No. _____

In the Supreme Court of the United States

THE STATE OF SOUTH CAROLINA, PETITIONER,

v.

KENNETH NAVY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

HENRY D. MCMASTER
Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
*SALLEY W. ELLIOTT
Assistant Deputy Attorney General
Counsel of Record
MICHELLE PARSONS KELLEY
Assistant Attorney General
South Carolina Attorney General's Office
P. O. Box 11549
Columbia, South Carolina 29211
selliott@scag.gov
(803) 734-3727

* *Counsel of Record* *Counsel for Petitioners*

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QUESTIONS PRESENTED

1. Should this Court address the governing admissibility test of *Seibert*'s fractured opinion where the federal circuit courts and state high courts are deeply divided over *Seibert*'s application and *Navy* presents a scenario in which the majority applied the plurality test to exclude statements that would have clearly been admitted under Justice Kennedy's test?

2. Should this Court address *Navy*'s holding where it impermissibly broadened *Seibert*'s application to non-custodial settings?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of South Carolina, through the Attorney General of South Carolina, hereby petitions the Court for a Writ of Certiorari to review the decision of the Supreme Court of South Carolina.

OPINIONS BELOW

The South Carolina Supreme Court's opinion is reported at *State v. Navy*, 688 S.E.2d 838 (S.C. 2010), and is attached to this petition as Appendix A. The South Carolina Supreme Court's order denying rehearing is unpublished and is attached to this petition as Appendix B. The decision of the South Carolina Court of Appeals can be found at *State v. Navy*, 635 S.E.2d 549 (S.C. App. 2006), and is attached to this petition as Appendix C.

STATEMENT OF JURISDICTION

The South Carolina Supreme Court filed its order denying the petition for rehearing on March 2, 2010. This petition for writ of certiorari is therefore timely pursuant to Supreme Court Rule 13 because it has been filed within 90 days of March 2, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be... compelled in a criminal case to be a witness against himself...

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A jury convicted the Respondent of homicide by child abuse for smothering his twenty-three-month-old son. During the homicide investigation, the Respondent spoke with police at the police station and gave a statement. Upon signing the first statement, the officers asked him a few more questions and then read his *Miranda* rights. After waiving his rights, the Respondent provided two additional statements.

The trial court found the Respondent was not in custody at the time of his interview at the police station and allowed the admission of the Respondent's first pre-*Miranda* statement, as well as the Respondent's two post-*Miranda* statements.

The South Carolina Court of Appeals held, however, (1) the defendant was in custody, thus warranting *Miranda* warnings, and (2) mid-interrogation *Miranda* warnings, given after the Respondent gave an oral inculpatory statement, were ineffective.

The South Carolina Supreme Court reversed in part and unanimously found the Respondent was not in custody during the first statement. But, a slim majority, the court held the non-custodial interview "matured" into a custodial interrogation following the first statement. In the minutes after the first statement, prior to *Miranda* and the subsequent statements, the officers informed the Respondent the victim had been smothered and

asked the Respondent to explain again how he comforted the victim. At this time, the Respondent told Smith that he may have "popped" the victim on his back and may have "patted" the victim on his mouth to stop him from crying. (R. 351). Smith recalled that Navy asked him if he was under arrest. Smith told Navy, "no, we are just trying to get some answers." (R. 1304-05). The majority found "[a]t this juncture, the nature of the interrogation and Respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In a 3-2 decision, the South Carolina Supreme Court held the written statements following *Miranda* warnings were not admissible, given a *Seibert* violation. The Chief Justice of the South Carolina Supreme Court authored the dissent, stating the situation had not matured into a custodial situation prior to *Miranda* and thus, *Seibert* did not apply. Again by a 3-2 split, the South Carolina Supreme Court denied the State's petition for rehearing.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This Court should grant review to identify the governing admissibility test of *Seibert*'s fractured opinion. The federal circuit courts and state high courts are deeply divided over *Seibert*'s application, which has led to inconsistent and

unreliable results. *Navy* requires this Court's determination of the reigning test because it presents a scenario in which the majority applied the plurality test to exclude statements that would have clearly been admitted under Justice Kennedy's test. This Court should also rectify *Navy*'s abandonment of established custody case law when *Navy* found an admittedly non-custodial questioning morphed into a custodial interrogation. Further, in applying *Seibert*'s plurality test, the *Navy* majority stretched the facts beyond reasonable interpretation, thereby widening the application of the test.

I. This Court should grant review to determine the meaning and applicability of Seibert's fractured opinion.

The federal circuit courts and state high courts nationwide are divided over which test controls *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the police arrested Seibert in the middle of the night and took her to the police station for interrogation. The police employed an intentional strategy of withholding her *Miranda* rights through thirty to forty minutes of interrogation until she confessed. The police then gave her a twenty-minute break before mirandizing her. After her *Miranda* waiver, the police reviewed the information provided in her first unwarned

confession and solicited the same admissions post-*Miranda*.

A. The Seibert opinion is badly fractured

This Court decided *Seibert* in a 4-1-4 split. Justice Souter authored the plurality opinion and described the custodial interrogation as "systematic, exhaustive, and managed with psychological skill." *Id.* at 617. Justice Souter said the main concern in analyzing a two-part custodial interrogation is whether the intervening *Miranda* warnings were effective. To determine effectiveness, the plurality instructed courts to consider the following:

1. The completeness and detail of the questions and answers in the first round of interrogation,
2. The overlapping content of the two statements,
3. The timing and setting of the first and the second,
4. The continuity of police personnel, and
5. The degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615.

Justice Kennedy provided the fifth vote for the majority, but concurred in judgment only. Justice Kennedy agreed the "question-first" tactic used in *Seibert* undermined the purpose of *Miranda*, but objected to the plurality's test, stating:

> This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations. In my view, this test cuts too broadly. *Miranda's* clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity. I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.
>
> The admissibility of postwarning statements should continue to be governed by the principles of *Elstad*. . .

Id. at 621-622 (citations omitted).

Justice Kennedy's test focused on the subjective view of the officers. Both the plurality and the dissent firmly rejected an admissibility test based on the subjective intent of the officers.[1] The dissent also rejected the plurality's effectiveness test, however, and proposed a voluntariness test instead.

B. The Circuit Courts of Appeal and state courts of last resort are irreconcilably split over the meaning and applicability of Seibert.

1. The Third, Fourth, Fifth, and Eighth Circuits have applied *Marks* to *Seibert* to say Justice Kennedy's test prevails. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

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[1] The plurality said, "[b]ecause the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work." *Seibert* at 617. Justice O'Connor's dissent followed, "[t]he plurality's rejection of an intent-based test is also, in my view, correct." *Id.* at 624.

These circuits have determined Justice Kennedy's test represents the narrowest grounds of a fractured *Seibert* decision and therefore controls. The Third Circuit discarded the application of the plurality five-factor test, saying it was "not faulty, but it was unnecessary, having found the initial failure to give *Miranda* warnings inadvertent." The Third Circuit promoted Justice Kennedy's test and held absent evidence of deliberate police action, the court should proceed only under *Elstad*. *U.S. v. Kiam,* 432 F.3d 524, 532-533 (3rd Cir. 2006). *See also U.S. v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) (The Fourth Circuit applied *Marks* to say, "Justice Kennedy's opinion therefore represents the holding of the *Seibert* Court."); *U.S. v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006)(holding that as the most narrow test, Justice Kennedy's test governs.); *U.S. v. Black Bear*, 422 R.3d 658, 664 (8th Cir. 2005) (Finds Justice Kennedy's test is the most narrow and prevailing test, stating "the key to *Seibert* is whether the police officer's technique was 'designed,' deliberate,' 'intentional,' or 'calculated' circumvention of *Miranda*.").

2. In direct contrast, the Seventh, Ninth, and Tenth Circuits have declined to declare Justice Kennedy's test as the voice of *Seibert*. These circuits reason that because both the plurality and the dissent have rejected a subjective test focused on the officer's intent, then Justice Kennedy's test cannot be the common denominator of this Court.

These circuits do not believe Justice Kennedy's test is a more narrow version of the plurality holding because the plurality has specifically rejected the premise of Justice Kennedy's test. Yet, these circuits remain unclear on which test ought to apply. Consequently, they have applied both the plurality test and Justice Kennedy's test out of precaution.

The Seventh Circuit concluded "the *Marks* rule is not applicable to *Seibert.* Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree." *U.S. v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009).

> In a situation like this, it is risky to assume that the Court has announced any particular rule of law, since the plurality and dissent approaches garnered only four votes each. . . . In the case of *Seibert,* the only thing we know for sure is that at least seven members of the Court rejected an intent-based approach and accepted some kind of exception to *Elstad,* even if the scope of that exception remains unclear.

Id. at 885. (citing *U.S. v. Rodriguez-Preciado*, 399 F.3d 1118, 1141 (9th Cir. 2005).

The Seventh Circuit declined to "resolve once and for all what rule or rules governing two-step interrogations can be distilled from *Seibert*" because the statements involved were admissible under either test. *Id.*

In the Ninth Circuit, the *Rodriguez-Preciado* majority concluded that they did not need to decide whether they were bound by the plurality test or Justice Kennedy's test because the defendant was mirandized at the inception of the interrogation. *Rodriguez-Preciado* at 1139-1141. The *Rodriguez-Preciado* dissent, however, outlined the *Seibert* dilemma in detail, saying "no opinion in *Seibert* commanded the agreement of a majority of Justices," and *Seibert* has created great difficulty for courts attempting to ascertain the appropriate rule.

The dissent submitted Justice Kennedy's opinion cannot be the "narrowest opinion embodying a position supported by at least five Justices in the majority. It embodies a position supported by two Justices, at most." *Id.* at 1140.

The dissent further argued the application of *Marks* to *Seibert* is "problematic." "When ... one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will

turn a single opinion that lacks majority support into national law." *Id.* at 1140 (citations omitted).

The dissent believed that at least five Justices supported all but one of *Seibert*'s principles. The dissent noted seven Justices dismissed the subjective intent focus of an admissibility test. Five Jusices advocated overruling *Orso* and five Justices also advocated *Elstad* exceptions. Consequently, "[t]he only point not enjoying the assent of five Justices is the appropriate admissibility standard to apply, on which the Court is split 4-1-4." *Id.* at 1141.

The Tenth Circuit also rejected Justice Kennedy's test as the voice of *Seibert* saying, "Determining the proper application of the *Marks* rule to *Siebert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court." *U.S. v. Carrizales-Toledo*, 454 F.3d 1142, 1150 (10th Cir. 2006). The Tenth Circuit also declined to determine the governing test because the relevant statements were admissible under either the plurality or Justice Kennedy's test.

3. The Second and Eleventh Circuits have applied both the plurality test and Justice Kennedy's test to admit statements, without analyzing which test prevails. *U.S. v. Carter*, 489 F.3d 528 (2nd Cir. 2007) (Said *Seibert* required "deliberate" police action, but applied both Justice Kennedy's test and plurality factors to determine

Elstad applied). *U.S. v. Gonzalez-Lauzan*, 437 F.3d 1128 (11th Cir. 2006). (Applied both the plurality and Justice Kennedy's test to find the statements were admissible); *See also U.S. v. McConer*, 530 F.3d 484 (6th Cir. 2008).

4. To add to the disorder, the state high courts vary wildly in their application of *Seibert,* but the split in their application is less clear. An examination of state courts reflects mass uncertainty regarding *Seibert*'s proper interpretation. Some states have chosen to apply Justice Kennedy's test. *See Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006) (Applied Justice Kennedy's test, calling it the most narrow holding of the majority). Other states have chosen to apply the plurality test. *See State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006)(Agreed "with the Seibert plurality and dissent that the intent of the officer doing the questioning is not relevant in a Miranda analysis." The Court held the statements were inadmissible due to the same prewarning and postwarning content.); *State v. Jones*, 151 P.3d 22 (Kan. 2007) (adopted plurality effectiveness language); *State v. Northern,* 262 S.W.3d 741 (Tenn. 2008) (Said many courts apply Justice Kennedy's test because they believe it is the most narrow, but Justice Kennedy's reasoning is "directly inconsistent" with the plurality and dissent's reasoning. Consequently, court applied plurality test.); *State v. O'Neill*, 936 A.2d 438 (N.J.

2007) ("The *Seibert* opinions have sown confusion in the state and federal courts, which have attempted to divine the governing standard that applies." The court ultimately used the plurality test, mixed with state laws, to find Seibert applied to the case at hand).

Some states don't understand which test they are applying. Florida found where there was no deliberate action by police officers, *Elstad* applied because Justice Kennedy suggested the plurality test applied only to situations of intentional police conduct. *Davis v. State*, 990 So.2d 459 (Fl. 2008) ("Because this is not a situation where Justice Kennedy agreed the plurality's test would apply, *Elstad* applies, as the four dissenting justices and Justice Kennedy stated.").

C. Inconsistent and unreliable results.

The federal circuit courts and state high courts are split over whether Justice Kennedy's test represents the *Seibert* holding. This split has resulted in inconsistent and unreliable results.

Navy calls for this Court's clarification of the *Seibert*'s governing test. The *Navy* majority widened the plurality test to exclude statements that were clearly admissible under Justice Kennedy's test.

In considering statement admissibility, Justice Kennedy first looked for a "deliberate two-

step strategy" and if there was no deliberate strategy, *Elstad* applied. *Seibert* at 622. *Navy*'s trial judge found no evidence of coercive interrogation strategy. Contrary to *Seibert*, the *Navy* officers never said they intentionally withheld *Miranda* warnings to strategically extract a prewarning confession. Smith explained that he did not inform Navy of *Miranda*, because the discussion was "non-custodial." (R. 1274). Upon being confronted with his child's suffocation and rib fractures, Navy admitted he may have "popped" the child and "patted" his mouth. After these admissions, Smith advised Navy of his *Miranda* rights out of "an abundance of caution." (R. 1282-1283, 1303- 1306). Navy voluntarily waived these rights.[2] At most, the facts indicate the officers made a "good-faith *Miranda* mistake." *Seibert* at 615.

According to Justice Kennedy's test, absent evidence of a deliberate two-step strategy by the police, *Elstad* governs the admissibility of Navy's post-warning statements. O*regon v. Elstad*, 470 U.S. 298, 318 (1985)) (considers whether the post-*Miranda* statement was voluntary). Evidence indicates the waiver was voluntary and the Respondent failed to argue otherwise below. Consequently, the application of Justice Kennedy's

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[2] Navy's waiver of his *Miranda* rights was undisputed on appeal.

test would have likely resulted in the admission of the Respondent's postwarning statements.

In employing a broadened version of the plurality test, *Navy* excluded statements that would have been admitted under Justice Kennedy's test. The disparity in results underscores the importance of distinguishing the reigning test.

II. The South Carolina Supreme Court impermissibly broadened Seibert's application to non-custodial settings.

A. Navy's majority stretched the facts beyond reasonable interpretation.

Prior to trial, the trial court conducted a *Jackson v. Denno* hearing to determine the admissibility of Navy's statements to the police. Lt. Smith testified *in camera* that he was the lead investigator in the death of the 23-month-old victim, on Sunday, February 9, 2003. (R. 1269-1270). On Wednesday morning at approximately 9:00 am, Smith and Sergeant Lancy Weeks went to talk with Navy at his home. Navy agreed to accompany them to the police station "to discuss some further details about this case." Smith stated Navy was "very agreeable and very cooperative. He said he would help in any way. He was glad to accompany [them] . . . that he only wanted some answers." Navy testified he wanted to delay the interview until after the victim's funeral visitation,

but he was told the interview could not wait. Smith recalled Navy was "upset" and crying at the time. They drove in an unmarked car. Smith and Weeks sat in the front while Navy sat in the back. Navy was neither handcuffed nor placed under arrest. Lt. Smith testified, "we basically just had some small talk on the way in the car." Navy was not questioned. (R. 1271-72, 1300-01, 1321). Smith testified that if Navy did not want to go with them, they would not have taken him. (R. 1271). Navy also admitted that he was informed that he would be back home in "couple of hours." Navy testified, "I just thought that they needed a quick statement from me and like they said they would take me back home."

Once they arrived at the police station, Navy was allowed to smoke a cigarette in the back parking lot. He also requested a soda. (R. 1273-1274). According to Smith, Navy cried and remained upset during the entire interview process. Smith stated that Navy was free to go home and would have been allowed to leave if he had asked to do so. (R. 1301- 1302).

Smith testified he took Weeks and Navy to his office where they went over Navy's statements from Sunday. (R. 1272- 1274). Smith explained that he did not inform Navy of his rights pursuant to *Miranda,* because the discussion was "non-custodial at that time." (R. 1274). Navy was "very cooperative," and spoke with them freely and voluntarily. (R. 1274). At 9:50, Navy gave the

police an oral statement. (R. 1274- 1275, 1281, 1421-23).

In this statement, Navy told the police that the victim fell out of his high chair that weekend, but he was okay and "acted normal" afterwards. On Sunday, Navy was at home when he heard the victim crying "like he had a nightmare." Navy went upstairs and found the child sitting up in his crib. Navy laid him down and patted him on the back to comfort him, and then went downstairs to get a bottle. Navy returned to find the victim having a hard time breathing. Navy panicked and ran up and down the stairs several times to figure out what was going on. Navy stated he went to see the victim again and he was lifeless. Navy administered CPR and called 911. Navy said he continued with CPR until the ambulance arrived. (R. 342-50). This first statement was typed and Navy signed each page.

After the first statement, Smith informed Navy the victim was suffocated and there was evidence of broken ribs. (R. 350-51). Navy "expressed some shock" about this information. Smith then asked Navy to explain again how he comforted the victim. At this time, Navy told Smith that he may have "popped" the victim on his back and may have "patted" the victim on his mouth to stop him from crying. (R. 351). Smith recalled that Navy asked him if he was under arrest. Smith told Navy, "no, we are just trying to get some answers." (R. 1304-05).

At that point, they took a break because Navy wanted to smoke another cigarette. Smith testified he accompanied Navy during the break because the Sheriff's office does not allow people to be unescorted in the Sheriff's department. Smith again stated that if Navy had requested to go home they would not have stopped him. He said Navy "was not in custody." (R. 1282, 1305, 1308).

They returned to the office and at 11:35, Smith advised Navy of his *Miranda* rights out of "an abundance of caution," "because I felt like that the latest responses possibly may lead into some incriminating statements[.]" (R. 1282-83, 1303-06). Navy acknowledged his rights and signed a written waiver. (R. 1283-86, 1420). Smith testified Navy understood his rights, and he voluntarily waived them and agreed to give another statement. (R. 1286-89).

Navy testified the police told him he "had" to come with them to give a statement, and that he had asked the officers if he could wait until after the victim's funeral. However, Navy admitted that he was informed that he would be back home in "couple of hours." Navy testified, "I just thought that they needed a quick statement from me and like they said they would take me back home."

B. Seibert did not in anyway change the test for custody determinations.

1. The South Carolina Court of Appeals held Respondent was in custody when the first oral statement was given to police and the trial court erred in finding to the contrary. The South Carolina Supreme Court majority found "it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record." Chief Justice Toal authored the dissent, but agreed with the majority that the Respondent was not in custody at the time of his first statement, finding the statement admissible.

The majority further found, however, the non-custodial interview turned into a custodial interrogation between Respondent's first statement and his *Miranda* warning. The dissenters disagreed, as does the Petitioner.

This Court has outlined the considerations for determining whether a defendant is in custody:

> Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a

> "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.

California v. Beheler, 463 U.S. 1121, 1125 (1983).

The Respondent did not think he was under arrest. He acknowledged the officers informed him that he would be back home in "couple of hours." The Respondent thought, "they needed a quick statement" before taking him home. The majority admitted the first statement was non-custodial. During the period identified as the point of escalation into custodial interrogation, the Respondent asked the officers if he was under arrest, and they informed him, "no, we are just trying to get some answers." (R. 1304-05).

The Respondent was admittedly aware he was not under arrest and this Court has identified that benchmark as the "ultimate inquiry." The majority disregarded *Beheler* to find the Respondent entered into custody even though he knew he was not under arrest and there were no changes in restraint or compulsion.

This Court has also held custody inquiries should be objective not subjective. "Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*,

511 U.S. 318, 323 (1994)*(citing Beckwith v. United States,* 425 U.S. 341 (1976)).

In this case, the objective circumstances of the interview did not differ between the initiation of the first statement and the implementation of *Miranda.* The first statement was held to be noncustodial and nothing about the setting or conditions of the interview changed. In declaring the officers "sprang" the news of his son's homicide on the Respondent and asked questions "designed to elicit incriminating information," the majority chose to focus on subjective considerations rather than the objective factors prescribed by this Court.

In *Beckwith,* this Court again emphasized custody determinations should look to the objective compulsion rather than the officer's subjective views. "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning." *Beckwith* at 346-347 (quoting *U.S. v. Caiello,* 420 F.2d 471, 473 (2nd Cir. 1969)).

In explaining why the situation turned custodial, the *Navy* majority stated, "The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession." Again, the majority's statements demonstrate the court's focus on the "strength" and "content" of the officers'

"suspicions," rather than any escalation of compulsion. In fact, the majority neglected to describe any factors that increased the objective compulsion of the interview such that the situation became custodial.

In *Seibert*, the Court explicitly noted that *Seibert* was "arrested" and, thus, in custody prior to any questioning by the police. *Seibert* at 606. *Seibert* did not abrogate the long-standing principle that *Miranda* warnings are not required when the individual's freedom has not been so restricted as to render him in custody. *Orozco v. Texas*, 394 U.S. 324, 327 (1969). Thus, if a suspect gives an unwarned, voluntary confession before being taken into custody, a subsequent confession exacted after the waiver of his *Miranda* rights need not be suppressed. Since Navy was not subjected to "custodial" questioning, *Miranda* warnings were not required. *A fortiori*, *Seibert* was not applicable.

2. *Navy*'s misapplication of custody law has consequences exceeding the boundaries of this case. In addition to distorting established precedent, *Navy* has stripped law enforcement of clear guidelines for custody analysis. This Court has recognized it is important for police to have clear guidelines to follow. *See Maryland v. Shatzer*, __ U.S. ___, 130 S.Ct. 1213 (2010). Though the Petitioner asserts the questioning never escalated into a custodial interrogation, if it had, it would

have been difficult for the officer to detect when the actual custodial interrogation began. Where even the state high court Chief Justice disputed the transition occurred, the officer was unlikely to realize he had entered the zone of custodial interrogation and *Miranda* was required. Justice Kennedy addressed this threat, stating:

> **An officer may not realize that a suspect is in custody and warnings are required**, and may not plan to question the suspect or may be waiting for a more appropriate time. Suppressing post-warning statements under such circumstances would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." *Elstad, supra,* at 308, 105 S.Ct. 1285.

Seibert at 602 (emphasis added). Justice Kennedy's words speak to the situation at hand. Even if the situation had become one of custodial interrogation, which the Petitioner does not concede it did, the officer did not realize Navy was in custody and warnings were required. As a result, the Petitioner submits the facts fall under *Elstad* and suppressing post-warning statements two and three did not deter improper police conduct or serve the "Fifth Amendment goal of

assuring trustworthy evidence." *Elstad* at 308. It is not clear why *Navy* found the situation became custodial, but it is very clear that law enforcement will encounter great difficultly in understanding and applying *Navy*.

C. *Navy's majority disregarded this Court's custody case law.*

As stated, the majority found the first oral statement was given in a non-custodial situation, but following the statement, the situation transitioned into a custodial interrogation. In footnote 4 of their opinion, the majority explained they were not focused on the admissibility of the first statement, but "on the police actions and interrogation after that statement had been given." In the opinion, the majority elaborated, stating:

> After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in

> follow-up questioning, asking specifically how respondent had comforted the crying child. **At this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation.** In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

Navy at 3 (emphasis added).

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having

> smothered him. Once those incriminating answers were given – i.e. after respondent admitted he had popped the child on the back and "patted" his mouth – respondent was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately.

Navy at 6.

Chief Justice Toal dissented and asserted the following:

> In the present case, I agree with the majority that the first statement was admissible because Respondent was not in custody when it was given. Because there was no custodial interrogation regarding the first statement, there was no need for *Miranda* warnings. The majority states that the interrogation status changed from noncustodial to custodial when the police asked Respondent how he comforted the child. However, merely asking questions that result in inculpatory responses does not change a noncustodial interrogation into a custodial interrogation. If this were so,

> the nature of police investigation would be forever altered. There is no evidence in the record to suggest the circumstances of questioning changed such that a custodial interrogation resulted when the police began to elicit inculpatory information. Hence, because there was no custodial interrogation, *Seibert* does not apply.

It is not entirely clear what the majority believed led to the heightened custodial level of the interview, but the following occurred between the first statement and *Miranda*, which is the period identified by the majority as when the custodial interrogation began: (1) The officers confronted the Respondent with information inconsistent with his prior statement, namely that his child had been killed; (2) The officers asked the Respondent to explain how he comforted the child; (3) The Respondent provided slightly incriminating answers that he may have "popped" the victim on his back and may have "patted" the victim on his mouth to stop him from crying; and (4) The officers administered *Miranda* warnings. None of these occurrences taken alone or together should have impacted the Respondent's custodial position. As Chief Justice Toal correctly asserted, there was "no evidence" to support the majority's custody determination. In contorting custody case law,

Navy created another layer of confusion on top of the misapplication of *Seibert.*

D. By stretching the facts beyond reasonable interpretation, Navy broadened the applicability of the plurality test.

The *Navy* majority significantly expanded the boundaries of *Seibert*'s plurality test when it applied *Seibert* to exclude *Navy*'s statements.

1. The first prong of the plurality's test considers "the completeness and detail of the questions and answers in the first round of interrogation." *Id.* at 615. In *Seibert*, the officer obtained a full confession pre-*Miranda* and then got the defendant to repeat her confession following her *Miranda.*

"Question-first's object, however, is to render *Miranda* warnings ineffective by waiting to give them until after the suspect has already confessed." *Seibert* at 601 (emphasis added). Justice Souter also stated, "This case tests a police protocol for custodial interrogation that calls for giving no warning of the rights to silence and counsel until interrogation has produced a confession." *Id.* at 604. (emphasis added). "[T]he sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble." *Id.* at 611. (emphasis added).

The *Navy* majority reasoned the situation became custodial after Respondent's first statement, so the "first round of interrogation" occurred during the grey area following the first statement and before the *Miranda* warnings. During this time, Officer Smith informed Navy the victim had been suffocated and there was evidence of broken ribs. Smith asked Navy to explain how he "comforted the baby, touched the baby, and that kind of thing." Unlike *Seibert*, these few pre-*Miranda* questions were limited and brief, lacking completeness or extensive detail. Merely asking the Respondent to explain how he comforted and touched the baby could hardly be described as "systematic, exhaustive, and managed with psychological skill." *Id.* at 616.

Navy's answers also fall short of the full confession described in *Seibert*. Navy told them "that he sort of popped the baby in his back when he was on his stomach, and he said he sort of may have patted the mouth to calm the crying." These answers cannot be considered a full confession, particularly in light of postwarning admissions.

2. Justice Souter also stated the court must consider the overlapping content between the prewarning and postwarning statements. Navy's brief answers are so limited in scope that virtually everything provided in the post-*Miranda* statements was new information. Justice Souter said, "[w]hen the police were finished there was

little, if anything, of incriminating potential left unsaid." *Id.* at 617. Here, the *Navy* majority highlighted the extensive additional information provided in the postwarning statements:

> Following the *Miranda* warnings, respondent gave his second statement, this one in writing, at 11:40 am. Significantly, in this second statement, respondent described the events as **"the same as in his first statement," except that:**
>
> 1) He could not get the child to be quiet, and while the crying child was sitting up in the crib, respondent put his hand over the child's mouth, but did not hold it there.
>
> 2) Respondent then laid the child on his stomach in the crib and "popped" him in the middle of the back, causing the child to cry "one time real loud." Respondent then put his hand over the child's mouth again to try to stop the crying, then noticed the child could not get his breath, perhaps as the result of the pop on the back.

3) Respondent, thinking he had knocked the child's breath out, went downstairs and returned with a bottle.

4) The child was still "making that noise" "like he was still trying to catch his breath" and respondent panicked. As the child quit and then resumed breathing, respondent went downstairs and got Terry.

5) When respondent and Terry got back upstairs, the child was not breathing.

6) In response to the question: "When you placed your hand over [the child's] mouth, is it possible that your hand covered his nose area as well," respondent answered "It could have been."

Q. When you popped him in the back, did you have your fist balled up?

A. No sir. It was my flat hand.

Q. How hard did you pop him?

A. Not like trying to kill him or nothing. I just popped him.

...

Q. Why did you pop [him] in the back Sunday?

A. I was frustrated because he was crying.

Following this second statement, which was reduced to writing, Sgt. Weeks contacted the pathologist who had conducted the autopsy to ask whether the actions respondent admitted committing in his second statement "could have caused" the child's death. The pathologist said no, and told the officer that the hand would have had to cover the child's nose and mouth for at least a minute. The officers then obtained a third written statement from respondent at

12:25 pm. The brief questions and answers are:

Q. [Respondent], is it possible that you held your hand over [the child's] mouth and nose for a longer period of time then you first related to us that you did?

A. Yeah, it could have been longer.

Q. How long do you think it could have been?

A. I don't know.

Q. Can you give us any idea at all how long you might have held your hand over his nose and mouth?

A. A minute, not more than two minutes.

Q. When you removed your hand the last time was [the child] breathing?

A. He was gasping for breath.

Navy at 3-5 (emphasis added).

Pre-*Miranda*, Navy told the officer "that he sort of popped the baby in his back when he was on his stomach, and he said he sort of may have patted the mouth to calm the crying." Post-*Miranda*, Navy admitted to popping the child hard out of frustration and covering the child's nose and mouth simultaneously for one to two minutes to the point that the child was "gasping for breath." The postwarning statement was not a repetition of a prewarning information. Rather, the initial statements simply hinted at culpability while the latter statements amounted to outright confessions.

3. *Navy*'s majority also erred when considering "the timing and setting" between the two statements. The majority stated, "the officers questioned respondent at headquarters for almost three hours before giving the warning." *Navy* at 7. As outlined in the opinion, the officers came to Navy's home at approximately 9:00 am. At 9:50 am, Navy began his first oral statement, which was then typed up for Navy's signature and signed by Navy. At the time of the oral statement, the majority found Navy was not in custody. The majority stated the line of questioning did not transition into a custodial interrogation until the officers asked a few questions to follow-up on the oral statement. After these follow-up questions, Navy was permitted an additional break and informed he was not under arrest. At 11:35, Navy was mirandized.

The officers did not subject Navy to three hours of custodial interrogation prior to a *Miranda* warning. The *Miranda* warning came approximately two hours and thirty-five minutes after the police went to Navy's home. More importantly, however, the majority categorized the bulk of that time as non-custodial. As a result, even if the questions following the oral statement properly mark the initiation of a custodial interrogation, the time lapsed between the initiation of the custodial interrogation and the implementation of *Miranda* warnings amounted to a matter of minutes rather than hours. This Court has made it clear that officers do not need to mirandize individuals who are not in custody[3] and Navy disregards this Court's precedent by factoring noncustodial interview time into their calculation of *Miranda* delay.

4. *Navy* is further distinguished from *Seibert* where Navy's statements prior to his *Miranda* warning are not identified as inadmissible. *Seibert* is clear that the officer erred in failing to warn the defendant that her prior statement was not admissible against her. In *Navy*, the majority found the first statement was admissible, but did not determine the admissibility of Navy's brief statements during the alleged prewarning custodial interrogation (which is the time period between the

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[3] *See Orozco v. Texas*, 394 U.S. 324, 327 (1969).

oral statement and the *Miranda* warnings). The majority stated the officer failed to inform Navy "the answers given after the first statement but before the administration of *Miranda* warnings may not be admissible." *Navy* at 6 (emphasis added). Where Navy's statements prior to *Miranda* may or may not be admissible, *Seibert* does not apply. Rather, *Seibert* only applies when the prior confession is clearly inadmissible.

5. *Navy* grossly erred by misinterpreting the facts to find the plurality test called for exclusion of the Navy's postwarning statements. *Seibert* targeted circumstances that "challenge the comprehensibility and efficacy of the *Miranda* warning to the point that a reasonable person in the suspect's shoes could not have understood them to convey a message that she retained a choice about continuing to talk." *Seibert* at 603.

Here, Officer Smith testified that after he informed Navy the victim had been suffocated, Navy asked if he was under arrest and the officer informed Navy he was not under arrest. Moreover, Navy also admitted that he was told he would be back home in "couple of hours." Navy testified, "I just thought that they needed a quick statement from me and like they said they would take me back home." Contrary to *Seibert*, the circumstances in Navy would allow a reasonable person in Navy's shoes to believe he had a choice about continuing to talk.

In finding the brief questioning of Navy rose to the level of *Seibert*, the *Navy* majority expanded the bounds of Seibert beyond those contemplated by this Court's plurality in *Seibert*. This Court must redress this inappropriate expansion of the plurality test as it is an important and recurring issue.

6. *Seibert*'s badly fractured opinion has created great confusion in the federal circuit courts and state high courts. Nationwide, courts are split in their application of *Seibert*'s admissibility test. This split has led to inconsistent and unreliable results. *Navy* squarely illustrates the problem of *Seibert*'s uncertainty. In *Navy*, the majority used an enlarged version of the plurality test to exclude statements that would have been clearly admissible under Justice Kennedy's test. Moreover, the *Navy* majority grossly disregarded this Court's custody standards to find an admittedly noncustodial questioning became a custodial interrogation. In doing so, *Navy* added another layer of confusion to the *Seibert* mire. *Navy* also stretched the prongs of the plurality test to exclude postwarning statements, thereby widening the plurality holding. Ultimately, the repetition and importance of the confusion surrounding the *Seibert* holding begs this Court for clarification. Further, *Navy*'s abandonment of custody precedent and unreasonable extension of the plurality test require this Court's remedy.

CONCLUSION

The petition for writ of certiorari should be granted.

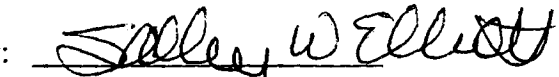
Respectfully submitted,

HENRY McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MICHELLE PARSONS KELLEY
Assistant Attorney General

By: 
Salley W. Elliott
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734- 3727
selliott@scag.gov

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