ADVANCE SHEET HEADNOTE
March 30, 2026

2026 CO 17

No. 25SA146, *People v. Lulei*—Constitutional Law—Fifth Amendment—Custody—Party Presentation.

The supreme court holds that the district court erred as a matter of law when it concluded that the defendant's invocation of the right to counsel outside of a custodial interrogation setting was nevertheless effective because police had attempted to advise him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Citing *People v. Kutlak*, 2016 CO 1, 364 P.3d 199, a plurality of the supreme court concludes that under the circumstances here, it may address whether the defendant was in custody as a necessary antecedent to the *Edwards v. Arizona*, 451 U.S. 477 (1981), issue before it. The supreme court's review of the record confirms the trial court's finding that the defendant was not in custody when he requested counsel. Thus, the district court erred in suppressing Lulei's statements under *Miranda* and *Edwards*. Accordingly, the supreme court reverses the district court's suppression order and remands the case to the district court for further proceedings.

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

2026 CO 17

Supreme Court Case No. 25SA146
Interlocutory Appeal from the District Court
District Court, City and County of Denver, Case No. 24CR5907
Honorable Eric Johnson, Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Dakotah J. Lulei.

Order Reversed
en banc
March 30, 2026

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

CHIEF JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 The People bring this interlocutory appeal under C.A.R. 4.1, challenging a Denver District Court order suppressing Defendant Dakotah J. Lulei's statements to law enforcement under *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that when an accused who is subject to custodial interrogation has invoked their right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), police may not reinitiate interrogation until counsel has been made available). At the suppression hearing, the district court acknowledged that the right to counsel under *Miranda* applies to custodial interrogation. It further concluded (consistent with defense counsel's position at the hearing) that Lulei was not in custody when he invoked his right to counsel as police attempted to advise him of his *Miranda* rights. Nevertheless, the district court ruled that Lulei's subsequent (albeit voluntary) statements must be suppressed under *Edwards* because the police did not scrupulously honor his request for a lawyer and instead reinitiated interrogation.

¶2 We conclude that the district court erred as a matter of law when it concluded that Lulei's invocation of the right to counsel outside of a custodial interrogation setting was nevertheless effective because police had attempted to advise him of his *Miranda* rights. Because our review of the record confirms the trial court's finding that Lulei was not in custody when he requested the presence of an attorney, *Miranda* and *Edwards* are inapplicable here and the district court

therefore erred in suppressing Lulei's statements under those cases. Accordingly, we reverse the district court's order and remand the case to the district court for further proceedings.

I. Facts and Procedural History

A. The Incident and Subsequent Police Interview

¶3 Late one evening, Lulei called 911 to report that his motel roommate was unconscious because of a possible overdose.[1] When police arrived, they saw emergency medical personnel performing CPR on the roommate, who died shortly thereafter. At that point, Lulei was not a suspect, nor did officers suspect foul play. Officers took Lulei's statement, processed the scene, and released the room back to Lulei.

¶4 The following morning, Detective Bolton of the Denver Police Department ("DPD") attended the roommate's autopsy. The results of the autopsy, along with evidence of additional 911 calls the evening before, led law enforcement to suspect there had been a disturbance between the men. Detective Bolton and another detective decided to reinterview Lulei as a witness. That afternoon, officers brought Lulei to police headquarters, handcuffing him in front of his body during

[1] We derive the facts from the transcript of the hearing on the motion to suppress and from our review of body-worn camera footage and the video- and audio-recorded events from the police interview room.

transportation for officer safety pursuant to DPD policy. Lulei was not under arrest at that point.

¶5 At police headquarters, Lulei waited in the lobby until he was brought into an interview room.[2] During the interview, Lulei was not handcuffed, and he had his cell phone and a water bottle with him. He took the seat closest to the door, which was unlocked. Detective Bolton entered, wearing a shirt and tie and visibly carrying a holstered firearm. He sat across a table from Lulei.

Det. Bolton:	What's up man?
Lulei:	Oh, . . . , it's this guy!
Det. Bolton:	This guy. Got your water I see?
Lulei:	Oh thank you big sexy.
Det. Bolton:	I got you, bro. [Sitting.] Alright.
Lulei:	Alright, so, uh, we're going to keep this under two minutes.
Det. Bolton:	Two minutes huh?
Lulei:	Oh, yeah, cuz, you have my statement right?
Det. Bolton:	Ah, dude, listen—
Lulei:	So, you have my statement, [slaps the desk] that's what we're going by. [Gets up.] Thank you, have

[2] The parties dispute how long Lulei waited before he was brought to the interview room. Lulei contends it was at least forty-five minutes, while Detective Bolton testified at the suppression hearing that it was less than fifteen minutes.

a good day. [Opens the door but remains in the room.]

Det. Bolton: Wait, wait, are you for real? Wait, wait, hold on—

Lulei: I am for real—

Det. Bolton: You can't leave—

Lulei: I am for real— [Stays in the room; closes the door and goes back to stand by his chair.]

Det. Bolton: You can't leave until the cop gets here; hold on, I've got to get you out of here.

Lulei: No, no, you have my statement—

Det. Bolton: I don't have your statement.

Lulei: The police have it, that's what happened, and I'm free to go now.

¶6 Lulei became agitated, telling Detective Bolton that he had been made to wait for over an hour and a half. Detective Bolton maintained a calm tone, told Lulei that it had not been that long, and that he just needed "to make sure we're all on the same page." Lulei agreed to stay and sat.

Det. Bolton: So, if you could give me just a little bit more of your time, I would appreciate it.

Lulei: Alright, so, here's the deal, here's the deal, here's the deal— [Takes a cell phone out of his pocket.]

Det. Bolton: I've been pretty smooth with you.

Lulei: You have been so that's why I'm—

Det. Bolton: Let's just start from scratch, and get this interview done, and be done.

Lulei: Yep, and then uh . . . [Sets timer on cell phone and puts phone on the desk.]

Det. Bolton: What do you want to show me?

Lulei: You have six minutes.

Det. Bolton: Six minutes? How'd you come up with that number?

Lulei: Just cuz. You're wasting time.

Det. Bolton: Alright buddy. Well listen, first of all, you're all the way down here at the police station, okay, and I know you talked to the cops a few times. I just have a couple follow-up questions for you really quick.

Lulei: Keep going with it. Yeah.

Det. Bolton: Alright. In order to do that, I want to read you your [*Miranda*] advisement form, alright? That way you feel protected, I feel protected, we all know we're on the same page, okay? I'll go through it line by line for you. But that's just, reading your rights. Have you ever had your rights read to you before? [Turns form toward Lulei.]

Lulei: [Takes advisement form; reads.] Oh, so I'm allowed to have a lawyer present for this?

Det. Bolton: Absolutely.

Lulei: Oh . . . yeah, let's reschedule this when I have a lawyer present.

Det. Bolton: Okay, we can do that.

Lulei: [Gets up and walks toward the door.] Yeah, reschedule this for when I have a lawyer present.

Det. Bolton: Alright, sounds good.

Lulei: And we'll do it at a time where you don't make me wait.

Det. Bolton: [Stands.] Well, listen man, things take time.

Lulei: [Opens the door.]

Det. Bolton: Hold on one second, let me get the officer so we can get you transported back.

Lulei: [Looking out into the hallway.] This guy right here?

Det. Bolton: Yep, absolutely.

Lulei: Oh, one hundred percent.

Det. Bolton: Alright, let me chat with him for a second, and I'll get you out of here in just a second, okay?

Lulei: No problem, and then, uh, you know, I want a lawyer present next time. And next time, I'm not waiting . . . .

¶7 Detective Bolton left the interview room and closed the door. After conferring with Detective Sandoval in the hall, they decided that they had enough information to arrest Lulei. Detective Bolton, Detective Sandoval, and a uniformed officer entered the interview room. The officer held out handcuffs and asked Lulei to turn around.

Lulei: What?

Officer: I'm just gonna put the cuffs on you; we did this before.

Lulei: But you all put it on in front of me on the way here.

Det. Sandoval: We did, yes. Not now.

Lulei: What's going on now?

Det. Bolton: Well, Dakotah, I tried to talk to you, get your side of the story. Right now, you're going to be arrested, okay?

Lulei: What the . . . ? For what?

Det. Sandoval: For murder.

Lulei: Oh, dude, no. Like, let's talk this out then. Dude, like, no.

Det. Sandoval: Nope, you had your chance, and you asked for a lawyer. We can't do it now.

Det. Bolton: I tried to talk to you smoothly, man, and hear your side of it. We have some serious questions.

Lulei: Alright, I'll rescind that then. I have serious—like, get answers then, dude. Like come on, like, don't . . . arrest me right now. I have my . . . motel paid for, for the next two weeks. I have to go to work on Monday. Like, I'm down to talk to you. Like, dude, like don't . . . detain me . . . I thought I was going to be free to go after this.

Det. Sandoval: Well, no one told you you were free to go after this—

Det. Bolton: No one told you that, and also, I tried to get your side of the story and figure it out, man, and you didn't want to talk.

Lulei: I'll talk to you now, man.

¶8 The officer escorted Lulei, still handcuffed, to a holding cell. Around twenty minutes later, Detective Bolton brought Lulei back to the interview room. After

receiving a full *Miranda* advisement, Lulei signed a form waiving his rights. During the approximately two-and-a-half-hour interview that followed, Lulei made incriminating statements.

B. The Suppression Hearing

¶9 Lulei later moved to suppress his statements made to Detective Bolton, arguing that (1) officers failed to honor his invocation of the right to counsel and (2) his subsequent statements to the police were involuntary.

¶10 At the suppression hearing, defense counsel acknowledged that the case law in this context generally involves individuals who are under arrest, and that "[h]ere we don't have that situation." Rather, Lulei "was told he wasn't under arrest" and "was brought as a witness to make a statement." Defense counsel also argued that "[w]hat make[s] this situation unique" is that Lulei had been told he could leave after invoking the right to counsel, and moments later police arrested him for murder. Defense counsel contended that this amounted to police coercion because it prompted Lulei to rescind his request for counsel and proceed with the interview.

¶11 The district court ruled on the motion from the bench. In its findings, the court accepted—and pointed out that the defense accepted—that Lulei was not in custody when he was brought to the police station. The district court then acknowledged that *Miranda* applies to custodial interrogation. The court

continued, "If everyone has confessed he was not in custody initially does it even really matter that he says I want a lawyer? I'm going to say yes. He was given his *Miranda* rights. He clearly, unambiguously invoked his right[] to have an attorney."

¶12 The court then found that the police failed to scrupulously honor Lulei's request for an attorney when they arrested him and reinitiated interrogation. It therefore granted Lulei's motion to suppress under *Edwards* because the police failed to honor Lulei's invocation of the right to counsel. The court also concluded that Lulei's subsequent statements to the police were voluntary and there was no coercive police conduct. The court emphasized that it was not suppressing Lulei's statements on voluntariness grounds.

¶13 After the court ruled, the People asked the court to clarify if it was finding that Lulei was not in custody when he was initially brought to the interview room. The court confirmed that "the evidence has established that when he was brought to the police station he was not in custody," but that the detective tried to read Lulei his *Miranda* rights and Lulei invoked his right to counsel. The court then reiterated that it was suppressing Lulei's statements because Lulei "asked for his right for the attorney and he is not the one that reinitiated."

C. The People's Appeal

¶14 After the suppression hearing, the People brought this interlocutory appeal under C.A.R. 4.1 seeking review of the district court's suppression ruling.[3]

¶15 In their initial briefing to this court, the People focused their arguments on the trial court's finding that the police violated *Edwards* by reinitiating interrogation after Lulei unambiguously invoked the right to counsel. The People contested this finding, arguing that when Lulei asked after being handcuffed, "What's going on now?" the detectives' comments did not amount to interrogation.

¶16 At oral argument, however, the People also pointed out that Lulei was not in custody when he asserted a right to counsel, and therefore he was not entitled to protections under *Edwards*. When offered an opportunity to respond on this point, defense counsel acknowledged that co-counsel who argued the motion had "conceded that point," and that, "at the time of the invocation [Lulei was] not per se in custody." Defense counsel later reiterated this point,[4] but argued that

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[3] The People raised a single issue:

> Whether the district court erred in suppressing the defendant's statements.

[4] When asked if the record showed that Lulei was not in custody, defense counsel replied, "I don't think I can in good faith make the argument that [Lulei] was in fact—or felt like he was—restrained, or not free to leave, until after he invoke[d] the right to counsel."

Detective Bolton's effort to administer the *Miranda* advisement effectively triggered Lulei's *Miranda* rights regardless of his custodial status.

¶17 After oral argument, Lulei requested leave to file supplemental briefing on the following issues:

> (1) Whether the prosecution waived any argument that Mr. Lulei was not in custody at the time of the invocation of the right to counsel.
>
> (2) Whether Mr. Lulei was, in fact, in custody at the time he invoked his right to counsel based on the totality of the circumstances, including the fact that he had been advised of his *Miranda* rights.
>
> (3) Whether the sum total of police conduct rendered Mr. Lulei's subsequent *Miranda* waiver involuntary.

¶18 We granted Lulei's request and ordered both parties to submit simultaneous supplemental briefing on the above issues. Having received this briefing, we now turn to our analysis.

II. Jurisdiction and Standard of Review

¶19 Under section 16-12-102(2), C.R.S. (2025), and C.A.R. 4.1, the prosecution may immediately appeal a district court's order granting a defendant's pretrial motion to suppress evidence.[5] *People v. Torres*, 2026 CO 15, ¶ 17, __ P.3d __.

¶20 "When reviewing a lower court's decision to suppress statements made by a defendant, the question before the court is a mixed issue of law and fact."

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[5] Pursuant to C.A.R. 4.1(a), the People certify that this appeal is not taken for the purpose of delay and that the suppressed evidence constitutes a substantial part of the People's case against Lulei. Lulei does not object to this certification.

People v. Kutlak, 2016 CO 1, ¶ 13, 364 P.3d 199, 203. We defer to a district court's factual findings if there is sufficient record evidence, and we review the legal effect of those findings de novo. *People v. Cerda*, 2024 CO 49, ¶ 22, 559 P.3d 206, 212. "[W]here the statements sought to be suppressed are audio- and video-recorded, and there are no disputed facts outside the recording controlling the issue of suppression, we are in a similar position as the trial court to determine whether the statements should be suppressed." *People v. Madrid*, 179 P.3d 1010, 1014 (Colo. 2008). "[W]e may undertake an independent review of the audio or video recording to determine whether the statements were properly suppressed in light of the controlling law." *Kutlak*, ¶ 13, 364 P.3d at 203.

III. Analysis

¶21 In *Miranda*, the United States Supreme Court "declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." *Edwards*, 451 U.S. at 482. In *Edwards*, the Court took steps to safeguard this Fifth Amendment right to counsel, holding that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* at 485.

¶22 Because the rule in *Edwards* serves to protect the right to counsel recognized in *Miranda*, and because the right to counsel recognized in *Miranda* applies only in the context of custodial interrogation, the rule in *Edwards* applies only when the

accused (1) is in custody, (2) is subject to interrogation, and (3) unambiguously invokes their right to counsel. *See Miranda*, 384 U.S. at 444–45; *Edwards*, 451 U.S. at 484–85; *Smith v. Illinois*, 469 U.S. 91, 95 (1984). Indeed, the Court has observed that *Miranda* and *Edwards* apply "only in the context of custodial interrogation," and that "[i]f the defendant is not in custody then those decisions do not apply." *Montejo v. Louisiana*, 556 U.S. 778, 795 (2009).

¶23 Here, the People seek review under C.A.R. 4.1, asking us to determine whether the trial court erred in suppressing Lulei's statements under *Edwards*. We first address whether we may consider the issue of custody in this case, given that the People did not argue this point in their initial briefing. We conclude that under our decision in *Kutlak*, we may do so because a defendant's custodial status is an issue antecedent to and ultimately dispositive of the trial court's *Edwards* analysis before us on appeal. Next, we independently review the audio- and video-recorded interrogation and confirm that Lulei was *not* in custody when he asked for a lawyer. Because Lulei's Fifth Amendment right to counsel had not attached, and because Detective Bolton's initial, attempted *Miranda* advisement did not alter Lulei's noncustodial status, we conclude that *Edwards* does not apply here. We hold that the district court therefore erred in suppressing Lulei's statements on the basis that police ran afoul of *Edwards* by reinitiating interrogation after Lulei requested an attorney.

A. Consideration of Custody as an Antecedent Issue

¶24 We first address whether we may consider the threshold issue of Lulei's custodial status in resolving this appeal.

¶25 Lulei argues that the People waived the issue of custody, and because it has not been properly presented, we should decline to consider it. He further contends that by focusing their initial briefing on whether police reinitiated interrogation under *Edwards*, the People effectively conceded that he was in custody for purposes of this appeal.

¶26 The People counter that a party's omission of a particular legal argument when addressing an issue is not a "waiver," but rather, that such an omission implicates the party presentation principle. They further argue that the party presentation rule does not constrain a court's fundamental obligation to ascertain controlling law. *See Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 980 (4th Cir. 2015). Here, the People maintain, we may consider custody as antecedent to the question of whether Lulei effectively invoked his right to counsel under *Miranda*.

¶27 It is true that we typically refuse to address issues or arguments on appeal that have been waived or abandoned. *See, e.g.*, *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007) (noting the "basic principle of appellate jurisprudence that arguments not advanced on appeal are generally deemed waived"); *CenCor, Inc. v. Tolman*,

868 P.2d 396, 397 n.1 (Colo. 1994) (noting that the propriety of the trial court's dismissal of certain claims was not briefed on appeal and thus was deemed abandoned). Although our case law has used the terms "waiver" and "abandonment" somewhat interchangeably, "waiver" has been more precisely associated with "'the intentional relinquishment of a known *right* or *privilege*.'" *People v. Rediger*, 2018 CO 32, ¶ 39, 416 P.3d 893, 902 (emphases added) (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)); *cf. Babcock v. People*, 2025 CO 26, ¶ 29, 569 P.3d 850, 856 (waiver of statutory rights must be "voluntary, but need not be knowing and intelligent" (quoting *Finney v. People*, 2014 CO 38, ¶ 16, 325 P.3d 1044, 1050)).[6] Abandonment, by contrast, "typically arises from a party's decision not to pursue or reassert a *claim* that the party had raised previously." *People v. Smith*, 2024 CO 3, ¶¶ 18–19, 541 P.3d 1191, 1195 (emphasis added) (deeming abandoned certain postconviction claims because they were neither briefed nor argued during a hearing to the postconviction court).

¶28 Omissions like waiver and abandonment implicate the broader principle of party presentation. *See* Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 Buff. L. Rev. 1029, 1037–42, 1045–48, 1075–76 (2022). Under that principle, courts "rely on the parties to frame the issues for decision." *Greenlaw v. United*

[6] It is unclear what "right" or "privilege" Lulei believes the People are relinquishing by omitting argument on the custody issue.

States, 554 U.S. 237, 243 (2008). This principle recognizes that courts "should not[] sally forth each day looking for wrongs to right." *Id.* at 244 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in the denial of rehearing en banc)). Instead, our adversarial system "is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)).

¶29 Fidelity to the party presentation principle therefore generally precludes a court from spontaneously deciding an issue that the parties have not raised or had the opportunity to address. *See Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (reversing the Fourth Circuit because it "transgressed the party-presentation principle by granting relief on a claim that [the defendant] never asserted and that the State never had the chance to address"); *Galvan v. People*, 2020 CO 82, ¶¶ 3, 5, 44–46, 476 P.3d 746, 750–51, 757–58 (concluding that a division of the court of appeals violated the party presentation principle when it "sua sponte and without briefing" addressed whether interpreting a statutory provision a certain way rendered it unconstitutionally vague and overbroad).

¶30 But "[t]he party presentation principle is supple, not ironclad." *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020); *cf. People in Int. of B.H.*, 2021 CO

39, ¶ 29 n.3, 488 P.3d 1026, 1034 n.3 (explaining that while the parties' briefs did not explicitly address a particular statute, one party raised the statute at oral argument; quoting *Sineneng-Smith* and concluding that our discussion of the statute did not "run afoul of the party-presentation principle given the scope of the issues that the parties [had] placed before us").

¶31 Importantly, the party presentation principle does not constrain a court's fundamental obligation to ascertain controlling law. *Dan Ryan Builders, Inc.*, 783 F.3d at 980. "A party's failure to identify the applicable legal rule certainly does not diminish a court's responsibility to apply that rule." *Id.* In other words, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 94–95, 98–100, 108–09 (1991) (concluding that while the petitioner did not raise an argument about the applicable state corporate law until her reply brief to the Seventh Circuit, the Seventh Circuit erred by disregarding that state law because it was required to identify "the proper *source* of federal common law in this area"); *see also Masterpiece Cakeshop, Inc. v. Scardina*, 2024 CO 67, ¶ 49, 556 P.3d 1238, 1250 ("[W]e have an obligation to interpret and apply the law.").

¶32 Relevant here, the Supreme Court has expressly recognized that courts have the discretion to consider an issue that is "'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 444–48 (1993) (omission in original) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)) (concluding that although respondents argued that a ruling was inconsistent with a particular federal statute that the parties had assumed was valid, the District of Columbia Circuit was within its discretion to first consider whether that statute was still in force); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–82 (1995) (concluding that the Court had the authority to consider an argument the petitioner had expressly disavowed in the courts below, citing *United States National Bank of Oregon*, and explaining that "[w]hen a question is, like this one, both prior to the clearly presented question and dependent upon many of the same factual inquiries, refusing to regard it as embraced within the petition may force us to assume what the facts will show to be ridiculous, a risk that ought to be avoided"); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) ("[T]here must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it . . . .").

¶33 The Supreme Court's reasoning applies here. In addressing whether the trial court erred in suppressing Lulei's statements under *Edwards*, we are not obligated to ignore the district court's erroneous legal premise that a *Miranda* advisement outside of a custodial interrogation triggers protections under *Miranda* and *Edwards*, simply because the People failed in their initial briefing to flag this particular basis for challenging the court's *Edwards* analysis. Likewise, the party presentation principle is not so rigid that it must force us to ignore the district court's factual finding (or defense counsel's concession) that Lulei was not in custody when he invoked the right to counsel—a critical finding that underpinned the district court's ruling. Rather, under the circumstances of this case, we may exercise our discretion to consider the custody issue as a necessary antecedent to the *Edwards* dispute before us because it is inherent to our review of the district court's ruling.

¶34 Our decision in *Kutlak* is illustrative of this point. There, we chose to consider an issue that was a necessary antecedent to the *Edwards* dispute before us, even though it had not been raised by the parties. In that case, a division of the court of appeals held that the police violated *Edwards* because they never stopped the interrogation after the defendant made a reference to his attorney. *Kutlak*, ¶ 7, 364 P.3d at 202. On review, we observed that an *Edwards* analysis embodies two distinct inquiries: first, whether the individual subjected to custodial interrogation

actually invoked their right to counsel, and second, whether they initiated further discussions with the police and knowingly and intelligently waived the right they previously invoked. *Id.* at ¶ 9, 364 P.3d at 202. Although it was undisputed that Kutlak was subjected to custodial interrogation, we were still required to ensure that "the suspect actually invoked his right to counsel." *Id.* at ¶¶ 9, 11, 364 P.3d at 202–03. The People had taken inconsistent positions on this point in the lower courts, and they had not initially briefed the issue for our review. *Id.* at ¶ 10, 364 P.3d at 202–03. Following oral argument to this court, we sua sponte ordered supplemental briefing on the issue of whether Kutlak had unambiguously invoked his right to counsel. *Id.* at ¶ 11, 364 P.3d at 203. We then ultimately resolved the case "on the threshold inquiry of the *Edwards* analysis," concluding that the defendant did not actually invoke his right to counsel. *Id.* at ¶ 12, 364 P.3d at 203. In sum, even though the People failed to initially brief the issue of invocation of counsel, we chose to address it as "antecedent to . . . and ultimately dispositive of" the *Edwards* issue directly before us. *U.S. Nat'l Bank of Or.*, 508 U.S. at 447 (omission in original) (quoting *Arcadia*, 498 U.S. at 77).

¶35 Our decision in *Kutlak* applies with equal force here. In this case, the People seek review under C.A.R. 4.1, asking us to determine whether the trial court erred in suppressing Lulei's statements under *Edwards*. To properly resolve that issue, we must first consider whether Lulei was in custody when he invoked his right to

counsel.[7] If Lulei was not in custody, then the rule in *Edwards* is inapplicable. *See Montejo*, 556 U.S. at 795 ("If the defendant is not in custody then [*Miranda* and *Edwards*] do not apply."). If *Edwards* is inapplicable, then we need not consider whether law enforcement violated *Edwards* by reinitiating the interrogation. *See Kutlak*, ¶ 12, 364 P.3d at 203.

¶36 Accordingly, guided by *Kutlak*, we proceed to consider whether Lulei was in custody when he asserted the right to counsel because custody is a necessary antecedent to the *Edwards* analysis presented on appeal.

B. *Miranda* and *Edwards*

¶37 The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[8] U.S. Const. amend. V. To protect this privilege against self-incrimination, *Miranda* requires law enforcement to employ procedural safeguards before subjecting an individual to custodial interrogation. *Miranda*, 384 U.S. at 478–79. Among other

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[7] We also note that our consideration of custody in this case does not give rise to concerns of unfairness or surprise. Here, the district court (and defense counsel) addressed the custody issue at the suppression hearing, the People raised it at oral argument to this court, where defense counsel had the opportunity to respond at some length, and both parties addressed it in supplemental briefing at Lulei's request. The latter two circumstances provide us with an even stronger basis to address the custody issue than we had in *Kutlak*, where we raised the invocation issue at oral argument and sua sponte requested supplemental briefing.

[8] The Colorado Constitution provides a similar privilege against self-incrimination. Colo. Const. art. II, § 18.

things, law enforcement must notify the individual of their right to remain silent and to have an attorney present during custodial interrogation. *Id.; see also Edwards*, 451 U.S. at 482 ("*Miranda* thus declared that an accused has a Fifth . . . Amendment right to have counsel present during custodial interrogation.").

¶38 *Miranda*'s prophylactic rule serves to "dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights." *Moran v. Burbine*, 475 U.S. 412, 425 (1986). Critically, "this extraordinary safeguard 'does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.'" *People v. Coke*, 2020 CO 28, ¶ 14, 461 P.3d 508, 513 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984)).

¶39 In *Edwards*, the Court clarified *Miranda*'s Fifth Amendment protections, holding that when an individual is subject to custodial interrogation and unambiguously invokes their right to counsel, law enforcement may not continue the interrogation until counsel has been made available, unless the individual reinitiates communication with the police. *Edwards*, 451 U.S. at 484–85. In other words, "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* at 485.

¶40 Because an individual's rights under *Miranda*—and, by extension, *Edwards*—attach only in the inherently coercive setting of custodial interrogation, "[i]f the defendant is not in custody then those decisions do not apply." *Montejo*, 556 U.S. at 795; *see also Coke*, ¶ 7, 461 P.3d at 512 (concluding that because the defendant was not in custody, she was not entitled to *Miranda* protections).

¶41 Importantly, a *Miranda* advisement does not itself create *Miranda* rights. "[The] Court has 'never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation."'" *Bobby v. Dixon*, 565 U.S. 23, 28 (2011) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991)). Similarly, while *Edwards* provides that the *Miranda* right to counsel, once invoked, is effective regarding future custodial interrogation, this does not mean that an individual may initially assert a Fifth Amendment right to counsel outside the context of custodial interrogation, with similar future effect. *McNeil*, 501 U.S. at 182 n.3.

¶42 Consistent with these principles, several states have recognized that a defendant may not invoke a Fifth Amendment right to counsel outside of custodial interrogation. *See, e.g.*, *State v. Bartelt*, 906 N.W.2d 684, 700 (Wis. 2018) ("Because [the defendant] was not in custody when he asked about counsel, his Fifth Amendment right to counsel did not attach."); *Commonwealth v. Libby*, 32 N.E.3d 890, 900 (Mass. 2015) ("Given our conclusion that the defendant was not in

custody . . . his interview on this date was simply not governed by *Miranda*. Therefore . . . he did not effectively invoke a 'right' to counsel." (citation omitted)); *State v. Pontbriand*, 878 A.2d 227, 234 (Vt. 2005) ("[The defendant] was not in police custody during the interview . . . [a]ccordingly, *Miranda* is inapplicable here, and the police were not obliged to stop questioning [him] when he indicated he wished to speak with a lawyer."); *Hannon v. State*, 84 P.3d 320, 337 (Wyo. 2004) ("[T]his [c]ourt adheres to the principle that the rights recognized in *Miranda,* including the right to counsel, apply only in the context of custodial interrogation.").

¶43 Moreover, administering a *Miranda* advisement does not create an inherently coercive environment when the individual is otherwise not in custody. *Cf. Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977) (holding that the defendant was not in custody even after the police advised the defendant of his *Miranda* rights and the defendant gave a taped confession). Indeed, other jurisdictions have expressly concluded that a *Miranda* advisement does not, by itself, trigger a suspect's Fifth Amendment right to counsel outside of custodial interrogation. *See, e.g.*, *Commonwealth v. Morgan*, 610 A.2d 1013, 1016, 1018 (Pa. Super. Ct. 1992) (noting that "the police officer took the precautionary step of reading *Miranda* rights to a *non-custodial suspect*, before they were exercised" and concluding that "it is error for a court to consider a confession presumptively coerced merely because a request for a lawyer is not honored where, as here, the suspect was *not*

in custody at the time"); *State v. Stanley*, 809 P.2d 944, 948 (Ariz. 1991) (concluding that "there was neither a *Miranda* nor an *Edwards* violation because [the defendant] was not in custody at the time of [the officer's] questioning" regardless of the fact that police gave the defendant *Miranda* warnings).

¶44 Here, although the district court twice concluded that Lulei was not in custody, it nevertheless ruled (consistent with defense counsel's contention at the suppression hearing) that Lulei's invocation of his right to counsel was effective because Detective Bolton attempted to give him a *Miranda* advisement. This ruling was erroneous as a matter of law. As discussed above, *Miranda* applies only in the context of custodial interrogation. The Fifth Amendment right to counsel is not triggered merely because the police attempted to give a *Miranda* advisement because a *Miranda* advisement, without more, does not create the context of custodial interrogation. *See McNeil*, 501 U.S. at 182 n.3.

C. The Record Confirms that Lulei Was Not in Custody When He Invoked the Right to Counsel

¶45 Our conclusion above does not end our inquiry. Rather, to determine whether the district court erred in suppressing Lulei's statements under *Edwards*, we must examine whether, under the totality of the circumstances, Lulei was in custody when he invoked the right to counsel. Our independent review of the audio- and video-recorded interrogation confirms the trial court's determination that he was not.

¶46 A person is in custody for purposes of *Miranda* if, under the totality of the circumstances, "a reasonable person in the suspect's position would have felt that [their] freedom of action had been curtailed to a degree associated with formal arrest." *People v. Eugene*, 2024 CO 59, ¶ 15, 555 P.3d 601, 605 (quoting *People v. Garcia*, 2017 CO 106, ¶ 20, 409 P.3d 312, 317); *see also Stansbury v. California*, 511 U.S. 318, 322 (1994).

¶47 We consider a nonexhaustive list of factors to determine whether, from an objective perspective, an individual was subjected to circumstances associated with formal arrest:

> (1) the time, place, and purpose of the encounter;
>
> (2) the persons present during the interrogation;
>
> (3) the words spoken by the officer to the defendant;
>
> (4) the officer's tone of voice and general demeanor;
>
> (5) the length and mood of the interrogation;
>
> (6) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation;
>
> (7) the officer's response to any questions asked by the defendant;
>
> (8) whether directions were given to the defendant during the interrogation; and
>
> (9) the defendant's verbal or nonverbal response to such directions.

People v. Matheny, 46 P.3d 453, 465–66 (Colo. 2002).

¶48 "A court may consider many factors, but no single factor is determinative, and a court is not limited in the number of factors it may consider." *Eugene*, ¶ 15, 555 P.3d at 605 (quoting *People v. Minjarez*, 81 P.3d 348, 353 (Colo. 2003)). It is irrelevant whether the individual is "actually arrested at the close of the interview." *People v. Willoughby*, 2023 CO 10, ¶ 21, 524 P.3d 1186, 1192 (quoting *Matheny*, 46 P.3d at 468 n.10).

¶49 Applying these factors here, our review of the record confirms that Lulei was not in custody when he invoked his right to counsel.

¶50 We begin by noting that the time and purpose of the encounter weigh against custody. The encounter took place in the early afternoon. *See id.* at ¶ 23, 524 P.3d at 1192 (noting that an encounter that takes place in daytime weighs against custody). Detective Bolton told Lulei that he had "a couple follow-up questions" regarding the roommate's death, indicating that the purpose of the encounter was for Lulei to provide more information as a voluntary witness, not a suspect. *Cf. People v. Holt*, 233 P.3d 1194, 1198 (Colo. 2010) (noting that the police behaved as though the defendant was a prime suspect in a serious felony investigation, a fact that was "an important consideration in our custody determination").

¶51 Lulei went to the station voluntarily—nothing in the record indicates he was taken against his will. *Compare Mathiason*, 429 U.S. at 495 (concluding that the fact

that the defendant went to the police station voluntarily and was told he was not under arrest weighed against custody), *with People v. Sandoval*, 218 P.3d 307, 309–10 (Colo. 2009) (concluding that the defendant was in custody in part because the officer informed the defendant that if he would not come to the station voluntarily, he would be forced to go against his will). Although Lulei was handcuffed in front of his body during transport to DPD headquarters, this was standard procedure for officer safety.

¶52 The encounter took place in a windowless interview room at the station, but the door was unlocked and Lulei was not in handcuffs or restrained in any way. *See People v. Clark*, 2020 CO 36, ¶ 33, 500 P.3d 356, 362 (noting that the absence of handcuffs during the interrogation weighed against custody); *Mathiason*, 429 U.S. at 495 (holding that the defendant was not in custody despite being questioned at the police station because "there is no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way"). Instead, he was free to get up, and he even opened the interview room door on multiple occasions. *See People v. Davis*, 2019 CO 84, ¶ 31, 449 P.3d 732, 740 ("Another 'well-recognized circumstance tending to show custody is the degree of physical restraint used by police officers to detain' a person." (quoting *People v. Breidenbach*, 875 P.2d 879, 886 (Colo. 1994))). Although Detective Bolton was carrying a holstered firearm, he was dressed in plain clothes and sat farthest from

the unlocked door. *See People v. Becker*, 196 P.3d 264, 267 (Colo. 2008) (considering the facts that the officer's weapon was concealed during the interrogation and the officer made an effort with his physical presence to avoid the appearance that the defendant was not free to leave in concluding that the defendant was not in custody).

¶53 Detective Bolton's tone was calm, nonconfrontational, casual, and generally deferential to Lulei, even when Lulei expressed his frustration that he was made to wait. *See Davis*, ¶ 33, 449 P.3d at 741 ("We have also considered an officer's tone of questioning particularly relevant to a custody determination."); *People v. Padilla*, 2021 CO 18, ¶ 24, 482 P.3d 441, 447 (considering the nonconfrontational, friendly demeanor of the officer and the casual mood of the conversation as facts weighing against custody).

¶54 The encounter was relatively brief; Lulei set a timer on his phone for six minutes, telling Detective Bolton that he was "wasting time." *See Padilla*, ¶ 25, 482 P.3d at 448 ("[W]e place particular emphasis on the fact that [the defendant] dictated the length of the interrogation . . . because a reasonable person who sets the length of an interrogation is unlikely to believe that his freedom of action has been curtailed to a degree associated with formal arrest.").

¶55 Furthermore, Detective Bolton made no threats, commands, or any show of force. *See People v. Bohler*, 2024 CO 18, ¶ 30, 545 P.3d 509, 516 (noting that the

officers "made no threats, they made no promises, and no one referenced criminal liability" when concluding that the defendant was not in custody (footnote omitted)). When Lulei indicated that he was leaving at the very beginning of the interview, Detective Bolton directed Lulei to wait. However, this directive was not accompanied by "force, threats of negative consequences for not complying, or an aggressive tone." *Id.* at ¶ 33, 545 P.3d at 517.

¶56 Additionally, Detective Bolton had not told Lulei that he was under arrest at any point before Lulei invoked the right to counsel. *See Willoughby*, ¶ 28, 524 P.3d at 1192 ("Courts place great weight on whether police tell a suspect that they are under arrest."). Instead, Detective Bolton repeatedly reassured Lulei that he would help Lulei leave and that he just wanted a little bit of Lulei's time. *Cf. Matheny*, 46 P.3d at 467 (concluding that the fact that the officer told the defendant he was free to go at any time weighed against custody). Finally, although Detective Bolton attempted to administer a *Miranda* advisement, this alone did not transform the situation into a custodial setting. *See United States v. Bautista*, 145 F.3d 1140, 1148 (10th Cir. 1998) (acknowledging that "the reading of the *Miranda* warning to a suspect does not create a custodial interrogation").

¶57 In sum, our review of the record confirms that, under the totality of the circumstances, a reasonable person in Lulei's position would not have felt that his freedom of movement was curtailed to a degree associated with formal arrest.

¶58 Because Lulei was not in custody when he invoked his right to counsel, *Miranda* and *Edwards* are inapplicable here. *Montejo*, 556 U.S. at 795. Put differently, because Lulei's Fifth Amendment right to counsel under *Miranda* had not attached, the district court erred in suppressing Lulei's statements under *Edwards* on grounds that law enforcement failed to scrupulously honor Lulei's request for an attorney by reinitiating the interrogation.

D. Voluntariness

¶59 Finally, we decline to consider Lulei's supplemental briefing arguments related to the voluntariness of his *Miranda* waiver and his post-*Miranda* statements because "interlocutory relief under C.A.R. 4.1 is not available to defendants." *People v. Brown*, 2022 CO 11, ¶ 13, 504 P.3d 970, 974–75. The district court concluded that Lulei's statements were voluntary and there was no police coercion. "[I]f the district court resolves a suppression issue against the defendant, we have no jurisdiction to address it in an interlocutory appeal." *People v. Weston*, 869 P.2d 1293, 1297 (Colo. 1994).

IV. Conclusion

¶60 This unusual case is illustrative of why the party presentation principle "is a 'supple' rule, not an intransigent one." *Galvan*, ¶ 46, 476 P.3d at 758 (quoting *Sineneng-Smith*, 590 U.S. at 376). Here, we have a finding by the trial court, based in part on a concession by defense counsel, that Lulei was not in custody. The

record supports that finding. Rigid adherence to the party presentation principle would require us to disregard that finding, not to mention the trial court's undisputable legal error premised on that finding. In all, it would force a resolution of the *Edwards* issue before us that is untethered to the facts or the law. But the principle is not ironclad, and we are not shackled to such an outcome. Instead, under the circumstances here, we follow our decision in *Kutlak* and exercise our discretion to address the issue of custody as a necessary antecedent to the *Edwards* issue before us. We perceive no unfairness in doing so here, particularly given that the issue of custody was expressly addressed (and conceded by the defense) below, it was discussed at oral argument, and the parties filed supplemental briefing on the issue in this court.

¶61 In sum, we reverse the district court's order suppressing Lulei's statements on the basis that law enforcement violated Lulei's *Miranda* rights under *Edwards*, and we remand the case for further proceedings.

JUSTICE BLANCO concurred in part and concurred in the judgment.

JUSTICE GABRIEL, joined by **JUSTICE HOOD** and **JUSTICE BERKENKOTTER**, dissented.

JUSTICE BLANCO, concurring in part and concurring in the judgment.

¶62 I write separately to address an apparent injustice: Today the People prevail on an argument they failed to advance. Specifically, this court rules in favor of the People because Dakotah J. Lulei "was not in custody [under *Miranda*] when he invoked his right to counsel," Pl. op. ¶ 49, even though the People failed to brief that issue prior to oral argument before this court.

¶63 But that is not the whole picture, and the party presentation principle remains vital. Although Lulei indicates the People unfairly ambushed him at oral argument, the parties also presented the *Miranda* custody issue in two other ways: the People's C.A.R. 4.1 Notice of Interlocutory Appeal (the "Notice") and the supplemental briefing *requested by Lulei*. These presentations from the parties collectively (if barely) placed the custody issue before this court despite the People's failure to do so in their pre-argument briefing.

¶64 Therefore, I agree with the plurality's conclusions regarding party presentation. I depart from its reasoning, however, because I do not rely on a "fundamental obligation to ascertain controlling law." Pl. op. at ¶ 31. Consequently, I respectfully agree with the plurality that we may address the custody issue, concur in part with its reasoning, and join this court's judgment.

I. Discussion

¶65 This court is unanimous in finding that the People failed to address the *Miranda* custody issue in their Opening Brief or in their Reply Brief. Pl. op. ¶¶ 15–16; Diss. op. ¶¶ 88, 90. The People did present the issue, however, by way of (1) the Notice, (2) oral argument, and (3) supplemental briefing.

¶66 First, the Notice framed the "Issues to be Raised on Appeal" as "Did the district court err in suppressing [Lulei's] statements?" Although it is preferable for issues to be framed with greater specificity, the People limited the Notice's citations to two cases: *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981). Both cases recognize custody as a prerequisite to their holdings. *See Miranda*, 384 U.S. at 478 ("To summarize, we hold that when an individual is taken into custody . . . and is subjected to questioning, the privilege against self-incrimination is jeopardized."); *Edwards*, 451 U.S. at 485–86 ("The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, . . . there would be no occasion to determine whether there had been a valid waiver."). Thus, the issue of custody was fairly encompassed by the Notice. The Notice, however, is insufficient to end my inquiry.

¶67 Second, during oral argument, the People addressed the custody issue by arguing, "[L]et's take a step back . . . . At the time that Mr. Lulei invoked [his right

to counsel,] he actually wasn't in custody . . . . That is what the trial court found." Indeed, the district court found that "everyone has confessed [Lulei] was not in custody [when he was brought to the police station,]" and Lulei did not contest this finding in his pre-oral argument Answer Brief. Even then, the Notice and the oral argument were insufficient to present the custody issue.

¶68 Finally, Lulei requested supplemental briefing after oral argument. This court then ordered briefing for, among other issues, "Whether Mr. Lulei was, in fact, in custody at the time he invoked his right to counsel . . . ." Thus, both Lulei and the People presented the *Miranda* custody issue to this court.

¶69 Importantly, this court did not address the custody issue on its own initiative. We do not permit courts below to reach an issue "sua sponte and without briefing" when "neither party raise[d] it," *Galvan v. People*, 2020 CO 82, ¶¶ 44–47, 476 P.3d 757–58, so I apply the same principle here. I find it significant that Lulei—rather than this court—requested supplemental briefing on the custody issue. *But see People v. Kutlak*, 2016 CO 1, ¶¶ 10–12, 364 P.3d 199, 202–03 (ruling in favor of the People after sua sponte requesting supplemental briefing on an issue the People raised in response to this court's questions during oral argument even when the People did not present the issue in pre-argument briefs). In my opinion, which follows the more recent *Galvan* to the extent that case conflicts with *Kutlak*, it took the sum of the Notice, oral argument, and

supplemental briefing to present this issue despite the People's failure to do so in their pre-argument briefing.

¶70 I also acknowledge this court facilitated the parties' presentations of the custody issue by ordering oral argument and supplemental briefing.[1] But those orders followed the Notice and Lulei's unopposed request for supplemental briefing, respectively, and there is no question this court had discretion to issue the orders. *See* C.A.R. 4.1(g) ("Oral argument is not permitted unless ordered by the court."). Now, the oral argument cannot be unheard; the supplemental briefing cannot be unfiled. Nor did either party ask this court to reconsider the orders. Therefore, I take this case as I find it, after the district court addressed the custody issue, which was then presented to this court through the sum of the Notice, oral argument, and supplemental briefing.

A. Agreement with the Plurality/Majority

¶71 Under these circumstances, I agree with the plurality's conclusions regarding party presentation, waiver, and abandonment. Having determined the custody issue was permissibly reached, I join this court's reasoning and conclusion that Lulei was not in custody when he requested an attorney. Pl. op. ¶¶ 37–58. I

[1] The orders were issued before I joined this court.

also join this court's decision to reverse the suppression order and to remand this case to the district court for further proceedings.

B. Disagreement with the Plurality

¶72 I do not agree with three aspects of the plurality's opinion. First, I do not join its discussion of courts' "fundamental obligation to ascertain controlling law." *Id*. at ¶¶ 31–36. I cannot square this proposed obligation with parties' responsibility to advance "the facts and argument entitling them to relief." *See Galvan*, ¶ 45, 476 P.3d at 757 (quoting *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020)). Although the plurality's opinion may be interpreted to avoid this conflict, courts should not place the cart (deciding legal questions) before the horse (confining decisions to contested issues). In my view, courts must first assure themselves that litigants have presented a disputed issue before considering the merits of the issue. A "fundamental obligation to ascertain controlling law" runs the risk of conflating issue presentation with merits determinations.

¶73 Even in *Masterpiece Cakeshop, Inc. v. Scardina*, 2024 CO 67, ¶ 21, 556 P.3d 1238, 1245, which the plurality cites, this court ruled on an issue preserved and presented by the petitioner: whether a particular statute barred the district court from hearing a claim. Only after we determined the issue was "squarely before us" did we interpret the statute. *Id.* Although we interpreted the statute differently than the parties, that was beside the point of whether the parties

presented the issue. *See id.*; *see also Lucero v. People*, 2017 CO 49, ¶ 26, 394 P.3d 1128, 1134 ("[C]ourts 'rely on the parties to frame the issues for decision' . . . . This principle, however, does not prevent a court from properly characterizing an issue that has been improperly characterized by a party." (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))). Thus, this court's legal determination properly followed the parties' issue presentation.

¶74 Accordingly, in assessing whether the custody issue is before this court, I considered the parties' presentations. I did not consider the issue's merits, nor did I follow a fundamental obligation to ascertain controlling law.

¶75 Second, I would specify that this court does not hold against Lulei the custody-related statements his counsel made during oral argument. *See* Diss. op. ¶ 100. *But see* Pl. op. ¶¶ 16 & 16 n.4, 60. In my view, litigants generally should not raise unbriefed issues during oral argument and adverse parties should not be penalized for good-faith responses to such arguments. I would seek to avoid any chilling effect on responses to objectively unexpected questions during oral argument.

¶76 Third, although I agree with the plurality's conclusions, I would be remiss to overlook the wisdom of the dissent and the value we must place on adhering to the party presentation principle. We rely on these procedures to provide a fair opportunity for preparation and to keep the judiciary in its adjudicatory lane.

There is a dire cost to everyone when courts deviate from these principles, which are only worthwhile if they are actively maintained. I differ from the dissent, however, because the parties in this matter did eventually present the custody issue to this court.

II. Conclusion

¶77 Accordingly, I respectfully concur in part and concur in the judgment.

JUSTICE GABRIEL, joined by JUSTICE HOOD and JUSTICE BERKENKOTTER, dissenting.

¶78 Today, a majority of this court reverses the district court's suppression order on the ground that *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), do not apply because Dakotah J. Lulei was not in custody during the interrogation at issue. Pl. op. ¶¶ 2, 23, 37–58; Conc. op. ¶ 71. In so ruling, the plurality adopts (and *substantially* develops over many pages) an argument that the People made for the first time in oral argument (during which the People relied on case law not cited in any of their briefs). And the plurality does so notwithstanding the fact that the People's new argument was completely inconsistent with the argument presented in their briefing before this court.

¶79 The plurality's analysis largely sidesteps long-settled principles of waiver and abandonment, and it substantially erodes the party presentation principle. After today, it would appear that any party may present at oral argument positions not argued in their briefs and this court may address those new assertions if they have some relationship to the issue actually raised and a majority of this court believes that addressing the new contentions will allow the majority to reach what it has determined to be the correct result.

¶80 I cannot subscribe to such a precedent, which undermines the orderly appellate process long prescribed by our rules and case law. Contrary to the plurality, I believe that, by arguing in their briefs only that the trial court

erroneously suppressed Lulei's statements because the police did not reinitiate questioning (an argument that presumed Lulei's custody and *Edwards*'s applicability in this case), the People waived or abandoned any contention that Lulei was not in custody and that *Edwards* did not apply. I would thus address only the issue that the People actually raised in this case, and I would conclude that after Lulei clearly and unambiguously invoked his right to counsel, the police did not scrupulously honor that invocation.

¶81 Accordingly, I would affirm the trial court's suppression order, and therefore, I respectfully dissent.

I. Factual and Procedural Background

¶82 After Lulei and another man spent time together in a motel room drinking and smoking pot, Lulei called 911 to report a medical emergency. Medical personnel and the police responded, but the other man (the "victim") was pronounced dead at the scene. An autopsy revealed that the victim had suffered severe internal trauma. The police thus commenced an investigation.

¶83 Lulei later agreed to come to police headquarters to give a statement, and the police transported him there in a police vehicle. Pursuant to department policy, Lulei was handcuffed (with his hands in front of him) while being transported.

¶84 Lulei was eventually brought to an interview room for questioning by Detective Bolton. Lulei told the detective that the police already had his statement, but the detective responded that he had a couple of follow-up questions. The detective then began going through a *Miranda* advisement form with Lulei. The detective provided the form to Lulei, who began reading it to himself. After reading the form for a brief time, Lulei asked, "Oh, so I'm allowed to have a lawyer present for this?" The detective responded, "Absolutely," at which point Lulei replied, "Oh, hell yeah, let's reschedule this when I have a lawyer present." The detective then said, "Okay, we can do that."

¶85 Lulei stood and opened the interview door to leave, but the detective told him to wait until he could talk to his colleagues. The detective left the room and conferred with another detective (Detective Sandoval) and a deputy district attorney, and the three of them decided to arrest Lulei. Detective Bolton then reentered the room with Detective Sandoval and a uniformed officer, and the officer asked Lulei to turn around. The following conversation ensued:

Lulei:	What?
Officer:	I'm just gonna put the cuffs on you; we did this before.
Lulei:	But you all put it on in front of me on the way here.
Det. Sandoval:	We did, yes. Not now.
Lulei:	What's going on now?

Det. Bolton: Well, Dakotah, *I tried to talk to you, get your side of the story. Right now, you're going to be arrested*, okay?

Lulei: What the fuck? For what?

Det. Sandoval: For murder.

Lulei: Oh, dude, no. Like, let's talk this out then. Dude, like, no.

Det. Sandoval: *Nope, you had your chance, and you asked for a lawyer. We can't do it now*.

Det. Bolton: *I tried to talk to you smoothly, man, and hear your side of it. We have some serious questions.*

Lulei: Alright, I'll rescind that then. I have serious—like, get answers then, dude. Like come on, like, don't fucking arrest me right now. I have my fucking motel paid for, for the next two weeks. I have to go to work on Monday. Like, I'm down to talk to you. Like, dude, like don't fucking detain me and shit like that. I thought I was going to be free to go after this.

Det. Sandoval: Well, no one told you you were free to go after this—

Det. Bolton: No one told you that, and also, *I tried to get your side of the story and figure it out, man, and you didn't want to talk*.

Lulei: I'll talk to you now, man.

Det. Bolton: Gimme a second.

(Emphases added.)

¶86 Detective Bolton subsequently re-*Mirandized* Lulei and proceeded to question him for over two hours. In the course of this conversation, Lulei made incriminating statements.

¶87 The People charged Lulei with one count of second degree murder and one count of first degree assault. Lulei thereafter filed a motion to suppress his statements to the detective, and the trial court conducted a hearing on this motion. At the conclusion of the hearing, the trial court granted the motion. As pertinent here, the court found that "defendant's request for [an] attorney was not scrupulously honored" when Lulei asked what was going on and the detective responded, "I tried to talk to you to get your side of the story. Right now, you're going to be arrested, okay?"

¶88 The People then filed an interlocutory appeal in this court. Notably, at no time did the People contend that Lulei was not in custody and therefore *Edwards* did not apply. To the contrary, throughout their briefing, the People proceeded on the premise that *Edwards* applied. They thus argued that the trial court had erred in suppressing the statements that Lulei had made to Detective Bolton because, in the People's view, the police did not reinitiate any questioning. Instead, the People maintained that they had scrupulously honored Lulei's unambiguous invocation of his right to counsel and they did nothing other than answer Lulei's questions about what was happening.

¶89 Lulei filed an answer brief, responding that Detective Bolton's comments referencing Lulei's invocation of his right to counsel was reasonably perceived by Lulei as punishment for invoking that right. Thus, in Lulei's view, the detective had improperly induced Lulei to reconsider his invocation of the right to counsel to avoid the perceived punishment. Finally, Lulei argued that he did nothing to reinitiate the interrogation.

¶90 The People then filed a reply, arguing that Detective Bolton had scrupulously honored Lulei's invocation of the right to counsel and that Lulei had decided to reinitiate the interrogation.

¶91 In short, *all* of the briefing in this case presumed that Lulei was in custody and proceeded on the premise that *Edwards* applies here. The parties disagreed only as to the result of the *Edwards* analysis.

¶92 Notwithstanding the foregoing, at oral argument, the People argued, for the first time, that Lulei was not in custody and that therefore *Edwards* does not actually apply. In so arguing, the People cited case law that they had not cited in any of their briefs, thereby ambushing Lulei's counsel.

¶93 Thereafter, Lulei requested supplemental briefing to address the issues newly raised at oral argument. We granted his motion and received simultaneous supplemental briefs from both parties.

II. Analysis

¶94 I begin by addressing the party presentation principle and whether, in the circumstances presented, the People waived or abandoned their contention that Lulei was not in custody and that therefore *Edwards* does not apply here. After concluding that the People waived or abandoned this contention, I address the question that the People raised in their initial briefing before us.

A. The Party Presentation Principle, Waiver, and Abandonment

¶95 The Supreme Court has stated:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."

Greenlaw v. United States, 554 U.S. 237, 243–44 (2008) (alteration in original) (footnote and citation omitted) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)).

¶96 In light of this settled law, we have long recognized "the basic principle of appellate jurisprudence that arguments not advanced on appeal are generally deemed waived." *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007). It has likewise long been settled that a party may lose its right to assert an issue on appellate

review "when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Steagald v. United States*, 451 U.S. 204, 209 (1981); *see also Compos v. People*, 2021 CO 19, ¶ 35, 484 P.3d 159, 165 (acknowledging the force of the defendant's argument that a court of appeals division had erred in adopting a new crime exception to *Miranda* when no party had advocated for such an exception, but not deciding that issue).

¶97 And in cases dating back nearly a century, we and divisions of our court of appeals have consistently said that arguments not pursued on appeal or not briefed are deemed abandoned. *See, e.g.*, *In re Stanley*, 2025 CO 51, ¶ 17 n.3, 576 P.3d 171, 178 n.3; *People v. Smith*, 2024 CO 3, ¶ 18, 541 P.3d 1191, 1195; *CenCor, Inc. v. Tolman*, 868 P.2d 396, 397 n.1 (Colo. 1994); *Nicoloff v. Bloom Land & Cattle Co.*, 66 P.2d 333, 334 (Colo. 1937); *Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 38, 365 P.3d 378, 386; *In re Marriage of Marson*, 929 P.2d 51, 54 (Colo. App. 1996). Indeed, in my almost eighteen years as an appellate judge, I have read numerous briefs in which the People have asserted this very argument against criminal defendants. As I have written previously, "[A]rguments regarding waivers and forfeitures do not operate solely against criminal defendants; they work both ways." *People v. Rigsby*, 2020 CO 74, ¶ 47, 471 P.3d 1068, 1079 (Gabriel, J., dissenting).

¶98 Here, as noted above, in their opening and reply briefs before us, the People framed their appellate issue based on the premise that Lulei was in custody during the interrogations at issue and that *Edwards* applied. At no time in either their opening or reply briefs did the People even suggest that Lulei might not have been in custody. And this is so even though, as the plurality points out, Pl. op. ¶¶ 10–13, 33, 60, the issue of whether Lulei was in custody was discussed in the trial court. Accordingly, the People were aware of a potential issue regarding whether Lulei was in custody, but they chose not to raise that issue in their initial briefing before us, despite the fact that it was their own interlocutory appeal and they controlled the issues to be raised.

¶99 Under the long-settled principles of law set forth above, I would conclude that by not advancing any argument in their initial briefs that Lulei was not in custody and therefore *Edwards* does not apply (indeed, by taking precisely the opposite position), the People waived or abandoned any such argument. Assuredly, if, as we have recently concluded, a defendant waives an objection to the belated setting of restitution by impliedly requesting that the trial court set restitution after the statutory deadline for doing so, *see Babcock v. People*, 2025 CO 26, ¶ 30, 569 P.3d 850, 856, then the People must likewise be deemed to have waived an argument when their briefing took a diametrically opposed position to the one that they subsequently took for the first time in oral argument.

¶100 I am not persuaded otherwise by the fact that the People presented their new position at oral argument, while the case was still under our consideration. To my knowledge, we have never previously concluded that a party that has waived or abandoned an argument can resurrect it by reversing course and presenting the waived or abandoned contention at oral argument. To allow a party to do so subverts the orderly appellate process established by our case law and appellate rules and invites appellate advocacy by ambush. Indeed, the plurality implicitly condones such a practice when it uses against Lulei statements regarding the issue of custody that his counsel made at oral argument after being ambushed. *See* Pl. op. ¶ 16 & n.4. The plurality does so notwithstanding the fact that when Lulei's counsel filed his supplemental brief, after being given an opportunity to consider the question appropriately, he corrected his prior statements and argued that Lulei was, in fact, in custody. In my view, condoning the People's taking a contrary position in oral argument from the one that they took in all of their briefing before us while simultaneously using against Lulei a statement that his counsel made after being surprised at oral argument (but that he later corrected) is inconsistent and manifestly unjust.

¶101 Nor can I subscribe to the plurality's approach based on our obligation to "ascertain controlling law." *Id.* at ¶¶ 26, 31. This case does not present any question regarding the "controlling law" because the parties agree on the law.

Thus, addressing the issue that the parties initially briefed (i.e., whether the People had scrupulously honored Lulei's unambiguous invocation of the right to counsel) would do no violence to the law. And if it were the case that we have an obligation to reach the result that we believe to be the correct one, regardless of what the parties argued, then we would never be bound by what the parties argue, and the party presentation principle would cease to exist.

¶102 On this point, I take no comfort from the plurality's apparent attempt to cabin its novel approach to the circumstance in which the newly raised issue is allegedly antecedent to and ultimately dispositive of the issue before the court. *Id.* at ¶¶ 23, 32–36. In support of this effort, the plurality principally relies on *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 447 (1993), and *People v. Kutlak*, 2016 CO 1, 364 P.3d 199. But neither of those cases applies here.

¶103 *United States National Bank*, 508 U.S. at 447–48, involved a question as to the very existence of the statute at issue. There, trade associations representing insurance agents challenged a decision by the Comptroller of the Currency relying on a 1916 statute to permit certain banks to sell insurance to a particular class of customers. *Id.* at 443–44. The Comptroller allowed the petitioner bank to do so, and the trade associations challenged that ruling, contending that the Comptroller's determination was inconsistent with the statute. *Id.* In the course

of the proceedings in the trial and intermediate appellate courts, an issue arose as to whether the statute had, in fact, been repealed. *Id.* at 444. Although the trade associations did not make such an argument, the court of appeals concluded that the statute had been repealed (thus undermining the Comptroller's decision), and the Supreme Court granted the bank's petition to review that determination. *Id.* at 444–45. It is in this context that the Court addressed whether the statute's repeal was properly before the intermediate appellate court. *Id.* at 447. Specifically, the Court observed that the appellate court could, in the exercise of its discretion, address an issue that was antecedent to and ultimately dispositive of the dispute before it because "[t]here can be no estoppel in the way of ascertaining the existence of a law." *Id.* at 447–48 (alteration in original) (quoting *Town of S. Ottawa v. Perkins*, 94 U.S. 260, 267 (1876)). In other words, it was perfectly appropriate for the appellate court, in the circumstances before it, to determine whether the statute at issue was even in effect.

¶104 *United States National Bank* is, thus, distinguishable from the present case. That case, unlike the one before us, directly involved a scenario in which the courts were required to ascertain the controlling law. (The Court ultimately determined that the statute at issue had not, in fact, been repealed. *Id.* at 462–63.) As noted above, the present case poses no such question. All parties agree on the controlling

law. The only issue is the application of the law to the facts before us, a matter of error correction, not ascertainment of the applicable law.

¶105 *Kutlak* likewise does not support the plurality's contention that it may properly address any issue that it deems antecedent to the question presented, even if the issue was waived. In *Kutlak*, ¶¶ 6–7, 364 P.3d at 202, the trial court denied Kutlak's motion to suppress statements that he had made in the course of a custodial interrogation, and a division of the court of appeals reversed, concluding that Kutlak had unambiguously invoked his right to counsel and did not reinitiate further communications. We granted certiorari solely on the question of whether Kutlak had reinitiated communications, but we ultimately concluded, instead, that he had not unambiguously invoked his right to counsel. *Id.* at ¶¶ 3, 8 n.2, 364 P.3d at 201, 202 n.2. We therefore reversed the division's judgment, *id.* at ¶ 3, 364 P.3d at 201, reaching that conclusion even though (1) we did not grant certiorari on the question of whether the defendant's invocation was unambiguous; (2) the People had conceded at every stage of the proceedings that the defendant's invocation was sufficient; and (3) no party had briefed the invocation question until we sua sponte requested supplemental briefing after the case was at issue, *id.* at ¶ 35, 364 P.3d at 208 (Gabriel, J., dissenting).

¶106 *Kutlak*, too, is distinguishable. We began our analysis by noting that we generally have discretion to affirm a trial court's suppression ruling on different

grounds from those on which the trial court had relied. *Id.* at ¶ 11, 364 P.3d at 203 (majority opinion). That principle does not apply here, however, because in this case, we are *reversing* the trial court's ruling. Nor did *Kutlak* involve a question of waiver or this Court's ability to resurrect an issue that a party had previously waived. (As noted above, although the People in that case had conceded a sufficient invocation of the right to counsel, the People did not initiate a contrary argument in this court; a majority of this court did so on its own.) And, respectfully, I am not persuaded by the fact that, in a single case decided a decade ago, a majority of this court departed from the ordinary appellate process, as it does in an arguably even more expansive way today. I believed that we were wrong to do so then, *see id.* at ¶¶ 33–40, 364 P.3d at 208–09 (Gabriel, J., dissenting), and I believe that we should not do so now, particularly given that we have not been consistent in so departing from our settled rules of procedure. (The present case provides one illustration of such an inconsistency. Here, the plurality repeatedly points out that Lulei allegedly conceded in the trial court that he was not in custody, and it uses that concession to justify ruling for the People, despite the fact that the People did not raise any issue regarding custody in their initial briefing before us. Pl. op. ¶¶ 33, 60. In *Kutlak*, however, the *People* conceded in both the trial court and on appeal that Kutlak had unambiguously invoked his right to counsel, but the majority effectively disregarded that concession and ruled

that Kutlak had not, in fact, unambiguously invoked that right. *Kutlak*, ¶¶ 7, 32, 364 P.3d at 202, 207. If the People's prior concessions in *Kutlak* became irrelevant once we ordered supplemental briefing, then Lulei's prior concessions should be treated the same way here.)

¶107 Finally, I do not believe that it is fair or appropriate to use against Lulei the fact that he was forced to seek supplemental briefing after being ambushed during oral argument. *See* Conc. op. ¶¶ 63, 67. After the People raised the custody issue for the first time at oral argument, a number of my colleagues expressed obvious interest in that issue during the argument. As a result, Lulei had no choice but to seek a reasonable opportunity to respond. Regardless, I take no solace in the fact that the parties were offered the opportunity to file supplemental briefs. If we can cure all waivers, abandonments, and party presentation problems simply by authorizing supplemental briefs, then those important doctrines will be rendered meaningless, at our discretion.

¶108 Notwithstanding the plurality's effort to downplay the nature of its ruling in this case, *see* Pl. op. ¶ 60, I believe that the harm to heretofore settled principles of party presentation, waiver, and abandonment that the plurality's opinion would engender is manifest and significant. If it can be said that the question of whether Lulei was in custody for *Edwards* purposes was properly before us because this case related to an alleged *Edwards* violation and the issue of custody

was antecedent to *Edwards*'s application, then there is no longer any limit to what a party can argue after filing its briefs. This is so because creative lawyers will inevitably be able to develop an argument as to how a newly raised assertion was related and somehow antecedent to a different contention that they actually presented. In addition, allowing parties to change their approach in this way would be inconsistent with the long line of authority providing that objecting on one ground does not preserve an objection on another ground. *See Udemba v. Nicoli*, 237 F.3d 8, 14–15 (1st Cir. 2001) ("It is a bedrock rule that a party who unsuccessfully objects to the introduction of evidence on one ground cannot switch horses in midstream and raise an entirely new ground of objection on appeal . . . ."); *People v. Rogers*, 2012 COA 192, ¶ 24, 317 P.3d 1280, 1284 ("An issue is unpreserved for review when an objection or request was made to the trial court, but on different grounds than those raised on appeal.").

¶109 For these reasons, I would conclude that by not advancing in their initial briefing an argument that Lulei was not in custody and therefore *Edwards* did not apply, the People waived or abandoned that argument. I would therefore limit our analysis to the issue that the parties actually briefed, namely, whether the People had scrupulously honored Lulei's invocation of his right to counsel and whether Lulei had reinitiated the interrogation.

¶110 I turn to that question next.

B. *Edwards*

¶111 The Fifth Amendment guarantees the right to counsel in the course of a custodial interrogation. *Miranda*, 384 U.S. at 469; *Leyba v. People*, 2021 CO 54, ¶ 12, 489 P.3d 728, 732.

¶112 In *Edwards*, 451 U.S. at 483–85, the Supreme Court opined that when a suspect invokes the right to counsel, interrogation must cease until counsel is made available or the suspect voluntarily reinitiates communications with the police and knowingly and intelligently waives his rights.

¶113 To invoke the right to counsel, a suspect's request for counsel must be clear and unambiguous. *See Leyba*, ¶ 13, 489 P.3d at 732. Upon a suspect's clear invocation of the right to counsel, police must "scrupulously honor[]" the request and cease questioning until counsel has been provided. *People v. Wood*, 135 P.3d 744, 753 (Colo. 2006); *accord Edwards*, 451 U.S. at 484–85; *Miranda*, 384 U.S. at 473–74. This bright-line rule exists to "prevent police from badgering a defendant into waiving his previously asserted right to counsel." *Kutlak*, ¶ 14, 364 P.3d at 204.

¶114 Once the police cease interrogation upon a suspect's invocation of the right to counsel, the suspect may nonetheless subject himself to additional interrogation by "initiat[ing] further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484–85. To reinitiate questioning, however, the

suspect's comments must "'evince[] a willingness and a desire for a generalized discussion about the investigation,' and not merely question the reasons for custody." *People v. Martinez*, 789 P.2d 420, 422 (Colo. 1990) (alteration in original) (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983) (plurality opinion)).

¶115 Here, no party disputes that Lulei clearly and unambiguously invoked his right to counsel. The question thus becomes whether the police then scrupulously honored that invocation and, if they did, whether Lulei reinitiated the questioning.

¶116 Like the trial court, I would conclude that the police did not scrupulously honor Lulei's invocation of his right to counsel. As noted above, when Lulei invoked his right and asked to reschedule for a time when he could have a lawyer present, Detective Bolton initially said that they could do that. The detective, however, did not allow Lulei to leave. Instead, the detective ordered Lulei to wait, walked outside, and returned with Detective Sandoval and a uniformed officer to arrest Lulei. Predictably, Lulei expressed surprise, and he inquired as to what was happening. Contrary to the People's position, the law enforcement officers did not merely answer Lulei's question. Instead, they repeatedly used his invocation of his Fifth Amendment rights against him. For example, when an exasperated Lulei offered to talk about what was happening, Detective Sandoval responded, "Nope, you had your chance, and you asked for a lawyer. We can't do it now." Detective Bolton then added, "I tried to talk to you smoothly, man, and hear your

side of it." And when Lulei expressed his understanding that he would be free to leave, Detective Bolton replied, "No one told you that, and also, I tried to get your side of the story and figure it out, man, and you didn't want to talk."

¶117 In my view, this is the antithesis of scrupulously honoring Lulei's invocation of the right to counsel. Indeed, it is precisely the type of badgering of a defendant into waiving his previously asserted right to counsel that the bright-line, "scrupulously honor" rule seeks to prevent. *See Kutlak*, ¶ 14, 364 P.3d at 204. The police expressly used Lulei's invocation of his Fifth Amendment rights against him and announced that they were arresting him for murder, apparently to provoke him into waiving his rights, which, unsurprisingly, he did. *See also People v. Cerda*, 2024 CO 49, ¶ 32 & n.3, 559 P.3d 206, 213–14, 213 n.3 (concluding that the police did not scrupulously honor the defendant's unambiguous and repeated invocations of his right to counsel when, after the defendant's invocations, the police told him that he would be charged with murder, knowing or reasonably anticipating in the circumstances presented that continuing the interrogation in this manner was likely to elicit an incriminating response). In my view, this was a blatant violation of *Edwards* and its progeny, and for that reason alone, I would affirm the trial court's suppression order.

¶118 Even were I to proceed to the question of whether Lulei reinitiated the interrogation, I perceive no such reinitiation here. Lulei was obviously surprised

by the turn of events, having just been told that the interview would be rescheduled for a time when he could have a lawyer present, and he initially did nothing more than question the reasons for his custody. As noted above, this type of question does not constitute reinitiation. *See Martinez*, 789 P.2d at 422. It was only after the police threatened Lulei that he, under duress, sought to engage in further dialogue. In no way do such circumstances constitute the kind of voluntary reinitiation of conversation envisioned by the above-described case law.

¶119 Accordingly, like the trial court, I would conclude that after Lulei clearly and unambiguously invoked his right to counsel, the police did not scrupulously honor that invocation and Lulei did nothing to reinitiate conversation so as to establish an intentional, knowing, and voluntary waiver of his rights.

III. Conclusion

¶120 For these reasons, I would conclude that the People waived or abandoned any argument that Lulei was not in custody and that *Edwards* therefore does not apply on the facts presented. Addressing, then, only the argument that the People properly presented to us, which presumed *Edwards*'s applicability, I would further conclude that the police did not scrupulously honor Lulei's clear and unambiguous invocation of his right to counsel, as *Edwards* required. I would therefore affirm the trial court's order suppressing Lulei's statements to the detective.

¶121 Accordingly, I respectfully dissent.