

Discussion

The standard of deliberate indifference was first introduced in *Estelle v. Gamble*, 429 U.S. 97 (1976), with the degree of intent defined by *Farmer v. Brennan*, 511 U.S. 825 (1994), as subjective rather than objective. Applying this subjective standard, courts consider what defendants know rather than what they should have known. In *Estelle v. Gamble* and *Farmer v. Brennan*, the Supreme Court, through the application of this standard of deliberate indifference, supported the autonomy and decision-making capacity of prison officials.

In this case of first impression, the appeals court provided important legal precedent in support of school districts. Matters of determining learning disabilities and whether the disability qualifies a child for special education services can be complex. With changing criteria for disabilities, changing regulations, and changes in a child's development, a child can qualify for special education at one point, but not later, and *vice versa*. In *S.H.*, the court provided support to school districts in its ruling that children who are later found to be without a disability cannot use the IDEA against school districts that relied on assessments that found a disability. By using this standard of deliberate indifference, the court supported the autonomy and decision-making capacity of the School District, much in the way the Court supported the prisons in *Estelle v. Gamble* and *Farmer v. Brennan*.

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Court-Ordered Psychiatric Examination Versus a Criminal Defendant's Fifth Amendment Rights

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When a Defendant Raises a Diminished-Capacity Defense, His Fifth Amendment Privilege Against Self-Incrimination Is Not Violated When the State Introduces Rebuttal Expert Testimony Obtained From His Court-Ordered Mental Evaluation

Scott Cheever was tried and convicted of capital murder and received a death sentence. During his trial in state court, and over his objection, the state introduced rebuttal testimony derived from his prior federal court-ordered evaluation. Mr. Cheever appealed the conviction, arguing that such testimony violated his Fifth Amendment right against self-incrimination. His appeal prevailed in the Kansas Supreme Court, and the state appealed to the U.S. Supreme Court, which reversed the state supreme court in *Kansas v. Cheever*, 134 S. Ct. 596 (2013). The issue before the Court was whether a defendant's affirmative defense of diminished capacity opens the door to expert rebuttal testimony derived from a previous court-ordered psychiatric evaluation.

Facts of the Case

On January 19, 2005, Mr. Cheever was at an acquaintance's residence cooking and smoking methamphetamine. Tipped off that authorities were on the way, Mr. Cheever and an acquaintance hid in the upstairs of the house. As Sheriff Matthew Samuels walked up the stairs, searching the home, Mr. Cheever shot him twice. Mr. Cheever then fired at other officers who attempted to assist the fallen officer.

Mr. Cheever was charged in state court with capital murder, and initial trial proceedings began. At about that same time, the Kansas Supreme Court struck down the state's death penalty statute in *State v. Marsh*, 102 P.3d 445 (Kan. 2004). State proceedings were suspended without prejudice, new federal death-penalty-eligible charges were filed, and trial proceedings began in the federal district court. Mr. Cheever announced a defense of diminished capacity based on his intoxication and chronic use of drugs. The federal district court judge ordered a mental health evaluation, which was conducted by a court-appointed psychiatrist, Dr. Michael Welner, who spent 5 ½ hours interviewing Mr. Cheever.

After the trial began in federal district court, it was halted by the illness of the defense attorney. Around the same time, the U.S. Supreme Court reversed the Kansas Supreme Court's prior *Marsh* decision and held that the state's death penalty statute was consti-

tutional (*Kansas v. Marsh*, 548 U.S. 163 (2006)). Mr. Cheever's case was returned to the Kansas state court and, once again, he was charged with capital murder and eligible for the state's resuscitated death penalty.

At trial, Mr. Cheever relied on the defense of voluntary intoxication (an absence of *mens rea*) and introduced expert testimony on the pharmacology and behavioral effects of methamphetamine. His defense expert, Dr. Roswell Lee Evans, a doctor of pharmacy and dean of the Auburn University School of Pharmacy, testified that Mr. Cheever had been intoxicated with methamphetamine at the time of the crime. Dr. Evans explained that long-term amphetamine use had damaged Mr. Cheever's brain, as later summarized by the Kansas Supreme Court:

Ultimately, Evans testified that it was his opinion that at the time Cheever committed the crimes, Cheever was both under the influence of recent methamphetamine use and impaired by neurotoxicity due to long-term methamphetamine use, which affected his ability to plan, form intent, and premeditate the crime. With respect to shooting Officer Samuels, Evans testified that there was no judgment. "There was no judgment at all. This man just did it" (*State v. Cheever*, 284 P.3d 1007 (Kan. 2012), p 1016).

In rebuttal to the voluntary intoxication defense and over the defense's objection, the trial court allowed Dr. Welner to testify on the results of the federal court-ordered mental examination that he had conducted. Relying on that examination, Dr. Welner opined that Mr. Cheever had no diminished capacity, that he was fully purposeful in premeditating and carrying out the murder of the sheriff, and that he had a sociopathic personality. In addition, the prosecution argued, through Dr. Welner's testimony, that Mr. Cheever's actions were driven by his antisocial personality, not intoxication. Mr. Cheever was convicted and sentenced to death.

He appealed to the Kansas Supreme Court, arguing that admission of the court-ordered psychiatric examination findings violated his Fifth and Fourteenth Amendment rights. He argued as well that Dr. Welner's testimony went far beyond the proper scope of rebuttal concerning his voluntary intoxication claim by opining about his actual guilt in portraying him as remorseless and of bad character.

The Kansas Supreme Court held that admitting Dr. Welner's rebuttal testimony violated Mr. Cheever's Fifth Amendment privilege because he had not raised a "mental disease or defect" defense at trial. The court held that waiver of that privilege occurs only when a defendant presents a defense at trial that

he or she lacks the requisite criminal intent due specifically to "mental disease or defect." The court further held that voluntary intoxication was not a "mental disease or defect"; thus, Mr. Cheever's reliance on that defense did not constitute a waiver of confidentiality of his mental examination (*State v. Cheever*, 284 P.3d 1007 (2012)). Mr. Cheever's conviction was reversed, and the state appealed to the U. S. Supreme Court.

Ruling and Reasoning

In a unanimous opinion, the Court held that the Fifth Amendment does not prohibit the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant for the limited purpose of rebuttal to the defendant's presentation of expert testimony in support of a defense of voluntary intoxication. Thus, the Kansas Supreme Court's ruling was vacated and the case remanded, with the Court noting that an issue left undecided by the Kansas court was whether Dr. Welner's testimony went beyond the limited scope of rebuttal and thus violated Mr. Cheever's Fifth Amendment rights.

The Court distinguished its decision from its prior holding in *Estelle v. Smith*, 451 U.S. 454 (1982), that compelled statements made to a psychiatrist for a competency evaluation cannot be used during the sentencing phase of trial to prove a defendant's future dangerousness. The Court noted that, in *Estelle*, the defendant did not rely on mental-state defenses or introduce psychiatric testimony.

The Court also cited its ruling in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), where the prosecution was allowed to introduce expert rebuttal evidence from a court-ordered evaluation against a defendant claiming extreme emotional disturbance as an affirmative defense. The Court reaffirmed the rule of *Buchanan*, stating that "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal" (*Cheever*, p 603).

Discussion

Kansas v. Cheever clarifies when expert testimony obtained from court-ordered evaluations can be used by the state in rebuttal to a diminished-capacity defense. Relying on its previous holding in *Buchanan*, the Supreme Court held that the scope of admissibility of such rebuttal testimony applies not only to

affirmative defenses of “mental disease or defect,” but also to diminished-capacity defenses such as voluntary intoxication. “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*, p 601). The Court stated that Fifth Amendment jurisprudence does not allow a defendant to avoid cross-examination; instead the Court views the defense expert as the voice of the defendant. However it cautioned, rebuttal testimony should not exceed areas covered by the defense expert; indeed, Federal Rule of Criminal Procedure 12.2 makes clear that the rebuttal testimony cannot exceed the scope of the defense expert’s testimony.

While allowing a limited scope of rebuttal, the Court noted that expert testimony cannot be used to rebut the defendant’s own testimony. Thus, expert testimony from a compelled mental examination of a defendant cannot be introduced except as a rebuttal. “We held in *Estelle* that under the Fifth Amendment, when a criminal defendant ‘neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence,’ his compelled statements to a psychiatrist cannot be used against him” (*Cheever*, p 600).

The holding in *Cheever* alerts forensic psychiatrists to the proper scope of rebuttal testimony and the importance of knowing the scope of an opposing expert’s testimony. *Cheever* also reaffirms the importance of giving an examinee appropriate disclosure and warning at the beginning of a forensic evaluation. *Cheever* also offers caution to defense attorneys to make judicious use of mental health evaluation referrals.

Further, the case gives insight into the Court’s view of mental state nomenclature. In *Cheever*, the Court cited its previous decision in *Buchanan* to assert that there is little constitutionally relevant distinction between “mental illness and mental defect” as against merely abnormal mental states. Whereas the Kansas Supreme Court read its statute on waiver of confidentiality as requiring a specific claim of mental illness or defect, the Supreme Court chose to read those terms expansively. This broadening is presaged in an earlier decision of the Court:

The term “mental illness” is devoid of any talismanic significance; the fact that a state civil commitment statute uses the term “mental abnormality” rather than the term “men-

tal illness” as a prerequisite for commitment is a matter of the state legislature’s choice; legal definitions which must take into account such questions as individual responsibility and competency need not mirror those advanced by the medical profession. [*Kansas v. Hendricks*, 521 U.S. 346 (1997), p 358].

Thus, in *Kansas v. Hendricks*, the Court showed skepticism toward narrow psychiatric terminology, dismissing the precision of terms sought by the Kansas Supreme Court, which had held the state’s Sexually Violent Predator statute unconstitutional because it used “mental abnormality” rather than “mental illness” as a basis for involuntary civil commitment. *Cheever* continues this broad legal view of psychiatric terminology.

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Intellectual Disability, IQ Measurement Error, and the Death Penalty

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The U.S. Supreme Court Holds That Use of A Bright-Line IQ Score Violates the Eighth Amendment

Freddie Hall, who had been sentenced to death in Florida, filed an *Atkins*-based claim of intellectual disability and challenged a Florida statute that set an IQ of 70 or less as a necessary condition for such a designation. In his last state court appeal, he presented with an IQ of 71. The Florida Supreme Court upheld his death sentence and he appealed to the U.S. Supreme Court. The issue presented to the Court was whether the measurement error (SEM) inherent in standard intelligence testing should be constitutionally recognized and that a 95 percent confidence interval around the IQ score 70 should replace the use of a bright-line IQ score of 70. In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court held that the SEM must be recognized when assessing intellectual disability and found Florida’s bright-line statute unconstitutional.