No. 12-609

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, works to advance the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing.[1] A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest courts of numerous states. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving the Fifth Amendment and its state analogues, speaking to the importance of balancing core constitutional protections with other constitutional and societal interests. As relates to the issues before the Court in this case, NACDL has an interest in protecting the rights of defendants to in-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Petitioner Kansas and Respondent Scott D. Cheever filed blanket consents to the filing of *amicus curiae* briefs, which were docketed on April 2, 2013, and April 3, 2013, respectively.

troduce mental-state evidence without waiving their privilege against compelled self-incrimination.

SUMMARY OF THE ARGUMENT

NACDL's members, who are in criminal trial courts across the country every day, provide a unique perspective on the State's efforts to rework Fifth Amendment waiver doctrine in this case. The State argues that any effort to present evidence to rebut the requisite mental state element operates as a *per se* and broad-scope waiver of the privilege against self incrimination. Such an expansive view has no foundation in this Court's precedents and would reverse the long-standing presumption against waivers. Moreover, forcing a defendant to choose between asserting a valid defense that he lacked the requisite intent and his right against self incrimination cannot in any respect be considered voluntary. *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

This Court has accorded a defendant's Fifth Amendment privilege against self incrimination the most zealous protection, *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972), requiring the prosecution to prove guilt independently. The State "may not by coercion prove its charge against an accused out of his own mouth." *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961). This privilege against compulsory self incrimination is so integral to our adversarial system that, absent a knowing, intelligent and voluntary waiver, a defendant *cannot* relinquish his Fifth Amendment rights. Because of the far-reaching consequences of waiver, "courts must 'indulge every reasonable presumption against waiver'" of this fundamental constitutional right. *Emspak* v. *United States*, 349 U.S. 190, 198 (1955) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

The State's claim that a defendant who chooses to argue that his mental state precluded him from having the requisite *mens rea* necessarily and voluntarily waives his right against self incrimination is inconsistent with the presumption against waiver. Further, Kansas would force the defendant to choose between two fundamental constitutional rights—the due process right to mount a defense, *Crane* v. *Kentucky*, 476 U.S. 683, 687 (1986), and the Fifth Amendment right not to incriminate himself, *Gibson* v. *Zahradnick,* 581 F.2d 75 (4th Cir. 1978). This Court has found such a choice "intolerable," *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), and should not permit it here.

Nor is the State's position supported by a genuine need to rebut a defendant's evidence of mental state. A defendant's ability to present evidence of intoxication to demonstrate that he lacked specific intent is well-established, *Hopt* v. *People*, 104 U.S. 631, 634 (1881). Allowing a defendant to claim the privilege against self incrimination in mounting that defense does not deprive the State of its ability to challenge that defense.

ARGUMENT

I. ASSERTING A VALID MENTAL-STATE DEFENSE DOES NOT WAIVE FIFTH AMENDMENT PROTECTIONS.

Kansas urges this Court to adopt a new *per se* rule that criminal defendants "necessarily waive[]" their Fifth Amendment privilege against self-incrimination simply by presenting *any* mental-state evidence. Pet. Br. 11, 13, 24, 35. This Court has rejected previous attempts by states to craft *per se* rules that impermissibly infringe upon a defendant's constitutional rights, and it should do so here. See,

e.g., *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1556 (2013); *Richards* v. *Wisconsin*, 520 U.S. 385, 391–96 (1997); *Rock* v. *Arkansas*, 483 U.S. 44, 62 (1987); *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975).

A. The State's *Per Se* Waiver Rule is Contrary to the Zealous Protection of a Defendant's Fifth Amendment Privilege.

When the State must prove *mens rea* as an element of the crime, the defendant must be permitted to present evidence showing the absence of that element because "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane*, 476 U.S. at 690 (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)); see also *Taylor* v. *Illinois*, 484 U.S. 400, 409 (1988); *Chambers* v. *Mississippi,* 410 U.S. 284, 294 (1973). By asserting a valid defense, the criminal defendant subjects the State's case to "'meaningful adversarial testing.'" *Crane*, 476 U.S. at 691 (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)).

Our adversarial system "is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers*, 365 U.S. at 541. The "essence" of the Fifth Amendment privilege against self incrimination requires the Government to convict an individual through the "'independent labor of its officers'," rather than the "'simple, cruel expedient of forcing'" incriminating information from the defendant's own lips. *Mitchell* v. *United States*, 526 U.S. 314, 326 (1999) (quoting *Estelle* v. *Smith*, 451 U.S. 454, 462 (1981) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 581–82 (1961))); see also John H. Langbein, *The Historical Origins of the Privilege Against Self*

Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1048 (1994). Accordingly, "[t]his Court has always broadly construed" the Fifth Amendment privilege against self incrimination "to assure that an individual is not compelled to produce evidence which later may be used against him." *Maness* v. *Meyers*, 419 U.S. 449, 461 (1975). Absent voluntary waiver, it is "impermissible" for the prosecution to rely on compelled statements. *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979).

The most stringent scrutiny is reserved for purported waivers of fundamental constitutional rights. An effective waiver requires the "intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464. Valid waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748; see also *Culombe*, 367 U.S. at 602 ("free and unconstrained choice"). Consequently, "courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Emspak*, 349 U.S. at 198 (quoting *Johnson*, 304 U.S. at 464).

This case is no different. The State's proposed *per se* rule cannot be reconciled with this Court's zealous protection of the privilege against compulsory self incrimination. That rule would hold that, by simply asserting a valid defense, a defendant would "necessarily waive[]" the privilege. Pet. Br. 11. "[I]t is doubtful whether such a 'waiver' could meet the high standard required for a voluntary, free and unconstrained . . . relinquishment of the Fifth Amendment privilege," because "[w]hat occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment." *United States* v. *Byers*, 740

F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (plurality opinion) (internal quotation marks and citation omitted).

The radical nature of the State's approach is most vividly illustrated by the simple fact that the State would reverse the traditional presumption against waiver and, instead, declare that a waiver has taken place in all cases where a defendant presents mental-state evidence. Under the State's approach, the presumption against waiver becomes meaningless because, contrary to well-established law, waiver would be "necessarily" assumed. See *Smith* v. *United States*, 337 U.S. 137, 150 (1949) ("Waiver of constitutional rights, however, is not lightly to be inferred."); *Johnson*, 304 U.S. at 464 ("whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case. . . ."). The State hardly needs such a tool. The presumption against waiver is only that—a presumption. It can be overcome where, for example, the State can fairly argue that the disputed evidence squarely contradicts the defendant's proffered evidence and properly falls within the scope of rebuttal. See Resp't Br. 16–24.

B. The State's *Per Se* Waiver Rule Creates an Intolerable Choice Between Constitutional Rights.

The State's *per se* rule forces a defendant to choose between asserting a valid mental-state defense or asserting the Fifth Amendment privilege against self incrimination. See Pet. Br. 29 ("Cheever could have insulated himself from any such examination by withdrawing his mental-status defense."). Forcing a defendant to make such a choice is, as this Court said in *Simmons*, "intolerable." 390 U.S. at 394; *accord*.

Lefkowitz v. *Cunningham*, 431 U.S. 801, 808–09 (1977).

Courts and commentators have consistently interpreted *Simmons* as creating a "rule that prohibits the state from requiring defendants to choose between any two constitutional entitlements." Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 Iowa L. Rev. 741, 744–45 n.14 (1981). Many courts have rejected states' attempts to force the "intolerable choice" between the privilege against self incrimination and other constitutional protections. See, *e.g.*, *Wehling* v. *Columbia Broad. Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979); *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979); *Collins* v. *Auger*, 577 F.2d 1107, 1110 (8th Cir. 1978); *United States* v. *Anderson*, 567 F.2d 839, 840 (8th Cir. 1977); *United States* v. *Sherpix, Inc.*, 512 F.2d 1361, 1370–71 (D.C. Cir. 1975); cf. *Gibson*, 581 F.2d at 80 ("Exercise of [the defendant's] right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of his constitutional privilege against self-incrimination.").

"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." *Collins*, 577 F.2d at 1110. The underlying decision in *Collins* v. *Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977), illustrates the wisdom and need for this rule, particularly when (as in this case) the defendant wishes to present a psychiatrist's testimony to support his defense. In considering such a choice, the district court in *Collins* found that it is "immaterial" whether the psychiatric examination is to determine the defendant's "capacity to aid in his

own defense or his mental condition at the time of the crime." 428 F. Supp. at 1082.

Psychiatric examinations are "intimate, personal and highly subjective." *Id.* at 1084. In other words, the nature of the psychiatric examination is "likely to be more probing than either a courtroom cross-examination or a police interrogation because, as one psychiatrist explains, the goal of the examining psychiatrist is to get 'a sounding of the depths of the patient's personality.'" Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 Crim. L. & Criminology 943, 962 (1983) (quoting Meyers, *The Psychiatric Examination*, 54 J. Crim. L. Criminology & Police Sci. 431, 442 (1963)). This difference "relates to the magnitude of infringement upon the defendant's fifth amendment privilege." *Id.* at 963; see also Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 Harv. L. Rev. 648, 658 (1970) ("examinations impinge greatly on the inviolability of the personality"). Taking into consideration "the nature of the statement . . . and the exposure which it invites," *In re Gault*, 387 U.S. 1, 49 (1967), the State's *per se* rule results in the unjustifiable infringement upon a criminal defendant's Fifth Amendment privilege against self incrimination.

C. The State's *Per Se* Waiver Rule is Unnecessary.

There is, moreover, simply no need for a *per se* waiver rule. Kansas overstates the urgent need for waiver by arguing that "it is inherently unfair to allow the defendant to raise a mental-status defense without granting the State *any* meaningful opportunity to contest the defense through lawfully obtained rebuttal evidence." Pet. Br. 27. This argu-

ment ignores the fact that prosecutors regularly rebut mental-state defenses without relying on compelled testimony. See Resp't Br. 40–41 (citing cases). And it ignores the fact that the State can call a rebuttal expert or rebut fact witnesses without relying on the defendant's compelled testimony.

For example, the Court has long recognized that medically trained experts (like psychiatrists) "are competent to give their opinions in evidence" without "their own personal knowledge" and "in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial." *Congress & Empire Spring Co.* v. *Edgar*, 99 U.S. 645, 657 (1878). Thus, allowing a defendant to present evidence of a valid defense without automatically forfeiting his fundamental right against compulsory incrimination will not "distort the truth-seeking process," "undermine the integrity of the criminal trial," or "impede the truth-seeking function" of the proceedings. Amicus Br. U.S. 7, 9. This Court should therefore reject *per se* waiver simply because the defendant introduces mental-state evidence.

II. PRESENTING EVIDENCE OF VOLUNTARY INTOXICATION DOES NOT WAIVE FIFTH AMENDMENT PROTECTIONS.

Mr. Cheever presented evidence of his voluntary intoxication to argue that he could not form the specific intent necessary for capital murder. This Court should not infer waiver of his privilege against compulsory self-incrimination simply because he asserted a valid defense under Kansas law and engaged in "meaningful adversarial testing" of the prosecution's burden of proof. *Cronic*, 466 U.S. at 656.

The availability and application of voluntary intoxication as a defense is a policy choice for the states, see *Powell* v. *Texas,* 392 U.S. 514, 535–36 (1968) (plurality opinion), and this Court has traditionally accorded the states "respect . . . in the establishment and implementation of their own criminal trial rules and procedures." *Chambers*, 410 U.S. at 302–03. Kansas enacted a valid statute that allows a criminal defendant to present relevant, probative evidence of voluntary intoxication to negate the mental-state element of a crime. When a defendant like Mr. Cheever presents a valid mental-state defense under state law, this Court should strike "a fair state-individual balance" and require prosecutors to "shoulder the entire load" of proving the elements of a crime without relying on compelled testimony. *Pennsylvania* v. *Muniz*, 496 U.S. 582, 595 n.8 (1990) (quoting *Doe* v. *United States*, 487 U.S. 201, 212–13 (1988) (quoting *Murphy* v. *Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (internal citations omitted))).

A. History of the Voluntary Intoxication Defense.

The defense of voluntary intoxication is not a new concept. Criminal defendants have successfully asserted such defenses over the past several centuries. See Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. Crim. L. & Criminology 482, 484–92 (1997); Meghan P. Ingle, Note, *Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 Vand. L. Rev. 607, 612–20 (2002). There is a long tradition of criminal defendants asking courts for lenience after committing criminal acts while inebriated, and American and British legal history reveals a surprising lack of hostility, if not outright acceptance, of the defense.

1. Early English legal attitudes toward drunkenness as a defense to culpability were unwelcoming, but never coalesced into adding *additional* punishment for drunkenness. One of the earliest cases declared: "As if a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be priviledged [sic] thereby." *Reniger* v. *Fogossa*, (1550) 75 Eng. Rep. 1 (K.B.) 31. Francis Bacon agreed, writing in 1630 that "if a drunken man commit a felonie, he shall not be excused because his imperfection came by his own fault." *The Elements of the Common Lawes of England* 34 (1630). Even during this time, however, both Blackstone and Coke attempted to push inebriation beyond mere non-defense into an aggravating factor in assessing guilt, but were not successful. See Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046 (1944).

The English courts' rejection of the intoxication defense began to change as attitudes about intoxication changed in the 17th and 18th centuries, prompting a "radical modification" of the law. *Id.* at 1048. As access to alcohol became widespread in society, alcoholism as a concept began to take shape, and the public came to believe that the problem "threatened to engulf the personality." Arlie Loughman, *Manifest Madness: Mental Incapacity in the Criminal Law* 175 (2012). For example, Sir Matthew Hale argued that habitual drunkenness, while "contracted by the vice and will of the party," should nonetheless be treated as involuntary and

thus excusable "phrenzy" in the commission of crime. 1 *History of the Pleas of the Crown* 32 (Thomas Dogherty ed., 1800) (1736). Views evolved to the point that even Sir James Fitzjames Stephen, previously an opponent of any lessening of culpability for inebriation, declared that judges could consider a defendant's drunkenness in deciding whether to reduce murder to manslaughter. See *Regina* v. *Doherty*, (1887) 16 Cox Cr. C. 306 (Cent. Crim. Ct.), 308; Hall, *supra*, at 1047, 1049.

2. The legal view of intoxication went through a similar metamorphosis in early America as well. The earliest reported case on the subject held that drunkenness was never a valid defense. See *Respublica* v. *Weidle*, 2 Dall. 88, 91 (Pa. 1781) ("[D]runkenness is no justification, or excuse, for committing the offence; to allow it as such, would open a door for the practice of the greatest enormities with impunity."). But the conventional wisdom started to shift by the 1800's, when habitual drunkenness was viewed as an addiction. See generally Harry G. Levine, *The Discovery of Addiction*, 39 J. Stud. Alcohol 143 (1978) (citing the assistance of the temperance movement in urging this view). While drunkenness was held to aggravate an offense (typically homicide) in mid-nineteenth-century cases in Texas, Illinois, and New York, each time the enhancement was overturned on appeal. R. U. Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 L. Q. Rev. 528, 531–32 & nn.23–24 (1933) (citing *People* v. *Rogers*, 18 N.Y. 9 (1858); *McIntyre* v. *People*, 38 Ill. 514 (1865); *Ferrell* v. *State*, 43 Tex. 503 (1875)).

By the 1850's, an American rule had formed: intoxication preventing a person from possessing intent to kill could reduce a charge of murder in the

first degree to murder in the second degree, see *Criminal Law—Murder—Intoxication as an Excuse*, 29 Yale L. J. 928, 928 (1920), though some jurisdictions went further, see, *e.g.*, *State* v. *Rumble*, 105 P. 1, 3 (Kan. 1909), *(superseded by statute*, *as stated in State* v. *Baacke*, 932 P.2d 396 (Kan. 1997)) ("[D]runkenness so extreme as to prevent the forming of a purpose to kill might, under our statute, reduce what would have been murder at the common law to manslaughter."). When this Court addressed the question in 1881, it surveyed the state of American common law at the time, determining that, while voluntary intoxication could not be a total excuse for homicide, a jury may consider it in assessing a defendant's purpose or intent in committing one. *Hopt*, 104 U.S. at 634; see also *Montana* v. *Egelhoff*, 518 U.S. 37, 47 (1996) (stating that this "new view" had prevailed by the late 1800's).

In the intervening years, any notion that inebriation could increase culpability had vanished. Two views remained: that intoxication should either not affect culpability or else *decrease* it, with the latter view having "gained a firm toehold in the law" by 1850. David McCord, *The English and American History of Voluntary Intoxication to Negate* Mens Rea, 11 J. Legal Hist. 372, 373–79 (1990). Despite this Court's apparent limitation of the issue to homicide in *Hopt*, state courts expanded the issue beyond drunkenness as a defense to premeditation into non-homicide crimes. Herbert Fingarette & Ann Fingarette Hasse, *Mental Disabilities and Criminal Responsibility* 90–91 (1979); see also, *e.g.*, *Cline* v. *State*, 43 Ohio St. 332, 334 (1885) ("[when] intent . . . is of the essence of the offense, it is possible that in proving intoxication you go far to prove that no crime was committed.").

The advent of specific intent as a basis for conviction of certain crimes other than homicide permitted voluntary intoxication to persist as a defense outside the realm of murder and manslaughter. See Fingarette & Hasse, *supra*, at 91–96; McCord, *supra*, at 382. Finally, the Model Penal Code, introduced in 1962, formally endorsed the defense and ensured that multiple states would adopt it. The Code adopted what was by then "the settled view of the common law": while intoxication is never an excuse for criminal conduct, "intoxication may generally be adduced in disproof if it is logically relevant" to an element of a crime requiring purpose or knowledge, such as premeditation or deliberation. Model Penal Code & Commentaries § 2.08 (1985).

B. Kansas Follows a Majority of States in Allowing the Voluntary Intoxication Defense.

Although states take different approaches to the defense of voluntary intoxication, a substantial majority of the states permit a defendant to introduce evidence of voluntary intoxication to negate an element of the crime.[2] See Addendum (listing thirty-five states). In Kansas, "[a]n act committed while in a state of voluntary intoxication is not less criminal by reason thereof . . . ." Kan. Stat. Ann. § 21-5205(b). Only "when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind." *Id.*

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[2] Fifteen states do not admit intoxication evidence as a defense to any crime, including: Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, and Texas. See Addendum.

Kansas charged Mr. Cheever with capital murder under Kan. Stat. Ann. § 21-3439(a)(5) (2005), which is defined as the "intentional and premeditated killing of a law enforcement officer." Of course, Kansas has the burden to prove the elements of the offense, including Mr. Cheever's premeditated intent. See *In re Winship*, 397 U.S. 358, 364 (1970). Nevertheless, Kansas claims that Mr. Cheever "*affirmatively and deliberately injected*" the issue of his mental state into the trial. Pet. Br. 26 (emphasis in original). But the defense of voluntary intoxication is not an affirmative defense under Kansas law. See *State* v. *Kleypas*, 40 P.3d 139, 191–92 (Kan. 2001) ("instruction on voluntary intoxication did not limit the jury's consideration of [the [defendatnt's] state of intoxication nor did it limit consideration of any other evidence offered as to mental illness, prior drug use, or brain damage in determining whether the State proved the elements of the crime"), *overruled on other grounds by Kansas* v. *Marsh*, 548 U.S. 163 (2006). The plain language of the statute makes it clear that a defendant's intoxication is something that "may be taken into consideration" by the jury when it determines whether the State has proved each element beyond a reasonable doubt. Kan. Stat. Ann. § 21-5205(b). Moreover, the State's argument ignores the traditional nature of an affirmative defense. See Resp't Br. 42–48.

Even if the State's rule had some valid application in the context of an affirmative defense, it does not in this case because Mr. Cheever presented evidence to challenge scienter. Kansas cannot use testimony based on Mr. Cheever's compelled psychiatric examination to prove the elements of his crime. See, *e.g.*, *Rogers*, 365 U.S. at 541. The State must instead rely on the "independent labor of its officers."

Culombe, 367 U.S. at 582. In this case, Mr. Cheever raised a valid defense under Kansas law, which called the prosecution's evidence of his premeditation into question, yet the trial court allowed the prosecution to use evidence from his compelled psychiatric examination to prove his guilt. Pet. Br. 8–9 ("In Dr. Welner's professional opinion, Cheever retained the ability to think before acting on the morning he murdered Sheriff Samuels and was able to form the premeditated intent to kill."). In doing so, the trial court violated Mr. Cheever's Fifth Amendment privilege against compulsory self incrimination.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Supreme Court of the State of Kansas.

Respectfully submitted,

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ADDENDUM

I. States that admit use of voluntary intoxication as a defense in some form

Alabama: Ala. Code § 13A-3-2(a) (2013) ("[I]ntoxication, whether voluntary or involuntary, is admissible in evidence whenever it is relevant to negate an element of the offense charged.").

Alaska: Alaska Stat. Ann. § 11.81.630 (West 2013) ("[E]vidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result.").

California: Cal. Penal Code § 29.4(b) (West 2013) ("Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.").

Colorado: Colo. Rev. Stat. Ann. § 18-1-804(1) (West 2013) ("[E]vidence of intoxication of the defendant may be offered by the defendant when it is relevant to negative the existence of a specific intent if such intent is an element of the crime charged.").

Connecticut: Conn. Gen. Stat. Ann. § 53a-7 (West 2013) ("[I]n any prosecution for an

offense evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the crime charged, provided when recklessness or criminal negligence is an element of the crime charged, if the actor, due to self-induced intoxication, is unaware of or disregards or fails to perceive a risk which he would have been aware of had he not been intoxicated, such unawareness, disregard or failure to perceive shall be immaterial.").

Illinois: *People* v. *Mocaby*, 194 Ill. App. 3d 441, 447 (1990) ("Intoxication may be a defense to a crime which requires a specific intent, such as murder, where the intoxication is so extreme as to suspend all reason and make it impossible for the defendant to form the necessary intent.").

Iowa: Iowa Code Ann. § 701.5 (West 2013) ("The fact that a person is under the influence of intoxicants or drugs . . . may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.").

Kansas: Kan. Stat. Ann. § 21-5205(b) (West 2012) ("[W]hen a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of [voluntary] intoxication may be taken into consideration in

determining such intent or state of mind.").

Kentucky: Ky. Rev. Stat. Ann. § 501.080 (West 2012) ("Intoxication is a defense to a criminal charge only if such condition . . . . (1) Negatives the existence of an element of the offense . . . .").

Louisiana: La. Rev. Stat. Ann. § 14:15(2) (2012) ("Where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 37(1)–(2) (2013) ("1. Except as provided in subsection 2, evidence of intoxication may raise a reasonable doubt as to the existence of a required culpable state of mind. 2. When recklessness establishes an element of the offense, if a person, due to self-induced intoxication, is unaware of a risk of which the person would have been aware had the person not been intoxicated, such unawareness is immaterial.").

Maryland: *Hook* v. *State*, 553 A.2d 233, 235 (Md. 1989) ("Although voluntary intoxication is not a defense to murder, evidence with respect to it is relevant and material to a determination by the trier of fact of the degree of a murder alleged to be premeditated.").

Massachusetts: *Com.* v. *Henson*, 476 N.E.2d 947, 954 (Mass. 1985) ("It is time to announce that where proof of a crime requires proof of a specific criminal intent and there is evidence tending to show that the defendant was under the influence of alcohol or some other drug at the time of the crime, the judge should instruct the jury, if requested, that they may consider evidence of the defendant's intoxication at the time of the crime in deciding whether the Commonwealth has proved that specific intent beyond a reasonable doubt."); *Com.* v. *Troy*, 540 N.E.2d 162, 166 (Mass. 1989) (limiting evidence of intoxication to specific intent crimes).

Michigan: *People* v. *Watts*, 348 N.W.2d 39, 40–41 (Mich. Ct. App. 1984) ("Voluntary intoxication is a defense to a specific intent crime because such a crime cannot be committed where the intent did not exist; however, voluntary intoxication is not a defense to a general intent crime.").

Minnesota: Minn. Stat. Ann. § 609.075 (West 2013) ("[W]hen a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of [voluntary] intoxication may be taken into consideration in determining such intent or state of mind.").

Nevada: Nev. Rev. Stat. Ann. § 193.220 (West 2012) ("[W]henever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree

of crime, the fact of the person's [voluntary] intoxication may be taken into consideration in determining the purpose, motive or intent.").

N. Hampshire: N.H. Rev. Stat. Ann. § 626:4 (2013) ("The defendant may . . . introduce evidence of intoxication whenever it is relevant to negate an element of the offense charged, and it shall be taken into consideration in determining whether such element has been proved beyond a reasonable doubt.").

N. Jersey: N.J. Stat. Ann. § 2C:2-8(a), (b) (West 2013) ("[I]ntoxication of the actor is not a defense unless it negatives an element of the offense. b. When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.").

N. Mexico: *State* v. *Campos*, P.2d 1266, 1278 (N.M. 1996) ("Intoxication would only serve as a defense to the specific-intent aspect of the crime, namely the intentional nature of the killing, but would still leave the defendant guilty of a knowing killing, which is also second-degree murder.").

N. York: N.Y. Penal Law § 15.25 (McKinney 2013) ("[I]n any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to

negative an element of the crime charged.").

N. Carolina: *State* v. *Golden*. 546 S.E.2d 163, 166 (N.C. 2001) ("[Voluntary intoxication] is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense.").

N. Dakota: N.D. Cent. Code Ann. § 12.1-04-02 (West 2011) ("Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged. 2. A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious, if his not being conscious thereof is due to self-induced intoxication.")

Oklahoma: *Crawford* v. *State*, 840 P.2d 627, 638 (Okla. Crim. App. 1992) ("However, we recognize an exception to this rule where the accused was so intoxicated that his mental abilities were totally overcome and it therefore became impossible for him to form criminal intent.") (*abrogated by Malone* v. *State*, 168 P.3d 185 (Okla. Crim. App. 2007).

Oregon: Or. Rev. Stat. Ann. § 161.125 (West 2013) ("[I]n any prosecution for an offense, evidence that the defendant . . . was intoxicated may be offered by the defendant whenever it is relevant to negative an element of the crime charged. (2) When recklessness establishes an element of the offense, if

the defendant, due to . . . voluntary intoxication, is unaware of a risk of which the defendant would have been aware had the defendant been not intoxicated . . . such unawareness is immaterial.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 308 (West 2013) ("[E]vidence of [voluntary intoxication] of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.").

Rhode Island: *State* v. *Sanden*, 626 A.2d 194, 199 (R.I. 1993) ("It is well settled in this state that if specific intent is an essential element of a crime, namely, murder, then the defendant's intoxication may be offered to negate his or her specific intent if it is 'of such a degree as to completely paralyze the will of the [defendant], take from him [or her] the power to withstand evil impulses and render his [or her] mind incapable of forming any sane design.'") (quoting *State* v. *Vanasse*, 107 A. 85, 86 (1919)).

S. Dakota: S.D. Codified Laws § 22-5-5 (2013) ([I]f the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was [voluntarily] intoxicated at the time in determining the purpose, motive, or intent with which the accused committed the act.").

Tennessee: Tenn. Code Ann. § 39-11-503(a)–(b) (West 2013) ("[I]ntoxication, whether voluntary or involuntary, is admissible in evidence, if it is relevant to negate a culpable mental state. (b) If recklessness establishes an element of an offense and the person is unaware of a risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense.").

Utah: Utah Code Ann. § 76-2-306 (West 2013) ("Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense.").

Vermont: *State* v. *Myers*, 26 A.3d 9, 23 (Vt. 2011) ("We have long recognized that voluntary intoxication can provide a defense to certain crimes . . . 'When specific intent is an element of a crime, evidence of either voluntary or involuntary intoxication may be introduced to show that the defendant could not have formed the necessary intent.'") (quoting *State* v. *Joyce*, 433 A.2d 271, 272 (1981)).

Virginia: *Chittum* v. *Com.*, 174 S.E.2d 779, 783 (Va. 1970) ("'Voluntary drunkenness, where it has not produced permanent insanity, is Never an excuse for crime;

Except, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree'.") (quoting *Gills* v. *Com.*, 126 S.E. 51, 53 (1925)).

Washington: Wash. Rev. Code Ann. § 9A.16.090 (West 2013) ("[W]henever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of . . . intoxication may be taken into consideration in determining such mental state.").

W. Virginia: *State* v. *Keeton*, 272 S.E.2d 817, 818, 820 (W. Va. 1980) ("[Voluntary] intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication."; "[V]oluntary drunkenness . . . may reduce the degree of the crime or negative a specific intent.") (citation omitted).

Wisconsin: Wis. Stat. Ann. § 939.42 (West 2013) ("An intoxicated or a drugged condition of the actor is a defense only if such condition . . . (2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24(3)."); Wis. Stat. Ann. § 939.24(3) (West 2013) ("A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of

creating an unreasonable and substantial risk of death or great bodily harm to another human being.").

Wyoming: Wyo. Stat. Ann. § 6-1-202(a) (West 2013) ("Self-induced intoxication of the defendant is not a defense to a criminal charge except to the extent that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime.").

II. States that do not admit intoxication evidence as a defense to any crime

Arizona: Ariz. Rev. Stat. Ann. § 13-503 (2013) ("Temporary intoxication. . . does not constitute insanity and is not a defense for any criminal act or requisite state of mind.").

Arkansas: *White* v. *State*, 717 S.W.2d 784, 784 (Ark. 1986) ("[V]oluntary intoxication is no defense to criminal prosecutions . . . .").

Delaware: Del. Code Ann. tit. 11, § 421 (West 2013) ("The fact that a criminal act was committed while the person committing such act was in a state of [voluntary] intoxication, or was committed because of such intoxication, is no defense to any criminal . . . .").

Florida: Fla. Stat. Ann. § 775.051 (West 2013) ("Evidence of a defendant's voluntary intoxication is not admissible to show

that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense . . . .").

Georgia: Ga. Code Ann. § 16-3-4(c) (West 2013) ("Voluntary intoxication shall not be an excuse for any criminal act or omission.").

Hawaii: Haw. Rev. Stat. § 702-230(1) (West 2013) ("(1) Self-induced intoxication is prohibited as a defense to any offense . . . .").

Idaho: Idaho Code Ann. § 18-116 (West 2013) ("A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense . . . .").

Indiana: Ind. Code Ann. § 35-41-2-5 (West 2013) ("Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense . . . .").

Mississippi: *Adams* v. *State*, 62 So. 3d 432, 441 (Miss. Ct. App. 2011) ("It is well established that voluntary intoxication is not a defense in Mississippi . . . '[t]he *McDaniel* rule prevents "submission to a jury the question of voluntary

intoxication as a defense in specific intent offenses.'" *Lee* v. *State,* 403 So. 2d 132, 134 (Miss.1981)") (citing *McDaniel* v. *State*, 356 So. 2d 1151, 1160 (Miss. 1978)).

Missouri: Mo. Ann. Stat. § 562.076(1), (3) (West 2013) ("1. A person who is in an intoxicated . . . condition . . . from alcohol . . . is criminally responsible for conduct . . . 3. Evidence that a person was in a voluntarily intoxicated . . . condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense.").

Montana: Mont. Code Ann. § 45-2-203 (West 2013) ("[A]n intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense . . . .").

Nebraska: Neb. Rev. Stat. Ann. § 29-122 (West 2012) ("Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense . . . .").

Ohio: Ohio Rev. Code Ann. § 2901.21(c) (West 2013) ("Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure

to act constitutes a criminal offense. [E]vidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.").

S. Carolina: *State* v. *Vaughn*, 232 S.E.2d. 328, 330 (S.C. 1977) ("We adopt the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific.").

Texas: Tex. Penal Code Ann. § 8.04(a) (West 2013) ("Voluntary intoxication does not constitute a defense to the commission of crime.").