NO. 23-5417

In the Supreme Court of the United States

ARI MISHA LIGGETT,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the
Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court erred by ruling that a defendant's non-*Miranda*-compliant statements may be admissible for impeachment or rebuttal if the defendant called an expert to opine on his mental state at the time of the offense, which the defendant did not do.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

For decades, this Court has consistently recognized an impeachment exception to the exclusionary rule to confront a defendant with statements he previously made that contradict his statements at trial. In *Harris v. New York*, this Court held that the impeachment exception allowed for voluntary statements taken in violation of *Miranda*[1] to be used to impeach a defendant's trial testimony when that testimony "contrasted sharply" with what he told the police upon arrest. 401 U.S. 222, 225 (1971). This Court reaffirmed that impeachment exception in both *United States v. Havens*, 446 U.S. 620 (1980), and *Oregon v. Hass*, 420 U.S. 714 (1975).

Then, in *James v. Illinois*, this Court held that the impeachment exception does not extend to all defense witnesses generally, including the fact witness at issue in *James* who testified to facts contrary to the prosecution's fact witnesses but whose testimony was contradicted by the defendant's own statements to police upon arrest, which had been suppressed. 493 U.S. 307, 310-15 (1990). This, the Court reasoned, would lessen the deterrent effect of the exclusionary rule. *Id.* at 317.

Since *James*, every lower court to consider this exception in the context of a not guilty by reason of insanity ("NGRI") defense has concluded that a defendant's voluntary but non-*Miranda*-compliant statements may be used to impeach or rebut

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

the defendant's contrary statements made to a mental health evaluator. This is because when a defendant pleads NGRI, he commonly presents his own statements to the jury through defense experts without the need to take the witness stand himself. In this context the *James* concern simply is not present. Indeed, a handful of lower courts have uniformly upheld impeachment or rebuttal evidence using a defendant's statements to law enforcement where they contrast with statements the defendant gave to the mental health evaluator. *See United States v. Rosales-Aguilar*, 818 F.3d 965 (9th Cir. 2016); *State v. DeGraw*, 470 S.E.2d 215 (W.Va. 1996); *People v. Edwards*, 217 Cal. Rptr. 3d 782 (Cal. Ct. App. 2017); *Wilkes v. United States*, 631 A.2d 880 (D.C. 1993). These holdings reject application of *James*; rather, they all are consistent with the principles behind *Harris*, that the "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226. There is no conflict on this distinction.

However, in all of those lower court cases, unlike here, the defense expert *actually testified*, thereby triggering the factual basis necessary to bring about rebuttal impeachment evidence. Here, on the contrary, Petitioner offered no expert who would have opined he was insane at the time of the murder, made no proffer that conveyed what sort of mental health evidence reflected on his sanity at the time of

the offense, and generally endorsed witnesses who had only historically treated or evaluated him well before the murder for mental health conditions. Thus, no defense testimony on this point was entered into evidence, and the prosecution never put on rebuttal evidence.

This posture not only renders this case a very poor vehicle for this Court's review, but any ultimate ruling would rest on conjecture. This is particularly true because the trial court below did not even guarantee the rebuttal evidence would be admissible; rather, the trial court conditioned its admission on additional evidentiary considerations. Thus, the issue Petitioner presents never actually arose.

STATEMENT OF THE CASE

Factual Background. In 2012, Petitioner killed his mother at their home with cyanide. *See* TR 10/23/14, pp 90-91. Petitioner then: told others, when they tried to contact the victim, that she was sick or wished to be alone; attempted to transfer to himself a large amount of money from the victim's checking account; and dismembered and concealed the victim's body in two large bins that he placed in the back of the victim's car, which he then used to leave the area. *See* TR 10/22/14, pp 185-88; TR 10/23/14, pp 53-54, 90-91, 128-32; TR 10/27/14, pp 227-45; TR 10/30/14, pp 90-94, 208-17, 243-46; TR 10/31/14, pp 108-110; TR 11/4/14, pp 108-09. Petitioner eventually returned and was apprehended. TR 10/22/14, pp 77-95, 110-16.

When officers first contacted him, Petitioner, unprompted, told them he could not tell right from wrong and asked them whether they would press criminal charges if he could convince them "there's not probable cause that I'm sane[.]" The officers did not respond and took Petitioner to the sheriff's office. Pet. App. 46-47.

At the sheriff's office, an investigator read Petitioner his *Miranda* rights, and Petitioner asked, "Can you call a public defender to be here now?" The investigator responded, "No," and handed Petitioner a written copy of his rights. The investigator told Petitioner that it was "up to you whether or not you want to talk or not." Petitioner signed the document and spoke to the investigator for several hours, making numerous statements reflecting on his mental state, denying killing his mother, and repeatedly telling investigators he was smarter than them. Petitioner was subsequently charged with first-degree murder. Pet. App. 47-49.

Pre-Trial Litigation. Petitioner had a long history of mental health problems that "ebb[ed] and flow[ed]" over time depending on his medication, care, and treatment. TR 10/28/14, pp 26-34. He also graduated high school with honors and briefly attended college. TR 10/28/14, pp 33-34. Given this history, Petitioner, in

addition to entering a plea of not guilty—which included, in part, pursuing an impaired mental condition-like defense[2]—pled NGRI. The court ordered a sanity and mental condition evaluation. TR 7/15/13, pp 3-4; CF, pp 222-24; Pet. App. 3. That evaluation, conducted by Dr. Wortzel, concluded Petitioner was sane. As part of that evaluation, Dr. Wortzel reviewed Petitioner's entire interview with police, including statements Petitioner made both before and after the *Miranda* advisement. Pet. App. 3.

Petitioner subsequently moved to suppress the statements he made during his police interview. The trial court found both that the investigator violated Petitioner's *Miranda* rights by not honoring his request for counsel and that Petitioner's post-advisement statements were involuntary. Pet. App. 49-50. It thus granted Petitioner's motion to suppress the statements he made after his request for counsel and ordered a new evaluation that did not consider those statements. Pet. App. 50.

Dr. DeQuardo conducted the second evaluation; he likewise concluded Petitioner was sane at the time of the offense. Pet. App. 4.

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[2] Colorado no longer recognizes the defense of impaired mental condition. However, it allows a defendant to introduce expert testimony concerning the defendant's mental condition that "is not so severe as to be included in the statutory definition of 'insanity'" in support of a defendant's theory that he did not form the mens rea required for conviction. *See People v. Rosas*, 2020 CO 22, ¶¶ 2-3, 8; *People v. Wilburn*, 2012 CO 21 ¶¶ 20-21; § 16-8-107(3)(b), C.R.S. (2023).

While that second evaluation was pending, the prosecution initiated an interlocutory appeal of the trial court's involuntariness ruling. Pet. App. 50. The Colorado Supreme Court reversed the trial court, finding that the statements were voluntary. *People v. Liggett*, 2014 CO 72, ¶ 1 (*Liggett I*); Pet. App. 46.

Petitioner then moved to preclude Dr. Wortzel's testimony at trial because his evaluation considered statements that, while voluntary, were taken in violation of *Miranda*. The trial court concluded that the prosecution could not use Dr. Wortzel's testimony during its case-in-chief but could use Dr. Wortzel "to rebut any evidence presented [by Petitioner] that [Petitioner] was insane *at the time of the alleged offense*." Pet. App. 20-26 (emphasis added). The court later clarified that whether defense counsel opened the door to Dr. Wortzel's testimony necessarily depended on the scope and nature of the questioning at trial. TR 10/7/14, pp 3-10.

Petitioner, generally speaking, endorsed former mental health providers as witnesses. *See* CF, pp 261-63, 925-27. But the defense told the court it did not intend to offer any opinions from any potential defense witnesses as to whether Petitioner was sane on the date of the offense.[3] TR 5/27/14, pp 9-10.

[3] At the time defense counsel made this statement, Dr. DeQuardo's evaluation was outstanding, which defense counsel noted as a caveat. TR 5/27/14, pp 9-10. Dr. DeQuardo ultimately determined Petitioner was sane on the date of the offense.

Proceedings at Trial. At trial, Petitioner argued both that he was not guilty and that, had he killed his mother, he was NGRI. *See* TR 10/22/14, pp 52-61. In its case-in-chief, the prosecution presented evidence from Dr. DeQuardo, as well as from Petitioner's friends, family members, and four mental health witnesses—including his treating psychiatrist for the year leading up to the murder; Petitioner cross-examined all of these witnesses about his mental health history, including Dr. DeQuardo at length. *See, e.g.*, TR 10/28/14, pp 84-127; TR 10/30/14, pp 116-21; TR 11/4/14, pp 203-64; TR 11/5/14, pp 46-91, 126-30. He also successfully introduced a video clip from his police interview, prior to the *Miranda* warnings, that included statements his counsel characterized as the "ramblings of someone who is in a psychotic state." TR 11/5/14, pp 5-9, 17-18; TR 11/7/14, pp 79-80. None of this evidence triggered the court's ruling so as to allow Dr. Wortzel to testify in rebuttal. And the jury received limiting instructions regarding the testimony of the four mental health witnesses and Dr. DeQuardo, restricting the use of that evidence to the question of Petitioner's sanity or mental condition. CF, pp 2120, 2123.

When the prosecution concluded its case-in-chief, defense counsel told the court that the defense had "12 witnesses under subpoena," primarily doctors. But the defense elected not to present those witnesses, assertedly to avoid Dr. Wortzel's

rebuttal testimony. But Petitioner did not disclose the identity of these witnesses or the nature of their potential testimony. TR 11/5/14, pp 172-74; Pet. App. 17.

Ultimately, Dr. Wortzel did not testify; nor were Petitioner's impeaching statements ever admitted. Pet. App. 3. Petitioner nevertheless argued in support of an NGRI verdict during closing argument, emphasizing his symptoms, diagnoses, and medication regimens over the course of his life. TR 11/7/14, pp 60-81. The jury found him guilty of first-degree murder. TR 11/10/14, pp 5-6.

Proceedings on Appeal. Petitioner directly appealed his conviction. During this process, Petitioner's appellate counsel moved to dismiss the appeal at Petitioner's request, representing that Petitioner wished to dismiss the appeal but that, in counsel's opinion, Petitioner lacked the capacity to make this decision. The court of appeals denied this motion. On limited remand, two competency evaluations declared Petitioner incompetent to proceed, and the district court entered an order to that effect in September 2017. So, the appeal proceeded simultaneously with competence restoration proceedings. *People v. Liggett*, 2018 COA 94M, ¶¶ 1-10 (*Liggett*

II); Pet. App. 37-38. Petitioner remained incompetent throughout the state appellate proceedings and, presumably, remains so today.[4]

On direct appeal, Petitioner argued that the trial court chilled his right to present a defense by ruling that the prosecution could use his voluntary non-*Miranda*-compliant statements through Dr. Wortzel as rebuttal evidence. The court of appeals rejected his argument, holding that the prosecution could rebut evidence supporting a defendant's insanity defense with psychiatric evidence derived from his voluntary statements, even when those statements were taken in violation of *Miranda*. *People v. Liggett*, 2021 COA 51, ¶¶ 35-44 (*Liggett III*); Pet. App. 32-34.

The Colorado Supreme Court affirmed, holding 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." *Liggett v. People*, 2023 CO 22, ¶ 4 (citing, inter alia, *Wilkes*, 631 A.2d 880) (*Liggett IV*); Pet. App. 2-3. But it cautioned that its holding did not mean such statements would

[4] The last status report filed by appellate counsel indicated Petitioner did not wish to participate in restoration proceedings and no progress had been made toward restoration. Status Report, 14CA2506 (filed Jan. 21, 2021). Petitioner's continued incompetency and ongoing restoration proceedings, as well as the lack of clarity as to whether Petitioner is persisting in his request to dismiss his appeal, make this a very poor vehicle for further review, in addition to the reasons discussed in Section III, *infra*.

always be admissible to rebut an insanity defense. Rather, the supreme court explained that evidentiary constraints would still apply to ensure the evidence "is used for a relevant, limited, and fair purpose." *Liggett IV*, ¶ 39; Pet. App. 7-8. Two justices dissented, concluding the opinion ran afoul of *James*, which allows the prosecution to introduce illegally obtained evidence to impeach the defendant's own testimony, but not to impeach all defense witnesses generally. *Liggett IV*, ¶¶ 65-67 (Márquez, J., dissenting); Pet. App. 11-12.

SUMMARY OF THE ARGUMENT

Avoiding perjury by proxy or the injection of perjury into the case by allowing the prosecution to use the defendant's prior voluntary but non-*Miranda*-compliant statements is consistent with this Court's well-developed precedent from *Harris*, *Hass*, *Haven*, and *James*. There is no reason to re-open that precedent. The trial court's ruling is little more than an application of that precedent.

The Colorado Supreme Court's ruling not only is consistent with this Court's precedent, but also is consistent with how courts across the country have addressed the defense-expert impeachment question. There is no split that warrants this Court's intervention.

Finally, this case is a poor vehicle to address the question of whether a defendant's voluntary but non-*Miranda*-compliant statements can be used to impeach

or rebut statements made to an expert mental health evaluator. There is no factual record to review this claim, as no such statements were admitted at trial. So any ruling would only be based on conjecture. Even assuming this issue warrants review, this Court should wait for a case where such testimony actually occurs.

REASONS FOR DENYING THE PETITION

I. The Colorado Supreme Court's decision aligns with decisions of this Court and does not run afoul of *James v. Illinois*.

This Court should decline review because the decision below aligns with this Court's decisions. Nor does it run afoul of *James*, which is not even implicated here.

A. This Court has consistently recognized an exception to the exclusionary rule where a defendant injects perjury at trial.

The exclusionary rule strikes a balance between the truth-seeking function of a trial and the interest of deterring prohibited police conduct. Exclusion of suppressed evidence or statements in the prosecution's case-in-chief is sufficient to satisfy the deterrent effect that flows from the rule. *Hass*, 420 U.S. at 721; *Harris*, 401 U.S. at 225. But the exclusionary rule does not operate as an absolute bar to the use of suppressed statements at trial so long as they were voluntary and uncoerced. *See Hass*, 420 U.S. at 723; *Harris*, 401 U.S. at 224. "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Hass*, 420 U.S. at 722.

Beginning with *Walder v. United States*, 347 U.S. 62 (1954), this Court has consistently recognized an exception to the exclusionary rule where a defendant testifies in a manner that contradicts suppressed evidence. This exception allows for the limited introduction of previously inadmissible evidence to challenge the erroneous impression created by the introduction of other misleading evidence, such as perjurious testimony, to further the court's truth-seeking function and "utilize the traditional truth-testing devices of the adversary process." *Harris*, 401 U.S. at 225. *Harris* first applied this exception in the context of a *Miranda* violation, and this exception was further developed in *Hass*, 420 U.S. 714, and *Havens*, 446 U.S. 620. *Liggett IV* follows this line of cases.

In *Harris*, this Court explained that the defendant's right to testify is a privilege that "cannot be construed to include the right to commit perjury," and that *Miranda* was a shield, not a sword "to use perjury by way of a defense." 401 U.S. at 225-26. Indeed, it "does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes," assuming other evidentiary conditions are satisfied. *Id.* at 224.

In *Hass*, this Court reaffirmed *Harris* where the defendant inculpated himself upon arrest, had those statements suppressed when he requested, but did not

receive, an attorney, and at trial then testified inconsistently with those prior admissions. 420 U.S. at 715-16. This Court recognized that absolute "inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." *Id*. at 723.

And in *Havens*, this Court applied *Harris* and *Hass* to a defendant testifying on cross-examination inconsistently with suppressed statements he had made at the time of his arrest. 446 U.S. at 622-23, 626. Like *Harris* and *Hass*, *Havens* stressed the truth-seeking function in criminal trials, as well as the defendant's obligation to speak the truth in response to proper questions. *Id*. at 626. Pertinent here, this necessarily extends to expert mental health evaluations probing a defendant's sanity. *Cf. id.*

Collectively and consistently, these cases reason that a defendant cannot take advantage of the protections of the exclusionary rule to inject untruths or perjury into trial. Specifically, they explain that "[e]very criminal defendant is privileged to testify in his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Harris*, 401 U.S. at 225. Indeed, introducing voluntary statements as impeachment is particularly important for "assessing [a] petitioner's credibility." *Id*. As this Court long ago recognized, 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.

Walder, 347 U.S. at 65; *see also Hass*, 420 U.S. at 721-22 (*Miranda* cannot be perverted into a license to use perjury for a defense); *accord Havens*, 446 U.S. at 624 (utilizing *Miranda* protections to facilitate perjury perverts the exclusionary rule).

So, just as where a defendant commits perjury through their own testimony, having a defendant attempt to introduce perjury by proxy through the testimony of experts means the balance of the exclusionary rule must permit admission of the voluntarily given suppressed materials for impeachment or rebuttal—fully consistent with *Harris* et al. Under those circumstances, the admission of such materials significantly furthers the truth-seeking function of the criminal trial, and the likelihood that the admission would encourage police misconduct is but a "speculative possibility." *James*, 493 U.S. at 311-12 (quoting *Harris*, 401 U.S. at 225). This is so because "the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility." *Hass*, 420 U.S. at 722 (citing *Harris*, 401 U.S. at 225). And prohibiting use of such statements in the prosecution's case-in-chief provides "sufficient deterrence." *Id.* at 721-22.

Indeed, a defendant can hardly be said to be taken by surprise when suppressed statements are introduced for impeachment or rebuttal in this fashion. On

the contrary, the defendant is well aware of the content of the suppressed statements he made in the first instance. *See id.* (noting that the defendant testified after knowing that the officer's opposing testimony had been ruled inadmissible in the prosecution's case-in-chief). This Court has repeatedly recognized that by introducing his contradictory statements at trial, a defendant opens the door to impeachment or rebuttal:[5]

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

Harris, 401 U.S. at 225-26; *accord Havens*, 446 U.S. at 626-27 (citations omitted). Put differently, "the shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[6] *Harris*, 401 U.S. at 226.

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[5] "But the [*Walder*] exception leaves defendants free to testify truthfully" without opening the door to impeachment by "avoiding any statements that directly contradict the suppressed evidence. The exception thus generally discourages perjured testimony without discouraging truthful testimony." *James*, 493 U.S. at 314.

[6] This Court has, in fact, recently indicated that, standing alone, "a violation of *Miranda* does not necessarily constitute a violation of the Constitution" and thus "does not constitute 'the deprivation of [a] right . . . secured by the Constitution." *Vega v. Tekoh*, 597 U.S. 134, 150 (2022) (citation omitted).

Petitioner claims *James* broadly prohibits admission of a defendant's voluntary non-*Miranda*-compliant statements as used against all defense witnesses. But as discussed *infra*, *James* reigned in an over-broad expansion of the *Harris / Hass / Havens* line of cases. It did not otherwise repudiate the core principle that a defendant cannot inject perjury or create perjury by proxy by use of his statements.

B. *James v. Illinois* addressed a materially different situation.

In *James*, the defendant's incriminating statements were used to impeach a defense fact witness, not the defendant himself. 493 U.S. at 310-11. Immediately after a shooting, the defendant changed his hair style to "black and curly"—in fact, police arrested him at the beauty parlor right after he changed his look, and he admitted intentionally changing his appearance, admissions that were later suppressed. *Id.* at 309. But at trial, a defense witness testified to the contrary, i.e., that the defendant had "black" hair on the day of the offense and, thus, could not have been the shooter. *Id*. at 310-11. The prosecution impeached this fact witness with the defendant's suppressed statements, and this Court held that such impeachment went far beyond impeaching a defendant with his contrary statements. *Id*. at 313-15. *James*, therefore, addressed a materially different situation, one where a defendant's statements were not being used to influence another witness's professional expert assessment of the defendant.

In essence, *James* reigned in an overly broad expansion of the impeachment exception to situations where the defendant's suppressed statements contradict his own statements at trial. Here, though, the trial court ruled that the defendant's suppressed statements might be admissible to impeach inconsistent statements the defendant made with a mental health evaluator.[7] Allowing impeachment where a defendant provides statements and information to an evaluating mental health expert, as occurred here,[8] satisfies this limitation and does not implicate *James*'s concern of an unwarranted expansion of *Walder*.

On the contrary, like in *Harris*, the impeachment exception impeaches a defendant with his inconsistent voluntary prior statements. Only here, the defendant made the statements to a mental health evaluator, through whom the defendant's statements would be introduced. Unrebutted, they would introduce potentially perjurious testimony. Had such impeachment actually occurred in this case, it would have been *consistent* with the principle of preventing a defendant from using *Miranda* as a sword and injecting perjury into evidence. Except here, Petitioner's

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[7] Of course, his statements were not even introduced, making the question here one of academic conjecture.

[8] Although, again, while Petitioner gave statements to Dr. Wortzel, neither Petitioner nor his defense was actually impeached with his statements here, meaning this case is very poorly suited to evaluate the specific outcome Petitioner claims could occur and that Petitioner claims implicates *James*.

statements never came in, and there was no rebuttal or impeachment at all. Moreover, *James* involved a nonexpert fact witness, who was not assessing the defendant's mental condition for purposes of making a diagnosis. That is not the circumstance presented here.

The *James* Court held that such a broad exception to the exclusionary rule would permit the impeachment of *all* defense witnesses in this manner, an exception so broad it virtually swallowed the exclusionary rule. *See Wilkes*, 631 A.2d at 887 (discussing *James*). And such an exception would undermine the truth-seeking function of the trial while weakening the deterrent effect of the exclusionary rule. For instance, "defendants might reasonably fear that one or more of their witnesses, in a position to offer truthful and favorable testimony, would also make some statement in sufficient tension with the tainted evidence to allow the prosecutor to introduce that evidence for impeachment." *James*, 493 U.S. at 315.

Additionally, such a broad rule would weaken the deterrent effect of the exclusionary rule by vastly increasing the number of occasions on which such evidence could be used. Defense witnesses easily outnumber testifying defendants, and the prosecutor's access to impeachment evidence would not just deter perjury, it could deter defendants from calling witnesses in the first place. *Id.* at 318-19. So *James*

held that such an exception was "inconsistent with the balance of values underlying [the Court's] previous applications of the exclusionary rule." *Id.* at 309.

But that concern does not arise where a defendant makes statements to a mental health evaluator: in this posture, as in *Harris*, *Hass*, and *Havens*, the defendant's statements are at issue. Indeed, *James* did not address—let alone prohibit—the situation here, where a defendant voluntarily made statements that an expert mental health evaluator reviewed in assessing the defendant's assertion of insanity. In doing so, the defendant put his condition directly at issue for evaluation, a condition his voluntary but non-*Miranda*-compliant statements impacted. Allowing assessment of these statements to combat a perjury-by-proxy defense is consistent with admitting them to combat direct perjury when a defendant testifies.

In short, here—unlike *James*—the defendant himself would be the real witness ultimately being impeached. If Petitioner had actually presented expert evidence, the impeaching and rebuttal value of using his voluntary non-*Miranda*-compliant statements would have been to probe *his own* underlying statements that formed the basis for Dr. Wortzel's evaluation. This is the same principle underlying the impeachment exception upheld in *Harris*, *Hass*, and *Havens*. *Cf. Havens*, 446 U.S. at 626 (reiterating that both *Hass* and *Harris* "rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against

him could be 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances'") (quoting *Harris*).

C. The decision below aligns with this Court's decisions.

The Colorado Supreme Court's decision in *Liggett IV* aligns with this Court's decisions in *Walder*, *Harris*, *Hass*, and *Havens*.[9] These cases ultimately form the foundation for the Colorado Supreme Court's reasoning, and *Liggett IV* is a logical application of this Court's decision in *Harris*.

Of course, *Liggett IV*'s holding is general in nature, and necessarily so since no defense expert testified and thus no impeachment or rebuttal occurred. What *might* have happened is a matter of conjecture and speculation.[10] Nevertheless, the holding in *Liggett IV* aligns with these precedents and does not run afoul of *James*.

Liggett IV ultimately held that, 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.

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[9] Other precedent from this Court, outside of the *Walder* line of cases, also supports the decision below. For instance, in *Buchanan v. Kentucky*, this Court found there was no Fifth Amendment violation in a case where the prosecution presented excerpts of a psychiatric report to rebut the defendant's evidence of extreme emotional disturbance when that report, similar to the insanity evaluations at issue here, had been requested by defense counsel. 483 U.S. 402, 421-25 (1987).

[10] As discussed below, the lack of a record makes this a poor vehicle for review.

Liggett IV, ¶ 40.

In support of its holding, *Liggett IV* adopted the rationale of *Wilkes*, by (1) recognizing that "it must 'strike a balance between the truth-seeking function of a trial and the deterrent function of the exclusionary rule'" and (2) acknowledging that "the 'truth-seeking process would be frustrated' by excluding the defendant's unwarned statements from rebuttal." *Liggett IV*, ¶ 37 (quoting *Wilkes*, 631 A.2d at 889). The Colorado Supreme Court reiterated 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.* (citing *Wilkes*).

But the court was cognizant of the impact allowing such statements could have on the defendant's case, even though it—like *Wilkes*—ultimately:

> 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."

Liggett IV, ¶ 37 (quoting *Wilkes*, 631 A.2d at 890). It emphasized that "[t]hat rationale bears equal force here, when [Petitioner] acknowledged to Dr. Wortzel that he "made up" portions of his voluntary statements to the police in order to avoid

criminal responsibility." *Id.* Thus, *Liggett IV* restricted its holding to situations where a defendant's statements to a defense expert are contradicted by suppressed evidence and the suppressed statements are essential to a diagnosis.

The court concluded that when a defendant puts his mental capacity at issue the prosecution may rebut the defense with psychological evidence even if that evidence includes the defendant's non-*Miranda*-compliant statements. *Id.* at ¶ 38. But the court cautioned that its "holding doesn't necessarily mean a defendant's illegally obtained statements will *always* be admissible to rebut an insanity defense." On the contrary, it emphasized that standard "[e]videntiary constraints still apply," including ensuring its use "for a relevant, limited, and fair purpose." *Liggett IV*, ¶ 39. This limitation is consistent with the rationale in *James*, preventing broad and indiscriminate use of a defendant's voluntary but non-*Miranda*-compliant statements to challenge all defense witnesses, but still promoting the truth-seeking function while preventing defendants from committing perjury by allowing proper exposure of such perjury through impeachment. 493 U.S. at 314-15.

In summary, *Liggett IV* held that a defendant may open the door to impeachment or rebuttal of statements made to a defense expert with suppressed statements provided that the suppressed statements: (1) contradict the statements made

to the defense expert; (2) are essential to a valid diagnosis; *and* (3) are subject to evidentiary restraints that ensure the statements will be used for a relevant, limited, and fair purpose.

Lastly, *Liggett IV* comports with this Court's decisions concerning the deterrent component of the balancing test. A defendant's suppressed statements still may not be introduced in the prosecution's case-in-chief. This, alone, is a sufficient deterrent. *Harris*, 401 U.S. at 225. Here, it is not until, and *unless*, the defendant introduces statements through a defense expert *and* those statements contradict the suppressed statements, that the impeachment exception would be triggered. Ultimately, the defendant is the one in control of this scenario occurring since a defendant can avoid use of the suppressed statements by not making contradictory statements to the defense expert. *James,* 493 U.S. at 314; *Liggett IV*, ¶ 37.

In short, the Colorado Supreme Court's holding aligns with this Court's decisions applying the impeachment exception and, as discussed below, decisions of courts from other jurisdictions addressing the same question. Like those cases, it neither implicates nor runs afoul of *James*. Further review is unnecessary.

II. There is no meaningful split among lower courts, and the Colorado Supreme Court's decision is not an outlier.

Relying on this Court's decisions in *Harris*, *Hass,* and *Havens*, courts in other jurisdictions have uniformly held, post-*James*, that a defendant's statements

introduced through a defense expert may be impeached or rebutted with the defendant's suppressed statements. In this way, just as a defendant may not use the exclusionary rule to inject perjury into trial, a defendant may not inject perjury or commit perjury by proxy by introducing his contradictory statements through a defense expert. Rather, such statements are properly subject to testing under the traditional tools of cross-examination. *E.g.*, *Wilkes*, 631 A.2d at 889; *see also Rosales-Aguilar*, 818 F.3d 965; *DeGraw*, 470 S.E.2d 215; *Edwards*, 217 Cal. Rptr. 3d 782.[11]

Petitioner nevertheless asserts that *Liggett IV* stands alone in allowing admission of a defendant's suppressed statements to impeach a defense witness. This is not so. Petitioner correctly notes that other jurisdictions allowing the use of a defendant's voluntary but non-*Miranda*-compliant statements have placed strict limits on their use, which he erroneously uses to suggest *Liggett IV* is out of step. Contrary to his assertions, *Liggett IV* is fully consistent with the cases on which he relies. Nor do those cases prohibit such use, meaning there is no split.

Liggett IV aligns with these decisions, which apply the impeachment exception and uniformly allow for defendants to be confronted with their voluntary statements in pursuit of the trial's truth-seeking function in narrow circumstances. For example:

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[11] These courts reject the contention that *James* controlled in this context.

● In *Wilkes*, the defendant raised an insanity defense, relying primarily on the testimony of a defense psychiatrist. The defense argued that the defendant had a dissociative disorder that caused him to black out and lose control over major swaths of time. 631 A.2d at 890-91. The expert testified about statements the defendant made to him, and he relied in large part on the defendant's claim that he had no memory of the shootings. The expert admitted that if the defendant recalled the shootings and had lied to him, he would reconsider his diagnosis. *Id.* at 889.

The defendant, however, had told police where he had stashed the murder weapon, as well as other details well after the murder. *Id.* at 890-91. While those statements were taken in violation of *Miranda*, the *Wilkes* court allowed their admission both by cross-examining the doctor with the defendant's statements showing he *did* recall the events and in the prosecution's rebuttal case through testimony by two officers to rebut the insanity defense. *Id.* at 881. The *Wilkes* court found that the defendant's un-*Mirandized* statements detailing the murder could be admitted to rebut an insanity defense. Even the defense expert conceded that the statements were necessary to arrive at an accurate diagnosis. *Id.* at 889.[12]

[12] The prosecution also called three experts of its own whose testimony was based in part on those statements and the conclusions they drew from them. *Wilkes*, 631 A.2d at 881. This *fully developed* factual background underscores just how poor a vehicle this case is. Assessing the impact of any admissions in this case is wholly speculative. *See* Section III, *infra*.

Relying on this Court's decisions, *Wilkes* explained that *James* did not bar all un-*Mirandized* statements from use as impeachment. Rather, it recognized that admission of the suppressed statements—which directly contradicted what the defendant told the psychiatrist—"provided the most relevant information available with which to probe the factual basis of [the defense expert's] opinion." *Id.* The *Wilkes* court explained that *James* merely rejected "the idea that 'all defense witnesses' can be treated as a homogeneous group for the purpose of determining the scope of the impeachment exception." *Id.* at 887. Consequently, *James*'s prohibition against broadly impeaching all lay fact witnesses with a defendant's voluntary and inconsistent statement was far different from impeaching an expert who relies on the defendant's statements and other information available from the defendant in order to arrive at an accurate sanity diagnosis. In this way, the impeachment ultimately is directly of the defendant, even if it is the expert testifying—essentially as the defendant's mouthpiece.

Consistent with *Harris*, *Hass*, and *Havens*, the *Wilkes* court highlighted how it did "not think the truth-seeking function of a trial would 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.* (emphasis added).

● In *Edwards*, the California Court of Appeals held that "use of defendant's illegally obtained statements to impeach the expert witnesses during the sanity phase promotes the same truth-seeking function of a criminal trial as the impeachment exception of a defendant who testifies." 217 Cal. Rptr. 3d at 789 (footnote omitted). Quoting this Court, *Edwards* emphasized that though "there is little, if any, concern that expert witnesses would commit perjury, the admission of this evidence prevents the defendant from turning the exclusionary rule into a '"a shield against contradiction of his untruths."' *Id.* (quoting *Harris*, 401 U.S. at 224).

Edwards had murdered a woman and claimed that voices had commanded him to do so. *Id.* at 784-86. But in statements to police after the murder, he was calm, knew right from wrong, and explained that his vendetta against women had prompted the killing. *Id.* The *Edwards* court allowed admission of the statements to rebut testimony from the defense mental health expert who testified that the defendant did not know right from wrong. *Id.* at 788. It explained that admitting the suppressed statements would not have a chilling effect on a defendant's ability to present a defense and recognized that expert witnesses "generally provide reports prior to trial, thereby allowing adequate preparation by defendants." *Id.* at 789-90.

● In *DeGraw*, 470 S.E.2d at 218, the defendant stabbed a woman to death, fled to his mother's house, and told his mother that he injured his hand stabbing

the victim. When police found him, they implied his injury was incriminating, and he said, "You've talked to mama." *Id.* at 221. This statement was later admitted to rebut his mental health defense that he "blacked out" and did not remember anything. *Id.* at 220. The West Virginia Supreme Court held that the defendant's suppressed statement was properly admitted in these circumstances, reasoning that:

> when a defendant offers the testimony of an expert in the course of presenting a defense such as the insanity defense . . . and the expert's opinion *is based, to any appreciable extent, on the defendant's statements to the expert*, the State may offer in evidence a statement the defendant voluntarily gave to police, which otherwise is found to be inadmissible.

Id. at 224 (emphasis added). Put simply, "in these types of cases the real witness being impeached is not the defense witness, but the defendant." *Id.* at 224. That is why it is critical to confront experts with the defendant's statements *and* why doing so is consistent with this Court's precedent in *Harris*, *Hass*, and *Havens*.

● Finally, in *Rosales-Aguilar*, the defendant illegally crossed the border back into the United States after being deported. 818 F.3d at 968. When confronted by Border Patrol, he admitted as much, but he was also disoriented and under the influence of drugs. *Id.* The trial court suppressed these statements because he could not have understood his rights and knowingly waived them. *Id.* The defense mental health expert testified, to support the theory that defendant could not have

formed specific intent, that defendant had no memory or awareness of the crime. *Id.* at 969. The trial court allowed admission of defendant's suppressed statements to impeach the defense expert and rebut this theory. *Id.* The Ninth Circuit affirmed, finding that a defendant should not be permitted to inject perjury through his expert. *Id.* at 970. The court viewed this situation as "much closer" to *Harris* and *Hass* than to *James*:

> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. Insofar as Rosales's statements to Dr. Carroll differ from the ones he made to the Border Patrol officers, the inconsistencies cast doubt on *his* veracity, not Dr. Carroll's. They were thus properly admitted to impeach Rosales's account of the events under dispute.

Id. (citing *Harris,* 401 U.S. at 226). Here, too, Petitioner's voluntary statements to investigators, which Dr. Wortzel reviewed, cast doubt on the veracity of *Petitioner's* assertions of insanity and provided meaningful information for Dr. Wortzel's assessment of Petitioner's sanity—an issue Petitioner directly put in front of the jury. Of course, Petitioner put on no defense experts and thus these statements were never introduced, meaning the impeachment did not occur at all.

There is one case, over four decades old and pre-dating *James*, that did not allow for the use of a defendant's voluntary but non-*Miranda*-compliant statements to be used to impeach or rebut statements made to mental health evaluators. But it

has significantly divergent facts. It also appears to be the sole outlier. In *United States v. Hinckley*, the D.C. Circuit found that unwarned statements elicited by *specially trained* FBI agents could not be admitted to impeach an insanity defense. 672 F.2d 115 (D.C. Cir. 1982). The *Hinckley* court relied heavily on a factor not present here: the statements were elicited by highly trained, highly educated FBI agents who were knowingly attempting to elicit incriminating responses. *Id*. at 124-25.

The *Hinckley* court noted the exclusionary rule requires a balancing between the interest in deterring law enforcement from violating constitutional rights and the truth-seeking mission of the courts. *Id.* at 129, 133-34; *see also James*, 493 U.S. at 311 & n.1. But the court found a significant distinction in that the FBI and Secret Service agents had heightened training:

> We are *not confronted here with the typical police officer*, but rather with the special concerns of highly trained agents whose job it is to prevent and investigate assassination attempts on major political figures.

Hinckley, 672 F.2d at 133-34 (emphasis added).

In reversing a court that had allowed illegally obtained statements to be used to impeach a defense mental health expert, *Hinckley* specifically distinguished FBI and Secret Service agents from "the typical police officer." *Id.* Thus, it does not even bar admission of statements made to "typical" police officers, such as those in this case. So even *Hinckley*, the decision most disapproving of the use of unwarned

statements to impeach an expert, is largely consistent with the Colorado Supreme Court's decision below. It certainly is not *inconsistent*; nor does it bear the weight Petitioner places on it in establishing any sort of meaningful split.

III. This is a poor vehicle because Petitioner's claim rests on conjecture and speculation, and the record does not contain sufficient facts for review.

In the end, one more fundamental reason weighs against review. Without a factual record on this issue—or, indeed, any rebuttal impeachment testimony being admitted at all—there is nothing to review. Petitioner's question is conjecture.

Petitioner claims the decision below runs afoul of *James* because it permits admission of psychiatric evidence in rebuttal even where that evidence includes a defendant's non-*Miranda*-compliant statements. He contends that, unlike other jurisdictions, Colorado permits *unlimited* use of such statements in rebuttal.[13] But Petitioner overstates Colorado's position. Further, since neither a defense expert nor Dr. Wortzel was called to testify, such evidence was not even introduced below.

[13] The Colorado Supreme Court's decision did not go so far. Given the underlying posture, the supreme court had no reason to explore the full contours of the admissibility of such rebuttal evidence, as none had been admitted. Instead, the court answered two more rudimentary questions: (1) Could such psychiatric evidence be presented in rebuttal? *Yes*. (2) Are there limitations on its admissibility? *Yes*. *See Liggett IV*, ¶ 39. These rules are hardly groundbreaking, and they align with the same precedent from this Court relied upon by Petitioner.

Consequently, this case does not present a sufficient factual basis for this Court's review, even assuming it is not already consistent with this Court's jurisprudence.

Below, the trial court excluded Dr. Wortzel from the prosecution's case-in-chief because his expert opinion considered Petitioner's non-*Miranda*-compliant statements. But, the court reasoned, *if* the defense presented evidence that Petitioner was insane at the time of his mother's death, *then* Dr. Wortzel potentially could be called as a rebuttal witness. At trial, however, the defense admitted it had no expert who would testify that Petitioner was insane at the time of the murder.[14] So, the prosecution never called Dr. Wortzel in rebuttal, and there was no testimony concerning Petitioner's non-*Miranda*-compliant statements. This alone makes this case an incredibly poor vehicle to address any constitutional rule, let alone suss out considerations necessary to make any type of admissibility determination.

Although Dr. Wortzel never testified, Petitioner claims he decided not to call several unnamed witnesses to avoid triggering Dr. Wortzel's rebuttal testimony. But Petitioner neither identified nor endorsed any expert who could testify he was insane at the time of the murder, so his claim that any uncalled witness would have

[14] Contrary to Petitioner's assertion, insanity was not Petitioner's only defense at trial. Petitioner also raised two other defenses—that he did not kill his mother; and that he did not form the requisite mens rea for murder.

triggered Dr. Wortzel's rebuttal fails at the threshold. Indeed, a review of Petitioner's endorsed witnesses reveals that his uncalled medical witnesses had, generally speaking, treated Petitioner at earlier phases in his life—*not contemporaneously* with the murder. *See* CF, pp 925-27. Petitioner's bald assertion cannot substitute for a properly developed record. On the contrary, to establish harm, Petitioner necessarily had to call witnesses to trigger the injury he claims.

Petitioner's framing ultimately requires comparing statements made to a testifying defense expert with those made to Dr. Wortzel and introduced through rebuttal. Without the testimony of these experts, too many contingencies and questions remain unresolved to allow for a meaningful review of—let alone provide guidance on—Petitioner's claim. *See Luce v. United States,* 469 U.S. 38, 41 (1984) ("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context.").

This Court's decision in *Luce* identifies a myriad of problems a court confronts when reviewing an undeveloped claim like this one and underscores the reasons this Court should deny review.

In *Luce*, the trial court ruled that a defendant's prior drug conviction could be admitted to impeach him *if* he testified and denied any prior involvement with

drugs. The defendant never testified, but he challenged the *in limine* ruling on appeal. *Id.* at 39-40. This Court refused to consider the claim since Luce had not testified and thus—like Petitioner here—*had never faced impeachment*; as a result, it was impossible to evaluate the issue. This Court explained that when the evidence (or a proffer of the evidence) that would have triggered the challenged impeachment does not come in and thus the impeachment does not occur, it is impossible to assess the issue. In such situations, "any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative." *See id.* at 41. Here, too, no impeachment was put at issue, and this Court's review is unwarranted.

The *Luce* Court recognized numerous, insurmountable difficulties in addressing a defendant's claim under such circumstances. For example:

- A trial court might, in the exercise of sound discretion, alter its previous *in limine* ruling. *Id.* at 41-42 (stating "it would be a matter of conjecture" to assess whether the trial court would have allowed the government to introduce such evidence without the condition precedent having occurred).
- The Government may not have even sought to impeach with the prior conviction, depending on the nature of the triggering testimony. *Id.* at 42

(recognizing prosecution might elect not to use any arguably inadmissible evidence as impeachment if its case otherwise is strong).

- Proper harmless error review cannot occur unless testimony is presented. *Id.* (explaining that if the trial court's *in limine* ruling was "reviewable on appeal, almost any error would result in the windfall of automatic reversal" because appellate courts "could not logically term 'harmless' an error that presumptively kept the defendant from testifying").
- Indeed, defendants must introduce such evidence "in order to preserve [such] claims." *Id.* (doing so "enable[s] the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole").
- Finally, a developed record where the substantive error actually occurs prevents appellate gamesmanship. *See id.* (requiring introduction of the allegedly incompetent evidence will discourage such motions solely to "plant" reversible error in the event of conviction).

This Court is faced with *all* these obstacles here.

First and foremost, no defense expert testified, meaning the trial court's ruling concerning Dr. Wortzel's possible impeachment testimony *never took place*.

Additionally, it is impossible to know whether Dr. Wortzel would have even been called as a rebuttal witness. For instance, the prosecution could have decided not to call Dr. Wortzel, even if given the opportunity to do so: "If, for example, the Government's case is strong, . . . a prosecutor might elect not to use . . . arguably inadmissible" evidence. *Luce*, 469 U.S. at 42.

Even then, it is uncertain whether he would have testified to Petitioner's suppressed statements. And even had Dr. Wortzel given such testimony, the question of harmlessness would have remained, a question that by definition is dependent on the actual testimony given. *See id.*; *see also Ohler v. United States*, 529 U.S. 753, 760-61 (2000) (Souter, J., dissenting) (discussing *Luce* and noting that "a rule allowing a silent defendant to appeal would require courts either to attempt wholly speculative harmless-error analysis, or to grant new trials to some defendants who were not harmed by the ruling" and that *Luce* "acknowledged the incapacity of an appellate court to assess the significance of the ruling for a defendant who remains silent"); *cf. Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (whether an error "is harmless in a particular case depends upon a host of factors" that consider the nature and importance of the excluded testimony in relation to the evidence as a whole). With the facts needed to evaluate such threshold considerations missing, this Court's review is unwarranted.

Further, the trial court could have altered its ruling on the admissibility of Dr. Wortzel's rebuttal testimony by either refusing his testimony outright or by limiting its scope based on Petitioner's evidence. *Cf. Luce*, 469 U.S. at 41-42. Finally, like the decision to testify, the decision to present certain witnesses "seldom turns on the resolution of one factor." *Cf. id.* at 42 (internal citation omitted). This is particularly true since Petitioner made no offer of proof as to who the witnesses were or what their testimony would have been.[15] *See id.* All these reasons, as outlined in *Luce*, illustrate why Petitioner's claim is poorly postured for review.

Here, any use by Dr. Wortzel of the statements was not a foregone conclusion. Nor was he the only expert who could have used them; on the contrary, a defense expert also could have relied on Petitioner's suppressed statements in opining that Petitioner was insane, directly countering Dr. Wortzel's opinion but also preemptively admitting the suppressed statements. If so, any challenge to Dr. Wortzel's subsequent use of the same statements in rebuttal would have been waived. *See Ohler*, 529 U.S. at 758-59. Of course, this did not occur at trial either, so this is no

[15] The *Liggett IV* majority found no reason to reach the question of whether the lack of an offer of proof rendered any error harmless, since the majority found no error. *Liggett IV*, ¶ 15 n.2. On the other hand, the approach taken by the dissent—which argued there may have been a reasonable probability that Petitioner was unable to put on any defense whatsoever—would have been directly at odds with this Court's reasoning in *Luce*. *See Liggett IV*, ¶ 91 (Márquez, J., dissenting).

basis on which to craft any meaningful rule on this issue—yet another reason this case is ill-suited for this Court's review. Put simply, without the testimony of a defense expert and the testimony of Dr. Wortzel with actual impeachment, Petitioner's claim cannot be subjected to a meaningful review for harmlessness.[16]

Petitioner nevertheless contends the Colorado Supreme Court's decision permits unlimited use of his suppressed statements in rebuttal. But Petitioner overstates the court's decision. As noted above, the Colorado Supreme Court made two basic determinations. First, it ruled that psychiatric evidence can be admitted as rebuttal evidence even when it includes defendant's non-*Miranda*-compliant statements:

> 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.

[16] This Court has said that when a trial court's pre-trial ruling prompts a defendant to introduce the unwanted evidence himself, that *does not yield reversible error* on appeal since the government may have elected not to use that evidence. *See Ohler*, 529 U.S. at 758-59. This means a trial court's ruling allowing unwanted evidence permissibly can present a defendant with the difficult choice of entering the evidence himself or waiting to see if the government will pursue it. That is no different than what occurred here. And since Petitioner did not trigger the evidence's admission, the government simply did not have occasion to use it.

Liggett IV, ¶ 40. Second, it explained that those statements are *not always admissible*, but rather are subject to the rules of evidence:

> 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.

Id. at ¶ 39 (emphasis added). This includes admitting evidence for limited purposes and restricting its consideration to proper topics, thus "protect[ing] the defendant's interests by ensuring that the evidence is used for a relevant, limited, and fair purpose." *Id.*

Here, though, the Colorado Supreme Court had no reason to explore the specific limits on when a rebuttal expert's specific testimony might be properly admitted, since no defense expert testimony—and thus no rebuttal testimony—was offered. The court instead focused on the more fundamental question of whether such limited-purpose testimony could be appropriate in rebuttal to avoid giving the jury a misleading impression. By its own terms, the supreme court's decision cautions against the broad reading Petitioner suggests. The absence of actual impeachment renders Petitioner's entire claim here nothing more than conjecture.

Put simply, Petitioner's claim requests that this Court consider matters beyond the scope of the Colorado Supreme Court's decision. Ultimately, his claim rests on conjecture and speculation. But to pursue such an argument, at minimum there needs to be an evidentiary basis to assess the issue. To allow this claim to advance would diminish the harmlessness component. And, as discussed in Section II, *supra*, every other case that has addressed this issue *had actual testimony and impeachment*. Consequently, this case is a poor vehicle to address Petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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