No. 08-

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

KARIN J. MORTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

STEVE SIX
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General
(Counsel of Record)
JARED S. MAAG
Deputy Solicitor General
120 S.W. 10th Ave., 2nd Fl.
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." In this case, the Kansas Supreme Court held that a suspect's confession was rendered involuntary for due process purposes because a government agent made a single misleading but non-coercive statement to the suspect, even though the court explicitly found that (1) there was no *Miranda* violation, (2) the agent made no false statements about the evidence against the suspect nor about the applicable law, and (3) "there was nothing coercive about the manner and duration of the interview."

This case thus presents the following question:

Whether police deception, standing alone, can render an otherwise voluntary confession "involuntary" for due process purposes?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully requests that this Court grant the petition for a writ of certiorari and summarily reverse the judgment of the Kansas Supreme Court. In the alternative, the Attorney General requests that the Court grant the petition and set the case for full briefing and oral argument.

OPINIONS BELOW

The July 3, 2008, opinion of the Kansas Supreme Court (Pet. App. 1a–44a) is reported at 186 P.3d 785 (Kan. 2008). The Kansas Court of Appeals opinion (Pet App. 45a–51a) is unpublished. No. 97,848, 2007 WL 2080540 (Kan. Ct. App. July 20, 2007).

JURISDICTION

The Kansas Supreme Court rendered its decision on July 3, 2008. This petition has been filed within 90 days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

STATEMENT

1. Respondent Karin Morton worked for the Ottawa Recreation Commission (ORC), a taxpayer-funded, local government entity that provides recreation services for the city of Ottawa, Kansas. Appendix to Petition for a Writ of Certiorari (hereafter "Pet. App.") 5a. As part of her duties,

Respondent was authorized to purchase surplus federal government property. *Id.*

On behalf of the ORC, Respondent purchased several federal surplus trailers, which under federal rules and regulations had to be used for public purposes. Pet. App. 5a. When the local director of the federal surplus property program, Paul Schwartz, noticed one of the trailers located at Respondent's residence, he became suspicious and sent a form to the ORC requesting verification that all federal surplus trailers were being used for public purposes. *Id.* at 5a–6a. Respondent completed and signed the form, attesting that all of the former federal trailers were located at ballparks in Ottawa where they were being used for concession stands and quarters for recreational staff and officials. *Id.* at 6a.

Schwartz then made his concerns known to the General Services Administration (GSA) and local police. Pet. App. 6a. An Ottawa police officer interviewed Respondent, with her attorney present. The officer gave Respondent *Miranda* warnings and the interview was recorded. Ottawa police then provided a report to GSA, which began its own investigation. *Id.*

The GSA investigator was Special Agent John Pontius. Pet. App. 6a. Pontius contacted Respondent to see if she would meet with him. She agreed, and Pontius met with her at the Ottawa police station. *Id.* He did not give her *Miranda* warnings, but he did inform her that she was not under arrest, that she did not have to answer questions, and that she could leave at any time. Respondent was not handcuffed or

restrained in any way during the interview. *Id.* at 8a.

In the interview, Respondent acknowledged that she had received the compliance form from Schwartz, that she had filled out the form, and that the handwriting and signature on the form were hers. Pet. App. 6a. She also told Pontius that she had parked a surplus trailer at her residence and that she had purchased the trailer as a gift for her husband. *Id.* at 47a. Respondent testified that it was not until near the end of the interview that she realized there was an ongoing criminal investigation into this matter. *Id.* at 9a.

2. Respondent was charged with one count of making a false information in violation of Kan. Stat. Ann. § 21-3711, a felony. Pet. App. 7a. She moved to suppress the statements she made to Special Agent Pontius, and the district court held a suppression hearing. *Id.* In that hearing, Respondent testified that when Pontius first called her, she asked him whether her attorney should be present for the interview. According to Respondent, Pontius told her it would be an "informal" interview and that "no, it's not that kind of interview. Some people bring their attorneys but it's nothing you'll need an attorney for." *Id.* at 7a–8a. Respondent further testified that she did not realize that Pontius was conducting a criminal investigation, or that there was an ongoing criminal investigation of any kind. *Id.* at 9a. According to Respondent, had she known those facts, she would never have agreed to speak to Pontius without her attorney. *Id.*

Pontius testified that he first contacted the attorney who had previously represented Respondent before contacting Respondent, but that the attorney's firm indicated that the firm was not sure it would continue representing Respondent. Pet. App. 9a. Only then did Pontius contact Respondent directly, and she agreed to meet with him at the Ottawa police station. *Id.* at 10a.

Pontius denied telling Respondent she did not need an attorney, and he testified that he made her aware that he was a criminal investigator for GSA. Pet. App. 10a. Pontius further testified, consistently with Respondent's testimony, that he told her that she was not under arrest, that she was not being detained, that the interview was not mandatory, that she could stop talking at any time, and that she was free to leave any time she wanted. Pontius testified that he did not give Respondent *Miranda* warnings because she was not in custody. *Id.*

The district court granted Respondent's motion to suppress. Pet. App. 10a. As the Kansas Supreme Court described it, the "basis for the trial court's decision is difficult to discern, but the ruling appears to have been based on two grounds: the agent's failure to provide *Miranda* warnings and the [trial] court's conclusion that the agent's conduct was unfair, rendering Morton's statements involuntary." *Id.* at 10a–11a.

3. The Kansas Court of Appeals reversed the trial court. First, the court of appeals emphasized that *Miranda* warnings are only required if police engage in a custodial interrogation. Pet. App. 48a. The

court of appeals briefly discussed the trial court's "abbreviated factual findings" that Respondent may have been misled about the nature of the interview and the existence of an ongoing criminal investigation, concluding that there "is evidence to support such findings." *Id.* at 49a. Nonetheless, after reviewing two Kansas cases addressing when an interrogation is "custodial," the court of appeals easily concluded that "[u]nder the circumstances presented here, Morton was not in custody, and thus Pontius was not required to read her the *Miranda* rights. The trial court erred in suppressing the statements." Pet. App. 51a.

4. The Kansas Supreme Court reversed the Court of Appeals. The supreme court recognized that the trial court's basis for suppressing Respondent's statements "is difficult to discern," Pet. App. 10a, but analyzed two legal questions: First, did Pontius violate the *Miranda* rule? Second, did Pontius's statement that Respondent did not need an attorney because "it's not that kind of interview" render Respondent's statements involuntary under the Due Process Clause of the Fourteenth Amendment? *Id.* at 10a–11a.

On the *Miranda* question, the supreme court observed that the trial court never made an explicit finding of fact on the disputed matter whether Pontius told Respondent that she did not need a lawyer. Pet. App. 15a. Nonetheless, because the trial court's conclusion that the interview was unfair seemed to imply a finding in Respondent's favor on that point, the supreme court accepted

"[Respondent's] version of events as true." *Id.* [And, for purposes of this petition for a writ of certiorari, Kansas does not challenge that factual assumption.] Considering the totality of the circumstances, the supreme court concluded that a reasonable person would not have believed herself to be in custody, so the interrogation was not custodial, *Miranda* did not apply, and there could be no *Miranda* violation. *Id.* at 16a–27a.

The supreme court then proceeded to the question at issue in this petition: whether a statement by Pontius that Respondent did not need an attorney because "it's not that kind of interview" rendered Respondent's subsequent incriminating statements involuntary and therefore inadmissible under due process principles? Pet. App. 27a. The supreme court observed that this Court has recognized that even a non-custodial interrogation can conceivably result in an involuntary confession, citing *Beckwith v. United States*, 425 U.S. 341, 347–48 (1976). *Id.* at 27a–28a. And the Kansas court opined that the trial court here appeared to have "determined that the agent's conduct was fundamentally unfair and, thus, [Respondent's] statements were not voluntary." *Id.* at 29a.

Citing a Kansas case, *State v. Walker*, 153 P.3d 1257, 1266 (Kan. 2007), the supreme court stated that the following six factors are considered in determining whether a statement was voluntary for due process purposes: (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to

communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. Pet. App. 29a. The court then narrowed the inquiry with the following analysis:

> In this case, there is no claim that [Respondent] had a mental condition that impacted the voluntariness of her statements. [Respondent] has not claimed the manner or duration of the interview made her statements involuntary. Specifically, there is no evidence the agent was hostile, threatening, or abusive. Further, [Respondent] has not claimed the length of the interview was so long that her will was overborne. She has not claimed she was deprived of the ability to communicate with the outside world during the interview. And there is no claim that her age, level of education, or background are relevant to the admissibility of her statements. In fact, the evidence showed that [Respondent] was 40 years old and has a degree in public administration. *Instead, only the fifth factor—the fairness of the officers—is at issue in this case.*

Id. at 29a–30a (emphasis added).

Focusing on the fairness of Pontius's conduct, the supreme court acknowledged that "[i]n the present case, [Pontius's] conduct did not involve false statements about the evidence against [Respondent] or misrepresentations of the law." Pet. App. 33a. Indeed, the court recognized that Respondent "had no *right* to have an attorney present in a noncustodial

interview." *Id.* (emphasis original). Nonetheless, the supreme court opined that it was constitutionally significant that Pontius "did not tell [Respondent] she had no *right* to have an attorney present, he told her she did not *need* an attorney." *Id.* at 34a (emphasis original). Opining that Respondent asked the question because she was trying to determine whether the interview was part of a criminal investigation, the supreme court concluded that Pontius's "response to [Respondent's] question was an affirmative misrepresentation about the true nature of the interview." *Id.*

The Kansas Supreme Court then opined that the "question then is whether the agent's conduct rendered [Respondent's] statements involuntary." The court declared that the "essential inquiry is whether the statements were the product of [Respondent's] free and independent will." Pet. App. 34a. The court evaluated that question in one paragraph, acknowledging that "[a]ll other aspects of the circumstances surrounding the interview indicate that [Respondent's] statements were voluntarily made," that Respondent was "a 40-year-old, college-educated woman who had been involved in a criminal investigation in this very matter, that there "was *nothing coercive about the manner and duration of the interview*," and that Pontius made clear to Respondent that "she did not have to answer any questions, she could stop the interview at any time, and she was free to leave at any time." *Id.* at 34a–35a (emphasis added).

The supreme court found, however, that had Respondent known Pontius was conducting a criminal investigation, "she would not have agreed to the interview without the advice and presence of counsel." Pet. App. 35a. Opining that [Respondent] "believed that the criminal investigation had ended, and [Pontius's] status as a criminal investigator was not patently apparent," *id.*, the court concluded that, "[u]nder these circumstances, by reason of the agent's conduct, [Respondent's] participation in the interview and the statements given therein were not the product of her free and independent will. Accordingly, [Respondent's] statements were involuntary and, thus, inadmissible." *Id.*

Two justices dissented. The Chief Justice did not disagree that Pontius's statement that Respondent did not need an attorney was misleading. Pet. App. 35a. But, she argued, no other facts here supported a conclusion that Respondent's statements were involuntary. *Id.* at 36a–37a. Indeed, the Chief Justice pointed out that "[t]he majority does not cite, nor is there any case in which we have found deceptive interrogation tactics, standing alone, were sufficient to render an otherwise voluntary confession involuntary." *Id.* at 37a. A second justice also wrote a dissenting opinion, making similar arguments. *Id.* at 38a–44a.

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court's Decision Conflicts With *Colorado v. Connelly*, 479 U.S. 157 (1986), On An Important And Recurring Constitutional Question

The fundamental flaw in the Kansas Supreme Court's decision is that court's complete failure to acknowledge that police coercion is a *constitutional prerequisite* to a finding that a confession is *involuntary* under the Due Process Clause. In evaluating whether police coercion has occurred, the courts apply a totality of the circumstances test. But the presence or absence of police coercion is not simply one factor to consider, it is the end determination of the inquiry. For over twenty years, this Court's decisions have been clear on these points, although some commentators and lower courts have expressed disagreement or argued for a different analysis.

In *Colorado v. Connelly*, 479 U.S. 157 (1986), a psychotic man approached police and declared that he had committed a murder and wanted to talk about it. After the man twice was advised of his *Miranda* rights, he told his story, offering many details about a murder. Ultimately, the state courts suppressed his confession on the ground that the man's psychosis precluded him from making free and rational choices. In the Colorado Supreme Court's opinion, such circumstances rendered the suspect's confession involuntary, even though the police did nothing coercive. *Id.* at 162–63.

This Court reversed. Specifically, the Court declared that "[w]e hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." 479 U.S. at 167.

Connelly sets a clear constitutional baseline for determining whether a confession is involuntary for due process purposes – there must be "coercive police activity," at a minimum. The presence or absence of coercive police activity is not simply *one factor* among many that courts are to consider. True, courts may consider a variety of factors in determining whether police coercion occurred, but *police coercion* is the ultimate inquiry, not just a factor in a "voluntariness" analysis.

Indeed, the Court has made clear that its confession cases use the terms "coerced confession" and "involuntary confession" interchangeably as "convenient shorthand." *Arizona v. Fulminante*, 499 U.S. 279, 288 n.3 (1991). In other words, courts are not at liberty to deem a confession "involuntary" in violation of due process principles unless and until there is a finding of *police coercion*. *Connelly* thus states the constitutional touchstone for confessions that violate the Fourteenth Amendment: there must be *police coercion* which causes the confession, and it is that coercion and causation which ultimately renders the confession *involuntary* for due process purposes.

The Kansas Supreme Court here erred—in the most fundamental fashion—by treating police

coercion as just one factor to consider in determining the "voluntariness" of Respondent's confession. As a result of that error, the Kansas court was able to conclude that Respondent's confession here was "involuntary" while at the same time concluding that "*[t]here was nothing coercive about the manner and duration of the interview . . . .*" Pet. App. 34a (emphasis added). These two positions, however, are incongruous and constitutionally illogical.

In finding that Respondent's confession was involuntary, the Kansas Supreme Court relied solely on Agent Pontius's statement to Respondent that she did not need an attorney because "it's not that kind of interview." But the weight of legal authority correctly holds that such actions do not render a confession involuntary for due process purposes. Indeed, the general rule is that "deception or fraud practiced upon the defendant in obtaining a confession does not constitute a violation of the principles of due process as long as it does not under the facts of the case amount to mental coercion." Annot., *Admissibility of confession as affected by its inducement through artifice, deception, trickery or fraud*, 99 A.L.R. 2d 772, § 4 (1965 & Cum. Supp.) (citing cases). In the context of deceptive police interrogation tactics, some older cases found confessions to be *unreliable* and therefore inadmissible because they were untrustworthy, *id.*, but that is different than finding, as the Kansas Supreme Court did here, that a misleading police statement rendered a confession *involuntary*.

Importantly, over twenty years ago, this Court rejected the *unreliability* rationale for finding that confessions were obtained in violation of due process principles. Again, in *Connelly*, the Court rejected consideration of any ultimate inquiry other than *police coercion*, declaring as follows: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment." 479 U.S. at 167.

In any event, no one here has questioned the *reliability* of the statements Respondent made to agent Pontius, nor did the Kansas Supreme Court mention or discuss reliability. Instead, that court only addressed voluntariness. As *Connelly* makes clear, even if the facts here supported a conclusion of unreliability—which they do not—such a determination would not provide a legitimate basis for finding a due process violation.

So long as *Connelly* remains good law, and there is no case from this Court suggesting that it is not, coercive police conduct is a constitutional prerequisite to finding that any confession was involuntarily obtained in violation of the Due Process Clause. Even commentators somewhat critical or questioning of the holding of *Connelly* recognize that *Connelly* is the controlling case on whether a confession was obtained in violation of due process principles. *See, e.g.*, 2 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure* § 6.2(b) (1999) (citing some articles critical of a strict focus on

police coercion, but recognizing that *Connelly* is the key case).

Though a few lower courts appear to have suppressed a confession on due process grounds when police misled a suspect about whether a confession or other evidence could be used against him, *see id.* § 6.2(c), p. 458, discussed below in Part II., no decision of this Court since *Connelly* has reached such a conclusion, nor suggested that police deception alone could render a confession involuntary in violation of due process principles. Thus, in light of *Connelly* and the Court's subsequent, unwavering adherence to the fundamental principles *Connelly* recognized, the Kansas Supreme Court's decision here is wrong as a matter of law. Indeed, unless this Court is to revisit the *Connelly* coercion principle, the question is not even debatable.

Kansas is mindful that this Court is not a general court of "error correction," but this case may warrant summary reversal for several reasons. First, the constitutional principle at stake is important and fundamental, one that arises regularly, indeed daily, as police question suspects in a variety of settings. Second, the Kansas Supreme Court's decision undermines the *Connelly* principle not only by incorrectly holding that coercion is not required to find that a confession is involuntary, but also by in effect declaring that any misleading statement by a police officer may trump all other considerations in determining the voluntariness of a confession. *See* Pet. App. 42a (Davis, J., dissenting) (the majority erroneously concludes that Respondent's statements

"were rendered involuntary *solely* on the basis of the agent's previous statement that the interview was not the sort where she would need an attorney.") (emphasis original). Lastly, the Kansas Supreme Court's decision rests entirely on principles of federal constitutional law. At this stage, there are no disputed facts, nor is state law in any way implicated. Rather, this case fits squarely within the type of cases involving pure questions of federal law in which the Court traditionally has exercised its prerogative to grant certiorari and summarily reverse. *See, e.g.*, Eugene Gressman, et al., *Supreme Court Practice* § 5.12(c) (9th ed. 2007).

II. The Decision Below Is Part Of A Conflict Of Authority On An Important And Recurring Constitutional Question

Hundreds of lower federal and state court decisions have followed, and continue to follow, the *Connelly* principle. *See, e.g.*, *Jackson v. McKee*, 525 F.3d 430, 433 (6th Cir. 2008) (citing *Connelly* and declaring that, "[a]ccordingly, when a criminal defendant can show that 'coercive police activity' caused him to make an involuntary confession, due process prohibits the government from relying on the statement."); *United States v. Fernandez*, No. 07-51100, 2008 WL 2704547 (5th Cir. July 10, 2008) ("The focus of our voluntariness inquiry must be on the Detectives' actions; indeed, 'coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.' *Colorado v. Connelly*, 479 U.S. 157,

167 (1986). Moreover, that coercive conduct must cause the confession. *Id.* at 164.").

Indeed, even the Kansas Supreme Court, in recent cases involving (1) a threat made in obtaining a confession and (2) a suspect with low intellect, has cited and recognized the *Connelly* coercion principle. *See, e.g.*, *State v. Brown*, 182 P.3d 1205, 1212 (Kan. 2008) (the "issue for us to consider is whether governmental coercion rendered the confession involuntary" when state officials suggested the suspect might lose custody of his children if he did not cooperate); *State v. Johnson*, No. 96,681, 2008 WL 2938478, at *9–10 (Kan. Aug. 1, 2008) (citing *Connelly* and recognizing that the question is whether police coerced a suspect's confession; a suspect's low intellect alone cannot render a confession involuntary).

Unfortunately, the Kansas Supreme Court—and some other lower state courts—appear to draw a distinction between the constitutional significance of police threats and a suspect's low mental capacity on the one hand, and police deception on the other. In the latter category, the Kansas Supreme Court and some other state courts apparently decline to follow the *Connelly* principle and instead have found confessions to be involuntary on the basis of deception alone, with no apparent police coercion, particularly if the deception involved misstatements of law. *See* LaFave et al. *supra*, § 6.2(c) nn.122, 123 (citing several state cases decided after *Connelly*; most involved police either telling a suspect that he

would have immunity or that his statements could not/would not be used against him).

In contrast, many lower state courts and federal Circuits have declined to create an exception for police deception and instead adhere to the *Connelly* coercion principle in all circumstances. *Id.* (citing cases from Nebraska, Georgia, Hawaii, Massachusetts, Missouri, and the Ninth Circuit). For example, the Nebraska Supreme Court has made clear that "mere deception will not render a statement involuntary or unreliable." *State v. Walker*, 493 N.W.2d 329, 333 (Neb. 1992). It is simply impossible to reconcile such holdings with the Kansas Supreme Court's decision, which found Respondent's statements to be involuntary simply and solely because of a single, misleading response by the agent to a question, a response that even though misleading neither misstated the law nor overstated the evidence against Respondent.

If the concern of those courts suppressing confessions on the basis of police deception alone—with no showing of police coercion—is that such statements may be false or unreliable, *Connelly* again provides the answer: *Connelly* expressly holds that *reliability* is a matter for state and federal evidentiary rules, not the *voluntariness* principle of the Due Process Clause. 479 U.S. at 167. The reasons for such a distinction are quite apparent. Police deception, unlike police coercion, would not inherently nor necessarily undermine judicial confidence in the veracity of the statements a suspect might make. Nor is it possible to equate police

deception with police coercion. Much deceptive behavior would not be coercive in any way, just as in this case. Thus, there are excellent reasons why police coercion and police deception are different constitutionally. As a general rule, the mere fact of police deception does not render police conduct inherently coercive, nor does it render suspects' statements inherently unreliable.

Even if some lower courts are correct in holding that police misstatements of law—or overstating the evidence against a suspect—are in effect exceptions to the *Connelly* coercion requirement, the Kansas Supreme Court's decision in this case still would be wrong. The Kansas Supreme Court expressly found that Agent Pontius did neither of those things. *See* Pet. App. 33a ("In the present case, the agent's conduct did not involve false statements about the evidence against Morton or misrepresentations of the law.") For reasons not really explained in its opinion, the Kansas Supreme Court apparently did not like what it saw here, and so declared a federal constitutional violation, even though the controlling decisions of this Court do not support finding such a violation. Further, the Kansas decision goes against the vast majority of lower court decisions, directly conflicting with many such decisions that make clear that police deception, standing alone, does not render an otherwise voluntary statement "involuntary" for due process purposes.

* * * * * * *

Kansas believes the Court's decision in *Colorado v. Connelly* dictates the outcome in this case and demonstrates that summary reversal of the Kansas Supreme Court decision would be appropriate here. If the Court perceives that there remains uncertainty regarding the correctness or the scope of the *Connelly* coercion principle, then Kansas asks that the Court set the case for full briefing and oral argument on the question whether a misleading statement by a police officer to a suspect, standing alone and in the absence of any other evidence of coercion, can ever render a resulting confession involuntary in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below either summarily reversed, or the case set for briefing and argument.

Respectfully submitted,

STEVE SIX
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General
(Counsel of Record)
JARED S. MAAG
Deputy Solicitor General
120 S.W. 10th Ave., 2nd Fl.
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for Petitioner

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