IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA,
Petitioner,

v.

BLAINE ROSS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Petitioner asks this Court to grant review of the following issue:

WHETHER THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEDGMENT AND WAIVER, AFFORDS A PRESUMPTION OF ADMISSIBILITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT?

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Case No. _____

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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Ross v. State, 35 Fla. L. Weekly S295 (Fla. May 27, 2010), as revised on September 8, 2010 (35 Fla. L. Weekly S501).

Petitioner's Appendix (A1-A180) contains the opinion of the Florida Supreme Court below, Case No. SC07-2368, (A1-A90). The Appendix further contains the trial court's order denying the motion to suppress (A91-A179) and the Miranda Waiver Form (A180). The parties will be referred to as they appear before this Court or as they stood in the court(s) below. [1]

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[1] The symbol; "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

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.

STATEMENT OF THE CASE

In 2007, Respondent Blaine Ross was convicted of robbery and two counts of first degree murder following the deaths of his parents, Richard and Kathleen Ross. Ross was arrested for the murders on January 9, 2004, after extensive questioning which started as a noncustodial interview at approximately 3:35 p.m. The trial court found that the interview became custodial so as to require warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), at 7:22 p.m., when Manatee County Sheriff's Detective William Waldron advised Ross of his constitutional rights and secured a written acknowledgment and waiver of rights (A180). The Florida Supreme Court disagreed and concluded that Ross was in custody two hours earlier, as of 5:20 p.m., when Waldron confronted Ross with the fact that his parents' blood had been found on a pair of his pants that had been collected from his girlfriend's house on January 8, 2004. Ross, 35 Fla. L. Weekly at S299 (A26). At issue in this petition is the propriety of the Florida Supreme Court's analysis and conclusion that Ross's statements following the execution of his written waiver of rights should have been excluded under this Court's decision in Missouri v. Seibert, 542 U.S. 600 (2004).

A. TRIAL

On January 7, 2004, Blaine Ross called 911 to report the discovery of his parents' bodies in the bedroom of their home in Bradenton, Florida. Law

enforcement officers with the Manatee County Sheriff's Office responded to the scene, and found Ross, 21-years-old, and his 16-year-old girlfriend, Erin, waiting outside the Ross home. At Ross's request, law enforcement transported him away from the scene to be interviewed.

Ross then spent about twelve hours at the Manatee Sheriff's substation, during which time he gave four separate interviews that amounted to a total of less than four hours. Ross was not advised of his Miranda rights but when he challenged the admission of these statements, the courts determined that there was no custodial interrogation so the statements were properly admitted. Ross, 35 Fla. L. Weekly at 297, n.7 [note at 309] (A14). In the interviews, Ross attempted to describe his actions over the previous few days but he admitted that his memory was poor as he had ingested illegal substances which interfered with his recall ability. Ross made a number of inconsistent, improbable, and implausible statements over the course of these interviews. He was repeatedly accused of having killed his parents but he consistently denied having done so. Ultimately, the questioning concluded and Ross was driven to his girlfriend's house about 2:40 a.m. on January 8.

On January 9, Ross returned to the sheriff's office seeking information about getting victim's assistance as well as the status of the investigation. The January 9 meeting between Ross and Det. Waldron was videotaped and admitted as evidence at trial. The tape opens with Ross and Waldron

discussing questions which Ross had based on media coverage he had seen about his parents' murders and some aspects of the investigation. After answering Ross's questions, Waldron asks if they could go back over the information they had been discussing on January 7 and 8 regarding Ross's actions before discovering his parents' bodies. Ross is offered a bathroom or smoke break and something to drink, but he declines. The time is 3:35 p.m. About half an hour later Ross and Waldron left the room for a cigarette break, and the interview is resumed at 4:33. Around 5:00 the interview becomes more heated, with Waldron repeating suspicions he had raised in the earlier interviews and Ross insisting that, while he did not remember details about his activities, he could not have committed the crimes. At 5:20, Waldron tells Ross that his pants that were collected from Erin's house had spots of blood on them that matched blood from the crime scene. About fifteen minutes later, Ross admits that it was possible he committed the crime with no memory of his actions, but that he did not believe he had done so.

A few minutes after 6:00, Ross asks to see his sister, and Waldron leaves the room so that Ross and his sister can speak alone. On the video, Ross's sister advises him to tell the truth, but not to let the police talk him into believing that he had done something that he did not do. Waldron returns and the interview resumes at 6:23 but is halted when Waldron leaves the room again shortly before 7:00. Waldron returns at 7:16 but leaves when Ross requests to speak to his sister again. Waldron returns five minutes later saying that he couldn't

find Ross's sister, but there were some other things he had learned, and they needed to go over some "procedures." Waldron then advises Ross of his constitutional rights, which were discussed briefly before Ross agreed to continue answering Waldron's questions. Ross signed a written waiver acknowledging his rights, and indicated, both orally and in writing, that he was willing to continue speaking with Waldron. Waldron proceeded to tell Ross that the police had discovered a bloody ski mask in his car, and Ross told Waldron that there was an innocent explanation for the mask. In fact, the mask did not incriminate Ross and was not admitted as evidence against him at the trial. At 7:54, Ross acknowledged knowing that he "did do this," telling Waldron that he recalls standing at the foot of his parents' bed with a bloody baseball bat in his hands. Ross admitted realizing what he had done and attempting to stage the scene to look like a burglary. He stated that he took his mother's purse and that, ultimately, he threw the purse, the baseball bat, and his bloody shirt off of a bridge. Ross continued to answer questions until 8:48, when he expressly invoked his right to remain silent.

It is undisputed that, at some point in this interview, the questioning became custodial; the trial court determined that custody occurred at approximately 7:22 p.m., when Det. Waldron advised Ross of his constitutional rights pursuant to Miranda, while the Florida Supreme Court determined that the interrogation had become custodial about two hours earlier, once Waldron confronted Ross with the fact that law enforcement

had detected blood on a pair of Ross's pants that had been collected from Erin's house and matched blood from the crime scene.

Several days after the arrest, Ross's sister contacted Waldron and advised him that Ross wanted to talk to him. Waldron spoke to Ross at the jail cell on January 12, and after receiving Miranda warnings again, Ross made further inculpatory statements. In addition to Ross's statements of January 7, 8, 9, and 12, the State presented evidence at trial indicating that Ross had been present at the scene. Specifically, Erin testified that Ross had not been at her house when she went to sleep on January 6, but he had been there when she woke up on January 7. Ross's fingerprint was found on a cigarette lighter which had been left on top of a baseball equipment bag in the garage of the house; the compartment for bats was unzipped and empty. Another fingerprint was found on the inside of a sliding glass door that had been left ajar. In addition, blood with his parents' DNA was found on the pants Ross had been wearing the night of the murder, which were collected at Erin's house the next day.

Evidence was also offered to establish a financial motive for the murders. Testimony and bank records showed that Ross had withdrawn a total of $1401.50 from his mother's checking account over a short period of time before her murder; a written contract dated January 6, 2004, between Ross and his mother stated, "I, Kathleen Ross, has [sic] loaned Blaine Ross $1400 that will be paid back

in full as soon as possible. Blaine will never ask for Sam's Club card or any other money."

The murders were estimated to have occurred between 3 a.m. and 5 a.m. on January 7. After Ross and Erin woke up at Erin's house on January 7, they went to a credit union where Ross attempted to withdraw money with an ATM card. When he was unable to obtain money, Ross went into the credit union to speak with an employee to have her access the account. When told that the account was only in his mother's name, Ross told the employee that his mother was out of town and he needed the PIN number. Although Ross was insistent, the credit union employee refused to give Ross access to the account. After leaving the credit union, Ross attempted to use the ATM card at another location but was still unable to obtain any money. At that point, Ross returned to his parents' house, ostensibly to talk to his mother about getting money, and that is when he discovered his parents' bodies.

At Ross's trial, the January 9 videotape was admitted and published, along with audiotapes of the January 7, 8 and 12 interviews. Ross presented defense witnesses in an attempt to establish that his confession was unreliable and that someone else had committed the murders. Ross was convicted as charged and, following a penalty phase proceeding, his jury recommended that two death sentences be imposed for the first degree murder convictions. The trial judge complied and sentenced Ross to death for the murders.

B. PRETRIAL SUPPRESSION HEARING

Ross filed written motions to suppress physical evidence which had been gathered as well as his statements to law enforcement officers on January 7 and 8, January 9, and January 12. A series of pretrial hearings were conducted in 2006 to address the constitutional issues raised in Ross's motions. The testimony regarding the circumstances of Ross's statements of January 9 was provided primarily by Det. Waldron and the defense confession expert, forensic psychologist Dr. Gregory DeClue. Ross did not testify.

Evidence was presented that the Manatee County Sheriff's Office formal policy required officers to provide Miranda warnings to any suspect before questioning either upon arrest or when the questioning passes from the fact-finding process to the accusatory stage. Det. Waldron testified that his training on interviews and interrogations taught him to provide Miranda warnings at the point where a person's movements are restricted and the person is not going to be free to leave. Waldron stated that the office policy was just a guideline and that, depending on the situation, some interviews became accusatory before the warnings were given. Waldron acknowledged that, before he spoke to Ross, he discussed the case with his supervisors and had been given suggestions on how to proceed. Manatee County Sheriff Charlie Wells had offered some advice before the January 9 interview and indicated that he was counting on Waldron to get "closure." Waldron also was aware that Wells and others were

monitoring the interview as it took place. When asked why he did not provide Ross with Miranda warnings earlier than he did, Waldron explained that he did not believe that he had probable cause to arrest Ross until he learned about the ski mask, which he believed would incriminate Ross.

Following the hearing, the trial court rendered an extensive order addressing numerous aspects of Ross's multiple statements. The court agreed with Det. Waldron that Ross was not in custody prior to the time that Waldron advised him of his rights and secured a written acknowledgment and waiver (A139-A153). The court described the January 9 interview, finding "[a]lthough there are portions of the interview that are confrontational and indeed pointed and accusatory, most of the interview was overtly non-confrontational and overtly conversational," (A145-A146) and "the majority of the conversation was cordial and particularly non-accusatory" (A148). The court also expressly found that there was "no evidence that the detectives deliberately withheld Miranda until the defendant confessed" (A152). In response to Ross's claim of involuntariness, the trial court found that "[t]here is nothing in the interviews that indicate that Defendant was coerced or intimidated into confessing to this crime" (A162).

C. THE FLORIDA SUPREME COURT OPINION

In a split 4-3 decision, the Florida Supreme Court concluded that Ross was actually in custody at the point where Waldron confronted him with the fact that blood from the crime scene had been found on the pants that he had left at Erin's house the morning of the murders, and determined that Miranda warnings should have been given at that time. The court also held that the failure to provide timely warnings and the manner in which the warnings were delivered rendered them ineffective, and, pursuant to this Court's Seibert decision, suppression of Ross's post-Miranda statements was also required. The court noted that the circumstances of the confession were "uncontroverted," and determined that the State had failed to establish that Ross's waiver had been knowingly, voluntarily and intelligently made, and that therefore the post-waiver statements should have been suppressed.

The dissenting justices agreed that Ross was in custody for Miranda purposes when confronted with the bloody pants, but concluded that the statements following Ross's written waiver of rights were properly admitted. The dissenters expressly disagreed with the majority's application of Seibert, noting that, since there was no evidence of a deliberate, two-step strategy to avoid Miranda, the standards of Oregon v. Elstad, 470 U.S. 298 (1985), should control. Because the record affirmatively demonstrated that Ross's pre-warning statements were voluntary, and that Waldron fully explained

Ross's rights before securing the written acknowledgment and waiver, Ross's post-warning statements were properly admitted. The dissenting opinion also concludes that the error in admitting Ross's statements after he was confronted with blood on his pants but before being provided with the warnings was harmless beyond any reasonable doubt. Therefore, the dissenting justices would have affirmed Ross's convictions despite admission of the January 9 videotape.

REASONS FOR GRANTING THE WRIT

Since the release of Missouri v. Seibert, 542 U.S. 600 (2004), both federal and state courts have struggled to apply the fragmented decision. The Florida Supreme Court opinion issued below reflects the difficulty which has been noted in a number of cases attempting to enforce Seibert. The Florida court itself disagreed on the proper application of Seibert and the appropriate standards to be assessed under the factual situation presented, with the three dissenting justices concluding "[t]he majority is improperly mixing the [Oregon v.] Elstad [470 U.S. 298 (1985)] and Seibert standards together." Ross, 35 Fla. L. Weekly at 307 (A79). The majority opinion itself recognized that "there is a split in the federal circuits regarding whether the plurality rather than [Justice Kennedy's] concurrence operates as the controlling precedent." Ross, 35 Fla. L. Weekly at 301, n.9 [note at 309] (A37). While the Florida Supreme Court has previously applied Justice Kennedy's concurring opinion as the operative rule, see Davis v. State, 990 So. 2d 459 (Fla. 2008), the analysis conducted in the instant case signals a clear retreat from that position. Below, the Florida court conflagrated Elstad and Seibert, concluding that both support the "application of a totality of the circumstances analysis when warnings are delivered midstream during an ongoing interrogation." Ross, 35 Fla. L. Weekly at 301 (A41). However, Justice Kennedy's opinion in Seibert rejects the suggestion that a Miranda violation in connection with one statement necessarily threatens the admissibility of other statements taken in full compliance with

Miranda, noting "[I]t would be extravagant to treat the presence of one statement that cannot be admitted under Miranda as sufficient reason to prohibit subsequent statements preceded by a proper warning." Id. at 620. The Florida Supreme Court opinion below failed to limit its Seibert application to Justice Kennedy's narrower opinion, and accordingly improperly directed a new trial be held and that Ross's voluntary, post-Miranda statements be excluded.

I.

THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEDGMENT AND WAIVER, SHOULD AFFORD A PRESUMPTION OF ADMISSIBILITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT.

In Oregon v. Elstad, 470 U.S. 298, 310-11 (1985), this Court held that where a properly-warned confession is preceded by an unwarned but clearly voluntary admission, "a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible." However, the release of Missouri v. Seibert, 542 U.S. 600 (2004), nearly twenty years later has generated confusion and conflict over the continued viability of Elstad as federal and state courts have struggled to apply the fractured Seibert decision to cases, such as the one below, where Miranda warnings are provided "midstream" during the course of a custodial interrogation. The resulting legal split among federal circuits and state courts of last resort provides an unsettled area of law which demands this Court's attention. Because the Florida Supreme Court below improperly commingled the relevant standards in an attempt to reconcile the

tension it identified as necessarily flowing from the case law, resulting in the suppression of a voluntary, post-warning confession, this case presents an appropriate vehicle to settle and resolve the proper analysis when these circumstances are presented.

The Conflict Among State and Federal Courts Interpreting Seibert

It is easy to identify the federal circuit split most commonly associated with Seibert's application, as the Florida Supreme Court acknowledged the line of debate in a footnote in its opinion rendered below. See Ross, 35 Fla. L. Weekly at 301, n.9 [note at 309] (A37-A38):

> [FN9] While we focus on Justice Kennedy's concurrence in analyzing the holding of Seibert, there is a split in the federal circuits regarding whether the plurality rather than his concurrence operates as the controlling precedent. In fact, while the case cited by the dissent, United States v. Stewart, 388 F.3d 1079 (7th Cir. 2004), relies on Justice Kennedy's concurrence as to the holding of Seibert, more recent circuit cases have called into question the reliance on Justice Kennedy's concurrence rather than the plurality. See, e.g., United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009) ("[W]e conclude that the Marks [v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)] rule

> is not applicable to Seibert. Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree."); United States v. Pacheco-Lopez, 531 F.3d 420, 427 n. 11 (6th Cir. 2008) (recognizing split in circuits as to whether Justice Kennedy's concurrence is controlling precedent); United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) ("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."). In Heron, 564 F.3d at 885, the Seventh Circuit recognized that it had not settled on a definitive approach to Seibert and held that its more recent decision in United States v. Peterson, 414 F.3d 825 (7th Cir. 2005), "may be in some tension with our decision in Stewart and Justice Kennedy's intent-based test."

A survey of relevant cases reveals that most federal circuits and several state courts of last resort have solidly adopted Justice Kennedy's concurring opinion as the holding in Seibert. See United States v. Carter, 489 F.3d 528, 536 (2d Cir. 2007), cert. denied, 128 S. Ct. 1066 (2008); United States v. Naranjo, 426 F.3d 221, 231-32 (3d Cir. 2005); United

States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006); United States v. Briones, 390 F.3d 610, 613 (8th Cir. 2004), cert. denied, 545 U.S. 1122 (2005); United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir. 2006); United States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006) (citing United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1136, n.6 (11th Cir.), cert. denied, 549 U.S. 861 (2006)), cert. denied, 551 U.S. 1138 (2007); Ford v. United States, 931 A.2d 1045, 1052 (D.C. Cir. 2007), cert. denied, 533 U.S. 1026 (2008); State v. Hickman, ___ P.3d ___, 2010 WL 3555802, at *4 (Wash. 2010); Carter v. State, 309 S.W.3d 31, 38 (Tex.Crim.App. 2010); State v. Gaw, 285 S.W.3d 318 (Mo. 2009), cert. denied, 130 S. Ct. 1082 (2010); People v. Rios, 101 Cal.Rptr.3d 713, 723 (Cal. 2009); People v. Lopez, 892 N.E.2d 1047, 1069 (Ill. 2008), cert. denied, 129 S. Ct. 998 (2009); State v. Fleurie, 968 A.2d 326 (Vt. 2008). These cases typically describe Seibert as carving out an exception to Elstad's application. The Sixth and Tenth Circuits have expressly questioned the proper scope of Seibert, suggesting that it strictly limited Elstad to its facts and created a new analysis to apply in all cases where Miranda warnings are administered midstream to assess the effectiveness of the warnings as provided. United States v. Pacheco-Lopez, 531 F.3d 420, 427 n. 11 (6th Cir. 2008); United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir.), cert. denied, 549 U.S. 1065 (2006). The First Circuit has declined to resolve the question, finding the result would be the same under either the plurality or Justice Kennedy's tests in those cases which have presented the issue. United States v.

Verdugo, ___ F.3d ___, 2010 WL 3260805 (1st Cir. Aug. 19, 2010); United States v. Jackson, 608 F.3d 100, 104 (1st Cir. 2010), pet. for cert. filed Sept. 2010. Most troubling are those jurisdictions, such as the Seventh Circuit, which are inconsistent about which analysis to undertake when reviewing the admissibility of statements made following Miranda warnings given in the middle of an interrogation. See United States v. Stewart, 388 F.3d 1079 (7th Cir. 2004) (applying Justice Kennedy's concurring opinion) and United States v. Heron, 564 F.3d 879 (7th Cir. 2009) (concluding that Marks does not apply to Seibert, and deeming it unnecessary "to resolve once and for all what rule or rules governing two-step interrogations can be distilled from Seibert"); see also Davis v. State, 990 So. 2d 459, 465-66 (Fla. 2008) (applying Justice Kennedy's concurring opinion) and Ross, 35 Fla. L. Weekly at 301-302 (A42-A43) (applying new totality-of-the-circumstances test which commingles the approach of Elstad, the Seibert majority, and Justice Kennedy's Seibert concurrence). Moreover, even those jurisdictions which appeared to have solidly adopted Justice Kennedy's concurring opinion have engaged in additional, unnecessary analyses, suggesting a lack of confidence in the true holding to be applied. See, e.g., United States v. Fellers, 397 F.3d 1090 (8th Cir.), cert. denied, 546 U.S. 933 (2005); Gonzalez-Lauzan, 437 F.3d at 1139, n.8, Fleurie, 968 A.2d at 333-36.

Thus, the most fundamental debate concerns the question of whether application of Seibert is properly assessed under Marks and therefore

restricted to Justice Kennedy's requirement that there be a deliberate, two-step strategy employed to compel Seibert's additional protections to insure the effectiveness of the Miranda warnings when given. The extent to which Elstad survived Seibert is a question which is necessarily at the heart of the Florida court's analysis below. By melding the voluntariness analysis of Elstad and the effectiveness-of-warnings analysis of Seibert into a wholesale, totality of the circumstances approach, the Florida court has returned litigation of this issue to the days before Miranda. Instead of assessing the voluntariness of particular statements on a case-by-case, totality of the circumstances approach, courts are now assessing the effectiveness of the Miranda waiver on a case-by-case, totality of the circumstances approach. Miranda itself attempted to resolve the difficult issue of the admissibility of incriminating statements made to law enforcement officers by providing an understandable method to insure that only those statements given after clear warning of the consequences could be produced for trial. In the absence of any evidence indicating either police misconduct (such as the use of coercion or Seibert's deliberate two-step strategy) or the suspect's inability to voluntarily waive his rights, the giving of full and accurate Miranda warnings, accompanied by a written acknowledgement and waiver of rights as in this case, should be sufficient to permit admission of the contested statements. However, in this case, the Florida Supreme Court ruled that it was not.

While the central issue in this case is whether a Seibert analysis into the effectiveness of midstream Miranda warnings is appropriate in the absence of evidence of an intentional tactic to delay Miranda until a confession has been obtained, other ancillary issues are also presented, such as the correct allocation of the burdens of proof and appropriate standards of review, which have also led to uncertainty and conflict. See United States v. Stewart, 536 F.3d 714, 719 (7th Cir.), cert. denied, 129 S. Ct. 741 (2008); United States v. Ollie, 442 F.3d 1135, 1142 (8th Cir. 2006); Williams, 435 F.3d at 1158, n.11; Carter, 309 S.W.3d at 38-39; Daniel S. Nooter, Note, Is Missouri v. Seibert Practicable?: Supreme Court Dances the "Two-Step" Around Miranda, 42 Am.Crim. L.Rev. 1093, 1113 (2005). These questions are of particular concern since "the trial judge's assessment of the interrogating officer's subjective intent is especially important under Justice Kennedy's approach in Seibert." Carter, 309 S.W.3d at 39. In its decision below, the Florida Supreme Court acknowledged that the trial court found "no evidence was submitted to show that the detectives deliberately withheld Miranda warnings until Ross confessed" but the appellate court did not feel bound by this finding, noting that "although deference is to be accorded to credibility findings, the issue of the admissibility of the postwarning statements is a mixed question of law and fact." Further, the court held "In this case, the trial court determined only that there was no evidence submitted to show that the detectives deliberately withheld Miranda until after Ross confessed, thus impermissibly shifting the burden of proof." This

holding conflicts with conclusions drawn in other cases with similar findings. Compare United States v. Crisp, 371 Fed. Appx. 925 (10th Cir. 2010) (unpublished) (statements admissible where "record does not reflect any indicia of deliberate action;" evidence insufficient to suggest deliberate delay); Stewart, 536 F.3d at 720-21 (finding of no deliberate delay is a factual finding entitled to deference); United States v. Naranjo, 223 Fed. Appx. 167, 169 (3d Cir.) (unpublished decision after remand) (statements properly admitted where officer testified he did not believe that he had to give warnings until the defendant was placed under arrest), cert. denied, 552 U.S. 1055 (2007); see also Carter, 309 S.W.3d at 41 (trial court's finding no improper intent reversed by intermediate appellate court finding a deliberate choice to undermine Miranda, which was reversed on discretionary review since the record supported the trial court's original finding); Ollie, 442 F.3d at 1143 (finding Justice Kennedy's test satisfied where there was no evidence presented on the issue of a deliberate delay). Therefore, there is conflict as to the proper application of Seibert above and beyond the basic question of whether Justice Kennedy's opinion controls.

Federal courts of appeal and state courts of last resort are divided on the proper application of Seibert. Consequently, this case satisfies Rule 10(b) of this Court's Rules relating to the propriety of certiorari review. There is clearly a need for a resolution from this Court to the existing division among courts across the country. Accordingly, the writ of certiorari should be granted.

The Florida Supreme Court's Opinion Below Conflicts With Elstad and Seibert

In addition to presenting an issue on which there is conflicting law among the federal circuits and state courts of last resort, this case also offers a state court of last resort decision on an important federal question which conflicts with this Court's precedents in Elstad and Seibert, warranting certiorari review under Rule 10(c) of this Court's Rules.

The Florida Supreme Court reversed Ross's convictions and resulting death sentences because the jury was allowed to consider the videotape of Ross's January 9, 2004 interview with Det. Waldron. In finding that Ross's confession should have been excluded, the Florida court commingled theories and standards from several different cases applying Miranda v. Arizona, 384 U.S. 436 (1966), including Oregon v. Elstad, 470 U.S. 298 (1985), and Missouri v. Seibert, 542 U.S. 600 (2004). Citing the overriding measure of finding a knowing and voluntary waiver from the totality of the circumstances, the court outlined the circumstances which allegedly compelled suppression: the fact that Miranda warnings were not provided at the point that the reviewing court concluded they should have been; the fact that the sheriff and his staff discussed the interview process before the interview started and monitored it as it progressed; and the fact that, when Miranda warnings were given, they were introduced as a

matter of "procedure," which the court held downplayed and diminished the importance of the warnings given so as to render them ineffective. As a result of its flawed legal analysis, the Florida court has reversed Ross's convictions for a new trial where the State may not offer evidence of Ross's voluntary, post-warning confession, despite the absence of any evidence of overreaching police misconduct or any evidence that Ross in fact failed to understand or appreciate the significance of the constitutional rights which he acknowledged and waived orally and in writing.

In discussing the governing case law, the Florida court "focused" on Justice Kennedy's concurrence when addressing Seibert. Ross, 35 Fla. L. Weekly at 301, n.9 [note at 309] (A37). However, rather than strictly applying Justice Kennedy's concurring opinion to restrict Seibert to its narrowest holding, the court's analysis demonstrates that it developed a new, "totality of the circumstances" standard to assess both the effectiveness of the Miranda warnings and the voluntariness of the Miranda waiver. See Ross, 35 Fla. L. Weekly at 301-305 (A42-A65). In doing so, the Florida court violated the "holding" of Seibert, which, pursuant to a straightforward application of Marks v. United States, 430 U.S. 188 (1977), must be construed as the narrowest ground on which the decision could be based.

It is readily apparent that this case does not involve the improper two-step strategy at issue in Seibert. It would be a stretch indeed to find that

Miranda warnings were withheld in this case until a confession had been obtained, since no confession was obtained prior to the administration of the warnings. Rather than restricting Seibert to cases presenting a method of securing a confession which would then be perfunctorily repeated following the warnings, the Florida Supreme Court changed the trigger by reviewing for any "improper and deliberate tactics in delaying the Miranda warnings." Ross, 35 Fla. L. Weekly at 301-303 (A42-A50).

As a result, the decision below is out of line with those cases holding that Justice Kennedy's opinion carved out a limited exception to Elstad, Seibert requires a court assessing the propriety of midstream Miranda warnings to first determine whether there was a deliberate strategy of delaying Miranda warnings until a confession had been obtained. According to Justice Kennedy, if this deliberate two-step strategy was not used, "[t]he admissibility of postwarning statements should continue to be governed by the principles of Elstad." Seibert, 542 U.S. at 622. Under Elstad, the first consideration is whether the initial, pre-warning statements were coerced or voluntarily produced. This is a necessary determination because there is a different analysis involved in assessing voluntariness of the waiver if there is a level of coercion which might carry over into the second interrogation.

In this case, the trial court determined that Ross's interviews, taken as a whole, "do not suggest that law enforcement engaged in coercion or intimidation." (A162). The dissenting opinion below,

which also expressly found Ross's initial, pre-warning statements to be "uncoerced," Ross, 35 Fla. L. Weekly at 307, n.33 [note at 310] (A76), recognized the majority's improper analysis and pointedly explained the error:

> [FN35] The majority cites the following language from Elstad as its support that Elstad requires an examination of the same factors as the plurality in Seibert would require: "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." Majority op. at 31 (quoting Elstad, 470 U.S. at 310 (citing Westover v. United States, decided together with Miranda, 384 U.S. at 494)). However, this language does not apply every time there are two confessions with an intervening Miranda waiver. Rather, this language referencing Westover only applies after a determination that the pre-Miranda statements were coerced, which was not the case in Elstad. As the United States Supreme Court explained in Elstad,
>
> > [t]he failure of police to administer Miranda warnings does not mean that the statements received have actually

> been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. See New York v. Quarles, 467 U.S., at 654, and n. 5; Miranda v. Arizona, supra, at 457. Of the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but clearly voluntary admission, the majority have explicitly or implicitly recognized that Westover's requirement of a break in the stream of events is inapposite. In these circumstances, a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an "act of free will." Wong Sun v. United States, 371 U.S., at 486.

Elstad, 470 U.S. at 310-11 (footnote omitted). Indeed, in Elstad, the United States Supreme Court reversed the

> Oregon court's holding that, despite the fact that the pre-Miranda statements were uncoerced, "lapse of time, and change of place from the original surroundings are the most important considerations" in determining the admissibility of the post-Miranda statements. Id. at 303 (quoting State v. Elstad, 61 Or.App. 673, 658 P.2d 552, 554 (Or.App.1983), rev'd, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), which cited Westover v. United States, 384 U.S. 436, 496, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

Ross, 35 Fla. L. Weekly at 308, n.35 [note at 310] (A86-A87).

Thus, both Seibert and Elstad compel analyses which are necessarily sequential rather than cumulative. A court faced with a challenge to midstream Miranda warnings should first determine if there was a "two-step interrogation technique [ ] used in a calculated way to undermine the Miranda warning." Seibert, 542 U.S. at 622. If there was, the court must consider the Seibert factors to determine if the Miranda warnings lost their effectiveness due to the strategic delay. If there was no deliberate delay until a confession was obtained, Seibert does not apply and the post-warning statements must be assessed under Elstad. Applying Elstad, the court must first determine if the initial, pre-warning statements were coerced. If so, the factors noted in Elstad must be considered to assess whether the

coercion carried over into the post-warning questioning (the time elapsed between statements, whether the second phase of questioning involved a change in place or in the identity of the interrogators). If, however, the initial pre-warning statements were voluntary, "careful and thorough administration of Miranda warnings" overcomes the presumption of inadmissibility which applies to the pre-warning statements.

The court below departed from the sequential Seibert/Elstad analysis outlined above and substituted a new analysis involving "a multiplicity of factors" impacting the ultimate issue of admissibility. The Florida court outlined its approach as follows:

> The caselaw demonstrates that the analysis of the admissibility of statements made following a custodial interrogation and after the delayed administration of Miranda warnings is based on the totality of the circumstances, with the following being factors important in making this determination: (1) whether the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement; [FN11] (2) whether the police minimized and downplayed the significance of the Miranda rights once they were given; [FN12] and (3) the circumstances surrounding both the warned and unwarned statements 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 second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." [FN13] In addition, there are other circumstances to consider on a case-by-case basis, such as the suspect's age, experience, intelligence, and language proficiency. [FN14]

[FN11] See Elstad, 470 U.S. at 314 ("We must conclude that, absent 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 [as to the later statement]." (emphasis supplied)).

[FN12] See Davis, 859 So.2d at 471 (noting that under Elstad, "a careful and thorough administration of Miranda warnings serves to cure the condition that made an unwarned statement inadmissible"); Ramirez, 739 So.2d at 574-75 (holding that postwarning statements had to be suppressed where officers employed a concerted effort to minimize and downplay the significance of the Miranda rights).

[FN13] Seibert, 542 U.S. at 615 (reviewing the following factors: "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 [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first"); see also Elstad, 470 U.S. at 310 ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.").

[FN14] See, e.g., Bevel v. State, 983 So.2d 505, 515-16 (Fla. 2008) (reviewing intelligence as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights); Chavez v. State, 832 So.2d 730, 750 (Fla. 2002) (reviewing defendant's understanding of the English language and noting that Miranda warnings were given in Spanish as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights); Ramirez, 739 So.2d

> at 576 (reviewing age and experience in criminal justice system as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights).

Ross, 35 Fla. L. Weekly at 301-302 [notes at 309] (A42-A43).

While the court identified the need to consider circumstances "such as the suspect's age, experience, intelligence, and language proficiency," the actual analysis conducted offered little concern for those traditional voluntariness factors. Conspicuously absent in the majority opinion below is any conclusion about the voluntariness of Ross's pre-warning custodial statements on January 9. The 64-page majority opinion devotes only a single sentence to these considerations, noting, "In addition, we also take into account that Ross was only twenty-one at the time with no indication of any prior experience with the criminal justice system." Ross, 35 Fla. L. Weekly at 304 (A64). This summary observation provides no support for any finding of coercion to defeat the trial court's finding that Ross entered a knowing, voluntary and intelligent waiver of his constitutional rights prior to confessing to having killed his parents.

Fundamentally, under Elstad, any analysis as to the voluntariness of statements produced after Miranda warnings are given midstream must begin with an analysis of the voluntariness of the initial,

pre-warning statements. As this Court has recognized, statements are not deemed to have been coerced simply because Miranda warnings were not given when required. "The Miranda exclusionary rule sweeps more broadly than the Fifth Amendment itself." Elstad, 470 U.S. at 306. In its opinion below, the Florida Supreme Court considered the initial statements to have been coerced just because they were unwarned. The court then analyzed whether this "coercion" carried over into the post-Miranda, warned statements. Finding that the warnings were "ineffective" because they were introduced as a matter of "procedure," the court then determined that the State failed to prove the voluntariness of the waiver, despite the absence of any actual coercion or confusion about the warnings as given. In doing so, the Florida court departed substantially from the proper analysis embodied in the holdings of Elstad and Seibert.

The Florida Supreme Court's decision in this case conflicts with this Court's precedents as to the proper assessment of the admissibility of voluntary statements following the administration of Miranda warnings during the course of a custodial interrogation. Consequently, certiorari review should be granted in this case.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner, the State of Florida respectfully requests that this Honorable Court GRANT this Petition for Writ of Certiorari.

Respectfully submitted,

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