

22-6441

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

DEC 21 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES DAYVAULT

(Your Name)

— PETITIONER

vs.

STATE OF KANSAS

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

KANSAS COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES DAYVAULT

(Your Name)

141 W. Elm St.

(Address)

WICHITA, KANSAS 67203

(City, State, Zip Code)

NO PERSONAL #, JAIL # 316-660-5245

(Phone Number)

Questions Presented

I. Did the Kansas Court of Appeals err when it affirmed the district court's denial of the motion to suppress?

A. When determining custody for the purposes of *Miranda*, if a sex case and a drug case have strikingly similar facts, does the court err by applying the law differently?

B. When determining custody for the purposes of *Miranda*, would a reasonable person feel free to terminate an encounter when law enforcement retains possession of their cellphone?

C. Does photography of children in public justify probable cause to seize a cell phone without a warrant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *State v. Dayvault*, No. 17-CR-3024, Eighteenth Judicial District District Court of Sedgwick County, Kansas. Judgment entered Mar 24, 2020.
- *State v. Dayvault*, No. 122,784, Kansas Court of Appeals. Judgment entered Feb 11, 2022.

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at 503 P.3d 270; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Sedgwick County District court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 9-30-2022. A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Provisions Involved

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

- Amendment V, US Constitution (emphasis added)

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized."

- Amendment IV, US Constitution

Statement of the Case

James Dayvault petitions for Writ of Certiorari to review the Kansas Court of Appeals' decision holding that the district court properly denied his motion to suppress. In 2017, police responded to a suspicious character call involving a man photographing children in public. Following up on that call, police arrived at Mr. Dayvault's home where they interrogated him on his front porch for over an hour without advising him of his *Miranda* rights. Mr. Dayvault was not free to leave nor free to reenter his home. Police took possession of Dayvault's cellphone and withheld it during the interrogation. At the conclusion of the encounter, police took Mr. Dayvault's phone without a warrant. A subsequent search of that phone uncovered evidence that resulted in six criminal charges. At district court, the Fifth and Fourth amendment issues contained within this petition were raised pretrial in a Motion to Suppress

and subsequent Motion to Reconsider. The district court found that Mr. Dayvault was not in custody (Appendix B, p.17) and that the warrantless seizure of his cellphone was excused by probable cause plus exigent circumstances (Appendix B, p.19). After a bench trial on stipulated facts, Mr. Dayvault was found guilty of four felonies, all stemming from the warrantless seizure of the phone. Dayvault timely appealed. At the Kansas Court of Appeals, by brief without oral argument, Dayvault argued that the district court erred when it denied the motion to suppress and motion to reconsider. The Kansas Court of Appeals affirmed the district courts denial of Dayvault's Motion to suppress by Memorandum Opinion filed February 11, 2022 (Appendix A, p.1). Dayvault timely appealed. At the Supreme Court of Kansas, Mr. Dayvault filed a petition for discretionary review. The court denied the petition on September 30, 2022. Dayvault timely appeals.

I. DID THE KANSAS COURT OF APPEALS ERR WHEN IT
AFFIRMED THE DISTRICT COURT'S DENIAL OF THE MOTION TO SUPPRESS?

+++ In asking the above question, Mr. Dayvault asks

this Court to consider the following questions. +++

A. WHEN DETERMINING CUSTODY FOR THE PURPOSES OF MIRANDA,

IF A SEX CASE AND A DRUG CASE HAVE STRIKINGLY SIMILAR

FACTS, DOES THE COURT ERR BY APPLYING THE LAW DIFFERENTLY?

"Applying the [Eight] factors to these circumstances, we note that Regelman was clearly considered a suspect, rather than a witness, and although he was not yet handcuffed or at a police station under a formal arrest, he was subjected to the functional equivalent of physical restraint since he had been denied freedom of movement and was ordered to return to his porch. Regelman was not free to leave and he was not allowed to reenter his residence. The officers had imposed a restraint on Regelman's freedom of movement to a degree associated with a formal arrest. In that situation a reasonable person would not have felt that he or she was at liberty to terminate the interview and leave. The subjective application of that objective test was that Regelman actually

tried to terminate and leave and was prevented from doing so. Faced with an order supported by two officers, he complied. He was in custody."

- *State v. Regelman* 430 P.3d at 953

In its Memorandum Opinion, the Kansas Court of Appeals cites

State v. Regelman, 430 P.3d 946 (2018), twice, yet fails to

acknowledge substantial similarities between the facts of the

two cases (Appendix A, p.7 & p.14). Both Dayvault and Regelman

were interrogated on their front porch after answering the

door to two police officers. Regelman was detained for 'close

to an hour' while Dayvault was detained for 'over an hour.'

Both Regelman and Dayvault were not free to leave their

front porch nor were they free to reenter their homes.

Both had their freedom of movement limited to sitting on

their front porch. During both encounters, the number of

police officers increased, from two to five officers.

Regelman was eventually handcuffed while Dayvault was told if he "got fidgety or started moving around" that he would be put in handcuffs. Both Dayvault and Regelman were treated as suspects from the very beginning of the encounter.

In both encounters, the majority of the 'incriminating statements' were made near the beginning of the encounter.

Regelman was charged with drug crimes while Dayvault was charged with sex crimes. The Supreme Court of Kansas found Regelman to be in custody for the purposes of *Miranda*. The Kansas Court of Appeals used similar facts, and even cited Regelman, yet concluded Dayvault was not in custody. Regelman was binding precedent at the time of this decision.

B. WHEN DETERMINING CUSTODY FOR THE PURPOSES OF
MIRANDA, WOULD A REASONABLE PERSON FEEL FREE TO
TERMINATE AN ENCOUNTER WHEN LAW ENFORCEMENT
RETAINS POSSESSION OF THEIR CELLPHONE?

In addition to the precedent in *Regelman*, within the first two minutes of the encounter with law enforcement, police patted Dayvault down "for officer safety." Thereafter, police remained in exclusive possession of the phone during the interrogation. Whenever Dayvault attempted to retrieve his cellphone, one or both officers immediately reprimanded him and ordered him to sit down.

In considering possession of a cellphone for the purposes of *Micanda*, we can look to *US v. LeBrun* 363 F.3d 715, 722 (8th Cir., 2004). LeBrun had his cellular phone with him

during the interview and called his wife. The 8th Circuit found:

"His cellular phone provided Le Brun a line of communication with the outside world and to some extent mitigated the incommunicado nature of interrogations with which the Miranda court was concerned and the psychological pressure associated with being in an interview room."

- LeBrun at 722

Conversely, by withholding possession of the cellphone, police increased the isolation of Mr. Dayvault, further creating a custodial environment. Furthermore, in *Riley v. California*, 134 S.Ct. 2473, this Court highlighted privacy interests inherent in a cellphone. Cell phones are valuable. A reasonable person would not feel free to leave without their phone, or at the very least, police possession of their phone would weigh heavily in such a decision.

+++ Additionally, Mr. Dayvault asks the court to consider the following facts to aid their determination of Court error +++

- Mr. Dayvault was never told he was free to leave, he was instead told he was "not yet under arrest."
- All of the officers involved in the encounter testified that Dayvault was not free to leave.
- Officer Rosenboom asked Officer Leffew whether Mr. Dayvault received the Miranda warnings. By asking Officer Leffew such a question, it becomes apparent that Officer Rosenboom recognized the interrogation was custodial.
- At least one officer remained with Mr. Dayvault at all times, effectively serving the function of an armed guard. Officer Rosenboom stood between Dayvault and the front door, blocking that point of access.

C. Does photography of children in public justify probable cause to seize a phone without a warrant?

Of course not. Photographing someone else's clothed children in public might be creepy, but it most certainly is not evidence that a crime has occurred.

In its *Miranda* analysis, the Kansas Court of Appeals limited its custody determination to the beginning of the hour long detention holding that Dayvault made 'incriminating' statements that supported the search and seizure of the phone before he asked to leave the porch. It wrote:

"It is unnecessary to determine if Officer Lettew's refusal to let Dayvault reenter his home constituted the functional equivalent of physical restraint because any functional equivalent occurred well after Dayvault admitted his actions. In other words, Dayvault did not request to leave the porch until after he admitted to the following:

1. taking photos of a child in a bikini outside in a nearby neighborhood;
 2. deleting the photo of the child in the bikini;
 3. taking photos of the child in the bikini for the purposes of his fantasies;
 4. needing to go back to Sex Addicts Anonymous and needing help;
 5. previously taking photos of clothed children while they were just "dancing around being silly"; and
 6. No longer having the photos of the children he previously took."
- State v. Dayvault (Appendix A, p. 15)

None of these admissions are criminal in nature.

It takes a big leap of logic to assume those actions are consistent with a crime. It takes an additional leap to assume evidence of such crime will be found on the cell phone. Even with statements made during the interrogation, police lacked probable cause to seize a cell phone without a warrant.

Consequently, the warrantless seizure of Mr. Dayvault's phone was illegal and any evidence gained therefrom must be suppressed.

Reasons for Granting the Petition

The Kansas Court of Appeals' decision is contrary to precedent as established by this Court in *Miranda v. Arizona*, 384 US 436 (1966) and by the Kansas Supreme Court in *State v. Regelman* 430 P3d 946 (2018). This Court needs not be lectured on the importance of precedent to insure consistency and stability of the law.

On the topic of cell phones during a police interrogation, existing law creates a logical problem. The courts use a totality of the circumstances test to determine if a reasonable person would feel free to terminate an encounter with law enforcement and leave. Many reasonable people would not feel free to leave if law enforcement withheld possession of their cell phone, during questioning.

Yet it is logically unsound to conclude that a person is in custody solely because their cell phone is in custody.

The courts are in disagreement as to how much weight the possession of a cell phone weighs in a custody determination, depending on if police or the defendant are in possession of the defendant's phone. Other courts give police possession of a cell phone no weight toward a finding of custody; like in the instant case, where the Kansas Court of Appeals ignored arguments about the phone and failed to consider them in its custody determination. The Missouri Court of Appeals summarized the state of the law on this issue in *State v. Wright*, 585 S.W.3d 360 (Mo.App.2019). They wrote:

"Though there is some authority for the proposition that a suspect's retention of a cellphone is a factor that

weighs against finding an interrogation to be custodial, the weight of authority suggests that possession (or not) of a suspect's cell phone is not outcome determinative. See *State v. Schneider*, 438 S.W.3d, 503 (Mo. App. E.D. 2016) (holding that a defendant's possession of a cell phone was an "additional factor" weighing against a finding of custody); *LeBrun*, 363 F.3d at 722 (recognizing that a suspect's mere possession of a cellular phone without more will not transform a custodial interrogation into a noncustodial one). *United States v. Swan*, 842 F.3d 28, 33 (1st Cir. 2016) (holding that while possession of a phone by police is "some evidence" of custody, it is not outcome determinative evidence.) see also *United States v. Campbell* 741 F.3d 251, 267 (1st Cir. 2013); *Commonwealth v. Yandamuri* 639 Pa. 100, 159 A.3d 503, 520-21 (2017); *State v. Daniell*, 346 Ga. App. 792, 817 S.E.2d 358, 360 (2018). The detective's possession of Wright's phone is thus not dispositive, and when viewed as a part of the totality of the circumstances, does not support a conclusion that a reasonable person would believe they are not free to leave. See, e.g. *Yandamuri*, 159 A.3d at 520-521 (finding there was "no significant restriction on [] freedom of movement" even when the defendant was questioned at the station house while police possessed his cell phone and car keys."

While a cell phone may not effect freedom of movement in a strict sense; the importance of a cell phone acts as a psychological restraint. *Miranda v. Arizona* was

decided decades before cell phones became commonplace.

Cellphones present a danger of police coercion that couldn't

have been contemplated by *Miranda*. The lower courts

need guidance on how to evaluate the role that a cell

phone can play in a police interrogation, and until they have

guidance from this Court, injustice will result from a

wide range of interpretations of this issue.

Photography is not a crime. If we allow police

officers to take a citizen's cell phone without a warrant

because they dislike the subject of or reasons for their

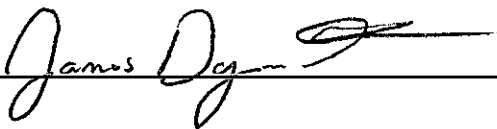
photography, then the privacy rights of Americans are

in grave danger.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 12 - 20 - 2022