No. 08-1159

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

BRIEF IN OPPOSITION

Frances M. Northcutt
1305 Prairie Street
Suite 300
Houston, TX 77002-2026
(713) 703-7083

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STATEMENT OF THE CASE

Prior to this Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), it was a common practice in some police departments to interrogate suspects according to a "question-first" strategy, under which officers would interrogate suspects without administering *Miranda* warnings and then, after obtaining an incriminating statement, *Mirandize* the suspects and get them to repeat the same information. *Seibert* held that the Fifth Amendment requires the suppression of confessions obtained pursuant to such a deliberate strategy to evade *Miranda*.

This case arises from a question-first interrogation conducted before *Seibert* was decided. On appeal, after *Seibert* was announced, the Texas Court of Criminal Appeals held that the interrogation violated the Fifth Amendment. The State of Texas seeks certiorari challenging that result.

1. On the morning of November 18, 2003, Officer Macario Sosa arrested respondent Raul Martinez in a convenience store parking lot, pursuant to a warrant issued in connection with a robbery and murder. Pet. App. 4. Despite knowing that this arrest placed respondent "in custody" for purposes of this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), Officer Sosa did not give *Miranda* warnings at this time. *Id.*; *see also* Tr. of Proceedings at 38-39, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003). At police headquarters, Officer Sosa and Officer Toby Hernandez "questioned [respondent] about the robbery and murder." Pet. App. 4. Respondent "denied knowing anything about the incident." *Id.*

The officers then subjected respondent to a polygraph examination, which someone else apparently administered and which "took three to four hours to complete." *Id.* Once again, no one advised respondent of his *Miranda* rights. Tr. of Proceedings at

19, 33-34, 45-46, 49, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003). Afterwards, Officer Sosa told respondent that he had "failed" the polygraph examination. Pet. App. 4.

Immediately following the polygraph examination (and seven hours after the initial interrogation began), the officers took respondent to municipal court, where a magistrate judge gave him *Miranda* warnings for the first time. *Id.* at 5, 21. Respondent was promptly transferred to the central holding station, where Officers Sosa and Hernandez "again questioned [him] about the robbery and murder." *Id.* at 5. This time, Officer Sosa began by reading *Miranda* warnings, but he did not inform respondent that neither his statements from the initial interrogation nor from the polygraph examination could be used against him. *Id.* at 23. To the contrary, Officer Sosa "referred to the first interrogation and restated what he had told [respondent] during the first interview." *Id.* at 22. The officers also referred to "the polygraph examiner, and the facts learned by [respondent] from the polygraph examiner." *Id.* at 23. Respondent gave a videotaped statement in which he stated that he "had become aware of certain facts about the crime through the polygraph examiner," claimed to have been a "'lookout' person" during the incident, and asserted that he "could easily have been mistaken" for the gunman. Pet. App. 5-6.

Before trial, respondent filed a motion to suppress his videotaped statement, arguing that the statement was inadmissible because the officers had deliberately and inexcusably failed to administer *Miranda* warnings upon his arrest or before the polygraph examination, and had failed to cure those Fifth Amendment violations before questioning him a third time. *Id.* at 6. Following an evidentiary hearing, the trial court

denied respondent's motion. Specifically, the trial court ruled that respondent's statement during the third interrogation was admissible because he had "freely, voluntarily and knowingly waive[d] his rights to remain silent and give[n] that statement." Tr. of Proceedings at 61, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003).

At trial, respondent was convicted of capital murder and sentenced to life in prison. Pet. App. 1-2.

2. The Texas Court of Appeals for the Thirteenth District affirmed in a divided opinion. The majority held that the videotaped statement followed an effective *Miranda* warning, and thus that admission of the statement did not violate respondent's constitutional rights. Pet. App. 6

3. The Court of Criminal Appeals of Texas granted discretionary review and reversed on three grounds. First, the court held that the State had failed to satisfy its burden of proving that respondent knowingly and voluntarily waived his *Miranda* rights. *Id.* at 16-18. The Texas Rules of Evidence require the proponent of evidence to lay an adequate foundation for its legal admissibility. Pet. App. 17 (citing Tex. R. Evid. 104(a)). Furthermore, this Court held in *Oregon v. Elstad*, 470 U.S. 298 (1985), that when a suspect was not read his *Miranda* rights before an initial interrogation, the prosecution must show that the initial interrogation did not taint post-warning statements. *See also Miranda*, 384 U.S. at 478-79 (effectiveness of waiver must be "demonstrated by the prosecution"). But here, the Court of Criminal Appeals explained that the State did not introduce "a complete, or even partial, description of the questions and answers in the first round of interrogation and polygraph test." Pet. App. 17. Furthermore, the Court of

Criminal Appeals noted that "[a]t the suppression hearing, the state failed to provide the polygrapher's name, the questions used during the polygraph examination, or the content of the initial interrogation of [respondent], all of which are under the exclusive control of the state." *Id.* at 18. That being so, there was no way the State could prove that the officers initial interrogations of respondent did not taint the post-warning questioning.

Second, the Court of Criminal Appeals held that the officers' use of the question-first method rendered respondent's statements inadmissible under this Court's intervening decision in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert* this Court held that *Miranda* warnings inserted "in the midst of coordinated and continuing interrogation" cannot function effectively absent specific, curative steps to remove the taint of the prior unwarned questioning. 542 U.S. at 613-14 (plurality opinion); *see also Id.* at 621 (Kennedy, J., concurring in the judgment). The Court of Criminal Appeals determined that the circumstances of respondent's interrogation mirrored those in *Seibert*: "Here, [respondent] was in custody for the purposes of *Miranda*; he gave both statements to law-enforcement officials after his formal arrest pursuant to an arrest warrant, and both statements were given at a police station." Pet. App. 19-20. Furthermore, "the absence of *Miranda* warnings at the beginning of the interrogation process was not a mistake based on the interrogating officers' mistaken belief that [respondent] was not in custody, but rather a conscious choice." *Id.* at 20. Applying factors and analysis from both the *Seibert* plurality opinion and Justice Kennedy's concurrence,[1] the Court of Criminal

[1] *See, e.g.*, Pet. App. 20-21 n.17 (quoting language from both the *Seibert* plurality opinion and Justice Kennedy's concurrence as support for the conclusion that a "substantial break" between respondent's interrogations did not occur); *id.* at 21-26 (applying factors from both the *Seibert* plurality opinion and Justice Kennedy's concurrence); *id.* at 24 & n.20 (quoting language from both the *Seibert* plurality and Justice Kennedy to support the

Appeals concluded that a "substantial break" between the interrogations had not occurred, and the officers had not taken curative steps to render effective their belated administration of *Miranda* warnings. *Id.* at 20-26.

Third, citing Texas law, the Court of Criminal Appeals held that "the officers had the responsibility to inform appellant that the questions asked during [the] polygraph test, or the test results, could be used at trial and that any mention of the test at trial was likewise prohibited." *Id.* at 23-24. Yet the officers "failed to inform [respondent] that he could refuse to take the polygraph test or that, after starting the test, he could stop at any time." *Id.* at 23. They also failed to advise him while referring to the polygraph during later questioning that the polygraph was inadmissible. *See id.*

Judge Price filed a concurring opinion, emphasizing that "the State itself has never complained that it has been saddled with an inappropriate burden of proof in this case." Pet. App. 28. He also explicitly stated that he believed respondent's statements were inadmissible under *Seibert*'s plurality opinion and Justice Kennedy's concurrence. *Id.* at 29.

Judge Hervey and three other judges dissented. The dissent agreed that the record was inadequate to determine what happened during respondent's initial interrogation and polygraph, but disagreed that the State should be penalized for this inadequacy. The dissent also agreed that "it is unnecessary to determine whether Justice Souter's or Justice

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conclusion that the interrogations "likely created the belief in [respondent's] mind that he was compelled to again discuss the matters raised in the first interview during the second interview."); *see also id.* at 19 (noting that both the *Seibert* plurality and Justice Kennedy were concerned with "the constitutional rights that the *Miranda* decision was intended to protect").

Kennedy's plurality opinions in *Seibert* control the disposition of this case." *Id.* at 37. Yet it believed that the State should prevail under either opinion.

REASONS FOR DENYING THE WRIT

The State asks this Court to apply its decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), to the facts of this case and to hold that the reasoning in Justice Kennedy's concurrence in that case is irrelevant to whether *Miranda* warnings given during a question-first interrogation are sufficient to render post-warning statements admissible. This Court should deny the petition because the Texas Court of Criminal Appeals correctly applied *Seibert.* Nor is there any meaningful conflict in authority regarding how to apply that decision. The vast majority of courts applying *Seibert* have applied factors and analysis from *both* the plurality opinion and Justice Kennedy's concurrence, and no court has decided a case in which strict application of either opinion was outcome determinative.

Even if there were meaningful confusion over *Seibert* in the lower courts, this case would be a poor vehicle for resolving it. First, all of the judges on the Texas Court of Criminal Appeals agreed that this case should come out the same way regardless of whether one of the two *Seibert* opinions exclusively governs question-first interrogations. Second, as the Court of Criminal Appeals expressly noted, "the record is lacking" in this case because it was developed prior to *Seibert* being decided; it is missing "a complete, or even partial, description of the questions and answers in the first round of interrogation and polygraph test," as well as critical information regarding the second round of interrogation. Pet. App. 17. Third, even setting *Seibert* aside, respondent's statement must be suppressed because the State failed to offer evidence sufficient to discharge its

burden under state (as well as federal) law of proving that respondent knowingly and voluntarily waived his *Miranda* rights. Fourth, the officers' failure to advise respondent that his polygraph examination results were inadmissible provides an adequate and independent state-law ground for excluding respondent's later statements.

I. The Texas Court Of Criminal Appeals' Application Of *Seibert* Is Correct

The Texas Court of Criminal Appeals correctly held that this Court's decision in *Seibert* precludes the prosecution from introducing respondent's post-warning statement in its case-in-chief.

1. As the Court of Criminal Appeals recognized, the admissibility of respondent's post-warning statement turns on this Court's decisions in *Seibert* and *Elstad*. In *Elstad*, the defendant made a cursory, one-sentence inculpatory statement in his own living room, before his arrest. 470 U.S. at 300-01. The officer's failure to provide *Miranda* warnings was an "oversight" apparently due to "confusion" as to whether the defendant was actually in custody at the time. *Id.* at 315-16. Officers transported the defendant to the police station where, an hour later, a different officer read him his *Miranda* warnings. *Id.* at 301. The defendant made a full confession that went far beyond the initial statement he provided in his living room. *See id.* at 301-02. This Court held that the defendant's post-warning confession should not be suppressed solely because he had made an unwarned inculpatory statement. *Id.* at 318.

The interrogation in *Seibert* represented the "opposite extreme." 542 U.S. at 616 (plurality opinion). The defendant in *Seibert* confessed during an initial interrogation conducted at the police station, before any *Miranda* warnings. *Id.* at 604-05 (plurality opinion). After a short break, the same police officer gave defendant her *Miranda* warnings, and continued the interrogation, in the same location, eliciting a confession that

was "'largely a repeat of information . . . obtained' prior to the warning." *Id.* at 605-06 (plurality opinion). In contrast to *Elstad*, the omission of *Miranda* warnings was not an "oversight," and there was no confusion regarding whether defendant was in custody. *See id.* at 616 (plurality opinion). The Court thus held that defendant's post-*Miranda* confession was inadmissible.

In this case, the Court of Criminal Appeals correctly held that the *Miranda* warnings were ineffective. The evidence shows that "the officers treated the video-taped interrogation as a continuation of the first; as in *Seibert*, Officer Sosa referred to the first interrogation and restated what he had told [respondent] during the first interview." Pet. App. 22. Additionally, "the polygraph examiner, and the facts learned by [respondent] from the polygraph examiner, were mentioned by [respondent] and the officers in the video." Pet. App. 23. Indeed, the facts of this case are even more egregious than those of *Seibert*. The officers subjected respondent to *two* unwarned interrogations (the initial interrogation and then the polygraph examination), and did not administer *Miranda* warnings until approximately *seven hours* had elapsed. Pet. App. 5, 21.

The Court of Criminal Appeals also correctly noted, in the words of the *Seibert* concurrence, that "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." 542 U.S. at 622 (Kennedy, J., concurring in the judgment); *see* Pet. App. 20. Even though the officers knew respondent was in custody, Tr. of Proceedings at 38-39, *State v. Martinez*, No. 930828 (Harris County Dist. Ct. May 19, 2003), they nonetheless "questioned [him] about the robbery and murder." Pet. App. 4. There is nothing in the record indicating that the omission of *Miranda* warnings for seven hours was an "oversight." As the Court of Criminal Appeals concluded, "[t]his

indicates that the absence of *Miranda* warnings at the beginning of the interrogation process was not a mistake based on the interrogating officers' mistaken belief that [respondent] was not in custody, but rather a conscious choice." Pet. App. 20.

2. The State does not dispute that the officers in this case deliberately withheld *Miranda* warnings during the first two rounds of respondent's interrogation, in a calculated attempt to evade *Miranda*. It nonetheless contends, for three reasons, that the Texas Court of Criminal Appeals' holding misapplied *Seibert.* None of the State's arguments have merit.

a. The State argues that the *Seibert* plurality opinion renders officers' intent to evade *Miranda* irrelevant and that the officers' midstream warnings were effective in this case. This argument misconstrues the *Seibert* plurality opinion, which condemned the deliberate use of question-first tactics. *See* 542 U.S. at 613-14. The plurality simply further recognized that "[b]ecause the intent of the officer will rarely be as candidly admitted" as it was in *Seibert*, it is appropriate to focus on "facts apart from intent that show the question-first tactic at work." *Id.* at 616 n.6. In other words, the plurality's approach does not *require* evidence of an officer's deliberate intent to evade *Miranda*, but such evidence is nonetheless *sufficient* to demonstrate the ineffectiveness of midstream warnings. Where, as here, the evidence shows that "the absence of *Miranda* warnings at the beginning of the interrogation process was . . . a conscious choice," Pet. App. 20, that evidence is relevant and any post-warning statements must be suppressed under either the plurality opinion or Justice Kennedy's concurrence.

b. The State also asserts that the Texas Court of Criminal Appeals "misstated and misapplied a rule of law in holding that the substance of any pre-warning statements is

'immaterial.'" Pet. 24. Under the State's reasoning, "the presence of prewarning incriminating statements was crucial to this Court in *Seibert*," Pet. 23, so the Court of Criminal Appeals erred here by construing the sparse evidentiary record against the State. In essence, the State argues that respondent cannot prevail under *Seibert* because the record contains absolutely no evidence regarding the substance of the pre-warning interrogations (*i.e.*, whether inculpatory statements were made).

This argument turns the State's well-established burden of proof on its head. As elaborated *infra* at 16, the State has the burden to demonstrate the effectiveness of *Miranda* warnings, and the validity of defendant's waiver. In this case, the State failed to provide crucial evidence and testimony at the suppression hearing regarding the substance of respondent's pre-warning statements–evidence and testimony readily available to the State. It cannot now shift its "heavy burden" to respondent. *See Colorado v. Connelly*, 479 U.S. 157, 167-68 (1986); *Miranda*, 384 U.S. at 478-79. If anything, these arguments regarding the inadequacy of the record further demonstrate why the State cannot prevail in this case, under any reading of *Seibert*.

c. Finally, the State argues that the magistrate's issuance of *Miranda* warnings between the polygraph examination and the videotaped statement qualifies as "curative measures," and constitutes a "substantial break in time and circumstances," rendering the midstream *Miranda* warnings effective. Pet. 25-26. The Texas Court of Criminal Appeals correctly rejected this argument. Pet. App. 20-26.

There was no substantial break in continuity between the interrogations. As this Court held in *Seibert*, "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to

independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." 542 U.S. at 614 (plurality opinion); *see also id.* at 620 (Kennedy, J., concurring in the judgment) (noting that the two-step interrogation strategy "is based on the assumption that *Miranda* warnings will tend to mean less when recited mid-interrogation, after inculpatory statements have already been obtained."). The Court of Criminal Appeals correctly noted that "[d]etermining whether a suspect was in the continuous presence of police personnel cannot be accomplished by focusing on only the lapse of time between the two statements." Pet. App. 21. Instead, a "substantial break in time and circumstances" exists only when it "ensure[s] that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment). As the record shows, "[t]he interrogation process was lengthy," and "[f]rom arrest to questioning to polygraph to magistration to questioning, the presence of police personnel was uninterrupted." Pet. App. 21-22. A magistrate's recitation of *Miranda* warnings cannot be effective when it immediately follows seven hours of interrogation, and then in turn is immediately followed by another interrogation on the exact same subject by the same officers, with no warning to the defendant that his or her prior statements are likely inadmissible.[2]

[2] In support of its argument, the State also invites this Court to rely on "precedent in analogous situations, such as a confession given after an illegal arrest." Pet. 26. This Court has repeatedly recognized, however, that the exclusionary rules of the Fourth and Fifth Amendments have fundamentally different purposes and underlying rationales. *See, e.g.*, *Elstad*, 470 U.S. at 304 (emphasizing the "fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment"). "The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony," including unwarned statements. *Id.* at 306-07

Even if there had been a substantial break in the respondent's interrogation, the Court of Criminal Appeals also correctly concluded that "[n]o curative steps were taken in this case." Pet. App. 26. The officers here did not give "an additional warning that explains the likely inadmissibility of the prewarning custodial statement," *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), nor was anything "said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led [respondent] through a systematic interrogation." *Id.* at 616 (plurality opinion). Instead, Officers Sosa and Hernandez made "references back" to the prior interrogations. *Id.* at 616; *see also* Pet. App. 22-23. In these circumstances, "a reasonable person in [respondent's] situation" undoubtedly would not "understand the import and effect of the *Miranda* warning." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

II. The State Exaggerates The Situation In The Lower Courts Concerning Applications of *Seibert*

The State asserts that a split in authority exists in that "many courts" have held that Justice Kennedy's *Seibert* concurrence exclusively governs question-first cases, while "other courts have recognized that the holdings themselves are more complex than that." Pet. 20. This argument distorts reality. No significant disagreement exists regarding *Seibert*.

1. Court after court has determined, like the Texas Court of Criminal Appeals in this case, that question-first cases after *Seibert* come out the same way regardless of whether one applies *Seibert*'s plurality's opinion, Justice Kennedy's opinion, or an

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(emphasis in original). In contrast, "[t]he purpose of the Fourth Amendment exclusionary rule is to *deter unreasonable searches*, no matter how probative their fruits." *Id.* at 306 (emphasis added). Accordingly, Fourth Amendment law has no application here.

amalgam of the two.[3] While Justice Kennedy in *Seibert* placed more emphasis on the police officers' intent to evade *Miranda*, both his opinion and the plurality's require officers who fail to give *Miranda* warnings at the outset of interrogations to give "curative measures," and those curative measures are nearly identical to the objective factors given by the plurality opinion as part of its threshold "effectiveness" inquiry. *Compare Seibert*, 542 U.S. at 615-16 (plurality opinion), *with id.* at 622 (Kennedy, J., concurring in the judgment). It thus is no surprise that the State does not point to any decision in which a court has found that choosing between the plurality or Justice

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[3] *See, e.g.*, *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009) ("[Defendant's] statements would be admissible under any test one might extract [from *Seibert*]."); *United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) ("We do not need to resolve this issue because regardless of the applicable framework [defendant's] statement must be suppressed."); *United States v. McConer*, 530 F.3d 484, 498 (6th Cir. 2008) (holding that defendant's statements were admissible under both the plurality test and Justice Kennedy's test); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("This case does not require us to determine which opinion reflects the holding of *Seibert*" because defendant's statements "would be admissible under the tests proposed by the plurality and by the concurring opinion."); *United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1137-39 (11th Cir. 2006) (holding that defendant's statements were admissible under both the plurality and Justice Kennedy's test); *United States v. Terry*, 400 F.3d 575, 582 (8th Cir. 2005) (same); *United States v. Fellers*, 397 F.3d 1090, 1098 (8th Cir. 2005) (same); *United States v. Briones*, 390 F.3d 610, 613-14 (8th Cir. 2004) (same); *United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (holding that post-warning statements were inadmissible under both the plurality opinion's approach and Justice Kennedy's test); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (noting that when two-step interrogation is deliberate, "the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge"); *Edwards v. United States*, 923 A.2d 840, 853 (D.C. 2007) (holding that defendant's statements were inadmissible, and concluding that "[t]he result is the same under the plurality's test as under Justice Kennedy's test."); *Alkabala-Sanchez v. Commonwealth*, 255 S.W.3d 916, 922 (Ky. 2008) (applying both the *Seibert* plurality and Justice Kennedy's concurring opinion, and holding that defendant's statements were admissible); *People v. Paulman*, 833 N.E.2d 239, 247 (N.Y. 2005) ("Because the statements in this case are admissible under the plurality's more stringent test, they are necessarily admissible under Justice Kennedy's analysis."); *State 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 post-warning confession is inadmissible under either the plurality's or Justice Kennedy's test.").

Kennedy's opinion was outcome determinative – much less a decision applying the plurality opinion in a way that shows it would have decided this case differently.

Indeed, the only decision the State cites in support of its claim that some lower courts have held that Justice Kennedy's concurrence is irrelevant to applying *Seibert* is *State v. Pye*, 653 S.E.2d 450 (Ga. 2007). But there, the Georgia Supreme Court held that *Seibert* required the statement at issue to be *suppressed* because the officers conducted a two-step procedure "without *any* break in the proceedings" and obtained *identical* statements. *Id.* at 454-55 (emphasis added). Accordingly, the court had no need to consider reaching the outcome that the State propounds here – namely, that *Seibert* allows the prosecution to admit statements obtained in deliberate violation of *Miranda* if it can prove that the midstream warnings the officers gave were somehow still effective.

III. This Case Is A Poor Vehicle For Giving Guidance Concerning Applying *Seibert*

Even if there were meaningful confusion among state and federal courts regarding how to apply *Seibert*, this case would present a poor vehicle for addressing it.

1. As the concurring and dissenting judges on the Court of Criminal Appeals recognized, this case does not turn on whether the plurality or Justice Kennedy's opinion in *Seibert* exclusively governs question-first cases. Pet App. 29 (Price, J., concurring) ("[W]e do not need to reach the issue of which opinion is controlling, since, in my view, the appellant should prevail under either test"); *id.* at 37 (Hervey, J., dissenting) ("[I]t is unnecessary to determine whether Justice Souter's or Justice Kennedy's plurality opinions in *Seibert* control the disposition of this case . . . ."). To be sure, the majority of the Court of Criminal Appeals at one point described the reasoning of Justice Kennedy's concurrence as "persuasive." Pet. App. 12. Yet it did not explicitly adopt that approach

to the exclusion of the plurality's, much less hold, as the State would have it, that the officers' subjective intent alone was enough to render respondent's post-warning statement inadmissible. To the contrary, the Court of Criminal Appeals repeatedly applied factors and analysis from *both* the *Seibert* plurality opinion and Justice Kennedy's concurrence. *See, e.g.*, Pet. App. 21-26; *see also supra* at 4 n.1. This shows beyond any doubt that it does not matter here which opinion is deemed "controlling," or how their analyses are melded together.

2. This case lacks an appropriate evidentiary record for giving any meaningful guidance regarding how to apply *Seibert*. This Court has repeatedly recognized that the development of constitutional principles is best undertaken in the context of concrete cases with fully developed records. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (per curiam). The suppression hearing in this case was held *before* this Court's *Seibert* decision. The Court of Criminal Appeals explained that "the record is lacking; it does not contain a complete, or even partial, description of the questions and answers in the first round of interrogation and polygraph test." Pet. App. 17; *see also id.* at 29 (Price, J., concurring) ("[W]e know almost nothing on the present record about the substance of the initial interrogation or the polygraph examination."); *id.* at 63 (Hervey, J., dissenting) (noting that the record is "incomplete" with "gaping holes of silence on critical issues"). If this Court does decide someday to elaborate on *Seibert*, it should do so in a case in which officers conducted their interrogation in the post-*Seibert* world, and in which the trial court applied factors from the *Seibert* decision to a full factual record.

3. It is also unlikely that this Court would even need to engage in any serious *Seibert* analysis in order to affirm here. The Court of Criminal Appeals held that deficiencies in the record prevented the State from meeting its threshold burden under state law of establishing the admissibility of the evidence it proffered. Pet. App. 17 (citing Tex. R. Evid. 104(a)). Thus, the State's inability to meet its burden of proof under state law is dispositive in this case. *Id.* at 17-18.

Even apart from this state law deficiency, the State failed to carry its burden of proof under federal law. This Court has held that the government has the burden to establish that it obtained a valid waiver of the right against self-incrimination. *Connelly*, 479 U.S. at 167-68. This includes the government's burden of demonstrating the effectiveness of *Miranda* warnings: "[U]nless and until such warnings and waiver are *demonstrated by the prosecution* at trial, no evidence obtained as a result of interrogation can be used against [defendant]." *Miranda*, 384 U.S. at 478-79 (emphasis added); *see also Moran v. Burbine*, 475 U.S. 412, 421 (1986) ("[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."). "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborating evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Miranda*, 384 U.S. at 475.

The Texas Court of Criminal Appeals correctly concluded that the record in this case lacks evidence on many factors relevant to the determination of whether respondent received effective warnings under *Seibert*. *See* Pet. App. 17-18 ("At the suppression

hearing, the state failed to provide the polygrapher's name, the questions used during the polygraph examination, or the content of the initial interrogation of appellant, all of which are under the exclusive control of the state."). On this record, the State cannot meet its threshold burden of demonstrating that respondent knowingly and voluntarily waived his *Miranda* rights.

4. Finally, it is unnecessary for this Court to reach the questions presented because an additional independent and adequate state-law ground supports the judgment of the Court of Criminal Appeals. As the Court of Criminal Appeals explained, "the officers had the responsibility" under state law "to inform [respondent] that the questions asked during the polygraph test, or the test results, could be used at trial and that any mention of the test was likewise prohibited." Pet. App. 23-24 (citing Tex. Code Crim. Proc. art. 15.051). Under state law "references to a polygraph test, or to its results, are inadmissible for all purposes." *Id.* at 23 (citing *Nesbit v. State*, 227 S.W.3d 64, 66 (Tex. Crim. App. 2007)). Yet the officers failed to advise respondent that his polygraph results were inadmissible, and the videotaped interrogation that the State introduced contained references to respondent's polygraph examination. Pet. App. 23. This error alone requires reversal of respondent's conviction. *See, e.g.*, *Nichols v. State*, 378 S.W.2d 335, 337 (Tex. Crim. App. 1964) (reversing conviction based on trial testimony disclosing that polygraph test had been taken; fact of polygraph test was "highly prejudicial to the rights of [defendant], and the harm done was so great that no instruction from the court could remove it.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 16th day of June, 2009.

By _____
Frances M. Northcutt

1305 Prairie Street
Suite 300
Houston, TX 77002-2026
(713) 703-7083