IN THE SUPREME COURT OF THE UNITED STATES

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KANSAS, :

Petitioner : No. 12-609

v. :

SCOTT D. CHEEVER :

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Washington, D.C.

Wednesday, October 16, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

DEREK SCHMIDT, ESQ., Attorney General, Topeka, Kansas; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

NEAL KATYAL, ESQ., Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-609, Kansas v. Cheever.

General Schmidt.

ORAL ARGUMENT OF DEREK SCHMIDT

ON BEHALF OF THE PETITIONER

MR. SCHMIDT: Mr. Chief Justice, and may it please the Court:

Once the Respondent made the trial decision to make his mental status an issue and then supported his argument by introducing, as evidence, the testimony of a mental health expert who had examined the defendant, he no longer could properly claim the protection of the Fifth Amendment to avoid like kind rebuttal by another court-appointed expert.

When the Kansas Supreme Court allowed the Respondent to do just that, it committed constitutional error and should be reversed for three reasons. First, this Court's cases point to the opposite conclusion. Second, allowing this mental for mental expert rebuttal is consistent with this Court's precedent with the purposes of the Fifth Amendment, and it is fair.

And third, a holding that is consistent with the Kansas Supreme Court's rule would have the effect of

undermining the truth-seeking function of the trial by excluding relevant evidence from the jury, especially in the mental health context where the jury has to make an assessment based upon --

JUSTICE SCALIA: Of course, that would -- that would be true, the last would be true, even if the defendant had not sought to introduce expert evidence of his own, right?

MR. SCHMIDT: It -- that would be true, Your Honor. We're not asking for a rule that that's -- that is that broad. We're asking for a rule of parity that allows that, once the defendant has opened the door by putting his own expert on, the government may respond in kind.

JUSTICE KENNEDY: Well, but just -- I have the same concern as Justice Scalia. I mean, that makes your case easier, but it seems to me that the defendant puts his mental capacity in issue and then testifies himself, but with no expert, the State can still call its own expert so far as the -- so far as the Federal constitution is concerned. There might be some Kansas rules about it.

MR. SCHMIDT: Your Honor, that may well be true, and the language of this Court's precedence through Smith and Buchanan, for example, suggests that

the rule may be broader than the minimum that we're asking for today.

JUSTICE SCALIA: Of course, the issue is not whether the State can call its own expert. The issue is whether the State can compel him to speak to its expert --

MR. SCHMIDT: Yes, Your Honor.

JUSTICE SCALIA: -- without which the expert can testify, right?

MR. SCHMIDT: Yes, Your Honor. The -- the Fifth Amendment, of course, is implicated when we're talking about a mental health expert who has conducted an examination of the defendant and the Respondent. That's what we believe is appropriate here, in terms of the parity rule. Once the defendant puts on his expert, who has done so, the government may respond in kind.

JUSTICE GINSBERG: General -- general --

JUSTICE KENNEDY: If I could just make -- it seems to me that it's not necessary to make our decision depend on whether or not another expert has been called. That makes your case easier. And sometimes, when we write opinions, we take the easiest route.

But I take it, under your theory, even if the defendant had not called his own expert, we would still have the same issue before the Court, and you

would take the position that a prosecution expert can testify. Now, whether or not he can use the previous statement, that's -- that's the second point.

MR. SCHMIDT: And, Your Honor, the -- the hypothetical Your Honor posits is closely related to the second question Kansas presented, which was not granted in this case, which would be the impeachment use once the defendant himself has testified.

JUSTICE GINSBURG: But he -- the defendant would have to introduce the issue of his mental state, either by his own testimony or an expert, but there's an oddity about this case.

Do I understand correctly, General Schmidt, that, if there had never been a Federal proceeding, if this case had proceeded from start to finish in the Kansas courts, there would have been no Welner evidence, there would have been no prosecution expert, because it wouldn't have been allowed under Kansas's own rules?

MR. SCHMIDT: Your Honor, Kansas law makes the distinction between voluntary intoxication as a defense and mental disease or defect as a defense. And it does provide a mechanism under the mental disease pleadings for the obtaining of a court-ordered mental evaluation, not under the other.

JUSTICE GINSBURG: This -- this case was

voluntary intoxication and -- and under Kansas procedure, the -- the prosecution could not have called a witness absent insanity or a mental disease; is that right?

MR. SCHMIDT: Justice Ginsburg, it is correct that Kansas could not have called a witness under a voluntary intoxication defense -- could not have obtained a court-ordered mental evaluation. That is correct.

The reason I didn't merely say yes is we do have some disagreement with the other side that would be dealt with in the courts below as to whether this truly was a voluntary intoxication defense, since the other side's expert did put the long-term effects on the defendant's mental capacity into issue based on his methamphetamine use.

JUSTICE ALITO: General Schmidt, am I wrong to think that the issue in this case is whether there was compulsion at the time when the statement was made to the -- the court-ordered expert?

MR. SCHMIDT: Justice Alito --

JUSTICE ALITO: That's the issue. It's not -- it wouldn't be a question of whether there was a violation of the Fifth Amendment privilege at the time when the statements were later introduced in the Kansas

trial.

Isn't it very well settled in this Court's precedents that the introduction of statements obtained -- that the introduction of statements at a trial is not -- does not implicate the Fifth Amendment privilege?

MR. SCHMIDT: Well, Your Honor, the -- the compulsion question is a threshold question. And to the extent this Court has recognized, for example, in cases like Ventris, that there are truly compelled statements in a Portash or Mincey sort of circumstance, that threshold issue would resolve it.

This is not that case. In fact, any compulsion that might be involved here is much closer to what happens when a defendant makes a trial decision to offer himself as a witness and go on the stand, and then, as a matter of operation of law, must subject himself to cross-examination.

JUSTICE ALITO: Well, that's the issue, as I see it, but maybe I'm wrong -- correct me if I'm wrong, and maybe Mr. Katyal will -- that the issue is whether there was unconstitutional compulsion at the time when the statements were obtained. But I thought it was very well settled that if there -- there wasn't compulsion at that time, then the later introduction of the statements

into the -- into evidence at the trial does not implicate the privilege against self-incrimination.

MR. SCHMIDT: That would certainly be true, Justice Alito, absolutely.

JUSTICE ALITO: So what happened in -- in State court really is -- is irrelevant to this. This is -- everything that -- everything important here was done under Rule 12.2 of the Federal Rules of Criminal Procedure and that's -- and that's the issue.

MR. SCHMIDT: If the compulsion test settles the matter, Justice Alito, yes, that is correct. Even if it doesn't settle the matter, we think there was then subsequently a waiver at the time the evidence was introduced in the State's trial.

JUSTICE KENNEDY: But -- but why doesn't it settle the matter as a -- as you understand the case that's being presented -- as a constitutional matter? Sure. Kansas may have some rules, maybe the judges say I'm not going to hear this, this -- this is a State rule, but insofar as the -- the Federal constitution is concerned, why doesn't that settle it?

MR. SCHMIDT: Your Honor, I think it can. There is some dispute between the parties on whether there is a sort of category of compulsion, called something else perhaps, which doesn't rise to the

Portash-Mincey constitutional bar standard.

For example, the Respondent has argued that, although this may not be like Portash and Mincey, there is still, nonetheless, some inappropriate burden upon the choice that was made and that that is somehow constitutionally suspect. So I'm merely trying not to concede the ground that, even if -- and I agree with you -- there was not constitutionally barred compulsion here, still, there is a way for Kansas to prevail in the case.

JUSTICE SCALIA: But sort of coming back to Justice Ginsburg's question, the Kansas Supreme Court held that the introduction of -- of the allegedly compelled testimony given to the -- to the psychiatrist violated the Federal Constitution. But why didn't -- why didn't the Kansas Supreme Court simply hold that there was no -- no right on the part of the prosecution to obtain that rebuttal evidence or to introduce it since this was a case of voluntary intoxication?

You -- you tell me that Kansas does not allow this just for voluntary intoxication, and that was -- that was the defense he was raising, right?

MR. SCHMIDT: Your Honor, I don't know why the Kansas Supreme Court chose to settle this by interpreting the Fifth Amendment in a manner that we

believe is incorrect, but nonetheless, that's what they did.

JUSTICE SCALIA: That's what they did. So when -- when we send it back, is it still open to them to decide that, under Kansas law, the testimony was not introducible?

MR. SCHMIDT: Your Honor, I suspect that, if this case is remanded, there will be a variety of other issues presented to the Kansas court, and it will have to determine how to resolve them.

JUSTICE GINSBURG: One issue is whether the expert, the government's expert, went beyond the scope of the direct, the experts for the defendant. That's an open -- that would be an open issue because I think Rule -- the Federal Rule 12.2 is very clear that the rebuttal testimony cannot exceed the scope of the defense expert's testimony.

MR. SCHMIDT: Justice Ginsburg, it may well be likely that, upon remand, the scope issue would come before the Kansas court to be resolved under principles of Kansas evidentiary law. In this case, of course, while it's been argued at some length by Respondent, we don't think the scope question is necessarily or properly in front of this Court.

It was a threshold determination made by the

Kansas court that the Fifth Amendment keeps our rebuttal witness off the stand at all, and we have to get past that in order to get to related questions.

JUSTICE SCALIA: And that is, as you say, a question of -- of Kansas law, so it would be odd for us to resolve that anyway.

MR. SCHMIDT: Well, Your Honor, I think that is a question of Fifth Amendment law. The Kansas Supreme Court interpreted the Fifth Amendment as creating a bar upon Dr. Welner's testimony.

JUSTICE SCALIA: I'm saying the question of whether the -- the cross-examination went beyond the scope of the direct and whether that invalidated it, that wouldn't be resolved under the Federal Rules of Civil Procedure, but rather under Kansas law, right?

MR. SCHMIDT: Your Honor, I believe that is correct. As a practical matter, this Court has recognized, in the Fifth Amendment context, that there are outer constitutional bounds with respect to scope, for example, the relevancy statute you recognized in both Brown and Magatha.

But those are not implicated here. And as a practical matter, the sorts of allegations that Respondent is now making, although they weren't objected to at trial with respect to specific aspects, would be

matters resolved under the Kansas Rules of Evidence.

JUSTICE BREYER: Should we say anything about that? I mean, one of the things he testified to -- that is, the government expert testified to -- the defendant was one of those unusual people who was actually exposed to a variety of different people in his life.

He had people who were criminal types. There were drug users. He found himself identifying and looking up to people alternatively described as "bad boys" or "outlaws." Looking up to them, being impressed and awed by them and in certain circumstances, wanting to outdo them.

Well, that doesn't seem to have much to do with the issue that the defendant put into the -- wanted to put in, in the Federal court, which was he wanted to ask about his -- about his -- his words exactly are "a defense of insanity," which can be interpreted broadly, namely, whether he is insane or not.

So we both have the government expert saying no, he's not insane, and the government expert going on to give an explanation of why he shot the sheriff. So is that -- is that, in your opinion, something we should say that's a serious question, whether that exceeds it, et cetera? What should we say about it?

MR. SCHMIDT: Justice Breyer, if the Court wishes to speak to scope, I think it could reaffirm that the constitutional standard, as it suggested in both Magatha and Brown, is reasonably related or relevant to the -- the direct examination.

JUSTICE BREYER: All right. So your words would be, because they have introduced what we'd say as, the defense has introduced an argument, that even if it's proper for the introduction of the government's expert witnesses under the Fifth Amendment, it still cannot be beyond -- go beyond what is -- what's your exact word, "reasonably" --

MR. SCHMIDT: "Reasonably related" was the phrase.

JUSTICE BREYER: -- reasonably related to the defense of insanity that the defendant himself raised, and then that would be an issue for the Kansas court to decide.

MR. SCHMIDT: And on the facts here, Your Honor, we think there are very good facts on both sides, that I suspect this Court doesn't want to --

JUSTICE BREYER: Well, you'd bring up arguments why this is okay, and they would bring up arguments why it isn't reasonably related, and Kansas would decide.

JUSTICE SOTOMAYOR: Can I go back to the line drawing?

MR. SCHMIDT: I'm sorry?

JUSTICE SOTOMAYOR: Can I go back to the line drawing?

MR. SCHMIDT: Yes, ma'am.

JUSTICE SOTOMAYOR: A question that some of my colleagues have focused on. If we're to say that this was not compelled speech, presumably, there'd be no reason the government couldn't use this report, whether or not the defendant put his or her mental state at issue, because if it's not compelled, you could use it as affirmative evidence, correct?

MR. SCHMIDT: If it is not constitutionally impermissible in the nature of the compulsion, yes, Your Honor.

JUSTICE SOTOMAYOR: Seems a somewhat --

JUSTICE ALITO: Why would that --

JUSTICE SOTOMAYOR: If I may finish?

JUSTICE ALITO: Yes, sure.

JUSTICE SOTOMAYOR: Assuming that I'm troubled by that holding, then what's the line we draw with respect to the question Justice Kennedy asked you as to when it is permissible. You're saying, let's just rule on the base. When the defendant puts on an expert,

we can rebut with an expert.

But the broader question of if he puts his mental state at issue without an expert, could you do it? Could you still put on his examination? I'm not sure you've really answered that question --

MR. SCHMIDT: Yes.

JUSTICE SOTOMAYOR: -- which is how broadly do we hold? There's a waiver whenever you put in your mental state at issue, or is it a waiver only when you use an expert, and then the government is free to respond with a compelled statement?

MR. SCHMIDT: Yes, Justice Sotomayor. I think, if the Court wishes to go beyond the rule that we're requesting in that regard, I would suggest it analyze the factors that were articulated by the Court in the Murphy case in 1964. That would be the case where the Court catalogued the values that are protected by the Fifth Amendment prohibition on self-incrimination -- mandatory self-incrimination.

JUSTICE GINSBURG: Isn't that an academic question in this case? After all, this expert for the government came in when the case was in the Federal system. The Federal system has a rule that, when the defense puts on an expert, the government can counter it.

So the -- the limit would be -- I mean, Kansas doesn't provide for this? The Federal Rules provide for it in a very limited way. So to talk about using it beyond the scope of the Federal rule seems to me not the case that's before us.

MR. SCHMIDT: I believe it is not the case before us, Your Honor. I believe we wouldn't want to concede there are other circumstances where it might be constitutionally permissible.

Mr. Chief Justice, with permission, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you.

Ms. Saharsky.

ORAL ARGUMENT OF NICOLE A. SAHARSKY,

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MS. SAHARSKY: Mr. Chief Justice, and may it please the Court:

When a defendant puts his mental state at issue through the testimony of an expert who's examined him, the State may rebut that testimony with its own expert who examined the defendant. The Fifth Amendment does not allow a defendant to put on his side of the story and then deprive the prosecution of any meaningful chance to respond. And we think the close analogy here

is the situation where a defendant himself takes the stand.

To the extent that the question -- the Court has questions about scope of the government's ability to respond, we think that those are answered, like the General said, by the questions about when the defendant takes the stand reasonably related to the subject matter that the defense put on.

CHIEF JUSTICE ROBERTS: Even if -- even if the defendant does not submit an expert of his own, but simply puts his mental state in issue?

MS. SAHARSKY: I think that that's a different case. The Court's cases -- Estelle, Buchanan, Powell -- have addressed an expert-for-expert situation. And the specific rationale there is that this mental health opinion testimony is different in that you really can't have an expert give an opinion without examining the defendant.

If we're talking about the defendant's testimony, you know, he's not qualified to be an expert. He can give factual statements about what happened to him and what was happening at the time of the crime, but he's not giving an expert opinion. So, to us, it does seem to be a different question about whether it's really reasonable to have an expert to rebut that

testimony. The Court just doesn't need to decide that question in this case.

There's also a second question that the General alluded to, which is, if he makes factual statements during his mental examination, the defendant, and then also gets up on the stand at trial, testifies and says something contrary -- you know, whether you could use those for impeachment purposes, the court didn't grant that question.

CHIEF JUSTICE ROBERTS: Why would it only be for -- why would it only be for impeachment purposes? It's directed at some statements that he said, which are not going -- not terribly pertinent to the mental diagnosis, but valuable evidence, and the defendant takes the stand; can the government call -- here's this person, he happens to be the doctor that took the -- the examination, but he learned some things here that we think are helpful.

MS. SAHARSKY: Well, I think this goes back to the questions that Justice Alito started asking about, which have to do with where there is compulsion here, if at all. This is a -- a unique situation in that there is a court-ordered mental exam, but it only happens as a result of the defendant's choice to give the notice of putting on the defense, and then the

evidence for the exam, at least under the rules, never comes in until he puts on his evidence first.

It's really a parity principle that the Court recognized in Estelle and in Buchanan. In those cases, we read them to -- for the Court to have said that there is sufficient compulsion in the ordering of the exam to raise Fifth Amendment questions.

But when the defendant opens the door, the Fifth Amendment just doesn't give him any right to -- to stop the prosecution from responding. But if the Court wanted to find that there was no compulsion and these statements could be used for any purposes, we think that would be more than the Court said in those prior cases.

But this is a different situation in that it is the defendant's choice that -- that affects whether this is ever going to come in. This is not the type of Portash-compelled testimony, where you're set before a grand jury and have to either self-incriminate, be in contempt, or commit perjury.

JUSTICE KAGAN: Ms. Saharsky --

JUSTICE ALITO: Isn't the question here whether Rule 12.2 is constitutional? Everything that was done here seems to me to have been done in compliance with Rule 12.2 of the Federal Rules of Criminal Procedure, so if there's -- insofar as the

taking of the statement is concerned, which I'm suggesting is the issue and not the later introduction in the Kansas court. Am I wrong on that?

MS. SAHARSKY: Well -- well, if the question is, is Rule .12 constitutional, we think the answer is, pretty clearly, yes. If you look at the way that that rule has evolved, it's evolved in response to this Court's decisions about the understanding of the Fifth Amendment, that there's a like-for-like principle, that when the defendant puts this in issue, that the State can respond in kind.

The Kansas Supreme Court thought that there was a separate issue because of the specific Kansas rules. But as the General suggested -- you know, those -- the Kansas rules may be a -- there may be a Kansas problem that has a Kansas law solution, but Federal constitutional law just doesn't depend on -- on the State rules of evidence.

JUSTICE KAGAN: I'm wondering whether you way over read the cases that you rely on because in all of those cases what we were talking about was an examination that had specifically requested by the defendant. Now, here, that's not the case. The defendant has asked for something and has opened the door, conceivably.

But the examination that we're talking about is one that the State has compelled and that the defendant does not wish to undergo. That's a big difference between this case and all the ones you rely on.

MS. SAHARSKY: That's a factual difference from, for example, Buchanan and Powell. But we think the key principle is the one that comes through in the Court's cases that, if the defendant opens the door, the State can respond. And we think that the Court -- that the Court repeated that principle numerous times. In Buchanan, it said, on page 425 of the decision, defense counsel is on notice that, if you open the door, the government can rebut.

And it's actually interesting. I think every member of the Court understood, although it wasn't clear from the majority opinion, that that could mean a separate examination. And I would point the Court to Justice Marshall's dissent, footnote 5, where he says, "Of course, you could have your own separate examination."

JUSTICE SCALIA: It seems to me --

JUSTICE KAGAN: Not to belabor this, but the -- the holding of the case is that the prosecution may rebut this presentation with evidence from the

reports of the examination that the defendant's requested.

MS. SAHARSKY: Right. That -- that was the specific holding based on the facts of that case, but because the Court --

JUSTICE KAGAN: I mean -- I guess the question is that you say it's a factual difference; it might be a factual difference between compulsion and lack of compulsion.

MS. SAHARSKY: Okay. And if the Court wants to say that there is sufficient compulsion here in the ordering of the mental state exam, despite the fact that there was the initial choice by the defendant, we would say the defendant's choice at trial to put on his testimony is what makes this -- this evidence available to the government to use in rebuttal.

So it's fine that Buchanan does not decide the exact facts of this case. You could say that the holding does not decide this case, but we think it comes pretty darn close because the Court's rationale was whether the defendant opened the door. It said, again and again, did the defendant open the door, and if he does, the State needs this evidence to have any effective means of rebuttal.

JUSTICE SCALIA: Well, wait. I mean, all

the State -- I think it oversimplifies it to say that when -- when the defendant puts it at issue, the government can respond. Yes, the government -- the government can respond with whatever evidence it has, but the issue here is not whether the government can respond.

The issue is whether the government can compel the defendant to undergo a psychiatric examination. That's -- that's quite a different issue really from whether the government can respond. Of course it can respond.

MS. SAHARSKY: That's right. The rule that we've -- we're asking this Court to adopt is -- you know, the same one that we think was at least hinted at in the decisions in -- in Estelle v. Smith and in Buchanan, which is when the defense is putting on an expert above his mental state that is testifying to an opinion based on an examination, that the State also can have its own expert that testifies as to mental state based on an examination.

We think this is a unique situation. We think that's all the Court needs to do to decide this case. To put it simply --

JUSTICE SCALIA: More precisely, it's not that the State can have its own expert. It's that the

State can compel the defendant to testify to an expert -- can compel the defendant to speak to a psychiatrist. That's really the issue, not -- not whether the government can respond. Of course, it can respond.

MS. SAHARSKY: Sure. The implication is that the -- the State has the same access to the defendant as the defense expert had because the State's expert is unable to come up with an opinion without a personal examination of the defendant. This was explained very well in your decision for the plurality of the D.C. Circuit in Byers, which is --

JUSTICE KAGAN: So is that a waiver theory? Because Justice Scalia's opinion was not based on a waiver theory. But my understanding of your brief was that you were arguing about waiver, is that right? That the -- the defendant here has waived the ability to say that he's being compelled?

MS. SAHARSKY: We've called it a waiver by the defendant's conduct for two reasons. One, that's what this Court called it in Powell, when it was describing its holding in Buchanan; two, that's what this Court has called it -- and I'd point you to page 15 of the gray brief -- in the cases about what happens when a defendant takes the stand, that, in the act of

taking the stand, he has waived his Fifth Amendment rights.

But you don't have to call it a waiver. The point is that the Fifth Amendment does not extend so far as the defendant claims. It doesn't allow him to both put on his side of the story and then claim that the government can't have a chance for any meaningful rebuttal.

So -- you know, we -- we really don't think that that label matters. We think that the Byers D.C. Circuit plurality, we think that the Pope decision that was well before this Court's decision in Estelle by then-Judge Blackmun, which said -- you know, call it either way -- you know, the result is the same, which is that this evidence can come in.

JUSTICE GINSBURG: Are you suggesting that the government can answer in -- in a like manner as the defendant? The defendant opens the door by experts, then the government can call experts? That is not to say that a defendant simply offers his own testimony, the government can do something that -- that the defense has not opened the door to.

MS. SAHARSKY: That's right. The State has an expert who examined -- the defense has an expert who examined the defendant; the State can use an expert who

examined the defendant. It's a parity principle there. It's a different question about trying to rebut or impeach the defendant's own statements.

JUSTICE SOTOMAYOR: Well, I'm presuming that if a defendant takes the stand and says something completely contrary to what he tells a government psychiatrist, that you would rely on the Brown line of cases, that you could cross-examine him on the contrary statement to the psychiatrist.

MS. SAHARSKY: Again, we think that's the second question presented that the court didn't grant, but there are good arguments for why the defendant, once he opens the door, should not be able to slam it shut. Also, we think this Court's cases, like Ventris, that have to do with the recent cases on impeachment, would go to this.

Now, there's a question about whether it's a difference that it's the defendant's own statements, as opposed to an expert's opinion, based on his statement.

JUSTICE SOTOMAYOR: Well, that would be a different issue. I'm just talking about whatever statements he made. But don't -- the light is on.

CHIEF JUSTICE ROBERTS: Counsel, your time has expired.

MS. SAHARSKY: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Katyal.

ORAL ARGUMENT OF NEAL KATYAL

ON BEHALF OF THE RESPONDENT

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

The State is trying to use Scott Cheever's words to execute him. That's wrong for many reasons, but the simplest one is that, whatever the scope of the Fifth Amendment waiver may be in this case, the prosecution here exceeded it. Scott Cheever's words were uttered in the context of an uncounseled, un-Mirandized, 5-1/2 hour jail exam that the State made him undergo as the price for putting on his voluntary intoxication defense.

JUSTICE GINSBURG: Mr. Katyal, if this had played out entirely in the Federal court, the examination of the defendant was pursuant to Federal Rule 12.2. Your argument seems to be that Rule 12.2 violates the Fifth Amendment. I mean, the mental examination was ordered in the Federal court after the defendant said, I am going to put on a couple of witnesses -- expert witnesses, to testify to my mental state.

Rule 12.2 says, when a defendant does that, then the government has the right to have the defendant

examined by its expert. So the broad argument that you're making seems to lead inevitably to the conclusion that Rule 12.2 is unconstitutional.

MR. KATYAL: Your Honor, we think that that's partially right. That is, our argument ultimately does invalidate a small part of the application of 12.2(d), and for that reason, we think that the Court should avoid that constitutional question by focusing on the scope question, which is a federal Fifth Amendment question, Justice Scalia, not one of Kansas law.

And if I could walk you through our 12.2 thinking, 12.2(d) excludes testimony from the defense expert, or it may. It's permissive. And so to the extent that a trial judge -- a Federal judge, excluded evidence that the defendant wanted to put on because he didn't -- because he didn't submit to the exam or the like, we do think that that application would be violated.

JUSTICE ALITO: That would be -- that's not a -- that's not a self-incrimination question, though, isn't it? It's a due process question. It's an unreasonable limitation on the defendant's ability to put on a defense.

MR. KATYAL: Your Honor, it's the clash

between -- it's just like Simmons. It's the clash between two different constitutional rights, the right to put on an effective defense on the one hand or the right that is burden -- the right of self-incrimination on the other. And it's that choice, Your Honor, which we find makes the compulsion necessary -- compulsion --

JUSTICE ALITO: No, but there wouldn't be at that point -- suppose the Federal rules simply said you can't have an expert testify about mental condition, period. That's a -- that raises a due process issue, and maybe there would be a serious due process question involved.

MR. KATYAL: Quite --

JUSTICE ALITO: Okay.

MR. KATYAL: Quite right.

JUSTICE ALITO: Up to that point, we're not quite at the Fifth Amendment.

MR. KATYAL: Quite right, Your Honor. But when a State like Kansas offers the voluntary intoxication defense -- makes it part of the State's burden to prove as an element of the offense and then conditions that by saying, well, if you put that evidence on, you then have to pay the price, submit to a 5-1/2 hour, uncounseled, un-Mirandized investigation that goes far beyond what the voluntary intoxication

is --

JUSTICE BREYER: You're - you're -- the State admits that all that they could put on is information from the psychiatrist that is reasonably related to the defense that the defendant raised. Do you disagree with that?

MR. KATYAL: No. We -- Your Honor, we agree, and we think that this case, obviously --

JUSTICE BREYER: All right. Then we both agree --

MR. KATYAL: We agree on the legal standard.

JUSTICE BREYER: Fine. You both agree that the test is "reasonably related." So we could simply say that. They both agree.

MR. KATYAL: And that's what we think you should say, Your Honor.

JUSTICE BREYER: And now, we send it back to the Kansas court and say, we are not going to go through the record here because you should do it.

MR. KATYAL: That's precisely right, Justice Breyer. Both sides are agreeing on the legal standard.

JUSTICE BREYER: Then why are we here? Everybody agrees.

MR. KATYAL: Well, that is -- that is, ultimately, what we think -- and it avoids the

constitutional question by doing that. And this case has never -- this Court has never squarely held that the legal proposition that both sides are now in agreement on --

JUSTICE SCALIA: But Kansas decided the constitutional question, and we can't send it back unless we reverse the Supreme Court of Kansas. So you say we're going to dodge the constitutional question? How can we? I think it has been decided by the Kansas Supreme Court.

MR. KATYAL: Your Honor, I think you can vacate the decision of the Kansas Supreme Court and remand for them to look at whether or not --

JUSTICE SCALIA: On what basis can we vacate? We can't vacate a decision, unless there's something wrong with it. What's wrong with it?

MR. KATYAL: Well, that it -- that it reached to ultimately decide this constitutional question on 12.2 that it didn't have to --

JUSTICE SCALIA: That's -- that's error? I mean, I understand it's general policy you don't reach a constitutional question unless you have to, but I've never heard of the proposition that, if a court unnecessarily reaches a constitutional question, it can be reversed, that we can send it back and say, don't

reach the constitutional question.

MR. KATYAL: Your Honor, I certainly think that's available to you, particularly in the context of this case, in which there is such an interrelationship between the scope issue and the ultimate merits question of the Fifth Amendment.

JUSTICE GINSBURG: But this --

JUSTICE SCALIA: I don't think so. Kansas decided the constitutional question. We took the case in order to decide that, and I think we have to decide it.

MR. KATYAL: Well, Justice Scalia, if I could just try -- try -- if you look at even Kansas's opening brief at page 9, at page 12, at page 40, at page 42, it's all about the scope question. That's their opening brief. And so we think that they are integrally bound up. Be that as it may, it might not --

JUSTICE GINSBURG: But the scope question wasn't decided by the Kansas court, and they wouldn't get to it, unless they held that, yes, you can have this rebuttal testimony. Then the next question is, if you can have it, how far it can go?

But the anterior question, can you have it at all, is the question the Kansas Supreme Court answered, no, you cannot have it. And we can't send it

back to them without -- I mean, if -- if you can't have it at all, then it's irrelevant that the scope was too broad.

MR. KATYAL: That's quite right. Our broadest position -- and we think the one that -- that also disposes of this case, is the idea, as Justice Scalia was saying to my colleague on the other side, that what's at issue here is not whether or not the State -- whether or not the State can follow where the defense has led, but rather how can they follow.

And here, the State is doing something that there is literally -- that this Court has never squarely authorized.

JUSTICE GINSBURG: Mr. Katyal, would you -- you said, in answer to my question, that Federal Rule of Criminal Procedure 12.2 violates the Fifth Amendment in small part. Can you be explicit? The rule, as I understand it, says if the defendant is going to introduce evidence concerning his mental state, then the government has a right to have the government's expert examine the defendant and rebut what the defendant's experts say.

That's what the rule is. And then it says, you can't go beyond the scope of that issue -- of the mental state.

MR. KATYAL: I think that's mostly right. I'd like to be a little bit -- break down the rule a little bit. 12.2(d) has the provision which says that if you -- that the price of not submitting to the exam is the exclusion of the defense expert, so we think that -- it's a permissive rule, but if it's applied, we think that's unconstitutional.

There are other points of 12.2 which don't raise --

JUSTICE GINSBURG: You think it's unconstitutional to say to the defendant, you have a choice; if you introduce this testimony, then the government can follow where you have led; if you don't introduce the testimony, then of course, the government has nothing to rebut?

MR. KATYAL: I don't think that's what 12.2(c)(4) says. Rather, what 12.2(c)(4) says is that -- that the State can introduce expert testimony on an issue regarding mental condition on which the defendant has introduced evidence.

JUSTICE GINSBURG: Yes.

MR. KATYAL: And it's not clear to me whether or not that's talking about a Buchanan situation, one in which the defense has requested the exam or not.

JUSTICE GINSBURG: It says, "on which the defendant has introduced evidence." The evidence is the defendant's expert.

MR. KATYAL: Exactly. And so to the extent, Your Honor, that it's used to -- to introduce, as it was in this case, evidence that -- that the defendant's own words against him, yes, we think that 12.2 raises a deep constitutional question, something which this Court has never --

JUSTICE SCALIA: Of course, there is nothing unusual about saying, if the defendant introduces certain evidence, he has to forfeit some of his Fifth Amendment self-incrimination rights.

MR. KATYAL: Absolutely.

JUSTICE SCALIA: It happens every time the defendant chooses to testify.

MR. KATYAL: Absolutely, Justice Scalia.

JUSTICE SCALIA: He need not testify, but if he introduces that evidence, he must submit to cross-examination and has to incriminate himself. And this is, it seems to me, quite similar. He need not introduce the evidence of the psychiatrist, but if he does, he has to forfeit his Fifth Amendment right not to talk to a psychiatrist.

MR. KATYAL: Well, we agree with the first

75 percent of that; that is, that, certainly, it's the case that when the defendant takes the stand, they are subject to cross-examination. Cheever took the stand. He is subject to cross-examination. Cheever's expert takes the stand, Evans. He is subject to cross-examination.

But the question here is whether or not the State can go further and force someone to submit to a mental health evaluation and use that against them.

JUSTICE SCALIA: I understand that. But it's still -- it's still the same -- the same correlative system playing --

MR. KATYAL: No, it --

JUSTICE SCALIA: If the defendant does one thing, he has to accept what goes along with it, and that includes waiving or forfeiting his -- his right not to incriminate himself.

MR. KATYAL: I don't think so. I don't think that's how it plays out. So, for example, if this were an accounting case -- a criminal accounting case, and the defendant had talked to -- the CEO of the company had talked to an accounting expert, walked them through all the books and so on and said, here's what happened, and so on, and the expert took the stand, I don't think the state could then force their expert to

talk to the defendant and have that evidence introduced against the defendant.

JUSTICE SCALIA: That's not getting into the defendant's mind.

MR. KATYAL: Oh, I think that cuts the other way.

JUSTICE SCALIA: It's only the psychiatrist who can get into the defendant's mind when he is -- when he is raising a mental capacity defense.

MR. KATYAL: And, Justice Scalia, that precisely cuts the other way. This Court, in Couch v. United States, said that's the heart of what the Fifth Amendment is about, the intrusion into a defendant's mind, and here, this case is a perfect illustration of that.

CHIEF JUSTICE ROBERTS: It's just the fact that the evidence here is based on the defendant's statements. If you had a physical object, you wouldn't say it's the -- the murder weapon. You wouldn't say that, if the defendant submits a study about the murder weapon, the ballistics, this and that, you wouldn't say, well, all the government can do is cross-examine the defendant's expert. You say, no, they get to do their own study.

The reality of what makes this different is

that here, when you're submitting and preparing psychiatric evidence, it's based on -- the ballistics testing is statements from -- from the defendant, and it seems to me unfair to say the defendant's expert has access to that ballistics evidence, but the State does not.

MR. KATYAL: Mr. Chief Justice, I think what does the work in your ballistics example is precisely that it isn't the defendant's own words; it's something else, and so it's wholly outside of the Fifth Amendment. What we are talking about here in this circumstance is Scott Cheever's own words to the --

CHIEF JUSTICE ROBERTS: No. I understand that. But it just so happens that the way you do the -- the testing on the evidence when you're talking about psychiatric evidence is to ask questions of the defendant. That's how you do it. That's the parallel to whatever ballistics tests they do on the -- on the firearm.

MR. KATYAL: Yes, but I think the Fifth Amendment imposes a different value judgment of our founders, based on this type of situation in which you are peering into the defendant's mind. I think that's what the language in Couch v. United States is all about, that there is a difference between --

JUSTICE KENNEDY: Well, we're going -- we're going right back -- the defense expert here peered into his mind. It's set out in the appendix. It's confusing because there's a Dr. Evans and also an Attorney Evans.

MR. KATYAL: Exactly.

JUSTICE KENNEDY: But the -- the expert is Dr. Evans. He peers into the defendant's mind.

Now, are -- is this case any different and any better for you because it happened in State court? Suppose everything here happened in the Federal court, would you have a constitutional objection?

MR. KATYAL: We would have a constitutional objection.

JUSTICE KENNEDY: And that constitutional objection would be?

MR. KATYAL: Exactly what I was saying to Justice Ginsburg, that this choice -- a Simons-like choice was forced upon the defendant. He could either put on his defense --

JUSTICE KENNEDY: So in your view -- in your view, the defendant can be interviewed by his own psychiatrist, but not by a prosecution psychiatrist?

MR. KATYAL: That -- that is correct, Your Honor. But, of course, the State can cross-examine

our -- our psychiatrist and every word --

JUSTICE GINSBURG: Mr. Katyal, if that's your position, then you must disagree with the D.C. Circuit decision, which was already mentioned, United States against Byers, which took the position that, where the defendant leads, the government may follow.

For the very reason that the defense expert has access to the defendant, you can't disarm the government by saying, we're not going to let you have a counter-expert. All you can do is cross-examine the defendant's expert.

MR. KATYAL: We -- we do ultimately disagree, Your Honor, with the bottom-line holding in the Byers case that -- that yourself and Justice Scalia was on. We think that that reasoning -- the way that the Court got there was to say that there was a policy-based reason under the Fifth Amendment that allowed this. It wasn't waiver, which you've been hearing about.

It was a policy-based reason. And frankly, I think that, ultimately, this is a -- the governments' argument, both governments, is an argument in search of a theory. We've heard a bunch of different ones. We've heard the Byers one about policy. We've heard Justice Alito's question --

JUSTICE GINSBURG: I didn't know that it was policy. I thought it was -- it was saying it is just like the defendant gets on the stand; he's subject to cross-examination. The defendant puts on experts; the government must be treated equally, must be able to put on its own experts.

And as far as waiver, that's a fiction, isn't it? The defendant could say, 100 times, I'm going to testify, but I'm not waiving my Fifth Amendment privilege. It wouldn't matter if he said that 100 times. He will be exposed to cross-examination.

MR. KATYAL: But, Justice Ginsburg, we think that Byers -- ultimately, the language, the way it got there was purely policy. And we think that this Court has, in the 30 years since Byers, really changed to the game on the use of policy-based reasoning when it comes to the Fifth Amendment.

JUSTICE KAGAN: Well, but if that's policy, why isn't the -- the cross-examination analogy policy as well? I mean, they are both based on some notion of what is parity and what's reciprocity and what's -- you know, what's appropriate to ask the defendant to bear once the defendant decides to become a witness in a proceeding.

So they are both the same kind of policy.

You want to call it that, but it's -- it's -- one is no more policy than the other.

MR. KATYAL: I don't quite think that's right. The text of the Fifth Amendment is that a defendant can't be "compelled" to be a witness. And once a defendant takes the stand and acts as a witness, then it seems to me that is behavior inconsistent, as Berghuis v. Thompson suggests, with the invocation of the Fifth Amendment privilege.

JUSTICE KENNEDY: Can you give me the -- can you give me the black letter formulation that you are asking this Court to adopt? It violates the Fifth Amendment when?

MR. KATYAL: When a defendant is forced to undergo a psychological examination as the price for putting on his mental state defense, at least -- at least when it's an element of the offense. We don't think you have to get into, as our brief explains, affirmative defenses like the Federal defense --

JUSTICE SCALIA: When you say as the price for putting on his defense, you mean as the price for introducing the testimony of a psychological expert?

MR. KATYAL: That is correct, Justice Scalia.

JUSTICE BREYER: The authority for that is

what?

MR. KATYAL: It's -- it's several cases, but I think Simmons is the best case. Justice Harlan's opinion for seven justices --

JUSTICE BREYER: Well, I mean -- you know, the obvious, it's not a question of policy. But one thing, the Fifth Amendment prevents you from being a witness against yourself, you didn't take the stand. So what you did was introduced three psychiatrists, and they said, this man was totally insane, he could form no will whatsoever, totally insane.

The government says, we have seven psychiatrists who would like to examine this man, and they'll come to the opposite conclusion. The judge says, okay, examine him, under compulsion. And they say he is totally sane. And they each have reasons.

Now, you're saying, in that case, the government cannot put any of those seven on the stand?

MR. KATYAL: Oh, disagree entirely.

JUSTICE BREYER: Really?

MR. KATYAL: The government can put experts on, psychiatric experts, but they can't put on --

JUSTICE BREYER: No, but they -- they base their testimony on an examination compelled by the --

MR. KATYAL: That's the problem, absolutely.
JUSTICE BREYER: All right. So you --
MR. KATYAL: And that is wholly foreign --
JUSTICE BREYER: But that -- that puts the government in a -- in an impossible position. The defense is allowed witnesses who've examined the defendant and -- oh, you mean you're only limiting it to the case where the defense witnesses don't examine the defendant?
MR. KATYAL: I'm saying that -- that in a circumstance -- that, either way, if it's the price for putting on the defense, then, yes, it's unconstitutional.
JUSTICE BREYER: You're -- I'm giving you a hypothetical.
MR. KATYAL: I don't think --
JUSTICE BREYER: Psychiatrist A, hired by the defense, examines the witness. He says he is totally mad. All right? That's his conclusion based on the examination. Psychiatrist B, who works for the government, has examined the witness under compulsion. All right? And he's done it under the authority of 12.2 because the defendant, just as here, made a 12.2 motion and said that this was a -- all right, just like here.
He examines him. He comes to the conclusion

this man is as sane as -- whatever the most sane thing is. All right.

(Laughter.)

JUSTICE BREYER: That's his conclusion.

You're saying the government can put on its witnesses, but the Fifth Amendment prohibits the -- sorry, the defense can put on its witness, but the -- the Fifth Amendment prohibits the defendant from putting on its own witness?

MR. KATYAL: No. The Fifth Amendment prohibits --

JUSTICE BREYER: That means it's something -- I can't imagine how the Fifth Amendment can say that. But go ahead.

MR. KATYAL: That is not our argument.

JUSTICE BREYER: What is your argument?

MR. KATYAL: The prosecution can still put on an expert witness; they just can't --

JUSTICE BREYER: No, no. They put on my witness, my imaginary psychiatrist A.

MR. KATYAL: Your imaginary psychiatrist can't be put on under our system and, indeed, under Kansas's own system, Justice Breyer.

JUSTICE BREYER: Well, that may be, but does the Federal Constitution -- it's my example. It's my

example.

MR. KATYAL: I think it does.

JUSTICE BREYER: Because --

MR. KATYAL: This Court has never once accepted the idea that a -- that the government can force someone to talk to your psychiatrist B and introduce his own words against him. That's what the Fifth Amendment is about, and I understand, sure, the government isn't going to have the evidence that it wants.

It's going to be the price of the Fifth Amendment. That's what it --

JUSTICE ALITO: Well, suppose we -- suppose we agree with you, and the response is the adoption of a new Federal rule of evidence or a State rule of evidence that says that evidence of a -- that an expert who testifies for the defense as to the mental -- the insanity or mental state of a defendant is very unreliable, if there has not been an opportunity for the defendant to be examined by another expert and, therefore, is just inadmissible. You can't do it at all.

Would there be a constitutional problem with that?

MR. KATYAL: If it's -- it's simply a rule

of evidence that doesn't condition one right against the other, no, I don't think so. It would go back to your earlier question --

JUSTICE BREYER: What do we do with this? The defense says, my defense will consist of the fact demonstrated by an expert that my heart is too weak to have made it up the stairs. All right. And I have Mister -- Dr. Smith, who has examined my heart, and he will testify it's impossible I could have been on the third floor, I would have been dead.

So the government says, we would like to have you examined by our doctor, Dr. B, who we believe will -- and the judge orders it. All right. So now, Dr. B says, his heart is sound as an ox, and he goes to it. You're saying the government could not put that Dr. B on the stand?

MR. KATYAL: I think that's right, Justice Breyer. The idea that the government can force someone to undergo a mental -- or, excuse me, a physical evaluation and maybe extract stuff from their body as the price for putting on a defense, yeah, I think that raises some Fifth Amendment questions --

JUSTICE SOTOMAYOR: Mr. Katyal, assuming the incredulity of my colleagues continues with your argument, which way would you rather lose?

(Laughter.)

JUSTICE SOTOMAYOR: On a waiver theory or on a lack of compulsion theory? And pick one and tell us the reason why that's preferable to the other.

MR. KATYAL: Well, certainly, I think lack of compulsion is not something that really is being advanced by the government in this case. Even their opening lines of their oral argument are focusing on waiver, not that. And I think it would raise any number of concerns, like the ones you suggested, to go on a compulsion theory, that it would allow introduction of evidence, even if the defendant hasn't led in that direction.

But I would like to try and take another shot at persuading your colleagues --

JUSTICE KAGAN: Mr. Katyal, could I go back to the cross-examination analogy? Because you say your case is different, but I think you'll have to explain that one to me. It seems to me that the cross-examination cases say you can't become a witness halfway. Once you've decided to become a witness, you have to subject yourself to all the things that every other witness is subjected to.

And it seems to me that you haven't convinced me that the same point isn't true here, that

the person, Mr. Cheever, has decided to become a witness, essentially, by giving an interview to his own expert and allowing his own expert to speak about what Mr. Cheever has told him. And so -- you know, he can't do it halfway. Now, the government has to get its shot. Same way.

MR. KATYAL: I don't quite think that the cross-examination cases go so far as to say that it leads to the same way and gets you so far as to say that if someone testifies by -- if an expert testifies using the defendant's own words, that that opens the door to the prosecution doing so.

There is something unique about the Fifth Amendment, and the idea that the government can peer into someone's mind and extract information out of them in an uncounseled, un-Mirandized 5-1/2 hour session, and have that used against them at trial. And the price that Cheever paid here was an extraordinary one.

He put on a defense that has been a defense for hundreds of years, the idea of voluntary intoxication, and he was told the cost of doing that was that this exam took place and all of this evidence ranging about outlaws and so on was introduced --

JUSTICE KENNEDY: Well, that's something of an overstatement because he also had the psychiatrist

who testified that, in his expert opinion, he did not have the requisite mental state, and he -- and he prefaced that by indicating how many people he had examined that had used meth and there was neurotoxicity, so this defense expert did testify to that.

MR. KATYAL: Well, he certainly testified to --

JUSTICE KENNEDY: So I think you quite overstate when you say the fact the defendant testified.

MR. KATYAL: Well, what the defense expert testified to, voluntary incapacitation under methamphetamine, and, certainly, the prosecution expert did that as well, but then the prosecution expert went a lot further to talk about his -- it's a suggested anti-social personality disorder, to suggest outlaws, and the outlaws evidence was introduced by the State first in the context of direct.

JUSTICE SOTOMAYOR: But that's scope issues. That's not right issues.

MR. KATYAL: Right, but I think it does bear on when you think about whether the Simmons analogy makes sense, whether or not forcing a defendant as the price of the defense to open the door to all of this evidence being introduced against him, that is not really a choice at all. That is ultimately --

JUSTICE GINSBURG: Mr. Katyal, you have conceded, I think, in response to Justice Alito's question, that the rules could be changed to say, defendant, you cannot put on these experts. So how does that maybe help defendants who want to put on a defense of mental state? You can't put it on, unless the government can put it on. That's the current rule.

But you're saying the response to it can be this evidence is shut out entirely. The government -- the government will have nothing to answer if the defendant doesn't put on experts. I'm not so sure that would be a rule that defense counsel would put on.

MR. KATYAL: I'm not sure that they would favor it or not. Our argument is simply that, when a state such as Kansas recognizes the voluntary intoxication defense and doesn't have all these witness rules, that Cheever is entitled to put on that effective defense and not have that right to clash against his Fifth Amendment right.

And, indeed, the fact that the State has all sorts of options available to it like expert -- like expert evidentiary rules or even abolishing the involuntary intoxication defense altogether is the true answer to the policy concerns, not trying to jigger into the Fifth Amendment, somehow some exception that allows

for psychiatric exams by criminal defendants.

JUSTICE SCALIA: I'll bet you the prosecution would accept your alternative in a heartbeat.

(Laughter.)

JUSTICE SCALIA: No defendant can introduce any psychiatric evidence. That's a good deal for the prosecution.

MR. KATYAL: It may be. It may not be. That's something the legislature would hammer out, but I think that's where the policy objection --

JUSTICE GINSBURG: What do you need to hammer out? You said that the rule now is no good because it allows government psychiatrists to have access to the defendant -- compelled access. That rule is no good, but the alternative of not allowing this evidence at all, what is there to hammer out?

MR. KATYAL: We think that, if the Court follows our rule, which suggests that you can't put the defendant to this choice, the State has the option of modifying the voluntary intoxication defense, possibly making it an affirmative defense or putting restrictions on experts, any number of things that may be possible in that circumstance or the legislative process, not through some Fifth Amendment interpretation of this

Court, to try and deal with a policy concern.

JUSTICE GINSBURG: Is there really a huge difference between mental state as an element of the offense and mental state as an affirmative defense? I mean, in reality, doesn't -- doesn't the mental state argument of the defendant function as an affirmative defense to premeditated murder?

Government has the burden of proof on mental state, but it -- it operates, as far as a defendant is concerned, if the defendant is able to show this voluntary intoxication, that would be a defense to premeditated murder.

MR. KATYAL: No, Your Honor, our brief at page 36 points out that, under Kansas law, it's an element of the offense, they bear the burden of proof. In the Sixth Circuit decision in United States v. Davis, I think, explains that in a circumstance like this -- like involuntary intoxication, the defendant is not interjecting some new issue into the trial.

The defendant is simply rebutting the premeditation argument, which is their burden to prove. And if you accept their argument here, you're essentially saying that the defendant's own words can be used by the State to shoulder the load against him. And that is something foreign to the Fifth Amendment.

It may be something you want to do for policy reasons, I understand that, but it is not something this Court has ever accepted.

If there are no other questions?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Katyal.

General Schmidt, you have four minutes remaining.

REBUTTAL ARGUMENT OF DEREK SCHMIDT
ON BEHALF OF THE PETITIONER

MR. SCHMIDT: Thank you, Mr. Chief Justice.

I would just like to refocus on what has happened in this case. The Kansas Supreme Court interpreted -- or we believe misinterpreted the Fifth Amendment to say that, once the defendant had put his own expert on the stand to testify in support of his mental health claim after this expert had examined the defendant, the government couldn't respond in kind. And it's that bar on our participating in the fact-finding in front of the jury that we are seeking to have overturned here.

JUSTICE BREYER: I think what he's saying is that, look, in Simmons, there is a Fourth Amendment problem, and the defendant wants to testify in a Fourth Amendment hearing. And if he does, the State will take

that statement and use it at the trial.

So because of the reasons -- I'd say the policies underlying the Fourth Amendment, the court says, that's wrong. He can go testify at the suppression hearing, and then they can't use his statement later. So by analogy, he says, it's a similar situation. He says, it's the policy behind the Fifth Amendment that says, if you're going to go see the government under compulsion -- the psychiatrist, you shouldn't be able to introduce that later.

I mean, I think that's, in my looking at them -- because I'm trying to see if I got the argument basically right, which is what I wanted to find out, and now, what's the response to that particular argument?

MR. SCHMIDT: I think, Your Honor, the Simmons circumstance is not applicable here, and, in fact, the Court would have to substantially expand Simmons in order to find it to fit these facts.

JUSTICE BREYER: You'd have to say then there's difference between the Fifth Amendment and the Fourth Amendment, and that difference would be what?

MR. SCHMIDT: Well, Your Honor, in the Simmons case, what the government sought to do was to take the defendant's unvarnished statements from the prior hearing and to introduce them without the

defendant having put those issues into the fact-finding portion of the trial as affirmative evidence in the government's case-in-chief. In that regard, it is much more like Smith on its facts, where the court said, even in the circumstances we're confronted with here, on those facts, we can't do it.

The court specifically said later, in the Salvucci case, that it hadn't addressed the question in Simmons as to whether or not the government could use that evidence from the suppression hearing for impeachment purposes, which is much more analogous here.

So it's an open question, even under Simmons, even if it applied, and the Court would have to extend it in that regard. The Court, I would suggest, shouldn't extend Simmons in that regard because, at the end of the day, the other differing -- different factor here -- and it goes to the line of question that started earlier -- is that there is something different, as the Court has repeatedly emphasized, in the nature that -- the actual nature of use and obtaining of mental health evidence. That's the ink that fires.

CHIEF JUSTICE ROBERTS: What if -- what happens if the defendant is going through this examination, they ask him this, he tells them this, that, and all of a sudden, they ask him a question, he

said, I'd rather not answer that. I mean, is he allowed -- allowed to do that?

MR. SCHMIDT: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: Why? Because it might incriminate me?

MR. SCHMIDT: In fact, on the record here, the government's expert, Dr. Welner, specifically advised the Respondent, before the examination began, that if at any point he wanted to terminate the examination, he was free to do so. So I think yes.

CHIEF JUSTICE ROBERTS: That's a little bit different. I understand terminate, then they'd say, well, look, you don't get to put your expert in. But what if it's just -- you know, particular questions? What happens then?

MR. SCHMIDT: Well, on -- on particular questions, I suppose the Respondent could invoke at that time. But more importantly, before any of that could be introduced at trial, there would be a report generated by the expert, and all counsel, including the Respondent's counsel, would have ability to review it and seek some sort of pretrial order to keep out any particularly offensive materials.

There are mechanisms to resolve any problems like that, that might arise.

JUSTICE SOTOMAYOR: I'm not quite sure I understand why we shouldn't follow the Simmons analogy because, as I understand it, we haven't ruled on the last question of whether you can use the compelled statements as impeachment. But if we assume that to be the case, most circuits who have addressed the issue, and I think it may be all of them, have said you can because there's a waiver of your Fourth Amendment right when you take the stand to impeachment.

Why couldn't we follow a similar reasoning here, which is, you're compelled to -- I'm sorry. Forget it. I can answer my own question.

CHIEF JUSTICE ROBERTS: Don't forget it. Why don't you try a quick response?

(Laughter.)

MR. SCHMIDT: Thank you, Mr. Chief Justice.

Justice Sotomayor, I think the -- the key difference in Simmons and the reason its reasoning shouldn't be applied here is that the distinction we've been drawing from the start of this case is that what we want is a rule of parity. We want to be able to rebut what the defendant himself put in issue in front of the jury, and that's not Simmons.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)