No. 12-609

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER

v.

SCOTT D. CHEEVER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a State violates a defendant's Fifth Amendment privilege against compelled self-incrimination when it introduces evidence obtained from a court-ordered mental health evaluation of the defendant to rebut testimony from a defense mental health expert that the defendant lacked the requisite mental state to commit murder.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statute and rules:

In the Supreme Court of the United States

No. 12-609

STATE OF KANSAS, PETITIONER

v.

SCOTT D. CHEEVER

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

BRIEF OF THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a State violates a defendant's Fifth Amendment privilege against compelled self-incrimination when it introduces evidence obtained from a court-ordered mental health evaluation of the defendant to rebut testimony from a defense mental health expert that the defendant lacked the requisite mental state to commit murder. Because the Fifth Amendment applies to the federal government as well as to the States (through the Fourteenth Amendment), resolution of the question presented will have substantial implications for the conduct of federal criminal trials. The United States therefore has a significant interest in the Court's disposition of this case.

STATEMENT

1. On January 19, 2005, respondent shot and killed Greenwood County Sheriff Matthew Samuels when

Sheriff Samuels attempted to arrest him on an outstanding warrant. Pet. App. 8. The police had received a tip that respondent was present in a home in an area of rural Kansas known for illegal drug activity. *Ibid.*; 1 Tr. 122.[1] At approximately 9:45 a.m., Sheriff Samuels and two other officers went to the home to apprehend respondent. Pet. App. 8; 4 Tr. 59.

Respondent was at the residence. Pet. App. 8. He and several other people had been cooking methamphetamine since the early morning hours. *Ibid.* Sometime between 3 a.m. and 8:30 a.m., respondent injected himself with one shot of methamphetamine. 4 Tr. 58, 140; J.A. 64. When respondent received word that the police were on their way, he and another man went to hide in an upstairs bedroom. Pet. App. 8. Respondent armed himself with a revolver and a semi-automatic pistol. *Id.* at 8-9.

From the upstairs bedroom, respondent heard the police pull up to the house. Pet. App. 9; 4 Tr. 60. He heard the owner of the house answer the door and tell Sheriff Samuels that respondent had already left and that the sheriff could come in and look around. Pet. App. 9; 4 Tr. 61-62. After checking the first floor, Sheriff Samuels noticed a stairway leading upstairs. Pet. App. 9; 2 Tr. 67-68. Sheriff Samuels started up the stairs, calling out respondent's name. Pet. App. 9; 2 Tr. 69-70. Respondent told the other man hiding upstairs to stay put, then stepped out of his hiding place with a cocked and loaded revolver. Pet. App. 9; 4 Tr. 63.

As Sheriff Samuels came up the stairs, respondent shot him in the chest. Pet. App. 9; 4 Tr. 63-64, 106.

---

[1] References to the trial transcript are to the volume and page number, so 1 Tr. 122 refers to page 122 of the transcript of the first day of trial.

Respondent went back in the bedroom and told the other man not to escape out the window. Pet. App. 9; 4 Tr. 64. Respondent went back to the stairway, saw Sheriff Samuels lying there, and shot him again. Pet. App. 9; 4 Tr. 65. Respondent then went back into the bedroom and saw that the other man had jumped out the window. *Ibid.*

Two officers came to Sheriff Samuels's aid, and respondent opened fire, nearly hitting one of them. Pet. App. 9; 1 Tr. 110-113; 4 Tr. 106. The officers pulled the sheriff out of the house and attempted CPR, but his wounds were fatal. 1 Tr. 114-119, 140-144; 2 Tr. 15, 22, 24, 31. Backup officers responded to the scene and surrounded the house, but respondent refused to come out. 1 Tr. 146; 2 Tr. 96; 3 Tr. 146-147, 162-164. After a seven-hour standoff, a SWAT team entered the house and rushed up the stairs. 3 Tr. 162-173; 4 Tr. 67-68. Respondent fired multiple rounds at the officers. Pet. App. 9; 3 Tr. 175, 177, 189. The officers returned fire, and respondent surrendered. 3 Tr. 178-179, 182.

The State filed criminal charges against respondent but then dismissed the charges because at that time the death penalty was unavailable as a punishment. See Pet. App. 10; see also *State* v. *Marsh*, 102 P.3d 445, 458 (Kan. 2004) (holding state death penalty statute unconstitutional), rev'd, 548 U.S. 163 (2006).

2. A federal grand jury returned a superseding indictment charging respondent with the murder of Sheriff Samuels, two counts of attempted murder, and various drug and firearm offenses. See Third Superseding Indictment 1-10 (6:05-CR-10050 Docket entry No. 200 (D. Kan. Dec. 14, 2011)).

Respondent filed a notice of his intention to use expert testimony to show that his methamphetamine use

made him unable to form the intent to commit murder. Pet. App. 69-70. Under Federal Rule of Criminal Procedure 12.2, a defendant who plans to introduce expert evidence "relating to a mental disease or defect or any other mental condition" bearing on guilt or capital punishment must provide notice within a certain time period. Fed. R. Crim. P. 12.2(b). When a defendant provides that notice, "the court may, upon the government's motion, order the defendant to be examined" by a mental health expert. Fed. R. Crim. P. 12.2(c)(1)(B).

Consistent with that rule, the district court ordered respondent to undergo a psychiatric examination. Pet. App. 11. Respondent was evaluated by Dr. Michael Welner, a psychiatrist with expertise about the effect of drugs on behavior. *Ibid.*; see J.A. 95-97. Dr. Welner reviewed respondent's medical reports and history and interviewed respondent for five and a half hours. J.A. 112-114.

The case proceeded to trial. During jury selection, defense counsel became unable to proceed, so the district court suspended the case. Pet. App. 10-11. In the meantime, this Court held that the Kansas death penalty statute is constitutional. See *Kansas* v. *Marsh*, 548 U.S. 163 (2006). Federal prosecutors dismissed the case without prejudice to enable respondent to be tried in state court. Pet. App. 11.

3. Respondent was charged in state court with the capital murder of Sheriff Samuels, attempted capital murder of four law enforcement officers, and several drug and firearm offenses. Pet. App. 6; see 06CR198 Compl. 1-5 (Greenwood Cnty. D. Ct. Oct. 25, 2006).

Respondent's defense at trial was that his methamphetamine use made him incapable of forming the intent to commit murder. Pet. App. 10. Respondent testified

in his own defense. He acknowledged that he had killed Sheriff Samuels and shot at the other officers, 4 Tr. 63-65, 84-85, but blamed his actions on his use of methamphetamine, *id.* at 5-41, 58-60, 90, 138.

The defense then presented the testimony of Dr. Roswell Lee Evans, Jr., a psychiatric pharmacist. Pet. App. 10. Dr. Evans testified about the short-term and long-term effects of methamphetamine use on the brain. *Id.* at 12-13. He stated that when a person ingests methamphetamine, he experiences an immediate "rush" that lasts up to half an hour and the drug remains in his system for 13 to 14 hours. *Id.* at 12; J.A. 38-40. Dr. Evans explained that, over time, methamphetamine use can "change the structure of the brain" and impair a person's ability to exercise judgment and make rational decisions. J.A. 40-43, 46. Based on his examination of respondent, Dr. Evans concluded that respondent had developed "neurotoxicity," meaning that his brain had been altered by long-term methamphetamine use, and he was "intoxicated by meth at the time of the sheriff's shooting," both of which "affect[ed] his ability to plan, to premeditate this crime." J.A. 47-51.

The State called Dr. Welner—the psychiatrist who had examined respondent in the federal case—as a rebuttal witness. Respondent objected, contending that because his defense was "voluntary intoxication" and not a "mental disease or defect," and Kansas rules of criminal procedure allow a trial court to order a mental examination only for a "mental disease or defect" defense, Dr. Welner was not a proper rebuttal witness. J.A. 88-90; see Kan. Stat. Ann. § 22-3219. The State replied that respondent had put his own mental state in issue by presenting Dr. Evans's testimony, and Dr. Welner's testimony "directly rebut[ted]" that testimony. J.A. 89-

90. The court agreed and permitted Dr. Welner to testify. J.A. 92.

Based on his examination of respondent, Dr. Welner concluded that respondent could form the intent to commit murder on the day of the crimes. J.A. 144. Dr. Welner observed that respondent had injected methamphetamine "on a number of occasions" without "becom[ing] homicidally violent," and he concluded that at the time of the crimes, respondent was "aware of his surroundings" and had the "ability to control his actions." J.A. 135-137, 141. Dr. Welner gave examples of respondent's conscious decisionmaking, including his decisions to hide upstairs, to stay quiet to evade detection, to wait to fire until Sheriff Samuels entered the stairwell, to direct the activities of the other man hiding upstairs, and to shoot Sheriff Samuels a second time. J.A. 136-141.

The jury convicted respondent on all charges and respondent was sentenced to death. Pet. App. 6.

4. The Kansas Supreme Court reversed respondent's convictions for murder and attempted murder. Pet. App. 1-68. The Kansas Supreme Court held that Dr. Welner's testimony had violated respondent's Fifth Amendment privilege against compelled self-incrimination. *Id.* at 7.

The Kansas Supreme Court noted that if a defendant "place[s] his or her mental state in issue" by "present[ing] evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect," that operates as a "waiver" of the Fifth Amendment privilege, and the State may "use [a court-ordered psychiatric] examination against the defendant." Pet. App. 24, 31. But the court found no such waiver here because respondent claimed a "temporary mental incapacity due

to voluntary intoxication," not a "mental disease or defect," and Kansas law authorizes a court-ordered psychiatric examination only for a "mental disease or defect" defense. *Id.* at 28-31, 34-35.

SUMMARY OF ARGUMENT

The Fifth Amendment privilege against compelled self-incrimination does not bar the prosecution from using testimony from a court-ordered mental health evaluation to rebut a defense expert's testimony about the defendant's mental state. The Fifth Amendment provides a defendant with a right not to testify at his own trial. But it does not permit the defendant to place his own one-sided version of events before the jury free from rebuttal. When a defendant provides his version of events—either through his own testimony or through a mental health expert—the defendant's conduct waives the Fifth Amendment privilege as appropriate to permit the prosecution to challenge that evidence. Denying the prosecution the chance to respond would distort the truth-seeking process and undermine the integrity of the criminal trial.

A. The core protection of the Fifth Amendment is a prohibition on the use of compelled testimony from the defendant to establish his guilt at trial. The defendant has a right to choose not to testify at his own trial, and if he invokes that right, the government and the court may not comment on his silence, and the jury may not draw an adverse inference from his silence. But if the defendant takes the opposite approach and presents a defense that includes his own statements, his defense is subject to adversarial testing. That is because the defendant, through his conduct, has relinquished the protection of the privilege and subjected his evidence to the ordinary working of the adversary system.

This Court has long recognized that a defendant who testifies in his own defense may not claim the privilege to avoid adversarial testing. Instead, his act of testifying opens the door to cross-examination and to impeachment using his own prior statements. This Court has termed the defendant's decision to take the stand a waiver: the defendant has a choice whether to testify at trial, and when he "offer[s] himself as a witness" he "waive[s]" the privilege against compelled self-incrimination. *Raffel* v. *United States*, 271 U.S. 494, 496-497 (1926).

B. The same principle applies when a defendant affirmatively introduces evidence of his own mental health at trial. In a series of decisions starting with *Estelle* v. *Smith*, 451 U.S. 454 (1981), this Court considered Fifth Amendment challenges to the prosecution's use of evidence from a court-ordered mental health examination of the defendant. Whether such evidence may be used by the prosecution, the Court explained, depends on whether the defendant had presented evidence that placed his own mental state in issue. In *Smith*, the defendant had not done so, and the privilege remained intact. But the Court recognized that it would be a "different situation" if the defendant had affirmatively introduced expert testimony about his mental state. *Id.* at 472. In that instance, the Court stated, a court-ordered mental health evaluation may be the only way the State can meaningfully respond to the defendant's evidence. *Id.* at 465.

In cases following *Smith*, when the defendant had placed his mental state in issue by presenting testimony from a mental health expert, the Court confirmed that the prosecution could use evidence from a court-ordered mental health examination to rebut the defendant's

evidence. See *Powell* v. *Texas*, 492 U.S. 680 (1989) (per curiam); *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). The Court reasoned that a defendant "waive[s] his Fifth Amendment privilege by raising a mental-status defense." *Powell*, 492 U.S. at 685.

Accordingly, just as a defendant cannot testify at trial and then claim the protection of the Fifth Amendment against relevant cross-examination, he cannot place his mental state in issue through the testimony of an expert and then claim that the Fifth Amendment immunizes his expert from rebuttal. To hold otherwise would unjustifiably impede the truth-seeking function of the criminal trial.

C. Permitting the prosecution to rebut the defendant's expert testimony with evidence from a court-ordered mental health evaluation is consistent with the purposes of the Fifth Amendment privilege. The Amendment protects the defendant's free choice. Only if the defendant himself introduces mental state evidence may the prosecution rebut the defense evidence using evidence from an examination of the defendant. The defendant's choice whether to put his mental state in issue, like his choice whether to testify, safeguards constitutional values against compelling the defendant to furnish testimonial evidence used to convict and punish him.

A contrary rule would be untenable. Allowing a defendant to introduce the testimony of his own mental health expert free from challenge would skew the truth-seeking function of the trial. Testimony from a mental health expert may carry great weight with the jury, and if the prosecution is not afforded a meaningful opportunity to challenge the defense expert, the jury would hear a one-sided story.

This Court has relied on the same logic to permit impeachment of a testifying defendant using evidence obtained in violation of constitutional guarantees. In that context, the evidence may be used for impeachment in order to preserve the integrity of the trial. The same principle of evenhandedness applies when the defendant puts his mental state in issue through expert testimony: the prosecution must have a fair opportunity to respond.

D. The Kansas Supreme Court erred in holding that the Fifth Amendment precluded the expert who performed the court-ordered examination from testifying in this case. Respondent argued that he lacked the necessary mental state to commit the crime, and he introduced his own expert's testimony about the effects of methamphetamine use to support that defense. Based on his examination of respondent, the defense expert concluded that respondent was unable to form the necessary intent to commit murder. But the expert who performed the court-ordered examination in federal court had reached a different conclusion. Once respondent introduced his own expert's testimony in the state trial, the State was entitled to present testimony from the expert who performed the court-ordered examination in rebuttal.

The Kansas Supreme Court incorrectly believed that whether respondent waived his Fifth Amendment privilege depended on state law. The court reasoned that because state law authorizes trial courts to order an examination only of a defendant raising a mental disease or defect defense, and respondent did not raise that type of defense, admission of the evidence from the examination ordered in federal court violated the Fifth Amendment. But whether the Fifth Amendment permits the State's use of that evidence in rebuttal is a federal ques-

tion controlled by federal law. It does not matter how state law characterizes respondent's mental-state defense or whether a state court may order a mental health examination when the defendant presents a certain defense. What matters is that respondent had "place[d] his mental status at issue" (*Buchanan*, 483 U.S. at 425 n.21) by introducing his own expert's testimony. The judgment of the Kansas Supreme Court should be reversed.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT BAR THE GOVERNMENT FROM PRESENTING EVIDENCE FROM A COURT-ORDERED MENTAL HEALTH EVALUATION OF THE DEFENDANT TO REBUT TESTIMONY FROM A DEFENSE MENTAL HEALTH EXPERT THAT THE DEFENDANT LACKED THE MENTAL STATE NECESSARY TO COMMIT THE CRIME

In this case, respondent put on an expert witness to testify about respondent's mental health. Based on his conversations with respondent, the expert testified that respondent was unable to form the necessary intent to commit murder. The State attempted to rebut that testimony by presenting its own expert, a psychiatrist who had previously examined respondent pursuant to a federal court order and concluded that respondent was able to form the necessary intent. The question here is whether, after respondent presented his own mental health expert's testimony to establish that he lacked the necessary mental state, he may use the Fifth Amendment to shield that testimony from rebuttal by the government's expert.

The answer is no. The Fifth Amendment does not give a criminal defendant the right to present his own version of events to the jury free from challenge. When

a defendant offers his own testimony, he waives the Fifth Amendment privilege to permit appropriate cross-examination. Similarly, when he presents a mental-state defense through an expert who examined him, the prosecution must have the opportunity to respond with a prior court-ordered examination of him. A contrary rule would be unfair to the prosecution and would leave the jury with a one-sided version of events, substantially impeding the jury's search for the truth.

A. A Defendant Who Testifies At Trial Waives His Fifth Amendment Privilege And His Testimony Is Subject To Adversarial Testing

1. The Fifth Amendment provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V; see U.S. Const. Amend. XIV. The "core protection" of the Self-Incrimination Clause is "a prohibition on compelling a criminal defendant to testify against himself at trial." *United States* v. *Patane*, 542 U.S. 630, 637 (2004) (plurality opinion); see *id.* at 645 (Kennedy, J., concurring in the judgment).

The privilege against compelled self-incrimination was in part a "response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber," *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), where an accused was placed under oath and then subjected to the "cruel trilemma of self-accusation, perjury or contempt," *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The Self-Incrimination Clause reflects the judgment that "the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Doe* v. *United States*, 487 U.S. 201, 212

(1988) (brackets in original; citation and emphasis omitted).

Accordingly, the Self-Incrimination Clause provides the defendant with a right not to testify (or even to be sworn as a witness) at his own trial. *Griffin* v. *California*, 380 U.S. 609, 613 (1965); see *Wilson* v. *United States*, 149 U.S. 60, 66 (1893). The Fifth Amendment privilege generally is not self-executing; if an individual "desires the protection of the privilege, he must claim it." *United States* v. *Monia*, 317 U.S. 424, 427 (1943). If a defendant invokes the privilege by declining to take the stand, the prosecution and the judge may not comment on the defendant's failure to testify, see *Griffin*, 380 U.S. at 614, and, at the defendant's request, the judge must instruct the jury not to draw an adverse inference from the defendant's silence, *Carter* v. *Kentucky*, 450 U.S. 288, 300 (1981).

2. At the same time, a criminal defendant "has the right to take the witness stand and to testify in his or her own defense." *Rock* v. *Arkansas*, 483 U.S. 44, 49 (1987). This was not the case at common law and in the American colonies, where a defendant was presumed incompetent to testify because of his stake in the outcome. See *Portuondo* v. *Agard*, 529 U.S. 61, 65-66 (2000); *Ferguson* v. *Georgia*, 365 U.S. 570, 574-577 (1961). But as this Court has explained, several constitutional provisions reflect the view that a criminal defendant may not be deprived of his liberty without having an opportunity "to be heard and to offer testimony" on his own behalf. *Rock*, 483 U.S. at 51-53.

If a criminal defendant elects to testify at trial, his testimony is subject to adversarial testing. "When a defendant assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the

truth-seeking function of the trial—are generally applicable to him as well." *Agard*, 529 U.S. at 69 (brackets and citation omitted). "It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell* v. *United States*, 526 U.S. 314, 321 (1999). That principle applies equally to a testifying defendant: "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, 402 U.S. 183, 215 (1971) (citing cases).

Although a defendant may refuse to testify at all, he "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900). The government also may impeach the defendant by confronting him with his prior convictions, his own prior inconsistent statements, or even his own pre-arrest silence. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 237-238 (1980); *McGautha*, 402 U.S. at 215; *Harris* v. *New York*, 401 U.S. 222, 225 (1971); *Spencer* v. *Texas*, 385 U.S. 554, 561 & n.7 (1967); see also pp. 25-26, *infra*.

Accordingly, it has "always been" understood that the Self-Incrimination Clause protects a defendant when he chooses to remain silent, but not when he chooses to speak, in that once the defendant testifies, his testimony is subject to adversarial testing. *Brown* v. *Walker*, 161 U.S. 591, 597 (1896); see, *e.g.*, *Agard*, 529 U.S. at 69; *Mitchell*, 526 U.S. at 321; *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 286 (1998); *McGautha*, 402 U.S. at 215; *Raffel* v. *United States*, 271 U.S. 494, 496-497

(1926); *Fitzpatrick*, 178 U.S. at 315; see also, *e.g.*, 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2276, at 459, 461-462 (John T. McNaughton rev., 1961).

3. The longstanding rule that a criminal defendant who chooses to testify is subject to adversarial testing is premised on the view that the defendant waives his Fifth Amendment privilege by testifying. The defendant "has the choice" whether to testify "after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness." *Brown* v. *United States*, 356 U.S. 148, 155 (1958). If the defendant claims the privilege, "the matter is at an end." *Johnson* v. *United States*, 318 U.S.189, 196 (1943) (citation omitted). But if the defendant "offer[s] himself as a witness," he "waive[s]" the privilege and is subject to cross-examination and impeachment. *Raffel*, 271 U.S. at 496-497. By testifying, the defendant has "cast aside the cloak of immunity." *Id.* at 497. See also, *e.g.*, *Mitchell*, 526 U.S. at 321 ("The privilege is waived for the matters to which the witness testifies."); *Johnson*, 318 U.S. at 195 (defendant's "voluntary offer of testimony" is a "waiver") (citation omitted); *Brown*, 161 U.S. at 597 (defendant "waive[s] his privilege" by testifying).

The purposes of the privilege against compelled self-incrimination do not extend to shielding a defendant who has chosen to testify at trial against cross-examination. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel*, 271 U.S. at 499. Once a defendant chooses to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations deter-

mining the scope and limits of the privilege against self-incrimination." *Brown*, 356 U.S. at 156. "[N]o unfairness" inheres in allowing cross-examination of a defendant who chooses to testify. *Mitchell*, 526 U.S. at 322. The Fifth Amendment does not provide a defendant with "an immunity from cross-examination on the matters he himself has put in dispute." *Brown*, 356 U.S. at 155-156.

A contrary rule would severely hamper the administration of justice. The "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). A testifying defendant, like any other witness, is "under an obligation to speak truthfully and accurately," and the prosecution may "utilize the traditional truth-testing devices of the adversary process" to ensure that he fulfills that obligation. *Harris*, 401 U.S. at 225. Cross-examination of a testifying defendant "enhance[s] the reliability of the criminal process" and "advances the truth-finding function of the criminal trial." *Jenkins*, 447 U.S. at 238; see *Agard*, 529 U.S. at 70 (the "adversary system * * * reposes judgment of the credibility of all witnesses in the jury") (citation omitted).

Permitting a defendant to testify and then claim the protection of the Fifth Amendment would transform the privilege from "a humane safeguard against judicially coerced self-disclosure" into an "invitation to mutilate the truth." *Brown*, 356 U.S. at 156. If a defendant could "pick and choose what aspects of a particular subject to discuss," it would "diminish[] the integrity of the factual inquiry" and "open the way to distortion of facts." *Mitchell*, 526 U.S. at 322 (citation omitted). It would also deprive the prosecution of a meaningful opportunity

to challenge the defendant's testimony. This Court has recognized, in the context of the Fifth Amendment privilege, that "it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States* v. *Robinson*, 485 U.S. 25, 33 (1988); see *Murphy*, 378 U.S. at 55 (one purpose underlying the privilege is a "sense of fair play"). For all of these reasons, this Court has long held that a defendant who chooses to testify has lost the protection of the Fifth Amendment privilege.

B. A Defendant Who Presents Expert Testimony About His Own Mental State Likewise Waives His Fifth Amendment Privilege

1. In a series of cases, this Court has recognized that, just as a criminal defendant may not present his own testimony and then claim a Fifth Amendment shield from cross-examination, the defendant may not present an expert to testify about his mental state and then claim a Fifth Amendment immunity from rebuttal.

The Court first considered a Fifth Amendment challenge to the prosecution's use of mental health evidence in *Estelle* v. *Smith*, 451 U.S. 454 (1981). In that case, the trial court ordered the defendant to undergo a competency exam, and it was not clear that the court had provided any notice to defense counsel. *Id.* at 456-460. The prosecution introduced testimony from the psychiatrist who conducted that examination to prove future dangerousness at a capital sentencing proceeding. *Id.* at 470-471. This Court concluded that the prosecution's use of this testimony violated the defendant's Fifth Amendment privilege against compelled self-incrimination and Sixth Amendment right to counsel. *Id.* at 468-469. Because the expert "drew his conclusions largely from [the defendant's] account of the crime," "[t]he Fifth Amend-

ment privilege * * * [wa]s directly involved." *Id.* at 464-465. The Court held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468.

Critical to the Court's reasoning was that the defendant had not placed his mental state in issue through expert testimony. *Smith*, 451 U.S. at 466. The Court recognized that "a different situation arises" when the defendant does put his own mental state in issue. *Id.* at 472; see *id.* at 457 n.1. In that instance, the Court suggested, the prosecution may have to present evidence derived from a court-ordered mental health evaluation, because "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." *Id.* at 465. "Accordingly," the Court noted, "several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." *Ibid.*

2. In *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987), the Court confronted the situation it had anticipated in *Smith*. A defendant on trial for murder attempted to establish a defense of "extreme emotional disturbance" by having a social worker introduce the results of psychological examinations of the defendant performed while the defendant was in custody. *Id.* at 408-409 & n.9. In response, the prosecution had the social worker read a report from another examination, ordered by the court at the joint request of the prosecution and defense

while the defendant was in custody. *Id.* at 410-411. The defendant contended that the prosecution's use of the mental health report violated his privilege against compelled self-incrimination. *Id.* at 411-412.

This Court rejected that argument, holding that the defendant in those circumstances had "no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Buchanan*, 483 U.S. at 423. The Court observed that its holding in *Smith* "logically leads to [the] proposition" that "if a defendant requests [a psychiatric] examination or presents psychiatric evidence," the "prosecution may rebut this presentation" with evidence from the court-ordered examination. *Id.* at 422. The Court then explained that the "entire defense strategy" was to establish "the 'mental status' defense of extreme emotional disturbance" by presenting psychological evaluations of the defendant, and the prosecution "could not respond to this defense unless it presented other psychological evidence." *Id.* at 423.

3. The Court reiterated that a defendant may not use the Fifth Amendment privilege to insulate a mental-state defense from rebuttal in *Powell* v. *Texas*, 492 U.S. 680 (1989) (per curiam). *Powell* concerned Fifth and Sixth Amendment challenges to the prosecution's use of a psychiatric examination of the defendant to rebut his insanity defense. *Id.* at 683. The Court found a violation of the right to counsel because that right had attached and counsel had not been given notice of the mental health examination. *Id.* at 685-686. But the Court rejected the defendant's Fifth Amendment challenge on the ground that the defendant had placed his own mental state in issue by presenting the results of his psychiatric examination at trial. *Id.* at 683-684.

Relying on its decisions in *Smith* and *Buchanan*, the Court concluded that a defendant who introduces his own mental health evaluation to prove a mental-state defense has no valid Fifth Amendment objection to the prosecution's use of a court-ordered examination of the defendant in rebuttal. *Powell*, 492 U.S. at 684-685. The Court noted, as it had in *Smith*, that a contrary rule would "deprive the State of the only effective means it has" to rebut the mental-state defense. *Ibid.* (quoting *Smith*, 451 U.S. at 465). And the Court characterized its decision in *Buchanan* as holding that the defendant had "waived his Fifth Amendment privilege by raising a mental-status defense." *Id.* at 685. The Court thus reaffirmed that a defendant who presents mental health testimony has no Fifth Amendment shield against rebuttal of that testimony using evidence from a court-ordered examination.[2]

4. This Court's decisions in *Smith*, *Buchanan*, and *Powell* establish that a defendant may not present expert evidence based on his own mental health examination free from rebuttal by the prosecution's expert witness. Just as a defendant who testifies at trial "cast[s]

---

[2] In *Penry* v. *Johnson*, 532 U.S. 782 (2001), the defendant presented expert testimony to establish that he was mentally retarded, and the prosecution responded by introducing a court-ordered psychiatric report relied on by that expert. *Id.* at 788. On federal habeas corpus review, the Court held that the state court's rejection of the defendant's Fifth Amendment challenge to the prosecution's use of the report did not conflict with clearly established federal law. *Id.* at 794-796. The Court noted that the only time it had found a Fifth Amendment violation based on the prosecution's use of mental health evidence was in *Smith*, and it found *Smith* distinguishable because Smith "had not placed his mental condition at issue," whereas Penry had "made his mental status a central issue" during his trial. *Id.* at 794.

aside the cloak of [Fifth Amendment] immunity," *Raffel*, 271 U.S. at 497, a defendant who presents a mental health expert's opinion based on interviews of the defendant has "waived" any Fifth Amendment objection to the prosecution's use of a court-ordered mental health examination in rebuttal, *Powell*, 492 U.S. at 684. In both contexts, whether the defendant waives the privilege depends on the choices he makes at trial.

C. Permitting The Prosecution To Rebut The Defendant's Expert Testimony About His Mental Health Respects The Fifth Amendment Privilege While Preventing Distortion Of The Trial And Unfairness To The Prosecution

1. The waiver principle recognized in this Court's cases appropriately respects the purposes of the Fifth Amendment. The government may not compel a defendant to make statements and then introduce those statements in its case in chief at trial. For the same reasons, the government may not compel a defendant to speak with a mental health professional and then use the expert's testimony affirmatively to establish guilt or the appropriate sentence when the defendant presents no expert mental health evidence of his own. See *Smith*, 451 U.S. at 462. The constitutional problem is the prosecution's use of the mental health examination "as affirmative evidence" rather than rebuttal evidence, *id.* at 466; such use violates the principle that the government cannot meet its burden of proof "by the simple, cruel expedient of forcing [the necessary evidence] from [the defendant's] own lips," *id.* at 462 (citation omitted).

But when a defendant uses his own statements to a mental health expert to establish his mental state, the Fifth Amendment privilege no longer shields him from the prosecution's similar use of mental health examination evidence. A defendant "waive[s]" "[t]he immunity

from giving testimony * * * by offering himself as a witness," *Raffel*, 271 U.S. at 496, and he equally "waive[s]" the Fifth Amendment privilege "by introducing psychiatric testimony in support of" a mental-state defense, *Powell*, 492 U.S. at 683. Once a defendant presents his own statements at trial—whether through his own testimony or through a mental health expert—he has abandoned the protection of the Fifth Amendment privilege, and his statements are subject to adversarial testing. *Smith*, 451 U.S. at 465. The Fifth Amendment does not permit a defendant to present his own statements through another witness and then claim that the privilege immunizes that witness from rebuttal.[3]

---

[3] The waiver of Fifth Amendment rights occurs because the defendant has taken actions inconsistent with the privilege by presenting expert testimony about his own mental state. A defendant may waive constitutional rights through conduct inconsistent with those rights. See, *e.g.*, *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2261-2262 (2010) (finding an "implied waiver" of a defendant's *Miranda* rights when accused makes statements after receiving warnings); *United States* v. *Goldberg*, 67 F.3d 1092, 1098-1100 (3d Cir. 1995) (defendant's repeated firing of court-appointed attorneys "may be treated as * * * a waiver of the right to counsel"). The defendant has ample notice of the consequences of his decision to present such mental health testimony. See *Buchanan*, 483 U.S. at 425 ("Given our decision in *Smith*, * * * counsel was certainly on notice that if * * * he intended to put on a 'mental status' defense for [the defendant], he would have to anticipate the use of psychological evidence by the prosecution in rebuttal."). Moreover, the Sixth Amendment guarantees that defense counsel will have notice of any mental health examination ordered by a court after the right to counsel has attached. See *Smith*, 451 U.S. at 469-471. This is accordingly not a context in which the defendant himself must affirmatively state his knowing and intelligent waiver of rights. Instead, the decision to present such expert evidence is one to be made in consultation with counsel as a matter of trial strategy. See *Florida* v. *Nixon*, 543 U.S. 175, 187-189 (2004). In any event, whether the Court relies on waiver principles,

The choice whether to present affirmative mental health evidence and risk rebuttal or to forgo use of such evidence and retain the privilege is a constitutionally permissible one. "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow." *McGautha*, 402 U.S. at 213 (internal quotation marks and citation omitted). "[E]very person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence." *Raffel*, 271 U.S. at 499. Yet this Court has recognized that whether to testify at trial is a "choice of litigation tactics," not an impermissible burden on the defendant's Fifth Amendment privilege. *Jenkins*, 447 U.S. at 238. The same is true with respect to the choice to put on expert testimony based on an examination of the defendant. The defendant may "put[] forward his version of the facts" through the testimony of his expert witness, but if he does, he "cannot reasonably claim" an immunity from rebuttal because "he has himself put [his mental state] in dispute." *Brown*, 356 U.S. at 155-156.

2. Permitting rebuttal of a defense mental health expert's testimony is necessary to preserve the integrity of the criminal trial. Society has a weighty interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). Interpreting the Fifth

---

on the Fifth Amendment's purposes, or on the need to protect the integrity of the trial process, the result is the same: a defendant who places his mental health in issue through the testimony of an expert who examined him has no Fifth Amendment right to exclude the testimony of an expert who conducted a court-ordered examination.

Amendment to prohibit the prosecution's use of a court-ordered mental health examination to rebut a defendant's mental-state defense would undermine the jury's search for truth. Without its own expert, the prosecution could not meaningfully challenge the testimony of the defendant's expert. See *United States* v. *Byers*, 740 F.2d 1104, 1114 (D.C. Cir. 1984) (en banc) (Scalia, J.) ("Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony."). And jurors, who "generally have no training in psychiatric matters," would be deprived of evidence necessary to "make [the] most accurate determination of the truth on the issue before them." *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985).

The prosecution's rebuttal evidence is especially important because juries may place great weight on the defense expert's testimony. "[P]sychiatric testimony * * * is clothed with a scientific authority that often carries great weight with lay juries." *Satterwhite* v. *Texas*, 486 U.S. 249, 264 (1988) (Marshall, J., concurring in part and concurring in the judgment). "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state," psychiatrists can "identify the elusive and often deceptive symptoms of" a mental impairment and can "tell the jury why their observations are relevant." *Ake*, 470 U.S. at 80 (internal quotation marks and citation omitted). As this Court recognized in *Smith*, permitting a defendant to introduce his own mental health evaluation and then claim the protection of the Fifth Amendment privilege could "deprive the State of the only effective means" it has to dispute a mental-state defense. 451 U.S. at 465; see, *e.g.*, *Buchanan*, 483 U.S. at 423; *Schneider* v. *Lynaugh*, 835 F.2d 570, 576 (5th Cir.), cert.

denied, 488 U.S. 831 (1988). Put simply, "the state must be able to follow where [the defendant] has led." *Byers*, 740 F.3d at 1113.

3. The principle that a defendant who introduces expert testimony of his own mental state opens the door to rebuttal is reinforced by this Court's cases addressing the permissible impeachment of a testifying defendant. This Court has recognized in numerous contexts that once a defendant testifies, he opens the door to impeachment using evidence that would not otherwise be available to the prosecution. For example, the prosecution may use evidence obtained from an illegal search or seizure to impeach a defendant's testimony at trial, because permitting the defendant to present false testimony and use the Fourth Amendment as his shield would pervert the truth-seeking process. *United States* v. *Havens*, 446 U.S. 620, 622, 626-627 (1980); *Walder* v. *United States*, 347 U.S. 62, 64-65 (1954). Evidence obtained in violation of the Sixth Amendment right to counsel likewise may be used for impeachment purposes, on the theory that the defendant's "perjurious statements" should not be "allow[ed] * * * to go unchallenged." *Kansas* v. *Ventris*, 556 U.S. 586, 594 (2009).

The Court also has permitted impeachment of a testifying defendant with statements obtained in violation of *Miranda*. See *Harris*, 401 U.S. at 223-226. Although "*Miranda* bar[s] the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel," the evidence is not "barred for all purposes"; instead, the prosecution may use that evidence to impeach the defendant so that "[t]he shield provided by *Miranda*" is not "perverted into a license to use perjury by way of a defense,

free from the risk of confrontation with prior inconsistent utterances." *Id.* at 223-226; see *Oregon* v. *Haas*, 420 U.S. 714, 723 (1975).

Although this case concerns rebuttal of an expert mental health witness rather than impeachment of the defendant himself, and the prosecution may use the evidence substantively as opposed to only for impeachment purposes, the prosecution's evidence is allowed in both contexts for similar reasons. The government is not allowed to use the evidence in its case in chief because such use would violate the Constitution, see *Ventris*, 556 U.S. at 590; *Smith*, 451 U.S. at 468; *Harris*, 401 U.S. at 224, or because exclusion is necessary to remedy an existing constitutional violation, see *Walder*, 347 U.S. at 64-65. But once the defendant has presented his own statements—through his own testimony or that of his expert—precluding the government from challenging those statements would unjustifiably skew the trial. Compare *Brown*, 356 U.S. at 156, with *Harris*, 401 U.S. at 225. In order to safeguard the fairness of the trial, a defendant cannot use the Fifth Amendment to put his version of events before the jury without being subject to meaningful adversarial testing by evidence from a court-ordered mental health examination.[4]

---

[4] Only in limited circumstances has the Court barred all uses of a defendant's statements at trial. Evidence obtained by coercion in violation of the Due Process Clause may not be used for any purpose. See *Mincey* v. *Arizona*, 437 U.S. 385, 398-399 (1978). Similarly, the Fifth Amendment forbids any use at trial of grand jury testimony compelled under a grant of immunity. See *New Jersey* v. *Portash*, 440 U.S. 450, 458-459 (1979); see also *Ventris*, 556 U.S. at 590.

Neither situation is implicated here. Court-ordered mental health examinations do not involve the types of coercive actions that implicate the Due Process Clause, such as use of force or threats to overbear the defendant's will. See, *e.g.*, *Mincey*, 437 U.S. at 401-402.

D. A Defendant's Waiver Of The Fifth Amendment Privilege Does Not Depend On State Law

1. Under the principles set out by this Court, the answer in this case is clear: respondent put his mental state in issue at trial through the testimony of a mental health expert who had examined him, and so the prosecution could use evidence from respondent's court-ordered mental examination in rebuttal. Respondent provided notice in his federal trial that he planned to present an expert to testify that he lacked the requisite

---

Moreover, use of evidence from a mental health examination in rebuttal is fundamentally unlike the use of immunized grand jury testimony. In an immunity order, "the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt," *Portash*, 440 U.S. at 459; here, a defendant faces the prospect of rebuttal using evidence from a court-ordered examination only when he first puts his mental health in issue, and giving the defendant the choice between "silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *Williams* v. *Florida*, 399 U.S. 78, 84 (1970).

Indeed, whatever compulsion is involved in a court order requiring a defendant to undergo a mental health examination is substantially lessened by the defendant's ability to choose whether to trigger the examination in the first place and whether to make the results of the examination available at trial. A court-ordered mental health examination generally occurs because the defendant notifies the court that he intends to present a mental-state defense. See Fed. R. Crim. P. 12.2(a) and (c)(1). And once the examination occurs, the defendant controls whether evidence from it will be admitted at trial: If the defendant presents expert testimony about his own mental state, then evidence from the examination may be used in rebuttal. See *Smith*, 451 U.S. at 465; see also Fed. R. Crim. P. 12.2(c)(4). The defendant never faces the "cruel trilemma of self-accusation, perjury or contempt," *Murphy*, 378 U.S. at 55. If he refuses to participate in a court-ordered mental health examination, the consequence is the exclusion of expert evidence supporting his mental-state defense at trial. See Fed. R. Crim. P. 12.2(d)(1).

mental state to commit murder, Pet. App. 69-70, and the district court ordered respondent to undergo a psychiatric examination, see Fed. R. Crim. P. 12.2(c)(1). No constitutional error occurred in the court's decision to order the examination. Such an examination cannot itself violate the privilege against compelled self-incrimination because the privilege is a "trial right of criminal defendants" and "a constitutional violation occurs only at trial" (for example, if such an examination is admitted in the government's case in chief). *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); see *Chavez* v. *Martinez*, 538 U.S. 760, 766-768 (2003) (plurality opinion).

The prosecution did not present any expert testimony about respondent's mental state in its case in chief in respondent's state trial. Instead, respondent put his mental health in issue by testifying himself about his methamphetamine use, 4 Tr. 5-41, 58-60, 90, 138, and then by presenting the testimony of Dr. Evans to provide an opinion about the effects of that methamphetamine use, J.A. 47-51. Once Dr. Evans presented this opinion, which was based on his interview with respondent, J.A. 35, it was appropriate for the State to present Dr. Welner's opinion about respondent's mental state, which he had developed based on the court-ordered evaluation of respondent, J.A. 113-114.

Dr. Welner's testimony directly rebutted Dr. Evans's testimony. Both experts considered the frequency and extent of respondent's methamphetamine use and addressed the effect it had on his behavior in general and his ability to control his actions on the day of the crimes. Compare J.A. 40-44, 46-52 (Dr. Evans) with J.A. 124-126, 134-141 (Dr. Welner). Dr. Welner reviewed Dr.

Evans's report and considered Dr. Evans's conclusions in preparing his own testimony. J.A. 113-114.[5]

Dr. Welner's testimony was critical evidence for the State in attempting to respond to the defense. The "entire defense strategy" was to claim that respondent lacked the necessary intent to commit murder, *Buchanan*, 483 U.S. at 423, and expert opinion testimony from a psychiatrist who had examined respondent was the "only effective means" of challenging the defense expert's testimony on this point, *Smith*, 451 U.S. at 465. Accordingly, the Fifth Amendment privilege does not preclude the prosecution's use of Dr. Welner's testimony to rebut the testimony of Dr. Evans.[6]

2. The Kansas Supreme Court erred in holding that the Fifth Amendment prohibited Dr. Welner from testifying at respondent's trial. That court correctly recognized, based on this Court's decisions, that when the defendant presents a mental health expert's testimony in support of a mental-state defense, he has "waive[d]

---

[5] The parties dispute whether Dr. Evans reviewed Dr. Welner's report in formulating his own opinion. Compare Pet. Br. 39 n.5 with Br. in Opp. 19-20; see 5 Tr. 61 (defense concession); Pet. App. 38 (Kansas Supreme Court's view). There is no need to resolve this question because respondent's presentation of Dr. Evans's testimony is itself sufficient to permit the State to present Dr. Welner's testimony in rebuttal.

[6] Respondent argued below that Dr. Welner's testimony exceeded the scope of rebuttal because Dr. Welner provided alternative reasons for respondent's behavior. See Resp. Kan. S. Ct. Br. 120-130, available at 2010 WL 7196356. No question about the proper scope of rebuttal testimony is before this Court, however, because respondent conceded in his brief in opposition that the Kansas Supreme Court did not address the scope question and characterized that question as a state-law issue appropriately left for remand. See Br. in Opp. 5, 7, 10-11.

[his] Fifth Amendment privilege" and "the State may use [a] court-ordered examination for the limited purpose of rebutting" that defense. Pet. App. 31; see *id.* at 27-28. But the court found no waiver here because the only type of mental-state defense for which the trial court could order a mental health examination under state law was a "mental disease or defect defense," and respondent put forth a different defense—"a temporary mental incapacity due to voluntary intoxication." *Id.* at 28, 32, 34-35; see Br. in Opp. 12-18 (embracing this reasoning).

The Kansas Supreme Court erred in using state law to decide the federal constitutional question. "The question of a waiver of a federally guaranteed constitutional right is * * * a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). The scope of the Fifth Amendment privilege does not depend upon whether the defendant is in state or federal court. See *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). In either case, what matters is whether the defendant has introduced testimony of a mental health expert who has examined the defendant and formed an opinion based on that examination. *Powell*, 492 U.S. at 684-685. State law may provide its own restrictions on the use of certain evidence at trial, but it may not alter the substantive scope of federal constitutional rights. See, *e.g.*, *Virginia* v. *Moore*, 553 U.S. 164, 171-172 (2008); *Arkansas* v. *Sullivan*, 532 U.S. 769, 772 (2001) (per curiam). A violation of state law is not a violation of the federal Constitution as such. See, *e.g.*, *Wilson* v. *Corcoran*, 131 S. Ct. 13, 16 (2010) (per curiam).

Contrary to the Kansas Supreme Court's view (Pet. App. 32), it does not matter for Fifth Amendment purposes whether state law characterizes respondent's

defense as a "mental capacity defense." This Court has considered use of court-ordered mental health examinations to rebut a variety of mental-state defenses, and it has never viewed the label placed on the defense by state law as determinative of the Fifth Amendment question. For example, the defendant in *Buchanan* attempted to establish an "extreme emotional disturbance" defense, which did not require proof of any permanent mental infirmity. 483 U.S. at 408 & n.8. The Court upheld the prosecution's use of a court-ordered psychiatric examination to rebut the defendant's mental state expert, not based on the specific type of the defense, but because the defendant had "place[d] his mental status at issue." *Id.* at 425 n.21; see also *Powell*, 492 U.S. at 683 (insanity defense).

The Fifth Amendment analysis likewise does not turn on whether state rules of criminal procedure permit the prosecution to obtain a court-ordered examination of the defendant. If state law does not provide such a procedure, then the prosecution may not have any material available to use for rebuttal. For example, the Kansas Supreme Court determined that Kansas trial courts may order a mental health examination only when the defendant plans to argue that he "lacked the mental state required" "as a result of a mental disease or defect" (Kan. Stat. Ann. § 22-3219) and it concluded that respondent did not present such a defense in this case. Pet. App. 34-35. If a court ordered a mental health examination in violation of state law, then a defendant could pursue a state-law remedy. But the defendant would not have a federal constitutional objection to the prosecution's use of the examination to rebut his own mental health expert's testimony.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney

MAY 2013