No. 20-6914
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

RYAN CLARK PETERSEN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Steve Marshall
Alabama Attorney General

Edmund Gerard LaCour Jr.
Solicitor General

Audrey Jordan
Assistant Attorney General
Counsel of Record *

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Audrey.Jordan@AlabamaAG.gov
(334) 353-8400 Facsimile
(334) 242-7300, 353-4338 *

March 29, 2021

CAPITAL CASE

QUESTION PRESENTED

In Kansas v. Cheever, the Court unanimously reaffirmed that the Fifth Amendment does not "prohibit[] the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut that defendant's presentation of expert testimony in support of a defense of" a mental-status defense. 571 U.S. 87, 90-91 (2013). Though "compelled," these statements can be admitted. Id. at 93.

After Ryan Petersen killed three people, he entered a plea of not guilty by reason of mental disease or defect and was evaluated by a court-appointed expert, Dr. Doug McKeown. Dr. McKeown told Peterson that the information he provided would not be used as evidence against him concerning his guilt. At trial, Peterson offered testimony from a psychologist regarding Petersen's mental state at the time of the offense. In rebuttal, the State offered, without objection, the mental-health evaluation and testimony of forensic psychologist Dr. McKeown.

The questions presented are:

1) Did the state trial court plainly err in allowing the State to admit Dr. McKeown's testimony as rebuttal evidence?

2) Did the Alabama Court of Criminal Appeals err when it held that the admission of Dr. McKeown's testimony was harmless?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

This case began on August 9, 2012, when Ryan Petersen was forcibly ejected from an adult nightclub called "Teasers Cabaret" for repeatedly groping the dancers. (C. 539.) Once outside, Petersen retrieved his handgun from the glove compartment of his car, walked back to the entrance, shot and killed doorman Cameron Paul Eubanks, walked inside, shot and killed dancer Tiffany Paige Grissett and patron Thomas "Rocky" Robins, and shot Scotty Blain Russell in the arm.

About two months after Petersen's arrest, Dr. Doug McKeown performed a court-ordered forensic evaluation to determine Petersen's competency to stand trial and competency at the time of the offense. (C. 127-33.) At trial, Peterson offered testimony from Dr. Mark Cunningham to support his defense of intoxication and insanity. (See Supp3 R. 3422-4012.)[1] Thereafter, the State offered Dr. McKeown's report[2] and testimony to rebut evidence about Petersen's mental state at the time of the offense. (See Supp3. 4241-4257.)

Petersen now challenges the admission this evidence, arguing that it violated his Fifth Amendment right because the evidence was gathered during his court-

1. "Supp3 R." refers to the third supplemental record on appeal, which contains the correct paginated transcript.
2. Notably, the report was admitted solely for demonstrative purposes. (Supp3 R. 4257.)

ordered psychological evaluation where he was assured his statements would not be used against him as evidence of his guilt.[3]

This claim presents a fact-bound question of no national importance. In fact, it rests on settled law and has little factual significance outside of Petersen's case. Moreover, the Alabama Court of Criminal Appeals correctly determined that the admission of Dr. McKeown's testimony was harmless error because it was cumulative to statements previously admitted by Petersen. Thus, this Court should deny Petersen's petition.

A. The Proceedings Below

Petersen was convicted of capital murder when he shot and killed Cameron Paul Eubanks, Tiffany Paige Grissett, and Thomas "Rocky" Robins. A Houston County grand jury indicted Petersen for capital murder, charging him with one count of capital murder wherein two or more persons were murdered by one act, scheme, or course of conduct in violation of Section 13A-5-40(a)(10) of the Code of Alabama and three counts of capital murder committed during the course of a burglary in

3. The forensic evaluation report notes that Petersen "was informed as to the purpose of the evaluation and the limited confidentiality involved." (C. 127.) He was also informed that "the results could be used in court . . . to assist reaching decisions concerning his [c]ompetency to [s]tand [t]rial and [m]ental [s]tate at the [t]ime of the [o]ffense, but that none of the information could be used as evidence against him concerning his guilt on any charge." (C. 127.)

violation of Section 13A-5-40(a)(4) of the Code of Alabama (1975).[4] (C. 49-58.) Petersen was arraigned and entered a plea of not guilty and not guilty by reason of mental disease or defect. (C. 95; Supp3 R. 3-10.) The jury found Petersen guilty as charged in the indictment and recommended he be sentenced to death by a vote of 10 to 2. (C. 488-92, 504-07; Supp3 R. 4463-64.) After determining the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Petersen to death. (C. 537-54; Supp3 R. 5144.) The Alabama Court of Criminal Appeals affirmed Petersen's capital murder convictions and his death sentence. Petersen v. State, CR-16-0652, 2019 WL 181145 (Ala. Crim. App. Jan. 11, 2019). The Alabama Supreme Court subsequently denied Petersen's petition for writ of certiorari.

B. Statement of the Facts

1. Facts Elicited During Petersen's Trial

On August 2, 2012, Petersen patronized Teasers Cabaret, which featured adult dancers for entertainment. (Supp3 R. 2157, 2244.) While there, Petersen repeated violated Teasers' "no touch" policy. (Supp3 R. 1805, 1807-09, 1962, 1142-43, 1195, 1198, 1285, 4068.) After dancer Tiffany Grissett complained to management, Petersen was questioned by co-owner Bruce Middleton and the floor manager.

4. Petersen was also indicted, and subsequently convicted, for one count of the attempted murder of Scotty Blain Russell in violation of Section 13A-4-2 of the Code of Alabama (1975). (C. 49-58, 488-92; Supp3 R. 4463-64.)

(Supp3 R. 2012, 2017-19, 2024.) Petersen told them that he had given Grissett $20 during a "dollar dance" and complained that he "was getting ripped off[.]" (Supp3 R. 2034.) Although Middleton refunded the $20, Petersen "went up to another level," stating that, "I ain't F'ing this club. I've done spent over F'ing hundred dollars, and I ain't going." (Supp3 R. 2034-35.) When Petersen refused to leave, the floor manager, Middleton, and doorman Cameron Eubanks physically escorted Petersen from Teasers. (Supp3 R. 1206, 1329, 1829, 2036-37.)

Thereafter, Petersen walked to his car, sat in the passenger seat, and took his handgun from the glove compartment. (Supp3 R. 1462, 1465.) He got out of his car, chambered a bullet, returned to the front entrance, and shot Eubanks five times in the torso and one time in the head. (Supp3 R. 1483, 1485, 1488, 1491.) He stepped over Eubanks's body, walked inside Teasers, and saw patron Scotty Russell, who attempted to cover his head with his arms. (Supp3 R. 1497, 1729.) Petersen shot Russell, the bullet striking Russell's arm. (Supp3 R. 1729.) Russell fell to the floor and "played dead." (Supp3 R. 1729.) Russell then heard Petersen state, "All right bitch. Now it's your turn." (Supp3 R. 1731.) At that point, Petersen pursued Grissett into the women's restroom and shot her twice in the back; one shot was fired at close range. (Supp3 R. 1880-84, 2324, 2450.) He then walked into the "private room" and shot Thomas "Rocky" Robins in the chest as Robins shielded a dancer. (Supp3 R. 2531, 4047.) Petersen fled to his car; however, he was unable to find his car keys

and ran to the wooded area behind Teasers where police found him the next morning. (C. 993, 999; Supp3 R. 2136.)

2. Dr. Doug McKeown's Report and Testimony

About two months after Petersen was arrested, Dr. McKeown performed a court-ordered forensic evaluation to determined Petersen's competency to stand trial and competency at the time of the offense. (C. 127-33.) When determining his mental state at the time, relevant to facts Peterson disclosed regarding about the incident, Dr. McKeown's report noted that Petersen stated that he had previously patronized Teasers; and that, on the night of the shooting, he had ingested "about six drinks." (C. 132.) He was later "thrown out" by the "bouncer" after an "argument with one of the waitresses and the manager[.]" (C. 132.) Dr. McKeown's report further reflected that Petersen "was able to provide information about his thoughts and activities as well as his behaviors that occurred after that point in time and indicated that he probably would have shot and killed himself if he had another bullet left[.]" (C. 132.) Petersen also acknowledged that "he left the premises and was found after having run through a field and some briars later that evening." (C. 132.)

At trial, Petersen called Dr. Mark Cunningham, who testified that Petersen was intoxicated "based on the totality and recurrent nature of the observations of him that night in Teasers and by his behavior in the immediate aftermath." (Supp3 R. 3499.) He noted that Petersen self-reported consuming six drinks. (Supp3 R.

3485.) Dr. Cunningham went on to testify about hypotheticals Dr. McKeown asked Petersen and offered his opinion of Dr. McKeown's findings. (Supp3 R. 3528-29.) He also testified about Petersen's statements about the crime and medical history, which were also previously admitted through Petersen's statements to police. (C. 992, 1026; Supp3 R. 3195-3225, 32-65, 3274-3306, 3476-79, 3485-87, 3502, 3510, 3526, 3531, 3635-54, 3663, 3667-74, 3693-94.) On cross-examination, he testified about his observations of Petersen from the indoor security footage from Teasers. (Supp3 R. 3845-47, 3896.) He also noted that he was "not asserting that it[was his] opinion that he was in withdrawal" from Klonopin at the of the shooting. (Supp3 R. 3869-70.)

On rebuttal, Dr McKeown testified, without objection, that Petersen had stated he ingested six drinks that night and stated that there was no indication that Petersen had consumed the drinks involuntarily. (Supp3 R. 4246-47.) He opined that Petersen was not "suffering from any severe mental disease or defect that he would have known what he was going at the time of the crime" "other than what influence may have occurred from what type of substances he may have taken." (Supp3 R. 4246.) Dr. McKeown testified that he had viewed the indoor security footage from Teasers and did not observe "anything unusual" about Petersen's movements to indicate he was intoxicated. (Supp3 R. 4252-53.) He opined that Petersen "knew that he had done something wrong and he needed to get away." (Supp3 R. 4254.)

REASONS FOR DENYING THE PETITION

This Court has repeatedly recognized that a defendant's compelled statements to a psychiatrist can be admitted "to rebut that defendant's presentation of expert testimony in support of" a mental-status defense. Kansas v. Cheever, 571 U.S. 87, 90 (2013). The State thus did not violate Peterson's Fifth Amendment rights by introducing Dr. McKeown to rebut Peterson's expert about Peterson's mental health. Moreover, the state appellate court correctly found that any error was harmless.

Accordingly, the petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. The petition presents no arguable split of authority and is fact-bound; thus, it fails to establish any of the grounds for granting certiorari review. Petersen's Fifth Amendment claim was never raised at trial and was rejected by the Alabama Court of Criminal Appeals after a thorough consideration of the facts and circumstances of this case, and Petersen has shown no conflict between that decision and a decision of any other court.

I. Dr. McKeown's testimony was properly admitted as rebuttal testimony to the psychiatric expert testimony first introduced by Peterson.

This case is squarely controlled by Kansas v. Cheever, where this Court unanimously reaffirmed that the Fifth Amendment does not "prohibit[] the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut that defendant's presentation of expert testimony in support of a" mental-health defense. 571 U.S. 87, 89-90 (2013). In Estelle, this Court held that an accused's compelled statements during a court-ordered psychiatric examination was subject to the Fifth Amendment right against self-incrimination. 451 U.S. at 461-69. But when an accused places his mental status at issue, even those compelled statements can be used against him for the purpose of rebutting the defendant's psychiatric evidence. See Cheever, 571 U.S. at 93; see also Buchanan, 483 U.S. at 422; see also Powell v. Texas, 492 U.S. 680, 685 (1989) (recognizing this Court held that the defendant in Buchanan "waived his Fifth Amendment privilege by raising a mental-status defense"). "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him." Cheever, 571 U.S. at 94.

Here, Petersen not only pleaded not guilty by reason of mental disease or defect, (C. 95; Supp3 R. 3-10), but he also offered expert testimony to support his defense of intoxication and insanity. (Supp3 R. 3422-4016.) Thus, this Court's

decisions in Estelle and Buchanan placed Petersen on notice that, if he intended to present a plea of not guilty by reason of mental disease or defect, he could anticipate evidence from Dr. McKeown's evaluation being used in rebuttal. In other words, "the State permissibly followed where the defense led. Excluding [Dr. McKeown's] testimony would have undermined Buchanan and the core truth-seeking function of the trial." Cheever, 571 U.S. at 95.

It makes no difference that Dr. McKeown told Peterson that the evidence gathered in his psychological evaluation would not be used against him as evidence of guilt. See Pet. i. First, the statement was true in the sense that none of the statements would be used to make an affirmative case against Peterson. Had Peterson not put his mental health at issue in the trial, the State could not have permissibly introduced any of Dr. McKeown's testimony about his evaluation of Peterson. Likewise, a defendant's silence can't be used against him—unless he takes the stand. At that point, his refusal to answer questions can and quite likely will be used against him.

Second, this Court has held that "compelled statements to a psychiatrist" can be admitted as rebuttal evidence in cases like this one. Cheever, 571 U.S. at 93 (emphasis added). Thus, Peterson's protestations (at 19-20) about the voluntariness of his statements to Dr. McKeown miss the point. Even if Peterson's statements were compelled through a misunderstanding about the nature of the evaluation, compelled

statements can be admissible in a case like this one. Peterson's case is controlled by Cheever, and his petition should be denied.

II. The Admission Of Dr. McKeown's Testimony Did Not Prejudice Peterson.

Even if the state court (contra Cheever) should not have admitted Dr. McKeown's testimony, the error was neither plain nor prejudicial. As the Alabama Court of Criminal Appeals found, Dr. McKeown's testimony did not prejudice Petersen. Petersen, 2019 WL 181145, at *54. There is no dispute that Petersen walked inside Teasers armed with a gun or that he shot and killed three people. As the state appellate court noted, after Petersen presented his expert testimony on intoxication and insanity, Dr. McKeown testified on rebuttal, without objection, that "there was no indication [Petersen] was suffering from a severe mental disease or defect that would have impaired his ability to understand the wrongfulness of his acts," and that the six drinks that Petersen stated he consumed would not have hindered his "ability to understand the nature of his actions[.]" Petersen, 2019 WL 181145, at *49. He did not testify to any inculpatory statement made by Petersen to him during the forensic exam. Under this Court's precedent, such testimony regarding Petersen's mental status at the time of the offense was admissible. Buchanan v. Kentucky, 483 U.S. 402, 422 (1987); Estelle v. Smith, 451 U.S. 454, 465 (1981).

Nevertheless, though Petersen's petition does not cite any specific testimony from Dr. McKeown in his argument, when Peterson was in state court, he challenged only excerpts of Dr. McKeown's testimony about hypothetical situations, matters unrelated to the shooting, testimony about the crime, and Petersen's medical history. But testimony about hypothetical situations or matters unrelated to the shooting, (see Supp3 R. 4243-44), were not relevant to whether Petersen committed the offense charged. Moreover, Dr. Cunningham testified on direct about the hypotheticals Dr. McKeown asked Petersen and offered his opinion on Dr. McKeown's findings. (Supp3 R. 3528-29.) Additionally, testimony about the crime (i.e., review of the indoor security footage of the shooting and Petersen's statement to police), as well as testimony about Petersen's medical history were previously admitted into evidence through Petersen's statements to police, as well as through Dr. Cunningham's testimony. Given this evidence was cumulative to evidence already before the jury, Dr. McKeown's testimony "did not probably injuriously affect Petersen's substantial rights" and was harmless. See Satterwhite v. Texas, 486 U.S. 249 (1988); see also Ex parte Brownfield, 44 So. 3d 43, 48-50 (Ala. 2009) (holding testimony from the State's rebuttal expert witness regarding statements made by the defendant about his "activities on the days surrounding the murders" resulted in harmless error). Petersen has made no attempt to argue that the state courts'

application of the harmless error doctrine in this case was erroneous. Thus, this Court should deny Petersen's petition for writ of certiorari.

CONCLUSION

For the reasons set forth above, this Court should deny Petersen's petition for writ of certiorari.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

/s/Audrey Jordan
Audrey Jordan
Assistant Attorney General