No. 21-945

IN THE

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

MANUEL GARCIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE STATE OF WISCONSIN

RESPONDENT MANUEL GARCIA'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

The State of Wisconsin misrepresents the record. It claims that Manuel Garcia's cross examination of a State witness was "designed to mislead the jury." In reality, the examination was a standard and proper exploration of the State's investigation, which discounted known, alternative explanations for the victim's injuries. Therefore, correctly stated, the only question presented in the State's petition for a writ of *certiorari* is as follows:

> **Does a criminal defendant "open the door" to the State's use of illegally obtained statements, during the State's case-in-chief, by confronting the State's witness with questions related to the State's investigation?**

The record and this Court's established precedent, which is not subject to any split of authorities at any level, govern the outcome and require this question be answered "No." The question is not worthy of review.

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STATEMENT OF THE CASE

A. The State subjected Garcia to an unconstitutional interrogation, so the trial court ordered Garcia's illegally obtained statements be suppressed.

Early on Friday, March 12, 2010, Investigator Brad Spiegelhoff arrived at the Wheaton Franciscan Hospital in response to a call regarding a deceased child, J.E.M. (R. 1 at 1.) At the hospital, Spiegelhoff interviewed J.E.M.'s mother, Lawanda Martinez, and her boyfriend, Manuel Garcia. (*Id.*; R. 59 at 4.) Through his conversation with Garcia, Spiegelhoff learned of two incidents in which J.E.M. was injured shortly before his death. Two days earlier, J.E.M. slipped and fell down the stairs; the day he went to the hospital, he jumped out of Garcia's truck and fell to the ground. (R. 1 at 2; R. 77 at 149:1-5, 19-22.)

Later Friday morning, Spiegelhoff spoke to the medical examiner who performed the autopsy on J.E.M., Dr. Lynda Biedrzycki. (R. 77 at 153:13-21.) Dr. Biedrzycki informed Spiegelhoff that based on her examination, J.E.M. died from injuries to his abdomen and chest area. (R. 1 at 1.) After speaking with Dr. Biedrzycki, Spiegelhoff brought Garcia and Ms. Martinez into custody for questioning at the police department. (*Id.* at 2; R. 77 at 154:14-20; R. 59 at 6.) There, Spiegelhoff learned from Ms. Martinez about another incident that occurred at a laundromat the day before J.E.M. died in which he fell out of a laundry cart that was being pushed around by another one of Ms. Martinez's kids. (R. 77 at 162:2-7.)

Spiegelhoff also interrogated Garcia at the police department. Prior to the questioning, Spiegelhoff provided

Garcia, a native Spanish speaker, a standard police department notification and waiver of rights form. (*See* R. 11 (8/22/2011 Motion Hearing Ex. 1); R. 56 at 19:1-4.) The form was printed in English, and Garcia was asked to read portions of it out loud in English. (R. 59 at 7:12-16.) Garcia signed the form, and Spiegelhoff began questioning Garcia in English. In response, Garcia made statements, in English, that were inculpatory (although, contrary to the State's representation to the Court, Garcia did not say that he threw J.E.M. against a wall). (*Id.* at 7-8.)

On April 1, 2010, the State charged Garcia with first-degree reckless homicide. (R. 3 at 1.) The State quickly moved for leave to admit Garcia's inculpatory statements at trial, and several years of protracted litigation followed. (R. 9 at 1.)

On January 11, 2013, circuit court Judge Wayne Marik suppressed Garcia's statements because he determined that Garcia did not understandingly, knowingly, or intelligently waive his rights prior to speaking with Spiegelhoff at the police department. (R. 59 at 33-34.) Judge Marik made clear in his oral ruling that the State could not use the illegally obtained statements in its case-in-chief, but the State would not be precluded from using the statements for rebuttal *if* Garcia testified. (*Id.* at 35-36.). Before trial, the case was reassigned to Judge Michael Piontek, who reaffirmed Judge Marik's decision to suppress Garcia's statements, explaining that the statements are "not admissible for any purpose in the State's case in chief." (R. 74 at 20.)

B. The trial court reversed course and allowed the State to use Garcia's illegally obtained statements in its case-in-chief.

At trial the State called Spiegelhoff as a witness during its case-in-chief. On direct-examination, the State questioned Spiegelhoff about his investigation, including his investigation of the stairs, truck, and laundromat incidents. (R. 77 at 142-163.)

Specifically—and directly relevant to the issue before the Court—the State concluded its direct-examination by asking Spiegelhoff why he did not investigate the laundromat incident after Ms. Martinez told him about it at the police department. (R. 77 at 162:16-23.) Spiegelhoff said he did not investigate the laundromat incident "[b]ecause based on what Dr. Biedrzycki told me, it was - - it could absolutely not be involved in the injury that caused his death." (R. 77 at 162:24-163:1.)

The State's line of questioning prompted counsel for Garcia, on cross-examination, to ask Spiegelhoff about the investigation. (R. 77 at 163-181.) Specifically, counsel for Garcia asked Spiegelhoff about what was investigated and what information was shared with Dr. Biedrzycki:

> **Q:** Okay. So you never even spoke to the pathologist about the basket incident.
>
> **A:** No, I did not.
>
> **Q:** So then the pathologist has no idea, as far as you know, that - - let me rephrase that.

> You've never spoke to the pathologist about the incident at the laundromat?
>
> **A:** No. I personally have not spoke to her.
>
> **Q:** So you were not - - you didn't take any - - did you do any investigation of the laundromat.
>
> **A:** No, I did not.
>
> * * *
>
> **Q:** And the only thing you presented to the pathologist is the two incidences… which you ask Manuel about in terms of any injuries that the child may have sustained recently; am I right?
>
> **A:** Correct.

(*Id.* at 167:9-16; 168:22-169:1.) Later in the questioning, counsel for Garcia confirmed:

> **Q:** So, again, those were the only two incidences… which you brought to the examiner, to the pathologist?
>
> **A:** When I spoke to her on the phone that morning those are the two I brought up to her at the time.
>
> **Q:** Nothing about the laundromat?
>
> **A:** Correct.

(*Id.* at 181:8-13.)

Importantly, counsel for Garcia never asked why Spiegelhoff did not investigate the laundromat incident or why he did not tell Dr. Biedrzycki about it.

The State neither objected to nor interrupted any of this questioning, and the trial court likewise did nothing. Instead, *after* the cross-examination was complete, the State moved to introduce Garcia's suppressed statements. The prosecutor argued that Garcia's questions challenged the "credibility and job done by Investigator Spiegelhoff" and "the only way I can rehabilitate that is I believe he's opened the door to the confession. Why he didn't continue on his investigation was because Garcia told him he did it." (*Id.* at 182:12-18.) The Judge deferred ruling on the motion until he could review the transcript of the questioning.

In the interim, the State conducted re-direct examination of Spiegelhoff. Again, the State asked Spiegelhoff about his investigative decision-making, establishing that he did not present the laundromat incident to Dr. Biedrzycki because at the time he spoke with her he did not know about the incident. (*Id.* at 189:2-10.) Spiegelhoff also testified that he did not think it was necessary to consider events that occurred in the days prior to the day the child died because Dr. Biedrzycki told him that, based on her examination, only events on the day the child died would be relevant to his death. (*Id.* at 191:2-13.)

The next day, the court revisited the State's motion to admit Garcia's suppressed statements, finding that Garcia's questioning was "absolutely proper," and that the State did not object to it. (R. 79 at 10:7-9). The court explained, "it is proper to inquire into the investigatory

process by which Investigator Spiegelhoff determined what action to take in this case." (*Id.* at 10:9-12) The court speculated, however, that Garcia might later "argue[] to the jury at closing this investigation was completely shoddy." (*Id.* at 10:20-21.) The judge acknowledged, "[a]ll of that's proper," but expressed concern about the State's ability to explain it. (*Id.* at 10-11.)

Despite recognizing that Garcia's cross-examination was "totally appropriate and proper cross-examination," the court granted the State's motion. (*See id.* at 21-22.) The judge provided no legal authority for admitting Garcia's excluded statements in the State's case-in-chief. Instead, he reasoned that "it would be manifestly unfair to have the jury hear just that side of it and not allow the investigator, because of Judge Marik's [suppression] ruling, to explain it." (*Id.*)

In response, counsel for Garcia pointed out that the State first questioned Spiegelhoff about his investigation of the laundromat incident and to not allow further questioning on the subject would be "tying [the] hands" of the defense. (*Id.* at 23:16-23.) Counsel also disputed the idea that Garcia's statements were an admission of guilt. (*Id.* at 25:5-12.)

On re-re-direct examination of Spiegelhoff, the State introduced not only the content of Garcia's suppressed statements, but also approximately 45 minutes of video-footage of Garcia's unconstitutional interrogation. (*Id.* at 22:19-24; 31-32.) Garcia was not planning to testify initially, but the court's ruling compelled him to take the stand. (*Id.* at 52:6-10.)

The State capitalized on the admission of Garcia's statements in closing argument, by arguing to the jury: "[a]nd *most importantly*, we know from the evidence you heard yesterday that Manuel Garcia told us he did this, […] [h]is confession matches what [the medical examiner] told us. *This removes any doubt* for you about who did this… ." (R. 80 at 14:10-12; 15:24-16:2.) (emphasis added). Garcia was convicted and sentenced to 50 years, with 40 years of confinement. (R. 35).

C. The Wisconsin Court of Appeals concluded Garcia's constitutional rights were violated and the Wisconsin Supreme Court affirmed.

Garcia appealed his conviction, arguing that his excluded statements should not have been admitted in the State's case-in-chief. (*See, e.g.*, Garcia Wis. Ct. App. Br. at 15.) The State argued the admission of Garcia's statements was proper because Garcia "opened the door," and because the "rule of completeness" supported admission. (State Wis. Ct. App. Br. at 11.)

The court of appeals ordered supplemental briefing on whether the rule established in *Harris v. New York*, 401 U.S. 222 (1971), applies such that Garcia "opened the door" to admission of his illegally obtained statements. In its supplemental brief, the State argued the admission of Garcia's excluded statements in the State's case-in-chief was in line with *Harris* and its progeny, and advanced a four-factor test for determining the admissibility of excluded evidence. (*See* State Wis. Ct. App. Supp. Br. at 1, 7.) The State conceded the evidentiary rule of completeness did not govern the outcome of the case. (*Id.* at 11.)

Garcia argued that *Harris*—including its underlying rationales and progeny—does not permit the State to introduce illegally obtained and excluded statements in its case-in-chief. (Garcia Wis. Ct. App. Supp. Br. at 1-2.) Garcia also argued that no exception to the exclusionary rule justified the admission of his statements in the State's case. (*Id.*)

The court of appeals agreed with Garcia, holding that the State may not use a defendant's voluntary but illegally obtained statements in its case-in-chief to rehabilitate its own witness. *See* App. 4A-5A, 12A. The court of appeals considered *Harris*' impeachment exception—the only exception to the exclusionary rule recognized in this Court's precedent—and concluded it did not allow the State to introduce Garcia's illegally obtained statements during the State's case-in-chief. *See id.* at 12A-19A. The court noted the "State present[ed] no case law holding to the contrary," and cited no cases applying the four-factor test enunciated in its brief. *Id.* at 19A-21A.

The court of appeals, therefore, reversed Garcia's conviction and granted him a new trial.

The Wisconsin Supreme Court granted the State's petition for review of the case. The parties submitted briefs and presented oral arguments. The Wisconsin State Public Defender submitted an amicus curiae brief. Less than two weeks after oral argument, an equally divided court affirmed the court of appeal's decision without issuing a written opinion. *See* App. 3A.

REASONS FOR DENYING THE PETITION

The State's Petition should be denied for two reasons.

First, the record does not support the State's question presented. That question is based on the fundamental misrepresentation that Garcia's cross-examination was "designed to mislead the jury," when, in reality, it was no more than an appropriate exploration of the State's investigation into several known, potential causes of the injuries that led to the victim's death. Moreover, Garcia's cross-examination in no way implicated his illegally obtained statements. He did not reference or put at issue the content of the illegally obtained statements, the fact that such statements existed, or the custodial interrogation that led to the statements.

Second, the law is well settled: illegally obtained evidence, such as Garcia's illegally obtained statements, is categorically inadmissible during the State's case-in-chief. This Court has consistently said just that in decades of precedent, and the State has not identified any conflict among lower courts' application of the principle. The few cases the State cites to support its position all deal with a defendant's silence, which is distinguishable from the situation in this case where the trial court admitted Garcia's illegally obtained statements. Without case law support on its side, the State effectively asks this Court to overrule nearly 70 years of uniform precedent but offers no good reason to take that drastic step.

For these reasons, Garcia respectfully requests that the Court deny the State's Petition.

I. The State's framing of the question presented is at odds with the record.

The State fundamentally misrepresents the record in its statement of the question presented. The State contends that Garcia sought to exploit the exclusion of his illegally obtained statements at trial by cross-examining the State's witness "in a manner designed to mislead the jury about the adequacy of the police investigation." The State then incorporates that misrepresentation directly into its statement of the issue, asking whether a defendant's cross-examination that is "designed to mislead the jury" can "open the door" to admission—*during the State's case-in-chief (a facet of the State's argument that its presentation of the issue elides)*—of a criminal defendant's illegally obtained, properly suppressed statements.

To be perfectly clear, no part of Garcia's "totally appropriate and proper cross-examination," was designed to mislead or misrepresent facts to the jury. Rather, it was nothing more than a standard and wholly proper exploration of the State's investigation of several known, alternative potential causes for the injuries that led to the victim's death. Specifically, Garcia's questioning focused on *what* information the investigator shared with the medical examiner about the days leading up to J.E.M.'s death. Garcia's counsel did not ask *why* Spiegelhoff did or did not pursue leads, he did not argue the propriety of the investigation, and he did not misrepresent any facts or evidence to the jury by asking these questions. To the contrary, Garcia's questions focused on the quality of the evidence against him. His counsel simply established that the medical examiner was informed J.E.M. had

fallen down the stairs, and out of a truck, but she was not told about J.E.M. falling out of a laundry cart a few days earlier.

Moreover, Garcia did not create the situation the State now presents to this Court. Importantly, it was the State that first questioned the investigator on direct examination about his investigation. And, unlike Garcia's questions, the State's questioning focused specifically on Spiegelhoff's investigative decision-making. At the end of its direct-examination, the State asked Spiegelhoff *why* he did not present the laundromat incident to the pathologist. Spiegelhoff explained that based on what the medical examiner told him, the laundromat incident "could absolutely not be involved in the injury that caused [the] death." (R. 77 at 162:24-163:1.)

By asking the questions it did, the State baited cross-examination on the issue. Defense counsel could either follow up and ask the limited questions he did, or refrain from cross-examining the witness about the investigation altogether in which case he would risk being ineffective. Counsel for Garcia chose the former, after which the State sought to introduce the excluded statements to "rehabilitate" its own witness, even though it was the State that asked about the investigation first. The State claimed, "the only way I can rehabilitate that is I believe he's opened the door to the confession. ***Why*** he didn't continue on his investigation was because Garcia told him he did it." (*See* R. 79 at 3:24-4:6.) (emphasis added). However, to reiterate, ***the State—not Garcia—***was the only one to ask Spiegelhoff why he didn't continue to investigate the laundromat. (*See* R. 77 at 162:16-23.)

Also contrary to the State's arguments, Garcia never claimed the investigation was "shoddy." The trial judge introduced the term when, granting the State's motion to introduce the statements, he speculated about what ***might*** occur later ***if*** it was "argued to the jury at closing this investigation was completely shoddy." (R. 79 at 10:20-21.) The judge acknowledged that, too, would be a "proper" argument for Garcia's counsel to make. (*See id.* at 10:22-11:12.) But, despite the argument being proper and despite the fact that there was nothing other than speculation that the argument could be made, the judge nonetheless decided to admit the illegally obtained statements and a 45-minute video of the interrogation as substantive evidence against Garcia during the State's case-in-chief. (*See id.*)

At bottom, the State, not Garcia, created and exaggerated the situation it now seeks to present to this Court. Knowing it was prohibited from introducing the excluded statements at trial, and absolutely prohibited from introducing them in its case-in-chief, the State tried to back-door them into its case by questioning its own witness about his investigation and then claiming it needed to rehabilitate that witness' testimony about the very same investigation.

And, despite the State's own baiting of the issue, in fact, ***none*** of Garcia's questions at trial implicated or put at issue the content of his excluded statements, the fact of the statements, or the custodial interrogation that led to the statements.

For these reasons, the State's question presented, premised as it is on a defendant's intent to "mislead" a jury, is not truly before this Court.

II. This Court's established precedent—which is not subject to any split of authority at any level—already forecloses the State's radical proposal to allow the admission of illegally obtained statements in the prosecution's case-in-chief.

The State has never challenged the trial court's underlying ruling that investigators obtained Garcia's statements illegally. (App. 7A n.4 ("Neither [trial judge's] rulings on these issues are being challenged on appeal.").) We, therefore, start from that unchallenged principle: ***Garcia's statements were illegally obtained***. Decades of this Court's established precedent—including most specifically its decision in *James v. Illinois*, 493 U.S. 307, 313 (1990)—foreclose the State's efforts to have those illegally obtained statements admitted during the State's case-in-chief.

A. The State's proposal violates nearly 70 years of this Court's precedent.

For nearly 70 years, this Court has followed a simple, categorical rule applicable to evidence such as Garcia's illegally obtained statements. ***If the government obtains evidence illegally, then the illegally obtained evidence is inadmissible during the government's case-in-chief.*** This exclusionary rule applies equally to physical evidence (as in *Walder v. United States*, 347 U.S. 62, 65 (1954)) as it does to a defendant's custodial statements (as the Court specifically stated in *Oregon v. Elstad*, 470 U.S. 298, 307 (1985)).

Accordingly, the question actually presented by the State's Petition—whether it can use illegally obtained

statements to rehabilitate "a witness for the State," during its case-in-chief—is already addressed and foreclosed by decades of this Court's precedent. (Pet'n at i.) Even passing the State's misleading framing of the question presented (Sec. I, *supra*), this Court's precedent compels the exact same answer: the precedent barred the State from using Garcia's illegally obtained statements during its case-in-chief. The Court of Appeals' reversal on that ground was, therefore, correct and review is unwarranted.

For purposes of illustration, the following discussion identifies some of this Court's statements of the applicable rule, which the Court has consistently adhered to since at least 1954. In fact, the Court has reiterated the rule in practically every decade since the 1950s.

1950s. In *Walder*, the Court ultimately allowed the introduction of physical evidence obtained in violation of the Fourth Amendment, but recognized that "evidence illegally secured by" the government is "not available for its case in chief. 347 U.S. at 65.

1960s. In *Mapp v. Ohio* and *Miranda v. Arizona*, the Court gave more shape to the exclusionary rule by applying it to state prosecutions and custodial interrogations, respectively. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Miranda v. Arizona*, 384 U.S. 436, 491-93 (1966).

1970s. In *Harris* and *Oregon v. Hass*, the Court recognized a limited exception to the exclusionary rule, allowing the prosecution to impeach a defendant's perjurious testimony with illegally obtained statements, but (as it had in *Walder*) reiterated that the illegally obtained statements still are "unavailable to the

prosecution in its case in chief." *Harris*, 401 U.S. at 225-26; *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975). *Harris* even recognized that the categorical bar on introduction of illegally obtained evidence during the prosecution's case-in-chief is the source from which the exclusionary rule's "deterrence flows." 401 U.S. at 225. In *Fare v. Michael C.*, the Court found *Miranda* inapplicable to the case facts, but stated in absolutely certain terms that "statements obtained during custodial interrogation conducted in violation of [the *Miranda*] rules may not be admitted against the accused, at least during the State's case in chief." 442 U.S. 707, 718 (1979).

1980s. In *United States v. Havens*, the Court again applied the impeachment exception while reiterating (as it had in *Walder*, *Harris*, and *Hass*) that "evidence that has been illegally obtained… is inadmissible on the government's direct case… ." 446 U.S. 620, 628 (1980). In *Elstad*, the Court found *Miranda* inapplicable to the case facts, but stated that even "*voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case." 470 U.S. at 307 (emphasis original).

1990s. In *James*—discussed in greater detail in Section II.B., *infra*—the Court refused to expand the impeachment exception to reach the defendant's witnesses. It reached that holding on the specific ground that a limited exclusionary rule, "requiring exclusion of illegally obtained evidence from only the government's case in chief," would be insufficient to serve the rule's deterrent purposes. 493 U.S. at 319. In *Michigan v. Harvey*, the Court again confirmed that the prosecution can impeach a defendant's false or inconsistent testimony with illegally obtained evidence, but (similar to *Walder*, *Harris*, *Hass*,

Havens, and *Elstad*) also confirmed the steadfast rule that "statements taken in violation of… *Miranda* rules may not be used in the prosecution's case in chief." 494 U.S. 344, 350 (1990). The Court then went on to say even more directly that the "prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections." *Id.* at 351. In *Withrow v. Williams*, JUSTICE O'CONNOR wrote in concurrence that "*Miranda,* for example, does not preclude the use of an unwarned confession outside the prosecution's case in chief," confirming that *Miranda* does preclude such use within the case-in-chief. 507 U.S. 680, 712 (1993).

2000s. In *Dickerson v. United States*, JUSTICE REHNQUIST writing for the majority applied principles of *stare decisis* to uphold *Miranda*, in which he acknowledged "the Court found [an] unacceptably great [risk of admitting an involuntary custodial confession] when the confession is offered in the case in chief to prove guilt." 530 U.S. 428, 442-43 (2000). In *United States v. Patane*, JUSTICE THOMAS writing for the majority held that *Miranda* does not require suppression of the physical fruits of a defendant's voluntary statements, but reiterated that "the *Miranda* rule creates a presumption of coercion… that is generally irrefutable for purposes of the prosecution's case in chief." 542 U.S. 630, 639-42 (2004). In *Kansas v. Ventris*, JUSTICE SCALIA writing for the majority held that an informant's testimony about the defendant's confession (elicited in violation of the Sixth Amendment) could be used to impeach the defendant's testimony, but presumed (as did the Court in *Walder*, *Harris*, *Hass*, *Havens*, *Elstad*, and *Harvey*) that the illegally obtained "confession was…

not admissible in the prosecution's case in chief." 556 U.S. 586, 590, 593 (2009).

2020s. Finally, just weeks ago in *Hemphill v. New York*—a case that bears a striking resemblance to this one—the Court held that a "misleading impression" created by defense counsel could not "open the door" to admission of testimonial hearsay against the defendant's Confrontation-Clause rights. Case No. 20-637, --- U.S. ----, 142 S. Ct. 681, 692-93 (Jan. 20, 2022). The Court affirmed that it "has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense." *Id.* at 692.

In *Hemphill*, the Court even addressed the same type of Constitutional vs. prophylactic distinction that the State tries to draw in its petition in this case. *Id.* (*Compare* Pet'n at 4, 16.) Discussing its decision in *Ventris*, the *Hemphill* Court said:

> Because the prophylactic exclusionary rule is a "deterrent sanction" rather than a "substantive guarantee," the Court [in *Ventris*] applied a balancing test to allow States to impeach defendants with the fruits of prior Fourth Amendment violations, ***even though the rule barred the admission of such fruits in the State's case-in-chief***.

Hemphill, 142 S.Ct. at 692 (citations omitted; emphasis added). Thus, in *Hemphill*, the Court was recognizing that exceptions to the exclusionary rule, such as that in *Ventris* or *Harris*' impeachment exception, already exist precisely

because the exclusionary rule is prophylactic. Those cases took into account the nature of the exclusionary rule as a deterrent sanction and still reached the categorical conclusion that any exception does not stretch into the State's case-in-chief. *See, e.g.*, *James*, 493 U.S. at 313-314; *Harris*, 401 U.S. at 225. Accordingly, the prophylactic nature of the right at issue in this case makes no difference to the outcome.[1]

* * *

In short—regardless of whether Garcia's protections are Constitutional or are prophylactic and regardless of their applicability to his illegally obtained statements rather than to illegally obtained physical evidence—the same rule that this Court has been applying since at least 1954 applies equally to this case: ***illegally obtained evidence is inadmissible in the prosecution's case-in-chief***. Accordingly, exactly as the Court of Appeals of Wisconsin held, Garcia's illegally obtained statements were inadmissible during the State's case-in-chief.

B. This Court's decision in *James*—including a statement unanimously adopted by the Court—forecloses the State's argument.

As already acknowledged, over the near-70 years the Court has been consistently applying this rule, it has

1. On January 14, 2022, the Court granted certiorari in *Vega v. Tekoh*, Case No. 21-499, on the question of whether a plaintiff states a claim for relief under 42 U.S.C. § 1983 based on a law enforcement officer's failure to provide *Miranda* warnings. That question, regarding a civil remedy, should not impact the exclusionary rule applied in criminal cases.

recognized limited exceptions. Most relevant among these is *Harris*' and its progeny's allowing prosecutors to use illegally obtained statements *outside* of their case-in-chief, for instance to impeach a defendant's own testimony. 401 U.S. at 225-26. However, as also reflected above, the Court has never disturbed the underlying categorical bar that prohibits prosecutors' use of illegally obtained statements *during* their case-in-chief.

In *James*, the Court considered whether to expand the *Harris* impeachment exception to allow prosecutors to use illegally obtained statements to impeach a defendant's witnesses. *James*, 493 U.S. at 320. The Court refused. *Id.* It did so, in part, because extending the exception to allow impeachment of defense *witnesses* would "chill some defendants from presenting their best defense and sometimes any defense at all." *Id.* at 314-15. *James* matters for three reasons.

First: *James* involved a request to expand the impeachment exception in a way that, like *Harris* and its progeny, would still apply only outside of the prosecution's case-in-chief. By contrast, here, the State makes the far more expansive request for an exception to the exclusionary rule applicable *inside* the prosecution's case-in-chief. So, even ignoring the Court's repeated statements rejecting just that position for decades (Sec. II.A., *supra*), the State simply cannot leapfrog over *James* to apply an exception one step beyond where the Court refused in *James*.

Second: *James*' emphasis on respecting defendants' ability to present all their defenses, 493 U.S. at 314-15, applies with equal or even greater force in Garcia's

circumstances. To reiterate, the State seeks permission to rehabilitate its own witnesses during its case-in-chief in response to unobjectionable cross-examination. In essence, the State proposes that every time a defendant's attorney asks a question that touches on a shortcoming in the investigation and that the State would like to explain with illegally obtained statements, the defendant "opens the door" to the admission of his or her illegally obtained statement. In each such instance the State will argue that the illegally obtained statement could have influenced the investigation. Accordingly, the State's proposal goes far beyond the risk of calling individual witnesses the *James* court found troubling, and expands directly to *per se* limit defendants' ability to assert defenses.

Third: The *James* dissent indicates that the Court would have unanimously rejected the position the State advances in this case. In dissent, JUSTICE KENNEDY (writing for himself, then-CHIEF JUSTICE REHNQUIST, and JUSTICES O'CONNOR AND SCALIA) concluded that he could not "draw the line where the majority does," and would instead allow prosecutors to impeach defense witnesses with illegally obtained statements. *James*, 493 U.S. at 324. However, in reaching that conclusion, JUSTICE KENNEDY emphasized two important points. *Id.* at 325, 329.

JUSTICE KENNEDY first based his conclusion on the steadfast categorical rule identified in Section II.A, *supra*, that illegally obtained evidence is categorically inadmissible in the prosecution's case in chief. *Id.* at 329. He determined that it was unreasonable to believe that the defense-witness exception considered in *James* would encourage law enforcement abuse. Why? Because, whatever circumstances an officer encounters, he or

she "***will know for certain… that evidence from an illegal search or arrest (which may well be crucial to securing a conviction) will be lost to the case in chief***." *Id.* (emphasis added). Quoting from *Harris*, JUSTICE KENNEDY even emphasized that the categorical exclusion of illegally obtained evidence from the prosecution's case-in-chief actually supplies the deterrent effect sought by the exclusionary rule: "'sufficient deterrence flows when the evidence is made unavailable to the prosecution in its case in chief.'" *Id.* (quoting *Harris*, 401 U.S. at 225).

JUSTICE KENNEDY also emphasized the dissent's belief that applying the defense-witness exception would not "chill defendants from putting on any defense," as long as the exception applied only to situations where the illegally obtained statement ***directly contradicted*** a defense witness' testimony:

> No restriction on the defense results if rebuttal of testimony by witnesses other than the defendant is confined to the introduction of excludable evidence that is in direct contradiction of the testimony. If mere tension with the tainted evidence, opened the door to introduction of *all* the evidence subject to suppression, then the majority's fears might be justified. But in this context rebuttal can and should be confined to situations where there is direct conflict, which is to say where, within reason, the witness' testimony and the excluded testimony cannot both be true.

Id. at 325 (emphasis in original; internal citations omitted).

And here, as detailed at Pages 12-14, *supra*, Garcia's cross-examination of the State's witness did not "direct[ly] conflict" with the excluded evidence. *Id*. This is not a situation where the excluded evidence and the import of Garcia's cross-examination "cannot both be true." *Id.* To the contrary, the investigator's decision to discount known, alternative theories could create reasonable doubt regardless of the fact that the investigator's decision to perform an inadequate investigation may have related to his having obtained statements illegally. In fact, the trial court recognized several times that Garcia's examination was "absolutely proper," and "totally appropriate and proper cross-examination." (R. 79 at 10:8; 21:10-11.)

Thus, at most, these two concepts present "mere tension" with one another. *James*, 493 U.S. at 325 n.1. And, despite calling for the broader adoption of the defense-witness exception, the *James* dissent still recognized that such "tension" should not "open[] the door to introduction" of the illegally obtained statement. *Id.* at 325.

C. The State has not identified any conflict on the meaning of this Court's established precedent among lower courts at any level.

The State has not identified any confusion or a split of authority on the question presented. To the contrary, the States seem to have uniformly set out the same exact decades-old rule consistently applied by this Court, with the high courts of at least 10 states in just the last five years restating the case-in-chief exclusion. *See, e.g.*, *People v. Padilla*, 482 P.3d 441, 445-46 (Colo. 2021) ("the state may not introduce, in its case-in-chief" illegally obtained evidence); *People v. Hoyt*, 456 P.3d 933, 967 (Cal. 2020)

("inadmissible during the prosecution's case-in-chief"); *Hinkson v. State*, 850 S.E.2d 41, 52 (Ga. 2020) ("To use a defendant's custodial statements in its case-in-chief, the State must show…" legality); *State v. Purcell*, 203 A.3d 542, 558 n.17 (Conn. 2019) ("may not be admitted into evidence against a defendant in the state's case-in-chief"); *Commonwealth v. Lukach*, 195 A.3d 176, 196 n.3 (Pa. 2018) ("excluded from the prosecution's case-in-chief"); *Secret v. Commonwealth*, 819 S.E.2d 234, 242 (Va. 2018) ("prohibits the use of compelled testimony by the prosecution in its case in chief…"); *Reynolds v. State*, 192 A.3d 617, 632 (Md. 2018) ("made unavailable to the prosecution in its case in chief"); *State v. Perry*, 159 A.3d 840, 844 (Me. 2017) ("may not offer the statements made during that interrogation against that person in its case-in-chief"); *Myers v. State*, 211 So. 3d 962, 969 (Fla. 2017) ("affords a bright-line, legal presumption of coercion, requiring suppression [that]… is irrebuttable for the purposes of the State's case in chief"); *State v. Baroz*, 404 P.3d 769, 778 (N.M. 2017) ("inadmissible in the prosecution's case in chief").

The Wisconsin Supreme Court follows this same rule. *See, e.g.*, *State v. Felix*, 811 N.W.2d 775, 781 (Wis. 2012) ("statement could not be used in the State's case-in chief"; citing *State v. Mendoza,* 291 N.W.2d 478, 485 (Wis. 1980) (same)).

Moreover, shortly after this Court decided *James*, the Eastern District of Wisconsin decided a federal habeas case considering whether a defendant's illegally obtained statements could be admitted at trial to impeach one of the state's witnesses in response to the defendant's testimony. *Kuntz v. McCaughtry*, 806 F.Supp. 1373 (E.D. Wis. 1992).

The District Court held that "[i]f impeachment of other *defense* witnesses…is prohibited, as it is under *James*, use of the statement to impeach *prosecution* witnesses is foreclosed a *fortiori*." *Id.* at 1380 (emphasis in original). The District Court unequivocally reaffirmed that "use of an illegal statement is thus prohibited during any part of the state's case, even if used to impeach its own witness." *Id.* The District Court also went a step further, explaining that allowing the prosecution to use illegally obtained statements during the presentation of its case for any purpose, "would virtually negate the exclusionary rule altogether." *Id.*

And, while the State has twice claimed that cases and holdings "from around the country" are inconsistent both with this widely accepted rule and with the decision below on the question presented, the State has not identified a single case to support that contention. (Pet'n at 3, 10; *see generally id.*)

Instead, the State cites a line of cases that have no application to illegally obtained and suppressed statements. (*See* Pet'n at 10-17.)

The State's arguments rest primarily on this Court's decision in *United States v. Robinson*. In that case, a prosecutor commented on a defendant's failure to testify at trial, for purposes of responding to the defendant's claim in his closing argument that he did not have an opportunity to explain his actions. 485 U.S. 25, 32 (1988). This Court found no violation of the Fifth Amendment privilege in those circumstances, but only in the fact-limited circumstances of that case in which "the prosecutor's reference to the defendant's opportunity to testify is a fair

response to a claim made by defendant or his counsel." *Id. Accord State v. Doss*, 754 N.W.2d 150, 171-72 (Wis. 2008) (recognizing that three factors must be present for a prosecutor's comments on the failure to testify to violate the rule articulated in *Robinson*).

The other federal cases cited by the State address a concept related to the *Robinson* fair response doctrine that is equally distinguishable and unrelated to the circumstances of this case. Those cases address a prosecutor's ability to comment on a defendant's post-*Miranda* silence when a defendant argues at trial that he cooperated with law enforcement. *See United States v. Martinez-Larraga*, 517 F.3d 258, 268 (5th Cir. 2008) (allowing "a prosecutor's reference to a defendant's post-*Miranda* silence … to respond to some contention of the defendant concerning his post-arrest behavior"); *United States v. Shue*, 766 F.2d 1122, 1129-32 (7th Cir. 1985) (rejecting the government's use of defendant's post-arrest silence because it went "beyond fair limits to impeach" the defendant's testimony, but generally recognizing that the prosecution can "elicit testimony of the defendant's post-arrest silence to rebut the impression of full cooperation"); *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975) ("silence was admissible for the purpose of rebutting the impression" defendant created of full cooperation with law enforcement). The principle applied in those cases is derived from this Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, this Court held that a defendant's post-arrest, post-*Miranda* silence may not be used to impeach a defendant's exculpatory story first told at trial; however, this Court explained, "the fact of post-arrest silence could be used by the prosecution to contradict a defendant [at trial] who testifies to an

exculpatory version of events and claims to have told the police the same version upon arrest." 426 U.S. at 610 n.11 (citing *Fairchild*, 505 F.2d at 1383). The cases the State relies upon refer to this caveat as an exception to *Doyle*. *See, e.g.*, *Martinez-Larraga*, 517 F.3d at 268; *Shue*, 766 F.2d at 1129.

Robinson and these other cases presented issues that differ from this case in several meaningful ways.

First: *Robinson* and the other cases all addressed a comment on the defendant's silence, whereas this case involves the substantive admission of a defendant's illegally obtained statements.

Second: In *Robinson* and every other cited case, the defendant took a position that was directly contrary to the reality of his silence, whereas Garcia's line of questioning in this case was not at all inconsistent with the reality of the State's investigation and the illegally obtained evidence. This point echoes one that JUSTICE ALITO emphasized in his *Hemphill* concurrence (joined by JUSTICE KAVANAUGH), finding that the defendant in that case had not implicitly waived his rights where there was

> neither conduct evincing intent to relinquish the right of confrontation nor action inconsistent with the assertion of that right. The introduction of evidence that is misleading as to the real facts does not, in itself, indicate a decision regarding whether any given declarant should be subjected to cross-examination. Nor is that kind of maneuver inconsistent with the assertion of the right to confront a declarant

> whose out-of-court statements could potentially set the record straight.

142 S. Ct. at 694–95. Of course, in this case, Garcia did not even "introduc[e]… evidence that is misleading." *Id.* He also did not "take[] the stand" as might also evidence an implicit waiver. *Id.* Nor, to reiterate, did he make any assertion "misleading as to the real facts." *Id.* Accordingly, *Robinson* and the other federal cases cited by the State do not apply.

***Third*:** In reaching its decision in *Robinson*, the Court emphasized that it was "evident that the prosecutorial comment did not treat the defendant's silence as substantive evidence of guilt." *Robinson*, 485 U.S. at 32. By contrast, in this case the State used the illegally obtained statements as substantive evidence against Garcia. Worse, the State did so within the prohibited confines of its case-in-chief.

***Fourth*:** Even if this "fair-response" concept *could* generally apply despite all these identified distinctions, as a basic matter of fact in the circumstance of this case it *cannot* apply. Put simply, the State's response was not fair: after defense counsel asked basic questions about the State's investigation (a topic that the State asked about first), the State played 45-minutes-worth of illegally obtained evidence.

Indeed, the last written decision below correctly rejected the idea that "fairness" permits the introduction of illegally obtained statements in the State's case-in-chief based on the rationale of *Harris* and its progeny. It "recognize[d] that *Harris*, *James*, and their progeny

all considered 'fairness'" in coming to the categorical conclusion that illegally obtained statements may only be used to impeach the defendant's testimony, and may not be used during the State's case-in-chief. App. 19A-20A. Moreover, there is nothing "fair" about introducing illegally obtained statements in response to a defendant's exercise of his constitutional right to confront witnesses through entirely lawful cross-examination.

Accordingly, the last written decision below—issued not by Wisconsin's highest court, but its intermediate appeals court—does not create confusion or a split and is instead perfectly consistent with the other states and Circuits that have consistently applied this Court's decades of precedent, including *James*. (*See* App. 12A-19A. *See generally* App. 1A-3A, 4A-22A.)

D. Against that settled backdrop, the State makes a radical proposal.

The State proposes disrupting this Court's and the lower courts' consistent application of this established precedent by radically reshaping this Court's jurisprudence. To decide in the State's favor, this Court would first need to leapfrog over and thereby implicitly overrule its *James* decision. (Sec. II.B., *supra*.) Then, the Court would have to reach even further back and explicitly overrule *either* every case involving the exclusion of illegally obtained evidence, beginning with *Walder* (1954) – *or* – *Miranda* and all its progeny (without that issue being squarely presented). (Sec. II.A, *supra*.).

And to what end? Adopting the rule advanced by the State would put every criminal defendant whose illegally

obtained statements have been suppressed to a heads-I-win-tails-you-lose situation: *either* forego presenting a legitimate and proper defense (even after the State has asked questions about just that defense) – *or* – consent to the admission of illegally obtained statements. Going forward, criminal defendants will be able to exercise one constitutional right or the other but not both.

This presents an unconstitutional solution in search of a problem. The State is wrong that Garcia "wield[ed]" his suppressed statements "to attack [the government's] investigation in a manner only possible due to the exclusion of the statements" (*see* Sec. I, *supra*) and is also wrong that more defendants will follow suit if the prosecution is not allowed to introduce suppressed statements. All lawyers, including defense counsel, are bound by professional and ethical duties that prohibit them from making knowingly false statements in court. *See, e.g.*, Wis. Sup. Ct. R. 20:3.3. "Garcia never talked to police," for example, would be a knowingly false statement. That is, of course, not the situation here. But even if it were, the response is not to punish the criminal defendant for the misdeeds of his counsel. Judges can respond appropriately by disciplining the attorney, and asking jurors to disregard the false statements.

Furthermore, in this case, introducing Garcia's illegally obtained statements was not the "only manner" in which the State could respond to the proper cross-examination. If the State believed it was necessary to rehabilitate its witness, the State could have engaged in additional re-direct examination of the investigator, or the State could have re-called the medical examiner to provide a better explanation of the victim's injuries

and potential causes. The solution was not, however, to introduce Garcia's illegally obtained statements.

* * *

To summarize, without good reason to adopt the State's position, without a split of authority to resolve, and without having been presented with an unsettled legal issue or even the issue that the State purports is implicated, the Court should not take any of the radical steps that would be necessary to overrule the lower court's decision.

CONCLUSION

The State's Petition should be denied.

Respectfully submitted this 25th day of February, 2022.

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