

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDER D. PENNINGTON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

REBECCA L. HUDSMITH
Federal Public Defender

DUSTIN C. TALBOT
Appellate Chief
Federal Public Defender's Office
Middle and Western Districts of
Louisiana
102 Versailles Boulevard, Suite 816
Lafayette, Louisiana 70501
Telephone: (337) 262-6336

Attorney for the Petitioner

QUESTION PRESENTED

Under the Fifth Amendment, is a suspect in a criminal investigation “in custody” when he is ordered out of his residence by armed agents who broke down his door to execute a search warrant and he is temporarily handcuffed and escorted to a police vehicle where he is questioned while other members of his residence were allowed back into the home?

TABLE OF CONTENTS

QUESTION PRESENTED	2
TABLE OF CONTENTS	3
APPENDIX INDEX	3
TABLE OF AUTHORITIES	4
OPINIONS BELOW	5
JURISDICTION.....	5
STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT OF THE CASE.....	5
I. The investigation into Pennington.....	5
II. Pennington’s statements to agents	8
III. The district court’s denial of Pennington’s motion to suppress	10
IV. The Fifth Circuit’s affirmance of Pennington’s conviction.....	11
REASONS FOR GRANTING THE WRIT	12
I. The Fifth Circuit’s “custody” determination in this case fails to apply this Court’s “custody” precedent such that defendants in the Fifth Circuit lack proper Fifth Amendment protections	12
CONCLUSION	15

APPENDIX INDEX

Fifth Circuit opinion, November 9, 2023	App. 001
District court judgment, January 12, 2023	App. 009
Magistrate court report and recommendations, April 22, 2022	App. 015

TABLE OF AUTHORITIES

<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984)	13
<i>California v. Beheler</i> , 463 U.S. 1121 (1983) (per curiam)	13
<i>Howes v. Fields</i> , 565 U.S. 499 (2012)	12
<i>Maryland v. Shatzer</i> , 559 U.S. 98 (2010)	13
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	<i>passim</i>
<i>New York v. Quarles</i> , 467 U.S. 649 (1984)	13
<i>Oregon v. Mathiason</i> , 429 U.S. 492 (1977)	13
<i>Stansbury v. California</i> , 511 U.S. 318 (1994) (per curiam)	12-13
<i>Thompson v. Keohane</i> , 516 U.S. 99 (1995)	13
<i>United States v. Pennington</i> , No. 23-30038, 2023 WL 7443229 (5th Cir. Nov. 9, 2023) (unpublished)	5, 12
<i>Yarborough v. Alvarado</i> , 541 U.S. 652 (2004)	13

STATUTES

U.S. CONST. amend. V	<i>passim</i>
18 U.S.C. §§ 2251(d)(l) & (e)	10-11
18 U.S.C. §§ 2252A(a)(2)(A) & (b)(l)	10
18 U.S.C. § 2252A(a)(2)	10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *United States v. Pennington*, No. 23-30038, 2023 WL 7443229 (5th Cir. Nov. 9, 2023) (unpublished), and is set forth at App. 001.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

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

U.S. CONST. amend. V.

STATEMENT OF THE CASE

I. The investigation into Pennington

The investigation into Alexander Pennington began in Portland, Oregon in 2021 when agents with Homeland Security arrested the administrator of an online private chatroom where child pornography was exchanged on an internet application called Kik. ROA.119-20. After the arrest, agents assumed the administrator's online

identity to investigate the other members of the chatroom. ROA.121. The chatrooms required that the members actively share pornography and if they did not, they would be kicked out of the chatroom by sub-administrators. ROA.121-22.

Investigators were able to determine that one sub-administrator, whose screen name was Grimka00, was linked to a residence in Las Vegas, Nevada, where Pennington lived with his mother and uncle. ROA.124-25. Pennington was a registered sex offender based upon a previous conviction for sexual assault of a child under the age of 14. ROA.125.

On July 7, 2021, investigators executed a search warrant during the morning hours on Pennington's residence. ROA.125-27. Approximately 15 sworn agents, wearing tactical gear and long rifles participated in the execution of the search warrant. ROA.128, ROA.144. Investigators surrounded the house, approached the door with a "ram," busted the door open, and then used a loudspeaker to "order the occupants to come outside." ROA.128, ROA.145-46. Pennington recalled being awakened by "loud bangs" and hearing orders to exit the residence. ROA.156-57. When Pennington, his mother, and uncle emerged from the residence they saw numerous police officers with assault rifles, bulletproof vests, and one officer was pointing his gun at Pennington as he exited the home. ROA.157. All three residents were handcuffed. ROA.129.

According to agent Tyson Alan Walch, the handcuffs were removed from all three residents approximately five minutes later after the residence was secured. ROA.129-30. Walch, who was armed and wearing plain clothes, then approached

Pennington, who was standing in the driveway, and asked if he would speak with agents. Walch claimed that “[t]here was some back and forth,¹ but eventually he agreed to talk to me.” ROA.130.

Walch claims that he told Pennington that he was not under arrest, and he wanted to “talk to him more about exactly why we were there to serve a search warrant on his house.” Walch says Pennington agreed. ROA.131. Walch then directed Pennington to Walch’s vehicle, an unmarked SUV, which was parked 15 to 20 yards away. ROA.131-32. Walch claimed that he wanted to speak in his vehicle “for privacy” and “to cut down on distractions.” ROA.131. Walch never removed his service weapon from its holster. ROA.132.

Pennington disagreed with Walch’s recollection of these events and would later testify that his handcuffs were not removed when officers removed the handcuffs from his mother and uncle. Pennington claims that he was cuffed in the front of his body and that he was led, still cuffed, by Walch to Walch’s SUV. ROA.157.

Pennington got inside of Walch’s SUV and sat in the front passenger seat. Walch sat in the driver’s seat and Detective David Chen sat directly behind Pennington in the rear passenger seat. ROA.133. Chen was also in plain clothes. ROA.132. Walch claims he told Pennington that the doors were unlocked and Pennington could get out at any time. ROA.136.

¹ The record does not expound upon this “back and forth.”

II. Pennington's statements to agents

In the SUV, Walch produced a digital audio recorder and claims Pennington objected to the recorder. Walch claims Pennington made clear that "if I were going to talk to him with a recorder going, he would want an attorney present." Walch did not allow Pennington to call for his attorney. ROA.148. Instead, Walch reportedly explained to Pennington that he uses an audio recording for accuracy and that Pennington "eventually agreed to allow me to turn the recorder on." ROA.134.

Pennington claimed, however, that once he was in Walch's SUV, he asked Walch what this was about, and Walch told him it concerned endangerment to a child. Pennington claimed that at that time he requested an attorney. ROA.157. Pennington claims he made this request prior to Walch producing the recording device. ROA.168. Walch then told Pennington that "it would be best if [he] were to comply." And Pennington responded that "I had been through something like this before and that I wanted an attorney." Walch then told Pennington that if he did not speak, he was going to be arrested. ROA.158-59. Pennington claims that he could observe his mother having a panic attack in front of the house and Walch told him if he did not answer the questions, they would not let him go help his mother. ROA.159.

The subsequent conversation between Walch and Pennington was recorded in a 30 minute audio recording. *See* ROA.250 (Exhibit List for Motion to Suppress Hearing). On the recording, which starts at 8:05 a.m., both Walch and Chen can be heard. *Audio Recording* at 00:00-00:30. Walch starts by telling Pennington, "Now let's go to the next step we discussed...this is the script we have to read." *Id.* at 00:30-

00:40. Walch then reads Pennington his *Miranda* rights. Then the following exchange occurs:

Walch: Do you understand your rights?
Pennington: Yes.
Walch: Is it okay if...if we talk?
Pennington: [No answer]
Walch: With the understanding that if you change your mind later you can stop this conversation at any time.
Pennington: Now that we are on the record if you could go ahead and explain to me what it is?
Walch: Sure. Sure.

Id. at 01:03-01:20. Walch would later admit that Pennington never specifically told Walch that he wished to waive his right to a lawyer, but, according to Walch, Pennington waived his *Miranda* rights by nodding his head in the affirmative. ROA.139, ROA.151. Without garnering Pennington's oral waiver of his *Miranda* rights, Walch proceeded to explain to Pennington, in detail, the investigation facts and then started asking Pennington specific questions about the allegations in the case. *Audio Recording* at 01:20.

After the 30 minute audio recording, Walch left Pennington in the vehicle with Chen while Pennington went to check on the status of the search in the residence. Walch claims he left Pennington in his vehicle because it was July in Las Vegas, and it was hot outside, and that Chen was merely a "chaperone" because he didn't want Pennington alone in his vehicle. ROA.135-36. Walch admitted, however, that he allowed Pennington's mother and uncle to sit in the air conditioned home during the search, but that Pennington was not allowed in the home because he was the "target." ROA.151.

III. The district court's denial of Pennington's motion to suppress

On November 18, 2021, Pennington was charged in the Western District of Louisiana in a nine count indictment with one count of conspiracy to advertise the distribution of child pornography in violation of 18 U.S.C. §§ 2251(d)(1) & (e), one count of conspiracy to distribute child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) & (b)(1), and seven counts of distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2). ROA.10-17.

Pennington moved to suppress his statements made to Walch and Chen because they failed to honor his request for an attorney and continued to question Pennington without him making a knowing, intelligent, and voluntary waiver of his rights. ROA.50-58. After holding an evidentiary hearing, where Walch and Pennington testified, the magistrate court issued a written Report and Recommendation that Walch's motion to suppress be denied.

In the Report and Recommendation, the magistrate court found Walch's testimony to be credible and Pennington's testimony not credible. ROA.81. On the disputed facts, the court first found that Pennington's handcuffs were removed prior to him being brought to Walch's SUV. ROA.80. The court then made the following factual findings regarding Pennington's request for counsel:

Agent Walch produced from his pocket a digital recorder, and Defendant expressed concern. Defendant told Walch that if Walch was going to record the interview, Defendant wanted an attorney. Walch explained to Defendant why he records his interviews (so no one can say the person being interviewed said something that he or she did not really say). With the benefit of that explanation, Defendant withdrew his objection to being interviewed without an attorney.

Agent Walch turned on the recorder and advised Defendant of his Miranda rights. Defendant stated that he understood his rights and was willing to talk. Defendant never said anything else about an attorney until the end of the second interview when Defendant asked if he could look through his phone to find a telephone number for an attorney.

ROA.80. The court first ruled that Pennington was not in custody during the interview and thus Walch was not required to give Pennington his *Miranda* warnings and Pennington was not required to waive those rights. ROA.82. The court then ruled that Pennington did not make an unequivocal and unambiguous request for an attorney. ROA.84. The district court issued an order denying Pennington's motion to suppress for the reasons set forth in the Report and Recommendation. ROA.96.

IV. The Fifth Circuit's affirmance of Pennington's conviction

On August 30, 2022, Pennington pled guilty, pursuant to a written plea agreement, to one count of Conspiracy to Advertise the Distribution of Child Pornography in violation of 18 U.S.C. §§ 2251(d)(1) & (e). ROA.97. The government agreed in the plea agreement that Pennington reserved the right to appeal the denial of his motion to suppress:

The government acknowledges that this is a conditional plea, pursuant to Federal Rule of Criminal Procedure 11(a)(2), and that the defendant reserves his right to appeal the Court's adverse ruling as to his Motion to Suppress [Rec. Doc. 55] and, should such appeal be successful, the defendant shall be allowed to withdraw his guilty plea.

ROA.253. On January 4, 2023, Pennington was sentenced to 30 years in prison. ROA.98. Judgment was entered on January 13, 2023. ROA.106. Pennington timely filed a notice of appeal on January 13, 2023. ROA.112.

Pennington appealed to the United States Court of Appeals for the Fifth Circuit and argued that he was in custody when he was questioning inside of Walch's police SUV and that his right to counsel was violated when Walch failed to honor his conditional request for an attorney prior to answering questions. On November 9, 2023, The Fifth Circuit affirmed Pennington's conviction and held that Pennington was not in custody at the time of his statements. *United States v. Pennington*, No. 23-30038, 2023 WL 7443229 (5th Cir. Nov. 9, 2023) (unpublished); App. 001. The Fifth Circuit did not reach the issue of Pennington's *Miranda* waiver or conditional request for counsel.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's "custody" determination in this case fails to apply this Court's "custody" precedent such that defendants in the Fifth Circuit lack proper Fifth Amendment protections

In this case, the Fifth Circuit has applied a "custody" test on the petitioner that resulted in a holding that petitioner was not in custody where his home was raided by armed police officers who broke down his door, he was ordered to exit the home where he was temporarily handcuffed and led to a police vehicle where he was questioned by two police officers for 30 minutes. The court below ruled that Pennington was not in custody under these circumstances, a ruling that is at odds with this Court's precedent.

As used in this Court's *Miranda* case law, "custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. *Howes v. Fields*, 565 U.S. 499, 508-09 (2012). In determining whether a

person is in custody in this sense, the initial step is to ascertain whether, in light of “the objective circumstances of the interrogation,” *Stansbury v. California*, 511 U.S. 318, 322-323, 325 (1994) (per curiam), a “reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). And in order to determine how a suspect would have “gauge[d]” his “freedom of movement,” courts must examine “all of the circumstances surrounding the interrogation.” *Stansbury*, 511 U.S. at 322, 325 (internal quotation marks omitted). Relevant factors include the location of the questioning, see *Maryland v. Shatzer*, 559 U.S. 98, 112-14 (2010), its duration, see *Berkemer v. McCarty*, 468 U.S. 420, 437-438 (1984), statements made during the interview, see *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004); *Stansbury*, 511 U.S. at 325, the presence or absence of physical restraints during the questioning, see *New York v. Quarles*, 467 U.S. 649, 655 (1984), and the release of the interviewee at the end of the questioning, see *California v. Beheler*, 463 U.S. 1121, 1122-1123 (1983) (per curiam).

A reasonable person in Pennington’s shoes would not have felt free to leave given the context and location of the questioning. Approximately 15 sworn agents, wearing tactical gear and long rifles, participated in the execution of the search warrant. ROA.128, ROA.144. Agents surrounded the house, approached the door with a “ram,” busted the door open, and then used a loudspeaker to “order the occupants to come outside.” ROA.128, ROA.145-46. When Pennington, his mother, and uncle emerged from the residence they saw numerous police officers with assault rifles,

bulletproof vests, and one officer was pointing his gun at Pennington as he exited the home. ROA.157. All three were handcuffed. ROA.129. From the outset of the encounter, a reasonable person in Pennington's situation would not feel free to leave the encounter with agents.

After a period of time, the handcuffs were removed and Pennington's family was allowed to freely re-enter the residence, but Pennington was not. ROA.129-30, 151. Instead, Pennington was immediately asked to accompany Walch to Walch's SUV with another investigator in order to answer questions. ROA.131-32. Pennington was not allowed to sit in the SUV alone. ROA.135-36. Walch characterized their treatment of Pennington as being "chaperoned" by agents. ROA.135-36. Someone requiring a "chaperone" does not have freedom of movement and is not free to leave without permission.

A reasonable person whose home was raided by 15 armed agents and who was placed in handcuffs would not feel free to leave. Especially when that person's family members were uncuffed and allowed to go back into the home, but they are not afforded the same freedoms. Instead, that person is escorted to a police officer's vehicle where two police officers sit on the side and behind that person during the questioning. It was made clear to Pennington that he was the target of the search warrant and investigation and the questioning centered on Pennington's role in the online child pornography chatrooms. The officer's initial show of force and handcuffs, combined with the disparate treatment of the residents would lead a reasonable person in Pennington's shoes to believe he was not free to leave.

Because the court below erroneously ruled that Pennington was not in custody, it failed to even reach the important constitutional issues raised concerning the actions taken by law enforcement during his detention, including that he waived his *Miranda* rights by remaining silent or that his request for an attorney to be present if officers were going to record the interview was ambiguous or equivocal. This Court should grant certiorari, reverse the lower court's custody finding and remand back to the Fifth Circuit for consideration of the remaining constitutional questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this February 7, 2024,

REBECCA L. HUDSMITH
Federal Public Defender

BY: *s/ Dustin C. Talbot*
DUSTIN C. TALBOT
Appellate Chief
Federal Public Defender's Office
Middle and Western Districts of Louisiana
102 Versailles Boulevard, Suite 816
Lafayette, Louisiana 70501
Telephone: (337) 262-6336

Attorney for the Petitioner