No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

RYAN PETERSEN, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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January 19, 2021

CAPITAL CASE

QUESTION PRESENTED

After pleading not guilty by reason of mental disease or defect, the trial court ordered Petitioner Ryan Petersen to be evaluated by a court-appointed expert, chosen by the prosecution. At the outset of the evaluation, the expert misinformed Mr. Petersen that"**none of the information could be used as evidence against him concerning his guilt on any charge**." Despite this assurance, the State called this expert to testify against Mr. Petersen at the culpability phase of his capital trial and the entire contents of his report, including the results of Mr. Petersen's competency evaluation, were admitted into evidence.

In Estelle v. Smith, this Court recognized that the Fifth Amendment protects defendants in the context of pre-trial psychological evaluations. 451 U.S. 454, 462-63 (1981). Later, in Buchanan v. Kentucky, this Court held that where a defendant puts his mental state at issue he may waive his Fifth Amendment right against self-incrimination for limited rebuttal purposes. 483 U.S. 402, 424 (1987). This case presents a question left unresolved by Estelle and Buchanan about constraints on the State's ability to obtain and introduce limited psychological evidence in rebuttal and this Court should grant certiorari to decide the following:

> Where a court-appointed mental health expert assures a criminal defendant that the evidence gathered in his psychological evaluation will **not** be used against him as evidence of guilt at his capital trial, does the State's subsequent introduction of that evidence against him exceed the scope permitted by the Fifth Amendment as set forth in Estelle and its progeny?

RELATED PROCEEDINGS

Houston County Circuit Court:

State v. Petersen, Nos. CC-2012-878; CC-2012-879; CC-2012-880; CC-2012-881; CC-2012-882. Order of conviction entered January 5, 2017; sentencing order entered March 24, 2017.

Alabama Court of Criminal Appeals:

Petersen v. State, No. CR-16-0652. Opinion affirming conviction and death sentence issued January 11, 2019; order overruling application for rehearing entered March 29, 2019.

Alabama Supreme Court:

Ex parte Petersen, No. 1180504. Order quashing grant of petition for writ of certiorari to the Alabama Court of Criminal Appeals entered August 21, 2020.

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STATEMENT OF JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. Petersen's convictions and death sentence on January 11, 2019. Petersen v. State, No. CR-16-0652, 2019 WL 181145 (Ala. Crim. App. Jan. 11, 2019). On March 29, 2019, the Court of Criminal Appeals denied rehearing. The Alabama Supreme Court granted Mr. Petersen's petition for a writ of certiorari on March 30, 2020. Order, Ex parte Petersen, No. 1180504 (Ala. Mar. 30, 2020). However, the Alabama

Supreme Court quashed the writ without opinion on August 21, 2020. Ex parte Petersen, No. 1180504, 2020 WL 4913645 (Ala. Aug. 21, 2020) (per curiam).[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Late on August 9, 2012, just hours after first showing signs of a mental breakdown and while under the influence of dextromethorphan ("DXM"), Mr. Petersen went to a nightclub in Houston County, Alabama. Around 11:30 p.m., following three hours of drinking, he exploded in violence after a dispute over

[1]Pursuant to this Court's order of March 19, 2020, and Rule 13.1, this petition is due on January 18, 2021. Because January 18 is a federal holiday, 5 U.S.C. § 6103, it is timely filed on January 19, 2021. Sup. Ct. R. 30.1.

$20 and being physically thrown out of the club, leaving three dead: Cameron Eubanks, Tiffany Grissett, and Thomas Robbins. (See C. 51-57.)[2]

Mr. Petersen has a long history of mental illness. In December 2006, at 17 years old, Mr. Petersen was hospitalized for suicidal ideation and aggressive behavior (C. 1218, 1231), and diagnosed with bipolar disorder with psychotic features, social phobia, and an emerging personality disorder, among other diagnoses (C. 1235). In 2009, Mr. Petersen was hospitalized due to substance abuse. Evaluations from that hospitalization concluded that he "appeared to have signs of schizophrenia" and his mother exhibited "denial about his psychiatric condition." (C. 1838.) Mr. Petersen then joined the Navy in February 2010, but was discharged approximately one year later after a psychological evaluation revealed a continuous need for treatment that disqualified him from service. (C. 548, 1590, 2987.)

Six months prior to the shooting, on January 31, 2012, the Coffee County Sheriff's Department successfully petitioned to have Mr. Petersen committed to Southeast Alabama Medical Center's Behavioral Medicine Unit ("BMU") because he had threatened to harm himself and his mother while in a child-like state at the Coffee County jail following an arrest for shoplifting. (C. 1438, 1450-51,

[2]"C." refers to the Clerk's Record, comprising the first 17 volumes filed August 17, 2017. "R." refers to the Reporter's Transcript, beginning at vol. 1, p. 30 of the third supplemental record filed January 5, 2018.

1815, 1817.) During Mr. Petersen's two-week hospitalization, Dr. David Waggoner, his treating psychiatrist at the BMU, who diagnosed Mr. Petersen with bipolar disorder with psychotic features, wrote two letters urging the Coffee County Probate Court to commit Mr. Petersen to Searcy State Hospital because of the risk of harm he continued to pose to others and himself and because he needed continued treatment to show improvement. (C. 1823, 1828.)

The Coffee County probate judge rejected Dr. Waggoner's twice-issued recommendation and let Mr. Petersen leave inpatient treatment (C. 1833-34), after hearing from a counselor at a different outpatient facility that had only seen Mr. Petersen once at the jail before his emergency commitment and once the morning of the hearing (C. 1830-31, 3377; R. 4817). After his release on February 13, 2012 (C. 1832), Mr. Petersen continued outpatient treatment (see, e.g., C. 1602, 1605, 1683), while taking several psychotropic medications, including Klonopin, an antianxiety agent with a mood stabilizing effect, Seroquel, an antipsychotic, and Zoloft, an antidepressant (R. 3489). As a result of these mental health disabilities, after his emergency hospitalization, Mr. Petersen began receiving Social Security disability benefits (C. 1034; R. 3569-70), including a one-time back-payment of around $10,000. (C. 1037; R. 3569-70.)

Five months after this hospitalization, in July 2012, Mr. Petersen purchased the pistol used in the shooting with some of this money in early July

(C. 1192-93; R. 3610), then obtained a concealed carry permit from the Coffee County Sheriff's Department (C. 1211), the same entity that, just a few months earlier, had successfully committed Mr. Petersen to the BMU at the Southeast Alabama Medical Center (C. 1815).

At noon on the day of the shooting, Mr. Petersen attended a group therapy session in which he suffered a mental health crisis. (C. 1602.) Patricia Huckabee, a group member present that morning, testified during the guilt phase that Mr. Petersen broke down crying and begging for help (R. 3350), pleading "he cannot be w/o [without] Klonopin because he will be [sic] **snap easily**, and needs more Klonopin" (C. 1602; R. 3305, 3313, 3348, 3373, 3486, 3496). The counselor for the session noted Mr. Petersen "[i]ndicates poor anger management other than taking medications. Progress is noted [as exhibited by] poor impulse control." (C. 1602.) There was no dispute at trial that Mr. Petersen was suffering from Klonopin withdawal (R. 1035, 3496-97, 4383), which is associated with increases in aggressive and hostile behavior (R. 3692; see also C. 1799). Despite Mr. Petersen's pleas and lack of progress, the counselor took no immediate action and Mr. Petersen was not scheduled to see the doctor until one month later. (C. 1213.)

At the same time, Mr. Petersen was self-medicating with DXM, an active ingredient in cough syrup. Over the course of the two days leading up to the

shooting, Mr. Petersen purchased and ingested two bottles of cough syrup containing DXM. (C. 1215; R. 2978, 4147-48.) DXM can produce dissociative feelings, "like you're outside yourself" or things are "unreal" (R. 3498-99; see also R. 4603), but also increases irritability and reactivity. (R. 3498; R. 4603.) These effects can linger for several days after ingestion. (R. 3498.)

Around 8:30 p.m., and under the influence of DXM, Mr. Petersen went to the nightclub. Over the next three hours, Mr. Petersen ingested copious amounts of alcohol. At a minimum, he drank a pitcher of beer and a "shot or two" (R. 1051), but evidence at trial indicated that Mr. Petersen spent $340 dollars at the club (R. 2250), and there were numerous glasses and a pitcher on the table where he had been seated (see, e.g., R. 3982). Scotty Russell, the surviving patron shot by Mr. Petersen, filed and settled a suit against the club and its owners for over-serving a "visibly intoxicated" Mr. Petersen. (C. 1969-73; R. 1782, 1784-85, 1787-88.) Additional eyewitness observations were that he was "drunk," behaved weirdly and rudely, and was "cut off."[3]

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[3]Holly Lowery, a waitress, served Mr. Petersen beer (R. 2089, 2101), while waiting on him more than once (R. 2092), and told investigators shortly after the shooting that Mr. Petersen was "acting kind of weird and strange" (R. 2121-22), and was "one of those aggravating drunks" (R. 2125). Krista Sellers, a dancer at the club, while referring to Mr. Petersen as "the drunk guy" "dancing around and stumbling" (R. 4028, 4030-31), told Investigator Adam Zeh shortly after the shooting that Mr. Petersen was served at least one pitcher of beer before being "cut off" (C. 3214; R. 4095). (See also C. 1209 (Alabama Crime Victims Fund form signed by Zeh indicating incident was "alcohol related"); R. 4107 (first responder

Around 11:30 p.m., after becoming more agitated and distressed in a back office, Mr. Petersen was physically thrown out of the club following an argument with club staff. Mr. Petersen got his weapon from his car before returning to the building and firing. (C. 1003-05, 1008.) Mr. Petersen recalled "it's just like a [sic] out of body experience" (C. 998), which was consistent with the lingering effects of DXM (R. 3498, 4603). He recalled that everything began with a dispute over payment for a drink, but eyewitnesses testified Mr. Petersen had mistakenly given one of the dancers, Tiffany Grissett, a $20 bill for a "dollar dance." (Compare C. 988-89 with R. 2035. See also R. 3667-69 (describing discrepancy).) He could not recall shooting more than one man. (C. 992, 996-99, 1018.)

After the shooting, Mr. Petersen ran out of the club, dropped the gun, his wallet, and keys, then hopped over a fence and went into the woods. (R. 3672.) He removed his shirt and shoes at some point before crawling through briars, leaving him heavily scratched. (See R. 3679.) He was apprehended around 7:15 a.m. when he surrendered himself to law enforcement in the woods. (R. 2136, 3672.) Local law enforcement reported to area media outlets that Mr. Petersen would not be interrogated immediately because they believed he was still intoxicated. (C. 1996-2001.)

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told Mr. Petersen was kicked out for drinking too much); R. 4246 (state's expert testified Mr. Petersen reported having around six drinks prior to shooting).)

Before trial, Mr. Petersen pleaded not guilty and not guilty by reason of mental disease or defect (R. 4, 6-7, 9-10), and the trial court ordered a competency and mental status evaluation (C. 95-103). At the direction of the prosecution, the court ordered Dr. Doug McKeown to conduct the evaluation. (R. 11.)

Prior to conducting the court-ordered pretrial competence and mental state evaluation, Dr. McKeown assured Mr. Petersen that, although the evaluation and report could be used in court proceedings and specifically for purposes of sentencing, "**none of the information could be used as evidence against him concerning his guilt on any charge**." (C. 1198.)

At trial, the State did not dispute that Mr. Petersen was under the influence of alcohol or DXM, that he was experiencing Klonopin withdrawal (see, e.g., R. 1029, 1035, 1049, 1054, 4380, 4383, 5084-85), or that he suffered from mental illness (see R. 1029, 4377, 5084-85). Rather, the State argued that none of these things prevented Mr. Petersen from having the requisite mental state to commit capital murder. (See, e.g., R. 1049, 1054, 1080.)

During opening, the State argued:

> If I could, after he was arrested, he was examined by our expert, Dr. McKeown, who said that he had seen him. He evaluated the defendant. 'His cognitive functioning demonstrates he has a reasonable ability to provide immediate, recent and remote recall of historical information. Indicates sometimes he has some trouble remembering details. Indicates he has some blacked-out type

> experiences when he has been under the influence of alcohol and other substance. He is currently oriented to time, place and location.' They talk about he recognized who the governor, mayor, whatever. He gets some of those right.
>
> But Dr. McKeown examines him for three things. Relationship is he competent to stand trial. Yes. All right. Also, at the time of the offense -- his mental state at the time of the offense, remember, when he's doing this. Can he appreciate what he's doing and does he know the difference between right and wrong.

(R. 1062-63.) The State then dismissed the defense experts, saying, "I expect the evidence will be it doesn't matter how many experts they put up there." (R. 1064.)

The defense introduced hundreds of pages of mental health records covering Mr. Petersen's hospitalizations and treatment history. (C. 1216-1800, 1835-97.) The defense also presented evidence of Mr. Petersen's extensive family history of mental illness, including his father's suicide and his mother's "socialization spectrum features" (R. 3540-3548; see also C. 1927-29), and of Mr. Petersen's mental health struggles in the Navy and subsequent discharge. (See, e.g., R. 3215, 3525, 3566-69, 3603, 3608, 3711-12, 3769-71.)

Drawing on this information (C. 1912; R. 3456-60, 3463-68, 3471-72), defense expert Mark Cunningham, a forensic psychologist and former Navy staff psychologist (R. 3434-37), testified that alcohol and DXM intoxication, Klonopin withdrawal, and mental illness (C. 1961-66; R. 3621-23, 3673-85), including autism spectrum disorder and a history of childhood abuse by his mother's

boyfriends (see C. 1935-37), created a confluence of instability that made Mr. Petersen highly impulsive, more aggressive, unable to regulate his emotional response, and unable to appropriately respond to difficult social situations, resulting in a violent meltdown on August 9, 2012. (R. 3673-3705.) On cross examination, the State questioned Dr. Cunningham about Dr. McKeown's report. (See R. 3823, 3862-63.)

The State then called Dr. McKeown as its very last guilt-phase witness and introduced his report into evidence to rebut the compelling defense case. (C. 1198-1204; R. 4240-4275.) Dr. McKeown testified that he conducted an "evaluation of [Mr. Petersen's] mental state on that night and his ability to relate to defense counsel." (R. 4244.) Critically, Dr. McKeown's in-person evaluation permitted observation beyond just the contents of Mr. Petersen's verbal responses, and notes on the examination of Mr. Petersen's demeanor, manner of response, and other nonverbal indicators were included in the evaluation report and incorporated into the conclusions Dr. McKeown explained in his testimony.[4]

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[4](See C. 1200 ("For cognitive function, he demonstrated a reasonable ability to provide immediate, recent, and remote recall"; "currently oriented to time, person, place, and situation"); 1201 ("Speech productivity is considered normal with a normal flow and a generally expressive and appropriate tone. He is understandable and coherent. Thought style suggests normal productivity with logical structure."); 1201 ("Motor activity level is considered generally normal with reasonable eye contact and no unusual mannerisms or gesturing.

Dr. McKeown concluded Mr. Petersen's responses and way of responding "indicated reasonable decision-making skills and the ability to interact with defense counsel." (R. 4250.) Dr. McKeown testified, "He provided no information that indicated he was not able to make decisions." (R. 4247.) Further, in the text of the report regarding competence to stand trial, Dr. McKeown recorded that Mr. Petersen "was aware that he would not have to testify in open court unless he chose to" and that "he would be considered capable of testifying in a relevant fashion if the need arose." (C. 1203.) At the conclusion of direct examination, Dr. McKeown's evaluation report, containing separate sections on Mr. Petersen's competence to stand trial and his mental state at the time of the offense, was admitted into evidence in full. (R. 4257.)

In closing, the State characterized the key issue as one that would require the jury to choose between the defense expert, which the State maligned as costly, biased, and wrong, and the State's expert, a neutral court-appointed expert, Dr. McKeown. The District Attorney began his rebuttal closing by reading directly from Dr. McKeown's report, including the finding that "His volitional use of alcohol during the time frame in question would not establish a basis for a mental state defense." (R. 4376-77; see also R. 4378 ("This is their

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Facial expressions are generally appropriate . . . ."); 1201 ("His current range of affect and affective control are considered to be basically appropriate . . . .").)

expert . . . .").) The State repeatedly returned to the topic of experts throughout its argument. (See R. 4381, 4395.) Just before being warned his time was running out, the District Attorney made sure to point out the allegiance of the State expert: "What did Doug McKeown tell you? I wish I got $300.00 an hour. Doug McKeown also said, I was ordered to do this by the Court. Cunningham was for them, for him." (R. 4396.)

At the penalty phase, after the jury convicted Mr. Petersen of capital murder, Dr. Randall Tackett, a pharmacologist, testified that Mr. Petersen was intoxicated (R. 4604), and suffering from Klonopin withdrawal (R. 4596-97), which increases irritability and paranoia while allowing the impulsivity of a bipolar manic phase to emerge due to lack of medication (R. 4598-4600). Dr. Marianne Rozensweig testified about Mr. Petersen's family history, including mental health history (see, e.g., R. 4737-44, 4761-64, 4775-76).

The death-qualified Houston County jury voted 10-2 for death, finding the additional aggravator of great risk of death to many persons applicable to two capital murder-burglary counts (for Tiffany Grissett and Thomas Robbins) and to the two-or-more capital murder count. (C. 501-07; R. 5113.) The trial court found the same aggravating circumstances, but also found three statutory mitigating circumstances. (C. 547 (Ala. Code § 13A-5-51(1) (no prior criminal history), (2) (extreme emotional disturbance), (7) (age at time of offense).) Yet,

despite finding that, at the time of the crime, Mr. Petersen was under the influence of alcohol and DXM, was not being treated for mental illness despite a need for treatment, and was experiencing Klonopin withdrawal (C. 548, 551), the trial court refused to find he lacked capacity to appreciate the criminality of his conduct or conform it to the law because "[t]he jury rejected his insanity defense and intoxication defenses" (C. 551). The trial court sentenced Mr. Petersen to death. (C. 553; R. 5144.)

On appeal to the Alabama Court of Criminal Appeals, Mr. Petersen argued that Dr. McKeown's affirmative misrepresentation to Mr. Petersen that his psychological evaluation would not be used as evidence against him in the guilt phase of his capital trial violated Mr. Petersen's Fifth Amendment right against self-incrimination under Estelle v. Smith, 451 U.S. 454 (1981), and violated state law prohibiting the introduction of competency results and statements made during a pre-trial psychological evaluation where the defendant does not testify. Without addressing his Fifth Amendment claim, the Alabama appellate court found that the admission of Mr. Petersen's competency results was error, but harmless, Petersen v. State, No. CR-16-0652, 2019 WL 181145, at *54 (Ala. Crim. App. Jan. 11, 2019), and affirmed Mr. Petersen's conviction and sentence. Subsequently, the Alabama Supreme Court granted Mr. Petersen's petition for a writ of certiorari on an unrelated issue, but quashed the writ. Ex parte

Petersen, No. 1180504, 2020 WL 4913645 (Ala. Aug. 21, 2020) (per curiam). This petition follows.

REASONS FOR GRANTING THE WRIT

In Estelle v. Smith, this Court held that the Fifth Amendment protects a defendant in the context of a psychological evaluation: "Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction,' it protects him as well from being made the 'deluded instrument' of his own execution." 451 U.S. 454, 462 (1981) (citation omitted)). Thus, admission of psychological evidence where a defendant does not initiate the evaluation and does not put his mental status at issue violates the Fifth Amendment. Id. at 465-66.

Subsequent decisions from this Court have made clear that while a criminal defendant's invocation of a mental health defense and presentation of mental health evidence may constitute a "waiver" of that Fifth Amendment right, see Buchanan v. Kentucky, 483 U.S. 402, 424 (1987); Kansas v. Cheever, 571 U.S. 87, 92 (2013), limits on the scope of that waiver nevertheless exist. Cheever, 571 U.S. at 97-98 (declining to address whether expert testimony "exceeded the scope of the rebuttal testimony permitted by the Fifth Amendment"); Powell v. Texas, 492 U.S. 680, 685-86 n.3 (1989) (per curiam) (noting that "nothing" in Court precedents "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 the trial."); Buchanan, 483 U.S. at 424 (noting "very different issue" of admissibility of evidence regarding defendant's competency to stand trial).

This Court should now grant certiorari to determine that where a court-appointed mental health expert assures a criminal defendant that the evidence gathered in his psychological evaluation will **not** be used against him as evidence of guilt at his capital trial, the State's subsequent introduction of that evidence against him exceeds the scope permitted by the Fifth Amendment as set forth in Estelle and its progeny. See Sup. Ct. R. 10(c).

I. In Estelle v. Smith and Buchanan v. Kentucky, this Court Recognized that the Fifth Amendment Limited the Acquisition and Admission of State Psychological Evidence.

In Estelle, this Court held that the admission of pretrial psychological evaluations and related testimony violated a defendant's Fifth and Sixth Amendment rights where the evaluation was procured without knowledge it would be used in an adverse way and without knowledge of counsel. Estelle v. Smith, 451 U.S. 454, 462-63 (1981). The defendant in that case, who had not raised an insanity defense or put his mental status at issue after being charged with a capital offense, had been evaluated for competence without knowledge of counsel by a court-appointed mental health expert chosen by the prosecution. Id.

at 456-57. At trial in the sentencing phase, the prosecution then introduced this competency evaluation into evidence through the expert's testimony. Id. at 459-60.

In finding a Fifth Amendment violation, the Court reasoned that the State's use of the psychological evidence ran afoul of its ruling in Miranda v. Arizona, 384 U.S. 436 (1966), which required that an accused be made aware of his Fifth Amendment privilege against self-incrimination before custodial interrogation. 451 U.S. at 466-69; Buchanan v. Kentucky, 483 U.S. 402, 422 (1987). The Court identified that an expert chosen by the State conducting an evaluation pursuant to a court order acts as "an agent of the State recounting unwarned statements made in a postarrest custodial setting" when testifying at trial and that violates the Fifth Amendment, 451 U.S. at 467, and that without warning neither the accused nor counsel had notice the evaluation could produce self-incriminating material for adversarial use, id. at 462, 466.

Subsequently, this Court embraced dicta in Estelle, see id. at 465, and held that where an accused puts his mental status at issue and puts on supporting evidence, the prosecution cannot be prevented from introducing psychological evidence from an evaluation for a "limited rebuttal purpose." Buchanan, 483 U.S. at 424; see also Kansas v. Cheever, 571 U.S. 87, 93 (2013). In Buchanan, a non-capital case, the prosecution introduced psychological evidence during cross

examination of a defense expert by requesting the expert read from a psychiatric evaluation that was conducted at joint request of the defense and prosecution for purposes of involuntary commitment when the defendant was still within the jurisdiction of juvenile court. Id. at 411-12. The report read by the expert had been redacted to exclude material on the accused's competence to stand trial and there were no statements "dealing with the crimes for which he was charged." Id. at 412 n.12, 423. In such limited circumstances, this Court held, a defendant waives his Fifth Amendment rights. Powell v. Texas, 492 U.S. 680, 684 (1989) (per curiam).

Subsequent cases from this Court, however, indicate that this waiver is not absolute and that there remain constitutional limitations as to the acquisition and scope of the evidence that can be admitted by the State, both as to content of that evidence and how it is used at trial. In Buchanan and later in Cheever, this Court found that even where a defendant has raised a mental health defense, the introduction of irrelevant evidence concerning the defendant's competence to stand trial may exceed the scope of the Fifth Amendment as set forth in Estelle. 483 U.S. at 423 n.20 (recognizing competence "very different issue" from issue at trial and therefore outside scope of admissibility); 571 U.S. at 97 (same). This Court also noted in Buchanan that the recounting of "statements . . . dealing with the crimes for which he was charged"

may exceed the scope of the Fifth Amendment. 483 U.S. at 423. Likewise, this Court has indicated that an insanity defense in the guilt phase would not, under Buchanan, necessarily open the door to the State's use of psychological evidence at sentencing. Powell, 492 U.S. at 685-86, n.3 ("Nothing in 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.").

II. Where a Defendant Is Assured that Evidence Gathered in His Court-Ordered Psychological Evaluation Will Not Be Used As Evidence of Guilt, the State's Subsequent Introduction of that Evidence Against Him at His Capital Trial Exceeds the Scope Permitted by the Fifth Amendment.

This Court should grant certiorari to affirm, consistent with its statements in Estelle v. Smith, 451 U.S. 454 (1981), and its progeny, that even where a defendant puts his mental status at issue the State may not exceed the scope of the Fifth Amendment by relying upon evidence obtained from a defendant after that defendant is assured that such evidence would not be used against him. To allow the State to do so would undermine the reliability of criminal trials and offend the "principles of humanity and civil liberty" secured by the Fifth Amendment. Malloy v. Hogan, 378 U.S. 1, 9 (1964) (quoting Bram v. United States, 168 U.S. 532 (1897)).

Here, Mr. Petersen pleaded not guilty by reason of mental disease or defect

and placed his mental status at issue. He was then compelled to sit for an evaluation by a State-chosen expert that evaluated him for both his competence to stand trial, a relatively neutral endeavor, and his mental state at the time of the offense, which may be used in an adverse manner. However, any understanding conveyed by counsel to Mr. Petersen about the purpose of the evaluation was disrupted by Dr. McKeown's promise at the outset that "none of the information could be used as evidence against him concerning his guilt on any charge." (C. 1198) Rather than a warning, Mr. Petersen received an assurance that, like the mental health professionals he had seen for years, this court-appointed expert was not acting in any adverse capacity. This promise fundamentally altered the context in which Mr. Petersen was being evaluated and, contrary to the expectation of both Estelle and Buchanan v. Kentucky, 483 U.S. 402 (1987), the parties were no longer on equal footing as to awareness of the evaluation and its purpose.

In other contexts, the Fifth Amendment would protect a defendant assured that he could not incriminate himself. For example, a statement or waiver is deemed involuntary where an interrogating law enforcement officer promises an accused that nothing he says will be used against him. See, e.g., Hutto v. Ross, 429 U.S. 28, 30 (1976) ("The test [of voluntariness] is whether the confession was . . . 'obtained by any direct or implied promises, however slight . . . .'" (quoting

Bram v. United States, 168 U.S. 532 (1897))); United States v. Lall, 607 F.3d 1277, 1286 (11th Cir. 2010) ("[G]iven the uniquely influential nature of a promise from a law enforcement official not to use a suspect's inculpatory statement, such a promise may be the most significant factor in assessing the voluntariness of an accused's confession . . . ." (quoting United States v. Walton, 10 F.3d 1024, 1030 (3rd Cir. 1993))). See also, e.g., Henry v. Kernan, 197 F.3d 1021, 1027-28 (9th Cir. 1999) (statement involuntary where "misleading comments were intended to convey the impression that anything said by the defendant would not be used against him for any purposes"); United States v. Rogers, 906 F.2d 189, 192 (5th Cir. 1990) (affirming suppression of inculpatory statement where false promise of non-prosecution rendered statement involuntary); United States v. Jacobs, 431 F.3d 99, 113 (3rd Cir. 2005) (statement involuntary where made pursuant to implied promise); United States v. Young, 964 F.3d 938, 944 (10th Cir. 2020) (finding statement involuntary where made pursuant to promise of leniency).

At its core, the Fifth Amendment right against self-incrimination serves to protect against unreliable trial outcomes. Bram, 168 U.S. at 543-48 (discussing the pre-colonial development of the privilege against self-incrimination and that "So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states"

enshrined the rule in "the impregnability of a constitutional enactment"). This Court has recognized that "the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." Malloy, 378 U.S. at 7. The reliability ensured by the Fifth Amendment is all the more important in a case where death is the potential punishment. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Thus, in large part, the Estelle Court was concerned with the unfair advantage gained by the State in using an accused's "unwitting" and "deluded" statements against him. 451 U.S. at 462, 466. Buchanan was likewise concerned with unfair advantage, that limiting the State's ability to introduce rebuttal evidence would create an unfair advantage for the accused. 483 U.S. at 422-23; see also Kansas v. Cheever, 571 U.S. 87, 94-95 (2013) (describing Buchanan as furthering "the core truth-seeking function of the trial"). In both cases, this Court recognized that the unfair advantage corrupted the fact-finding process. Here, by assuring Mr. Petersen that the psychological evaluation and its results would not be used in adversarial way, in a case that turned on his mental status in moments of crisis and confrontation, the State obtained an unfair advantage in securing Mr. Petersen's conviction and sentence of death.

This Court should therefore grant certiorari review to clarify that the introduction of evidence obtained by assuring a defendant that a pre-trial

psychological evaluation could not be used against him at trial exceeds the scope permitted by the Fifth Amendment under Estelle and its progeny.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully Submitted,

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