No.23-5417

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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Colorado misstates the issue presented by this Petition.

The Colorado Attorney General misstates the issue presented by Ari Ligget's petition. The issue is not whether Liggett's statements were admissible to impeach his testimony at trial. The issue is whether (as the trial judge ruled) his statements were admissible as substantive rebuttal evidence.

The trial court's ruling, which was affirmed by the Colorado Supreme Court and the Colorado Court of Appeals was:

> 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.

Appendix p. 26 (emphasis added).

The dissenting Justices of the Colorado Supreme Court recognized the broad scope of the majority's ruling:

> 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 (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 (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.

Liggett v. People, 2023 CO 22, ¶ 65 (Marquez and Hart, J.J., dissenting).

I. The Colorado Supreme Court's decision is an outlier, aligning with neither *James v. Illinois* nor rulings of other lower courts.

The Colorado Attorney General is wrong that the Colorado Supreme Court has not departed from this Court's precedent. The "perjury by proxy" exception to the exclusionary rule has repeatedly been rejected both by this Court and all other Courts. *See James v. Illinois*, at 314-315 ("expanding the impeachment exception to encompass the testimony of all defense witnesses likely would chill some defendants from presenting their best defense and sometimes any defense at all—through the testimony of others."). *See also United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982) (finding no discernible reason the insanity defense should be "single[d] out … for application of the testimony-by-proxy theory" to curtail the exclusionary rule while other affirmative defenses are not.)

By misstating the issue presented by Ari Ligget's petition, the Colorado Attorney General is able to leave the impression that Colorado's decision aligns with the rulings of other courts allowing the use of a defendant's non-*Miranda*-compliant statements when they contrast with statements the defendant gave to a mental health evaluator who relied on those statements to conclude the

defendant was sane.[1] But if that were so, the CSC would not have affirmed Ligget's convictions. That is because the trial judge went far beyond the confines of precedent. At trial, no limitations were placed on the use of his non-*Miranda*-compliant statements. The government was allowed to use Liggett's illegally obtained statements to rebut any evidence he presented on the question of insanity. Appendix p. 26 (quoted above).

The State is wrong in its assertion that *Liggett IV* tracks decisions from other jurisdictions (notably *Wilkes*, *Edwards*, *DeGraw* and *Rosales-Aguilar*). Each of those courts adhered to this Court's ruling in *James* notwithstanding the defendant's mental capacity defense. When Courts have allowed a defendant's non-*Miranda*-compliant statements to challenge the conclusions of the defendant's mental health expert, it is because the expert relied on statements contradicted by the defendant's non-*Miranda*-compliant statements. E.g., *State v. Garcia*, 951 N.W.2d 631, 638 (Wis. Ct. App. 2020) ("Courts have made a narrow exception to the *Harris*/*James* rule in cases where the defendant uses an insanity defense. In these types of cases, the psychiatrist's testimony/opinions are based

[1] *Wilkes v. United States*, 631 A.2d 880, 889 (D.C. 1993); *People v. Edwards*, 217 Cal. Rptr. 3d 782, 789 (Cal. Ct. App. 2017); *State v. DeGraw*, 470 S.E.2d 215 (W.Va. 1996), *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982); *State v. Garcia*, 951 N.W. 2d 631, 638 n. 16 (Wis. Ct. App. 2020), *affirmed by an equally divided court*, 399 Wis.2d 324, 964 N.W.2d 342 (Mem), *cert. denied*, 142 S. Ct. 1442, 212 L. Ed. 2d 538 (2022); *United States v. Rosales-Aguilar*, 818 F.3d 965, 970 (9th Cir. 2016); *State v. Kozlov*, 276 P.3d 1207, 1230 (Utah Ct. App. 2012).

on statements made to him or her by the defendant; therefore, the statements that are actually being impeached are those of the defendant and not the witness. *See United States v. Rosales-Aguilar*, 818 F.3d 965, 970 (9th Cir. 2016); *Wilkes v. United States*, 631 A.2d 880, 889-90 (D.C. 1993).").

Rather than hewing to this narrow exception, the Colorado Supreme Court greatly expanded the State's ability to use a defendant's illegally obtained statements against him if he interposes a mental status defense. The Colorado Attorney General is wrong in arguing there are any special limitations on the use of a defendant's statements when insanity is asserted. Under the CSC's ruling, the only "limitation" placed on the use of a defendant's illegally obtained statements when a mental health status defense is raised are the rules of evidence. But that is no limitation. The rules of evidence already apply in *all* cases. The CSC crafted no special protections limiting the use of a defendant's illegally obtained statements. Its ruling treats Mr. Liggett's illegally obtained statements the same as his lawfully obtained statements.

By affirming the trial court's ruling that by presenting any evidence supporting his insanity defense Mr. Liggett opened the door to the admissibility of his suppressed statements, the CSC placed no such limits on the use of the suppressed statements. The limitations this Court placed on the prosecution's use of illegally obtained statements in *James, supra,* are not dependent merely on the rules of evidence, as the Colorado Supreme Court holds. The limitations

are placed there to vindicate a defendant's constitutional rights and to deter police misconduct. The Colorado Supreme Court relegates these concerns to the dustbin and instead holds that when a defendant raises a mental health defense, illegally obtained evidence can be used provided the Government follows the rules of evidence. Rather than limiting the use of such illegally obtained statements to rebut contrary statements made during the defendant's own testimony or those presented through an expert who relied on those statements in reaching opinions, the Court allows admission of the statements to rebut a defense.

The purpose of the impeachment exception adopted by this Court in *James* is to dissuade a defendant "from 'affirmatively resort[ing] to perjurious testimony.' " *James* at 314 (*quoting Walder v. United States,* 347 U.S. 62, 65(1954*)*). While this purpose is served when a defendant tells police one thing but tells his expert something different, the purpose underlying *James* does not apply when a defendant merely seeks to present evidence about his mental status.

That *James* addresses a materially different situation that does not render the holding and rationale in *James* inapplicable. Numerous courts have applied this Court's holding in *James* to the precise situation here, and except for Colorado, none of them have held that when a defendant presents evidence supporting a mental health status defense, his otherwise suppressed

statements become admissible subject only to the rules of evidence. (See cases cited in footnote 1 *supra*).

Contrary to Colorado's arguments, the mere presentation of mental health evidence supporting an insanity defense is not the equivalent of a "perjury-by-proxy" defense" (BIO p. 19). The State cites not one case from any jurisdiction that has adopted this approach. Nor is there one. In fact, the Colorado Supreme Court, in a case not involving a mental status defense, explicitly rejected that argument . (See *People v. Johnson,* 2021 CO 35, ¶ 34 (" fear of "perjury by proxy" is insufficient grounds to expand the impeachment exception to a defense witness" even one "who ostensibly has an incentive to lie on behalf of the defendant.").

The issue is not, as Colorado suggests, whether a defendant's illegally obtained statements can be used to impeach or rebut contrary statements the defendant made to a mental health evaluator. If that had been the trial court's ruling, the Colorado Supreme Court opinion would be in line with the rulings of other Courts and would be in line with this Court's decision in *James.* But this is not what the Court ruled. Neither the trial court nor the Colorado Supreme Court limited the admissibility of the illegally obtained statements to impeach contradictory statements of the defendant made to and relied on by a mental health evaluator. The trial court ruled that if Mr. Liggett presented *any* evidence to support his insanity defense, then *all* the illegally obtained statements become

admissible. The Colorado Supreme Court affirmed that ruling. The only "limits" placed on the admissibility of the statements are the rules of evidence, which apply to all evidence.

The State's characterization of the holding in *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982) is inaccurate. It is not an outlier. Nor (as Colorado suggests) is its holding dependent on the statements being obtained by federal law enforcement officials rather than state law enforcement officials. The *Hinckley* Court, while acknowledging the impeachment exception *in Harris v. New York*, 401 U.S. 222, 224 (1971) , rejected the broad exception that the government argued for in that case—the same broad exception that Colorado defends here:

> The very broad scope of evidence that may be relevant to an insanity defense—cited by the government as a reason to dispense with *Miranda*'s protections—will serve to enhance the possibility that any retreat from those protections will be abused. We thus find no reason for countenancing a broad exception to the Supreme Court's clearly enunciated policy against the use of tainted evidence simply because that evidence will be used to counter an insanity defense.

Hinckley, 672 F.2d at 134. While recognizing that the exclusionary rule does not give a defendant license to present perjured testimony, *id*. at 134, n. 117, the *Hinckley* Court refused to "extend the exception to include use of tainted evidence for rebutting the substance of a defendant's testimony." *Ibid*.[2] The

[2] The *Hinckley* Court was right to identify the Government's proposed rule as a "drastic" departure from then-existing precedent. No other jurisdiction

Hinckley Court included a warning the Colorado Supreme Court should have heeded about the curtailment of the deterrent effect of the exclusionary rule that would follow if a defendant's statements were not restricted to impeachment purposes:

> Were we to curtail the exclusionary rule in the drastic manner the government urges, we would provide little or no deterrence of constitutional violations against defendants whose sanity is the principal issue in the case. The government would be able, under the guise of rebuttal, to use any illegally obtained evidence relevant to the principal issue in the case -- insanity.

Ibid.[3]

Alas, this has come to pass in Colorado. As Justice Marquez stated in her dissent

> [*Ligget IV*] 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.

Liggett v. People, 2023 CO 22, ¶ 67b (Marquez, J. dissenting, joined by Hart, J.).

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had adopted the Government's novel approach. That was true in 1982 when *Hinckley* was decided, and it remained the case throughout the country until the Colorado Supreme Court held otherwise.

[3] The *Hinckley* Court's holding is in line with the later decisions of other Courts including *Wilkes, Edwards, Garcia. DeGraw* and *Rosales-Aguilar.*

Defendants in Colorado, by simply raising a mental status defense, should not thereby forfeit their rights to not have illegally obtained evidence used against them. If the defendant does not seek to introduce perjured testimony through an expert, the State should not benefit from the illegal actions of its agents. See *Edwards v. Baughman*, No. 17-CV-06469-SI, 2019 WL 1369931, at *8 (N.D. Cal. Mar. 26, 2019) ("Defendants could avoid impeachment of the testimony of expert witnesses by not providing these witnesses with statements that contradict the suppressed statements.")

II. This case is an excellent vehicle for this Court to address the important constitutional issue raised in the Petition.

Colorado, citing *Luce v. United States*, 469 U.S. 38 (1984), argues that because Mr. Liggett did not call witnesses to testify to his mental health or otherwise put on evidence "he was insane at the time of the alleged offense," this Court is somehow impeded from ruling on the scope of the *James* impeachment exception in cases when the defendant interposes a mental health defense. That is wrong. That Liggett did not go forward with his defense shows exactly why this Court's intervention is necessary. Removing *James's* limitations upon use of illegally obtained statements can eviscerate the defense by chilling its ability to raise otherwise legitimate defenses.

Colorado's argument ignores what the trial court ruled *and what the Colorado Supreme Court* affirmed: i.e., if Mr. Liggett presented any evidence to support his defense of NGRI, the State could then introduce his non-*Miranda*

compliant statements. No limitations were placed on the introduction of those statements. The trial court's ruling was a constitutional determination that did not turn upon factual considerations. The propriety of that ruling turns primarily on a legal question, specifically, whether the CSC was correct as a matter of constitutional law to carve out a "mental health exception" to this Court's holding in *James v. Illinois*, *supra*.

That *Luce* does not bar review in these circumstances was observed by Justice Brennan in his concurrence in *Luce*, where he stated, "[when] the determinative question turns on legal and not factual considerations, a requirement that the defendant actually testify at trial to preserve the admissibility issue for appeal might not necessarily be appropriate." *Luce, supra*, 469 U.S. at 44 (Brennan, J., concurring, joined by Marshall, J.).

The flaw in Colorado's argument is exemplified by the thoughtful discussion of *Luce* in *People v. Morris*, 2013 IL App (1st) 110413, ¶ 46, 1 N.E.3d 1033, 1048 (Ill. App. Ct. 2013), *cert. denied*, 135 S.Ct. 147 (2014). The Illinois Appellate Court explained that this Court's concerns in *Luce* about reviewing rulings on admissibility of evidence do not apply when the propriety of the ruling does not depend on factual considerations. In that case, "the trial court made a definitive ruling that defendant's suppressed statement could be used for impeachment purposes." Ibid. The Illinois Court well-articulated why *Luce* did not bar review:

> The trial court's ruling did not turn on primarily factual considerations such as weighing the probative value of a prior conviction versus its prejudicial effect under Federal Rule of Evidence 609(a)(1). Nor was the trial court's ruling conditional and dependent upon the testimony actually elicited by the witness on direct examination. There is also no question as to whether the State was going to impeach defendant's proposed experts with portions of defendant's suppressed statement, as the State clearly represented to the court that it would do so if defendant called those witnesses.

Ibid. These are exactly the circumstances here. Here, as in the Illinois case,

> [t]he trial court's ruling on the motion in limine was also one of constitutional dimensions and the propriety of that ruling turns primarily on a legal question, specifically, whether under the United States Supreme Court's holding in cases such as *James v. Illinois*, 493 U.S. 307 (1990), the State should be allowed to use defendant's suppressed statement to impeach defense witnesses other than the defendant himself.

Ibid.

No additional facts are necessary to determine whether the Colorado Supreme Court's erred as a matter of constitutional law when it ruled that, despite *James*, the prosecution may use a defendant's illegally obtained statements to rebut any evidence the defendant may present supporting his mental status defense.

CONCLUSION

Because the Colorado Supreme Court has substantially departed from this Court's precedent and created an exception to the exclusionary rule this Court has never sanctioned, this Court should grant review and reverse the Colorado Supreme Court.

Respectfully submitted,

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