No. 08-1159 MAR 13 2009



In The
# Supreme Court of the United States

THE STATE OF TEXAS,

*Petitioner,*

v.

RAUL ADAM MARTINEZ, JR.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the subjective intent of an interrogating officer is relevant to the analysis under *Missouri v. Seibert* when a suspect in custody discusses the case both before and after receiving *Miranda* warnings.

2. Whether statements uttered during the course of a pre-warning polygraph examination are material to the analysis under *Missouri v. Seibert* when a suspect in custody discusses the case both before and after receiving *Miranda* warnings.

3. Whether a magistrate's issuance of *Miranda* warnings between a pre-warning polygraph examination at one location and a post-warning videotaped statement at another location operates as a sufficient break in continuity for the purposes of *Missouri v. Seibert*.

## LIST OF PARTIES

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**Eric Kugler** – Assistant District Attorney on appeal

**Vanessa Velasquez; Charles Thompson** – Assistant District Attorneys at trial

Respondent or criminal defendant:

**Raul Adam Martinez, Jr.**

Counsel for Respondent:

**Frances Northcutt** – Counsel on appeal

**Shawna Reagin** – Counsel at trial

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**TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:**

## CITATIONS OF OPINIONS

*Martinez v. Texas*, 272 S.W.3d 615 (Tex. Crim. App. 2008).

*Martinez v. Texas*, 204 S.W.3d 914 (Tex. App. – Corpus Christi 2006).

## STATEMENT OF JURISDICTION

The respondent was charged with capital murder, found guilty by a jury, and sentenced to life in prison (CR – 14, 165). He appealed the ruling on his pre-trial motion to suppress his videotaped statement, and the intermediate appellate court affirmed the conviction based on this Court's plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004). *Martinez v. Texas*, 204 S.W.3d 914 (Tex. App. – Corpus Christi, 2006) (App. 68). On December 17, 2008, the Texas Court of Criminal Appeals reversed the conviction based on Justice Kennedy's concurring opinion in *Seibert*. *Martinez v. Texas*, 272 S.W.3d 615 (Tex. Crim. App. 2008) (App. 1). No motion for rehearing was filed. This petition is timely if filed by March 17, 2009. SUP. CT. R. 13(1). This Court has jurisdiction to hear the case because the respondent asserted a right under the United States Constitution. *See* 28 U.S.C. § 1257(a) (providing for jurisdiction "where any title, right, privilege, or immunity is specially set up or claimed under the

Constitution."). Specifically, the respondent has claimed in every court that the admission of his videotaped statement violated his rights under the Fifth Amendment to the United States Constitution. While the case was remanded for a harm analysis, the most recent decision is final on the constitutional issues. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975) (recognizing an exception to the finality requirement "where the federal claim has been finally decided, with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.").

## CONSTITUTIONAL PROVISIONS INVOLVED

### Amendment V

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

**Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President

and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. CONST. amend. XIV.

## STATEMENT OF THE CASE

### A. Facts of the Offense and Police Investigation

In the early morning hours of August 3, 2002, Alfredo Loredo was socializing in his apartment complex with his friends Gustavo Camilo and Manuel Molina (RR. IV – 129-130, 174). They were in the parking lot, talking and drinking beer, but they were not intoxicated (RR. IV – 130, 174-175). All three men had been paid that day (RR. IV – 140-141, 176).

Sometime that evening, Raul Martinez, the respondent, and a man named James Ruiz approached with guns (RR. IV – 135-136, 148-155). The respondent and his companion announced that it was a robbery, and the three victims raised their hands up in the air (RR. IV – 179). Camilo gave his wallet containing $1,200 to the respondent; however, Camilo was shot in the stomach when he started moving (RR. IV – 137, 140, 175, 184, 187, 189). The respondent stuck the rifle or shotgun into Loredo's belly and asked for money (RR. IV – 136, 179-180). Loredo moved to the side and Molina came over to help him (RR. IV – 136-137). The respondent shouted to Ruiz to shoot, and another shot was fired (RR. IV – 183). Molina was hit and fell to the ground; he died from his wounds the next morning (RR. IV – 137) (RR. V – 51). Ruiz then took Molina's wallet (RR. IV – 140, 184-185).

The robbers knocked Loredo to the ground and stole his wallet, which included his license, bankcard,

and $400 in cash (RR. IV – 138-140). Before the robbers left, they shot Loredo in the neck (RR. IV – 41, 138-139). The respondent and Ruiz returned to their car and drove away with the lights off (RR. IV – 102-106, 122-124, 127-128). Luckily, Loredo was wearing a cell phone, so he called his brother-in-law, who in turn called the police (RR. IV – 141).

Marcario Sosa with the Houston Police Department's homicide division was assigned to the case; he requested a composite sketch from Loredo's description, and eventually got a tip, which allowed him to assemble some photo lineups (RR. V – 72-73). Loredo and Camilo identified both the respondent and Ruiz from the photo lineups (RR. IV –148-153, 195-198) (RR. V – 73-83). Sosa obtained an arrest warrant for the respondent, and the respondent gave a videotaped statement (RR. V – 85-93). The respondent was charged with capital murder.

### B. Motion to Suppress Respondent's Videotaped Statement

The respondent filed a boilerplate pre-trial motion to suppress his written and oral statements (CR – 45). The motion claimed that the respondent's statements were involuntary, were not properly admonished, and were the result of custodial interrogations in violation of the Fifth and Fourteenth Amendments to the United States Constitution, among other provisions (CR – 45-47).

Detective Sosa was the sole witness at the hearing on that motion (RR. III – 3). He testified about the progress and direction of the investigation from the shooting itself to the point at which he secured a warrant for the respondent's arrest (RR. III – 7-15). Sosa was alone when he arrested the respondent in the parking lot of a convenience store between 10:00 a.m. and noon (RR. III – 16-18, 32). Sosa told the respondent that he was under arrest for capital murder, but Sosa "didn't go into any details or anything." (RR. III – 32-33, 39).

Sosa took the respondent to the police station at 1200 Travis in downtown Houston where he and his partner had a brief general conversation with the respondent regarding the incident (RR. III – 19, 33). Sosa asked the respondent if he wanted to speak with them, but the respondent claimed that he did not know anything about the situation (RR. III – 34). Sosa then arranged for the respondent to take a polygraph examination, which was a routine tool in Sosa's investigations (RR. III – 19, 34-35, 41). The respondent was allowed to go to the bathroom and was given a cheeseburger and some lemonade (RR. III – 20, 37). He was allowed to use the telephone; he called his father before making his statement, and he called his girlfriend after making his statement (RR. III – 27) (St. Ex. 1A).

The polygraph examiner informed Sosa that there was "an area of deception." (RR. III – 45). At approximately 4:55 p.m., Sosa took the respondent to a magistrate at the municipal court at 1400 Lubbock,

at which time the respondent was given his statutory and constitutional warnings (RR. III – 43, 45). Sosa then placed the respondent in an interview room at the central hold area at 61 Reisner, which is northwest of downtown Houston; there he read the respondent his statutory warnings and secured a waiver of those rights (RR. III – 18-24, 46-47). The respondent gave a lengthy statement that was recorded on videotape (RR. III – 25) (St. Ex. 1, 1A).

The respondent gave at least five different versions of the offense in his statement (RR. V – 98-99). In the beginning, he claimed that there were three individuals involved in the robbery, but later stated that four were involved (RR. V – 99) (St. Ex. 1A). Sometimes the respondent claimed that Fabian Montes was driving, and sometimes he claimed that Luis Martinez was driving (St. Ex. 1A). Sometimes the respondent claimed that he heard three gunshots; another time he claimed that he did not hear any gunshots (St. Ex. 1A). The respondent placed himself at the location of the murder near the time of the murder; however, he claimed that he remained inside the vehicle as the lookout (RR. V – 100-101).

At the conclusion of the suppression hearing, the trial court denied the respondent's motion in the following exchange, which includes all of the respondent's argument during that hearing:

> Ms. Reagin: Your Honor, just preliminarily, we note the lack of an expressed waiver of rights at the beginning of the

videotape basically with the detective, knowing these rights, do you want to talk? There is no express waiver of the rights; however, more importantly, we ask you to consider the day-long worth of activities that seem to be quite vague in Detective Sosa's mind, the lack of any record-keeping, the inability to explain what's been going on, what was talked about all day long, the lack, most importantly, of any reading of rights or *Miranda* warnings during all the questioning that occurred throughout the day by the polygraph examiner and then through these huge blanks of time up until the trip to the magistrate, which did not occur until almost 5:00 o'clock.

We submit those are not sufficient intervening circumstances to remove any taint. First of all, the lack of warnings before the day's questioning and then on the tape itself. We urge you to consider the coercive techniques that are used, the argumentation of Mr. Martinez's refusal to accept his denials of guilt, the suggestion made that there is evidence that exists when it doesn't truly exist and so forth. And we also urge you to consider Detective Sosa's lack of memory concerning the events surrounding the taking of the statement also raise some question about the credibility involved with regard to what he says about what was done. We urge you to suppress the statement.

The Court: I am going to admit the statement. I make a specific finding I have

> found Officer Sosa to be a credible witness. The arrest warrant is a good arrest warrant. It appeared that the defendant did freely, voluntarily and knowingly waive his rights to remain silent and give that statement. There was no testimony of any threats. The behavior of Officer Sosa appears to be exemplary and it is admitted.

(RR. III – 60-61). When a redacted version of the respondent's videotaped statement was offered during the trial, the respondent re-urged the objection and for the first time mentioned "Missouri v. Seibert," which was then pending in this Court (RR. V – 94-95). The trial court again overruled the objection (RR. V – 95).

### C. Appeal to the Intermediate State Court

The respondent appealed his conviction, and the case was transferred to the Court of Appeals for the Thirteenth District of Texas at Corpus Christi. *Martinez*, 204 S.W.3d at 914. The respondent argued on appeal that his constitutional rights were violated and cited *Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002). Ten days after the respondent filed his brief, this Court affirmed the lower court's reversal in *Seibert*. The Thirteenth Court of Appeals based its analysis on this Court's plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004), and affirmed the conviction, holding that the respondent had voluntarily waived his constitutional rights. *Martinez*, 204 S.W.3d at 918-922.

### D. Appeal to the State Court of Last Resort

The Texas Court of Criminal Appeals granted discretionary review and, in a five-to-four decision, reversed the ruling of the lower appellate court. The Texas Court of Criminal Appeals based its decision on Justice Kennedy's concurring opinion in *Seibert*. *Martinez*, 272 S.W.3d at 621. The court held that the respondent's videotaped statement was inadmissible because police officers violated the respondent's *Miranda* rights. *Martinez*, 272 S.W.3d at 627. While that court remanded to the lower appellate court for a harm analysis, its opinion was final on the admissibility of the respondent's statement and on the violation of his constitutional rights. *See Cox Broadcasting*, 420 U.S. at 481 (recognizing an exception to the finality requirement "where the federal claim has been finally decided, with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.").

## ARGUMENT

The Texas Court of Criminal Appeals reversed the conviction in this case, holding that the interrogating officer used a two-step interrogation technique in a "calculated way" to overcome the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Martinez*, 272 S.W.3d at 623. But that court misapplied this Court's reasoning in *Missouri v. Seibert*, 542 U.S. 600

(2004), in which seven Justices rejected the relevance of the interrogator's subjective intent. The Texas Court of Criminal Appeals also stated that the substance of the respondent's pre-warning statement was "immaterial" in a *Seibert* analysis. *Martinez*, 272 S.W.3d at 624. But the focus in *Seibert* was the use of pre-warning statements to extract post-warning statements. And whether that was done cannot be determined without a record of the substance of those pre-warning statements, which was never developed in the present case. Finally, the Texas Court of Criminal Appeals held that there were no curative measures in the present case. *Martinez*, 272 S.W.3d at 627. But the respondent received his *Miranda* warnings from a magistrate in between his pre-warning polygraph examination at one location and his post-warning videotaped statement at another location. Therefore, this Court should grant review to clarify and correct the analyses used by the Texas Court of Criminal Appeals.

### A. The subjective intent of an interrogating officer is irrelevant to the analysis under *Missouri v. Seibert*.

This Court's first seminal opinion to address "midstream" *Miranda* warnings was *Oregon v. Elstad*, 470 U.S. 298 (1985). In that case, the officers went to the 18-year-old defendant's home with a warrant for his arrest. *Id.*, 470 U.S. at 300. Elstad's mother answered the door and led the officers to her son's room where he lay on his bed, wearing shorts

and listening to his stereo. *Id.* The officers asked him to get dressed and to accompany them into the living room where they asked him whether he was involved in the robbery at a neighbor's house. *Id.*, 470 U.S. at 300-301. Elstad looked at the officer and stated, "Yes, I was there." *Id.* The officers then took Elstad down to the police station and, one hour later, read him his *Miranda* warnings. *Id.*, 470 U.S. at 301. Elstad waived his rights and gave a full written statement about the robbery. *Id.* At trial, the pre-*Miranda* oral statement was excluded, but the written statement was admitted, and Elstad was convicted. *Id.* The Oregon Court of Appeals reversed the conviction, stating that the "cat was sufficiently out of the bag to exert a coercive impact on [respondent's] later admissions," and this Court granted review. *Id.*, 470 U.S. at 302-303.

In a six-to-three decision, this Court held that, although a *Miranda* violation made the first statement inadmissible, the post-warning statements could be introduced against the accused because "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression" given the facts of that case. *Elstad*, 470 U.S. at 308 (citing *Michigan v. Tucker*, 417 U.S. 433, 445 (1974)). In reversing the Oregon court, this Court rejected both the "fruit of the poisonous tree" and the "cat out of the bag" arguments. *Elstad*, 470 U.S. at 303-317.

The *Elstad* Court noted that although the warnings were belated, they were "undeniably complete," and neither the environment nor the manner of either interrogation was coercive. *Id.*, 470 U.S. at 314-315. This Court also noted that the officers did not exploit the pre-warning admission to pressure the defendant into waiving his right to remain silent. *Id.*, 470 U.S. at 316. This Court concluded, "We hold today that a suspect who has once responded to prewarning yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.*, 470 U.S. at 318.

This Court readdressed the issue approximately 20 years later. In *Missouri v. Seibert*, 542 U.S. 600, 604 (2004), the defendant feared charges of neglect when her son, who was afflicted with cerebral palsy, died in his sleep. She was present when two of her other sons and their friends discussed burning her family's mobile home to conceal the circumstances of her son's death. *Id.* The defendant's son and a friend set fire to the home and left Donald, an unrelated mentally-ill 18-year-old living with the family, to die in the fire in order to avoid the appearance that Seibert's son had been unattended. *Id.*, 542 U.S. at 604-605.

Five days after the fire, the police arrested Seibert, but did not inform her of her rights under *Miranda*. *Id.*, 542 U.S. at 605. At the police station, Officer Hanrahan questioned her for 30 to 40 minutes during which he squeezed her arm and obtained a

confession that the plan was for Donald to die in the fire. *Id.* Hanrahan then gave Seibert a 20-minute break, returned to give her *Miranda* warnings, and obtained a signed waiver. *Id.* He resumed questioning, confronting Seibert with her pre-warning statements and getting her to repeat the information. *Id.*

At trial, Seibert moved to suppress both her pre-warning and post-warning statements. *Id.* Hanrahan testified that he made a conscious decision to withhold *Miranda* warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given. *Id.* The District Court suppressed the pre-warning statement but admitted the post-warning one, and Seibert was convicted of second-degree murder. *Id.* The Missouri Supreme Court reversed, holding that the second statement was clearly the product of the invalid first statement, and distinguished *Elstad* on the ground that the warnings had not intentionally been withheld in that case. *Id.*, 542 U.S. at 607-608.

This Court granted certiorari and, in a vote with no majority opinion, held that the second confession was inadmissible. *Id.*, 542 U.S. 608-617. The four-Justice plurality opinion distinguished *Elstad* in the context of the following test to determine whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object:

> [(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 [statements],
>
> [(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.*, 542 U.S. at 615. The *Seibert* plurality further distinguished *Elstad* by stating that "since a reasonable person in [Elstad]'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.*, 542 U.S. at 615-616. The plurality then stated:

> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. *When the police were finished there was little, if anything, of incriminating potential left unsaid.*

*Id.* (footnote omitted) (emphasis added). The *Seibert* plurality concluded that a reasonable person would regard the second questioning as a continuation of

the earlier questions especially in light of the fact that the responses during the second session were fostered by references back to the confession already given. *Id.*, 542 U.S. at 617.

The four-Justice dissent in *Seibert* joined the plurality insofar as it refused to follow the "fruit of the poisonous tree" theory in the context of *Miranda* requirements. *Id.*, 542 U.S. at 623 (O'Connor, J., dissenting). The dissent also joined the plurality insofar as it refused to focus on the subjective intent of the interrogating officer. *Id.* But the dissent stated that the plurality should have analyzed the issue in terms of voluntariness under the Fifth Amendment, and should have determined whether any taint had dissipated by a change in time or circumstances. *Id.*, 542 U.S. at 627-628.

There were two concurring opinions in *Seibert*. Justice Breyer joined the plurality; however, he wrote separately to say that he subscribed to the "fruit of the poisonous tree" theory unless the failure to warn was in good faith and that he believed the plurality's approach would be the functional equivalent of such a test. *Id.*, 542 U.S. at 617-618 (Breyer, J., concurring). Justice Kennedy on the other hand rejected the "fruit of the poisonous tree" approach, but he also rejected the completely objective tests that were championed by both the plurality and the dissent. *Id.*, 542 U.S. at 619-622 (Kennedy, J., concurring). Instead, Justice Kennedy argued that *Elstad* controlled unless there was a subjectively deliberate two-step strategy to undermine *Miranda*; if there was a

deliberate two-step strategy, then the evidence must be excluded unless curative measures were taken. *Id.*, 542 U.S. at 622 (Kennedy, J., concurring). Curative measures included "a substantial break in time and circumstances" between the two statements to allow the "accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id.* Justice Kennedy agreed that Seibert's statement should be suppressed, but based on completely different logic than that used by the plurality. *Id.*, 542 U.S. at 619-22 (Kennedy, J., concurring).

One of the first challenges in the application of *Seibert* is the determination of the holding in the case. In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court stated that ordinarily, where "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." But the *Marks* rule produces a determinate holding only when one opinion is a logical subset of other, broader opinions. *Martinez*, 204 S.W.3d at 918 (citing *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006)).

In the present case, the Texas Court of Criminal Appeals claimed that Justice Kennedy's concurrence "took a narrower view," namely that *Elstad* should be followed "unless there is proof that the interrogating officer knowingly and willing[ly] utilized the two-stage technique." *Martinez*, 272 S.W.3d at 620. That

court then applied Justice Kennedy's opinion as if it were the holding of the Court. *Martinez*, 272 S.W.3d at 621. But a careful reading of *Seibert* reveals that Justice Kennedy's subjective test was not adopted by any of the other Justices. In fact, seven other Justices flatly rejected such a subjective element; only Justice Breyer would have joined Justice Kennedy in the subjective waters with his "good faith" element. Furthermore, the only major holdings shared by Justice Kennedy and the plurality were that the "fruit of the poisonous tree" analysis was inappropriate and that Seibert's statement should be suppressed. Therefore, it cannot be said that Justice Kennedy's subjective test was in fact the holding of the *Seibert* Court under a *Marks* analysis.

Justice Kennedy himself claimed that his opinion was "narrower," and many appellate courts have latched on to that assertion. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring); *see also United States v. Williams*, 435 F.3d 1148, 1157-58 (9th Cir. 2006) ("Although the plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed the *Seibert* exception to those cases involving deliberate use of the two-step procedure to weaken *Miranda*'s protections."); *United States v. Kiam*, 432 F.3d 524, 532-33 (3d Cir. 2006) (applying Justice Kennedy's test in finding that law enforcement officials had not performed a deliberate two-step interrogation), *cert. denied*, 546 U.S. 1223 (2006); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005) ("In *Seibert*, Justice Kennedy

concurred in the judgment of the Court on the narrowest grounds."); *United States 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."). But the bare assertion of being a narrower test does not make it so. Justice Kennedy's test might apply in fewer situations than the plurality's, but it is a substantively different test when it does apply. As demonstrated previously, Justice Kennedy's opinion cannot be a narrower slice of the plurality's opinion for the same reasons that a lemon wedge cannot be a narrower slice of an apple.

There is currently a split among the federal circuit courts concerning the proper interpretation of *Seibert*. As cited above, many courts have accepted Justice Kennedy's claim that his opinion is narrower and have therefore applied Justice Kennedy's test as the opinion of the court. But other courts have recognized that the holdings themselves are more complex than that. *See United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (reading the plurality's balancing test into Justice Kennedy's allowance for "curative steps"); *Carrizales-Toledo*, 454 F.3d at 1151 ("Determining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court.").

None of the major holdings in the *Seibert* case were adopted by all nine of the Justices. More importantly, only three holdings received a majority of the

votes, as illustrated by the attached Venn diagram (App. 104). First, eight Justices agreed that the "fruit of the poisonous tree" approach was improper in the context of *Miranda*. *Seibert*, 542 U.S. at 619-622. Second, six Justices held that Seibert's second statement should be suppressed. *Id.*, 542 U.S. at 619-622. And third, seven Justices believed that the subjective intent of the interrogator was not a relevant factor in the analysis. *Id.*, 542 U.S. at 623 (O'Connor, J., dissenting) ("the plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer."). The first majority holding is an important issue, but is not relevant to the present case. And the second majority holding is only relevant in a case that is factually identical to *Seibert*, which the present case is not. But the third majority holding was the focus of the lower court's analysis, and the lower court repudiated that holding on its way to reversing the conviction in this case.

The Texas Court of Criminal Appeals has not been alone in determining that Justice Kennedy's concurrence represented the opinion of the *Seibert* Court. As stated previously, the circuit courts and the state courts of last resort have disagreed on the issue. *Compare United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008), *and Kiam*, 432 F.3d at 532-33, *and United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir. 2005), *and United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004), *with Carrizales-Toledo*, 454 F.3d at 1151 (describing the problem with adopting Justice Kennedy's approach), *and United*

*States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139-42 (9th Cir. 2005) (Berzon, J., dissenting) (describing how a court should not adopt Justice Kennedy's opinion and might instead choose to apply the plurality's test). Some courts have abandoned any hope of resolving the dispute and simply analyzed the issue under both the plurality's and Justice Kennedy's opinions, which is a waste of judicial resources. *See Tennessee v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009) ("In this case, we again determine that it is unnecessary to predict the eventual outcome of the competing *Seibert* approaches because we find that the Defendant's postwarning confession is inadmissible under either the plurality's or Justice Kennedy's test."). Finally, the Supreme Court of Georgia recently held that the *Seibert* plurality was the controlling opinion because "a requirement that there be found a subjective intent on the part of police was not only rejected by the plurality of *Seibert*, but also by the four Justices who comprised the dissent." *Georgia v. Pye*, 653 S.E.2d 450, 453 n.6 (Ga. 2007). Therefore, it is appropriate for this Court to grant review on the first question presented. SUP. CT. R. 10(b) (indicating a reason for review when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.").

### B. Statements uttered during the course of a pre-warning polygraph examination are material to the analysis under *Missouri v. Seibert*.

With regard to the second question, the Texas Court of Criminal Appeals held that a *Miranda* violation occurs the instant that a "question-first interrogation begins." *Martinez*, 272 S.W.3d at 620. Therefore, the court concluded that it was "immaterial to our consideration whether incriminating statements emerged from the prewarning interrogation." *Id.*, 272 S.W.3d at 624. But the presence of prewarning incriminating statements was crucial to this Court in *Seibert*. In fact, three of the five factors listed by the plurality required knowledge of the prewarning statements: namely, "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, . . . and, the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615. And Justice Kennedy's concurrence stated that "If 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." *Seibert*, 542 U.S. at 622 (J. Kennedy, concurring) (emphasis added). Therefore, the substance of the pre-warning statements was material under either the plurality's or Justice Kennedy's

test. And the Texas Court of Criminal Appeals was incorrect in their holding on that issue.

In *United States v. Patane*, 542 U.S. 630, 641 (2004), this Court stated, "Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial." But the Texas Court of Criminal Appeals directly contradicted that holding when it stated, "When a question-first interrogation begins, it cannot be known whether the suspect will incriminate himself, but the suspect's rights as set out in *Miranda* have already been violated." *Martinez*, 272 S.W.3d at 624. That faulty premise was the basis for the Texas court to conclude that the nature of the pre-warning statements were immaterial to the analysis, which is also inconsistent with the majority of the opinions in *Seibert*. *Id.* The faulty premise led to a faulty conclusion that was inconsistent with nearly all of the *Seibert* opinions.

The Texas Court of Criminal Appeals has misstated and misapplied a rule of law in holding that the substance of any pre-warning statements is "immaterial." In fact, knowledge of such statements is critical to the analysis. *Cf. Agee v. White*, 809 F.2d 1487, 1491-92 (11th Cir. 1987) ("Here, by contrast, appellant's initial statement did not admit participation in criminal activity, and thus in no way increased the pressure for appellant to give the police additional, incriminating information."). Therefore, this Court should grant review in order to clarify and correct that rule. SUP. CT. R. 10(b).

### C. A magistrate's issuance of *Miranda* warnings between a pre-warning polygraph examination at one location and a post-warning videotaped statement at another location operates as a sufficient break in continuity for the purposes of *Missouri v. Seibert*.

With regard to the third question, the Texas Court of Criminal Appeals held that the issuance of *Miranda* warnings by a magistrate at the courthouse while the respondent was transported from one location to another did not operate as a sufficient break in continuity for the purposes of *Seibert*. The Texas Court of Criminal Appeals listed the curative measures outlined by the plurality's and by Justice Kennedy's opinions in *Seibert*, but it did not apply them to the respondent's case. *Martinez*, 272 S.W.3d at 627. Instead, it merely concluded that the measures in the present case were not curative. And such amounted to an incorrect statement of the law.

The respondent had a brief general conversation with the officers prior to his post-warning statement; however, the discussion "didn't go into any details or anything," and the respondent claimed that he did not know anything about the case (RR. III – 19, 33-34). There was a delay of several hours between the arrest and the warnings; however, that delay was due to the administration of a polygraph exam. Furthermore, the polygraph examination and the videotaped statement occurred at different locations. Most importantly, the officers who conducted the videotaped

statement never referred to any pre-warning statements by the respondent in an attempt to compel the respondent to repeat them on the videotape (St. Ex. 1A). Finally, even in his videotaped statement, the respondent did not admit to participating in the shootings themselves; rather, he claimed that he remained in the back seat of the car while two other men involved in the murder got out (St. Ex. 1A).

There was a substantial break in the time and circumstances between the polygraph examination and the videotaped statement. After the polygraph examination, the respondent was taken before a magistrate at the courthouse where he received his warnings and was then taken to a third address where he eventually gave his statement. *See Seibert*, 542 U.S. at 622 (Kennedy, J., concurring) (stating that curative measures included "a substantial break in time and circumstances" between the two statements to allow the "accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn."). To hold that such procedures do not operate as curative measures flies in the face of this Court's precedent in analogous situations, such as a confession given after an illegal arrest. *See Brown v. Illinois*, 422 U.S. 590, 611 (1975) ("I thus would require some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause, before the taint can be deemed removed.") (Powell, J.,

concurring); *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (holding that appearance before neutral magistrate and representation by counsel at lineup purged lineup of taint from illegal arrest).

If the Texas Court of Criminal Appeals had operated under the correct rule of law, it would have been compelled to find that a substantial break occurred in this case. And this Court's fractured *Seibert* opinion needs clarification in order to guide the lower courts on the correct rule of law in such situations. Therefore, this Court should grant review to eliminate the substantial confusion that has been generated in this area of the law and to settle on the proper analysis. *See* SUP. CT. R. 10(c) (indicating a reason for review when "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.").

## CONCLUSION

For the forgoing reasons, the State of Texas requests that this Court grant review.

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*Date: March 13, 2009*