related to substance abuse, and that the prosecution's testing should be limited to substance abuse. He asserted that his notice was not an open door for every type of mental testing. The court agreed, finding that, due to questions about its reliability, the Psychopathy Checklist would not be allowed at all, and that the other tests could be utilized, only to the extent that the tests related to substance abuse, and that the prosecution would be barred from introducing any evidence outside mental health testing related to substance abuse. 320 F.Supp.2d 794 -795.

In Wilkens v. State, 847 S.W.2d 547 (Tex.Crim.App.1992) the court recognized that under Buchanan, when a defendant raises an insanity defense and offers psychiatric evidence in support, he waives his Fifth Amendment rights as to the State's use of psychiatric evidence in rebuttal. However, the court then limited the waiver, finding that the waiver did not allow the admission of testimony on the issue of future dangerousness in the penalty phase, obtained from that examination, when the defendant did not offer psychiatric testimony on that subject. 847 S.W.2d 551-552. The court stated:

> In *Buchanan,* the Supreme Court emphasized that the Fifth Amendment was not violated by admission of psychiatric or psychological evidence for a "limited rebuttal purpose." See *id.,* 483 U.S. at 425, n. 21, 107 S.Ct. at 2919, n. 21, 97

> L.Ed.2d at 357, n. 21. It therefore follows that when such evidence is admitted to prove one of the special issues upon which the State bears the burden of proof, it will violate the Fifth Amendment unless it is restricted to rebuttal.

847 S.W.2d 553.

See also, Centeno v. Superior Court, 117 Cal.App.4th 30, 45, 11 Cal.Rptr.3d 533 (Cal.App. 2 Dist.,2004)(while a defendant who tenders his mental condition as an issue is subject to examination by prosecution experts, the examinations are permissible only to the extent they are reasonably related to the determination of the existence of the mental condition raised by the defendant).

Finally, Scott would note that Dr. Welner's examination was conducted in the federal prosecution, under Federal Rule of Criminal Procedure 12.2. (R. XXVII, 58). That rule limits the use of the defendant's compelled statements to issues on which the defendant has introduced evidence:

> **(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
>
> **(B)** has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

Just as the defendant's election to take the witness stand and testify acts as a waiver of his Fifth Amendment privilege with regard to the issues raised by his testimony, the defendant's election to present expert testimony, in support of a mental

status defense, from a witness who has examined him, acts as a waiver of his privilege with regard to the issues raised by that expert's testimony. It does not, in the words of Fitzpatrick, allow the prosecution to compel the defendant to "furnish original evidence against himself." Or, as held in Wilkins, this waiver does not allow the State to use the evidence obtained through the compelled examination to prove facts upon which the State bears the burden of proof.

Evidence in support of Scott's claim of impairment due to voluntary intoxication did not act as a waiver of his Fifth Amendment and Section 10 rights with regard to evidence of a character disorder, bad character or lack of remorse, and such evidence was improperly admitted.

In the first Cheever decision, this Court observed that Dr. Welner's testimony was "extensive and devastating," noting in particular that "[h]e characterized Cheever as a person who had chosen an antisocial outlaw life style and who was indifferent to the violence he had committed." Cheever, 295 Kan. 256. This highly prejudicial evidence should not have been admitted, because it exceeded the scope of the waiver of Scott's Fifth Amendment and Section 10 rights that occurred when he offered expert testimony on the subject of methamphetamine intoxication.

Scott objected when the State called Dr. Welner in rebuttal, and when questioned about the nature of Dr. Welner's proposed testimony, the prosecutor admitted that he was offering the witness not only to rebut the evidence of intoxication, but to support and advance a theory of prosecution:

MR. LIND: He's going to say that he examined Mr. Cheever and that Mr. Cheever has an antisocial personality, which would take into account these actions and explain his actions on that day. And that he's going to say he looked at the possibility of intoxication as a defense. He's going to explain Mr. Cheever's movements that day and his actions with regard to more in line of someone with an antisocial personality rather than someone who was intoxicated. It directly rebuts their defense of intoxication.

(R. XXVII, 58-59).

and

MR. LIND: I am, Your Honor. We intend to go through his evaluation of Cheever, because he evaluated him - he didn't go in and say, "I'm looking at one item." He went in and said, "I'm looking at Mr. Cheever to see what's here."

So he's going to talk about things that he both counted and discounted, but he'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.

MR. EVANS: I don't think Evans presented any psychological view of antisocial personality. He talked about meth, Judge, and how meth, you know, affects an individual and how he thinks it affected Cheever, **so I think to go into antisocial personality disorder and psychological testing is clearly beyond the scope of what we presented.**

(R. XXVII, 62)(emphasis added).

THE COURT: I think the State certainly is entitled to rebut the involuntary intoxication defense. I'm not arguing that point. But I'm just kind of thinking to myself, I mean I don't know what his report says, I've never been provided his report. And I don't know how extensive his contacts with Mr. Cheever were. I guess I'm going to hear that he conducted lengthy interviews and did battery of tests on him.

MR. DISNEY: And ultimately, I mean, it will rebut the involuntary intoxication, which is why he's coming along to say that, no, this wasn't a result of involuntary intoxication.

THE COURT: His bottom line basically is he did these things because of his antisocial personality, not because his brain was impaired by methamphetamine?

MR. DISNEY: Exactly.

MR. LIND: Yes.

THE COURT: Well, I think your point is well made, I mean in terms of preserving it for the record, Mr. Evans. I will allow the State to proceed at this point with their expert witness.

(R. XXVII, 63-64).

As promised, the State asked Dr. Welner to provide "alternative explanations, including diagnoses," which would account for Scott's actions. (R. XXVII, 65, 81). Dr. Welner explained that during his five and one half hour interview with Scott he administered a "Personality Assessment Inventory," "to account for the range of possibilities, both diagnostic, relating to his psychiatric diagnosis, or relating to his personality and his qualities..." (R. XXVII, 84, 88).

He testified that Scott committed these crimes because he had a personality disorder, because he had chosen to be an outlaw, and because he wanted to outdo the outlaws that he admired:

> ...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, 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.

(R. XXVII, 104-106).

On cross-examination Dr. Welner testified that Scott was dependent on methamphetamine in January, 2005, but "he was making decisions in keeping with priorities that he had established for himself." (R. XXVII, 127). He stated, "I 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." (R. XXVII, 127-128).

Dr. Welner went even further afield from rebutting the intoxication defense when he testified that Scott had no remorse for Sheriff Samuels' death. Under the guise of relating Scott's mental status at the time of their interview he testified that Scott had

"...no sign of depression, no sign of sadness, no sign of preoccupation with the event or its consequences or other people affected by it..." (R. XXVII, 86). He returned to a lack of remorse theme 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 - 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.

(R. XXVII, 106-107).

Evidence that Scott had a bad character or character disorder, that he idolized and wished to emulate or outdo other outlaws, particularly those who engaged in fatal shootouts with police officers, and that he felt no remorse for Sheriff Samuels' death, bore no relation to Scott's evidence that his ability to premeditate and form intent was impaired by methamphetamine intoxication. Scott's waiver of his Fifth Amendment and Section 10 rights did not extend to these subjects and the evidence was admitted in violation of his federal and state constitutional rights against self-incrimination.

As the federal court noted in Williams, the State may use the results of a compelled examination to rebut the defendant's mental status defense, but may not prosecute based upon that examination. As the Supreme Court found in Fitzpatrick, the defendant who takes the witness stand waives his Fifth Amendment rights with regard to the issues raised by his testimony, but he still may not be compelled to furnish original evidence against himself, by being required to answer questions which exceed the scope of his testimony. In this case, the State used Dr. Welner's opinion that Scott wanted to be an outlaw who engaged in fatal shootouts with the police to establish motive. As this Court observed in State v. Carapezza, 286 Kan. 992, Syl. ¶¶ 4, 191 P.3d 256 (2008)(Carapezza I), although motive and intent are not identical, the State may seek to admit evidence of motive to explain why a defendant may have committed a crime. Here, the State used Scott's compelled examination to support and advance its theory of the case: Scott cherished a long-held ambition to engage in a fatal shoot out with law enforcement officers and seized the opportunity to fulfill it when Sheriff Samuels and his deputies arrived at Hilltop. Then the State garnished its theory with Dr. Welner's testimony that Scott had no remorse for his actions.

Evidence in support of Scott's claim of lack of the ability to premeditate or form intent due to voluntary intoxication, did not act as a waiver of his Fifth Amendment and Section 10 rights with regard to his statements about details of the crimes charged, and Dr. Welner's first person narrative of the crime was improperly admitted.

In Buchanan, when finding that the psychiatrist's report was properly used in rebuttal, the Supreme Court was careful to note that the report did not describe any statements by the defendant concerning the crimes charged. 483 U.S. 423-424. This is consistent with earlier decisions from federal courts that distinguish the prosecution's right to obtain information about the defendant's mental status from the defendant, when he raises a mental status defense, and the right to obtain information about the crime itself from the defendant. For example, in United States v. Albright, 388 F.2d 719 (C.A.W.Va. 1968), the defendant was compelled to undergo a psychiatric evaluation after interposing a defense of temporary insanity. The federal court of appeals found no Fifth Amendment violation, but observed,

> The manifest purpose of the examination in this case was, and the proper objective of a mental examination in any criminal case where a defendant's sanity is in issue should be, to obtain knowledge not about facts concerning defendant's participation in the criminal acts charged, but about facts concerning a defendant which are themselves material to the case…. The purpose is not to prove by evidence wrested from a defendant whether he is guilty as charged but, rather, to prove whether a defendant possesses the requisite mentality to be guilty as charged, assuming that his guilt is otherwise established, or whether, legally, he cannot be held criminally responsible, irrespective of what other proof may establish he has done.

388 F.2d 723.

Similarly, in United States v. Reifsteck 535 F.2d 1030 (C.A.Mo. 1976) the defendant presented an insanity defense and the court allowed the admission of evidence regarding her mental condition based on observations psychiatrists made of her during a court-ordered stay at a mental hospital. The court found the defendant's right against self incrimination had not been violated because the testimony was limited to the doctors'

clinical impressions of her mental state at the time of the offense and no one testified with regard to any incriminating statements that she made. The court stated: "We emphasize that admission of psychiatric testimony on the issue of sanity at the time of the offense which included statements of the accused relating to guilt would raise serious self-incrimination questions." 535 F.2d 1034, FN 1.

In State v. Bush, 191 W.Va. 8, 10, 442 S.E.2d 437, 439 (1994) the defendant, charged with a double murder, raised a voluntary intoxication defense. At trial, he objected, on Fifth Amendment grounds, to the admission of testimony from two witnesses who performed psychological evaluations on him at the request of the prosecution. In rejecting this claim the court noted that "neither expert revealed any incriminating statements the defendant may have made to them in regard to the commission of the murders. They only testified as to the defendant's mental status and his self-reported drug use." 442 S.E.2d 439. The West Virginia court also noted its previous decision that, in order to prevent constitutional violations, the court-ordered evaluator should exclude, in his or her testimony, any specific statements that a defendant made regarding the charged offense. Because neither witness testified about the murders, what led up to the murders, or any of the defendant's statements about the murders, the admission of the testimony did not violate the defendant's right against self-incrimination.

In this case, Dr. Welner described the events in question themselves in great detail, narrating them from Scott's point of view. This Court characterized this portion of Dr. Welner's testimony in the following manner:

> 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.

Cheever, 295 Kan. 256.

The United States Supreme Court also took particular note of Dr. Welner's narrative: "In an extended soliloquy, Dr. Welner narrated the crime from Cheever's perspective…" Cheever, 134 S.Ct. 603, FN3.

Dr. Welner's first person narrative, told from Scott's point of view, *if accurate*, could have only been based on details of the crimes provided by Scott during his compelled examination:

> 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 then 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.

(R. XXVII, 101-102).

As explained in the next section, Dr. Welner took events that occurred at different times (Scott heard the police arrive, Matthew Denny jumped out the window) and placed them together in his narrative, (I hear the police but I don't jump out the window like Matthew Denny) thus misleading the jury. But, assuming each event occurred, although not in the sequence presented in the narrative, details regarding Scott's perceptions, which could have only come from Scott, were, like evidence regarding Scott's character, outside the scope of the Fifth Amendment and Section 10 waivers occasioned by Scott's evidence regarding voluntary intoxication. Although his voluntary intoxication defense opened the door to questions about his state of mind at the time in question, it did not open the door to admission of Scott's compelled statements regarding the crimes in question. Likewise, his voluntary intoxication defense did not open the door for Dr. Welner to transform himself into a fact witness and testify, as if he were present, to the events of the day in question. Scott retained his Fifth Amendment and Section 10 rights with regard to details of the crimes charged.

In Traywicks v. Oklahoma, 927 P.2d 1062, 1065 (Okla.Crim.App.1996) the court held that a defendant may be compelled to answer questions about his mental health when he raises an insanity defense, but a constitutional violation may occur if compelled to reveal details of the crime itself. The defendant was on trial for the murder of his wife. At the time of the killing, the defendant was intoxicated. He raised mental

defect/alcoholism as a defense, and called several experts to testify regarding his mental condition at the time of the incident. The state's mental health expert testified that he asked the defendant about the murder, and that the defendant refused to answer any questions about the incident itself. 927 P.2d 1063. On appeal, the defendant argued that this testimony constituted a Doyle violation. 927 P.2d 1063 -1064. See, Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976)(prosecutorial comment on defendant's post-arrest silence violates defendant's Fifth Amendment rights). The Oklahoma court agreed, finding that the prosecution should not have been allowed to question the defendant, then the expert, about his refusal to answer questions about the murder itself. 927 P.2d 1065. The court found that when a defendant raises the issue of insanity, the prosecution may rebut the defense with the results of a compelled mental health examination, but that the insanity defense does not grant the prosecution *carte blanche* in examining the defendant. 927 P.2d 1065. The court stated:

> …while the defendant may be compelled to answer questions about his mental health, **a constitutional violation may occur if the defendant is compelled to reveal details of the crime itself to the State's mental health expert**. This distinction makes sense. The State needs the mental health evidence to rebut the insanity defense, and it seems logical that raising that defense waives the defendant's right to silence as to those mental health issues. However, evidence of the crime itself is a distinct and different question from the issue of mental illness. **Accordingly, the defendant retains the right to assert his Fifth Amendment privilege as to the details of the crime**. Of course, the defendant could waive his privilege to remain silent as to the details of the crime, but that waiver would have to be done knowingly and voluntarily after the administration of *Miranda* warnings.

927 P.2d 1065 (emphasis added).

See also, Lewis v. Oklahoma, 970 P.2d 1158, 1171 (Okla.Crim.App.1998) ("when a defendant raises an insanity defense he waives his Fifth Amendment right to silence regarding mental health issues but he does not waive his right to remain silent regarding the details of the crime.")

Similarly, in Shepard v. Bowe, 250 Or. 288, 442 P.2d 238 (1968), the defendant raised an insanity defense to a charge of leaving the scene of an injury accident. The trial court ordered a mental evaluation, and further ordered the defendant to answer the evaluator's questions about his actions or conduct with regard to the offense. 442 P.2d 239. The Oregon Supreme Court reversed the lower court, finding that despite his insanity plea, the defendant retained his right against self incrimination and the only way to preserve that right was to hold that the defendant could not be compelled to answer those questions. 442 P.2d 240-241.

In Collins v. Auger, 577 F.2d 1107 (C.A.Iowa 1978), the defendant underwent an evaluation to determine his competency to stand trial on a charge of assault with intent to commit rape. During the evaluation, the defendant confessed to the crime charged to the psychiatrist who was evaluating him. On collateral review, a federal district court found that the admission of the defendant's confession to the psychiatrist, as part of the prosecution's case to establish his guilt, violated his due process rights. 577 F.2d 1108. The appellate court agreed finding:

> The defendant is entitled to raise his mental condition at the time of the offense as a defense. He is also entitled, under proper circumstances, to an examination to determine his competency to stand trial. Psychiatric examinations are essential to

> the proof of his mental condition. An indigent must seek a court order authorizing the examination and the payment of its cost. If the giving of a Miranda warning satisfied requirements of the Fifth Amendment and the Fourteenth Amendment and made the defendant's incriminating admissions admissible, the defendant would be placed in a situation where he must sacrifice one Constitutional right to claim another.
>
> If a defendant cooperated with the psychiatrist and made a full disclosure of his thinking processes and his background, including incriminating statements and if he failed to establish his lack of mental capacity, he would be faced with these admissions on trial. If a defendant exercised his right to remain silent and refused to cooperate with the psychiatrist the likelihood of a meaningful and reliable examination would be considerably decreased and his opportunity to urge a possible defense thwarted. A defendant should not be compelled to choose between exercising his Fifth Amendment right not to incriminate himself and his due process right to seek out available defenses.

577 F.2d 1109 -1110.

Scott's expert, Dr. Evans, did not testify as to Scott's psychological make-up, his character, his actions surrounding the crimes charged or his feelings about the impact of his actions. (R. XXVII, 5-57). The trial court's determination that Scott's expert's testimony opened the door for this type of evidence constituted an abuse of discretion because it was based on an error of law and guided by erroneous legal conclusions, that the mental status defense allowed the State *carte blanche* to introduce any evidence obtained during the compelled examination.