

No. 13-52

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Petitioner,

v.

JEFFERY SWINDLER, Respondent.

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

BRIEF IN OPPOSITION

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Respondent Jeffery Swindler respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Kansas Supreme Court.

Reasons for Denying the Writ

1. The Kansas Supreme Court did not decide the Miranda issue of which petitioner seeks review.

In its first question presented, petitioner asks whether, having given Miranda warnings, officers had to stop their interrogation when respondent indicated a desire to stop. Pet. at 13. The Kansas Supreme Court did not decide this issue. Contrary to petitioner's suggestion that the Kansas Supreme Court's opinion is "ambiguous and confusing" on this point, it is crystal clear.

In his brief before the Kansas Supreme Court, respondent asserted related but alternative arguments: (1) that "the KBI investigation evolved into a custodial interrogation," with attendant Miranda consequences, and (2) "Mr. Swindler's statements were not voluntary." *State v. Swindler*, Brief of Appellant, No. 104,580 (Kan. 2013) (Appendix A) at 15, 24. Respondent's counsel had acknowledged a split of authority on the first argument. *Id.* at 13-14. Petitioner responded to these alternative arguments as presented. *State v. Swindler*, Brief of Appellee, No. 104,580 (Kan. 2013) (Appendix B), at 8, 16.

The Kansas Supreme Court clearly and unequivocally decided the case based on the second issue and refrained from reaching the first:

Swindler has two distinct avenues of attack. First, under a Miranda analysis, Swindler argues that the officers gave him Miranda warnings in what ended up as a custodial interrogation and that he unequivocally invoked his right to remain silent. Under this avenue, according to Swindler, everything he said after invoking his right was per se inadmissible. The State's response to this line of argument is twofold: (1) the interview was not custodial, and thus Swindler was not entitled to

protections under Miranda; and (2) even if Swindler was entitled to Miranda protections, he failed to invoke his right to remain silent unequivocally.

Swindler's second avenue of attack is based on a Fifth Amendment Due Process voluntariness analysis. He argues that, independent of the Miranda and invocation of his right to remain silent, the investigators' conduct compelled his confessions. The State responds that Swindler's statements were freely and voluntarily given. [Pet. App'x A-13].

The Kansas Supreme Court considered the issues in reverse order and held that “the State cannot carry its burden to show that Swindler's resulting oral confession, written confessions, and drawing were given voluntarily under the Fifth Amendment.” Pet. App'x A-20.

After making this Fifth Amendment voluntariness finding, the Kansas Supreme Court explicitly held that it did not need to—and would not—reach any Miranda issue:

We therefore need not analyze whether the interview up until Swindler's "I'm done. I want to go home. I'm done" statement was, in fact, a custodial interrogation. We may simply assume that all or part of it was and note that he received the warnings the law required him to be given in such a situation.

The next question in a Miranda analysis would ordinarily be whether the defendant unequivocally invoked his or her right to remain silent. This question also need not be answered here.

In short, Swindler's first attempt to invoke his right to remain silent also marked the line we have identified above between his voluntary statements and involuntary statements under the Fifth Amendment. We need not decide whether Swindler's statement "I'm done. I want to go home. I'm done" was an unequivocal invocation of his right to remain silent, because we have already decided that anything after that statement was inadmissible as involuntary under the Fifth Amendment. [Pet. App'x A-23].

The Kansas Supreme Court unequivocally decided this case based on the alternative argument regarding voluntariness. The Kansas Supreme Court did not decide the Miranda issue for which petitioner seeks review.

2. Petitioner has not shown sufficient reason to have this Court substitute its factual judgment for that of the Kansas Supreme Court regarding the voluntariness finding, particularly in light of a state statute that would also require suppression of statements.

In the alternative, petitioner suggests that the Kansas Supreme Court's determination that the state failed to meet its burden regarding voluntariness is "plainly incorrect, and a candidate for summary reversal." Pet. at 14. A writ of certiorari is rarely granted when the "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 12. The particular factual nature of the instant case demonstrates the reason for this rule.

The Kansas Supreme Court followed this Court's direction to "examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976). The Kansas Supreme Court concluded that, based on a thorough review of the appellate record, the state had not met its burden to show voluntariness:

In short, the investigators set the rules of engagement and then did not hesitate to break them as soon as they thought Swindler might slip away without telling them what they wanted to hear. Under the totality of these circumstances, the State cannot carry its burden to show that Swindler's resulting oral confession, written confessions, and drawing were given voluntarily under the Fifth Amendment. [Pet. App'x A-20.]

The Kansas Supreme Court reviewed the entire record, including detailed review of the videotaped interrogation, and made its determination regarding the voluntariness of

respondent's statements. At most, petitioner is asserting that the Kansas Supreme Court has misapplied a properly stated rule of law.

Petitioner argues by hyperbole that the Kansas Supreme Court "effectively held that any non-custodial interview that at some point becomes custodial is so inherently and necessarily coercive that any resulting confession is automatically involuntary." Pet. at 14. The Kansas Supreme Court did not make such a ruling. As guided by this Court, the Kansas Supreme Court looked at the totality of the circumstances of the case and held that "[u]nder the totality of these circumstances," the particular statements in this particular case were not voluntary. Pet. App'x A-20. A single case turning on specific facts cannot be read as broadly as suggested by petitioner.

In any case, summary decision would be inappropriate. If this Court did decide it should substitute its factual judgment for that of the Kansas Supreme Court, it could only do so after it "examine[d] the entire record" and made its own detailed factual findings regarding whether the state met its burden. *Beckwith v. United States*, 425 U.S. at 347-48. Because of its factual nature, this case is particularly inappropriate for summary decision.

Finally, this case is not a good vehicle for review because, even if this Court would substitute its factual judgment for that of the Kansas Supreme Court with regard to the Fifth Amendment voluntariness finding, it is not clear that the outcome of the case would change. Although the Kansas Supreme Court decided this case on Fifth Amendment grounds, it noted that a state statute was also implicated:

In a criminal proceeding as against the accused, a previous statement by the accused relative to the offense charged [is admissible], but only if the judge finds that the accused (1) when making the statement was conscious and was capable of understanding what the accused said and did and (2)

was not induced to make the statement (A) under compulsion or by infliction or threats of infliction of suffering upon the accused or another, or by prolonged interrogation under such circumstances as to render the statement involuntary or (B) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same. [K.S.A. 60-460(f) (cited in slip op. at 13)].

This state statute is subject to construction and application by the state court. *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975)(“a State's highest court is the final judicial arbiter of the meaning of state statutes”). Even if this Court found that the totality of the circumstances conclusively showed that petitioner had met its burden of proof with regard to Fifth Amendment voluntariness, the Kansas Supreme Court would certainly be free to apply its own voluntariness findings under this statute on remand, which would still result in suppression of respondent’s statements.

Conclusion

Because the Kansas Supreme Court did not decide the Miranda issue and because the state has not shown grounds for this Court to substitute its factual judgment for that of the Kansas Supreme Court, this case is a poor vehicle for certiorari review. This Court should deny the petition.

Respectfully submitted,

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