No. 21-

IN THE

Supreme Court of the United States

NAHID KADIR MOSHREFI,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment protects an individual who invokes her privilege against self-incrimination during pre-arrest, non-custodial questioning by police officers.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Nahid Kadir Moshrefi. Respondent is the State of Colorado. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the Colorado Supreme Court and the Colorado Court of Appeals:

The People of the State v. *Nahid Kadir Moshrefi,* No. 2021SC503 (Colo. Nov. 22, 2021)

The People of the State v. *Nahid Kadir Moshrefi,* No. 17CA1929 (Colo. App. May 27, 2021)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nahid Kadir Moshrefi respectfully petitions for a writ of certiorari to review the judgment and opinion of the Colorado Court of Appeals.

OPINIONS BELOW

The order of Colorado Supreme Court is unpublished and is reproduced in the appendix to this petition at Pet. App. 29a. The opinion of Colorado Court of Appeals is unpublished and is reproduced in the appendix to this petition at Pet. App. 1a–28a.

JURISDICTION

The Court of Appeals for the State of Colorado entered judgment on May 27, 2021. Pet. App. 1a–28a. The Supreme Court of Colorado denied Ms. Moshrefi's petition for a writ of certiorari on November 22, 2021, Pet. App. 29a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

LEGAL FRAMEWORK

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Introduction

This case presents an open question that this Court has acknowledged twice—namely, whether and under what circumstances the Fifth Amendment's privilege against self-incrimination protects individuals in pre-arrest, noncustodial questioning by police. In *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980), the Court held that "the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility" when that individual subsequently elects to testify at trial. But *Jenkins* expressly declined to "consider whether or under" what conditions "prearrest silence may be protected by the Fifth Amendment" outside of impeachment. *Id.* at 236 n.2.

Salinas v. *Texas*, 570 U.S. 178 (2013), similarly left open the question here. The Court there held that when an individual does not "expressly invoke the privilege against self-incrimination in response to [an] officer's question," but simply stays silent during a prearrest interview, the Fifth Amendment offers no protection because "the privilege . . . is not self-executing." *Id.* at 181. But *Salinas* left unresolved whether individuals are afforded constitutional protection when they *do* affirmatively invoke the privilege against self-incrimination in a prearrest, non-custodial setting. See *id.* at 183.

That question is now squarely presented in this case When confronted by two detectives in her own home

regarding an ongoing investigation, Ms. Moshrefi repeatedly invoked her privilege against self-incrimination.

At the beginning of the interview, she asked whether the detectives had "a warrant for my arrest." Pet. App. 84a. When told that they did not, she told them to "please get one and I'll obtain an attorney and talk to you at that point." *Id.* Yet that did not end the interview, and the detectives went forward with the interview uninterrupted. Cf. *Smith* v. *Illinois*, 469 U.S. 91, 97 n.6 (1984) (holding such actions unconstitutional in context of custodial interrogation).

Minutes later, Ms. Moshrefi indicated that she was "done answering questions." Pet. App. 86a. Instead of respecting that request, however, the detectives continued to press forward with another set of questions. *Id.*

Following another round of questioning, Ms. Moshrefi insisted, once again, that she "want[ed] to have some representation for me." *Id.* at 101a. Yet once again the interview ran on unabated. It was not until 37 minutes in, after Ms. Moshrefi stated—twice in a row—that she "want[ed] to call an attorney," that the interview finally ceased. *Id.* at 105a.

Trial counsel moved to suppress statements Ms. Moshrefi made during the interview. The trial court denied this motion, and the Colorado Court of Appeals affirmed. See Op. at 16 ¶ 34 ("[T]he Fifth Amendment privilege does not apply outside of "the context of some legal proceeding . . .' or a 'custodial interrogation' . . . ."). In so doing, the Court of Appeals joined an already entrenched and wide split of law.

Four federal circuits (including the Tenth Circuit, contrary to Colorado's decision here) and at least two state high courts hold that the Fifth Amendment does

apply in the context of non-custodial questioning by the police. See*, e.g.*, *Combs* v. *Coyle*, 205 F.3d 269, 283 (6th Cir. 2000)*; United States* v. *Burson*, 952 F.2d 1196, 1200–01 (10th Cir. 1991)*; Coppola* v. *Powell*, 878 F.2d 1562, 1564, 1568 (1st Cir. 1989)*; United States ex rel. Savory* v. *Lane*, 832 F.2d 1011, 1018–20 (7th Cir. 1987); *State* v. *Costillo*, 475 P.3d 803, 809 (N.M. Ct. App. 2020); *State* v. *Cassavaugh*, 12 A.3d 1277, 1286–87 (N.H. 2010).

Four other circuits and at least one state high court, however, have held that officers can continue to question and obtain evidence even *after* individuals unequivocally invoke their Fifth Amendment rights. See*, e.g.*, *United States* v. *Oplinger*, 150 F.3d 1061, 1066–67 (9th Cir. 1998); *United States* v. *Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States* v. *Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *United States* v. *Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *State* v. *Kinder*, 942 S.W.2d 313, 326 (Mo. 1996).

For Ms. Moshrefi, the responses that she gave during her interview were essential to her eventual prosecution and subsequent conviction. Had prosecutors brought charges in federal court rather than state court, or in nearby New Mexico, for example, those statements would not have been admitted and Ms. Moshrefi would not have been convicted. Such a disparity on an important and recurring question warrants review—especially because Ms. Moshrefi was in her own home, expressly and repeatedly invoking her privilege, while detectives continued to question and used her statements against her. Colorado's decision (and the decisions of like-minded courts) combine with *Jenkins* to create a type of general warrant: Armed officers can come into a home and start asking questions, and whether the occupant remains silent or makes a

statement, that act becomes admissible evidence. The Fifth Amendment must mean more.

B. Factual Background

On the morning of April 20, 2016, Detectives Beren and Calhoun arrived at Ms. Moshrefi's home. Pet. App. 55a–56a, 74a. The detectives were investigating money Ms. Moshrefi received from her boyfriend, Bill Maruca, following reports from Mr. Maruca's bank and his therapist regarding possible elder abuse. *Id.* at 36a–39a.

Ms. Moshrefi lived with her estranged husband, Mr. Joseph Zalewski; they slept in separate bedrooms. *Id.* at 43a. When the detectives arrived, Mr. Zalewski let them into the garage, opened the door to the house, and called Ms. Moshrefi. *Id.* at 55a–56a. When Ms. Moshrefi appeared, the detectives told Mr. Zalewski they "need[ed] to talk to [Ms. Moshrefi] in private." *Id.* at 74a. Ms. Moshrefi objected, insisting that he stay. But the detectives demanded Mr. Zalewski "step out" of the house, and he complied. *Id.* at 57a–58a, 74a. One of the detectives was visibly armed. *Id.* at 56a

Ms. Moshrefi repeatedly asked why the detectives were there. *Id.* at 76a, 79a, 85a. They deflected these questions and gave limited information. *Id.* The detectives instead asked about Mr. Maruca giving Ms. Moshrefi money. *Id.* at 83a–84a. Given the nature of the questions, Ms. Moshrefi inquired further, prompting the following exchange:

> [Ms. Moshrefi]: Is this a criminal investigation? Am I under investigation, what is this?
>
> Det. Beren: Yes, it's a criminal investigation . . .
>
> [Ms. Moshrefi]: So . . .
>
> Det. Beren: into the money that Bill has given you.

> [Ms. Moshrefi]: . . . do you have a . . . Ok, do you have a warrant for my arrest?
>
> Det. Beren: No, not yet.
>
> [Ms. Moshrefi]: Ok, then please get one and I'll obtain an attorney and talk to you at that point.

Id. at 84a.

Detective Beren seemed prepared to end questioning, responding, "Ok. Um the, let's see. Alrighty . . ." *Id*. However, her counterpart, Detective Calhoun, who had been mostly silent up until this point, interjected, telling Ms. Moshrefi that they already had a lot of information, the money transfers looked bad, and they wanted to know how she spent the money. *Id*., 85a.

Detective Beren chimed back in, with apparent recognition that Ms. Moshrefi had sought to end the conversation:

> Det. Beren: Ok. Alright, if you're done answering questions them um that's all I've got for now.
>
> [Ms. Moshrefi]: Ok

Id. at 86a.

But Detective Calhoun would not give up so easily, and he continued to question Ms. Moshrefi. The detectives became more confrontational over the course of the interview. See 87a–105a.

After 27 minutes, Ms. Moshrefi reiterated that she wanted a lawyer. *Id*. at 84a. Nevertheless, the detectives continued to interrogate her. *Id*. at 84a–105a. A few minutes later, Ms. Moshrefi declared, yet again, that she wanted a lawyer. *Id*. at 105a. The detectives finally halted questioning. *Id*.

C. Pre-Trial and Trial Proceedings

Ms. Moshrefi was charged with exploitation of and theft from an at-risk adult. Prior to trial, defense counsel moved to suppress Ms. Moshrefi's statements. He argued, among other things, that police were required to honor Ms. Moshrefi's invocation of her rights even though she was not in custody. *Id.* at 59a–65a, 68a–73a. The trial court denied the motion, ruling that the Fifth Amendment applies during "custodial interrogation," and that Ms. Moshrefi was not in custody. *Id.* at 66a–67a.

At trial, the prosecution relied heavily on Ms. Moshrefi's statements to argue that she knowingly deceived Mr. Maruca into giving her money. *Id.* at 33a–34a, 47a–53a. The jury convicted her as charged.

D. Proceedings on Appeal

Ms. Moshrefi argued that she invoked her Fifth Amendment privilege against self-incrimination when she told the detectives, "please get [a warrant] and I'll obtain an attorney and talk to you at that point." She argued that police had a duty to honor that invocation. Because they did not do so, her subsequent statements should have been suppressed.

The Colorado Court of Appeals held that "the Fifth Amendment does not apply outside of the context of . . . custodial interrogation." *Id.* at 17a. Ms. Moshrefi petitioned for certiorari review in the Colorado Supreme Court, arguing that that court should revisit its holding in *People* v. *Coke*, 461 P.3d 508 (Colo. 2020), on which the Court of Appeals relied to conclude that the Fifth Amendment privilege against self-incrimination did not apply. The Colorado Supreme Court denied review.

REASONS FOR GRANTING THE PETITION

I. COURTS REMAIN SPLIT POST-*SALINAS* OVER WHETHER THE CONSTITUTION PROHIBITS USING PREARREST, PRE-*MIRANDA* SILENCE AS EVIDENCE OF GUILT.

1. The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Consistent with this protection, the government generally may not introduce into evidence statements from those in custody if it fails to first inform them of their rights to silence and to counsel. See *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). Once a person adequately invokes either right, the government must "cut off questioning" and "scrupulously honor[ ]" the request. *Id.* at 474, 479; see also *Smith*, 469 U.S. at 98.

A lingering and unresolved issue—which this Court first acknowledged over forty years ago—is how the Fifth Amendment's protections apply in the pre-arrest, noncustodial context. Thus, in *Jenkins* v. *Anderson*, the Court noted the yet-to-be decided issue of "whether or under what circumstances prearrest silence may be protected by the Fifth Amendment." 447 U.S. at 236 n.2. The Court granted certiorari in *Salinas* v. *Texas* intending to decide the issue—namely, "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." 570 U.S. at 183. But *Salinas* proved a poor vehicle. The petitioner had failed adequately to "invoke the privilege during his interview," so the Court found "it unnecessary to reach that question." *Id.* As a result, the Court left open again whether the Fifth Amendment provides constitutional protection when there is no ambiguity about a person's assertion of their rights.

2. With no resolution from this Court on whether and how the Fifth Amendment protects individuals during prearrest, noncustodial police questioning, the issue has plagued lower courts and produced an intolerable split of authorities. Four federal courts of appeals and at least eight state appellate courts had ruled before *Salinas*, for example, that the Fifth Amendment prohibits the government from using silence in the prearrest, pre-*Miranda* context as evidence in its case-in-chief—thus necessarily concluding that the Fifth Amendment provides some protection in this context. See *Combs* v. *Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States* v. *Burson*, 952 F.2d 1196, 1200–01 (10th Cir. 1991); *Coppola* v. *Powell*, 878 F.2d 1562, 1564, 1568 (1st Cir. 1989); *United States ex rel. Savory* v. *Lane*, 832 F.2d 1011, 1018–20 (7th Cir. 1987); *State* v. *Moore*, 965 P.2d 174, 180–81 (Idaho 1998); *State* v. *Rowland*, 452 N.W.2d 758, 763 (Neb. 1990); *State* v. *Boston*, 663 S.E.2d 886, 896 (N.C. Ct. App. 2008); *State* v. *Cassavaugh*, 12 A.3d 1277, 1286–87 (N.H. 2010); *State* v. *Leach*, 807 N.E.2d 335, 339–41 (Ohio 2004); *State* v. *Palmer*, 860 P.2d 339, 349–50 (Utah Ct. App. 1993); *State* v. *Easter*, 922 P.2d 1285, 1291–93 (Wash. 1996); *State* v. *Fencl*, 325 N.W.2d 703, 710 (Wis. 1982).

At the same time, four federal courts of appeals and at least five state appellate courts reached the opposite conclusion—that this evidence *is* constitutionally permissible. See *United States* v. *Oplinger*, 150 F.3d 1061, 1066–67 (9th Cir. 1998), *overruled on other grounds by United States* v. *Contreras*, 593 F.3d 1135 (9th Cir. 2010) (per curiam); *United States* v. *Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States* v. *Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *United States* v. *Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *State* v. *Leecan*, 504 A.2d 480, 484 (Conn. 1986); *People* v. *Schollaert*, 486 N.W.2d 312, 315 (Mich. Ct. App. 1992); *State* v.

Borg, 806 N.W.2d 535, 543 (Minn. 2011); *State* v. *Kinder*, 942 S.W.2d 313, 326 (Mo. 1996); *State* v. *Helgeson*, 303 N.W.2d 342, 347 (N.D. 1981).

This divide has only deepened since *Salinas*, as courts continue to reach conflicting conclusions. Compare *United States* v. *Okatan*, 728 F.3d 111, 116–17, 119–20 (2d Cir. 2013) (concluding Fifth Amendment applies to police questioning in prearrest, noncustodial context to bar later comment on silence); *State* v. *Lovejoy*, 89 A.3d 1066, 1075 (Me. 2014) (same); *Costillo*, 475 P.3d at 809 (same), with *State* v. *Lopez*, 279 P.3d 640, 645 (Ariz. Ct. App. 2012) (concluding the opposite). Nor have the courts that already ruled on the issue changed course; rather, several of them have reiterated their pre-*Salinas* positions. See, *e.g.*, *United States* v. *Howard*, 785 F. App'x 93, 97 (4th Cir. 2019) ("Yet a prosecutor may introduce 'testimony concerning a defendant's silence when the defendant has not received any *Miranda* warnings during the period in which he remained silent immediately after his arrest.'" (quoting *Love*, 767 F.2d at 1063) (cleaned up)); *United States* v. *Wilchcombe*, 838 F.3d 1179, 1191 (11th Cir. 2016) ("Whatever the state of the law in other circuits, in our circuit it was permissible for the government to comment on Beauplant's silence."); *id.* at 1190 (citing *Rivera*, 944 F.2d at 1568); see also *State* v. *Parker*, 334 P.3d 806, 821 (Idaho 2014); *State* v. *Batayneh*, 780 S.E.2d 891, at *3–4 (N.C. Ct. App. 2015) (unpublished opinion).

Indeed, lower courts have highlighted the split and the lack of guidance from this Court. The Eleventh Circuit noted "that the circuit courts do not agree as to when the government may comment on a defendant's silence." *Wilchcombe*, 838 F.3d at 1190. Some "[c]ircuits prohibit the use of even pre-arrest silence as substantive evidence of guilt." *Id.* A few "prohibit the use

of post-arrest, pre-*Miranda* silence as substantive evidence of guilt." *Id.* Still others "permit the government to comment on a defendant's silence at any time prior to the issuance of Miranda warnings." *Id.* And "[a]lthough the Supreme Court once granted certiorari [in *Salinas*] to resolve this question, the Court ultimately decided the case on other grounds, leaving the circuit split in place." *Id.*

Likewise, the New Mexico Court of Appeals noted in *Costillo* the longstanding and unresolved split:

> In *Jenkins* v. *Anderson*, the United States Supreme Court held that use of prearrest silence to impeach a criminal defendant's credibility does not violate the Fifth Amendment, but the Court expressly reserved the question of whether a defendant's prearrest silence can be used in circumstances other than impeachment. That question has remained open since *Jenkins*, as evinced by the division among lower courts considering whether the Constitution protects prearrest, pre-*Miranda* invocations of silence from substantive evidentiary use.

Costillo, 475 P.3d at 808 (citations omitted).

II. THE DECISION BELOW IS INCORRECT.

A. The Privilege Against Self-Incrimination is Deeply Rooted and Applies Broadly.

According to the Colorado Court of Appeals, "the Fifth Amendment privilege does not apply outside of 'the context of some legal proceeding in which an individual is being asked to testify against herself' or a 'custodial interrogation.'" Pet. App. 17a (citation omitted). In other words, if an individual is neither testify-

ing in some legal proceeding nor in custody, the individual has no Fifth Amendment protections whatsoever.

That cannot be correct. There is nothing in the Fifth Amendment that says it applies *only* when an individual is in custody. Rather, this Court's jurisprudence has consistently made clear that the Amendment sweeps broadly.

In *Escobedo* v. *Illinois*, the police jeopardized the defendant's privilege against self-incrimination by continuing to question him after his explicit request for the assistance of counsel. 378 U.S. 478, 481, 488, 491 (1964). *Escobedo* was decided pre-*Miranda*, so the defendant had no right to receive an explicit warning about his Fifth Amendment privilege, nor did he receive any such warning. *Id.* at 479–83. Still, this Court held that the defendant in fact had the privilege. No warning, or right to be warned, was necessary to create it.

Miranda itself reinforces the point. That decision established that individuals subject to custodial interrogation must be warned explicitly of their Fifth Amendment rights. *Miranda*, 384 U.S. at 467. To reach that conclusion, *Miranda* traced the privilege against self-incrimination to the Founders' desire to right the wrongs of the English Star Chamber, in which individuals were required to swear an oath binding them "to answer to all questions posed . . . on any subject." *Id.* at 458–59. By contrast, the Founders sought to rebalance "the proper scope of governmental power over the citizen," allowing individuals a zone of privacy from governmental inquisition. *Id.* at 460. *Miranda* described this privilege as "*the* essential mainstay of our adversary system." *Id.* (emphasis added). That essential privilege is particularly *at risk* during custodial interrogation, requiring the greater safeguard of an

explicit warning, but it is certainly not *limited to* custodial interrogation.

Consonant with these foundational cases, Ms. Moshrefi had the right not to incriminate herself—a right she explicitly invoked repeatedly after she learned that the interview was part of a criminal investigation in which she was a suspect. That constituted "per se an invocation of [her] Fifth Amendment rights, requiring that all interrogation cease." *Fare* v. *Michael C.*, 442 U.S. 707, 719 (1979); *Doyle* v. *Ohio*, 426 U.S. 610, 618–19 (1976) (it is "fundamentally unfair and a deprivation of due process" for pre-trial violations of a criminal defendant's Fifth Amendment rights to later penalize that defendant at trial.).

B. Ms. Moshrefi's Interview was Improperly Admitted as Substantive Evidence.

This Court has established a clear distinction between self-incriminating statements used as impeachment and self-incriminating statements used as substantive evidence of guilt.

In *Griffin* v. *California*, the defendant chose not to testify during the guilt phase. 380 U.S. 609, 609 (1965). The trial court allowed the prosecutor to comment on that silence as substantive evidence of the defendant's guilt. *Id.* at 611. This Court criticized this practice, describing it as "in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." *Id.* at 613. That amounts to "a penalty imposed by courts for exercising a constitutional privilege." *Id.* at 614.

By contrast, statements taken in violation of *Miranda* are admissible to impeach defendants' credibility. See *Harris* v. *New York*, 401 U.S. 222, 225 (1971); *Jenkins*, 447 U.S. at 238 ("[T]he Fifth Amendment is

not violated by the use of prearrest silence to impeach a criminal defendant's credibility.").

It is easy to harmonize these cases: both rules serve to "advance[] the truth-finding function of the criminal trial." *Id.* at 238. On the one hand, defendants have no right to commit perjury. *Harris*, 401 U.S. at 225. On the other, the substantive privilege against self-incrimination is a bedrock of our adversarial system, see *Miranda*, 384 U.S. at 460, which this Court has always held is the most effective guarantee of reliability and truth. See, *e.g.*, *Herring* v. *New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

Ms. Moshrefi's case fits squarely under this framework. Her interview answers formed an integral part of what the jury heard at trial before it returned a guilty verdict. The prosecution's opening statement employed Ms. Moshrefi's responses to the detectives' questioning to depict her as deceptive and conscious of her own guilt. These themes were echoed in closing statements. And consonant with *Harris*, *Jenkins*, and *Griffin*, that strategy—using such statements as substantive evidence of guilt—was improper.

Ms. Moshrefi's case also presents a question this Court sought to resolve in *Salinas* v. *Texas*. There, the Court ultimately ruled that the defendant had failed to "invoke the privilege during his interview," so it was "unnecessary to reach [the] question" of what substantive rights a defendant is entitled to with a sufficient assertion. 570 U.S. at 183. Not so here. Ms. Moshrefi explicitly invoked her privilege multiple times, satisfying this Court's "express invocation requirement." *Id.* at 187. Granting this petition would thus provide

an opportunity to apply the *Salinas* rule clearly, emphasizing the importance of "[doing] enough to put police on notice that [a defendant] is relying on his Fifth Amendment privilege." *Id.* at 188.

Ms. Moshrefi offers this Court a workable rule that is entirely consistent with decades of precedent: individuals need not be *warned* of their Fifth Amendment privilege against self-incrimination in a pre-arrest, non-custodial interrogation. But where an individual *expressly invokes* that privilege and police nonetheless continue questioning, any statements made after that invocation may not be introduced at trial as substantive evidence of guilt.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE SPLIT.

1. There is no question on these facts that Ms. Moshrefi expressly invoked her Fifth Amendment privilege. And there is no question that the issue was preserved throughout.

First, before trial, Ms. Moshrefi moved to suppress the 27 minutes of the interview that occurred after she advised the detectives that she would talk to them after they had gotten a warrant and she had gotten an attorney. Pet. App. 68–71a. In denying this motion to suppress, the trial court observed that the motion "cites cases that are *Miranda* based," and proceeded to analyze Ms. Moshrefi's invocation of her right to counsel under both the Fifth and Sixth Amendments. *Id.* at 66a.

Ms. Moshrefi's statements in that interview formed an integral part of what the jury heard at trial before it returned a guilty verdict. The jury heard a recording of the complete interview, and was provided with a transcript. *Id.* at 41a–42a. Both the prosecution and defense theories of the case hinged on whether Ms.

Moshrefi had deceived Mr. Maruca by telling him she had cancer. The prosecution's opening statement uses Ms. Moshrefi's responses to the detectives' questioning to depict petitioner as deceptive and conscious of her own guilt, claiming that she changed her story over the course of that interview from flatly denying that she had ever told Mr. Maruca she had cancer to "admit[ting] that she told Bill she was paying a doctor for treatment, if she didn't get treatment, she was going to die" and that she made up this story "to [get] attention." *Id.* at 33a. By contrast, the defense opening statement emphasized that Ms. Moshrefi "specifically" told the detectives "I never told him I had cancer" and provides an alternate narrative to contextualize Mr. Maruca's gifts. *Id.* at 64a, 69a.

The closing statements similarly highlighted Ms. Moshrefi's pre-arrest interview responses. According to the prosecution, one "layer of deception" was that Ms. Moshrefi told detectives she had never told Mr. Maruca she had cancer. *Id.* at 45a. Another "layer" was the statements she made to the detectives about Mr. Maruca's treatment at Ms. Moshrefi's clinic, Holistic Healing Health, and the charges for that treatment. *Id.* at 80a. The jury was instructed that "deception" was an element of both of the offenses with which Ms. Moshrefi was charged. See *Id.* at 30a.

Second, the Colorado Court of Appeals held "[u]nder the Due Process Clauses of the United States and Colorado Constitutions" that Ms. Moshrefi's April 2016 statements were voluntary under the totality of the circumstances, *Id.* at 9a–10a, and that she was not in custody, so no Fifth Amendment right could have attached, *id* at 18a.

Finally, the case is uncomplicated by alternative holdings. See *id.* at 9a–10a, 18a. The Colorado Court of Appeals squarely held that the admitted statements

were "voluntary." No alternative "harmless error" argument was even mounted by the prosecution on this point. *Id.* at 12a–14a.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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