ADVANCE SHEET HEADNOTE
May 15, 2023

2023 CO 22

No. 21SC395, *Liggett v. People*—Insanity—Self-Incrimination—*Miranda v. Arizona*—Privileged Communications and Confidentiality.

The supreme court considers whether (1) the trial court violated the defendant's Fifth Amendment rights by ruling that the People could present psychiatric evidence derived from the defendant's voluntary statements to rebut evidence supporting his insanity defense, even though police obtained those statements in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); and (2) whether the trial court improperly expanded the privilege waiver set forth in section 16-8-103.6(2)(a), C.R.S. (2022), to the defendant's nonphysician medical providers.

The supreme court now holds, first, 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.

Second, the court holds 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 trial each made their observations as agents of the defendant's physicians, the court holds that the defendant waived the privilege he shared with these witnesses.

Accordingly, the court affirms the judgment of the court of appeals.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 22

Supreme Court Case No. 21SC395
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 14CA2506

Petitioner:

Ari Misha Liggett,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
May 15, 2023

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CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court, in which **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE MÁRQUEZ, joined by **JUSTICE HART**, dissented.

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 (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.

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 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

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[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.

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]

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[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

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.

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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.

¶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" 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

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[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."

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

[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.

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; 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. 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 (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. *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 (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 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, 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").

¶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

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[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.

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 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 . . . [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*, 613 N.E.2d 1014, 1021–22 (Ohio 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.*, 553 N.E.2d 1038, 1051 (Ohio 1990))); *People v. Lang*, 498 N.E.2d 1105, 1132 (Ill. 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.

¶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 (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.

¶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 *Walder v. United States*, 347 U.S. 62 (1954), and continuing with *Harris v. New York*, 401 U.S. 222, 225 (1971), and *James*, 493 U.S. at 320, 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. 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. He further testified that he had never purchased, sold, or possessed any

[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.

narcotics. *Id.* at 63–64. 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. 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 (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 rule to prevent the prosecution from challenging his credibility. *Id.*

¶70 In *Harris*, 401 U.S. at 225, 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. 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. 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.

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[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 (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 (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 truth-seeking function of criminal trials—to determine the limits of the rule in both contexts. *Compare James*, 493 U.S. at 319–20 ("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 ("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).

¶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. 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. 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.[3]

¶72 Two decades later, in *James*, 493 U.S. at 313–14, 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.

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[3] This court applied *Harris* in *People v. Cole*, 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.)

¶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. 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 (quoting *Harris*, 401 U.S. at 225). 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.

¶74 From there, however, the *James* court expressly rejected "[e]xpanding the class of impeachable witnesses from the defendant alone to all defense witnesses." *Id.* at 313–14. 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. 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. 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. 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. 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. 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. 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 ("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 (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 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]

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[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 (1990); *Oregon v. Hass*, 420 U.S. 714, 720–24 (1975); and *Harris*, 401 U.S. at 224–26).

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 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

[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."

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.

¶86 In short, nothing about the rationale of *Wilkes* "bears equal force here." Maj. op. ¶ 37. To the contrary, the balancing approach 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. 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 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 ("[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.