No. 21-7934

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT CASH SCHEUERMAN,

Petitioner,

v.

KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF IN OPPOSITION

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General

BRANT M. LAUE
Solicitor General of Kansas
(Counsel of Record)
DWIGHT R. CARSWELL
Deputy Solicitor General
SHANNON GRAMMEL
Deputy Solicitor General
KURTIS K. WIARD
Assistant Solicitor General

120 S.W. 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
brant.laue@ag.ks.gov

QUESTION PRESENTED

Whether an individual's mere presence as a passenger in a car, without more, is sufficient to provide Fourth Amendment "standing" to challenge a search of that car by law enforcement.

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STATEMENT OF THE CASE

1. On August 8, 2016, Detective David Paden of the Barton County Sheriff's Office stopped a car on a rural road outside of Great Bend, Kansas. Pet. App. A, 3-4. Petitioner Robert Cash Scheuerman—who Detective Paden knew had an active arrest warrant against him—was visible in the passenger seat. Pet. App. B, 3-4. Petitioner's girlfriend, Gwen Finnigan, was the driver and owner of the car.[1] Pet. App. A, 4, 16.

When Detective Paden pulled her over, Finnigan stopped the car in the traffic lane because there was not sufficient space to pull over on the shoulder. Pet. App. A, 4. Detective Paden ordered Finnigan to exit the car, which she did. Pet. App. A, 4; B, 4. Detective Paden also radioed for backup, as he knew Petitioner had previously stated that he would not go to jail peaceably and would fight the police with deadly force. Pet. App. B, 4; R. II, 1.[2]

Shortly thereafter, other officers including Sergeant Lloyd Lewis arrived on the scene. Pet. App. A, 4; B, 4. Detective Paden and Sergeant Lewis approached the car and saw that Petitioner was holding a gun to his head. Pet. App. A, 4. To protect Finnigan—and in compliance with Sheriff's Office policies—officers moved her to a safe location. Pet. App. A, 4; B, 4.

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[1] Neither party has disputed that the vehicle was owned by Finnigan and not by Petitioner. Pet. App. B, 8 ("Scheuerman does not dispute he was not the car's owner.").

[2] References to "R." are to the appellate record below.

Petitioner and the remaining officers engaged in a stand-off that lasted longer than an hour. Pet. App. A, 4; B, 4. Eventually, the officers convinced Petitioner to put the gun down and exit the car. Pet. App. A, 4. The officers took Petitioner into custody. Pet. App. A, 4. As he was being taken into custody, Petitioner told the officers that any "dope" in the car belonged to him and not to Finnigan. Pet. App. A, 4.

Because Finnigan's car was blocking the traffic lane and Finnigan was not on the scene to reclaim the car, the officers impounded the car. Pet. App. A, 4. Sergeant Lewis retrieved the gun Petitioner had held from the car and performed an inventory search. Pet. App. A, 4. During the search, he found a backpack that contained methamphetamine, a holster for the gun, and a magazine for the gun. Pet. App. A, 4; B, 4.

2. The State charged Petitioner with six counts relating to his possession of the methamphetamine and the gun, including possession of methamphetamine with intent to distribute at least 3.5 grams but less than 100 grams (a level 2 drug felony, Kan. Stat. Ann. § 21-5705(d)(3)(C) (2016)). Pet. App. A, 4; B, 4.

Petitioner moved to suppress the evidence obtained during the search of Finnigan's car on the ground that the search was unlawful.[3] Pet. App. A, 4. The district court denied the motion after an evidentiary hearing. Pet. App. A, 4.

[3] Petitioner also argued that the evidence should be suppressed because the initial stop of Finnigan's car was unlawful. Pet. App. A, 4. Petitioner later dropped this issue on appeal, and it is not at issue here. Pet. App. B, 7.

Petitioner then agreed to a bench trial based on stipulated facts. Pet. App. A, 5. In exchange for Petitioner's stipulation, the State agreed to reduce the possession charge to possession of methamphetamine with intent to distribute at least 1 gram but less than 3.5 grams (a level 3 drug felony, Kan. Stat. Ann. § 21-5705(d)(3)(B) (2016)). Pet. App. A, 5; B, 5. The State also dismissed the other five charges against Petitioner. Pet. App. A, 5.

At the conclusion of the bench trial, the district court found Petitioner guilty of the reduced possession charge and sentenced him to 73 months in prison with 36 months of post-release supervision. Pet. App. A, 5-6.

3. Petitioner appealed to the court of appeals, arguing that the district court (1) erred in denying his suppression motion and (2) lacked sufficient evidence to convict him. Pet. App. B, 5-14. The court of appeals rejected Petitioner's argument regarding the suppression motion, holding that he lacked Fourth Amendment standing to challenge the search of Finnigan's car. Pet. App. B, 5-8. The court of appeals agreed with Petitioner, however, that there was insufficient evidence to support his conviction.[4] Pet. App. B, 8-14. It therefore reversed Petitioner's conviction and vacated his corresponding sentence. Pet. App. B, 14.

[4] The basis of Petitioner's sufficiency-of-the-evidence challenge was that he had stipulated to possessing "*at least 3.5 grams* but less than 100 grams of methamphetamine," Pet. App. A, 5 (emphasis added), but was found guilty of possessing only "at least 1 gram but *less than 3.5 grams* of methamphetamine," Pet. App. B, 11 (emphasis added). There was thus, Petitioner argued, insufficient evidence to prove that he "possessed less than 3.5 grams of methamphetamine." Pet. App. B, 8.

4. The State petitioned the Kansas Supreme Court for review of the sufficiency-of-the-evidence holding, and Petitioner cross-petitioned for review of the suppression-motion holding. Pet. App. A, 6, 13. The Kansas Supreme Court granted both petitions and unanimously affirmed the court of appeals in part and reversed in part. Pet. App. A, 3, 6. It accordingly affirmed Petitioner's underlying conviction and sentence. Pet. App. A, 17.

The Kansas Supreme Court first reversed the court of appeals' holding that the district court lacked sufficient evidence to convict Petitioner.[5] Pet. App. A, 6-13.

It then affirmed the court of appeals' holding that Petitioner lacked standing to challenge the search of Finnigan's car. Pet. App. A, 13-17. As the Kansas Supreme Court recognized, in order to challenge a search under the Fourth Amendment, defendants "must establish that they have a subjective expectation of privacy in the area searched and this expectation must be objectively reasonable." Pet. App. A, 14 (citation omitted). The Kansas Supreme Court stressed that "there is no bright line holding 'that passengers cannot have an expectation of privacy in automobiles.'" Pet. App. A, 16 (quoting *Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018)). Rather, it explained, numerous "factors" may be relevant in assessing a passenger's "'privacy expectation'" in a car. Pet. App. A, 16 (citation omitted). The Kansas Supreme Court noted that this Court has historically "focused" on "'lawful possession and control and the attendant right to exclude'" when evaluating a

[5] The Kansas Supreme Court's sufficiency-of-the-evidence holding is not at issue here. *See* Pet. 3 n.2.

passenger's expectation of privacy. Pet. App. A, 16 (quoting *Byrd*, 138 S. Ct. at 1528). But it noted that other relevant factors may include "legitimate presence in the area searched" and "prior use of the area searched." Pet. App. A, 16 (citation omitted).

The Kansas Supreme Court concluded that, based on the totality of the circumstances here, Petitioner lacked "a reasonable expectation of privacy in the car" and thus "lacked Fourth Amendment 'standing' to challenge the search." Pet. App. A, 17. While Petitioner had "paid for the car" and "had used the vehicle in the past," those facts alone were not sufficient to establish a reasonable expectation of privacy in the car. Pet. App. A, 16. Petitioner did not own the car and was not driving the car. Pet. App. A, 16. He also "presented no evidence that he had any right to control the car or to exclude others from it at any time." Pet. App. A, 16. Based on all of these facts, the Kansas Supreme Court concluded that Petitioner could not challenge the search of Finnigan's car. Pet. App. A, 17.

REASONS FOR DENYING THE WRIT

Petitioner's overarching argument for certiorari is that "the Kansas Supreme Court's categorical limitation of Fourth Amendment 'standing' to persons who have an ownership or possessory interest in a car is in error." Pet. 18. This argument mischaracterizes the Kansas Supreme Court's decision, does not implicate any alleged split of authority, and at bottom seeks simple error correction where no error was made. Certiorari is unwarranted.

I. Petitioner Mischaracterizes The Kansas Supreme Court's Decision.

Petitioner frames the question presented in this case as "[w]hether passengers are *categorically* unable to challenge the search of a car in which they are . . . riding unless they can show an ownership or possessory interest in the car, even when they are present with the permission of the owner and have significant noncommercial connections to the vehicle." Pet. ii (emphasis added). And according to Petitioner, the Kansas Supreme Court's answer to that question was yes. Pet. 4-5.

In fact, the Kansas Supreme Court's holding was not categorical. The Kansas Supreme Court expressly recognized guidance from this Court that "there is no bright line holding 'that passengers cannot have an expectation of privacy in automobiles.'" Pet. App. A, 16 (quoting *Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018)). Rather, as this Court has instructed, a passenger's expectation of privacy is keyed to the nature and extent of that passenger's "lawful possession and control" of the car and "the attendant right to exclude" from the car. Pet. App. A, 16 (quoting *Byrd*, 138 S. Ct. at 1528). The Kansas Supreme Court identified numerous factors for courts to evaluate in making this fact-based determination. Those factors include "possession or ownership of the area searched or the property seized"—but they also include other factors like "legitimate presence in the area searched, . . . prior use of the area searched or the property seized, ability to control or exclude others' use of the property, and a subjective expectation of privacy." Pet. App. A, 16 (quoting *United States v. Lochan*, 674 F.2d 960, 965 (1st Cir. 1982)).

Put simply, the Kansas Supreme Court did not set forth a "categorical rule[] that prohibit[s] passengers from making Fourth Amendment challenges related to searches of vehicles unless they can prove ownership or possessory interest in the car," as Petitioner alleges. Pet. 8. Rather, it performed a fact-based analysis that looked to the totality of the circumstances—including, but not limited to, the passenger's ownership or other possessory interest in the car—to determine whether a passenger has a "reasonable expectation of privacy in the car." Pet. App. A, 17. For this reason, the case does not present an opportunity to consider Petitioner's "categorical[]" question presented. Pet. ii.

II. The Kansas Supreme Court's Decision Does Not Implicate Any Alleged Split.

Petitioner does not clearly allege any split of authority regarding the Kansas Supreme Court's actual holding: that, based on the particular circumstances present here, a passenger like Petitioner lacks a reasonable expectation of privacy in the car searched. Instead, citing two cases from other states, Petitioner suggests that other courts have "rejected" the "categorical rule" taken by the Kansas Supreme Court. Pet. 15-17. Petitioner is incorrect for the fundamental reason that the Kansas Supreme Court did not adopt a categorical approach. *See supra* 6-7. But he is also incorrect because there is no tension between the Kansas Supreme Court's decision in this case and the other courts' decisions in those cases.

Both of the cases Petitioner relies on involve, as Petitioner concedes, "the specific connections of a taxi cab passenger to the vehicle in which they ride." Pet. 16. In *Chapa v. State*, 729 S.W.2d 723 (Tex. Crim. App. 1987), the Texas Court of

Criminal Appeals held that a passenger who "call[ed]," "got in," and "instructed" a taxicab as a "presumptively paying fare" had a reasonable expectation of privacy in that taxicab. *Id.* at 726, 728. Similarly, in *Bates v. State*, 494 A.2d 976 (Md. Ct. Spec. App. 1985), the Maryland Court of Special Appeals held that a passenger who had "hailed and hired" and "direct[ed]" a taxicab had a reasonable expectation of privacy in that taxicab. *Id.* at 979.

But the context of a taxicab ride is meaningfully different from the context of a noncommercial ride with a companion. "There is a significant measure of control in the hirer of a taxicab that is not possessed by a mere gratuitous passenger in an automobile." *Id.* As the Kansas Supreme Court correctly recognized, a passenger in a taxicab has "contracted to pay for both the right to exclude others from the cab and the right to control its destination in certain respects."[6] Pet. App. A, 16 (quoting *United States v. Woodrum*, 202 F.3d 1, 6 (1st Cir. 2000)); *see also Chapa*, 729 S.W.2d at 728 (explaining that a taxicab passenger "could determine its destination for the duration of his presence therein" and could "exclude others from it during their ride"). That degree of control and ability to exclude may give rise to a reasonable expectation of privacy. But there is no indication in the record that Petitioner—like a taxicab passenger—had any control over or right to exclude

[6] Notably, the courts in both *Chapa* and *Bates* stressed laws or regulations that expressly gave taxicab passengers the right to exclude others from the taxicab. *See Chapa*, 729 S.W.2d at 728; *Bates*, 494 A.2d at 979. The courts found such legal provisions to be "clear[] indici[a] of society's preparedness to accept as reasonable an expectation of privacy in the passenger compartment of a taxicab." *Chapa*, 729 S.W.2d at 728. Petitioner has pointed to no similar provision he could have invoked to exclude others from Finnigan's car.

others from Finnigan's car. *See* Pet. App. A, 16 ("Scheuerman presented no evidence that he had any right to control the car or to exclude others from it at any time.").

The tension in case law Petitioner hints at is illusory, as the cases he cites involved different outcomes based on materially different facts.

III. The Kansas Supreme Court's Decision Is Correct.

Review is further unwarranted in this case because the decision of the Kansas Supreme Court is correct.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const. amend. IV. It does not, however, allow people to challenge searches of "effects" that are not "their[s]." Put otherwise, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (citation omitted). If a person "is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property," that person "has not had any of his Fourth Amendment rights infringed" and lacks what is referred to as Fourth Amendment "standing." *Id.* at 134.

As relevant here, the touchstone of Fourth Amendment standing is whether one has a "'legitimate expectation of privacy in the premises' searched." *Byrd*, 138 S. Ct. at 1526 (quoting *Rakas*, 439 U.S. at 143). "A subjective expectation of privacy is legitimate if it is 'one that society is prepared to recognize as "reasonable."'" *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990) (quoting *Rakas*, 439 U.S. at 143 n.12).

As this Court recently explained, "[o]ne who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." *Byrd*, 138 S. Ct. at 1527. But as for someone like Petitioner who does not own the car, "legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy." *Id.*

The fact that a person is "in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched." *Rakas*, 439 U.S. at 148. Rather, in order to evaluate one's reasonable expectation of privacy in the car, courts must look to "source[s] outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Byrd*, 138 S. Ct. at 1527 (quoting *Rakas*, 439 U.S. at 144 n.12). In cases like this one involving cars, this Court has often emphasized that a person may "have a legitimate expectation of privacy by virtue of the right to exclude." *Id.* (citation omitted); *see also Rakas*, 439 U.S. at 149 (distinguishing mere passengers from those who do not own the property searched but could nonetheless "exclude others from it"). A person in a car may enjoy that right to exclude if they, for example, "own[]," "lawfully possess[]," or "control[]" the car. *Byrd*, 138 S. Ct. at 1527.

Following this analysis, this Court thus held in *Rakas* that "passengers occupying a car which they neither owned nor leased" and were not driving did not have a reasonable expectation of privacy in that car. 439 U.S. at 140. Such

passengers did not have "complete dominion and control" over the car and could not "exclude others from it." *Id.* at 149. Conversely, in *Byrd*, this Court held that a driver "in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." 138 S. Ct. at 1524. That person, this Court explained, "would have the expectation of privacy that comes with the right to exclude." *Id.* at 1528.

The Kansas Supreme Court correctly applied that law to the facts in this case to determine that Petitioner did not have "a legitimate expectation of privacy" in Finnigan's car. *Rakas*, 439 U.S. at 143. Petitioner was merely a passenger in Finnigan's car. The only other connections he had to the car were that he (1) "paid for the car" and (2) "had used the vehicle in the past." Pet. App. A, 16. Petitioner "presented no evidence that he had any right to control the car or to exclude others from it at any time." Pet. App. A, 16. As in *Rakas*, Petitioner was a mere passenger with "neither a property nor a possessory interest in the automobile" and who did not otherwise have "dominion and control over" the automobile. 439 U.S. at 148-49.

Petitioner argues that the so-called "social guest" doctrine for searches of the home should apply equally in the context of automobiles.[7] Pet. 9-13. In advancing this argument, Petitioner relies on two cases from this Court holding that an overnight guest in a home had a reasonable expectation of privacy there, *Olson*, 495

[7] Petitioner's thin factual showing of connection to Finnigan's car may in part be due to the fact that he asserted his "social guest" argument for the first time in the Kansas Supreme Court. *See State v. Hutto*, 490 P.3d 43, 48 (Kan. 2021) ("This court does not make factual findings; it reviews those made by district courts.").

U.S. at 98-100, and that a brief business guest in a home did not have a reasonable expectation of privacy there, *Minnesota v. Carter*, 525 U.S. 83, 90-91 (1998).

The Kansas Supreme Court rightly rejected this argument on the ground that "more weight is given to an individual's expectation of privacy in their home than in their car." Pet. App. A, 15. The Kansas Supreme Court did not, as Petitioner argues, "conflate[]" the automobile exception and Fourth Amendment standing.[8] Pet. 13-14. Rather, it simply followed this Court's instruction that—including in the context of standing—"cars are not to be treated identically with houses or Apartments for Fourth Amendment purposes." *Rakas*, 439 U.S. at 148.

This Court has repeatedly underscored the constitutionally meaningful distinction between the greater privacy one might expect in the home and the lesser privacy one might expect in a car when evaluating Fourth Amendment standing. *See, e.g.*, *Byrd*, 138 S. Ct. at 1526 ("The Court has acknowledged . . . that there is a diminished expectation of privacy in automobiles . . . ."). This Court in *Rakas* emphasized that distinction in holding that passengers in a car they did not own or control did not have standing to challenge a search of that car. 439 U.S. at 148. And it also emphasized the unique and heightened nature of the privacy expected in the home in articulating the "social guest" doctrine. *See Carter*, 525 U.S. at 90 ("Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property."); *Olson*, 495 U.S. at 99

[8] The automobile exception to the Fourth Amendment's warrant requirement provides that "the search of an automobile can be reasonable without a warrant." *Collins v. Virginia*, 138 S. Ct. 1663, 1669 (2018).

("[A]lthough we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.").

In any event, Petitioner has not even established that he has the sort of "significant, noncommercial connections to the car" that he asserts would render him the equivalent of a social guest. Pet. 12; *see Rakas*, 439 U.S. at 130 n.1 ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."). Once again, the only connections Petitioner has established to Finnigan's car are that he (1) helped pay for it and (2) used it previously. Pet. 12; *see also* Pet. App. A, 16. Such weak connections are a far cry from those of the overnight guest in *Olson* that suggested "a degree of acceptance into the household." *Carter*, 525 U.S. at 90.

For all these reasons, the Kansas Supreme Court correctly held that Petitioner did not have a reasonable expectation of privacy in his girlfriend's car in which he was a mere passenger. This Court's review is not warranted.

CONCLUSION

The petition should be denied.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
/s/ Brant M. Laue
BRANT M. LAUE
Solicitor General of Kansas
(Counsel of Record)
DWIGHT R. CARSWELL
Deputy Solicitor General
SHANNON GRAMMEL
Deputy Solicitor General
KURTIS K. WIARD
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
brant.laue@ag.ks.gov

Counsel for Respondent

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