No.

IN THE
# Supreme Court of the United States

ARI MISHA LIGGETT,

*Petitioner*

v.

STATE OF COLORADO,

*Respondent.*

On Petition For A Writ Of Certiorari To
The Supreme Court of Colorado

## APPENDIX

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# APPENDIX A

*Liggett v. People*, 2023 CO 22, 529 P.3d 113 (Colo. 2023)

(*Liggett IV*)

529 P.3d 113
Supreme Court of Colorado.

Ari Misha LIGGETT, Petitioner,
v.
The PEOPLE of the State of Colorado. Respondent.

Supreme Court Case No. 21SC395

May 15, 2023

**Synopsis**

**Background:** Following reversal of grant of defendant's motion to suppress statements made during custodial interrogation, 334 P.3d 231, defendant, who pleaded not guilty by reason of insanity (NGRI), was convicted in the District Court, Arapahoe County, Michelle A. Amico, J., of first-degree murder. Defendant appealed. The Court of Appeals, 490 P.3d 405, denied defendant's request to stay the appellate proceedings indefinitely but granted request for limited remand for competence restoration proceedings while the appeal proceeded, and later, the Court of Appeals, 492 P.3d 356, affirmed the judgment of conviction. Certiorari was granted.

**Holdings:** The Supreme Court, Boatright, C.J., held that:

by pleading NGRI, defendant opened the door to rebuttal of his NGRI defense, without violating his Fifth Amendment right against self-incrimination, with testimony of examining psychiatrist whose opinion was based in part on statements made by defendant following *Miranda* violation by police, and

statutory waiver of physician-patient privilege and confidentiality, arising from NGRI defense, includes communications made to a physician's or psychologist's agents.

Affirmed.

Márquez, J., filed a dissenting opinion, in which Hart, J., joined.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion.

***116** *Certiorari to the Colorado Court of Appeals*, Court of Appeals Case No. 14CA2506

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En Banc
CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court, in which JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE SAMOUR, and JUSTICE BERKENKOTTER joined.

**Opinion**

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 The People charged Ari Misha Liggett with the first degree murder of his mother. Although Liggett pleaded not guilty by reason of insanity ("NGRI"), he was ultimately convicted. Liggett raises two issues for our review.

¶2 First, Liggett argues that the trial court violated his Fifth Amendment rights by ruling that the People could use psychiatric evidence derived from Liggett's voluntary custodial statements to "rebut any evidence presented that [he] was insane at the time of the alleged offense," even though police obtained those statements in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶3 Second, Liggett argues that the trial court erred by permitting the People to subpoena and present privileged information from his nonphysician medical providers. It is undisputed that by pleading NGRI, Liggett waived any claim of privilege "as to communications made by [Liggett] to a physician or psychologist" regarding his mental condition. § 16-8-103.6(2)(a), C.R.S. (2022). Liggett argues, however, that the trial court improperly expanded this waiver to other medical providers, like nurses and therapists.

¶4 A division of the court of appeals upheld Liggett's conviction, and we affirm the division's judgment. In line with our precedents, we hold that when a defendant presents

  

psychiatric evidence supporting their insanity defense, they can open the door to the admission of psychiatric evidence rebutting that defense, even if the evidence includes the defendant's voluntary but non-*Miranda*-compliant statements. Additionally, we hold that section 16-8-103.6's waiver of privilege as to "communications made by the defendant to a physician or psychologist" includes communications made to a physician's or psychologist's agents. Because the nonphysician medical providers who testified at Liggett's trial made their observations as agents of Liggett's physicians, we conclude that Liggett waived the statutory privileges he shared with those providers.

## *117 I. Facts and Procedural History

¶5 After Liggett's mother was reported missing, police spotted Liggett driving her car. Liggett fled, but police apprehended him and discovered his mother's remains in the car.

¶6 Following his arrest, Liggett consented to an interview at the sheriff's office. The People concede that police violated Liggett's *Miranda* rights during this interview. Under questioning, Liggett denied killing his mother. He also volunteered information about his mental health, saying that other people could "shape-change," that he was God, and that his psychiatrist could prove he had "a completely inculpable state of mind."

¶7 The People charged Liggett with first degree murder, crime of violence, and vehicular eluding. Liggett pleaded NGRI, and the trial court ordered a sanity evaluation. Dr. Hal Wortzel conducted the evaluation and, in so doing, reviewed Liggett's interview with the police. In his report, Dr. Wortzel recounted information from Liggett's police interview, including that Liggett told the police he paid two unnamed friends $5,000 each to help dispose of his mother's body. But in his psychiatric interview with Dr. Wortzel, Liggett "acknowledge[d] having 'made up' the part about two other men dismembering the body." Dr. Wortzel found this contradiction significant, because "[d]uring the present evaluation [Liggett] indicates having fabricated that part of the story to avoid any criminal responsibility associated with dismembering a corpse." Accordingly, Dr. Wortzel opined that "one is forced to seriously consider [Liggett's] willingness to alter other essential elements of his account in a manner that also serves to mitigate his responsibility." Ultimately, Dr. Wortzel concluded that Liggett could understand his actions were wrong and could form a culpable mental state when he killed his mother.

¶8 Liggett moved to suppress evidence derived from his statements to police, including Dr. Wortzel's testimony, under *Miranda.* While the People conceded that officers violated Liggett's *Miranda* rights during the interview, they argued that his statements were nonetheless voluntary and thus could be used to impeach his testimony at trial or to rebut evidence supporting his NGRI defense. Initially, the trial court suppressed Liggett's statements, finding that they were involuntary; however, we reversed on interlocutory appeal and held that the statements were voluntary. *People v. Liggett,* 2014 CO 72, ¶¶ 36–37, 334 P.3d 231, 241 *("Liggett I")*.

¶9 On remand, the trial court revised its order regarding Dr. Wortzel's testimony in accordance with *Liggett I*. Although the court still refused to allow the People to call Dr. Wortzel during their case-in-chief (because of the *Miranda* violation), it ruled that they could use his testimony "to rebut any evidence presented that [Liggett] was insane at the time of the alleged offense." Specifically, relying on *People v. Branch,* 805 P.2d 1075 (Colo. 1991), and *Dunlap v. People,* 173 P.3d 1054 (Colo. 2007), the court ordered that if Liggett "present[ed] evidence that he was insane at the time of the alleged offense," the People could then "call Dr. Wortzel in rebuttal to opine on [Liggett's] sanity" even though his opinion was "based in part" on statements Liggett made following the *Miranda* violation.

¶10 Before trial, the People issued subpoenas to Liggett's medical providers seeking information regarding his mental health. They sought "[a]ll records of statements by [Liggett] concerning his mental condition to medical professionals, including but not limited to physicians, psychologists, nurses, social workers and therapists" across specified dates, including before the offense. [1]

¶11 Liggett moved to quash the subpoenas, arguing that they covered privileged information. He acknowledged that under section 16-8-103.6(2)(a), a defendant who pleads NGRI "waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for the mental condition." But he argued that this statutory waiver applies only to "a physician or psychologist," meaning the observations of other medical providers (like nurses ***118** and counselors) remained privileged. *See* § 13-90-107(1)(d),

  

(g), C.R.S. (2022) (codifying nurse-patient and counselor-patient privileges).

¶12 The trial court disagreed. Relying on *Gray v. District Court,* 884 P.2d 286 (Colo. 1994), and *People v. Herrera,* 87 P.3d 240 (Colo. App. 2003), the trial court interpreted the statutory waiver provision "to allow for full disclosure of medical and mental health records concerning the mental condition that the defendant has placed at issue in a criminal case." Therefore, the trial court refused to quash the subpoenas.

¶13 Ultimately, two of Liggett's nonphysician medical providers testified at trial. Professional Counselor M.H., who worked alongside the last psychiatrist to treat Liggett before he killed his mother, testified about observations M.H. made while serving on that treatment team. Similarly, Registered Nurse C.R.V. testified about observations she made while admitting Liggett to a psychiatric treatment unit in 2009. C.R.V. testified that she would assess patients' treatment needs while admitting them to the unit, but actual diagnosis was "left to the psychiatrist."

¶14 A second court-ordered sanity evaluator, Dr. John DeQuardo, also testified to his observations of Liggett. Unlike Dr. Wortzel, Dr. DeQuardo did not review Liggett's custodial statements to the police. Dr. DeQuardo testified that Liggett knew what he was doing was wrong and could form a culpable mental state during the time of the killing.

¶15 After the People rested, Liggett elected not to present any evidence in his defense. Outside of the presence of the jury, his counsel stated that the defense had twelve unnamed witnesses under subpoena, most of whom were doctors. [2] But because the trial court's earlier suppression order would permit the People to call Dr. Wortzel in rebuttal if Liggett presented evidence that he was insane, the defense opted not to call any of these witnesses, and Dr. Wortzel did not testify at trial.

¶16 Ultimately, the jury found Liggett guilty of first degree murder. On appeal, Liggett argued that the trial court chilled his right to present a defense by ruling that the People could use his unwarned voluntary statements, through Dr. Wortzel, as rebuttal evidence. *People v. Liggett,* 2021 COA 51, ¶ 35, 492 P.3d 356, 363 *("Liggett II")*. He relied on *People v. Trujillo,* 49 P.3d 316, 322, 324 (Colo. 2002), which held that a defendant's unwarned statements cannot be used to impeach other defense witnesses or generally challenge the theory of defense. *Liggett II,* ¶¶ 41–42, 492 P.3d at 363–64.

¶17 The division disagreed and held, instead, that the People could rebut evidence supporting a defendant's insanity defense with psychiatric evidence derived from their voluntary statements, even if the police obtained those statements by violating *Miranda. Id.* at ¶¶ 37, 39–40, 492 P.3d at 363 (citing *Dunlap*, 173 P.3d at 1096). In so holding, the division deemed *Trujillo* inapposite because it didn't involve an NGRI defense; instead, the division reasoned that *Dunlap,* 173 P.3d at 1096, specifically permitted using a defendant's voluntary, unwarned statements to rebut evidence of his sanity. *Liggett II,* ¶ 43, 492 P.3d at 364. Accordingly, the division concluded that the trial court did not abuse its discretion by ruling that the People could call Dr. Wortzel in rebuttal if Liggett presented evidence regarding his NGRI defense. *Id.* at ¶¶ 43–44, 492 P.3d at 364.

¶18 Also on appeal, Liggett maintained that section 16-8-103.6's privilege waiver applies only to a "physician or psychologist" ***119** and that the trial court erred by expanding the statute to medical providers like M.H. and C.R.V. *Id.* at ¶ 15, 492 P.3d at 360. Again, the division disagreed. *Id.* Relying on *Gray,* the division held that section 16-8-103.6 "contemplate[s] a waiver not only of a privilege between a physician or psychologist and the patient, but also as to *any* claim of confidentiality or privilege that relates to the course of an examination or treatment for a mental condition and to medical records concerning such a condition." *Id.* at ¶ 24, 492 P.3d at 361. The division thus concluded that the trial court did not err by allowing the People to present M.H.'s and C.R.V.'s testimony. *Id.* at ¶ 30, 492 P.3d at 362.

¶19 We granted certiorari review. [3]

## II. Admissibility of Liggett's Voluntary Statements to Rebut His NGRI Defense

¶20 We first consider whether the trial court erred by ruling that the People could present Dr. Wortzel's testimony to rebut evidence supporting Liggett's NGRI defense, even though Dr. Wortzel reviewed Liggett's unwarned custodial statements to the police. We begin by outlining the appropriate standard of review. Then, we turn to *Miranda* and its progeny. In line with our precedents, we hold that when a defendant presents psychiatric evidence supporting their insanity defense, they can open the door to the admission of psychiatric evidence rebutting that defense, even if the evidence includes the defendant's voluntary but

  

non-*Miranda*-compliant statements. Accordingly, the trial court did not violate Liggett's Fifth Amendment rights by ruling that the People could present Dr. Wortzel's testimony in rebuttal if Liggett presented evidence that he was insane.

### A. Standard of Review

¶21 The parties disagree over our standard of review; Liggett advocates for de novo review, while the People urge us to review for an abuse of discretion. [4]

¶22 "We review a trial court's interpretation of the law governing the admissibility of evidence de novo." *People v. Johnson*, 2021 CO 35, ¶ 15, 486 P.3d 1154, 1158. This includes "the broader legal question of whether a defendant *can* open the door for the admission of evidence otherwise barred by the exclusionary rule." *Id.*; *cf. United States v. Cotto*, 995 F.3d 786, 795 (10th Cir. 2021) ("[W]e ... review de novo the applicability of exceptions to the exclusionary rule ...."). Likewise, while we afford deference to a trial court on purely factual issues, "the application of the legal standard to the facts" in the arena of constitutional rights is an exercise that "resolve[s] the constitutional question at hand" and "merits de novo review." *People v. Al-Yousif,* 49 P.3d 1165, 1169 (Colo. 2002).

¶23 The underlying facts here aren't in dispute, and the constitutional question before us is a legal question. Thus, we review de novo whether a defendant can open the door to the admission of psychiatric evidence to rebut their insanity defense, even if that evidence includes the defendant's voluntary but non-*Miranda*-compliant statements, by presenting psychiatric evidence in their defense.

### B. *Miranda* and the Exclusionary Rule

¶24 The Fifth Amendment guarantees the right against self-incrimination. U.S. Const. amend. V. To protect that right, procedural safeguards are necessary when the police subject a suspect to custodial interrogation; ***120** the police must warn the suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602. If the police violate these safeguards, the exclusionary rule applies, and the suspect's illegally obtained statements are inadmissible as substantive evidence of guilt. *Trujillo*, 49 P.3d at 321.

¶25 But while a defendant's *involuntary* statements are inadmissible for any purpose, *Branch*, 805 P.2d at 1081, the prosecution may nevertheless use a defendant's *voluntary* statements—even those obtained in violation of *Miranda*—to impeach the defendant's testimony at trial. *Harris v. New York*, 401 U.S. 222, 225–26, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). Similarly, "when a defendant places his mental capacity at issue the prosecution may rebut the defense with psychological evidence, even if that evidence includes [the] defendant's statements not taken in compliance with *Miranda*." *Dunlap,* 173 P.3d at 1096 (citing *Branch*, 805 P.2d at 1083 & n.4).

¶26 Here, because police violated Liggett's *Miranda* rights during his interview, the trial court barred evidence derived from his statements (namely, Dr. Wortzel's testimony) from the People's case-in-chief. But because Liggett's statements were voluntary, *Liggett I*, ¶ 36, 334 P.3d at 241, the trial court ruled that if Liggett presented evidence of insanity, then the People could "call Dr. Wortzel in rebuttal to opine on [Liggett's] sanity" even though his opinion was "based in part" on statements Liggett made following a *Miranda* violation. While Liggett concedes that the People could have used his statements to impeach *his own* testimony, he argues that the exclusionary rule prohibited the People from using those statements to rebut *other evidence* supporting his NGRI defense.

¶27 We addressed this issue in *Dunlap.* In that case, after his arrest, Dunlap was transferred to a hospital to undergo a competency examination. *Dunlap,* 173 P.3d at 1064. Dunlap did not receive *Miranda* warnings prior to the examination. *Id.* at 1095. The examination then produced records documenting "the near unanimous view of [hospital] staff and doctors that Dunlap was malingering his symptoms." *Id.* at 1068.

¶28 Because Dunlap did not receive *Miranda* warnings before the examination, the trial court suppressed these records. *Id.* at 1064, 1095. But while it ruled that the prosecution could not use the evidence during the case-in-chief, it further ruled that they "could use the evidence in rebuttal if [Dunlap] opened the door by presenting mental health evidence." *Id.* at 1064. Because the records "pervasively stat[ed] the case for malingering," Dunlap's trial counsel "determined that it was

  

critical the jury not learn about" them and abandoned a mental health defense. *Id.* at 1066 & n.13.

¶29 Dunlap sought post-conviction relief under Crim. P. 35(c), arguing that his trial counsel provided ineffective assistance by abandoning a mental health defense. *Id.* at 1061–63. During the Rule 35(c) hearing, Dunlap introduced the testimony of four physicians to show that a mental health defense would have been viable. *Id.* at 1065. The post-conviction court then permitted the prosecution to present evidence from Dunlap's competency evaluation—even though it stemmed from a *Miranda* violation—to rebut the testimony of the physicians. *Id.* at 1095. Relying on this evidence, the court determined that Dunlap was not prejudiced by his trial counsel's decision to abandon a mental health defense; if Dunlap had pursued that defense at trial, the prosecution would have introduced damaging evidence from the evaluation in response. *Id.* at 1069, 1095.

¶30 On appeal, we held that the post-conviction court did not violate Dunlap's Fifth Amendment rights by admitting evidence from the evaluation to rebut his physicians' testimony. *Id.* at 1096. Although the evidence stemmed from a *Miranda* violation, we had previously "recognized that when a defendant places his mental capacity at issue the prosecution may rebut the defense with psychological evidence, even if that evidence includes [the] defendant's statements not taken in compliance with *Miranda*," so long as the statements were voluntary. ***121** *Id.* at 1096 & n.49 (citing *Branch*, 805 P.2d at 1083 & n.4); *see also Branch*, 805 P.2d at 1083 (stating that the failure to give *Miranda* warnings to a defendant prior to a competency evaluation "will not prohibit the prosecution from utilizing such statements, so long as they are otherwise voluntary, either to rebut the defendant's evidence of lack of capacity to form the requisite culpable mental state or to impeach the defendant's testimony"). Dunlap put his mental condition at issue in the Rule 35(c) hearing, and thus the prosecution did not violate his Fifth Amendment rights by presenting psychological evidence derived from his voluntary statements in rebuttal. *Dunlap*, 173 P.3d at 1096. Further, the record supported the trial court's earlier ruling that the prosecution could use Dunlap's statements to rebut a mental health defense. *Id.* at 1096 & n.51.

¶31 So too here. Liggett put his mental condition at issue by pleading NGRI, and after advising Liggett of the consequences of that plea, the trial court ordered Dr. Wortzel to perform a sanity evaluation. Because Dr. Wortzel relied on Liggett's illegally obtained statements, the trial court appropriately barred Dr. Wortzel's testimony from the People's case-in-chief. But if Liggett had presented evidence supporting his NGRI defense, the People would have been within their right to rebut that evidence with Dr. Wortzel's testimony, just as the prosecution rebutted Dunlap's psychological evidence with evidence derived from his unwarned statements. It makes little difference that Liggett gave his statements to the police while Dunlap made his directly to the competency evaluator; Fifth Amendment protections apply in both contexts. And Dr. Wortzel relied on Liggett's statements to the police just as the competency evaluator relied on Dunlap's statements during the evaluation.

¶32 Nevertheless, Liggett contends that *Dunlap* does not control and instead urges us to apply *Trujillo*, 49 P.3d at 325. There, a warrant was issued for Trujillo's arrest after he failed to attend a court appearance. *Id.* at 318. The police apprehended Trujillo and interviewed him without providing *Miranda* warnings. *Id.* During the interview, Trujillo said he knew about the warrant and was fleeing the state when he was arrested. *Id.* But at his trial for violating bond conditions, Trujillo's defense was that he hadn't known about the missed court appearance and, therefore, didn't act "knowingly"—the requisite mens rea. *Id.* at 318–19.

¶33 Trujillo didn't testify, but his wife testified that he was "very forgetful," that she kept track of his appointments, and that Trujillo either failed to tell her the date of his appearance or she wrote it down incorrectly. *Id.* at 318. After the defense rested, the prosecution introduced Trujillo's unwarned statements to impeach his wife's testimony "and to rebut Trujillo's defense that he is generally unable to keep track of his appointments and was unaware of the scheduled court appearance." *Id.* The prosecution proceeded to use Trujillo's statements as substantive evidence of guilt, arguing that the statements "prove[d] culpable mental state" because they showed Trujillo knew about his arrest warrant and, by inference, his missed appearance. *Id.* at 319.

¶34 We reversed Trujillo's conviction. *Id.* at 326. We noted that the prosecution had used Trujillo's unwarned statements to (1) prove mens rea and (2) impeach a separate defense witness (his wife). *Id.* at 325. The Supreme Court has forbidden both uses, so we followed suit. *See id.* at 322 (recognizing that "admission of the defendant's [unwarned] custodial statements as evidence of guilt during the state's case-in-chief or during rebuttal" violates the Fifth Amendment); *James v. Illinois,* 493 U.S. 307, 320, 110 S.Ct. 648, 107 L.Ed.2d 676 (1990) (holding that the impeachment

  

exception to the exclusionary rule does not extend to the impeachment of defense witnesses aside from the defendant). Yet in reversing the conviction, we discussed potential exceptions to the rule that a defendant's unwarned statements cannot be used to impeach other defense witnesses, including "when a psychiatric or other expert testifies about her opinion which is based on what the defendant told her, and the defendant's unwarned custodial statements would lead to a different opinion." *Trujillo*, 49 P.3d at 325 (citing *Wilkes v. United States*, 631 A.2d 880, 889 (D.C. 1993)). Because the case didn't involve psychiatric ***122** testimony, we didn't explore the contours of that exception. *Id.* Instead, we simply recognized that the prosecution generally cannot use a defendant's unwarned statements to prove an element of its case or impeach witnesses aside from a testifying defendant. *Id.*

¶35 Importantly, and unlike Liggett or Dunlap, Trujillo didn't put his mental capacity at issue by pleading NGRI or otherwise presenting psychiatric evidence that he was unable to form the requisite mental state. So, *Trujillo* did not address (and specifically declined to address) the question that *Dunlap* later answered: Whether the People can use psychological evidence derived from a defendant's voluntary statements to rebut evidence of a mental condition that the defendant put at issue. *See Dunlap*, 173 P.3d at 1096 & n.50. Because this case involves that exact question, *Dunlap* governs.

¶36 Moreover, the rule from *Dunlap* furthers the truth-seeking function of trial. The District of Columbia Court of Appeals addressed a similar issue in *Wilkes*, 631 A.2d at 889, and specifically balanced the deterrence and truth-seeking concerns involved here. In *Wilkes,* the police interviewed the defendant without providing *Miranda* warnings; the defendant then made statements indicating that he remembered the alleged crime. *Id.* at 881–82. The trial court excluded these statements from the government's case-in-chief (due to the *Miranda* violation) but ruled that the statements were voluntary. *Id.* at 882. At trial, the defendant claimed insanity and presented the testimony of a psychiatrist who based his diagnosis " 'in large part' on [the defendant's] statement to him that he had no memory of [the crime]." *Id.* at 883. The trial court then allowed the government to cross-examine the psychiatrist about the defendant's unwarned statements indicating that he did, in fact, remember the crime, which the psychiatrist conceded would force him to reconsider his diagnosis. *Id.* Additionally, the trial court allowed the government to rebut the defendant's evidence with other evidence derived from the defendant's unwarned statements; namely, the testimony of three psychiatric experts who reviewed the unwarned statements and opined that the defendant was sane, as well as the testimony of the interviewing police officers. *Id.* at 883–84.

¶37 The District of Columbia Court of Appeals affirmed. *Id.* at 891. Recognizing that it must "strike a balance between the truth-seeking function of a trial and the deterrent function of the exclusionary rule," the court determined that the "truth-seeking process would be frustrated" by excluding the defendant's unwarned statements from rebuttal. *Id.* at 889. In particular, the court reasoned that the truth-seeking function would not "be served, even marginally, if the medical experts on either side of the case were required to render opinions on complicated issues of mental disability while ignorant of facts essential to a valid diagnosis." *Id.* On the other hand, the court was not persuaded "that allowing statements which have been excluded under *Miranda* to be used for rebutting an insanity defense would chill a defendant's ability to raise the best defense available," when a defendant could avoid admission of the suppressed statements by not "telling something to a psychiatrist that is contradicted by [the suppressed] evidence." *Id.* at 890. That rationale bears equal force here, when Liggett openly acknowledged to Dr. Wortzel that he "made up" portions of his voluntary statements to the police in order to avoid criminal responsibility.

¶38 Accordingly, we adhere to *Dunlap:* "[W]hen a defendant places his mental capacity at issue the prosecution may rebut the defense with psychological evidence, even if that evidence includes [the] defendant's statements not taken in compliance with *Miranda.*" *Dunlap*, 173 P.3d at 1096.

¶39 We caution that our holding doesn't necessarily mean a defendant's illegally obtained statements will *always* be admissible to rebut an insanity defense. Evidentiary constraints still apply. For example, the court may exclude the evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" or the other risks described in CRE 403. And when evidence is admissible for one purpose but not another (e.g., to rebut an insanity defense but not as evidence of guilt in the People's case-in-chief), "the court, upon request, ***123** shall restrict the evidence to its proper scope and instruct the jury accordingly." CRE 105; *see also* § 16-8-107(1.5)(a), C.R.S. (2022) (providing that evidence acquired during a court-ordered sanity examination "is admissible only as to the issues raised by the defendant's plea of [NGRI], and the jury, at the request of either party,

  

shall be so instructed"). So to the extent that prosecutors could seek to use a defendant's statements improperly, evidentiary constraints protect the defendant's interests by ensuring that the evidence is used for a relevant, limited, and fair purpose.

¶40 But these considerations are evidentiary—not constitutional. As a constitutional matter, when a defendant presents psychiatric evidence supporting their insanity defense, they can open the door to the admission of psychiatric evidence rebutting that defense, even if the evidence includes the defendant's voluntary but non-*Miranda*-compliant statements. *Dunlap*, 173 P.3d at 1095–96; *Branch*, 805 P.2d at 1083. Accordingly, the trial court did not violate Liggett's Fifth Amendment rights when it ruled that the People could use psychiatric evidence derived from Liggett's voluntary but unwarned statements to rebut evidence supporting his NGRI defense.

## III. Statutory Waiver of Privilege

¶41 We next evaluate Liggett's argument that section 16-8-103.6 applies only to a "physician or psychologist." We begin by identifying our standard of review and discussing the principles of statutory interpretation. Then, we address and reject the People's contention that Liggett has not provided a sufficient record on appeal for us to decide this issue. Turning to section 16-8-103.6 itself, we reaffirm that the statute codifies a waiver "to *any* claim of confidentiality or privilege" as to communications made by a defendant to a physician or psychologist in the course of treatment for a mental condition the defendant placed at issue. *Gray*, 884 P.2d at 293. Specifically, we hold that section 16-8-103.6's waiver of privilege as to "communications made by the defendant to a physician or psychologist" includes communications made to a physician's or psychologist's agents. Finally, because the nonphysician witnesses who testified at trial each made their observations as agents of Liggett's physicians, we affirm.

### A. Standard of Review and Rules of Statutory Interpretation

¶42 We review a trial court's ruling on a motion to quash for abuse of discretion. *People v. Brothers*, 2013 CO 31, ¶ 19, 308 P.3d 1213, 1217. A trial court abuses its discretion if it misapplies the law. *Antero Res. Corp. v. Strudley*, 2015 CO 26, ¶ 14, 347 P.3d 149, 154. Statutory interpretation is a question of law, which we review de novo. *People v. Subjack*, 2021 CO 10, ¶ 14, 480 P.3d 114, 117.

¶43 Our goal when interpreting a statute is to "ascertain and give effect to the legislature's intent—the polestar of statutory construction." *People v. Kailey*, 2014 CO 50, ¶ 13, 333 P.3d 89, 93. When determining legislative intent, we look first to the language of the statute, "giving its words and phrases their plain and ordinary meanings." *McCoy v. People*, 2019 CO 44, ¶ 37, 442 P.3d 379, 389. Still, we presume that the legislature "intends a just and reasonable result," so we look to the entire statutory scheme to give consistent, harmonious, and sensible effect to all its parts. *Cisneros v. Elder*, 2022 CO 13M, ¶ 21, 506 P.3d 828, 832. And when determining the plain and ordinary meaning of words, we may consider definitions included in a recognized dictionary. *Cowen v. People*, 2018 CO 96, ¶ 14, 431 P.3d 215, 218.

### B. Record on Appeal

¶44 As a preliminary matter, the People argue that this issue is unreviewable because the subpoenaed materials are not in the record and therefore, Liggett cannot demonstrate that any of those materials were privileged. *See People v. Ullery*, 984 P.2d 586, 591 (Colo. 1999) (concluding that defendant who failed to make a record indicating why material should remain privileged despite section 16-8-103.6 could not "overcome the presumption that the trial court's ruling [that the materials were discoverable] was correct").

***124** ¶45 We disagree. The People presented testimony from two nonphysicians who were nonetheless bound by the privilege statute: Professional Counselor M.H. and Registered Nurse C.R.V. *See* § 13-90-107(1)(d), (g). Their testimony, which Liggett included in the record, provides us with sufficient information to decide whether the disclosure of their observations was proper.

### C. Section 16-8-103.6

¶46 Under subsections 13-90-107(1)(d) and (g), information that physicians and psychologists learn during the treatment of a patient is generally privileged and cannot be disclosed without their patient's consent. Similarly, subsections 13-90-107(1)(d) and (g) protect information that registered nurses, professional counselors, and other nonphysician medical providers learn during the treatment of their patients.

  

These privileges "prohibit both testimonial disclosures and 'pretrial discovery of information within the scope of the privilege.' " *Zapata v. People*, 2018 CO 82, ¶ 33, 428 P.3d 517, 525 (quoting *Clark v. Dist. Ct.*, 668 P.2d 3, 8 (Colo. 1983)). Once a privilege attaches, "the only basis for authorizing a disclosure of the confidential information is an express or implied waiver." *Clark*, 668 P.2d at 9.

¶47 Section 16-8-103.6(2)(a) codifies one such waiver: A defendant who pleads NGRI "waives any claim of confidentiality or privilege *as to communications made by the defendant to a physician or psychologist* in the course of an examination or treatment for the mental condition" at issue. (Emphasis added.)

¶48 Liggett argues that, by its plain language, this statutory waiver applies *only* to a defendant's communications with the providers actually named in the statute: a physician or psychologist. He insists that it does not apply to communications with other medical providers—such as counselors and nurses—regardless of whether they work with physicians or psychologists. [5]

¶49 In response, the People argue that Liggett cannot demonstrate error based on M.H.'s and C.R.V.'s testimony because both worked on treatment teams with Liggett's physicians; therefore, the People argue, these professionals testified to "communications made by the defendant to a physician or psychologist" as contemplated by section 16-8-103.6. Thus, the People argue, the division correctly interpreted section 16-8-103.6 to encompass a broad waiver of any claim of privilege that relates to the course of an examination or treatment for the defendant's mental condition.

¶50 Again, we find guidance in our precedents—namely, *Gray*, 884 P.2d 286. After Gray pleaded NGRI, he moved to suppress records from a previous psychiatric hospitalization. *Id.* at 288. The prosecution argued that under section 16-8-103.6, they were entitled to "any records of any examinations ever performed on Gray in his lifetime that may deal with any psychological condition which might support a plea of [NGRI]." *Id.* Despite section 16-8-103.6, Gray responded that he did not waive the physician-patient privilege he shared with the psychiatrists who treated him before the alleged offense occurred. *Id.* at 288, 292. He further argued that the observations of consulting psychiatrists retained by his attorney were protected by the attorney-client privilege and that section 16-8-103.6 did not waive this privilege. *Id.* at 292–93.

¶51 We rejected Gray's interpretation of section 16-8-103.6. *Id.* at 293. Instead, we stated that "[b]ased on a plain reading of the statute, section 16-8-103.6 indicates that the legislature has created a *statutory* waiver to *any* claim of confidentiality or privilege, which includes the attorney-client and physician/psychologist-patient privileges." *Id.* We determined that by putting their mental condition at issue in trial, a defendant "waives the protection to communications, including medical records, that pre-date or post-date the criminal offense, made by a defendant to a physician or psychologist in the course of ***125** examination or treatment." *Id.* Likewise, "the defendant waives the right to claim the attorney-client and physician/psychologist-patient privileges" as to those communications. *Id.*

¶52 *Gray* confirms the breadth of section 16-8-103.6: When the statute says that a defendant "waives *any* claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist," § 16-8-103.6(2)(a) (emphasis added), it means that the defendant waives *every* claim of confidentiality or privilege, *see Any,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/any [https://perma.cc/UUB9-552B] (defining "any" as "every: used to indicate one selected without restriction"). This broad language is not limited to the physician-patient or psychologist-patient privileges alone; otherwise, the legislature could have simply specified those privileges. The legislature's choice, instead, to broadly state that the defendant waives "any" claim of privilege is significant. Indeed, *Gray* confirmed that the statutory waiver extends beyond the physician-patient or psychologist-patient privileges—under section 16-8-103.6, a defendant also "waives the right to claim the attorney-client" privilege as to communications made to consulting psychiatrists retained by the defendant's attorney, even though section 16-8-103.6 does not directly mention the attorney-client privilege or attorneys. *Gray*, 884 P.2d at 293. In effect, "any claim of confidentiality or privilege" includes claims under the nurse-patient and counselor-patient privileges; while the statute does not mention those privileges specifically (or, indeed, *any* privilege specifically), they are encompassed by the words "any claim."

¶53 With this in mind, we turn next to the phrase "communications made by the defendant to a physician or psychologist." § 16-8-103.6(2)

  

(a). "Communications" encompass more than direct conversations between a defendant and a physician. Rather, "communications" are "[t]he messages or ideas ... expressed or exchanged" through "speech, writing, gestures, or conduct." *Communication,* Black's Law Dictionary (11th ed. 2019); *see also Communication,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/communication [https://perma.cc/AD2S-2QBM] (defining "communication" as "information transmitted or conveyed"). In *Gray,* for instance, we held that the defendant waived claims of privilege regarding "hospital records" related to his condition, in addition to the testimony of psychiatrists who examined him. 884 P.2d at 289. Accordingly, the word "communications" in section 16-8-103.6 refers to the information conveyed to a physician or psychologist about the defendant's mental health. It does not restrict how the defendant may convey that information.

¶54 The "communications" covered by section 16-8-103.6(2)(a) are limited to those "made by the defendant *to a physician or psychologist* in the course of an examination or treatment for the mental condition" at issue. (Emphasis added.) But the phrase "to a physician or psychologist" doesn't specify that communications must be made *directly* to a physician or psychologist, rather than through other providers on the physician's or psychologist's behalf. *Cf. People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 22, 465 P.3d 554, 560 ("[W]e do not add words to or subtract words from a statute.").

¶55 As the testimony in this case illustrates, physicians can receive information about a defendant's mental condition through their staff just as readily as they can receive that information directly from the defendant. Dr. Cynthia Wang was the last psychiatrist to treat Liggett before his arrest, but she only met with him personally for five, twenty-minute sessions. Yet in addition, Liggett met with other members of Dr. Wang's treatment team—including Professional Counselor M.H., whose testimony is at issue here. Dr. Wang testified that the information she gathered from M.H. and other staff informed her decision-making when treating Liggett; she called her team's input "[a]bsolutely" important to her treatment of patients. In essence, communications from Liggett to Dr. Wang's team guided Dr. Wang's treatment of Liggett, even though he did not convey those communications directly to her.

¶56 Indeed, other statutes expressly contemplate collaboration between physicians, psychologists, and nonphysician medical providers. *See* § 12-245-303(2)(e), C.R.S. (2022) ("The practice of psychology includes ... ***126** [c]onsultation with physicians, other health-care professionals, and patients regarding all available treatment options with respect to provision of care for a specific patient or client ...."); § 12-255-104(10)(b)(IV), (12), C.R.S. (2022) ("The 'practice of professional nursing' includes ... [e]xecuting delegated medical functions and delegated patient care functions," which "shall be performed under the responsible direction and supervision of a licensed health care provider."); § 12-245-211, C.R.S. (2022) ("In order to provide for the diagnosis and treatment of medical problems, a [licensed professional counselor] ... shall collaborate with a physician licensed under the laws of this state ...."). The statutory scheme recognizes that nonphysician medical providers may help treat patients under the supervision of physicians.

¶57 Such a relationship between a physician and a nonphysician provider is, in effect, a relationship between a principal and an agent. *Cf. People v. Morrow*, 682 P.2d 1201, 1206 (Colo. App. 1983) ("An agent is one who acts for or in place of another by authority from him."); Restatement (Second) of Agency § 1 (Am. L. Inst. 1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."). When an agency relationship exists, knowledge obtained by an agent within the scope of their agency is imputed to the principal. *See Morrow*, 682 P.2d at 1206–07; Restatement (Second) of Agency § 9(3) (Am. L. Inst. 1958) ("A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it ....").

¶58 In many circumstances, active communication between physicians and nonphysicians may not only be reasonable, but necessary to the proper treatment of a patient. *See Berdyck v. Shinde*, 66 Ohio St.3d 573, 613 N.E.2d 1014, 1021–22 (1993) ("[A]ccepted standards of nursing practice include a duty to keep the attending physician informed of a patient's condition so as to permit the physician to make a proper diagnosis of and devise a plan of treatment for the patient." (quoting *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 553 N.E.2d 1038, 1051 (1990))); *People v. Lang*, 113 Ill.2d 407, 101 Ill.Dec. 597, 498 N.E.2d 1105, 1132 (1986) (holding that testifying doctors properly relied upon and disclosed reports by hospital staff, because "[a]ny psychiatric history would be incomplete and unreliable if it did not include the observations of nurses, social workers, and other personnel at the hospital where

  

a patient has received psychiatric treatment"). Put simply, physicians and nonphysicians treat patients as a team, and team members naturally and properly communicate.

¶59 Accordingly, we decline to interpret section 16-8-103.6 in a manner that would fail to account for collaboration between physicians, psychologists, and nonphysician medical providers, particularly when the statute broadly applies to "any claim of confidentiality or privilege." Liggett's reading of section 16-8-103.6(2)(a)—that its waiver of "any claim of confidentiality or privilege" only applies to communications made directly to physicians or psychologists—would do exactly that. Instead, to give the statute its proper effect, we determine that the statute's waiver also applies to communications made to a physician's or psychologist's agents. Such an interpretation accounts for the unremarkable reality that physicians and nonphysicians communicate with one another when treating patients. Thus, we hold that section 16-8-103.6's waiver of privilege as to "communications made by the defendant to a physician or psychologist" includes communications to a physician's or psychologist's agents.

### D. Application

¶60 We turn now to whether the trial court abused its discretion based on the record Liggett has provided. The People issued subpoenas to Liggett's medical providers requesting statements that Liggett made to physicians, psychologists, and other medical providers (like nurses, social workers, and therapists). As discussed above, the court refused to quash these subpoenas, and two of Liggett's nonphysician medical providers testified at trial about their observations of Liggett during treatment.

***127** ¶61 Specifically, Professional Counselor M.H. testified about observations he made while serving on the treatment team of Dr. Wang, the last psychiatrist to treat Liggett before he killed his mother. Dr. Wang testified that the information she gathered from M.H. and other staff informed her decision-making when treating Liggett, and M.H. agreed during his testimony that he would share his observations of Liggett's condition and demeanor with the treatment team to "make sure we're on the same page." Liggett plainly waived the physician-patient privilege he shared with Dr. Wang once he pleaded NGRI. § 16-8-103.6(2)(a). And because M.H. treated Liggett while serving on Dr. Wang's team, Liggett also waived "any claim of confidentiality or privilege" he shared with M.H. once he pleaded NGRI.

¶62 Likewise, Registered Nurse C.R.V. testified to observations she made while admitting Liggett to an acute psychiatric treatment unit. At the psychiatric unit, C.R.V. performed intake evaluations of patients to "try[ ] to understand a little bit about what their needs might be for medication," as well as their "medical issues and psychiatric issues." Any official diagnosis, as C.R.V. said, "was left to the psychiatrist." Thus, the information C.R.V. testified to was information she gathered for Liggett's psychiatrists. Liggett waived any claim of confidentiality or privilege with those physicians. And because C.R.V. obtained information from Liggett on his physicians' behalf, Liggett waived any claim of confidentiality or privilege with her, too.

¶63 Based on this record, the trial court did not abuse its discretion by allowing M.H. and C.R.V. to reveal their observations of Liggett. While those observations were initially privileged under subsections 13-90-107(1)(d) and (g), both providers made their observations on behalf of Liggett's physician or psychologist. And since Liggett waived "any claim of confidentiality or privilege" as to communications that he made to his physicians and psychologists once he pleaded NGRI, he further waived the privilege he shared with M.H. and C.R.V.

### IV. Conclusion

¶64 For the foregoing reasons, we affirm the judgment of the court of appeals.

JUSTICE MÁRQUEZ, joined by JUSTICE HART, dissented.

JUSTICE MÁRQUEZ, joined by JUSTICE HART, dissenting.

### I. Introduction

¶65 Under the exclusionary rule, the government may not use illegally obtained evidence in its case-in-chief. Such illegally obtained evidence includes a defendant's statements to police taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This case concerns the narrow impeachment exception to this rule, which "permits the prosecution in a criminal proceeding to introduce illegally

  

obtained evidence *to impeach the defendant's own testimony.*" *James v. Illinois*, 493 U.S. 307, 308–09, 110 S.Ct. 648, 107 L.Ed.2d 676 (1990) (emphasis added). The majority greatly expands this impeachment exception to hold that the prosecution may use a defendant's unconstitutionally obtained statements to police as substantive evidence to rebut a defendant's insanity defense—regardless of whether the defendant testifies. Today's decision disregards the narrow purpose and scope of the impeachment exception established by the Supreme Court. It all but eviscerates the protections of the Fifth Amendment and the exclusionary rule for defendants who rely on mental capacity defenses. And it chills defendants like Liggett from presenting their best defense (or any defense at all) through the testimony of others. *See James*, 493 U.S. at 314–15, 110 S.Ct. 648.

¶66 The majority relies on this court's decision in *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007), which expanded the impeachment exception to allow the prosecution to use a defendant's illegally obtained statements for general rebuttal purposes, regardless of whether the defendant offers contradictory testimony or even testifies at all. But this holding in *Dunlap* contravened settled Supreme Court case law. Starting with ***128** *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), and continuing with *Harris v. New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), and *James*, 493 U.S. at 320, 110 S.Ct. 648, the Court's consistent explanation of the purpose of the impeachment exception and "careful weighing of ... [the] competing values" implicated by the exclusionary rule led it to reject the very expansions of the impeachment exception approved by this court in *Dunlap*. *James*, 493 U.S. at 320, 110 S.Ct. 648. Instead of recognizing the error in *Dunlap*, the majority instead compounds it by now allowing the prosecution to use a defendant's unwarned statements to police as substantive evidence to rebut the defense's entire theory of the case—not merely to impeach the defendant's testimony. In so doing, the majority ignores binding Supreme Court precedent and fundamentally distorts the purpose of the impeachment exception.

¶67 Today's ruling undermines the deterrent role of the exclusionary rule while contributing little to the truth-seeking function of a criminal trial. It also curtails the Fifth Amendment rights of criminal defendants who wish to rely on a mental status defense and encourages precisely the harm that the *James* rule was designed to prevent: the prosecution brandishing illegally obtained evidence as a sword to dissuade defendants from presenting their best (or only) defense. Accordingly, I respectfully dissent.

## II. Analysis

¶68 I begin by describing the purpose and scope of the impeachment exception to the exclusionary rule as established by controlling Supreme Court precedent. I then discuss how *Dunlap* contravened that precedent and how the majority repeats *Dunlap*'s errors. Next, I explain how the majority's ruling further distorts the impeachment exception to allow the prosecution to use the defendant's illegally obtained statements made to police as substantive evidence to rebut the defendant's insanity defense. Finally, I discuss why the trial court's ruling here was not harmless. [1]

### A. The Purpose of the Impeachment Exception Dictates Its Scope

¶69 The Supreme Court first carved out the impeachment exception to the exclusionary rule in *Walder*. There, the defendant, who testified, denied his involvement in the drug crimes with which he was charged. *Walder*, 347 U.S. at 63, 74 S.Ct. 354. He further testified that he had never purchased, sold, or possessed any narcotics. *Id.* at 63–64, 74 S.Ct. 354. In response, the trial court allowed the government to impeach the defendant's credibility by introducing testimony about heroin (unlawfully) seized from the defendant in an earlier case. *Id.* at 64, 74 S.Ct. 354. The Court affirmed the admission of such evidence under these circumstances, holding:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. *It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.* Such an extension of the [exclusionary rule] would be a perversion of the Fourth Amendment.

  

*Id*., 347 U.S. at 65, 74 S.Ct. 354 (emphasis added). Importantly, the Court limited the prosecution's use of illegally obtained evidence to the impeachment of perjurious testimony by the defendant. The Court emphasized that "the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him," and that a defendant must be "free to deny all the elements of the case against him" without thereby allowing the prosecution to circumvent the exclusionary rule by introducing illegally obtained evidence "by way of rebuttal." *Id.* That said, the Court reasoned that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony" by relying on the exclusionary ***129** rule to prevent the prosecution from challenging his credibility. *Id.*

¶70 In *Harris*, 401 U.S. at 225, 91 S.Ct. 643, the Court applied *Walder's* impeachment exception to the exclusionary rule in the *Miranda* (Fifth Amendment) context. [2] There, the defendant was charged with selling heroin to an undercover officer. *Id.* at 222–23, 91 S.Ct. 643. The defendant testified in his own defense, and his testimony contrasted sharply with what he had told police shortly after his arrest. *Id.* at 225, 91 S.Ct. 643. The trial court allowed the prosecution to impeach the defendant with voluntary statements he made to police that had been obtained in violation of *Miranda.* The jury was instructed that these statements could be considered only in assessing the defendant's credibility and not as evidence of guilt. *Id.* at 223–24, 91 S.Ct. 643.

¶71 The Supreme Court upheld the admission of the unlawfully obtained statements for the limited purpose of impeaching the defendant's contradictory testimony at trial. *Id.* at 226, 91 S.Ct. 643. The Court reasoned that the benefit to the jury of this method of assessing the defendant's credibility should not be lost because of the "speculative possibility" that it would encourage police misconduct. *Id.* at 225, 91 S.Ct. 643. In sum, "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense," free from the risk of impeachment by prior inconsistent statements. *Id.* at 226, 91 S.Ct. 643. [3]

¶72 Two decades later, in *James*, 493 U.S. at 313–14, 110 S.Ct. 648, the Court reaffirmed the narrow purpose and scope of the impeachment exception articulated in *Walder* and *Harris,* and expressly rejected the Illinois Supreme Court's expansion of the exception to use a defendant's illegally obtained statements to impeach defense witnesses other than the defendant.

¶73 The *James* court began by acknowledging the fundamental truth-seeking goal of the legal process and by observing that, to preserve other cherished constitutional values, the exclusionary rule limits the means by which the government may conduct this search for truth. *Id.* at 311, 110 S.Ct. 648. It explained that the Court has nevertheless carved out exceptions to the exclusionary rule where "the introduction of reliable and probative evidence would significantly further the truthseeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.' " *Id.* at 311, 110 S.Ct. 648 (quoting *Harris*, 401 U.S. at 225, 91 S.Ct. 643). It identified the impeachment exception as an example, noting that this exception "permits the prosecution to introduce illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's own testimony." *Id.* at 312, 110 S.Ct. 648.

¶74 From there, however, the *James* court expressly rejected "[e]xpanding the class of ***130** impeachable witnesses from the defendant alone to all defense witnesses." *Id.* at 313–14, 110 S.Ct. 648. The Court reasoned that such an expansion "would frustrate rather than further the purposes underlying the exclusionary rule" because it would likely dissuade some defendants from calling witnesses who would otherwise offer probative evidence. *Id.* at 314–16, 110 S.Ct. 648. The Court observed that, while defendants may not "pervert" the exclusionary rule into a shield for perjury, it is "no more appropriate for the State to brandish such evidence as a sword with which to dissuade defendants from presenting a meaningful defense through other witnesses." *Id.* at 317, 110 S.Ct. 648. Given this, the Court concluded that "the truth-seeking rationale supporting the impeachment of defendants in *Walder* and its progeny does not apply to other witnesses with equal force." *Id.*

¶75 Moreover, the Court concluded, broadening the impeachment exception to encompass other defense witnesses would significantly weaken the exclusionary rule's deterrent effect on police misconduct because it would "significantly enhance the expected value to the prosecution of illegally obtained evidence." *Id.* at 317–18, 110 S.Ct. 648. Such an expansion would vastly increase the number of opportunities to use such evidence, and the prosecutor's access to such evidence would also deter defendants from calling witnesses in the first place, thereby keeping probative exculpatory evidence from the jury. *Id.* at 318, 110 S.Ct. 648. Thus, the expansion of the impeachment exception would

  

make it "far more than a 'speculative possibility' that police misconduct will be encouraged by permitting such use of illegally obtained evidence." *Id.*

¶76 In the end, the Court observed that it must "focus on the systemic effects of proposed exceptions to ensure that individual liberty from arbitrary or oppressive police conduct does not succumb to the inexorable pressure to introduce all incriminating evidence, no matter how obtained, in each and every criminal case." *Id.* at 319–20, 110 S.Ct. 648. It noted that its previous recognition of an "impeachment exception limited to the testimony of defendants" reflected a careful weighing of competing values. *Id.* at 320, 110 S.Ct. 648. Because expanding the impeachment exception to encompass the testimony of all defense witnesses would not further the truth-seeking function with the same force as the original exception but would appreciably undermine the deterrent effect of the exclusionary rule, the Court chose to "adhere to the line drawn in [its] previous cases." *Id.*

### B. *Dunlap* Erroneously Expanded the Impeachment Exception Beyond Its Intended Purpose and Scope

¶77 Importantly, as its name suggests, the impeachment exception to the exclusionary rule permits the prosecution to use illegally obtained evidence only to *impeach the defendant's credibility*—not for rebuttal. Thus, the impeachment exception cases discussed above concerned the introduction of otherwise inadmissible evidence (testimonial or physical) that contradicted the testimony of the defendant.

¶78 Rebuttal evidence, by contrast, is "generally substantive in nature[;] may support the party's case-in-chief"; and "explains, refutes, counteracts, or disproves the evidence put on by the other party." *People v. Trujillo*, 49 P.3d 316, 319–21 (Colo. 2002). The use of illegally obtained evidence for *rebuttal* purposes violates the well-established rule that such evidence cannot be used as substantive evidence of guilt. *See James*, 493 U.S. at 313, 110 S.Ct. 648 ("This Court insisted throughout this line of [exclusionary rule] cases that 'evidence that has been illegally obtained ... is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.' " (quoting *United States v. Havens*, 446 U.S. 620, 628, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980))). Indeed, this court has expressly acknowledged that "expand[ing] the *Harris* rule to permit use of a defendant's voluntary but unwarned custodial statements to rebut defense evidence or impeach a witness other than the defendant ... would require the creation of a rule that contravenes the United States Supreme Court's holding and reasoning in *Harris* and *James*." *Trujillo*, 49 P.3d at 325.

¶79 In *Dunlap*, this court nevertheless concluded that the prosecution could generally ***131** rebut the defendant's mental health defense with the testimony of doctors, hospital staff, and jail staff that relied on statements made by the defendant without adequate *Miranda* warnings. 173 P.3d at 1096 ("We have recognized that when a defendant places his mental capacity at issue the prosecution may rebut the defense with psychological evidence, even if that evidence includes defendant's statements not taken in compliance with *Miranda*."). In so doing, the *Dunlap* court did not even cite, much less distinguish *Harris* or *James*. Instead, it mischaracterized this court's holding in *People v. Branch*, 805 P.2d 1075 (Colo. 1991), and leaned heavily on a single phrase of dicta from that case, divorced from its context. *Dunlap*, 173 P.3d at 1096 (citing *Branch*, 805 P.2d at 1083 & n.4). [4]

¶80 *Branch* did not, as *Dunlap* stated, "recognize[ ] that when a defendant places his mental capacity at issue the prosecution may rebut the defense with psychological evidence, even if that evidence includes [a] defendant's statements not taken in compliance with *Miranda*." *Id.* at 1096. Instead, in *Branch*, the issue was whether "the prosecution should have been permitted to use the defendant's [unwarned] statements to [the evaluator] during the competency examination *for the purpose of impeaching the defendant's testimony at trial*." 805 P.2d at 1083 (emphasis added). True, in a background discussion of Supreme Court case law, the opinion in *Branch* suggested that such evidence could be used "to rebut the defendant's evidence of lack of capacity to form the requisite culpable mental state." *Id.* But this partial sentence was both an inaccurate summary of case law [5] and, in any event, dicta because the court was not asked to decide whether illegally obtained statements could be used generally to rebut the defendant's mental capacity defense. *Dunlap*'s wholesale reliance on this partial sentence from *Branch* was therefore error.

¶81 The *Dunlap* court also erroneously distinguished *Trujillo* by mischaracterizing dicta from that decision. *Dunlap*, 173 P.3d at 1096 n.50 ("In *Trujillo* ... we recognized that an exception to [the rule that statements taken in violation of *Miranda* may only be used to impeach the testimony of the defendant] occurs when the defendant has raised a mental health defense."). But *Trujillo* simply observed that *other* courts had recognized "two narrow exceptions" to the general

  

rule that "no federal or state court has admitted a defendant's unwarned custodial statements to impeach other defense witnesses." 49 P.3d at 325 (citing *Wilkes v. United States*, 631 A.2d 880, 889 (D.C. 1993); and *Appling v. State*, 904 S.W.2d 912, 917 (Tex. App. 1995)). *Trujillo*'s descriptions of those exceptions, of which it offered no assessment, was dicta because the court was "not called upon to address either of [those] circumstances" and because it expressly stated that "[n]either of the two exceptions ... apply here." *Id.*

¶82 Finally, *Dunlap*'s (and the majority's) reliance on *Wilkes* for the proposition that unwarned statements by a defendant are generally admissible to rebut a mental status defense is misplaced. *Wilkes* is by no means binding on this court and, in any case, merely stands for the proposition that the defendant cannot circumvent the impeachment exception by using another witness as a mouthpiece for the defendant's own statements. In *Wilkes*, the defendant's expert witness, Dr. Saiger, testified "in detail what Wilkes had told him" and based his diagnosis "in large part on Wilkes' statements to him that he had no memory of the [alleged crime]." 631 A.2d at 889 (quotations omitted). Wilkes's excluded statements directly contradicted what he had told Dr. Saiger, and the doctor "conceded ***132** that if Wilkes did remember what happened on [the date of the alleged crime] and lied when he said he didn't, the diagnosis would definitely be reconsidered." *Id.* Under these circumstances (i.e., where the defendant's expert was relying on statements by the defendant that were contradicted by his unlawfully obtained statements to police), the court permitted the prosecution to use the defendant's unwarned statements to "rebut" the expert's testimony. *See Trujillo,* 49 P.3d at 320 ("Despite the definitions set forth above, the terms impeachment and rebuttal are sometimes used interchangeably."). The holding in *Wilkes* was essentially a straightforward application of the impeachment exception as defined by *James*; the court simply allowed the prosecution to use the illegally obtained evidence to impeach the contradictory statements of the defendant that he was making through his expert witness. *See Wilkes*, 631 A.2d at 890. Nothing about the rationale in *Wilkes* suggests that whenever a defendant places his mental capacity at issue the prosecution may rebut the defense with a defendant's illegally obtained statements. *Dunlap*'s reliance on *Wilkes* for that proposition is simply wrong.

### C. The Majority Repeats *Dunlap*'s Errors and Further Distorts the Impeachment Exception

¶83 The majority leans heavily on *Dunlap*, repeating and compounding its errors, including its misapplication of *Wilkes*. Like the court in *Dunlap*, the majority makes no attempt to explain how its holding is not precluded by the Supreme Court's decisions in *Harris* and *James*. Relying on *Dunlap*'s misapplication of *Wilkes*, the majority holds that the prosecution may use Liggett's unwarned statements to police to rebut any psychiatric evidence that he was insane at the time of the alleged offense.

¶84 Importantly, the facts of this case distinguish it from those the *Wilkes* court considered when balancing the truth-seeking function of trial and the deterrent effect of the exclusionary rule. First, *Wilkes* limited its holding to cases where "there is evidence tending to show that [the defendant] lied *and that the psychiatrist's diagnosis was based on that lie.*" *Id.* at 890. Here, by contrast, there is no suggestion that Liggett lied to any defense expert, let alone that a defense expert relied on that lie to make a psychiatric diagnosis in support of Liggett's insanity defense. Moreover, the trial court here did not limit Dr. Wortzel's testimony to impeaching false statements Liggett might have made to a defense expert; instead, it ruled that Dr. Wortzel's testimony could be admitted broadly "to rebut any evidence presented that [Liggett] was insane at the time of the alleged offense." Maj. op. ¶ 9. Indeed, by invoking the *impeachment* exception to allow the prosecution to introduce Liggett's illegally obtained statements to rebut any psychiatric evidence that Liggett was insane at the time of the offense, the majority goes beyond *Wilkes* and obliterates the distinction between impeachment and rebuttal.

¶85 Second, the *Wilkes* court reasoned that the admission of the defendant's unlawfully obtained statements in that case created only a "speculative possibility" of encouraging police misconduct because it assumed that "the police have no way of knowing, at the time someone is arrested and questioned, whether an insanity defense will be raised much later at the suspect's trial." 631 A.2d at 890. But here, it was clear from Liggett's first interaction with police that he would likely rely on an insanity defense.[6] Thus, the majority's rule allowing the prosecution to introduce a defendant's illegally obtained statements to police through the testimony of a competency evaluator—particularly on these facts—greatly undermines the deterrent function of the exclusionary rule by "significantly enhanc[ing] the expected value to the prosecution of illegally obtained evidence." *See James*, 493 U.S. at 317–18, 110 S.Ct. 648.

  

¶86 In short, nothing about the rationale of *Wilkes* "bears equal force here." Maj. op. ¶ 37. To the contrary, the balancing approach ***133** required by the Supreme Court's case law does not warrant the majority's expansion of the impeachment exception today.

¶87 The introduction of Dr. Wortzel's testimony would have contributed precious little to the truth-seeking function of the trial. There is no evidence in the record that Liggett was attempting to offer perjurious testimony that would have been successfully impeached by Dr. Wortzel's testimony. Indeed, there is no indication that Dr. Wortzel would have testified that Liggett ever contradicted his assertions that he was insane, which he made from the moment of his arrest. Dr. Wortzel's report demonstrates that he would have merely provided his opinion that Liggett was not legally insane at the time he committed the crime.

¶88 Moreover, it is unclear what additional probative value Dr. Wortzel's testimony would have offered. Because he had relied on Liggett's illegally obtained statements to police to reach his conclusion about Liggett's sanity, the court ordered a second sanity evaluation by a separate evaluator who was not permitted to consider the unwarned statements. Dr. DeQuardo's second evaluation reached the same ultimate conclusion as Dr. Wortzel's did concerning Liggett's mental state at the time of the killing, and he testified to this effect. The only salient difference between the two reports was that Dr. Wortzel's included a section summarizing Liggett's unlawfully obtained statements to police and other references to these statements. This strongly suggests that the prosecution's real purpose in seeking to admit Dr. Wortzel's testimony would not have been to aid the truth-seeking function of trial by correcting perjurious testimony but to smuggle in the defendant's unlawfully obtained statements to police.

¶89 This court should have used this opportunity to revisit its errors in *Dunlap*. Instead, the majority stretches the bounds of the impeachment exception even further to allow prosecutors to use a defendant's unwarned statements made *to police during custodial interrogation* as substantive evidence to rebut an insanity defense. I am particularly concerned that the majority's holding today expressly permits the prosecution to introduce illegally obtained statements a defendant made to police by simply funneling those statements through the testimony of a competency evaluator. Such a rule eviscerates the protections of the exclusionary rule for defendants who wish to raise a not guilty by reason of insanity ("NGRI") defense. Going forward, the government will have every incentive to have at least one competency evaluator review any unlawfully obtained statements because doing so ensures that such statements can then be wielded to rebut (or simply fend off) any mental status defense.

¶90 By ignoring the *James* court's "carefully weighed" limitations on the impeachment exception, the majority's ruling enables the precise harm that those limitations were designed to prevent: dissuading defendants from presenting their best defense or from presenting any defense at all. In the majority's own words, this is exactly what happened in this case: "Liggett elected not to present any evidence in his defense. ... [B]ecause the trial court's earlier suppression order would permit the People to call Dr. Wortzel in rebuttal if Liggett presented evidence that he was insane, the defense opted not to call any of these witnesses." Maj. op. ¶ 15; *see also People v. Liggett*, 2021 COA 51, ¶ 8, 492 P.3d 356, 359–60 ("In the end, Liggett did not present any expert evidence concerning his sanity or mental condition."). This expansion of the impeachment exception permitted "the State to brandish [illegally obtained] evidence as a sword with which to dissuade [the] defendant[ ] from presenting a meaningful defense through other witnesses," which *James* held to be unacceptable. 493 U.S. at 317, 110 S.Ct. 648. The Supreme Court surely never intended the impeachment exception to be used to force a defendant to choose between presenting a valid mental status defense and the protections of the Fifth Amendment.

### D. The Trial Court's Ruling Here Was Not Harmless

¶91 Liggett was prejudiced by his inability to present his own evidence in support of his mental status defense due to the threat that his unwarned, inculpatory statements to police ***134** would be admitted "to rebut any evidence presented that [Liggett] was insane at the time of the alleged offense." Maj. op. ¶ 9 (alteration in original). Liggett's mental status at the time of the offense went to the essence of his defense; thus, without the ability to present evidence in support of his mental status defense, he essentially had no defense. *See* Maj. op. ¶ 15 ("After the People rested, Liggett elected not to present any evidence in his defense."). This is precisely the harm the Supreme Court sought to prevent through its holding in *James,* which the court disregarded here. *See* 493 U.S. at 314–15, 110 S.Ct. 648 ("[E]xpanding the impeachment exception ... would chill some defendants from presenting their best defense and sometimes any defense

  

at all."). Though the cursory offer of proof from Liggett's defense counsel did not describe in any detail the content of the testimony Liggett intended to present through various witnesses, *see* Maj. op. ¶ 15 n.2, I cannot conclude from that lack of information that there is no reasonable probability that Liggett was prejudiced by his inability to put on any defense whatsoever, or that nothing in the defense witnesses' testimony could have affected the jury's verdict. Accordingly, the error was not harmless.

**III. Conclusion**

¶92 Because the majority's decision expanding the scope of the impeachment exception to the exclusionary rule is contrary to binding Supreme Court precedent and undermines the protections of the Fifth and Sixth Amendments, I respectfully dissent.

¶93 I am authorized to state that JUSTICE HART joins in this dissent.

**All Citations**

529 P.3d 113, 2023 CO 22

## Footnotes

1 The language of one subpoena differed slightly, requesting "[a]ll records of observation, assessment, and treatment of [Liggett] for mental condition" across specified dates.

2 Liggett's counsel made a brief offer of proof as to who those witnesses were, stating: "I believe the majority of [the witnesses] were doctors—or all of them were doctors that we intended to call. Doctors and police officers." The People argue that this offer was insufficient and that any error in the trial court's ruling was necessarily harmless. *See People v. Bell,* 809 P.2d 1026, 1029 (Colo. App. 1990) ("Before an exclusion reaches [constitutional] proportions, the accused must make a plausible showing of how the evidence would have been both material and favorable to his defense. In addition, even exclusions of constitutional magnitude are not reversible error if they are harmless beyond a reasonable doubt." (citation omitted)). Because we ultimately determine that the trial court did not err, we do not address whether the defense's cursory offer of proof was sufficient or whether any error was harmless.

3 We granted certiorari to review the following issues:

1. Whether the court of appeals erred in expanding the waiver of confidentiality or privilege in section 16-8-103.6(2)(a), C.R.S. (2021), beyond what is specifically provided for by the plain language of the statute.

2. Whether the court of appeals erred in ruling that the defendant's voluntary statement to law enforcement obtained in violation of *Miranda v. Arizona* was admissible if he presented any evidence that "he was insane at the time of the alleged offense."

4 The court of appeals division reviewed for an abuse of discretion, citing *Dunlap,* 173 P.3d at 1097. *Liggett II*, ¶ 16, 492 P.3d at 360. But as Liggett notes, the *Dunlap* court applied the abuse of discretion standard to an evidentiary question concerning CRE 701, not the defendant's Fifth Amendment claim. *See Dunlap,* 173 P.3d at 1095–97.

5 Liggett's counsel acknowledged at oral arguments that, even under his interpretation of the statute, a *testifying* physician or psychologist likely could reveal the observations of their staff if (1) those observations were in the physician's or psychologist's records and (2) the physician or psychologist relied upon the observations

  

when forming an expert opinion. For the reasons discussed below, the statute is nonetheless broader than Liggett's interpretation.

1 Because I would reverse on this issue, I express no opinion on the issue of whether waiver of privilege as to "communications made by the defendant to a physician or psychologist" under section 16-8-103.6, C.R.S. (2022), includes communications made to a physician's or a psychologist's agents.

2 Though the Fourth and Fifth Amendments serve different purposes, *see People v. Trujillo*, 49 P.3d 316, 328 (Colo. 2002) (Coats, J., concurring in the judgment), the Supreme Court has applied the exclusionary rule to enforce both rights. *See, e.g., Michigan v. Tucker*, 417 U.S. 433, 446–47, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) (stating that the exclusionary rule "would seem applicable to the Fifth Amendment context as well" as the "search-and-seizure context"); *Harris*, 401 U.S. at 225, 91 S.Ct. 643 (applying the exclusionary rule to deter *Miranda* violations). The Court also uses similar tests—balancing the deterrent effect of the rule and the promotion of the truthseeking function of criminal trials—to determine the limits of the rule in both contexts. *Compare James*, 493 U.S. at 319–20, 110 S.Ct. 648 ("careful[ly] weighing ... competing values" of "the deterrent effect of the exclusionary rule" and "[t]he cost to the truth-seeking process of evidentiary exclusion" in the Fourth Amendment context), *with Tucker*, 417 U.S. at 450–51, 94 S.Ct. 2357 ("balancing the interests involved" by "weigh[ing] the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence" with "the need to provide an effective sanction to a constitutional right" in a Fifth Amendment context).

3 This court applied *Harris* in *People v. Cole*, 195 Colo. 483, 584 P.2d 71, 76 (Colo. 1978), holding:

> [*Harris*] and its progeny reflect a determination that no defendant is entitled to pervert his right to testify into a right to commit perjury. Evidence, inadmissible against the defendant in the prosecution's case in chief, is, therefore, permitted to be used *for the limited purpose of impeaching the defendant's credibility should he take the stand and testify in a manner inconsistent with his prior statements.*

(Emphasis added.)

4 *Dunlap* also cited three pre-*James* decisions from federal circuit courts—none of which addressed prosecutors' use of statements taken in violation of *Miranda. See Dunlap*, 173 P.3d at 1096 (citing *Isley v. Dugger*, 877 F.2d 47, 49–50 (11th Cir. 1989); *Schneider v. Lynaugh*, 835 F.2d 570, 575–77 (5th Cir. 1988); and *Watters v. Hubbard*, 725 F.2d 381, 383–86 (6th Cir. 1984)).

5 The cases cited in *Branch* for this proposition plainly do not support the quoted phrase. Instead, they squarely comport with the narrow contours of the impeachment exception. *Branch*, 805 P.2d at 1083 (citing *Michigan v. Harvey,* 494 U.S. 344, 349, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990); *Oregon v. Hass*, 420 U.S. 714, 720–24, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); and *Harris*, 401 U.S. at 224–26, 91 S.Ct. 643).

6 Liggett made numerous statements that revealed his intent to rely on a not guilty by reason of insanity ("NGRI") defense even before he was interviewed by police. In fact, immediately following his arrest, Liggett told the arresting officers, "I am insane. I don't know right from wrong."

# APPENDIX B

*People v. Ligget*, Arapahoe County, Colorado Dist. Ct. No. 12-2253
(Order issued Oct. 14, 2014)

| | |
|---|---|
| DISTRICT COURT, ARAPAHOE COUNTY, COLORADO<br>7325 South Potomac Street<br>Centennial, Colorado 80112<br>(303) 649-6355<br><br>Plaintiff: **THE PEOPLE OF THE STATE OF COLORADO**<br><br>v.<br><br>Defendant: **ARI LIGGETT** | **▲COURT USE ONLY▲** |
| | Case Number: **12CR2253**<br><br>Division: 206 |

**ORDER RE: DEFENDANT'S MOTION TO PRECLUDE DR. WORTZEL'S SANITY OPINION PURSUANT TO *JAMES V. ILLINOIS* AND *PEOPLE V. DRACON***
**[DEF-50]**

THIS MATTER comes before the Court on the Defendant's Motion to Preclude Dr. Wortzel's Sanity Opinion Pursuant to *James v. Illinois* and *People v. Dracon*. The Court, having reviewed the Defendant's Motion, the People's Response to DEF-50 Motion to Preclude Dr. Wortzel's Sanity Opinion Pursuant to *James v. Illinois* and *People v. Dracon*, relevant case law, the relevant record and being fully advised in the premises, Orders as follows:

1. At the time the Defendant was arrested in this matter on October 17, 2012, he provided statements to law enforcement. The Court ultimately ruled that statements he made to law enforcement post-*Miranda* were suppressed as a result of a *Miranda* violation (conceded by the People) and were also involuntary.

2. The People filed a Notice of Interlocutory Appeal with the Colorado Supreme Court on March 25, 2014, pursuant to Colorado Appellate Rules, Rule 4.1, challenging the trial court's ruling that the Defendant's post-*Miranda* statements were involuntary.

3. On September 22, 2014, the Colorado Supreme Court issued an opinion in *People v. Liggett*, 2014 WL 4694461___P.3d ___(2014). The Colorado Supreme Court held that:

"when considering the totality of the circumstances, the investigators never overbore Liggett's will, and thus his statements were voluntary. Accordingly, we reverse the trial court's suppression order and remand the matter to the trial court for proceedings consistent with this opinion." *People v. Liggett,* No. 14SA88, 2014 WL 4694461, at *1 (Colo. 2014).

4. In summary, the Defendant now argues that the reversal of the finding of involuntariness affects the state's evidence in only one manner, namely, if the Defendant elects to testify, the People may now use his post-*Miranda* statements to impeach him. *People v. Dracon*, 884 P.2d 712 (Colo. 1994). Defendant asserts that the reversal of the trial court's finding of involuntariness does not change the ruling that Dr. Wortzel cannot testify to his opinion as to sanity at trial.

5. The People, in their response, assert that in light of the reversal of the trial court's finding of involuntariness, the People can now use his post-*Miranda* statements not only to impeach the Defendant himself if he elects to testify, but also to impeach any evidence the Defendant might introduce to establish he was insane at the time of the alleged offense.

6. This Court has reviewed the entire transcript of March 12, 2014, in which Chief Judge Sylvester issued ruling on Defendant's post-*Miranda* statements. This Court finds that, after analysis of all the factors contained in *People v. Jennings,* 808 P.2d 839 (Colo. 1991), he ruled that the statements were involuntary. As a result, he suppressed the post-*Miranda* statements at trial. In addition, in light of the fact that the first sanity evaluator, Dr. Wortzel, relied upon Defendant's post-*Miranda* statements in formulating his sanity opinion, a new sanity evaluation was ordered. Chief Judge Sylvester appointed a completely new evaluator and ordered that this new evaluator could not utilize Dr. Wortzel's report or the Defendant's post-*Miranda* statements. While Defendant argued in Defendant's Motion 51 that this ruling was as a result of a finding of outrageous governmental misconduct, this Court does not find the transcript as a whole supportive of this argument, as noted in this Court's Order regarding Defendant's Motion 51. This Court's finding is also consistent with the recitation of Chief Judge Sylvester's ruling in the Colorado Supreme Court Opinion:

> "The trial court, however, suppressed the statements Liggett made after Investigator Clark denied his right to an attorney because of the Miranda violation and because it found those statements to be involuntary. Further, because Dr. Wortzel watched the video of the interview as part of his evaluation, the trial court ordered a new sanity evaluation and precluded Dr. Wortzel from testifying at trial. The People then filed this interlocutory appeal." *People v. Liggett,* No. 14SA88, 2014 WL 4694461, at *5 (Colo. 2014).

7. The crux of the inquiry here is how the People may use the Defendant's post-*Miranda* statements in light of the Colorado Supreme Court's finding that these statements were in fact voluntary.

8. Neither side disputes that the People may use the Defendant's post-*Miranda* statements for impeachment purposes in the event the Defendant elects to testify on his own behalf at trial. *People v. Branch*, 805 P.2d 1075 (Colo. 1991); *Lanari v. People*, 827 P.2d 495 (Colo. 1992).

9. Pursuant to Colorado Appellate Rules, Rule 4.1(a) and C.R.S. §16-12-102(2), the People may file an interlocutory appeal after the trial court grants a motion to suppress evidence if the prosecution "certifies to the judge who granted such motion and to the Supreme Court that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant."

10. The People, in their opening brief to the Colorado Supreme Court, asserted the video of the Defendant's interview on October 17, 2012 and Dr. Wortzel's report are a substantial part of their case because they may seek to introduce them as rebuttal or impeachment evidence.

11. An order suppressing a statement which the prosecution sought to use only for impeachment purposes if defendant elected to testify is *not* subject to interlocutory appeal because it was not a substantial part of the prosecution's proof. *People v. Garner*, 736 P.2d 413 (Colo. 1987). The Court finds it is likely the Colorado Supreme Court accepted and ruled upon the People's interlocutory appeal because the People asserted the Defendant's post-*Miranda* statements were crucial not only to impeach the Defendant should he testify, but also to rebut any claim he may assert that he was insane at the time of the alleged offense.

12. The People rely upon two primary cases for the proposition that voluntary statements obtained in violation of *Miranda* are admissible when a defendant places his mental condition at issue by introducing evidence of insanity and when those statements form part of the opinion of a sanity evaluator. Those two cases are *People v. Branch*, 805 P.2d 1075 (Colo. 1991) and *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007).

13. *Branch* is factually distinct from this case. In *Branch*, the defendant was charged with murder in the first degree. Prior to trial, the defendant, without counsel present, asked to speak to the judge in chambers. The judge did speak with the defendant in chambers and the defendant told the judge he was concerned about his mental and emotional state and needed some help. The judge then appointed a forensic psychiatrist to conduct a competency evaluation. The defendant was never advised in advance of the competency examination of his privilege against self-incrimination during the examination, never advised the prosecution would receive a copy of the competency report and never advised about his right to confer with counsel. The evaluation was conducted and the defendant made several statements to the forensic psychiatrist during the examination.

14. At the time of trial, the defendant elected to testify on his own behalf. On cross-examination, the prosecutor made repeated references to statements made by the defendant to the forensic psychiatrist during the competency examination for the purpose of impeaching the defendant on several aspects of his testimony on direct examination. The defendant was ultimately convicted at trial and appealed his conviction.

15. The Court of Appeals concluded the defendant's statements to the forensic psychiatrist were both involuntary and obtained in violation of his privilege against self-incrimination and his right to counsel and were improperly used to impeach him at trial. The Colorado Supreme Court reversed the Court of Appeals, finding they erred in holding that solely because the trial court did not employ adequate procedural safeguards, the defendant's statements to the psychiatrist were involuntary and hence inadmissible for any purpose at trial. The case was then remanded back to the trial court for further findings to determine if the defendant's statements to the psychiatrist were the product of coercive governmental action. If the trial court deemed the statements involuntary due to coercive governmental action, the defendant would be entitled to a new trial. However, if the trial court determined that the statements, although obtained without procedural safeguards designed to ensure protection of the defendant's fifth and sixth amendment rights, were voluntary, then the trial court should reinstate the judgment of conviction.

16. This holding suggests that even though statements made to a forensic psychiatrist might have occurred without procedural safeguards, as long as they are voluntary, they can be used at trial to rebut a mental capacity defense. The Colorado Supreme Court stated:

> "These same procedural deficiencies will not prohibit the prosecution from utilizing such statements, so long as they are otherwise voluntary, either to rebut the defendant's evidence of lack of capacity to form the requisite culpable mental state or to impeach the defendant's testimony offered in defense of the charges. *Branch*, 805 P.2d at 1083.
>
> "As we discuss in the text, however, when a defendant elects to present "mental capacity" evidence or to testify in his own defense at the guilt phase of the trial, then the holdings of *Buchanan*, *Harvey*, *Hass* and *Harris* militate in favor of permitting the prosecution to use the defendant's uncounseled but otherwise constitutionally voluntary statements as rebuttal or impeachment evidence." *Branch*, 805 P.2d at 1083 fn4.
>
> "We emphasize here that we deal in this case only with the prosecutorial use during the guilt phase of a criminal trial of the defendant's statements to a court-appointed psychiatrist during a court-ordered competency examination. Nothing in our opinion is intended to affect the admissibility of such statements at a trial on the issue raised by a plea of insanity or at a trial on the issue of the defendant's competency to

proceed." *Branch*, 805 P.2d at 1080 fn2.

17. It should be noted that in this specific case, Defendant has been represented by counsel, elected to enter a plea of Not Guilty by Reason of Insanity and was fully advised of all of the consequences associated with such plea before the sanity examination was conducted. The procedural safeguard which did not take place here was the violation of the Defendant's fifth and sixth amendment rights at the commencement of his interview with police. This is precisely the point Defendant argues to distinguish his case from *Branch*. In *Branch*, the statements that were permitted to be used to rebut a mental capacity defense (as long as deemed voluntary) were made *directly* to the forensic psychiatrist rather than to law enforcement and then subsequently used by the forensic psychiatrist?. Defendant makes the argument that for this reason, the holding in *Branch* is inapplicable.

18. Defendant relies upon *James v. Illinois*, 493 U.S. 307 (1990) to support his position that the People can only use his post-Miranda statements to impeach him if he elects to testify and for no other purpose.

19. *James* is a case factually distinct from this case as well. In *James*, the defendant was on trial for murder and attempted murder. The day after the shooting took place, the defendant was arrested and questioned by police and he admitted that he had altered the appearance of his hair in order to change his appearance. Prior to trial, the trial court granted his motion to suppress this statement about his appearance as the fruit of an unlawful arrest. At trial, the defendant did not testify. However, the defense did call a witness who testified about how the defendant's hair looked on the day of the shooting. The trial court permitted the prosecution to impeach this witness' testimony with the defendant's illegally obtained statement about changing the look of his hair.

20. In *James*, the United States Supreme Court found that expanding the impeachment exception beyond impeachment of the defendant himself would create different incentives affecting the behavior of both defendants and law enforcement. The United States Supreme Court further found that an expansion of the exclusionary rule beyond this narrow exception would not promote the truth-seeking function to the same extent as did creation of the original exception, and it would significantly undermine the deterrent effect of the general exclusionary rule. Clear in *James* is that it is not permissible to expand the impeachment exception to encompass the testimony of all defense witnesses.

21. *James* is not an insanity case or a case in which mental capacity was at issue, rather, identification was the central issue. *James* addresses a situation in which the defendant's illegally obtained statement was used to impeach a third party, non-expert witness, who provided testimony inconsistent with a statement defendant had made that was obtained in violation of his fifth amendment rights. One basis utilized by the United States Supreme Court in not permitting this type of expansion of the exclusionary rule is to deter police misconduct by enhancing the expected value to the prosecution of illegally obtained evidence. The *James* court held to permit this type of impeachment expansion would vastly increase the number of occasions in which such evidence would be used and

also, due to the chilling effect, would deter defendants from calling witnesses in the first place, thereby keeping exculpatory evidence from the jury. When police officers confront opportunities to obtain illegal evidence after they have legally obtained sufficient evidence to sustain a prima facie case, excluding such evidence from only the prosecution's case in chief would leave officers with little to lose and much to gain by overstepping the constitutional limits on evidence gathering.

22. Defendant's counsel made a very articulate argument as to why *James* should control in this case. In part, the argument was that permitting a mental health evaluator who examines the defendant and gets the benefit of using evidence illegally obtained by the police as part of that examination would not in any manner deter police from obtaining these statements in an illegal manner. In other words, the police could have free reign to go ahead and violate a defendant's rights knowing that it does not matter, a mental health examiner will get to use it in the future and therefore, this information will come before the jury in all events. In addition, in the case in which a defendant purports to have mental health issues, the police can take further advantage of that "status" in making efforts to obtain evidence illegally knowing it may be used in a subsequent competency or insanity evaluation.

23. In *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007), the defendant was sent to the Colorado Mental Health Unit at Pueblo (CMHIP) as part of a competency examination. The People introduced evidence of the Defendant's evaluation at CMHIP, including statements the Defendant being made while under evaluation. On appeal, the defendant asserted that these statements were obtained in violation of his rights to remain silent and right to counsel. The *Dunlap* court affirmed the more general principle that, where the defendant places his mental health at issue, the People may rebut defense psychiatric evidence even if that evidence includes the defendant's statements not taken in compliance with *Miranda*:

> "We have likewise recognized that when a defendant places his mental capacity at issue, the prosecution may rebut the defense with psychological evidence, even if that evidence includes defendant's statements not taken in compliance with *Miranda*." *Dunlap*, 173 P.3d at 1096.

24. In *People v. Trujillo*, 49 P.3d 316 (Colo. 2002), the Supreme Court of Colorado held that a defendant's voluntary statements taken in violation of *Miranda* may only be used by the prosecution to impeach the testimony of any other defense witness or to generally rebut a defense theory. However, an exception to this rule occurs when the defendant has raised a mental health defense. The *Dunlap* court did comment on the *Trujillo* case in FN50 of the opinion.

25. Defendant's counsel makes another articulate argument to distinguish *Branch* and *Dunlap* in that the statements in those cases were made directly to an evaluator who personally testified about the defendant's statements, rather than to a law enforcement officer who in turn, through the prosecution, provided the statements to the evaluator.

26. The Court finds that the opinion issued from the Colorado Supreme Court in this case, *People v. Liggett*, 2014 WL 4694461, ___P.3d___, (2014), provides some guidance as well. If the Colorado Supreme Court had viewed the Defendant's statements as relevant only to impeachment if the Defendant elected to testify, the Colorado Supreme Court would have denied the interlocutory appeal pursuant to *People v. Garner*, 736 P.2d 413 (Colo. 1987). The Colorado Supreme Court was clearly cognizant of the facts of this case by virtue of the briefs presented by both sides. They were clearly aware the People requested a review of Chief Judge Sylvester's finding of involuntariness for the purpose of not only impeachment of the Defendant, but because Dr. Wortzel used the statements at issue as part of his ultimate opinion on the issue of sanity.

27. The Court's review of all of the cases cited by both sides leads this Court to conclude the People may use the Defendant's voluntary post-*Miranda* statements to impeach the Defendant if he elects to testify in his own defense and to rebut any evidence presented that the Defendant was insane at the time of the alleged offense. These are the only two areas in which this evidence may be used. The People cannot call Dr. Wortzel in their case-in-chief, but rather must wait until the Defendant has put his mental health at issue, i.e. presents evidence that he was insane at the time of the alleged offense. At that time, the People may then call Dr. Wortzel in rebuttal to opine on the Defendant's sanity, noting that Dr. Wortzel's opinion is based in part upon the Defendant's post-*Miranda* statements to law enforcement which have now been ruled voluntary by the Colorado Supreme Court.

WHEREFORE, the Defendant's Motion to Preclude Dr. Wortzel's Sanity Opinion Pursuant to *James v. Illinois* and *People v. Dracon* is **DENIED**.

SO ORDERED THIS 14TH DAY OF OCTOBER, 2014.

**BY THE COURT:**

Michelle A. Amico
District Court Judge

# APPENDIX C

*People v. Ligget*, 2021 COA 51, 492 P.3d 356 (Colo. App. 2021)

(*Liggett III*)

492 P.3d 356
Colorado Court of Appeals, Division VI.

The PEOPLE of the State of Colorado, Plaintiff-Appellee,
v.
Ari Misha LIGGETT, Defendant-Appellant.

Court of Appeals No. 14CA2506

Announced April 22, 2021

**Synopsis**

**Background:** Following reversal of the grant of defendant's motion to suppress statements made during custodial interrogation, 334 P.3d 231, defendant was convicted in the District Court, Arapahoe County, Michelle A. Amico, J., of first-degree murder and was sentenced to life in prison without parole. Defendant appealed. The Court of Appeals, 2018 WL 3384668, denied defendant's request to stay the appellate proceedings indefinitely but granted request for limited remand for competence restoration proceedings while the appeal proceeded.

**Holdings:** The Court of Appeals, Casebolt, J., sitting by assignment, held that:

psychiatric nurses and licensed professional counselors, although not specifically designated in the waiver statute, were encompassed by the statutory waiver of confidentiality for a physician or psychologist;

trial court's ruling in denying defendant's motion to quash subpoenas duces tecum for his medical records from psychiatric nurse and licensed professional counselor did not violate separation of powers doctrine;

prosecution could use doctor's testimony and sanity opinion, which were partially based on defendant's unwarned but voluntary statements to law enforcement after arrest, to rebut psychiatric evidence that defendant presented to demonstrate his insanity at the time of the killing; and

statute requiring a defendant intending to offer expert opinion evidence concerning his mental condition to submit to a court-ordered evaluation did not violate Fifth Amendment privilege against self-incrimination or right to remain silent on its face or as applied to defendant.

Affirmed.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion.

***358** Arapahoe County District Court No. 12CR2253, Honorable Michelle A. Amico, Judge

**Attorneys and Law Firms**

Philip J. Weiser, Attorney General, Matthew S. Holman, First Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Eric A. Samler, Alternate Defense Counsel, Hollis A. Whitson, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

**Opinion**

Opinion by JUDGE CASEBOLT [*]

***359** ¶ 1 Raising a matter involving a unique interpretation and application of section 16-8-103.6(2)(a), C.R.S. 2020 — a provision waiving confidentiality of certain statements and records of a criminal defendant when he or she pleads not guilty by reason of insanity (NGRI) — defendant, Ari Misha Liggett, appeals the judgment of conviction entered upon a jury verdict finding him guilty of first degree murder after deliberation and a crime of violence. In affirming the judgment, we hold that a psychiatric nurse and a licensed professional counselor, although not specifically designated in the waiver statute, are encompassed by the statutory waiver of confidentiality for a physician or psychologist.

## I. Background

¶ 2 After Liggett and his mother were reported missing by family members, law enforcement officers conducted a search of his mother's house, where Liggett lived, and found evidence of human remains. Shortly thereafter, the officers encountered Liggett erratically driving his mother's car in the neighborhood. Liggett evaded the officers in a vehicle chase, which ultimately led to Liggett crashing the vehicle and being apprehended. A search of the vehicle revealed several large

  

containers filled with liquid and the mother's dismembered body.

¶ 3 Liggett was immediately arrested and taken to the sheriff's office, where he consented to an interview. After the interview began, Liggett was read his *Miranda* rights. He then asked if a public defender could be called to the station, to which the investigator replied, "no." Liggett continued to answer questions from the investigators until he was handcuffed and taken to jail.

¶ 4 Before trial, Liggett moved to suppress the statements he had made to the investigators during the interview. The prosecution conceded that a *Miranda* violation had occurred. The trial court ruled that (1) the statements were inadmissible in the prosecution's case-in-chief because of the *Miranda* violation; and (2) the statements were also involuntary. As to the latter conclusion, the prosecution filed an interlocutory appeal, and the supreme court reversed, holding that Liggett's statements were voluntary. *See People v. Liggett*, 2014 CO 72, ¶ 1, 334 P.3d 231.

¶ 5 After the interlocutory appeal was decided and the case was remanded, Liggett pleaded NGRI under section 16-8-103, C.R.S. 2020, and the court ordered a sanity evaluation. Liggett also notified the trial court that he intended to introduce expert opinion testimony concerning his mental state at the time of the killing. The trial court advised him of the statutory consequences of this notice and his NGRI plea.

¶ 6 Liggett simultaneously filed a motion to declare section 16-8-107(3)(b), C.R.S. 2020, unconstitutional. Section 16-8-107(3)(b) requires a defendant who wishes to introduce expert opinion evidence regarding his mental condition first to notify the court and then to undergo a court-ordered sanity evaluation. The trial court denied Liggett's motion.

¶ 7 Dr. Hal Wortzel of the Colorado Mental Health Institute at Pueblo conducted Liggett's sanity evaluation, which included a review of Liggett's interview with law enforcement. Dr. Wortzel concluded that Liggett was legally sane at the time of the killing. Because Dr. Wortzel had relied on Liggett's suppressed but voluntary statements to law enforcement, the trial court subsequently ordered a second sanity evaluation by a different doctor, who reached the same conclusion, without knowledge or consideration of the suppressed statements.

¶ 8 Liggett then moved to preclude the use of Dr. Wortzel's testimony and evaluation during trial. The trial court ruled that the prosecution could not use Dr. Wortzel's testimony or evaluation in its case-in-chief but could use them to rebut evidence of Liggett's insanity during the killing, should he choose to present such evidence. In the end, Liggett ***360** did not present any expert evidence concerning his sanity or mental condition, nor did he or Dr. Wortzel testify at trial.

¶ 9 Before trial, the prosecution served subpoenas duces tecum on several agencies, requesting "all records of [Liggett's] psychiatric or psychological treatment or evaluation." Liggett moved to quash the subpoenas. Finding the subpoenas overly broad, the trial court granted the motion. However, the court permitted the prosecution to reissue the subpoenas, provided that the new subpoenas "strictly adhere[d] to the statutory language in [section] 16-8-103.6" by requesting only communications made by Liggett "to a physician or psychologist."

¶ 10 After the prosecution reissued the subpoenas, Liggett renewed his motion to quash. At a hearing on the motion, the trial court revised its prior decision, citing the broad waiver of privilege established in *Gray v. District Court*, 884 P.2d 286 (Colo. 1994), and subsequently followed in *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003). The trial court permitted the disclosure of statements by Liggett "concerning his mental condition to medical professionals, including but not limited to physicians, psychologists, nurses, social workers and therapists, all records of medications prescribed and treatment provided for mental conditions, and all records of behavioral observation."

¶ 11 A jury convicted Liggett as charged. Before sentencing, Liggett asserted that he was not competent to proceed, but he withdrew the motion at the sentencing hearing. The trial court then sentenced Liggett to life in prison without parole.

¶ 12 Liggett timely filed a notice of appeal. His appellate counsel then requested a limited remand to determine Liggett's mental competence. After a motions division of this court granted Liggett's request for a limited remand, the trial court entered an order finding Liggett incompetent to proceed and incompetent to make a knowing, voluntary, and intelligent waiver of his rights to counsel and to appeal.

¶ 13 In *People v. Liggett*, 2018 COA 94M, —— P.3d ——, 2018 WL 3384668, another division of this court held that the appeal should not be stayed indefinitely even though the trial court had found Liggett to be legally incompetent after the notice of appeal had been filed. The division also held that

  

it had authority to bifurcate the direct appeal and to grant a limited remand for competence restoration proceedings while the appeal proceeded. *Id.* at ¶¶ 3-4.

¶ 14 In this now-ripe direct appeal, Liggett challenges the trial court's denials of (1) his motion to quash the prosecution's subpoenas duces tecum; (2) his motion to preclude Dr. Wortzel's testimony and sanity evaluation; and (3) his motion to declare section 16-8-107(3)(b) unconstitutional. We address and reject each of Liggett's contentions in turn.

## II. Motion to Quash the Subpoenas Duces Tecum

¶ 15 Liggett contends that the trial court erred by denying his motion to quash the prosecution's subpoenas duces tecum because the court's ruling unlawfully expanded the waiver of the physician-patient/psychologist-patient privilege under section 16-8-103.6(2)(a). He argues that the court erroneously permitted the disclosure of records from persons other than physicians or psychologists, including nurses, social workers, and therapists. We are not persuaded.

### A. Standard of Review and Preservation

¶ 16 We review a trial court's ruling on a motion to quash for abuse of discretion. *People v. Spykstra*, 234 P.3d 662, 666 (Colo. 2010). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it is based on a misapplication of the law. *People v. Elmarr*, 2015 CO 53, ¶ 20, 351 P.3d 431.

¶ 17 The People contend Liggett did not provide a sufficient appellate record for us to decide this issue because the subpoenaed materials are not part of the record. They argue that Liggett's claim should fail because, without the subpoenaed records, we will be unable to determine if the contents of the records violated section 16-8-103.6(2)(a) and whether Liggett suffered any prejudice as a result.

***361** ¶ 18 Colorado authority is clear that "it is the duty of the party asserting error to present a record demonstrating that error," and, "[i]f the appealing party fails to provide us with such a complete record, we must presume the correctness of the trial court's proceedings." *People v. Ullery*, 984 P.2d 586, 591 (Colo. 1999). Here, however, the prosecution presented testimony at trial from a psychiatric nurse and a licensed professional counselor, both of whom testified to their observations of and statements by Liggett. The appellate record includes transcripts of their testimony, which gives us sufficient information to decide this issue.

### B. Applicable Law

¶ 19 Under section 13-90-107(1)(d), C.R.S. 2020, communications between a patient and certain health care professionals are privileged. The statute states in relevant part as follows:

> A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient.

*Id.*

¶ 20 These privileges prohibit both testimonial disclosures and "pretrial discovery of information within the scope of the privilege." *Zapata v. People*, 2018 CO 82, ¶ 33, 428 P.3d 517 (quoting *Clark v. Dist. Ct.*, 668 P.2d 3, 8 (Colo. 1983)).

¶ 21 But, a defendant who places his or her mental condition at issue by pleading NGRI "waives any claim of confidentiality or privilege as to communications made by [him] to a physician or psychologist in the course of an examination or treatment for the mental condition for the purpose of any trial or hearing on the issue of the mental condition." § 16-8-103.6(2)(a).

¶ 22 The supreme court has interpreted section 16-8-103.6 to mean that a defendant who pleads NGRI "consents to disclosure of pre- or post-offense information concerning the defendant's medical condition." *Gray*, 884 P.2d at 293. The *Gray* court said,

> Based on a plain reading of the statute, section 16-8-103.6 indicates that the

  

> legislature has created a *statutory* waiver to *any* claim of confidentiality or privilege, which includes the attorney-client and physician/psychologist-patient privileges. The defendant waives the protection to communications, including medical records, that pre-date and post-date the criminal offense, made by a defendant to a physician or psychologist in the course of examination or treatment.

*Id.*

¶ 23 In *Gray*, the supreme court reasoned that, in the interest of discerning the truth regarding a defendant's mental state at the time the crime was committed, "both prosecution and defense counsel need full access to reports concerning defendant's medical history as well as a diagnostic assessment by psychiatric witnesses who treated or examined the defendant before or after the crime concerning the mental condition." *Id.* at 296; *see People v. Ullery*, 964 P.2d 539, 541-42 (Colo. App. 1997) ("As the *Gray* court determined, the legislative history of this section demonstrates that the General Assembly intended to allow for full disclosure of medical and mental health records concerning a mental condition that the defendant places in issue in a criminal case."), *aff'd in part and rev'd in part on other grounds*, 984 P.2d 586 (Colo. 1999). And discovery is not limited only to an expert's written reports; rather, the statute explicitly requires disclosure of all communications made by the defendant to a physician or psychologist in the course of treatment or evaluation. *Id.* at 543.

C. Interpretation and Application

¶ 24 We interpret the *Gray* court's broad statement to contemplate a waiver not only of a privilege between a physician or psychologist and the patient, but also as to *any* claim of confidentiality or privilege that relates to the course of an examination or treatment for a mental condition and to medical records concerning such a condition. *See Herrera*, 87 P.3d at 248 ("The [*Gray*] court thus concluded that the statute requires disclosure ***362** of *all information, pre-or post-offense, concerning a defendant's mental condition*.") (emphasis added).

¶ 25 Asserting a plain language construction, Liggett contends that the statute only waives a claim of confidentiality or privilege as to communications made by the defendant "to a physician or psychologist," and not to nurses, professional counselors, family therapists, social workers, or other health care professionals. We disagree.

¶ 26 Absent the broad language in *Gray* and subsequent cases interpreting and applying it, Liggett's claim that the statute means only what it says would hold significant weight. *See Cowen v. People*, 2018 CO 96, ¶ 12, 431 P.3d 215 ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992))).

¶ 27 But we conclude that *Gray* abjured such a strict interpretation for this particular statute. Accordingly, by permitting disclosure of records concerning Liggett's mental condition from medical professionals generally, the trial court correctly applied the broad waiver of privilege contemplated by *Gray* and *Herrera*. To restrict the disclosure to statements made only to Liggett's physicians or psychologists would contradict the holdings in *Gray* and *Herrera*, as well as short-circuit the public policy supporting them. *See Herrera*, 87 P.3d at 249 (noting that full disclosure of medical and mental health records concerning the mental condition that a defendant places in issue is necessarily in the public interest for the ascertainment of the truth (citing *Gray*, 884 P.2d 286)).

¶ 28 In that regard, we note that section 13-90-107, the statute creating privileges, also states specifically in subsection (1)(g) that there is a privilege preventing disclosure of communications between a person and a licensed or unlicensed psychologist, professional counselor, marriage and family therapist, social worker, addiction counselor, and secretary, stenographer, or clerk employed thereby. So if, as here, there is a claim to confidentiality by a person who pleads NGRI, applying the *Gray* and *Herrera* reasoning, there is a waiver of confidentiality as to persons identified in section 13-90-107(1)(g) in addition to those identified in section 16-8-103.6.

¶ 29 If we were to accept Liggett's plain language contention, then we would be forced to conclude that a licensed registered nurse, specifically mentioned in section 13-90-107(1)(d) as being covered by the privilege, would nevertheless not be within a waiver of that privilege in section 16-8-103.6(2)(a) because a nurse is not included within the category of

  

a "physician or psychologist." Such a conclusion would defy common sense. Surely, examining physicians and psychologists would want and need to consider information communicated to nurses and other persons identified in section 13-90-107(1)(g) by the person claiming NGRI, as well as records obtained from counselors and other persons identified in that subsection.

¶ 30 Accordingly, the testimony at trial from a psychiatric nurse and a licensed professional counselor did not run afoul of Liggett's privilege, nor did the documents requested by the subpoenas.

### D. Separation of Powers

¶ 31 To the extent Liggett contends that the trial court's ruling violated the separations of powers doctrine, we disagree.

¶ 32 Article III of the Colorado Constitution prevents one branch of government from exercising powers that the constitution makes the exclusive domain of another branch. *Dee Enters. v. Indus. Claim Appeals Off.*, 89 P.3d 430, 433 (Colo. App. 2003). The separation of powers doctrine "does not require a complete division of authority among the three branches, however, and the powers exercised by different branches of government necessarily overlap." *Id.*

¶ 33 Liggett asserts that the General Assembly specifically limited the waiver of privilege in section 16-8-103.6(2)(a) to psychiatrists and psychologists, and the trial court improperly expanded the waiver beyond that which the legislature chose. But separation of powers questions generally concern conflicts between statutes and court rules, and Liggett ***363** has not identified such a conflict. The trial court's ruling does not constitute a "court rule." Liggett's claim involves the alleged impropriety of the trial court's ruling based on its interpretation and application of section 16-8-103.6(2)(a). But interpretation and application of a statute is a matter that is "peculiarly the province of the judiciary." *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371, 1378 (1985) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)).

¶ 34 We thus conclude that the trial court did not abuse its discretion by denying Liggett's motion to quash the subpoenas duces tecum.

## III. Admissibility of Liggett's Voluntary Statements to Law Enforcement

¶ 35 Liggett next contends that the trial court erred by ruling that the prosecution could use his voluntary but unwarned statements — through Dr. Wortzel's testimony and sanity opinion — to rebut any evidence he might present that he was legally insane or suffered from a mental condition at the time of the killing. He asserts that the ruling chilled his presentation of evidence. We disagree.

### A. Standard of Review

¶ 36 We review a trial court's rulings on evidentiary issues for an abuse of discretion. *Dunlap v. People*, 173 P.3d 1054, 1097 (Colo. 2007). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it is based on a misapplication of the law. *Elmarr*, ¶ 20.

### B. Applicable Law

¶ 37 When a defendant pleads NGRI, he places his mental capacity at issue, § 16-8-103.6, and undergoes a court-ordered mental health evaluation, § 16-8-105.5, C.R.S. 2020. As to the defendant's statements to the evaluator, a failure to adequately advise the defendant under *Miranda* precludes the prosecution from using the statements as substantive evidence in its case-in-chief. *People v. Branch*, 805 P.2d 1075, 1083 (Colo. 1991). But if the defendant subsequently presents evidence of his mental condition, the prosecution may rebut this presentation with evidence from the court-ordered evaluation, including his unwarned statements, so long as they were voluntary. *Dunlap*, 173 P.3d at 1096 (citing *Branch*, 805 P.2d at 1083 & n.4).

### C. Analysis

¶ 38 In the trial court's ruling permitting Dr. Wortzel to testify as a rebuttal witness, the court concluded the following:

> The People may use the Defendant's voluntary post-*Miranda* statements to impeach the Defendant if he elects

  

> to testify in his own defense *and to rebut any evidence presented that the Defendant was insane at the time of the alleged offense*. These are the only two areas in which this evidence may be used. *The People cannot call Dr. Wortzel in their case-in-chief, but rather must wait until the Defendant has put his mental health at issue, i.e. presents evidence that he was insane at the time of the alleged offense*. At that time, the People may then call Dr. Wortzel in rebuttal to opine on the Defendant's sanity, noting that Dr. Wortzel's opinion is based in part upon the Defendant's post-*Miranda* statements to law enforcement which have now been ruled voluntary by the Colorado Supreme Court.

(Emphasis added.)

¶ 39 The trial court's ruling is precisely in line with *Dunlap* and *Branch*. Although Liggett's statements to investigators were made without *Miranda* warnings, the supreme court ruled that they were voluntary. *See Liggett*, 2014 CO 94M, ¶ 1, —— P.3d ——.

¶ 40 Therefore, if Liggett were to have presented evidence of his insanity at trial, the prosecution would have been permitted to use his statements as rebuttal evidence. *Dunlap*, 173 P.3d at 1096 ("[W]hen a defendant places his mental capacity at issue the prosecution may rebut the defense with psychological evidence, even if that evidence includes defendant's statements not taken in compliance with *Miranda*." (citing *Branch*, 805 P.2d at 1083 & n.4)).

¶ 41 Nevertheless, Liggett attempts to distinguish his case from *Dunlap* and *Branch*, relying primarily on ***364** *People v. Trujillo*, 49 P.3d 316 (Colo. 2002). Liggett's reliance on *Trujillo*, however, is misplaced.

¶ 42 Expressly at issue in *Trujillo* was whether the defendant's statements to law enforcement, which were voluntary but not taken in compliance with *Miranda*, could be introduced to challenge the theory of defense or to impeach a defense witness when the defendant does not testify. *Id.* at 317. The supreme court held that unwarned, voluntary custodial statements may be admissible at trial only to impeach the defendant. *Id.* at 321. Based on authority from other jurisdictions, the court also found "two narrow exceptions" to its holding but concluded they were not applicable to Trujillo's case:

> The first occurs when a psychiatric or other expert testifies about her opinion which is based on what the defendant told her, and the defendant's unwarned custodial statements would lead to a different opinion. The second occurs when a defense witness testifies specifically about what the defendant told her, i.e., the defendant's hearsay is admitted, and he may then be impeached as a hearsay declarant with his own unwarned custodial statements.

*Id.* at 325 (citation omitted).

¶ 43 We conclude that neither the holding nor the two exceptions from *Trujillo* apply to Liggett's case. The issue in this case is whether the trial court's ruling would have improperly permitted the use of Liggett's unwarned, voluntary statements *as rebuttal evidence if he were to present evidence of his insanity or mental condition*. *Dunlap* and *Branch* permit such use, but *Trujillo* does not address that particular issue. Rather, *Trujillo* deals strictly with the use of those statements to impeach a defense witness when the defendant does not testify — factual circumstances not present in Liggett's case. *See Dunlap*, 173 P.3d at 1096 n.50 ("We have held that a defendant's voluntary statements taken in violation of *Miranda* may only be used by the prosecution to impeach the testimony of the defendant if he testifies, and not to impeach the testimony of any other defense witness or to generally rebut a defense theory. In *Trujillo*, however, we recognized that an exception to this rule occurs when the defendant has raised a mental health defense. *Trujillo* thus does not alter our conclusion in this case.") (citations omitted).

¶ 44 For these reasons, we conclude that the trial court did not abuse its discretion by ruling that the prosecution could use Dr. Wortzel's testimony and sanity opinion — partially based on Liggett's unwarned but voluntary statements to law enforcement — to rebut any psychiatric evidence Liggett

  

might present to demonstrate his insanity at the time of the killing.

## IV. Constitutionality of Section 16-8-107(3)(b)

¶ 45 Finally, Liggett contends that the trial court erred by denying his motion challenging the constitutionality of section 16-8-107(3)(b) facially and as applied. We disagree.

### A. Standard of Review

¶ 46 Whether a statute is constitutional is a question of law that we review de novo. *People v. Bondurant*, 2012 COA 50, ¶ 11, 296 P.3d 200 (citing *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000)). We presume statutes are constitutional, and the burden is on the party challenging the statute to demonstrate unconstitutionality beyond a reasonable doubt. *Id.* at ¶¶ 11-12; *see Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 30, 467 P.3d 314 (reaffirming this test).

¶ 47 Generally, a statute is facially unconstitutional only "if the complaining party can show that the law is unconstitutional in all its applications." *Id.* at ¶ 14 (quoting *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010)). And a facially constitutional statute may be unconstitutional as applied under the circumstances in which the party has acted or proposes to act. *Id.*

### B. Applicable Law

¶ 48 Section 16-8-107(3)(b) provides that a defendant who intends to offer expert opinion evidence concerning his mental condition — regardless of whether the defendant pleads NGRI — may offer such evidence at ***365** trial only if he notifies the court and the prosecution of this intent and undergoes a court-ordered examination pursuant to section 16-8-106. A defendant giving such notice waives the privilege against self-incrimination as to statements pertaining to his mental condition. *See* § 16-8-103.6; *Bondurant*, ¶¶ 44-46.

### C. Analysis

¶ 49 Liggett argues that section 16-8-107(3)(b) is unconstitutional on its face because it forces a defendant to undergo and cooperate with a court-ordered sanity examination to rebut the prosecution's proof of mens rea. In making this argument, Liggett asserts that the statute forces a defendant to choose between his Fifth Amendment privilege against self-incrimination and concomitant right to remain silent, and his right to present a defense. He maintains that the statute forces a defendant to make involuntary, unprivileged statements about his mental condition during the court-ordered evaluation, which violates his privilege against self-incrimination. And, Liggett continues, if the defendant does not cooperate with the examination, this constitutional privilege is further violated because evidence of his noncooperation may be admissible at trial to rebut any evidence he presents concerning his mental state, and his right to present a defense is violated because he is then prohibited from presenting any expert evidence concerning his mental condition, which thereby lowers the prosecution's burden of proof. *See* § 16-8-106(2)(c), C.R.S. 2020.

¶ 50 Similarly, Liggett contends that section 16-8-107(3)(b) is unconstitutional as applied to him because he "was put in the untenable position of having to submit to an evaluation simply to challenge the prosecution's ability to prove mens rea beyond a reasonable doubt." He goes on to claim that through the court-ordered evaluation he "was compelled to provide otherwise unavailable evidence to the prosecution," which was "then used directly and indirectly to assist the prosecution in building its case."

¶ 51 Several other divisions of this court have addressed and rejected these exact arguments. *See People v. Herdman*, 2012 COA 89, ¶¶ 36-38, 310 P.3d 170 (holding that the admission of expert rebuttal evidence concerning defendant's mental condition, obtained through court-ordered evaluations, did not violate the defendant's privilege against self-incrimination); *Bondurant*, ¶¶ 41-52 (concluding that "a defendant raising his or her mental condition as a defense cannot be compelled to make involuntary statements in the compulsory examination," and, therefore, section 16-8-107 does not violate a defendant's privilege against self-incrimination; nor does section 16-8-107 violate a defendant's right to present a defense by prohibiting him from calling witnesses); *Herrera*, 87 P.3d at 245-48 (finding that "the privilege against self-incrimination is not implicated by a court-ordered mental examination when the information obtained therefrom is admitted only on the issue of mental condition," and use of a defendant's statements during a court-ordered sanity evaluation does not force him to choose between self-incrimination or loss of the right to present a

  

defense); *People v. Roadcap*, 78 P.3d 1108, 1111-13 (Colo. App. 2003) (holding that the admission of expert rebuttal testimony regarding a defendant's mental condition did not prevent the defendant from presenting a defense or force him to choose between asserting a defense and asserting his privilege against self-incrimination).

¶ 52 Liggett has not demonstrated that these holdings are inapplicable to his case or that section 16-8-107(3)(b) has otherwise deprived him of his constitutional rights. Furthermore, we agree with the reasoning and analysis in these cited cases and perceive no reason to depart from this well-established authority.

¶ 53 As he did in his trial court motion, on appeal Liggett makes several additional but cursory constitutional challenges to section 16-8-107(3)(b). In passing, he discusses an equal protection challenge but does so without sufficient development of the argument for us to decide the issue. *See Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 604 (Colo. App. 2007) (appellate courts do not address undeveloped arguments). And, while at trial Liggett challenged section 16-8-107(3)(b) as violative of his right to effective ***366** assistance of counsel, he does not reassert the argument on appeal and has therefore abandoned it. *See People v. Osorio*, 170 P.3d 796, 801 (Colo. App. 2007).

¶ 54 Accordingly, we reject Liggett's contentions that section 16-8-107(3)(b) is unconstitutional on its face or as applied.

## V. Conclusion

¶ 55 We affirm Liggett's judgment of conviction.

JUDGE RICHMAN and JUDGE LIPINSKY concur.

**All Citations**

492 P.3d 356, 2021 COA 51

## Footnotes

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

# APPENDIX D

*People v. Ligget*, 2018 COA 94M, 490 P.3d 405 (Colo. App. 2018)

(*Liggett II*)

490 P.3d 405
Colorado Court of Appeals, Division A.

The PEOPLE of the State of Colorado, Plaintiff–Appellee,
v.
Ari Misha LIGGETT, Defendant–Appellant.
The People of the State of Colorado, Plaintiff–Appellee,
v.
Ari Misha Liggett, Defendant–Appellant.

Court of Appeals No. 14CA2506,
Court of Appeals No. 14CA2511

Announced July 12, 2018

As Modified on Denial of Rehearing August 23, 2018

**Synopsis**

**Background:** Following guilty verdict for first-degree murder, the District Court, Arapahoe County, No. 12CR2253 and 10CR576, Michelle A. Amico, J., sentenced defendant to life in prison without possibility of parole and found that murder conviction constituted a violation of defendant's probation and sentenced him to a three-year concurrent prison sentence. Public defender filed notice of appeal. Appellate counsel filed a motion to stay the proceedings and requested a limited remand to determine whether defendant was competent to proceed and competent to validly waive his rights to appeal and to counsel. The Court of Appeals granted the motion. The District Court found defendant incompetent to proceed and incompetent to make a valid waiver of his rights to counsel and to appeal. Appellate counsel filed motion to stay appellate proceedings indefinitely and for a limited remand to restore defendant to competency.

**Holdings:** The Court of Appeals, Freyre, J., held that:

finding that defendant was incompetent to proceed and to make a valid waiver of his rights to counsel and to appeal did not warrant stay of direct appeal;

restoring defendant's competence was necessary for Court of Appeals to rule on defendant's request to terminate counsel and to dismiss the appeal; and

defendant's confinement in the custody of the Department of Corrections did not preclude proceedings to restore defendant to competency.

Ordered accordingly.

**Procedural Posture(s):** Appellate Review.

***407** Arapahoe County District Court No. 12CR2253, Arapahoe County District Court No. 10CR576, Honorable Michelle A. Amico, Judge

**Attorneys and Law Firms**

Cynthia H. Coffman, Attorney General, Matthew S. Holman, Assistant Attorney General, Denver, Colorado, for Plaintiff–Appellee

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**Opinion**

Order by JUDGE FREYRE

¶ 1 In this direct appeal of two cases—first degree murder after deliberation and revocation of probation (based on the murder conviction)—counsel for the defendant, Ari Misha Liggett, request an indefinite stay of the appellate proceedings due to Liggett's incompetence. For the same reason, counsel ask us to stay ruling on Liggett's request to terminate counsel's representation and to dismiss the appeal. Finally, counsel ask us to remand the cases to the district court for competency restoration proceedings.

¶ 2 Liggett's counsel and the People agree, as do we, that an incompetent defendant cannot waive the right to counsel or a direct appeal. Therefore, we cannot rule on these requests until Liggett is restored to competence during the period in which we have jurisdiction over the appeal, as discussed in Part IV.

¶ 3 The remaining two requests present issues no Colorado appellate court has considered. First, should a defendant's direct criminal appeal be stayed indefinitely when such person is found legally incompetent after the notice of appeal is filed? For the reasons explained below, we answer that question “no.” We hold that a defendant's direct criminal appeal should proceed, despite a finding of incompetence.

  

Therefore, we deny Liggett's counsel's request to indefinitely stay the appellate proceedings.

¶ 4 Second, does this court have the authority to bifurcate the direct appeal and to grant a limited remand for competence restoration proceedings while the appeal proceeds? We answer that question "yes." We hold that section 13-4-102(3), C.R.S. 2017, authorizes this court to "issue any writs, directives, orders, and mandates necessary to the determination of cases within [our] jurisdiction." Because, due to Liggett's incompetence, we are unable to rule on the pending requests to dismiss counsel and to dismiss the appeal, we conclude that a limited remand for restoration proceedings under section 16-8.5-111(2), C.R.S. 2017, is necessary for our future determination of these motions and the dispositions of the direct ***408** appeals. Therefore, we grant in part Liggett's counsel's request for a remand to restore Liggett to legal competence.

## I. Background

¶ 5 A jury convicted Liggett of first degree murder after deliberation on November 10, 2014. The court sentenced him to life in prison without the possibility of parole on November 14, 2014. At the same time, the court found that Liggett's murder conviction constituted a violation of his probation and sentenced him to a three-year concurrent prison sentence for the violation. It awarded him 1095 days of presentence confinement credit on the three-year sentence. [1]

¶ 6 Following the imposition of sentence, trial counsel asked the court to appoint the public defender's office for the purpose of appealing both cases. Liggett did not object. Thus, when Liggett was competent, the public defender filed a timely notice of appeal on December 29, 2014. Both cases were eventually assigned to current counsel acting as alternate defense counsel.

¶ 7 On September 19, 2016, appellate counsel filed a motion to dismiss the appeal in the murder case. By an order, this court denied that motion with leave to renew it upon receiving an affidavit from Liggett averring that he had been advised of his rights concerning the appeals and that he wished to dismiss them.

¶ 8 On October 24, 2016, appellate counsel filed a motion to stay the proceedings in both cases and requested a limited remand to determine whether Liggett was competent to proceed and competent to knowingly, voluntarily, and intelligently waive his rights to appeal and to counsel. Counsel represented that Liggett wished to terminate counsel's representation, and to dismiss the appeals. Counsel asserted a good faith belief that Liggett (1) lacked the capacity to make an informed choice; (2) lacked an understanding of his choices; (3) lacked an understanding of counsel's role in the appellate proceedings; and (4) was overcome by a serious thought disorder. Because of these issues, counsel maintained they could not ethically procure an affidavit from Liggett waiving his rights to appeal and to counsel, absent a competency determination.

¶ 9 By a one-judge order, this court granted the motion for limited remand on December 13, 2016. After receiving two evaluations declaring Liggett incompetent to proceed, the district court entered an order on September 26, 2017, finding Liggett incompetent to proceed and incompetent to make a knowing, voluntary, and intelligent waiver of his rights to counsel and to appeal. Based on the language of the remand order, the district court ruled that it did not have jurisdiction to initiate restoration proceedings.

¶ 10 After the recertification of both cases on appeal, counsel filed a motion to stay the appellate proceedings indefinitely and for a limited remand to restore Liggett to competence. The People objected, arguing, based on out-of-state jurisprudence and on William H. Erickson et al., *Mental Health Standards* 7-5.4 (Am. Bar Ass'n 1984), that the appeal could proceed. Thereafter, we requested supplemental briefing on the novel issues described above.

## II. Waiver of Counsel and Appeal

¶ 11 It is well settled that the right to counsel is a constitutional right and that a defendant may waive that right only if (1) the defendant is competent to waive the right, and (2) the defendant makes the waiver knowingly, voluntarily, and intelligently. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16; *Godinez v. Moran*, 509 U.S. 389, 400-01, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); *People v. Davis*, 2015 CO 36M, ¶ 15, 352 P.3d 950. A defendant is competent to waive this right when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[ ] and ... has a rational as well as factual understanding of the proceedings against him." *Davis*, ¶ 16 (quoting *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) ). Moreover, a defendant must be

  

competent to abandon his appeals. ***409** *Rees v. Peyton*, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966); *see People v. Bergerud*, 223 P.3d 686, 693-94 (Colo. 2010) (noting that decision whether to take an appeal is so fundamental to a defense that it cannot be made by defense counsel, but rather must be made by the defendant himself).

¶ 12 Because Liggett's counsel and the People agree that Liggett is incompetent, and because they agree that an incompetent defendant cannot waive the right to counsel or to a direct appeal, we conclude, consistent with the district court's finding, that Liggett is currently incompetent to waive counsel and to dismiss the appeal. Therefore, we cannot rule on the requests to dismiss counsel and to dismiss the appeal unless and until Liggett is restored to competence during the appellate process.

## III. The Direct Appeal May Proceed Despite the Incompetence Finding

¶ 13 Liggett's counsel contend that the direct appeal should be stayed indefinitely because proceeding while Liggett is incompetent will violate his Sixth Amendment right to counsel and his Fifth and Fourteenth Amendment rights to due process of law. Counsel rely on well-established federal jurisprudence holding that an incompetent defendant may not be prosecuted unless he possesses both a sufficient present ability to consult with counsel and a rational and factual understanding of the nature of the proceedings. *See Dusky*, 362 U.S. at 402, 80 S.Ct. 788; *see also Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Appellate defense counsel further contend that a meaningful attorney-client relationship cannot exist if a defendant is incompetent, so counsel is unable to fulfill the ethical obligations of representation. Finally, counsel contend that proceeding with the appeal to completion will trigger state and federal periods for filing postconviction motions, and, thus, Liggett's incompetence may work a forfeiture of important postconviction rights.

¶ 14 Relying on numerous out-of-state cases that have addressed this issue, the People argue that the direct appeal should proceed because appellate proceedings do not require a defendant's participation in the same way that trial proceedings do. They further argue that any failure of appellate counsel to raise meritorious issues due to incompetence can be remedied through postconviction relief. We find the People's argument persuasive and therefore deny Liggett's motion to indefinitely stay the direct appeals.

### A. Standard of Review and Relevant Law

¶ 15 It is well settled that the conviction of a person who is mentally incompetent violates the basic concepts of due process under the Fourteenth Amendment to the United States Constitution and article II, section 16 of the Colorado Constitution. Moreover, federal and state due process guarantees mandate fair procedures on appeals as of right, including the appointment of counsel for indigent defendants and the effective assistance of counsel. *See Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Douglas v. California*, 372 U.S. 353, 357-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Adargo v. People*, 159 Colo. 321, 324, 411 P.2d 245, 247 (1966); *Petition of Griffin*, 152 Colo. 347, 349-50, 382 P.2d 202, 204 (1963). Colorado provides a statutory direct appeal as of right to all persons convicted of a felony. § 16-12-101, C.R.S. 2017; *see* C.A.R. 4(b)(1), (c); *People v. Wiedemer*, 852 P.2d 424, 438 (Colo. 1993). This right includes the right to counsel and the right to the effective assistance of appellate counsel. *See People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989).

¶ 16 The General Assembly has prescribed the procedures for district courts to follow when a defendant's competence is raised during the trial proceedings. *See* §§ 16-8.5-102 to -116, C.R.S. 2017. However, no such procedures exist for defendants who become incompetent after a notice of appeal is filed. Thus, we examine how other courts faced with this issue have resolved this procedural conundrum, together with Colorado's competency statutes, to the extent they are applicable.

***410** ¶ 17 Whether an incompetent defendant's appeal should be stayed or should proceed is a question of law that we review de novo. *See In re J.C.T.*, 176 P.3d 726, 729 (Colo. 2007). Moreover, we interpret statutes de novo. *Bostelman v. People*, 162 P.3d 686, 689 (Colo. 2007). In construing statutes, we look first to their plain language and give words their common and ordinary meanings. *Id.* at 690. We presume the General Assembly understands the legal import of the words it uses and intends that each word be given meaning. *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 943 (Colo. 2004).

  

B. Analysis

¶ 18 A majority of courts faced with deciding whether an incompetent defendant's appeal should be stayed or should proceed have adopted the procedure set forth in the Mental Health Standards prepared by the American Bar Association (ABA). These courts have held that an incompetent defendant's direct appeal should not be stayed, despite incompetence, as long as the defendant is provided a postconviction remedy to raise issues not raised on appeal due to the defendant's incompetence. *See Buxton v. State*, 352 P.3d 436, 438 (Alaska Ct. App. 2015) (holding that an incompetent defendant's appeal may proceed provided that postconviction relief is later available, at which time he can show that he was prejudiced by the appeal proceeding); *People v. Kelly*, 1 Cal.4th 495, 3 Cal.Rptr.2d 677, 822 P.2d 385 (1992) (same); *Dugar v. Whitley*, 615 So.2d 1334, 1335 (La. 1993) (same); *Fisher v. State*, 845 P.2d 1272, 1276-77 (Okla. Crim. App. 1992) (holding that an incompetent defendant's appeal may proceed if he is later provided a postconviction remedy for raising issues due to incompetence); *Reid v. State*, 197 S.W.3d 694, 705-06 (Tenn. 2006) (holding that in postconviction proceedings, which include direct appeal, legal claims and factual claims not requiring a defendant's input should not be stayed based on incompetence); *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727, 735-36 (1994) (applying procedure from ABA standards to postconviction and direct appeal proceedings). *But see Commonwealth v. Silo*, 469 Pa. 40, 364 A.2d 893, 895 (1976) (holding that it would be improper to permit an incompetent defendant's appeal to proceed if the defendant was unable to assist counsel in its preparation).

¶ 19 These courts reason that a stay would be harmful by causing a defendant to suffer from delayed reversals of meritorious claims, and further, that proceeding with the appellate process advances the state's interest in the expeditious administration of the criminal justice system. *See Buxton*, 352 P.3d at 438; *Reid*, 197 S.W.3d at 705-06. They further reason that the same considerations that prohibit an incompetent person from being tried do not apply once judgment has been entered. For instance, issues on appeal are limited to the appellate record, and attorneys do not need to rely on a defendant's recollection of the trial proceedings to decide which issues are worthy of pursuit. *See Kelly*, 3 Cal.Rptr.2d 677, 822 P.2d at 407-08. In permitting an appeal to proceed, however, these courts agree that due process requires that a defendant be able to raise issues not raised on appeal due to the defendant's incompetence in a later postconviction setting when and if the defendant has been restored to competence. *See Debra A.E.*, 523 N.W.2d at 735 ("Assessing competency during [appellate] proceedings creates a record of a defendant's mental capacity, thus eliminating the difficulty of attempting to measure that capacity months or years after the period in question.").

¶ 20 ABA mental health standard 7-5.4, titled "[m]ental incompetence at time of noncapital appeal," provides as follows:

> (a) A defendant is incompetent at the time of appeal in a noncapital case if the defendant does not have sufficient present ability to consult with [the] defendant's lawyer with a reasonable degree of rational understanding, or if the defendant does not have a rational as well as factual understanding appropriate to the nature of the proceedings.
>
> (b) Mental incompetence of the defendant at the time of appeal from conviction in a criminal case should not prohibit the continuation of such appeal as to matters deemed by counsel or by the court to be appropriate.
>
> ***411** (i) If, following the conviction of the defendant in a criminal case, there should arise a good faith doubt about the mental competence of the defendant during the time of appeal, counsel for the state or the defendant should make such doubt known to the court and include it in the record.
>
> (ii) Counsel for the defendant should proceed to prosecute the appeal on behalf of the defendant despite the defendant's incompetence and should raise on such appeal all issues deemed by counsel to be appropriate.
>
> (c) Mental incompetence of the defendant during the time of appeal shall be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for postconviction relief, any matter not raised on the initial appeal because of the defendant's incompetence.

¶ 21 Comments to the standard explain that it is based on three assumptions. First, criminal defendants' interests are best served by proceeding with the appeal because a timely resolution of the appeal might overturn their convictions or modify their sentences. *Mental Health Standards* 7-5.4 cmt. Second, although criminal defendants must decide whether to appeal a conviction, they otherwise rely on appellate counsel's strategic and tactical decisions about which claims to raise and how those claims should be argued. *Id.* Finally, a defendant's

  

incompetence "rarely affects the fairness or accuracy of appellate decisions" because defendants generally do not actively participate in the appellate proceedings. *Id.* at cmt. intro.

¶ 22 On August 8, 2016, the ABA replaced these standards with new ones. *See Criminal Justice Standards on Mental Health* (Am. Bar Ass'n 2016), https://perma.cc/82UC-QZXH. The new standard applicable here is Standard 7-8.8, titled "[c]ompetence to proceed: appealing from conviction in a noncapital case." It provides as follows:

> (a) Consistent with Standard 7-5.2, the test for determining whether the defendant is competent to make a decision regarding whether to appeal [a] conviction in a noncapital case should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision.
>
> (i) If the defense attorney believes the defendant is competent under this Standard, then the defense attorney should abide by the defendant's decision about whether to appeal.
>
> (ii) If the defense attorney believes the defendant is incompetent under this Standard then the attorney may petition the court to permit a next friend acting on the defendant's behalf to initiate or pursue the appeal.
>
> (b) The decision about which issues to raise on appeal is the defense attorney's. However, incompetence of the defendant during the time of appeal should be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for postconviction relief, any matter not raised on the initial appeal because of the defendant's incompetence.

¶ 23 Further, Standard 7-5.2, titled "[c]ompetence to proceed with specific decisions: control and direction of case," identifies matters solely under the defendant's sphere of control. These matters include the decisions to plead guilty; to assert a defense of non-responsibility; and to waive the rights to a jury trial, to testify, and to appeal. Standard 7-5.2(a).

¶ 24 While Standard 7-8.8 omits specific language directing appellate counsel to prosecute the appeal despite the defendant's incompetence, we construe that standard as assuming the ongoing prosecution of the appeal by (1) specifically identifying matters within a defendant's sphere of control in Standard 7-5.2, which notably excludes appellate issues; (2) specifying that defense counsel decides which issues to raise on appeal; and (3) providing an incompetent defendant with a remedy for challenging issues not ***412** raised due to incompetence in a later appeal or postconviction proceeding. [2]

C. Application

¶ 25 We are persuaded by the reasoning of the ABA standards and the cases applying them and conclude that they set forth a practical procedure that both promotes the effective administration of the judicial system and provides meaningful postconviction relief to defendants when and if competence is restored.

¶ 26 First, there are significant differences between the trial and appellate stages of a criminal proceeding. Criminal proceedings are initiated by the state. The purpose of a trial, from the state's perspective, is to prove beyond a reasonable doubt that a presumptively innocent person is guilty of a crime. Requiring competence at this stage preserves the presumption of innocence by ensuring that a criminal defendant can assist defense counsel in defending the case. Competence also ensures that a defendant is able to make significant constitutional choices that require the advice of counsel, like whether to plead guilty, to testify, or to pursue self-representation. *See McCoy v. Louisiana*, 584 U.S. ——, ——, 138 S.Ct. 1500, 1508, 200 L.Ed.2d 821 (2018) (describing decisions reserved for the defendant as including whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, assert innocence at trial, and forgo an appeal). Such assistance is crucial as the defendant often possesses the only information that may cast doubt on the state's case. Further, a defendant's ability to communicate with and assist defense counsel preserves the defendant's constitutional rights to be present and to confront accusers.

¶ 27 In contrast, appellate proceedings are generally initiated by a defendant who seeks to overturn a finding of guilt. A convicted defendant no longer enjoys the presumption of innocence and the attendant rights of confrontation and to be present at the proceeding. Indeed, a convicted defendant's choices are primarily whether to pursue a direct appeal and whether to be represented by counsel. Moreover, unlike the right to a jury trial, which is guaranteed by the Federal and

  

State Constitutions, there is no corresponding constitutional right to an appeal. *See Ross v. Moffitt*, 417 U.S. 600, 610-11, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). And, because appellate counsel's ability to raise issues is limited to the appellate record, communication with and input from a defendant are not necessary for counsel to effectively brief issues on appeal. *See Kelly*, 3 Cal.Rptr.2d 677, 822 P.2d at 414 (" '[C]onvicted defendants, like parties to appellate litigation in general, do not participate in appeal proceedings.' " (quoting *ABA Criminal Justice Mental Health Standards* 7-5.4(c) cmt. intro. (1989) ) ). Because of these significant differences between a defendant's involvement in the trial and appellate processes, we are not convinced that the cases which preclude the *prosecution* of an incompetent defendant, on which Liggett's counsel rely, necessarily preclude the direct appeal of a defendant's conviction when incompetence arises during the appellate process.

¶ 28 We find support in the existing competency statutes and in particular, section 16-8.5-102(1), C.R.S. 2017, which governs the procedures for raising pretrial incompetency. This provision provides as follows:

> While a defendant is incompetent to proceed, the defendant shall not be tried or sentenced, nor shall the court consider or decide pretrial matters that are not susceptible of fair determination without the personal participation of the defendant. However, a determination that a defendant is incompetent to proceed *shall not preclude the furtherance of the proceedings by the court to consider and decide matters*, including a preliminary hearing and motions, *that are susceptible of fair determination prior to trial and without the personal participation of the defendant.*

*Id.* (emphases added). Thus, the General Assembly has recognized that even before a ***413** conviction is entered, incompetence implicates a defendant's decisions and choices, but does not require the complete cessation of all proceedings. Indeed, those pretrial proceedings in which the personal participation of the defendant is not required and that are susceptible of fair determination without the defendant's participation may proceed.

¶ 29 Similarly, Colorado law holds that appellate counsel—not the defendant—primarily decides, as a matter of strategy, which issues should be raised on appeal. *See Downey v. People*, 25 P.3d 1200, 1206 (Colo. 2001); *People v. Ray*, 2015 COA 92, ¶ 13, 378 P.3d 772; *People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007).

¶ 30 We acknowledge that a defendant's incompetence might prevent counsel from acquiring information or learning of concerns important to the proper disposition of an appeal. Consequently, we hold that Liggett must be permitted to raise in a postconviction motion any matter not raised in the direct appeal due to his incompetence. When and if he is restored to competence, [3] the postconviction limitations set forth in Crim. P. 35(c), including, but not limited to, the time limits of subsection (3)(I), the claim limits of subsection (3)(VI), the claim limits of subsection (3)(VII), and the claim limits of subsection (3)(VIII), should not apply to him. [4]

¶ 31 Accordingly, we deny Liggett's counsel's request to indefinitely stay the direct appeal in each case, and we direct the parties to proceed with briefing in accordance with a separate briefing order issued today. The briefing schedule will be sent under a separate order of this court.

## IV. Bifurcated Proceedings

¶ 32 Having concluded that the direct appeal can proceed, we must decide how to resolve the pending motions before us in light of Liggett's incompetence. The People contend that the direct appeal divested the district court of jurisdiction and that the appeal and restoration proceedings cannot occur simultaneously. They also argue that the district court has no authority to order the Department of Corrections (DOC), in whose custody Liggett resides, to restore him to competency.

¶ 33 Liggett's counsel do not separately address bifurcation, but request a stay of all proceedings, which we have already rejected, and a remand for restoration to competence.

¶ 34 This court's subject matter jurisdiction is a question of law that we review de novo. *People v. Sandoval*, 2016 COA 57, ¶ 14, 383 P.3d 92. We agree with the People that, generally, the filing of a notice of appeal divests the district court of jurisdiction to issue further orders that relate to the order or

  

judgment on appeal. *People v. Hampton*, 696 P.2d 765, 771-72 (Colo. 1985); *see also* § 13-4-102(1)(2); C.A.R. 1. We further agree that the existing competency statutes, article 8.5 of title 16, govern a defendant's competency to participate in criminal proceedings in the district court before a conviction enters and do not apply to direct appeals.

¶ 35 Nevertheless, section 13-4-102(3) provides that "[t]he court of appeals shall have authority to issue any writs, directives, orders, and mandates *necessary to the determination of cases within its jurisdiction*." (Emphasis added.) *See also* ***414** *People v. Bergen*, 883 P.2d 532, 542 (Colo. App. 1994) (recognizing that the court of appeals does not possess general powers of supervision over lower courts except as provided in section 13-4-102(3) ). No one questions our jurisdiction to consider Liggett's appeals—the only question is whether we possess the legal authority to order restoration while the appeal is pending. The answer to that question depends on whether restoration is necessary to the determination of Liggett's cases. Because his incompetence precludes us from ruling on a portion of his motion to stay proceedings — his requests to terminate counsel and to dismiss the appeal — we conclude that a limited remand to restore Liggett's competence is necessary to our determination of these requests and, thus, to these cases. [5]

¶ 36 We find support for our position in the numerous instances recognized by statute, case law, and rule in which this court retains concurrent jurisdiction with the district court during a direct appeal. *See, e.g.*, § 13-20-901(1), C.R.S. 2017 (district court proceedings not stayed when the court of appeals exercises its discretion to consider an interlocutory appeal of an order granting or denying class certification); § 18-1.3-202, C.R.S. 2017 (district court retains jurisdiction to modify terms of and revoke probation during appeal); § 19-3-205, C.R.S. 2017 (district court retains jurisdiction over any child adjudicated neglected or dependent until the age of twenty-one including when adjudication order is on appeal); *Sanoff v. People*, 187 P.3d 576 (Colo. 2008) (district court retains jurisdiction to rule on restitution after notice of appeal is filed); *People in Interest of Dveirin*, 755 P.2d 1207, 1209 (Colo. 1988) (district court retains jurisdiction over all subsequent certification proceedings when the validity of short-term certification is pending appeal); *In re Parental Responsibilities Concerning W.C.*, 2018 COA 63 (district court retains jurisdiction to consider motions to modify parenting time and decision-making while permanent orders are on appeal); *People in Interest of E.M.*, 2016 COA 38M, 417 P.3d 843 (district court retains jurisdiction to enter and modify treatment plans while adjudicatory order is on appeal), *aff'd sub nom. People in Interest of L.M.*, 2018 CO 34, 416 P.3d 875; *In re Estate of Scott*, 119 P.3d 511 (Colo. App. 2004) (probate court retains jurisdiction to conduct administration of the estate after its judgment regarding all pending claims and parties is final), *aff'd sub nom. Scott v. Scott*, 136 P.3d 892 (Colo. 2006); *People v. Stewart*, 26 P.3d 17 (Colo. App. 2000) (district court retains jurisdiction to rule on motions for stay and for appeal bonds during appeal), *aff'd in part and rev'd in part*, 55 P.3d 107 (Colo. 2002); *Koontz v. Rosener*, 787 P.2d 192, 198 (Colo. App. 1989) (district court retains jurisdiction to consider attorney fees as costs after notice of appeal is filed); *see also* C.R.C.P. 54(b) (district court retains jurisdiction over remaining claims while certified claims are appealed); C.R.C.P. 59 (district court retains jurisdiction to rule on a pending Rule 59 motion after notice of appeal is filed).

¶ 37 Moreover, we are not persuaded that Liggett's confinement in the custody of the DOC necessarily precludes restoration proceedings from occurring. The plain language of section 16-8.5-111(2)(b) provides that the district court may commit a defendant to the Department of Human Services for restoration and gives the executive director of the Department authority over the restoration proceedings. Nothing in the statutory language requires a defendant to reside in a particular location for restoration to occur. And we note that Liggett was confined in the custody of the DOC when the district court ordered the Department to perform the competency examinations pursuant to our limited remand. We have no reason to expect that such cooperation between the Department and the DOC will not or cannot occur with respect to restoration proceedings.

¶ 38 Nevertheless, we leave to the district court's discretion the resolution of any issues that may arise between the Department and the DOC. Accordingly, we remand the case to the district court for the limited purpose ***415** of ordering proceedings to restore Liggett to competence. This order will remain in effect until Liggett is restored to competence or until the mandate issues, whichever occurs first.

## V. Conclusion

¶ 39 We grant a stay of the ruling on Liggett's requests to terminate counsel and to dismiss the appeal. We deny the request to indefinitely stay the appellate proceedings and order the direct appeal to proceed in accordance with the

  

scheduling order. We grant the request for a limited remand to seek to restore Liggett to competence and remand the case to the district court for that limited purpose. If competence is restored before the mandate issues, then Liggett shall immediately forward a copy of the district court's order to this court. Entry of the order on the matter shall be construed as recertification of the appeal by the district court. The order entered shall be made a part of the record on appeal.

¶ 40 If Liggett wishes to amend the notice of appeal with any issue arising on remand, a motion to amend shall be filed within fourteen days of notice of recertification of the appeal by this division and shall be accompanied by a motion to supplement the record, if necessary.

¶ 41 We further order Liggett's counsel to notify this division in writing of the status of the district court proceedings in the event that this matter is not concluded within sixty-three days from the date of this order. Liggett's counsel shall file status reports every sixty-three days until recertification or until further order of this division.

JUDGE TAUBMAN and JUDGE ASHBY concur.

**All Citations**

490 P.3d 405, 2018 COA 94M

## Footnotes

1 Although that sentence has been fully served, the probation appeal is not moot because a reversal of the murder conviction would require reversal of the probation revocation finding.

2 The revised standards also provide a procedure for initiating the appellate process where a defendant becomes incompetent in the period between the imposition of sentence and the filing of the notice of appeal, an issue not presented here. *Criminal Justice Standards on Mental Health* 7-8.8 (Am. Bar Ass'n 2016), https://perma.cc/82UC-QZXH.

3 Because of this holding, we do not further address timing issues related to state postconviction proceedings or offer any opinion on whether a defendant must be competent to pursue postconviction relief under Crim. P. 35(c). Additionally, we reject Liggett's counsel's argument that proceeding with the appeal would necessarily cause a forfeiture of Liggett's federal habeas corpus rights. *See Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (holding that the one-year statute of limitations on petitions for federal habeas relief by state prisoners is subject to equitable tolling); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011) (holding that a petitioner's incompetence can constitute an extraordinary circumstance that tolls the limitations period if the petitioner established mental incompetence and that such incompetence caused the failure to comply with the statute of limitations).

4 A defendant claiming ineffective assistance of appellate counsel during the period of incompetency retains the burden of proving both deficient performance and prejudice in order to receive postconviction relief. *People v. Valdez*, 789 P.2d 406, 409-10 (Colo. 1990).

5 We may rule on the pending requests if Liggett's competence is restored before we lose jurisdiction over the appeal. If Liggett remains incompetent, restoration for those matters within the appellate court's jurisdiction will be rendered moot when the mandate issues.

# APPENDIX E

*People v. Ligget*, 2014 CO 72, 334 P.3d 231 (Colo. 2014)

(*Liggett I*)

334 P.3d 231
Supreme Court of Colorado.

The PEOPLE of the State of Colorado, Plaintiff–Appellant
v.
Ari Misha LIGGETT, Defendant–Appellee

Supreme Court Case No. 14SA88

September 22, 2014

**Synopsis**

**Background:** Defendant who was charged with first-degree murder and other offense moved to suppress statements that he made during a custodial interrogation. The District Court, Arapahoe County, William B. Sylvester, J., granted the motion in part. Prosecution filed an interlocutory appeal.

The Supreme Court, Boatright, J., held that law enforcement investigators did not overbear defendant's will during the interrogation, such that defendant's statements were voluntary.

Reversed and remanded.

***232** *Interlocutory Appeal from the District Court*, Arapahoe County District Court Case No. 12CR2253, Honorable William B. Sylvester, Judge.

**Attorneys and Law Firms**

George H. Brauchler, District Attorney, Eighteenth Judicial District, Susan J. Trout, Senior Deputy District Attorney, Centennial, Colorado, Attorneys for Plaintiff–Appellant.

Douglas K. Wilson, Public Defender, Natalie Girard, Deputy Public Defender, Julia Marchelya, Deputy Public Defender, Jessica Enggasser Johnson, Deputy Public Defender, Centennial, Colorado, Attorneys for Defendant–Appellee.

En Banc

**Opinion**

***233** JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶ 1 In this interlocutory appeal pursuant to C.A.R. 4.1, we consider whether the trial court should have suppressed statements that Defendant–Appellee Mr. Ari Liggett made to investigators during an interview on October 17, 2012. The trial court suppressed the majority of the statements that Liggett made during this interview because it found that they were involuntary. We, however, hold that, when considering the totality of the circumstances, the investigators never overbore Liggett's will, and thus his statements were voluntary. Accordingly, we reverse the trial court's suppression order and remand the matter to the trial court for proceedings consistent with this opinion.

## I. Facts and Proceedings Below

¶ 2 A police officer stopped the vehicle that Liggett was driving and, upon asking dispatch to scan the license plate, determined that it was associated with both a missing person (Liggett's mother) and an armed-and-dangerous person (Liggett himself). After the police officer ordered Liggett to turn the car off and place his hands through the window, Liggett sped off and a police chase ensued. During the chase, when Liggett attempted to make a right turn, the vehicle spun out and hit a concrete wall. Liggett then exited the vehicle and ran, and the police chased him on foot. Eventually, Liggett threw his hands up and surrendered, and the officers handcuffed him.

¶ 3 Then, while "the officers were talking among themselves," Liggett made several unprompted statements, including:

- "I can't tell right from wrong. I'm insane. My psychiatrist will confirm it."
- "Hey guys, umm, I've just got a simple question. If I can convince you that there's not probable cause that I'm sane, do you press criminal charges?"
- "I think I'm God. I've thought so for years."
- "I think breaking most laws is the right thing to do...."
- "I think that everyone can read my mind, see the past and the future, and shape-change, and they aren't [inaudible]

  

to any mortal weapons or abuse because they can use their mind to control their emotions. I think that the whole world is a conspiracy out to get me because I'm the only person who can't do a number of those things."

¶ 4 Without responding to Liggett's assertions, the officers placed him in the backseat of a police car because he was under arrest. At that time, Sergeant Peterson asked Liggett if he was okay. Liggett responded that he was physically fine but that the past couple of days had been difficult. On suspicion that Liggett was involved with his mother's disappearance, Sergeant Peterson then asked Liggett if he would be willing to go to the sheriff's office and speak with some investigators. Liggett answered in the affirmative, and the police then took him to the sheriff's office.

¶ 5 There, the investigators interviewed Liggett, un-handcuffed, in a small room. Liggett first spoke primarily with Investigator Clark and then separately with Sergeant Peterson. The interview began at approximately 2:50 a.m. when Investigator Clark stated, "I know that ... you came down here on your own," to which Liggett contradicted, "I actually didn't, you know. People, you know, um, more wanted to talk to me." Investigator Clark responded by asking Liggett, "[D]o you want to talk to me? I'll help you out how I can, okay?" Liggett did not answer the question but rather stated, "Um, basically it boils down to this" and then launched into a speech of sorts that included the following statements:

- "I've been a victim of society my whole life."
- "Ever since I was little ... I felt that everyone is, has, basically all the powers of God. They can shape-change to the past and future, anywhere, any time.... I think it's possible that I'm the only one who doesn't have those powers yet."
- "I think that, uh, breaking a lot of laws is the right thing to do."

¶ 6 Eventually, Investigator Clark returned Liggett to the task at hand, stating that he was going to read Liggett his *Miranda* ***234** rights and clarifying, "[R]eally the things [sic] I need to talk to you about is your mom." After Investigator Clark read Liggett his *Miranda* rights, Liggett asked, "Can you call a public defender to be here now?" Investigator Clark responded, "No." He then gave Liggett a written copy of his rights and asked him to sign and initial the document. As Liggett prepared to sign the document, he stated, "You know, I would be found incompetent, um, at this present time.... Would all this be rejected as evidence if I talk to you?" Investigator Clark did not answer Liggett's question but stated, "So this is just up to you whether or not you want to talk or not." Liggett, in turn, did not respond directly to Investigator Clark's statement but asked where he should sign and initial the document.

¶ 7 After Liggett signed and initialed the document, Investigator Clark began asking him questions about his whereabouts for the past couple of days, which led to questions about his mother and culminated with, "Is your Mom hurt?" In response, Liggett first explained, "I think she might have committed suicide," and he eventually told Investigator Clark that she did so by ingesting potassium cyanide because she was "bipolar." And while he gave additional details over the course of the interview, he maintained that he found his mom dead and "panicked" because he needed money and was only included in her will as a trust beneficiary. Consequently, he decided to cover up her suicide so that he could continue to use her credit cards and checks. He further expounded that in an effort to conceal the suicide, he called two friends who came to the house to help him. [1]

¶ 8 Liggett also explained to Investigator Clark why he was not responsible for his mother's death. For example, after the investigator told Liggett that the police had found potassium cyanide in the family's refrigerator, Liggett stated numerous times that it would have been impossible for him to put a lethal dose of potassium cyanide in his mother's food without her noticing because of its strong odor and taste. He also stated that while he panicked and was worried about money when he found his mother dead, he had no motive to kill her because he was not worried about money in general—in fact, he was planning on filing several lawsuits that would result in substantial judgments in his favor. In response, Investigator Clark—testing another possible motive—stated that he had information that Liggett's mother was planning on asking him to leave the house when she got married. Investigator Clark asked Liggett whether that upset him. Liggett responded that he did not believe she really would have gotten married and that it was simply untrue that his mother and her fiancé had asked him to leave. He also explained that if they did get married, he would benefit because she would be "less abusive" to him and he "would have more money." Lastly, Liggett explained his version of events by repeatedly stating that his mother's suicide made sense because "1 in 20, uh, bipolars will commit suicide and [his mother] had severe bipolar."

  

¶ 9 In response to Liggett's statements, Investigator Clark's tone was cordial, and he never raised his voice. Indeed, throughout the entire interview, he remained calm and respectful while he persistently questioned Liggett about his actions, motives, and whereabouts over the past couple of days. Liggett provided answers to each question, never wavering from the following basic elements:

- his mother committed suicide;
- he found her dead; and
- two friends, whom he met in jail and refused to name, came to the house and helped him conceal his mother's death.

¶ 10 Then, approximately 1 hour and 20 minutes into the interview, Investigator Clark got Liggett a glass of water and they took a short break. Investigator Clark then changed tactics and sympathized with Liggett by asking, "Your mom didn't treat you fair, did she?" Liggett explained that in 10th grade he realized that everyone had the power to shape-change but him and that "every day [he] begged for help." Investigator ***235** Clark and Liggett then had the following exchange:

> Investigator Clark: "And you wanted help."
>
> Liggett: "I wanted help very, very badly."
>
> Investigator Clark: "You mom didn't give it to you."
>
> Liggett: "My mom told me to go to the mental hospital."
>
> Investigator Clark: "And you didn't want to do that."

¶ 11 Starting from the premise that Liggett's mom "ha[d] been abusive to [him his] whole life," Investigator Clark then challenged Liggett, stating that he did not believe that the two men existed or that his mother committed suicide but rather that Liggett murdered her. Investigator Clark then expounded on how exactly Liggett murdered his mother. In response, Liggett kept denying the accusations and redirected the interview by telling Investigator Clark, "I need you to go through that step-by-step again, and this time we're gonna stop at each step, and I'm gonna explain to you why it didn't happen and give you evidence that it didn't happen." Investigator Clark then complied with the request by describing his account in snippets. Liggett responded by explaining why he thought Investigator Clark was wrong.

¶ 12 At this time and during the entire interview, Liggett frequently interjected with several statements related to themes about his beliefs and his mental state. For example, when Investigator Clark said, "You know, I really kind of need to know the names of these friends," Liggett responded, "I know you want to, but again, I ... first of all I think breaking the law is the right thing to do." He also told Investigator Clark that he is God but possessed by demons:

> I'm possessed by demons and their knowledge of the force is just physically or, whatever you wanna call it, stronger than mine.... We live in a corrupt society where I am the, uh ... uh, I'm the highest. I'm God so there's no one who can teach me how to be free.

He also asserted that this corrupt society was "out to get [him]." And, according to Liggett, his mother, in particular, sought to repress him: "[Y]ou know, I wanted out of that house very, very, very badly. I'm not her son, you know, I'm her victim. I've been trying to press charges on her for years.... I believe she's a shape changer who is willfully giving in to evil."

¶ 13 In response, Investigator Clark patiently allowed Liggett to assert his beliefs and even conceded that Liggett was the smarter of the two:

> Investigator Clark: "I told you once, I'm just a dumb cop."
>
> Liggett: "Alright, alright. I see. So I gotta work with you down here."
>
> Investigator Clark: "Please do. At my level."
>
> Liggett: "Alright."
>
> Investigator Clark: "Can you do that?"
>
> Liggett: "I'll do my best."

Investigator Clark then attempted to get Liggett to speak at his "level" and, for the remainder of the interview, to tell him "the truth." Despite the investigators' variety of different interrogation tactics, Liggett maintained his version of events. The interview with Investigator Clark

  

ended with Liggett explaining that his mother could have put the potassium cyanide into any food substance to commit suicide, while acknowledging that it was possible, but "unlikely," that she accidentally ingested it. In total, Investigator Clark's interview of Liggett lasted over three hours, including two short breaks during which Investigator Clark got Liggett water to drink. At no point did Liggett accept any responsibility for his mother's death.

¶ 14 Then, after a 1–hour–and–18–minute break—during which Liggett used the restroom, and the investigators got Liggett breakfast and 2 cups of coffee—Sergeant Peterson, who had spoken with Liggett in the police car, interviewed him for approximately 1 hour. At the outset, he stated, "I just didn't know if there was anything you wanted to talk to me about because we had seen each other earlier tonight when you were in the car." After a digression, during which Liggett confirmed that he was not injured and learned that Sergeant Peterson was investigating his mother's disappearance, ***236** Liggett directed the interview by asking Sergeant Peterson, "So tell me about what's going through your mind about [the investigation]." Sergeant Peterson countered by stating that he was really trying to get Liggett to "share [his] thoughts," and for the remainder of this portion of the interview, he told Liggett that he knew Liggett had killed his mother. Instead of asking what happened, Sergeant Peterson asked Liggett why he murdered his mother, for example, stating, "[Liggett], [2] will you tell me why you had to kill your mom? Please? Just tell me why it had to happen. There has to be a reason." Again, Liggett responded by maintaining that his mother committed suicide because she was "bipolar." He also emphasized the same themes that he had discussed with Investigator Clark:

- "Um, everyone has the power to shape-change.... They have the power to see the past and the future. They have the power to read everyone's mind. They have the power to influence events.... With everyone's power it doesn't make any sense except to repress people like me who are possessed by demons and haven't been able to tap into those powers."
- "My views of right and wrong are very different from society. I believe that for me to commit most crimes against most people is the right thing to do."
- "[My mom] was, um, actually, uh, fairly vicious towards me. Every tone, every gesture was meant to humiliate, repress, and weaken me."
- "I am God. The way, the truth, and the light."

¶ 15 Approximately halfway through this portion of the interview, Sergeant Peterson asked Liggett, "I have a couple other questions if you don't mind, is that okay? Or do you want to stop?" Liggett responded, "No, you can ask what you're gonna ask." Sergeant Peterson then continued to ask Liggett why he killed his mother. Not only did Liggett not tell Sergeant Peterson why he supposedly killed his mother, but he disagreed with Sergeant Peterson about the basic premise—that he had in fact killed her: "If you tell me your evidence, I can tell you why it didn't happen that way." Instead of answering, Sergeant Peterson kept pressing him, even addressing him in the third person:

> Sergeant Peterson: "Why did [Liggett] have to kill his mom? If you're God, you would know."
>
> Liggett: "[Liggett] did not kill his mom."
>
> Sergeant Peterson: "We both know he did."
>
> Liggett: "We don't know he did."
>
> Sergeant Peterson: "No, we both know he killed his mom, but I don't know the reason why. You know that."
>
> Liggett: "[Liggett] did not kill his mom."

¶ 16 After that exchange, Sergeant Peterson told Liggett that he was "gonna have to leave this room" because he had a meeting to attend. The interview then ended similarly to how the entire colloquy had proceeded, with Sergeant Peterson asking, "Are you gonna tell me why you had to kill her?" and Liggett responding, "I didn't do it." A police officer then handcuffed Liggett and took him to jail.

¶ 17 Subsequently, the People charged Liggett with one count each of first-degree murder, crime of violence, and vehicular eluding. [3] Liggett pled not guilty by reason of insanity, and the court ordered a sanity evaluation. Dr. Wortzel of the Colorado Mental Health Institute at Pueblo conducted a Sanity and Mental Condition Evaluation, which included a review of Liggett's interview on October 17, 2012.

¶ 18 During pre-trial motions, Liggett moved to suppress the statements he made during the interview on October 17, 2012, arguing that they were involuntary. The trial court found that Liggett's question to Investigator Clark—"Can you call a public defender to be here now?"—was an "unequivocal invocation" of his right to counsel, and as a result, it found that Investigator Clark violated Liggett's *Miranda* rights when

  

he responded, "No." The trial court ***237** therefore found it "important to delineate between the initial statements at the sheriff's office before the *Miranda* warnings and then the statements subsequent to the *Miranda* warnings." After considering several factors, including the *Miranda* violation, the court denied Liggett's motion as to the statements he made before Investigator Clark violated his *Miranda* rights. The trial court, however, suppressed the statements Liggett made after Investigator Clark denied his right to an attorney because of the *Miranda* violation and because it found those statements to be involuntary. Further, because Dr. Wortzel watched the video of the interview as part of his evaluation, the trial court ordered a new sanity evaluation and precluded Dr. Wortzel from testifying at trial. The People then filed this interlocutory appeal. [4]

## II. Standard of Review

¶ 19 Whether statements should be suppressed because they are involuntary presents a mixed question of law and fact. *People v. McIntyre,* 2014 CO 39, ¶ 13, 325 P.3d 583. As to the trial court's factual findings, we defer to them as long as they are supported by competent evidence. *Id*. We review the legal effect of those facts, however, de novo. *Id.*

## III. Analysis

¶ 20 The issue here is whether the investigators coerced Liggett into speaking with them so as to overbear his will. To resolve this issue, we first review the law surrounding voluntariness. We then apply this law to the facts of this case and conclude that the investigators did not coerce Liggett into making the statements but rather that Liggett spoke voluntarily.

### A. Law of Voluntariness and Coercion

¶ 21 In order for a defendant's statements to be admissible, the due process clauses of both the United States and Colorado Constitutions require that they be voluntary. *Effland v. People,* 240 P.3d 868, 877 (Colo. 2010). A statement is voluntary if it is " 'the product of an essentially free and unconstrained choice by its maker.' " *Id*. (quoting *People v. Raffaelli,* 647 P.2d 230, 234 (Colo. 1982)). In contrast, a statement is involuntary if "coercive police conduct played a significant role in inducing [the statement]." *People v. Zadran,* 2013 CO 69, ¶ 12, 314 P.3d 830.

¶ 22 To ascertain whether a defendant's statements are involuntary because the police's conduct was coercive "so as to overbear the defendant's will," *id.* at ¶ 10, we must conduct a totality-of-the-circumstances analysis that focuses on "the significant details surrounding and inhering" in the questioning, *People v. Ramadon,* 2013 CO 68, ¶ 20, 314 P.3d 836. As part of this analysis, we must contemplate " 'both the defendant's ability to resist coercive pressures and the nature of the police conduct.' " *McIntyre,* ¶ 17 (quoting *Ramadon,* ¶ 20). In particular, we consider several "non-exhaustive" factors:

1. whether the defendant was in custody;
2. whether the defendant was free to leave;
3. whether the defendant was aware of the situation;
4. whether the police read *Miranda* rights to the defendant;
5. whether the defendant understood and waived *Miranda* rights;
6. whether the defendant had an opportunity to confer with counsel or anyone else prior to or during the interrogation;
7. whether the statement was made during the interrogation or volunteered later;

***238** 8. whether the police threatened [the] defendant or promised anything directly or impliedly;

9. the method [or style] of the interrogation;
10. the defendant's mental and physical condition just prior to the interrogation;
11. the length of the interrogation;
12. the location of the interrogation; and
13. the physical conditions of the location where the interrogation occurred.

*Id.* (alterations in original) (quoting *Zadran,* ¶ 11). When analyzing these factors, we do not "perform a purely quantitative comparison and mechanically tally those factors suggestive of voluntariness against those indicative of coercion." *Id.* at ¶ 20 n.2. Rather, we must consider these

  

factors to inform the ultimate inquiry, which is whether the police's conduct was coercive " 'so as to overbear the defendant's will.' " *See id.* at ¶ 16 (quoting *Zadran,* ¶ 10).

¶ 23 Having reviewed the law surrounding voluntariness, we now consider whether the trial court erred when it suppressed the statements Liggett made to the investigators during the interview on October 17, 2012.

### B. Application to This Case

¶ 24 After reviewing the record and considering the totality of the circumstances, we conclude that Liggett spoke voluntarily. The record reflects that, although the majority of the factors weigh against a finding of voluntariness, the critical inquiry—whether the investigators actually overbore Liggett's will—necessitates a different conclusion. Importantly, from the outset, Liggett wanted to talk and tell the investigators his version of events and his beliefs. In addition, while the investigators repeatedly accused Liggett of killing his mother, Liggett—throughout the entire, lengthy interview—resolutely denied that he had any role in her death. Thus, the investigators did not overbear Liggett's will. As such, the trial court should not have suppressed his statements.

¶ 25 At the hearing on Liggett's motion to suppress, the trial court made findings regarding each of the 13 factors. The trial court proceeded factor by factor, asking the parties to present arguments before it made findings. After the court made individual findings on each factor, it found the following findings to be of "particular import": (1) the interview occurred during the very early morning hours; (2) the interview was long; (3) the investigators improperly denied Liggett counsel; and (4) Investigator Clark promised Liggett, "I'll help you out how I can." The court then found that when Liggett "invoked his right to counsel," the scale tipped toward involuntariness, and consequently, it suppressed the statements Liggett made after he asked if Investigator Clark could call a public defender.

¶ 26 Admittedly, as the trial court found, most of the factors do militate toward a finding that the investigators' conduct was coercive. Specifically, Liggett spoke during a custodial interrogation in a small room at the sheriff's office and was not given the opportunity to confer with counsel. In addition, the interview was long, it occurred during the early morning hours, and Liggett had been awake for a lengthy period of time. The People have also conceded that the investigators violated Liggett's *Miranda* rights. [5]

¶ 27 Not all of the factors that the trial court relied on, however, indicate that the investigators were coercive. Although the trial court found that Investigator Clark made a promise to Liggett at the beginning of the interview when he stated, "I'll help you out how I can, okay?" this statement was never referenced again, and the investigators mentioned no specific guarantees to help Liggett. As such, Investigator Clark's vague promise was merely an "attempt[ ] to establish a friendly rapport with [Liggett]." *See Zadran,* ¶¶ 15–16 (noting that the trial court found the statement, "I think it would be in your best interest to talk to me," was an implied promise but finding that this statement did not amount to coercion because it was meant to "establish a friendly rapport"). ***239** It was not a specific promise that induced Liggett into speaking with him. *See id.* at ¶ ¶ 17–19 (considering whether threats or promises were specific enough so as to overbear the defendant's will and constitute coercion); *see also People v. Parada,* 188 Colo. 230, 232–34, 533 P.2d 1121, 1122–23 (1975) (finding that an implied promise that statements would not be used against the defendant in court rendered the subsequent statements involuntary); *People v. Quintana,* 198 Colo. 461, 462–64, 601 P.2d 350, 350–52 (1979) (finding that statements were involuntary where the sheriff promised, amongst other things, that he would talk to the defendant's former employer about re-hiring him if the defendant talked with him).

¶ 28 In addition, as the trial court found, the investigators never—in five and a half hours—threatened Liggett. While the investigators were honest with Liggett about how they thought his mother died, they never bullied him into agreeing with them. The investigators also never successfully "exploited [Liggett's] weaknesses or vulnerabilities." *Zadran,* ¶ 16; *cf. Ramadon,* ¶ 25 (finding that the threat of deportation was a "uniquely terrifying prospect" for the defendant, who had been "brought to the United States for his safety after members of his family were killed by the Iraqi military").

¶ 29 As to Liggett's "mental and physical condition," the trial court found that there was "no obvious physical condition that would have negatively impacted [Liggett's] ability to engage in this interview or interrogation." The record supports this finding. Both Investigator Clark and Sergeant Peterson asked if Liggett was hurt in the car accident, and aside from a scrape on his arm, Liggett indicated that he felt fine. Regarding Liggett's mental condition, the trial court found that some

  

of his responses were "bizarre." But it is also clear that Liggett understood where he was and the nature of the interrogation. He also followed the investigators' questions. When a question did confuse him, he asked for clarification. For example, when Investigator Clark characterized Liggett's living arrangement as "kind of walking on eggshells," Liggett asked Investigator Clark to "explain that."

¶ 30 In response to Liggett's questions and statements, the investigators, throughout the interview, calmly and politely spoke to Liggett, and thus the "method and style of the interrogation" also cuts against a finding that the investigators were coercive. They never insulted Liggett nor used a derogatory tone. And, while Investigator Clark repeatedly asked Liggett to speak at his "level," his tone was not condescending. He again was attempting to establish a friendly rapport with Liggett. In addition, although Sergeant Peterson asked questions that assumed that Liggett had killed his mother and engaged in repetitive questioning, his conduct was not coercive. Sergeant Peterson did not persuade Liggett to provide more information than he had already provided to Investigator Clark or change his story. *Cf. Raffaelli,* 647 P.2d at 236 (finding substantial evidence in the record for the trial court's finding that statements were involuntary where the questions were repetitive, creating a stressful situation that resulted in a confession). To the contrary, Liggett resisted this tactic, even adamantly disagreeing that he had killed his mother. *See Ramadon,* ¶ 20 (stating that courts must consider "the defendant's ability to resist coercive pressures"). Namely, Sergeant Peterson's last question was, "Are you gonna tell me why you had to kill her?" to which Liggett responded, "I didn't do it." Thus, during the entire five-and-a-half-hour interview, other than providing additional details in response to the investigators' questions, Liggett never changed his story that his mother committed suicide. Simply put, he never succumbed to the investigators' suggestion that he killed his mother.

¶ 31 Liggett not only conversed freely with the investigators and resisted their tactics, but he even reinitiated the conversation several times throughout the morning. For example, during the first water break, Liggett was drinking a glass of water, and the investigators were talking in the hallway with the door to the interview room ajar. Liggett shouted to one of the investigators, "[G]entleman, one other thing.... I have one other thing to tell the detectives." After about a minute, Investigator Clark returned to the room and asked Liggett, "You said you wanted ***240** to talk to me?" Liggett responded, "Yeah, uh, I wanted to say that, uh, my mom had, um, given me permission to drive her car and, uh, use her credit card for basically emergencies."

¶ 32 Similarly, during the second water break, Liggett again volunteered information to Investigator Clark while they were waiting for another investigator, who had primarily been listening to the interview, to return:

> Investigator Clark: "I tell you what, my partner has to use the facilities. Do you have to use the facilities at all?"
>
> Liggett: "Um ..."
>
> Investigator Clark: "No?"
>
> Liggett: "I can wait."
>
> Investigator Clark: "We'll just wait for him to get back."
>
> Liggett: "You know, um ... my psychiatrist and, um, therapist, um, can prove that I have a completely inculpable state of mind, also, and have had it for months."
>
> Investigator Clark: "Okay. So, what does that mean to you?"
>
> Liggett: "It means I'm not criminally liable."

¶ 33 In addition to the fact that Liggett indicated on several occasions that he wanted to speak with Investigator Clark, Sergeant Peterson repeatedly asked Liggett if he wanted to talk:

- "Would you mind answering a couple other questions for me?"
- "Can I ask you a pretty direct question?"
- "Can I ask you a question?"

Crucially, approximately halfway through the interview, Sergeant Peterson asked Liggett, "I have a couple other questions if you don't mind, is that okay? Or do you want to stop?" Liggett responded, "No, you can ask what you're gonna ask." So, Sergeant Peterson gave Liggett the option of ending the interview, but Liggett allowed him to continue asking questions.

¶ 34 Liggett's eagerness to converse was evidenced even at the very beginning of his encounter with the police, at the site of the car crash. As the trial court found, shortly after the car crash, Liggett started talking to the officers, even asking them a question, "If I can convince you that

  

there's not probable cause that I'm sane, do you press criminal charges?" These statements were not only unprompted, but the similarity between Liggett's initial statements and the statements he made later during the interview suggests that Liggett wanted to tell the investigators very specific things, including: (1) he cannot tell right from wrong; ***241** (2) a court would find him incompetent; (3) everyone else has the ability to shape-change but him; (4) he is God; and (5) society and his mother, who had abused him, seek to repress him. Thus, even though Liggett's first statements are not at issue in this appeal, they demonstrate Liggett's willingness—even a desire—to talk, which indicates that the investigators did not overbear his will, and that his statements were voluntary.

¶ 35 That said, while some factors indicate that the investigators' conduct was not coercive, as the trial court found, the majority of them *do* indicate that Investigator Clark and Sergeant Peterson were coercive. But "[v]oluntariness should not be ascertained through rote tabulation." *McIntyre,* ¶ 20 n.2. Courts cannot simply "mechanically tally" the factors to determine whether a statement is involuntary. *Id*. The factors are "non-exhaustive," and courts must consider the totality of the circumstances of each case. *Id.* at ¶¶ 16–17. In determining whether a statement is voluntary, courts must keep the reason for considering these factors—the ultimate inquiry—in mind: whether the police's conduct "actually overbore the defendant's will." *Id*. at ¶ 19 (stating that the "critical issue in determining voluntariness ... is whether [the interviewing officer] actually overbore the defendant's will"). In this instance, the trial court never considered the nexus between the investigators' actions and Liggett's statements to them. Simply put, it never considered whether the investigators actually overbore Liggett's will.

¶ 36 When considering the ultimate inquiry, we conclude that under the totality of the circumstances, Investigator Clark and Sergeant Peterson did not overbear Liggett's will. Importantly, Liggett wanted to tell the investigators his story and his beliefs, including that: (1) he cannot tell right from wrong; (2) a court would find him incompetent; (3) everyone else has the ability to shape-change but him; (4) he is God; (5) society and his mother seek to repress him; and, most importantly, (6) his mother's death was a suicide. Furthermore, while the investigators did get Liggett to provide several details regarding the previous couple of days, his version of events never changed during the entire five-and-a-half-hour interview. And even though the investigators assumed that Liggett had killed his mother, Liggett, to the very end, disagreed with them and denied any responsibility in causing her death. Thus, Liggett's will was not overborne. As a result, we conclude that Liggett spoke voluntarily.

## IV. Conclusion

¶ 37 For the foregoing reasons, we hold that, when considering the totality of the circumstances, the investigators never overbore Liggett's will, and thus his statements were voluntary. Accordingly, we reverse the trial court's suppression order and remand the matter to the trial court for proceedings consistent with this opinion.

### All Citations

334 P.3d 231, 2014 CO 72

## Footnotes

1 The trial court has limited the public's access to much of the evidence in this case, including the video and transcript of the interview at issue in this appeal. In deference to the trial court, we have omitted certain details that are not crucial to our analysis.

2 Throughout the entire interview, the investigators referred to Mr. Liggett by his first name, Ari.

3 The trial court dismissed the vehicular eluding charge at a preliminary hearing.

4 Section 16–12–102(2), C.R.S. (2014), allows the prosecution to file an interlocutory appeal after the trial court grants a motion to suppress evidence if the prosecution "certifies to the judge who granted such motion and to the supreme court that the appeal is not taken for the purposes of delay and the evidence is a substantial part

  

of the proof of the charge pending against the defendant." The People here filed such a certificate, and in their Opening Brief they indicated that the video of the interview on October 17, 2012, and Dr. Wortzel's report are a substantial part of their case because they may seek to introduce them as rebuttal or impeachment evidence.

5 Statements obtained in violation of *Miranda* are not necessarily involuntary, but they are inadmissible in the People's case-in-chief. *People v. N.A.S.,* 2014 CO 65, ¶ 17, 329 P.3d 285.