No.

IN THE
Supreme Court of the United States

SHAWN WILLIAM WASS,

Petitioner

v.

STATE OF IDAHO,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Thirteen years ago, in *Missouri v. Seibert*, 542 U.S. 600 (2004), this Court considered the admissibility of a statement where an officer "questions first"—*i.e.*, he or she elicits an admission without providing a *Miranda* warning, then provides the warning and elicits the same admission. The federal circuits and state high courts are now in an acknowledged, 17-to-8 split over which opinion represents the "narrowest grounds," *Marks v. United States*, 430 U.S. 188, 193 (1977), of the Court's fractured decision in *Seibert*.

The question presented is:

> When an officer "questions first," is the admissibility of the suspect's post-warning statement governed by the four-judge plurality's objective, suspect-focused test, *Seibert*, 542 U.S. at 615-16, or Justice Kennedy's subjective, officer-focused test, *id.* at 622?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shawn William Wass respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINION AND ORDER BELOW

The Supreme Court of Idaho's opinion (Pet. App. 1a-15a) is published at 396 P.3d 1243. The oral opinion of the district court (Pet. App. 16a-18a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on June 22, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "No person . . . 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."

The Fourteenth Amendment to the U.S. Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

The present case satisfies all of this Court's criteria for certiorari. It concerns an issue upon which there is an acknowledged split involving twenty-five federal circuits and state high courts. The decision below turned squarely on which side of that split is correct. And the issue is worthy of this Court's review—indeed, it is about how to interpret decisions of this Court and, in particular, *Missouri v. Seibert*, 542 U.S. 600 (2004), which involved a fundamental question of federal constitutional law.

Thirteen years ago, this Court granted certiorari in *Seibert* to resolve a 2-2 split among federal circuits regarding the admissibility of statements obtained when a law enforcement officer "questions first"—*i.e.*, he or she elicits an admission without providing the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), then provides the warning and elicits the statement again. Federal circuits and state high courts are now split 17-to-8 as to the proper test under *Seibert*. Seven federal circuits, nine state high courts (including the court below), and the Supreme Court of Puerto Rico apply the subjective, officer-focused inquiry set forth in Justice Kennedy's separate concurrence: Whether "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Seibert*, 542 U.S. at 622. On the other hand, one federal circuit, six state high courts, and the D.C. Court of Appeals apply the objective, suspect-focused test articulated in the four-judge plurality opinion: Whether "a reasonable person in the suspect's shoes could have seen the [second]

questioning as a new and distinct experience, [such that] the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.* at 615-16.

The question presented is fundamental at its most general level—how lower courts are to determine "the narrowest grounds" of a fractured opinion of this Court, *Marks v. United States*, 430 U.S. 188 (1977)—and its most specific—the constitutional rule to which law enforcement officers must conform their conduct.

It is thus not surprising that, in the wake of *Seibert*, multiple state attorneys general asked this Court to resolve this issue.[1] In response to prior petitions, briefs in opposition advised this Court to wait for the split to ripen. Seven years ago, for instance, the U.S. Solicitor General counseled against certiorari, arguing that there was no split among the federal circuits and only a "single outlying" decision from a state high court.[2] The federal circuits are now split, and the split includes an additional 14 state high courts, the Supreme Court of Puerto Rico, and the D.C. Court of Appeals.

Indeed, the split among the circuits and state high courts has now reached the intolerable circumstance in which two different constitutional rules apply in

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[1] *See* Petition for Writ of Certiorari, *Ohio v. Farris*, No. 06-464 (U.S. Oct. 2, 2006), 2006 WL 2826269; Petition for Writ of Certiorari, *South Carolina v. Navy*, No. 09-1459 (U.S. May 27, 2010), 2010 WL 2214870.

[2] Brief in Opposition at 15, *Hill v. United States*, No. 09-740 (Apr. 2, 2010), 2010 WL 1321421.

the very same jurisdiction. In at least six states, the admissibility of an incriminating statement where an officer "questions first" is governed by a different constitutional standard depending on whether the suspect is ultimately prosecuted for a federal crime or a state crime. In such states, both law enforcement and defense counsel lack certainty as to whether admissibility is contingent upon a finding that the officer acted with ill intent, *Seibert*, 542 U.S. at 622, or the understanding of a reasonable person in the suspect's shoes, *id*. at 615-16.

This case presents the perfect record to resolve this issue. The facts are settled and simple (indeed, much simpler than *Seibert* itself). The question presented is perfectly preserved and was the sole issue passed upon by the court below to resolve Petitioner's appeal.

The Court should grant certiorari.

STATEMENT OF THE CASE

I. "Question First" Interrogation Of Petitioner.

On August 9, 2015, Canyon County Deputy Sheriff Dan Drake approached Petitioner, who was standing outside of a parked vehicle on a closed road. Pet. App. 2a. Deputy Drake asked Petitioner for his identification. Petitioner responded that he did not have any, but verbally identified himself. Pet. App. 2a.

Deputy Drake then asked Petitioner if he had anything illegal inside the vehicle. *Id*. Petitioner responded that he did not. *Id*. Deputy Drake asked Petitioner for consent to search the vehicle, which Petitioner refused. *Id*. Deputy Drake then sought

consent to search the vehicle from a woman sitting in the front seat, who also declined. *Id.*

Deputy Drake entered Petitioner's information into his mobile computer and learned that Petitioner had a suspended license and two outstanding arrest warrants. Pet. App. 2a-3a. After performing a field sobriety test, which Petitioner passed, Deputy Drake informed Petitioner of the outstanding warrants and placed him under arrest. Pet. App. 3a. Without providing a *Miranda* warning, Deputy Drake again asked Petitioner whether he had anything illegal in the vehicle. *Id.* This time, Petitioner confessed that he had syringes in a grocery bag in the backseat of the car. *Id.* Deputy Drake then put Petitioner in the rear seat of his patrol car. *Id.*

Approximately two minutes later, Deputy Drake returned, gave Petitioner *Miranda* warnings, and asked him to state again whether he had anything illegal in the car. *Id.* Petitioner, again, replied that there were syringes in the backseat that belonged to him. *Id.*

Deputy Drake searched the vehicle and located the syringes to which Petitioner had laid claim, along with other drug evidence. *Id.*

II. District Court Proceedings.

Petitioner moved to suppress both his pre- and post-*Miranda* statements that the syringes in the car belonged to him, as well as the physical drug evidence

itself. CR 42-50.[3] The State conceded that Petitioner's first, unwarned statement was inadmissible. CR 61. However, it contested suppression of Petitioner's post-*Miranda* statement and the physical evidence. CR 61-66.

The district court denied Petitioner's motion in its entirety. According to the court, Petitioner's second admission was admissible because "the officer did not tactically induce a confession prior to Miranda warnings—or coerce a confession or use improper tactics to obtain the confession prior to Miranda warnings." Pet. App. 18a. Because there was no "coercion . . . calculated to undermine the suspect's ability to exercise free will," the court reasoned, "the Miranda warnings given a few minutes later cure that problem." *Id.*

The court also concluded that the physical drug evidence was admissible under the automobile exception to the Fourth Amendment. *Id.*

Petitioner thereafter entered into a plea agreement, which expressly preserved the right to appeal the district court's ruling on his motion to suppress. Pet. App. 19a-20a; *see also* CR 75-76.

III. Supreme Court of Idaho.

On appeal to the Supreme Court of Idaho, Petitioner conceded that the physical drug evidence obtained from the vehicle was admissible under *United States v. Patane*, 542 U.S. 630 (2004).

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[3] All references to "CR" refer to the court record on file with the Supreme Court of Idaho, No. 43844-2015.

Appellant Reply Br. at 3. The sole issue on appeal was the admissibility of his post-warning statement that there were syringes in the back seat that belonged to him.

Petitioner urged the court to adopt the test applied by the four-judge plurality in *Seibert*: Whether "a reasonable person in the suspect's shoes could have seen the [second] questioning as a new and distinct experience, [such that] the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." 542 U.S. at 615-16; Appellant Br. at 9. Because the delayed *Miranda* warning and questioning took place just two minutes after the officer's initial questioning, took place at the same location, was conducted by the same police officer, and concerned the same incriminating statement that Petitioner had made just moments before, Petitioner argued that a reasonable person in his shoes would have seen the questioning as a continuous experience and the officer's midstream warning would not have been effective. Appellant Br. at 10.

The Supreme Court of Idaho affirmed. It acknowledged that "[i]nterpretation of the *Seibert* opinion is currently subject to a circuit split." Pet. App. 12a. Applying the directive in *Marks*, 430 U.S. 188, that a fragmented decision is governed by the "position taken by those Members who concurred in the judgments on the narrowest grounds," it concluded that the circumstances were controlled by Justice Kennedy's separate concurrence. Pet. App. 12a-14a (quoting *Marks*, 430 U.S. at 193). In particular, the

court reasoned that "Justice Kennedy agreed to the Plurality's framework, but only in cases in which the two stage-interrogation was the result of an intentional tactic to induce a confession and not in the case of mistake or accident." Pet. App. 14a. "Accordingly, the more narrow holding of *Seibert* is Justice Kennedy's." *Id.*

Because Deputy Drake "did not intentionally use a two-stage interrogation technique as a tactic to induce a confession," the court concluded that suppression was unwarranted and affirmed. Pet. App. 14a-15a.

REASONS FOR GRANTING THE PETITION

The question presented is the subject of an acknowledged split between the federal circuits and state high courts. The split has reached significant proportions, with 17 federal circuits and state high courts on one side and eight on the other. The split concerns a fundamental issue of federal constitutional law and only this Court can resolve it.

I. The Question Presented Is The Subject Of An Acknowledged Split Among Twenty-Five Federal Circuits And State High Courts.

In *Seibert*, a law enforcement officer obtained a confession after intentionally withholding *Miranda* warnings. After giving the suspect a 20-minute break, the officer returned, provided a *Miranda* warning and elicited the same incriminating statements. 542 U.S. at 604-05. A majority of this Court held that the suspect's post-warning statements must be

suppressed, but disagreed as to the test that should be applied.

Writing for four members of the Court, Justice Souter viewed the critical inquiry as "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* at 611-12. In other words, whether "a reasonable person in the suspect's shoes could have seen the [second] questioning as a new and distinct experience" and "the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.* at 615-16. According to Justice Souter, the effectiveness of a midstream *Miranda* warning would depend upon a variety of factors, including "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615. Justice Souter rejected the argument that the Court's earlier decision in *Oregon v. Elstad*, 470 U.S. 298 (1985), called for a different approach. *Seibert*, 542 U.S. at 614-15.

Justice Kennedy agreed with the four-judge plurality that the post-warning statements must be suppressed. He expressed "agree[ment] with much in the careful and convincing opinion for the plurality," but stated that he "would apply a narrower test applicable only in the infrequent case, . . . in which the

two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.* at 622. According to Justice Kennedy, "[i]f the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Id.* Because the officer in *Seibert* had taken no curative steps, such as "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning," suppression was warranted. *Id.*

Justice Breyer joined Justice Souter's opinion in full, but authored a separate concurrence to express his view that the four-judge plurality's test was tantamount to asking whether the challenged statement was "the 'fruits' of the initial unwarned questioning," which he described as a "sound and workable approach." *Id.* at 617-18. He expressed agreement with Justice Kennedy's opinion, however, "insofar as it is consistent with this approach and makes clear that a good-faith exception applies." *Id.* at 618.

Four dissenting Justices would have held that *Oregon v. Elstad*, 470 U.S. 298 (1985), requires admission of a statement obtained through "question first" tactic unless the statement is actually coerced or involuntary. *Seibert*, 542 U.S. at 628. The dissenters expressly agreed with the plurality's focus "on the way in which suspects experience interrogation" and expressly rejected Justice Kennedy's focus on "the subjective intent of the interrogating officer." *Id.* at

623-24. According to the dissenting Justices, "the approach espoused by Justice Kennedy is ill advised" because it "untethers the analysis from facts knowable to, and therefore having any potential directly to affect, the suspect" and requires courts "to conduct the kind of difficult, state-of-mind inquiry that we normally take pains to avoid." *Id.* at 627.

As set forth below, federal circuits and state high courts are now split 17-to-8 as to whether Justice Kennedy's subjective, officer-focused test or the four-judge plurality's objective, suspect-focused test represents "that position taken by those Members who concurred in the judgments on the narrowest grounds," as required by *Marks*, 430 U.S. at 188. In recent years, numerous courts[4] and commentators[5] have acknowledged this split.

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[4] *See, e.g.*, Pet. App. 12a ("Interpretation of the *Seibert* opinion is currently subject to a circuit split."); *Reyes v. Lewis*, 833 F.3d 1001, 1009-10 (9th Cir. 2016) (Callahan, J., dissenting from denial of rehearing en banc) (describing circuit split); *United States v. Ray*, 803 F.3d 244, 271 (6th Cir. 2015) ("[O]ur sister circuits disagree as to whether the plurality opinion or Justice Kennedy's concurrence controls."); *State v. Frazier*, No. E2010-01822, 2012 WL 1996864, at *18 (Tenn. Crim. App. June 5, 2012) ("Courts are divided over which test is controlling.") *Ross v. State*, 45 So. 3d 403, 422 & n. 9 (Fla. 2010) ("[T]here is a split in the federal circuits regarding whether the plurality rather than [Justice Kennedy's] concurrence operates as the controlling precedent.").

[5] *See, e.g.*, Joshua I. Rodriguez, Note, *Interrogation First, Miranda Warnings Afterward: A Critical Analysis of the Supreme Court's Approach to Delayed Miranda Warnings*, 40 Fordham Urb. L.J. 1091, 1109 (2013) ("Intra-circuit splits between whether to apply the plurality approach or Justice

A. Seven Federal Circuits, Nine State High Courts, And The Supreme Court Of Puerto Rico Hold That Justice Kennedy's Opinion Governs.

As described above, the Supreme Court of Idaho adopted Justice Kennedy's opinion in *Seibert* upon concluding that it provides "the narrowest grounds" under *Marks*. Pet. App. 12a-14a. It reasoned that while "the Plurality set forth a multi-factor analysis to be applied in every instance of two-stage interrogation," Justice Kennedy would more narrowly consider such factors "only in cases in which the two stage-interrogation was the result of an intentional tactic to induce a confession." Pet. App. 14a.

Seven federal circuits—the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh—have adopted the same reasoning and conclusion. *See Jones v. Murphy*, 694 F.3d 225, 246 n.13 (2d Cir. 2012) ("[O]ur Court has clarified that Justice Kennedy's opinion, which provided the fifth vote for the result in the case, is controlling."); *United States v. Naranjo*, 426 F.3d 221, 231 (3d Cir. 2005) ("Justice Kennedy's opinion provides the narrowest rationale for resolving the

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Kennedy's approach have also plagued question-first jurisprudence."); Locke Houston, Comment, *Miranda-in-the-Middle: Why Justice Kennedy's Subjective Intent of the Officer Test in* Missouri v. Seibert *Is Binding and Good Public Policy*, 82 Miss. L.J. 1129, 1141-53 (2013) (describing "the circuit split resulting from the plurality opinion in *Missouri v. Seibert*"); Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. Davis L. Rev. 1407, 1428-29 (2011) (explaining that "*Seibert* has been a puzzle for police and lower courts" and describing split).

issues raised by two-step interrogations[.]"); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) ("Justice Kennedy's opinion . . . represents the holding of the *Seibert* Court[.]"); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006) ("[W]e find *Seibert*'s holding in Justice Kennedy's opinion concurring in the judgment."); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007) ("We treat Justice Kennedy's concurrence as controlling since it provided the fifth vote necessary for a majority and since it was decided on narrower grounds than the plurality opinion."); *Reyes v. Lewis*, 833 F.3d 1001, 1002 (9th Cir. 2016) (" Justice Kennedy's concurrence provides the controlling test."); *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006) ("Because *Seibert* is a plurality decision and Justice Kennedy concurred in the result on the narrowest grounds, it is his concurring opinion that provides the controlling law.").

Another eight state high courts (in addition to Idaho) and the Supreme Court of Puerto Rico have also reached this conclusion. *See State v. Collings*, 450 S.W.3d 741, 755 (Mo. 2014) ("[T]his Court [has] adopted Justice Kennedy's opinion concurring in the result in *Seibert*[.]"); *Jackson v. State*, 427 S.W.3d 607, 616-17 (Ark. 2013) (holding that *Seibert* requires exclusion only in cases of purposeful tactics); *State v. Nightingale*, 58 A.3d 1057, 1067 (Me. 2012) ("We now follow the majority of the federal circuits in applying Justice Kennedy's *Seibert* analysis."); *Robinson v. State*, 19 A.3d 952, 961-64 (Md. 2011) (adopting Justice Kennedy's opinion as the "narrower test"); *Pueblo v. Millan Pacheco*, 182 D.P.R. 595, 633-36 (P.R.

2011) (adopting Justice Kennedy's separate opinion as controlling); *Ross v. State*, 45 So. 3d 403, 422 (Fla. 2010) ("Because this was a plurality opinion, Justice Kennedy's opinion concurring in the judgment becomes a pivotal focus in determining the impact and ramifications of *Seibert*."); *People v. Lopez*, 892 N.E.2d 1047, 1069 (Ill. 2008) ("[W]e find that Justice Kennedy's concurrence resolves the case on the narrowest grounds and is therefore controlling authority."); *Martinez v. State*, 272 S.W.3d 615, 621, 626-27 (Tex. Crim. App. 2008) (adopting Justice Kennedy's deliberateness test); *Jackson v. Com.*, 187 S.W.3d 300, 309 (Ky. 2006) (applying "the narrowest holding, rendered by Justice Kennedy").[6]

B. One Federal Circuit, Six State Courts Of Last Resort, And The D.C. Court of Appeals Apply The Four-Judge Plurality's Test.

In conflict with the circuits and state courts above, one federal circuit, six state high courts, and the D.C. Court of Appeals apply Justice Souter's objective, suspect-focused test. These courts have generally

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[6] Intermediate appellate courts in Alabama, Arizona, California, Iowa, Louisiana, Michigan, Virginia, and Washington also hold that Justice Kennedy's opinion controls. *White v. State*, 179 So.3d 170, 191 (Ala. Crim. App. 2013); *State v. Zamora*, 202 P.3d 528, 535 (Ariz. Ct. App. 2009); *People v. Camino*, 116 Cal. Rptr. 3d 173, 182 (Cal. Ct. App. 2010); *State v. Gomez*, 820 N.W.2d 158, 2012 WL 2122266, at *8 (Iowa Ct. App. 2012); *State v. Bruce*, 169 So. 3d 671, 678 (La. Ct. App. 2015); *People v. Bush*, No. 330077, 2017 WL 2797758, at *15 (Mich. Ct. App. June 27, 2017); *Kuhne v. Com.*, 733 S.E.2d 667, 672-73 (Va. Ct. App. 2012); *State v. Rhoden*, 356 P.3d 242, 246 (Wash. Ct. App. 2015).

reached this conclusion in one of two ways: (1) by reasoning that *Seibert* contains no binding opinion under *Marks*, but adopting the four-judge plurality's test as the most consistent with Fifth/Fourteenth Amendment precedent; or (2) by applying the four-judge plurality opinion as binding precedent.

The Sixth Circuit and the Supreme Court of Connecticut have each adopted the four-judge plurality's test after concluding that the *Marks* test yields no binding opinion. In *United States v. Ray*, 803 F.3d 244 (6th Cir. 2015), the Sixth Circuit rejected the proposition that Judge Kennedy's concurrence offers "the narrowest ground on which [this] Court agreed." *Id.* at 270. Acknowledging that its "sister circuits disagree," the Sixth Circuit reasoned that "three of the four Justices in the plurality *and* the four dissenters decisively rejected [Justice Kennedy's] subjective good faith consideration, based on deliberateness on the part of the police." *Id.* at 271 (quoting *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1138-40 (9th Cir. 2005) (Berzon, J., dissenting)) (emphasis in original).[7] Because "the plurality and dissent each received only four votes," however, the Sixth Circuit concluded that "*Seibert* did not announce a binding rule." *Id.* at 272. It "resolve[d] this open question . . . by adopting the multi-factor test announced by the *Seibert* plurality."

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[7] The Sixth Circuit adopted Judge Berzon's reasoning, which assumed "for the sake of argument" that Justice Breyer's separate concurrence indicates that he would agree with Justice Kennedy's deliberateness point (despite the fact that he joined the plurality opinion in full). *Ray*, 803 F.3d at 271 (quoting *Rodriguez-Preciado*, 399 F.3d at 1139-40 & n.12 (Berzon, J., dissenting)).

Id.; *see also State v. Donald*, 157 A.3d 1134, 1143 n.8 (Conn. 2017) ("While we acknowledge that the plurality's factor test is not binding on this court, we find the plurality's approach more persuasive[.]").[8]

Six state high courts—Georgia, Indiana, Nebraska, Ohio, South Carolina and Vermont—and the D.C. Court of Appeals apply the four-judge plurality opinion as controlling. *State v. Juranek*, 844 N.W.2d 791, 803-04 (Neb. 2014) (adopting the plurality's test and holding that statement was admissible because the circumstances "did not rise to the level of making the *Miranda* warnings ineffective"); *State v. Brooks*, 70 A.3d 1014, 1019-20 (Vt. 2013) (adopting the plurality's test as to whether "the subsequent *Miranda* warning operated effectively"); *Kelly v. State*, 997 N.E.2d 1045, 1054-55 (Ind. 2013) (holding that the plurality's test applies and excluding evidence notwithstanding the absence of any evidence related to the questioning officer's motives); *State v. Navy*, 688 S.E.2d 838, 842 (S.C. 2010) (holding that subjective intent "was not

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[8] The Seventh Circuit has similarly concluded that Justice Kennedy's separate concurrence does not control under *Marks*. It, like the Sixth Circuit, reasoned that although "parts of [Justice Kennedy's] reasoning could be construed as a narrower ground than the one described in Justice Souter's plurality . . . Justice Kennedy's intent-based test was rejected by both the plurality opinion and the dissent[.]" *United States v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009). It thus concluded that Justice Kennedy's opinion "is obviously not the 'common denominator' that *Marks* was talking about." *Id.* at 885. On the facts before it, however, the Seventh Circuit found it unnecessary to go further and "resolve once and for all what rule or rules governing two-step interrogations can be distilled from *Seibert*." *Id.*

determinative in *Seibert*" and excluding statements because "the four elements outlined in [the plurality opinion] were met here"); *State v. Pye*, 653 S.E.2d 450, 453 & n.6 (Ga. 2007) ("[W]e will not consider *Seibert* to hold that a finding of subjective intent is required, and will consider the analysis presented in the plurality opinion to be that mandated by the United States Supreme Court."); *State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006) (adopting holding of *Seibert* plurality "that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis"); *Hairston v. United States*, 905 A.2d 765, 780-81 (D.C. 2006) ("[U]nder *Seibert*, our task is to determine whether . . . the *Miranda* warnings administered in the second session of their interaction [were] ineffective.").[9]

II. This Case Is Worthy Of This Court's Review.

A. This Issue Is Fundamental, Recurs Frequently, And The Arguments On Each Side Have Been Fully Aired.

This case concerns a question of federal constitutional law that is of fundamental importance to defendants and to law enforcement. As numerous

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[9] The Oregon Supreme Court has adopted the *Seibert* plurality's test in interpreting its state constitution. *State v. Vondehn*, 236 P.3d 691, 701-704 (Or. 2010) ("[W]e adopt the reasoning and the analysis of the *Seibert* plurality as our own" and "state explicitly that we reject [Justice Kennedy's] approach."). The plurality's test has also been adopted by one state intermediate appellate court. *Crawford v. State*, 100 P.3d 440, 450 (Alaska Ct. App. 2004).

courts and commentators have recognized, "the inconsistency in the circuit courts' treatment of question-first cases provides poor guidance to police." Rodriguez, *supra*, at 1096; *State v. O'Neill*, 936 A.2d 438, 454 (N.J. 2007) (observing that "police officers . . . must have workable standards to apply to the complex, ever-changing fact patterns that play out in the real world" and expressing frustration that the confusion regarding *Seibert* "provide[s] no certainty concerning the standard that might apply to the next set of slightly different facts").[10]

This uncertainty is particularly consequential because the tests applied by the four-judge plurality and Justice Kennedy are premised upon fundamentally different concerns. The tests differ as to the relevant actor (suspect vs. officer), the relevant mens rea (objective vs. subjective), and as to the relevant inquiry—"the effectiveness of warnings," *Seibert*, 542 U.S. at 612-13 (plurality), or ill intent, *id.* at 622 (Kennedy, J., concurring).

It is thus not surprising that multiple state attorneys general have asked this Court to resolve this split.[11] Responses to past petitions advised

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[10] *See also* Fan, *supra*, at 1428 ("*Seibert* has been a puzzle for police[.]"); Stewart J. Weiss, *Missouri v. Seibert: Two-Stepping Towards the Apocalypse*, 95 J. Crim. L. & Criminology 945, 946 (2005) (status quo has "left police without a clear rule of conduct"); Briana Collier, Note, *Disrespecting Miranda: Vermont's Choice in State v. Fleurie*, Vt. B.J., Spring 2010, at 30, 35 (status quo has "confuse[d] officers on what tactics are appropriate and permissible").

[11] *See* Petition for Writ of Certiorari, *Ohio v. Farris*, No. 06-464 (U.S. Oct. 2, 2006), 2006 WL 2826269; Petition for Writ of

against certiorari on the basis that "only a handful of courts have had occasion" to apply *Seibert* and "none appear to have found that strictly applying the plurality or Justice Kennedy's opinion was outcome-determinative."[12] Those arguments would be indefensible today. There have now been thousands of cases applying *Seibert*, which have—like this case and those discussed above—definitively adopted one side of the split, believing it to be outcome determinative.[13]

Certiorari, *South Carolina v. Navy*, No. 09-1459 (U.S. May 27, 2010), 2010 WL 2214870.

[12] Brief in Opposition at 7, *Ohio v. Farris*, No. 06-464 (U.S. Jan. 3, 2007), 2007 WL 54986; *see also* Brief in Opposition at 12, *South Carolina v. Navy*, No. 09-1459 (U.S. July 30, 2010), 2010 WL 5829803.

[13] *See, e.g.*, *United States v. Ray*, No. 16-1785, 2017 WL 2471245, at *1 (6th Cir. June 8, 2017) (holding that evidence must be suppressed, confirming that the Sixth Circuit's earlier adoption of the plurality approach in *Ray*, 803 F.3d 244, was dispositive); *United States v. Pacheco-Lopez*, 531 F.3d 420, 426 n.10 (6th Cir. 2008) (holding evidence inadmissible under plurality's test "even if the police didn't purposefully implement a question first-warn later strategy"); *id.* at 431 (Griffin, J., dissenting) ("[T]he majority clearly errs by applying the *Seibert* (plurality opinion) 'effectiveness' factors in the absence of a factual finding that the police deliberately attempted to evade the safeguards of *Miranda*."); *United States v. Sanchez-Gallegos*, 412 F. App'x 58, 73 & n.2 (10th Cir. 2011) (Ebel, J., concurring) (finding evidence admissible under Justice Kennedy's test, but "acknowledge[ing] that the conclusion might be different under the plurality's test in *Seibert*"); *United States v. Zubiate*, No. 08-CR-507, 2009 WL 483199, at *9 (E.D.N.Y. Feb, 25, 2009) (finding that question-first conduct of ICE agents would have led to inadmissibility under the plurality's test, but not Justice Kennedy's because the conduct was not "calculated"); *United States v. Capers*, No. 06

Seven years ago, the U.S. Solicitor General similarly counseled against certiorari, advising that "[e]very federal court of appeals that has decided the issue has concluded that Justice Kennedy's concurring opinion represents the holding of *Seibert*" and that the "single outlying" state high court decision at the time "does not indicate that there is widespread confusion among the lower courts meriting this Court's review."[14] There is now an acknowledged conflict between the federal circuits, an additional 14 state high courts, the Supreme Court of Puerto Rico, and the D.C. Court of Appeals. As these prior BIOs counseled, "if it becomes apparent in future cases that . . . courts are applying the *Seibert* plurality

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CR. 266, 2007 WL 959300, at *12-15 (S.D.N.Y. Mar. 29, 2007) (suppressing statements in the absence of "the subjective police purpose to vitiate *Miranda* which Justice Kennedy defined"); *Kelly v. State*, 997 N.E.2d 1045, 1055 (Ind. 2013) (applying plurality test to exclude with "no knowledge of" any intent on the part of the officer); *Morris v. State*, 871 N.E.2d 1011, 1019 (Ind. Ct. App. 2007) (applying plurality where there is no finding of intent); *King v. State*, 844 N.E.2d 92, 98 (Ind. Ct. App. 2005) (same); Rodriguez, *supra* at 1110 ("[C]ircuit cases have demonstrated that the choice between the plurality and Justice Kennedy's approach can yield opposite results."); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 Geo. L.J. 1, 48 (2010) (explaining that there is a "nontrivial subset of cases in which the outcome rests on determining which test is the law").

[14] Brief in Opposition at 15, *Hill v. United States*, No. 09-740 (Apr. 2, 2010), 2010 WL 1321421.

test"—as is now the case—this Court's review is warranted.[15]

Indeed, the need for this Court's intervention has reached an additional peak. The split set forth above has not only caused different tests to be applied in different circuits and states, it causes different tests to apply *within the same jurisdiction*. In at least six states, the test applied by state courts differs from the test applied by federal courts. Thus, the admissibility of a suspect's incriminating statement may turn on whether he ultimately faces state or federal prosecution. If an officer in Kentucky "questions first" without the specific intent to circumvent *Miranda*, for instance, the suspect's post-warning statement will be admitted if the he is ultimately tried for a state offense, *Jackson*, 187 S.W.3d at 309, but may be excluded if he is ultimately charged with a federal offense, *see Ray*, 803 F.3d at 272. Georgian officers and suspects face the reverse uncertainty—admission of the post-warning statement in the case of federal prosecution, *Street*, 472 F.3d at 1313, but potential exclusion in state prosecution, *Pye*, 653 S.E.2d at 453. Defendants and officers in Michigan, Nebraska, South Carolina and Vermont face similar uncertainty. *See supra* Part I.

This is made more problematic by the fact that the officer and suspect may have no idea whether the suspect will ultimately be tried for a state or federal crime at the time the questioning occurs. Such

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[15] Brief in Opposition at 12, *Farris*, No. 06-464. *supra*.

uncertainty is intolerable for individuals facing criminal liability, for defense counsel who need to be able to advise their clients, and for law enforcement who need to conform their conduct one way or the other in the field.

This Court has routinely granted certiorari when it becomes clear that lower courts have struggled to interpret a fractured decision under *Marks*. *See, e.g.*, *Nichols v. United States*, 511 U.S. 738, 746 (1994) (resolving disagreement where *Marks* "baffled and divided the lower courts"); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *see also United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016) (en banc) ("In the nearly forty years since *Marks*, lower courts have struggled to divine what the Supreme Court meant by 'the narrowest grounds.'"). Furthermore, granting certiorari would provide the Court an opportunity to provide further clarity on how to interpret fractured decisions of this Court. As indicated above, courts of appeals are divided on the method for discerning "narrowest grounds" of a fractured decision under *Marks*. *See Davis*, 825 F.3d at 1024. The stark circumstances here—in which a majority of lower courts are applying a test adopted by, at most, two Justices and expressly rejected by the other seven——provide an important opportunity to do so.[16]

[16] Indeed, the constitutional question raised here and upon which the Court divided in *Seibert* provides a better posture to resolve the disagreement over *Marks* than other fractured decisions of this Court. The application of *Marks* to *Freeman v. United States*, 564 U.S. 522 (2011), for instance, appears to be the other frequently recurring context in which lower courts have divided as to the application of *Marks*. As the U.S. Solicitor General has

The arguments on each side of this conflict have been fully aired. Indeed, in addition to the express disagreement between lower courts set forth above, there have been an inordinate number of divided opinions within circuits and state courts exploring the issue of which *Seibert* opinion controls. *See, e.g.*, *Ross v. State*, 45 So. 3d 403, 421-22, 435, 439-43 (Fla. 2010) (three separate opinions addressing proper test under *Seibert*); *Martinez v. State*, 272 S.W.3d 615 (Tex. Crim. App. 2008) (5-to-4 opinion); *Reyes*, 833 F.3d at 1002-03, 1007-09 (9th Cir.) (en banc) (three judges agreeing Justice Kennedy's opinion controls, five judges disagreeing and calling for rehearing en banc); *Thompson v. Runnels*, 657 F.3d 784, 788-90 (9th Cir. 2011) (seven judges calling for en banc review, in part, on basis that Justice Kennedy's concurring opinion should have controlled); *see also State v. Gaw*, 285 S.W.3d 318, 322-325, 325-26 (Mo. 2009) (divided en banc opinion); *Rodriguez–Preciado*, 399 F.3d at 1138-42 (Berzon, J., dissenting); *Pacheco-Lopez*, 531 F.3d at 430-33 (Griffin, J., dissenting).

B. This Case Is The Perfect Vehicle.

This case is an ideal vehicle to resolve the question presented.

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noted, however, this Court is unlikely to grant certiorari in that context because prosecutors can easily avoid the plea agreement issue addressed in *Freeman* going forward, making it "a relatively short-lived issue for the courts." Brief in Opposition at 18, *McNeese v. United States of America*, No. 16-66 (U.S. Oct. 14, 2016), 2016 WL 6082343. The present conflict will persist until this Court resolves it.

First, the issue is fully preserved and squarely presented. In his guilty plea, Petitioner specifically reserved the right to appeal the trial court's adverse ruling on his motion to suppress and to withdraw his guilty plea in the event he prevailed on appeal. Pet. App. 20a. Before the Supreme Court of Idaho, Petitioner advanced the four-judge plurality's test, expressly noting that "a circuit split ha[d] developed" on the issue. Appellant Br. 9-11 & n.2. The Supreme Court of Idaho openly rejected application of the four-judge plurality decision and adopted Justice Kennedy's test. Its application of that test to conclude suppression was unwarranted was the sole basis for its decision.

Second, all of the usual distractions in a case like this have been conceded. There has never been any dispute that Petitioner was in "custody" when he was placed under arrest and first questioned by Deputy Drake. *See Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (observing that "the task of defining 'custody' is a slippery one"). Moreover, Petitioner does not dispute the trial court's finding that Deputy Drake had no subjective intent to circumvent *Miranda*.

Third, the undisputed facts present this issue in a simple and stark manner: Immediately before being arrested, Petitioner denied possessing anything illegal. Only after he was arrested and questioned without being advised of his rights, did Petitioner admit that he had syringes in the back of the vehicle. Two minutes later, at the same location, the same officer told Petitioner he had a right to remain silent, asked him if he understood, and asked him if he would

repeat the same statement regarding the syringes. *Cf. Seibert*, 542 U.S. at 615 (plurality) (articulating as relevant factors "the timing and setting of the first and the second," "the overlapping content of the two statements," "the continuity of police personnel," and "the degree to which the interrogator's questions treated the second round as continuous with the first"). Indeed, knowing the focus of disagreement between the plurality and Justice Kennedy in *Seibert*, the record here is superior to *Seibert* itself or the Court's prior decision in *Elstad*. The *Miranda* warning here was literally "midstream" in the arrest and questioning of Petitioner, rather than coming in two stages or after a more substantial break in time. *Seibert*, 542 U.S. at 605, 615 (noting that *Seibert* involved a more substantial delay and in *Elstad* the separate "occasion for questioning at the station house" caused "a markedly different experience").

III. The Decision Below Is Wrong.

The majority position that Justice Kennedy's opinion provides the "narrowest grounds" in *Seibert* is wrong.

While applying *Marks* to determine a fractured decision's "narrowest grounds" has occasionally "baffled and divided the lower courts," *Nichols v. United States*, 511 U.S. 738, 746 (1994), "two main approaches have emerged: one focusing on the *reasoning* of the various opinions and the other on the ultimate *results*." *Davis*, 825 F.3d at 1020 (emphasis in original). Justice Kennedy's separate opinion does not control under either approach.

Under the reasoning-based approach to *Marks*, the controlling opinion must "'represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment.'" *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)); *Davis*, 825 F.3d at 1020-21. Even assuming for the sake of argument that Justice Breyer agreed with Justice Kennedy's deliberateness point (despite joining the four-judge plurality in full), Justice Kennedy's officer-focused standard is "obviously not the 'common denominator' that *Marks* was talking about" because it was endorsed by, at most, two Justices and expressly rejected by the rest. *Heron*, 564 F.3d at 884-85.

As Judges Callahan and Berzon have separately explained in reference to *Seibert*, "reasoning expressly rejected by at least seven Justices cannot be elevated to the status of controlling Supreme Court law." *Reyes*, 833 F.3d at 1008 (Callahan, J., dissenting from denial of rehearing en banc); *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., dissenting) ("*Marks* does not prescribe the adoption as governing precedent of a position squarely rejected by seven Justices"); *cf. also Williams v. Illinois*, 567 U.S. 50, 120 (2012) (Kagan, J., dissenting) ("I call Justice Alito's opinion 'the plurality,' because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication.").

Under the results-based approach to *Marks*, an opinion controls only if it "'would necessarily produce results with which a majority of the Justices from the controlling case would agree.'" *Davis*, 825 F.3d at 1021 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694-97 (3d Cir. 1991)). Justice Kennedy's opinion does not satisfy this test, either. As described above, Justice Kennedy's test is based upon fundamentally different concerns than the four-judge plurality decision. The inquiry is different in at least three respects: (i) the relevant actor (suspect vs. officer); (ii) the relevant mens rea (objective vs. subjective); (iii) and the fundamental concern—"the effectiveness of warnings," *Seibert*, 542 U.S. at 612-13 (plurality), or ill intent, *id.* at 622 (Kennedy, J., concurring).

Thus, again, as Judge Callahan recently explained, "there are likely to be cases where relief would be granted under Justice Kennedy's test but not the plurality's test." *Reyes*, 833 F.3d at 1008 (Callahan, J., dissenting from denial of rehearing en banc). "The plurality's test is concerned with the effectiveness of the belated *Miranda* warnings." *Id.* "By contrast, Justice Kennedy looks first to whether the police deliberately violated *Miranda* and, if so, whether the officers used 'curative measures . . . before the postwarning statement is made[.]'" *Id.* (quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring)). Consequently,

> [t]here are likely to be cases involving deliberate *Miranda* violations where most of the plurality's 'effectiveness factors' are met but, because no

> explanation of the prewarning statement's inadmissibility or other 'specific, curative step' was taken, Justice Kennedy's curative measures requirement isn't. Similarly, there are likely cases involving deliberate violations where Justice Kennedy's curative-measures requirement is met because 'specific, curative steps' were taken, such as a warning that the pre-*Miranda* confession could not be used against the suspect, but the plurality's effectiveness requirement isn't.

Id. at 1008-09.[17]

The court below thus erred in concluding that Justice Kennedy's separate concurrence in *Seibert* controls this case. The Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[17] As a result, this case provides a straightforward and important opportunity to clarify the application of *Marks* to fractured decisions. Of course, if the Court were to conclude that it is "not useful to pursue the *Marks* inquiry" in this case, it could instead resolve the split among the lower courts by answering the question presented anew. *Nichols*, 511 U.S. at 745-56.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF IDAHO
Docket Nos. 43844 &
43845

STATE OF IDAHO,	)	
	)	Boise, April 2017
Plaintiff-Respondent,	)	Term
	)	
v.	)	2017 Opinion No. 73
	)	
SHAWN WILLIAM WASS,	)	Filed: June 22, 2017
	)	
Defendant-Appellant.	)	Karel A. Lehrman,
	)	Clerk

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. Hon. Christopher S. Nye, District Judge.

The judgment of conviction is affirmed.

Eric D. Fredericksen, State Appellate Public Defender, Boise, attorney for appellant. Andrea Reynolds argued.

Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, attorney for respondent. John C. McKinney argued.

JONES, Justice

I. NATURE OF THE CASE

Shawn William Wass ("Wass") appeals from the judgment entered upon his conditional guilty plea to possession of a controlled substance (methamphetamine). He asserts on appeal that the district court erred when it denied his motion to suppress his admission to the arresting officer that he was in possession of syringes.

II. FACTUAL AND PROCEDURAL BACKGROUND

At approximately 12:37 A.M. on August 9, 2015, Officer Dan Drake ("Officer Drake") of the Canyon County Sheriff's Office was patrolling the Sportsman's access on 21319 Midland Boulevard. He observed a purple Hyundai Elantra in the parking area, which is closed during the night. Officer Drake approached the vehicle. Grace Stanbery ("Stanbery") was sitting in the passenger seat. Wass was standing behind the vehicle. Officer Drake spoke briefly to Wass, who admitted that he and Stanbery had been drinking two hours prior. Officer Drake asked both parties for identification. Stanbery provided an Idaho driver's license. Wass gave Officer Drake his name, but claimed that he did not have any identification on him. Officer Drake asked Wass if there was anything illegal in the vehicle. Wass answered that there was not. Officer Drake asked Wass and Stanbery for permission to search the vehicle. Both refused. Officer Drake then returned to his vehicle to enter the identifying information he had been given into his mobile computer. The mobile computer alerted Officer

Drake that Wass had two active outstanding warrants. Officer Drake reapproached the vehicle and administered a field sobriety test on Wass. During the field sobriety test, Wass placed his wallet on the hood of the vehicle. Wass then admitted that he had identification in his wallet and that he had lied to Officer Drake because he was concerned that there might be an outstanding warrant. Officer Drake informed Wass that there were actually two outstanding warrants and placed him in wrist restraints. Officer Drake again asked Wass if there was anything illegal in Wass' vehicle. This time Wass admitted that there were syringes in the vehicle. At the time of this admission, Wass had not been informed of his *Miranda* rights. Officer Drake later testified that he immediately realized at that time that he had made "a mistake."

After Wass told him that there were syringes in the vehicle, Officer Drake placed Wass in his police vehicle. Officer Drake approached Wass' vehicle but did not enter it. He visually inspected the vehicle but was unable to see anything illegal. After approximately two minutes, Officer Drake returned to his police vehicle. Officer Drake informed Wass of his *Miranda* rights. Wass affirmed that he understood his rights. Officer Drake then asked Wass if, with those rights in mind, Wass still wanted to tell him about anything illegal in Wass' vehicle. Wass again stated that there were syringes in the vehicle. Officer Drake searched Wass' vehicle where he recovered a black spoon with white residue, three syringes, a cotton arm sleeve, two small pieces of cotton, and an aluminum foil bindle containing marijuana. One of the syringes was

loaded with a white clear liquid. The syringe containing the clear liquid tested positive for methamphetamine.

On August 20, 2015, the State filed an Information alleging felony Possession of Methamphetamine. On October 5, 2015, Wass filed a motion to suppress the statements he made to Officer Drake with respect to the presence of syringes in his vehicle and any physical evidence recovered as a result of those statements. Wass argued that he was not informed of his *Miranda* rights prior to being questioned.

At a hearing on October 22, 2015, the district court denied the motion to suppress. It held as follows:

> [T]he question is whether the drug evidence must be suppressed because the first -- because of the first unwarned statements about the syringes or does the second statements after the - - does the Miranda warnings given a few minutes later cure that problem.
>
> . . . I find that the officer did not tactically induce a confession prior to Miranda warnings - - or coerce a confession or use improper tactics to obtain the confession prior to Miranda warnings. And the second Miranda warnings does cure the failure to administer it the first time.
>
> It's not a coercion where the actual circumstances are calculated to undermine the suspect's ability to exercise free will. So I find that the second Miranda

> warnings does [sic] cure it. Once that happens, then the officer has reasonable articulable suspicion to search the automobile under the automobile search warrantless exception and he does search it and finds the items found in the case. So I'm denying the motion to suppress.

On December 22, 2015, Wass and the State entered into a plea agreement by which Wass agreed to plead guilty to felony Possession of Methamphetamine while reserving his right to appeal the district court's denial of his motion to suppress. The district court sentenced Wass to a suspended sentence of seven years with three years fixed. Wass appeals.

III. ISSUE ON APPEAL

1. Did the district court err when it denied Wass' motion to suppress his oral admission that there were syringes in his vehicle?

IV. STANDARD OF REVIEW

In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated. *State v. Watts*, 142 Idaho 230, 232, 127 P.3d 133, 135 (2005). This Court will accept the trial court's findings of fact unless they are clearly erroneous. *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). However, this Court may freely review the trial court's application of constitutional principles in light of the facts found. *Id. State v. Purdum*, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009).

V. ANALYSIS

The United States Supreme Court first addressed the issue of whether admissions made in response to police questioning before *Miranda* warnings have the effect of rendering the same admissions made again after *Miranda* warnings inadmissible in the case of *Oregon v. Elstad*, 470 U.S. 298 (1985). *Elstad* arose out of the theft of roughly $150,000 of art and furniture from a home while the owners were on vacation. *Id.* A witness to the burglary contacted police and implicated Elstad, a friend of the owners' son. *Id.* Police arrived at Elstad's residence where he lived with his parents. *Id.* A police officer spoke with Elstad, at his residence, informing him that the police believed Elstad was involved in the burglary. *Id.* at 301. Elstad responded that he was present when the burglary took place. *Id.* Elstad was arrested and taken to the police station where he was advised of his *Miranda* rights. *Id.* Elstad indicated that he understood his rights and gave a full statement confessing to being involved in the burglary. *Id.* At trial, Elstad moved to have his post-*Miranda* admissions suppressed. *Id.* at 302. His motion to suppress was denied, and he was convicted on the evidence of his confession. *Id.* Elstad appealed to the Oregon Court of Appeals, which reversed his conviction, reasoning that Elstad's original statement was made in response to a *Miranda* violation and that not enough time had passed between Elstad's pre- *Miranda* statement at his house and his post-*Miranda* statement at the police station to cure the taint of the original violation. *Id.* at 303.

The United States Supreme Court reversed. *Id.* at 318. It held that the Oregon Court of Appeals had erred in treating a *Miranda* violation as equivalent to a constitutional violation. *Id.* at 304. It explained that a breach of *Miranda* does not necessarily mean a Fifth Amendment violation has occurred. *Id.* at 307. Accordingly, "errors [] made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Id.* at 309. The United States Supreme Court reasoned that:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.
>
> . . . .
>
> . . . [A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of

> compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.
>
> . . . .
>
> . . . [T]here is no warrant for presuming coercive effect [with respect to the post-*Miranda* statement] where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary.

Id. at 309, 314, 318. Elstad's initial pre-*Miranda* statement, the United States Supreme Court concluded, "was voluntary, within the meaning of the Fifth Amendment." *Id.* at 315. Accordingly, it focused on the facts surrounding Elstad's post-*Miranda* warning statements and found that Elstad "knowingly and voluntarily waived his right to remain silent before he described his participation in the burglary." *Id.* The United States Supreme Court concluded that "[w]e hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 318.

Twenty years later, the United States Supreme Court revisited *Elstad* in *Missouri v.*

Seibert, 542 U.S. 600 (2004). *Seibert* arose out of the death of Jonathan Seibert, a twelve year old boy with cerebral palsy. *Id.* at 604. Following Jonathan's death, his mother, Patrice Seibert ("Patrice"), feared charges of neglect because her son's body was covered in bedsores. *Id.* In order to conceal the facts surrounding Jonathan's death, Patrice's two other sons and two of their friends devised a plan, with her knowledge, to set the family's mobile home on fire. *Id.* In order to avoid the appearance that Jonathan had been left alone, they set the mobile home on fire while Donald Rector, a mentally ill teenager living with the family was still inside. *Id.* Donald died in the fire. *Id.*

Five days later, at approximately 3:00 A.M., the police arrested Patrice and brought her to the police station. *Id.* Prior to the arrest, the arresting officer was specifically instructed by the officer scheduled to conduct the interrogation not to give Patrice *Miranda* warnings. *Id.* At the police station, the interrogating officer questioned Patrice for 30 to 40 minutes, squeezing her arm and repeating that "Donald was supposed to die in his sleep." *Id.* at 605. Patrice broke down and admitted that Donald was supposed to die in the fire. *Id.* Following Patrice's admission, the interrogating officer brought a tape recorder into the interrogation room, and it was only then that he informed Patrice of her *Miranda* rights. *Id.* During the taped interrogation that followed, the interrogating officer confronted Patrice with her pre-*Miranda* statements in order to obtain a confession. *Id.*

At trial, the interrogating officer testified that he had made a "conscious decision" to

initially withhold *Miranda* warnings from Patrice as an interrogation tactic. *Id.* at 606–07. The trial court suppressed the pre-*Miranda* statements but allowed evidence of the post-*Miranda* confession. *Id.* at 607. The Supreme Court of Missouri reversed, holding that the confession was clearly a product of the pre-*Miranda* statements and that the interrogating officer intended to deprive Patrice of the opportunity to exercise her *Miranda* rights. *Id.* The United States Supreme Court affirmed the Supreme Court of Missouri. *Id.* at 617. In a plurality opinion, Justice Souter reasoned that *Miranda* stands for the proposition that "a suspect must be adequately and effectively advised of the choice the Constitution guarantees." *Id.* at 611 (internal quotations and citations omitted). "By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 613. "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." *Id.*

Writing for the plurality, Justice Souter distinguished *Seibert* from the holding in *Elstad*, by noting that

> in *Elstad*, it was not unreasonable to see the occasion for questioning at the station

> house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Id. at 615–16.

In conclusion, Justice Souter identified several factors that a court should consider in determining whether post-*Miranda* statements are admissible:

> The contrast between *Elstad* and [*Seibert*] reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615.

Justice Kennedy concurred in the judgment, but provided a different holding. *Id.* at 618. He agreed with the plurality opinion that "[t]he interrogation technique used in this case is

designed to circumvent *Miranda v. Arizona* . . . . It undermines the *Miranda* warning and obscures its meaning." *Id.* Justice Kennedy differed with the plurality, however, writing that

> [t]he plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on "whether the *Miranda* warnings delivered midstream could have been effective enough to accomplish their object" given the specific facts of the case. . . . 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.

Id. at 621–22.

Interpretation of the *Seibert* opinion is currently subject to a circuit split. The majority of circuits, including the Ninth Circuit Court of Appeals, have determined that Justice Kennedy's concurrence, and not Justice Souter's plurality opinion, contains the precedential holding of the case.

> Ordinarily, "[w]hen 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. United States,* 430 U.S. 188, 193,

> 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) . . . .
>
> . . . [B]oth the plurality and Justice Kennedy agree that where law enforcement officers *deliberately* employ a two-step interrogation to obtain a confession and where separations of time and circumstance and additional curative warnings are absent or fail to apprise a *reasonable person* in the suspect's shoes of his rights, the trial court should suppress the confession. This narrower test—that excludes confessions made after a deliberate, objectively ineffective mid-stream warning—represents *Seibert's* holding. In situations where the two-step strategy was not deliberately employed, *Elstad* continues to govern the admissibility of postwarning statements.

U.S. v. Williams, 435 F.3d 1148, 1157–58 (9th Cir. 2006). Other circuit courts have come to the same conclusion. *See U.S. v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006) ("we find *Seibert*'s holding in Justice Kennedy's opinion concurring in the judgment."); *U.S. v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2005) ("This court applies the *Seibert* plurality opinion as narrowed by Justice Kennedy. . . . Once we determine that the *Miranda* violation was not deliberate, we must fall back on *Elstad* as instructed by Justice Kennedy."); *U.S. v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) ("Justice Kennedy's opinion therefore represents the holding of the *Seibert* Court: The admissibility of postwarning statements is governed by *Elstad* unless the deliberate 'question- first' strategy is employed.");

U.S. v. Briones, 390 F.3d 610, 613 (8th Cir. 2004) ("Because Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."); *U.S. v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) ("Justice Kennedy thus provided a fifth vote to depart from *Elstad,* but only where the police set out deliberately to withhold *Miranda* warnings until after a confession has been secured. Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*.").

We hereby adopt the analysis of *Seibert* promulgated by the majority of circuit courts. "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*, 430 U.S. at 193 (internal quotations and citation omitted). In *Seibert*, the Plurality set forth a multi-factor analysis to be applied in every instance of two-stage interrogation. Justice Kennedy agreed to the Plurality's framework, but only in cases in which the two stage-interrogation was the result of an intentional tactic to induce a confession and not in the case of mistake or accident. Accordingly, the more narrow holding of *Seibert* is Justice Kennedy's; the Plurality's multi-factor analysis is applicable only in cases of intentional two-stage interrogations.

It follows that *Seibert* does not apply to this case. There is no evidence that the district court erred when it determined that Officer Drake did not

intentionally use a two-stage interrogation technique as a tactic to induce a confession. Rather, all of the evidence presented to the district court indicates that Officer Drake made a mistake questioning Wass before giving him his *Miranda* rights, realized his mistake, and immediately attempted to correct his mistake by giving Wass his *Miranda* warnings and questioning him again.

Because *Seibert* does not apply here, *Elstad* governs our analysis. Under *Elstad*, a suspect's prior, voluntary statements made in violation of *Miranda* do not preclude the trier of fact from concluding that the suspect's later voluntary statements made after being administered *Miranda* rights were the result of a rational and intelligent choice to waive those rights. Wass did not contend in the district court that either his pre- or post-*Miranda* statements were coerced. Therefore, we uphold the court's decision that his post-*Miranda* statements were admissible.

VI. CONCLUSION

This Court affirms the district court's judgment of conviction.

Chief Justice BURDICK, Justices EISMANN, HORTON and BRODY **CONCUR**.

APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO, Plaintiff,	)	
v.	)	Case No. CR-2015-15271
SHAWN WILLIAM WASS, Defendant.	)	

Appearances:

MR. FRANK ZEBARI and MS. ANN VOSS, Canyon County Deputy Prosecuting Attorneys, 1115 Albany, Caldwell, Idaho, 83605, Attorneys on behalf of the Plaintiff.

Mr. DAVID SMETHERS, Canyon County Deputy Public Defender, 111 North Eleventh Avenue, Suite 120, Caldwell, Idaho, 83605, Attorney on behalf of the Defendant.

BE IT REMEMBERED that the foregoing-entitled action pending in the above-entitled court, came on regularly for Motion to Supress Hearing at 9:56 a.m., October 22, 2015, at the Canyon County Courthouse, Courtroom 2, Caldwell, Idaho, before THE HONORABLE CHRISTOPHER S. NYE, District Judge.

MOTION TO SUPPRESS HEARING

* * *

[25] BY THE COURT: Thank you. I'm finding the following facts in this case: On August 9 of this year, Officer Drake saw a purple car parked at Midland sportsman's access. This was after midnight and it was dark and testified that that area is closed during the nighttime. He did a welfare check and saw the defendant standing near the car. A female was in the passenger seat.

They asked if there had been any drinking. The defendant admitted he had been drinking. He gave him field [26] sobriety tests which he passed.

Initially, the defendant said he didn't have any ID on him but when the officer checked his name through dispatch, it confirmed there were some active warrants. He produced his driver's license and his wallet. He was placed under arrest on these active warrants.

After he was placed under arrest, the officer asked him is there anything illegal in the car and he responded that there was some syringes in a pouch in the car and both parties admit that this was pre Miranda.

Shortly -- about two minutes afterwards, he gave the Miranda warnings to the defendant and the defendant made the same statements. So the question is whether the drug evidence must be suppressed because the first -- because of the first unwarned statements about the syringes or does the second statements after the --

does the Miranda warnings given a few minutes later cure that problem.

And I find that it does cure the problem and I'm going to deny the suppression. I find that the officer did not tactically induce a confession prior to Miranda warnings -- or coerce a confession or use improper tactics to obtain the confession prior to Miranda warnings. And the second Miranda warnings does cure the failure to administer it the first time.

It's not a coercion where the actual circumstances [27] are calculated to undermine the suspect's ability to exercise free will. So I find that the second Miranda warnings does cure it. Once that happens, then the officer has reasonable articulable suspicion to search the automobile under the automobile search warrantless exception and he does search it and finds the items found in the case. So I'm denying the motion to suppress.

* * *

APPENDIX C

David J. Smethers
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Attorneys for the Defendant

IN THE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,	)	
	)	Case No.
Plaintiff,	)	CR-2015-15271
	)	
v.	)	
	)	BINDING PLEA
SHAWN WILLIAM WASS,	)	AGREEMENT
	)	PURSUANT TO
Defendant.	)	I.C.R. 11(a)(2)
	)	

The parties above-named, by and through undersign counsel, come now and hereby stipulate and agree, pursuant to Idaho Criminal Rule11(a)(2),

to the following:

1) With approval of the Court, the defendant shall enter a conditional plea of "guilty" in the above-entitled action.
2) The defendant's conditional plea of "guilty" shall reserve in writing the right, on appeal from judgment, to review the Court's adverse ruling on the Defendant's Idaho Criminal Rule 12(b) Motions to Suppress Evidence and Admissions/Confessions.
3) If the defendant prevails on appeal, the defendant shall be allowed to withdraw his conditional plea of "guilty" pursuant to Idaho Criminal Rule 11(a)(2).

DATED this 22 day of December, 2015

/s/ Anne Voss
Deputy Prosecuting Attorney

DATED this 22 day of December, 2015

/s/ Shawn W. Wass
Shawn William Wass
Defendant

DATED this 22 day of December, 2015

/s/ David J. Smethers
David Smethers, Deputy
Public Defender
Attorney for the Defendant