No. 18-5418

# In the Supreme Court of the United States

KENNETH GREEN,
*Petitioner,*

v.

STATE OF COLORADO,
*Respondents.*

On Petition for Writ of Certiorari to
The Colorado Supreme Court

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether this Court should intervene prematurely, where Colorado's appellate courts have yet to address Petitioner's claims on the merits but will review them in a case currently pending in the Colorado Court of Appeals.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Rules

## INTRODUCTION

The claims Petitioner presents to this Court have yet to be reviewed on the merits in Colorado's appellate courts. They are, however, the subject of an appeal currently pending in the Colorado Court of Appeals, where Petitioner's opening brief is due on December 28, 2018. Petitioner nonetheless asks this Court to grant certiorari review of the Colorado Supreme Court's refusal to prematurely consider those same claims.

Specifically, Petitioner sought intervention in an original proceeding in the Colorado Supreme Court, under a rule that affords discretionary extraordinary relief when "no other adequate remedy is available."[1] Consistent with the rule, the Colorado Supreme Court denied relief without requiring an answer and without explanation. But that does not mean that the Colorado Supreme Court considered Petitioner's claims on their merits. Nor does it preclude the Court of Appeals from considering the merits of Petitioner's claims in his currently pending appeal. Because the merits of his claims have not been, but will be, considered by Colorado's appellate courts, this Court should deny the petition for certiorari.

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[1] Colo. App. R. 21(a)(1).

## STATEMENT OF THE CASE

The true nature of Petitioner's claims is demonstrated by a careful review of the record.

### I. Petitioner was afforded counsel, pleaded guilty, and was sentenced in 2011.

On June 9, 2011, Petitioner was arrested after his seven-year-old daughter revealed that he had put his penis in her vagina.[2] The next day, June 10, a magistrate reviewed a detective's affidavit describing the child sex assault and found that the affidavit established probable cause.[3] The day after that, June 11, Petitioner received an advisement of rights and a restraining order issued by a magistrate.[4] On June 16, 2011 Petitioner was charged with offenses arising from the sexual assault in Case 11CR2366.[5]

On the day of Petitioner's arrest, officers had executed a search warrant and found over forty marijuana plants in his home, along with firearms and harvested marijuana.[6] He was therefore also charged with marijuana cultivation-related offenses in Case 11CR2449.

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[2] First Supp. R., 11CR2366, p. 1.

[3] *Id.*, p. 2. As will be discussed, one of Petitioner's primary claims is simply inaccurate; he inaccurately claims that no magistrate found probable cause to hold him following his warrantless arrest. *See* Pet. i–iii, 23–27.

[4] First Supp. R., 11CR2366, pp. 3–4.

[5] *Id.*, pp. 7–9.

[6] First Supp. R., 11CR2449, pp. 2–4.

Petitioner received appointed counsel, who initially sought a preliminary hearing in both cases.[7] In Colorado, a preliminary hearing is a pre-arraignment procedure by which defendants can require the prosecution to establish probable cause through live testimony.[8] Petitioner, however, subsequently chose to waive his right to a preliminary hearing in exchange for a specific plea offer.[9]

That plea offer contemplated Petitioner pleading guilty to two charges in the child sex assault case, receiving a prison sentence (in the range of 10 to 32 years) on one charge, followed by a consecutive sentence of lifetime Sex-Offender Intensive Supervision Probation ("SOISP") on the other charge.[10] The prison component would run concurrently with a shorter prison sentence (not exceeding 6 years) in the marijuana case.[11]

Petitioner had plenty of time to consider the offer. To allow him more time to consult with counsel, arraignments scheduled for September 8, 2011, November 3, 2011, and November 10, 2011 were rescheduled.[12] On November 10 and throughout the following week, Petitioner signed plea paperwork that advised him of the elements of the charged offenses, the sentencing ranges, the prosecution's

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[7] First Supp. R., 11CR2366, pp. 28–30, 32; First Supp. R., 11CR2449, pp. 24–26, 31.

[8] *See* Colo. Rev. Stat. § 16-5-301.

[9] First Supp. R., 11CR2366, p. 42; First Supp. R., 11CR2449, pp. 37, 41.

[10] First Supp. R., 11CR2366, p. 42.

[11] First Supp. R., 11CR2449, pp. 37, 41.

[12] First Supp. R., 11CR2366, pp. 44–46, 50, 196–197; First Supp. R., 11CR2449, pp. 44–47, 181–183.

sentencing concessions, and his constitutional rights.[13] He initialed every paragraph and sub-paragraph of the guilty plea advisements, indicating that he understood.[14]

Petitioner entered a guilty plea on November 17, 2011. The judge engaged him in a direct colloquy to determine whether his decision to plead guilty was voluntary.[15] During that colloquy, Petitioner at one point stated, "I feel that I have no other options, Your Honor," and "I'm very afraid, Your Honor. I don't know what to do."[16] In response, the judge explained at length that Petitioner did indeed have options: Petitioner could either proceed with the guilty pleas, or instead plead not guilty and have the cases scheduled for trial.[17]

After conferring with counsel, Petitioner again told the judge that he was "very afraid," that it was a "very difficult decision," and that "I don't want to plead guilty to something I didn't do."[18] The judge again explained that the decision about how to plea was entirely up to Petitioner, and that the decision had to be free and voluntary.[19] Counsel then stated that Petitioner's hesitation was that the plea agreement called for Petitioner to plead guilty to one fictitious charge that lacked a factual basis, which had been negotiated to allow Petitioner to have a shorter prison

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[13] First Supp. R., 11CR2366, pp. 55–69; First Supp. R., 11CR2449, pp. 51–55.

[14] First Supp. R., 11CR2366, pp. 60–67; First Supp. R., 11CR2449, pp. 51–54.

[15] Pet. App. E (Transcript, Nov. 17, 2011 Arraignment, pp. 1–23).

[16] *Id.*, pp. 6–7.

[17] *Id.*, pp. 6–8.

[18] *Id.*, pp. 8–9.

[19] *Id.*, pp. 9–10.

sentence; Petitioner by contrast had "no hesitation in admitting" to his sex offense, for which he would receive probation.[20]

The judge reiterated that the choice about the plea was Petitioner's to make, and Petitioner again conferred with counsel.[21] Petitioner then said, "I reluctantly plead guilty," so the judge explained that Petitioner needed to give an unqualified, straight answer to the question of how he wanted to plead.[22] Petitioner then insisted, "Yes, yes. I'll take the deal," and when the judge asked whether this was Petitioner's own free and voluntary decision, Petitioner responded, "Yes."[23]

The judge then reviewed the plea paperwork with Petitioner, confirmed that the initials and signatures on the paperwork were his, advised him of the statutorily available sentencing ranges as well as the agreed-upon ranges, and asked a series of questions to ensure that Petitioner understood his rights and that the decision he was making was voluntary.[24] Petitioner responded with answers such as "Yes, I understand," Yes it is," and "Yes," indicating that his decision was knowing and voluntary.[25] The judge accordingly accepted the guilty pleas and scheduled the cases for sentencing.[26]

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[20] *Id.*, pp. 10–11.

[21] *Id.*, pp. 11–12.

[22] *Id.*, p. 12.

[23] *Id.*, p. 12.

[24] *Id.*, pp. 12–21.

[25] *Id.*

[26] *Id.*, p. 22.

Prior to sentencing, Petitioner underwent a statutorily required substance abuse evaluation and an offense-specific psychosexual evaluation.[27] During those evaluations, he admitted that he had been growing marijuana in his home for financial gain.[28] He also admitted to touching his daughter's vagina with his hand, rubbing his penis on the outside of her vagina, and subsequently ejaculating; he denied, however, that any penetration occurred.[29]

Sentencing took place on February 16, 2012. In Case 11CR2366, on Count Five (sexual assault on a child) the judge sentenced Petitioner to Sex Offender Intensive Supervision Probation for an indefinite term of ten-years-to-life, to run consecutively to the sentence he would receive on Count Six. On Count Six (child abuse causing serious bodily injury) the judge sentenced Petitioner to 20 years in state prison.[30] In Case 11CR2449, on Count One (possession with the intent to distribute marijuana) the judge sentenced Petitioner to six years in prison, to be served concurrently with the prison sentence in Case 11CR2366.[31] These sentences were consistent with the parties' plea agreement.[32]

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[27] First Supp. R., 11CR2366, pp. 70–106; 11CR2449, pp. 56–92; *see* Colo. Rev. Stat. § 16-11-102.

[28] First Supp. R., 11CR2366, p. 78; 11CR2449, p. 64.

[29] First Supp. R., 11CR2366, p. 87; 11CR2449, p. 65. Petitioner pleaded guilty to sexual assault on a child, Colo. Rev. Stat. § 18-3-405(1), which only requires "sexual contact," not "sexual penetration." *See* First Supp. R., 11CR2366, pp. 56, 62, 68, 108; Pet. App. E (Nov. 17, 2011 Rule 11 Hearing, p. 22); *see also* Colo. Rev. Stat. § 18-3-401(4) & (6) (defining the terms).

[30] First Supp. R., 11CR2366, pp. 108, 282–283.

[31] First Supp. R., 11CR2449, pp. 94, 268–269.

[32] First Supp. R., 11CR2366, pp. 42, 55–69; First Supp. R., 11CR2449, pp. 37, 41, 51–55.

## II. The state district court denied Petitioner's post-conviction claims in 2014 and 2015, and Petitioner did not appeal.

In 2014 and 2015, Petitioner filed approximately ten post-conviction motions in each of his cases, raising various claims. Those motions had all been denied by October 2015, and Petitioner did not timely appeal any of the denials.[33] Respondent will nonetheless highlight several of those claims because Petitioner is attempting to assert them now in this Court.

**Voluntariness of Plea.** Petitioner argued that his guilty plea was not voluntary, noting that he had expressed some initial confusion and reluctance during the November 17, 2011 arraignment, at which he pleaded guilty.[34] The district court rejected Petitioner's argument in several different orders in 2014 and 2015.[35]

**48-Hour Rule.** Petitioner noted that he was subjected to a warrantless arrest and claimed that he was held for more than 48 hours without a probable cause determination by a magistrate, in violation of *Gerstain v. Pugh*, 420 U.S. 103

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[33] Petitioner's claims were denied in orders in July and September, 2014. First Supp. R., 11CR2366, pp. 141, 155–156, 157–158, 161; 11CR2449, pp. 135, 177–178. Although Petitioner's motion under Colo. R. Crim. P. 35(c) appears to have been addressed in those 2014 orders, it was explicitly denied in an order dated October 13, 2015. First Supp. R., 11CR2366, pp. 195–198; 11CR2449, pp. 181–184. An order denying such a motion is a final appealable order, *see* Colo. R. Crim. P. 35(c)(3)(IX), and any appeal therefore had to be filed within 49 days, *see* Colo. R. App. P. 4(b)(1). No appeal was filed.

[34] First Supp. R., 11CR2366, pp. 115, 118, 127–128, 145; 11CR2449, pp. 109, 112, 121–122, 139.

[35] First Supp. R., 11CR2366, pp. 141, 157–158, 195–198; 11CR2449, pp. 135, 181–184.

(1973) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).[36] The district court rejected this claim in 2015, noting that Petitioner had identified no evidence or facts to support the claim.[37]

**Free Transcripts.** Petitioner argued that he was entitled to free transcripts in order to show that his guilty plea was involuntary and to show that his counsel did not receive a copy of the pre-sentence report 72 hours before the sentencing hearing, as required by statute.[38] The district court rejected Petitioner's request for free transcripts in 2014 and 2015.[39]

### III. The district court denied one post-conviction claim in 2017, and Petitioner's appeal of that ruling is still pending.

In March 2017, Petitioner filed motions under Colo. R. Crim. P. 35(a), which provides that a court may correct a sentence at any time if the sentence was "not authorized by law" or was "imposed without jurisdiction." These motions purported to challenge the district court's jurisdiction, but again argued that Petitioner's guilty pleas were involuntary and that there was no probable cause finding within 48 hours of his arrest.[40] The motions also challenged the deduction of funds from his inmate account and claimed that Colorado's statutes did not authorize a probation

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[36] First Supp. R., 11CR2366, pp. 111, 128, 146, 159–160, 165–167; 11CR2449, pp. 105, 122, 140, 148–149, 153–155.

[37] First Supp. R., 11CR2366, p. 196; 11CR2449, p. 182.

[38] First Supp. R., 11CR2366, pp. 114–116, 145–146; 11CR2449, pp. 139–140.

[39] First Supp. R., 11CR2366, p. 198; 11CR2449, p. 184.

[40] First Supp. R., 11CR2366, pp. 205–218, 246–250; 11CR2449, pp. 191–204, 232–236.

sentence to run consecutive to a prison sentence.[41] The district court denied each of Petitioner's claims on July 23, 2017.[42]

On August 4, 2017, Petitioner filed a timely appeal of the district court's 2017 ruling in Colorado Court of Appeals Case 17CA1385.[43] The Court of Appeals granted Petitioner extensions of time, and Petitioner's opening brief is now due on December 28, 2018. His notice of appeal and other papers filed in that case show that the claims he wishes to present to this Court—regarding the voluntariness of his plea, the 48-hour rule, and his desire for free transcripts—are still being litigated in Colorado's appellate courts and will presumably be addressed by the Colorado Court of Appeals.[44]

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[41] *Id.*

[42] First Supp. R., 11CR2366, pp. 322–325; 11CR2449, pp. 304–307.

[43] First Supp. R., 11CR2366, p. 326; 11CR2449, p. 308.

[44] *See* Aug. 4, 2017 Notice of Appeal, Colorado Court of Appeals Case 17CA1385; *see also* First Supp. R., 11CR2366, pp. 333, 341–342; 11CR2449, pp. 315, 323–324.

## REASONS FOR DENYING THE PETITION

Petitioner's request for certiorari review is premature. Colorado's appellate courts have yet to review Petitioner's claims on their merits, although the Colorado Court of Appeals will address them in pending Case 17CA1385. If needed, Petitioner can then seek review in the Colorado Supreme Court. And if Petitioner is dissatisfied with the resolution of his claims in the Colorado courts, he can seek review in this Court once Colorado's appellate process is complete. It would be extraordinary for this Court to grant review of Petitioner's claims at this stage of the case, without allowing Colorado's appellate courts to first review them on the merits. And Petitioner has not identified any split of authority or other "compelling reasons" that would require this Court to intervene at this stage. Sup. Ct. R. 10. The Petition should therefore be denied.

### I. The Petition is premature because Colorado's appellate courts have yet to review the merits of Petitioner's claims.

The Petition asks this Court to review the Colorado Supreme Court's decision in Case 17SA266. That decision, however, was simply the denial of extraordinary relief, not a ruling on the merits of Petitioner's claims. Petitioner can raise the same arguments he makes in the Petition in his pending appeal before Colorado Court of Appeals, and the Colorado Supreme Court's denial of extraordinary relief has no effect on how the Court of Appeals will address Petitioner's claims. Nor does that denial have any effect on Petitioner's ability to later seek relief in the Colorado Supreme Court and, if he desires, this Court.

### A. The Colorado Supreme Court's refusal to grant extraordinary relief in Case 17SA266 did not address Petitioner's claims on their merits.

In Case 17SA266, Petitioner sought the Colorado Supreme Court's intervention under a state procedural rule that allows litigants to bring original proceedings seeking extraordinary relief when "no other adequate remedy is available."[45] Consistent with both the rule and its common practice, the Colorado Supreme Court denied Petitioner's request without requiring an answer and without opinion or explanation.[46] That does not mean that the Colorado Supreme Court considered or decided Petitioner's claims on their merits.[47] Nor does it preclude the Colorado Court of Appeals from considering the merits of Petitioner's claims in his currently pending appeal in Case 17CA1385.[48]

### B. The Colorado Court of Appeals will address the merits of Petitioner's claims in Case 17CA1385.

The record shows that the three claims Petitioner asks this Court to review—concerning the voluntariness of his guilty plea, compliance with the 48-hour rule, and his request for free transcripts—will be litigated in Case 17CA1385 in the Colorado Court of Appeals. Those issues either were addressed in the district court order that is the subject of the appeal or have otherwise been raised in that appeal

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[45] R., 17SA266, pp. 4–18; *see also* Colo. App. R. 21(a)(1).

[46] *See* Pet. App. A; *see also* C.A.R. 21(h) & (i).

[47] *Meredith v. Zavaras*, 954 P.2d 597, 600 n. 5 (Colo. 1998).

[48] *People v. Daley*, 97 P.3d 295, 297 (Colo. App. 2004).

through motions.[49] In the event Petitioner is dissatisfied with the decision rendered by the Court of Appeals, Colorado's procedures allow him to ask the Colorado Supreme Court for certiorari review.[50] And, of course, Petitioner can seek review in this Court once the state-court process is complete. This Court should therefore deny certiorari and allow Colorado's appellate courts to review and decide Petitioner's claims on the merits in the first instance.

## II. Petitioner's claims are without merit.

Even if Petitioner's claims were not premature, the available record shows that the trial court's orders were correct. That record—which the Colorado Court of Appeals will consider and rule on—supports the trial court's conclusions that Petitioner's guilty plea was voluntary, that a magistrate found probable cause within 48 hours of his arrest, and that Petitioner was not entitled to free transcripts.

### A. The record shows that Petitioner's guilty plea was voluntary.

Petitioner asks this Court to review the voluntariness of his guilty plea under *Boykin v. Alabama*, 395 U.S. 238 (1969), an issue that was addressed in the trial court order that will be reviewed by the Colorado Court of Appeals.[51] The record in Case 17CA1385 is adequate for the Colorado Court of Appeals to review the issue. It

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[49] Pet. ii, 5–27; First Supp. R., 11CR2366, pp. 322–325, 341–342; 11CR2449, pp. 304–307, 323–324.

[50] *See* Colo. Rev. Stat. § 13-4-108; *see also* Colo. R. App. P. 49.

[51] Pet. ii, 16–20; First Supp. R., 11CR2366, p. 324; 11CR2449, p. 306.

shows that the trial judge ensured that Petitioner's initial uncertainty about the guilty plea was resolved before the judge made a finding of voluntariness and accepted the guilty plea.[52] The trial court thus correctly found that Petitioner's guilty plea was voluntary.

### B. The record shows that a magistrate found probable cause within 48 hours of Petitioner's arrest.

Petitioner also claims that no magistrate made a probable cause determination within 48 hours of his warrantless arrest, in violation of *Gerstain v. Pugh*, 420 U.S. 103 (1973) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).[53] But Petitioner was arrested for the child sex assault on June 9, 2011, and the record shows that the very next day—June 10, 2011—a magistrate reviewed a detective's affidavit describing the evidence of that offense and found that the affidavit established probable cause.[54] The Colorado Court of Appeals can therefore review this issue based on the record in Case 17CA1385, and that record shows that Petitioner's argument is incorrect.

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[52] *See* First Supp. R., 11CR2366, pp. 251–258, 11CR2449, pp. 237–244; *see also* Pet. App. E (Transcript, Nov. 17, 2011 Arraignment, pp. 1–22). Petitioner also claimed, in one of his district court filings, that during the November 17, 2011 arraignment, at which he pleaded guilty, the judge began counting down how many minutes Petitioner was taking to decide how to plead. First Supp. R., 11CR2366, p. 128, 11CR2449, p. 122. The record, however, shows this claim about counting down minutes to be false. *See* First Supp. R., 11CR2366, pp. 251–258, 11CR2449, pp. 237–244; *see also* Pet. App. E (Transcript, Nov. 17, 2011 Arraignment, pp. 1–22).

[53] Pet. ii, 10–16, 24–26; First Supp. R., 11CR2366, pp. 322–325; 11CR2449, pp. 304–307.

[54] First Supp. R., 11CR2366, pp. 1–2.

### C. The record shows that Petitioner was not entitled to free transcripts.

Petitioner argues that the trial court erred by not providing him with free transcripts to pursue his appeal.[55] An indigent defendant is indeed entitled to the provision of transcripts at no cost in a *direct* appeal. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). However, this is not a direct appeal, but a collateral attack on a conviction, for which free transcripts are not a constitutional right. *United States v. MacCollum*, 426 U.S. 317, 325–326 (1976).

In any event, there is no need here for the provision of additional transcripts in order for Colorado's appellate courts to address the claims Petitioner has raised. The existing record already contains a transcript of his November 17, 2011 arraignment, which affords a basis for reviewing the voluntariness of his plea.[56] The record also contains a transcript of his February 16, 2012 sentencing hearing.[57] As for his claim regarding the 48-hour rule, there are no relevant transcripts because—consistent with this Court's precedents—no hearing was held when the magistrate, on June 10, 2011, reviewed the police affidavit and found probable cause for his warrantless arrest.[58] Petitioner thus already has access to all the existing transcripts that are relevant to his claims. As the state district court noted in rejecting his most recent such request, the other transcripts Petitioner is seeking

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[55] Pet. ii–iii, 21–22.

[56] First Supp. R., 11CR2366, pp. 251–258, 11CR2449, pp. 237–244; *see also* Pet. App. E (Transcript, Nov. 17, 2011 Arraignment, pp. 1–22).

[57] First Supp. R., 11CR2366, pp. 280–284, 11CR2449, pp. 266–270.

[58] *Gerstain*, 420 U.S. at 114; *County of Riverside*, 500 U.S. at 56. First Supp. R., 11CR2366, pp. 1–2.

are court proceedings where nothing substantive occurred that could affect his claims; thus, the court validly denied his request.[59]

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[59] The first requested date was a court appearance at which the judge served him with a restraining order, the next was an appearance at which Petitioner waived his right to a preliminary hearing, and the remaining four were subsequent dates on which the parties simply rescheduled the arraignment. *See* First Supp. R., 11CR2366, pp. 3–4, 42, 44–46, 50, 341, 376–377; 11CR2449, pp. 41, 44–47, 323, 357–358.