NO. 21-460

In the
Supreme Court of the United States

APRIL DIANE MYRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY

The government concedes that two federal courts of appeal have concluded "that the Constitution forbids the prosecution from relying on the defendant's denial of consent to a warrantless search as evidence of guilt." BIO 8 (citing *United States v. Thame*, 846 F.2d 200, 208 (3d Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978)). That, however, is precisely what the Ninth Circuit allowed the prosecution to do here: April Myres declined to let two FBI agents take fingerprints in her home. Based solely on that clear exercise of her Fourth Amendment rights, the government elicited testimony at trial that she refused to cooperate with the FBI, and that this refusal was an "indicator" of guilt.

The government does not dispute the importance of this constitutional question. Rather, it argues that this Court should not grant review because, it claims, the Ninth Circuit did not allow the government to rely on testimony using Myres's invocation of her Fourth Amendment rights to prove her guilt because the challenged testimony did not expressly mention fingerprinting. But the record establishes, and the district court expressly confirmed, that the challenged testimony was based solely on her Fourth Amendment assertion. As a result, the Ninth Circuit licensed the government to comment adversely on a defendant's assertion of constitutional rights as long as the government keeps the jury in the dark about the details and skips directly to the bottom-line inference of guilt.

Separately, the government asserts that this case is not a good vehicle to consider the question for other reasons, but that's also wrong.

The government claims that the petition should be denied as "interlocutory" because the Ninth Circuit remanded for resentencing. But Myres's conviction is final, she will have no further opportunity to vindicate her Fourth Amendment rights on remand, and the authorities the government cites don't apply here. Because the remand cannot affect the issues raised in this petition, there is no reason to delay review.

The government also contends that this case is a poor vehicle because this Court has not yet answered the threshold question whether the government can comment on a defendant's invocation of her Fourth Amendment rights. But that's a reason to grant the petition, not deny it. This Court frequently reviews threshold questions by addressing their applications in particular cases.

This Court should do so now, despite the government's assertions that this case is "factbound." In truth, the critical facts are undisputed, and the government acknowledges that the threshold legal question is open—making this the opposite of fact-bound error correction. Moreover, this case does not present a unique set of circumstances that are unlikely to recur. To the contrary, the Ninth Circuit's decision ensures that the issue will recur frequently because it offers prosecutors a foolproof way to use defendants' exercise of their constitutional rights as evidence of guilt. Finally, the government argues waiver and harmless error, but the record disproves both. This Court should grant review.

I. This Court Should Address Whether The Government May Use A Defendant's Invocation Of Her Fourth Amendment Rights Against Her

As the government concedes, this Court has not decided whether the Constitution prohibits prosecutors from commenting on defendants' exercise of their Fourth Amendment rights,[1] although two appellate decisions have concluded that it does. BIO 8, 10 (citing *Thame*, 846 F.2d at 208; *Prescott*, 581 F.2d at 1352). Those decisions conflict with the opinion below, which concluded that the government *could* use Myres's refusal to consent to a warrantless search against her. App.3. In so holding, the Ninth Circuit created a work-around that the government can use in every case, letting it use the exercise of constitutional rights as evidence of guilt as long as it jumps directly to the bottom line that the defendant did not cooperate and that that failure to cooperate is evidence of guilt.

The issue presented in this petition is important and likely to recur. In other contexts, this Court has consistently prevented a defendant's invocation of her

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[1] The government nonetheless cites *Wisconsin v. Mitchell,* 58 U.S. 476, 489 (1993), for the proposition that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime." That is irrelevant to the Fourth and Fifth Amendments, violations of which cannot, absent limited exceptions, be used to establish guilt. *Cf. Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (due process violation to use arrestee's silence to impeach explanation offered at trial); *Mapp v. Ohio*, 367 U.S. 643 (1961) (barring use of evidence obtained in violation of the Fourth Amendment). But even if *Mitchell* were relevant, it just underscores the importance of the Court reviewing which constitutional rights merit protection.

constitutional rights from being used against her at trial. Pet. 11; *e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966); *Griffin v. California*, 380 U.S. 609, 611-14 (1965). Penalizing the invocation of constitutional rights is particularly problematic where, as here, those rights are at their apex. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (cleaned up)); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) ("[T]he Fourth Amendment draws 'a firm line at the entrance to the house.'"). To allow the government to use the invocation of a defendant's Fourth Amendment rights to refuse a warrantless search in their home would make those rights—and the heightened level of protection the Constitution affords to the home—a nullity. All the government needs to do is point to the fact of non-cooperation as evidence of guilt in summary, rather than detail. That doesn't just fail to deter law enforcement overreach, it encourages it.

II. This Case Is An Excellent Vehicle To Decide This Question

This Court should grant review because the issue is an important one, it is squarely presented, and none of the government's reasons for denying review here hold up.

A. The Issue Is Squarely Presented

The government suggests that the issue is not squarely presented here because (1) the jury "could not reasonably connect" the claims adjuster's testimony

"to constitutionally protected conduct," and (2) the Ninth Circuit purportedly did not hold "that the claims adjuster was permitted to testify about petitioner's refusal to permit such a search." BIO 8-9 (cleaned up). That gets both the record and the Ninth Circuit's decision fundamentally wrong.

First, the government's assertion that the claims adjuster's testimony was *not* based on Myres's refusal to allow the FBI to dust for fingerprints in her home is incorrect. The *only* FBI request Myres refused was for fingerprinting, ER 1659-61, and *all* of the impressions to which the adjuster testified were based on that refusal. ER 98:3-16. The district court left no doubt about this point. At trial, defense counsel objected that the adjuster's testimony was based on Myres's refusal to allow fingerprinting, and the district court agreed: "Right. You and I know that. The jury does not…." ER 111:17-18. The Ninth Circuit affirmed this ruling that the prosecution could comment adversely on Myres's refusal as long as the witness did not mention fingerprinting. That squarely tees up the issue. It doesn't matter whether the jury could figure out that the testimony was based on her invocation of her Fourth Amendment rights because the Constitution doesn't allow it regardless. Pet. 12-13.

Second, contrary to the government's assertions, the Ninth Circuit did not conclude that testimony about Myres's refusal to consent to a warrantless search would be impermissible. The court expressly *allowed* such testimony because (1) "the jury could not reasonably connect it to constitutionally protected conduct," and (2) even if that testimony was a comment on Myres's exercise of her Fourth

Amendment rights, it "was admitted for a proper purpose: to undermine Myres's theme that she was the victim of a burglary." App.3. (As Myres explained in her petition, the testimony was not in fact admitted for a proper purpose, and the government does not dispute this. Pet. 13.) Thus, the Ninth Circuit affirmed Myres's conviction despite the categorical prohibition the government claims appellate courts (including the Ninth) have adopted. Pet. 13.

B. The Decision Is Not Interlocutory

Alternatively, the government suggests, this Court need not consider this case because it is at an "interlocutory" stage. BIO 7. But the decision below is not interlocutory in any relevant sense: the Ninth Circuit affirmed Myres's conviction, remanding only for resentencing on an unrelated issue. App.3-7. Because Myres can no longer challenge her conviction at resentencing or in a subsequent appeal, *United States v. Herrera*, 414 F. App'x 58, 59-61 (9th Cir. 2011); *United States v. Broussard*, 611 F.3d 1069, 1073 (9th Cir. 2010), there is no possibility that "proceedings on remand may affect the consideration of the issues presented in a petition." BIO 7.

There is no reason to delay review. This Court often grants petitions (including petitions by the government) seeking review of decisions affirming a defendant's conviction while vacating her sentence. *E.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020); *Boyle v. United States*, 556 U.S. 938 (2009); *Oregon v. Guzek*, 546 U.S. 517 (2006); *United States v. Cotton*, 535 U.S. 625 (2002); *Koon v. United States*, 518 U.S. 81 (1996); *United States v. Dunnigan*, 507 U.S. 87 (1993); *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

The government cites no contrary case, relying instead on two *civil* cases seeking review of interlocutory motion-to-dismiss decisions. BIO 7 (citing *Hamilton-Brown Shoe Co. v. Wolf Bros & Co.*, 240 U.S. 251, 253-54 (1916); *NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (mem.) (statement of Kavanaugh, J.)). For criminal cases, the government cites only a single footnote in a treatise, which does not support the government's argument. BIO 7 (citing Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019)). The footnote first cites a law review article arguing against reviewing interlocutory orders when a final disposition below might make it unnecessary to address an important and difficult constitutional question. *Id.* There is no chance of that here, where the Ninth Circuit finally resolved the only question presented and resentencing cannot moot it. The footnote next summarizes the government's view that judicial efficiency would be better served by deferring review "until in fact, the defendant is convicted." *Id.* Myres *has* "in fact" been convicted. *Id.* Finally, the footnote acknowledges that this Court has granted review of criminal decisions far less final than the decision below. *Id.*[2] The government's sole authority thus provides no basis for delaying review until after resentencing.

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[2] *See Bates v. United States*, 522 U.S. 23 (1997) (reviewing reinstatement of prosecution); *Solorio v. United States*, 483 U.S. 435 (1987) (same); *Oliver v. United States*, 466 U.S. 170 (1984) (reviewing reversal of order suppressing evidence).

C. The "Threshold Question" Should Be Decided Here

The government contends review is unwarranted because the Court has not yet decided the threshold question. BIO 10. Leaving aside the oddity of suggesting that review is more appropriate when a question has already been decided (which would seem to be pure error correction), that threshold question is important, was litigated and addressed in the district court and the Ninth Circuit, and is squarely presented by Myres's petition.

The government nonetheless suggests that the Court should wait for a petition to decide the "upstream" question whether the Constitution imposes such a rule before deciding the "downstream" question whether it applies here. BIO 11. But this Court routinely adopts "upstream" legal rules in the process of applying those rules to the "downstream" facts of the case before it. *E.g.*, *District of Columbia v. Heller*, 554 US 570, 635 (2008) (adopting and applying individual-right reading of Second Amendment and to specific "ban on handgun possession in the home"); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (adopting new approach to Confrontation Clause and applying to facts of case). After all, this Court can resolve only "concrete legal issues, presented in actual cases, not abstractions." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (cleaned up). There is no reason not to do the same here.

D. None of the Government's Fallback Arguments Hold Water.

Finally, the government invokes waiver and harmless error to contend that this case is a bad vehicle. Not so. Myres did not waive any part of her argument. BIO 11. She objected to the adjuster's testimony repeatedly before the district court, and preserved these arguments on appeal, even relying on *Doyle*, the very case the government claims she waived. Answering Br. 3, 49; Reply Br. 8 n.3.

As for harmless error, the government never argued before that the error was harmless beyond a reasonable doubt—the standard it now concedes governs here. BIO 11. The government cannot raise a constitutional harmless error argument for the first time in this Court.

Even if it could, the error was not harmless. The government fails even to mention, let alone answer, the facts showing how close the case was and how hotly contested each of the government's claims were. While the government claimed that the entirety of Myres's insurance claim was a fraud, Myres proved that many valuable items were actually stolen from her home and that her ex-boyfriend (with whom she had broken up and cut off communications before the burglary) was the culprit.[3] In response, the

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[3] Photos of many of the items on Myres's claim form were found on her ex's phone, with texts to others—but not Myres—looking for buyers. The government also notes that there was no evidence of forced entry, but doesn't acknowledge that Myres's backyard was accessible from the home next door and that the police found

government waffled about whether her ex had committed the burglary, ER 375, 396, 1604-05, and its suggestion that Myres conspired with him blew up on cross-examination. ER 634-35.

Myres directly contested more granular accusations too. The government reports that Myres's insurance claim "sought reimbursement for luxury items worth thousands of dollars, and that those items were later recovered from petitioner's home nearly a year after the purported burglary," BIO 11, but doesn't mention that only three of the forty-three items on her claim form were recovered from her home (and that far more were in her ex's possession). ER 873-76. For each of those three items, Myres had a persuasive explanation for a good faith mistake, such as a purse found in a mismatched duster bag. ER 687-88. Myres also did *not* include on her claim form other items her ex stole, confirming that her form was sloppily, not fraudulently prepared. ER 885-87, 1729.

As its other basis for harmless error, the government claims Myres made misrepresentations about, for example, who was at her home the evening before the burglary and whether she had a boyfriend who could have been involved. Here too, the government leaves out the evidence that Myres did not make these statements to defraud her insurer, but to try to protect her son and friends, whom she believed the police were unfairly profiling. Video evidence confirmed that her son and friends did not steal anything, and her statements weren't intended to and

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the door to the backyard open after the burglary. Opening Br. 15-16.

didn't impact her insurer.[4] ER 454. Any failure to mention her ex-boyfriend was intended to save her job—which she would have otherwise lost—not defraud her insurer. Opening Br. 14. Myres had not had any contact with him since their breakup before the burglary, and did not know he was involved in the burglary until the government indicted her and produced evidence that he was trying to sell her stolen possessions. Far from wanting to protect him, she would have had every reason to bring him to justice.

Finally, the government claims that Myres fraudulently sought recovery for Sheriff's Department property. BIO 11. But the Department's own policies, which Myres signed, and one of her superiors, both explained that she was liable for lost Department-issued items. ER 725, 1372-73, 1720-21. That evidence undercut any claim that Myres fraudulently claimed those items. Opening Br. 16.

The government's harmless error claim is meritless, especially under the beyond-a-reasonable-doubt standard. No court below affirmed on this basis, nor could it on this record.

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[4] The government suggests that Myres was uncooperative with a police officer who called her (BIO 3), but Myres had already submitted to two interviews by that officer and, far from refusing to talk further, asked the officer to contact her through counsel. ER 114, 119.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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