No. 11-1318

In the Supreme Court of the United States

CECIL EDWARD ALFORD, PETITIONER

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Although the State has filed a brief in opposition, the facts it is required to admit make plain that review is needed to end widespread confusion about the meaning of the "booking exception" to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Like the Texas Court of Criminal Appeals, Pet. App. 18a, the State recognizes that "there is a substantial conflict among the lower courts' treatment of the booking exception," Opp. 4-5; accord *id.* at 5 (acknowledging "conflicting authorities"); *id.* at 9 (noting "conflict"), which has yielded three inconsistent tests. It concedes that this "split" (*id.* at 10) reflects "confusion in the lower courts" (*id.* at 26; accord *id.* at 18) about the meaning of the plurality opinion in *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990), which first recognized that answers to certain questions such as those seeking "biographical data necessary to complete booking or pretrial services" ordinarily may be admitted even if *Miranda* warnings were not administered. 496 U.S. at 601 (opinion of Brennan, J.) (internal quotation marks omitted). And it tacitly agrees that this state of affairs is unsustainable, where courts like the one below use a standard that permits unwarned questioning that is "highly likely to be incriminating," Opp. 6, while others suppress answers to such questions on *Miranda* grounds, a standard that the State claims is "unworkable." *Id.* at 23. "[M]uch of the confusion among the lower courts could be resolved," the State concedes, if this Court granted review. *Id.* at 10

Texas nonetheless contends that the petition should be denied because "this case is not *ideally* suited for review and * * * the opinion below was correctly decided." Opp. 9 (emphasis added). But the

State's strained efforts to defend the decision below starkly demonstrate that the "should have known" rule most faithfully implements *Muniz* and *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). And the State's claimed vehicle problems do not survive even casual scrutiny. Further review is warranted.

A. Only This Court's Review Will Resolve The Acknowledged Three-Way Split

As the Texas Court of Criminal Appeals observed, Pet. App. 21a-26a, the federal courts of appeals and state courts of last resort have adopted three inconsistent approaches to determining when the booking exception applies, which look to whether (1) the officer intended to elicit incriminating information (the subjective "intent" test); (2) the officer should have known that the question would likely yield incriminating information (the objective "should have known" test); or (3) the question is reasonably related to a legitimate administrative function (the "legitimate administrative function" test).

Texas agrees there is a three-way split, Opp. 4-5, but claims some of the courts petitioner identified as having adopted the "should have known" and "intent" tests are (or "seem[] to" be) "legitimate administrative function" jurisdictions. *Id.* at 5-9. But the State does not dispute the petition's classification of the vast majority of jurisdictions, and its quibbling about the precise lines on which the courts have divided (which in any event is largely mistaken[1]) does not diminish

[1] For example, *State* v. *Walton*, 41 S.W.3d 75 (Tenn. 2001), cited at Opp. 5, explained that answers to routine questions are admissible unless the questions were "either intended or reasonably likely to elicit incriminating information." 41 S.W.3d at

the deep and intractable divisions. Indeed, because the State's uncertainty about the division of authority reflects the "confusing" (*id*. at 6, 7) and "unclear" (*id.* at 8) case law and "confusion" (*id.* at 26; *id.* at 18) about the meaning of *Muniz*, it underscores the urgent need for further guidance. This uncertainty per-

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84 n.6 (citing *State* v. *Cobb*, 539 P.2d 1140 (Or. Ct. App. 1975), and *Muniz*, 496 U.S. at 602 n.14). *Ares* v. *State*, 937 A.2d 127 (Del. 2007), looked to whether the officer "should have known that his question was likely to elicit an incriminating response," *id*. at 131, and relied on a Second Circuit case that did the same. *Id.* n.10 (citing *Rosa* v. *McCray*, 396 F.3d 210, 222 (2d Cir. 2005)). And *United States* v. *Pacheco-Lopez*, 531 F.3d 420 (6th Cir. 2008), see Opp. 5, explained that under the booking exception, "'[e]ven a relatively innocuous series of questions may * * * be reasonably likely to elicit an incriminating response.'" 531 F.3d at 424 (quoting *United States* v. *Avery*, 717 F.2d 1020, 1025 (6th Cir. 1983)).

The unpublished opinions respondent cites (Opp. 7) do not undercut the Fourth Circuit's prior adoption of an intent standard. *United States* v. *D'Anjou*, 16 F.3d 604, 608-09 (4th Cir. 1994) (booking "exception does not apply to questions, even during booking, that are designed to elicit incriminatory admissions"). The Eleventh Circuit did not "*sub silentio*" depart from the "intent" test adopted in *United States* v. *Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991), see Opp. 8; the two-sentence discussion in *United States* v. *Doe*, 661 F.3d 550 (11th Cir. 2011), does not mention the "legitimate administrative function" test but does quote *Sweeting*. *Id.* at 567.

While State v. *Bryant*, 624 N.W.2d 865, 870-71 (Wis. Ct. App.), is a court of appeals decision, it provides a useful interpretive gloss on *State* v. *Stevens*, 511 N.W.2d 591 (Wis. 1994), overruled on other grounds by *Richards* v. *Wisconsin*, 520 U.S. 385 (1997), where the court suppressed a statement although "it [was] impossible to determine the officer's intent from the record" because the questions "*may have been* intended to elicit incriminating responses," suggesting use of the "should have known" test. *Id*. at 599 (emphasis added).

sists, as the Texas Court of Criminal Appeals noted, because this "Court has provided no definitive guidance on the scope of the exception." Pet. App.14a.

The State's contention that the booking exception arises only rarely (Opp. 9 n.3) is fanciful. The State's peculiar focus on the relative scarcity of published Texas cases "since December 2010," *ibid.*, conveniently overlooks legions of cases in Texas state courts during the preceding five years,[2] to say nothing of recent decisions of other state courts and the federal courts of appeals.[3] Every day in this country, police arrest and book individuals and subject them to pre-*Miranda* questions that are evaluated under a hodgepodge of standards. See Charles D. Weisselberg, *Mourning* Miranda, 96 Cal. L. Rev. 1519, 1558-

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[2] *E.g.*, *Smith* v. *State*, No. 01-09-263-CR, 2010 WL 3928585 (Tex. App. Oct. 7, 2010); *Campbell* v. *State,* No. 04-08-193-CR, 2009 WL 2265472 (Tex. App. July 29, 2009); *Faulk* v. *State*, No. 07-07-353-CR, 2009 WL 435398 (Tex. App. Feb. 23, 2009); *Jackson* v. *State,* No. 05-07-783-CR, 2009 WL 264630 (Tex. App. Feb. 5, 2009); *Donnell* v. *State*, No. 05-05-1445-CR, 2008 WL 73398 (Tex. App. Jan. 8, 2008); *Ramirez* v. *State*, No. AP-75167, 2007 WL 4375936 (Tex. Crim. App. Dec. 12, 2007); *Pierce* v. *State*, 234 S.W.3d 265 (Tex. App. 2007); *Bradley* v. *State*, No. 12-05-24-CR, 2006 WL 1420399 (Tex. App. May 24, 2006); *Schreyer* v. *State*, No. 05-03-1127-CR, 2005 WL 1793193 (Tex. App. July 29, 2005); *Flores* v. *State*, No. 05-03-1429-CR, 2005 WL 675329 (Tex. App. Mar. 24, 2005).

[3] See, *e.g.*, *United States* v. *Knope*, 655 F.3d 647, 652 (7th Cir. 2011); *United States* v. *Brotemarkle*, 449 Fed. App'x 893 (11th Cir. 2011) (per curiam); *Doe*, 661 F.3d at 567; *United States* v. *Thomas*, 381 Fed. App'x 495 (6th Cir. 2010); *Watson* v. *United States*, 43 A.3d 276 (D.C. 2012); *State* v. *Ortiz*, 346 S.W.3d 127 (Tex. App. 2011); *State* v. *Pugh*, 784 N.W.2d 183 (Wis. Ct. App. 2010); *Prioleau* v. *State*, 984 A.2d 851 (Md. 2009); *Ares*, 937 A.2d at 130.

1559 (2008). There is no question that this issue is recurring and that resolution is needed.

B. The Decision Below Is Wrong

Texas labors for *thirty pages* (Opp. 11-41) to demonstrate that the "legitimate administrative function" test adopted by just two of the 28 jurisdictions to have addressed the question is the only standard consistent "with the holdings in *Innis*, *Muniz*, *and* [*South Dakota* v.] *Neville,*" 459 U.S. 553 (1983). *Id.* at 11. Even if the State were correct, that would only underscore the importance of immediate review to correct the 17 jurisdictions that have adopted the "should have known" test, see Pet. 10, which respondent maintains "conflicts with the holdings" of this Court, Opp. 11, and "presents police with an extraordinary challenge." *Id.* at 24. But the State is plainly wrong.

Muniz confirmed that questions asked during booking constitute "custodial interrogation," 496 U.S. at 601 (opinion of Brennan, J.), but a plurality went on to recognize a narrow exception to *Miranda* for "routine booking question[s]" that "secure the *biographical* data necessary to complete booking or pretrial services." 496 U.S. at 601 (opinion of Brennan, J.) (internal quotation marks omitted; emphasis added). The plurality made clear that the booking exception does not extend to questions that are designed to elicit incriminatory admissions." *Id.* at 602 n.14 (opinion of Brennan, J.) (internal quotation marks omitted). As noted in our petition, Pet. 18-19, the *Muniz* plurality supported its conclusion by citing three court of appeals decisions that together indicated that questioning "designed to elicit incriminating

admissions," 496 U.S. at 602 n.14, includes not only questions subjectively *intended* to induce incriminating responses, but also those which are "reasonably likely" to do so. See *ibid.* (citing *United States* v. *Avery*, 717 F.2d 1020, 1025 (6th Cir. 1983) (booking exception does not include questions "reasonably likely to elicit an incriminating response"); *United States* v. *Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983) (if questions are "reasonably likely to elicit an incriminating response, the [booking] exception does not apply")).[4] That conclusion was confirmed by a majority of the *Muniz* Court: In determining whether a question "'attendant to' [a] legitimate police procedure" required warnings, the Court inquired whether it was "likely to be perceived as calling for an[] incriminating response." 496 U.S. at 605 (discussing "inquir[y]" into whether suspect "wished to submit to [an alcohol] test"). This Court has confirmed that understanding in recent years through a host of decisions that have adopted objective tests for other *Miranda* exceptions. Pet. 19-20 (collecting authorities).

Texas argues (Opp. 11-20) that the "should have known" test *cannot* be correct because it is inconsistent with the questions approved in *Muniz* and *Neville*. But the questions approved in *Muniz*—the arrestee's "name, address, height, weight, eye color, date of birth, and current age"—sought only the most basic "biographical data" (*Muniz*, 496 U.S. at 601 (opinion of Brennan, J.)) and thus were not likely to

[4] Although the State criticizes this reading as "arbitrar[y]," Opp. 29 n.10, it concedes that lower courts have widely embraced this interpretation, *id.*at 26, and offers no reason the plurality would cite *Avery* and *Mata-Abundiz* if not to express approval of the standard they employed.

incriminate. Although Muniz's *manner* of responding revealed he was intoxicated, a majority of this Court held that "any slurring of speech" "constitute[d] non-testimonial components of those responses" and "[r]equiring a suspect to reveal the physical manner in which he articulates words * * * does not, without more, compel him to provide a 'testimonial' response for purposes of the [Fifth Amendment] privilege." 496 U.S. at 592.

Neville is inapposite; it involved not the booking exception—the defendant there had been advised of his *Miranda* rights, see 459 U.S. at 555—but whether a person must be warned that his refusal to take a blood-alcohol test could be used against him at trial. Because Texas believes that "a police inquiry whether the suspect will take a blood-alcohol test" is inherently incriminating, it contends that *Neville*'s statement that such inquiry "is not an interrogation" supports its conclusion that the "legitimate administrative function" test governs the booking exception. Opp. 14-15 (quoting 459 U.S. at 564 n.15). But because a majority of this Court explicitly concluded that asking whether a suspect "wishe[s] to submit to [an alcohol] test" is "not likely to be perceived as calling for any incriminating response," *Muniz*, 496 U.S. at 605, *Neville*'s language is consistent with the "should have known test."

Respondent next claims that the "should have known" test is "contrary to the rationale of the booking exception," which is "to allow police * * * to run a jail without having to worry about *Miranda* issues." Opp. 20. But as *Neville* itself demonstrates, 459 U.S. at 555, the simplest way of "run[ning] a jail without

having to worry about *Miranda* issues" is to provide timely warnings. "The police are already well accustomed to giving *Miranda* warnings to persons taken into custody. Adherence to the principle that all suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes," *Berkemer* v. *McCarty*, 468 U.S. 420, 434 (1984), much less to obtain "biographical data" for administrative purposes.

The State contends that experience in jurisdictions that have adopted the "should have known" test show that it is "unworkable." Opp. 23. But though the test has been used for decades, the State cannot produce evidence of overturned convictions or unadministerable jails. Instead it asserts that courts in those jurisdictions must "distort[] the definition of 'incriminating' in order to preserve a semblance of the booking exception." *Id.* at 24. But the cases cited stand for the unremarkable proposition that officers should be aware that a question could be incriminating when "'the requested information is * * * *clearly and directly linked to the suspected offense*.'" Opp. 24 (quoting *United States* v. *Reyes*, 225 F.3d 71, 76-77 (1st Cir. 2000)). Far from being a "distortion," that uncontroversial conclusion follows directly from *Innis*.

Indeed, the "should have known" test is more readily administered than the test adopted below because it incorporates the *Innis* standard that respondent admits has long governed "all police words or actions with an arrestee." *Id.* at 34. Using this familiar standard to determine the scope of the booking exception thus *directly advances* "the goal of hav-

ing clear, uniform rules in the *Miranda* context." *Id.* at 24. By contrast, the "legitimate administrative function" test requires police to apply a novel test involving unfamiliar judgments about what administrative purposes are "legitimate" in the jail context. And as the brief in opposition (perhaps inadvertently) makes clear, because the "should have known" test is objective and "'extend[s] only to words or actions * * * that [police] should have known were reasonably likely to elicit an incriminating response,'" it does not require police to "be held accountable for the unforeseeable results of their words or actions." *Id.* at 38 (quoting *Innis*, 446 U.S. at 301-302).

C. The Issue Is Important

There can be little question that this issue is an important one. The standard for deciding whether a question comes within the booking exception is frequently outcome-determinative. As Texas candidly states, "virtually no criminal defendant would win [a suppression motion] under an intent test," Opp. 11 n.4, while the "legitimate administrative function" test would deem questions to come within the booking exception even if they were "highly likely to be incriminating." *Id.* at 6. By contrast, the "should have known" test would subject to suppression those unwarned inquiries where an inculpatory response is reasonably foreseeable. Thus, the question is of unquestionable importance in criminal prosecutions.

D. No Vehicle Problem Would Prevent Resolution Of This Issue

As noted in our petition, Pet. 24, this case squarely presents a single issue that has been thoroughly

litigated and decided in the courts below. Far from disputing that fact, the State observes that "[t]he [Court of Criminal Appeals'] opinion represents one of the most thoughtful examinations of the booking exception in many years." Opp. 10.

Respondent nonetheless contends that this case presents a "less than ideal" vehicle in which to address the *Miranda* booking exception, *ibid.*, arguing that because petitioner did not assert that Officer Ramirez intended to elicit incriminating admissions, Pet. App. 28a n.27, "not all of the booking exception theories remain live issues." Opp. 10. Not so; indeed, this case is a particularly good vehicle *because* the facts are undisputed. Opp. 1. To begin with, as respondent notes (*id.* at 32), *Muniz* and *Innis* already establish that the booking exception does not apply when an officer has a subjective intent to elicit incriminating information. *Innis*, 446 U.S. at 301 n.7; *Muniz*, 496 U.S. at 602 n.14. Second, petitioner does not have to assert that he is entitled to relief under each of the three tests to permit the Court to consider the full range of alternative approaches to the booking exception; the Court would be free to adopt the "intent" test as the sole determinant of the applicability of the booking exception and resolve the case accordingly. Although the court below did not consider that test's application here, its application to the facts of this case would be straightforward,[5] and this Court would have the benefit of the views of the numerous

[5] Indeed, as respondent candidly notes, "virtually no criminal defendant would win under an intent test, who has not already won under a should-have-known test." Opp. 11 n.4. Accordingly, the court's failure to address its application here was inconsequential.

other courts that have fully discussed that theory under a wide variety of circumstances. There is therefore no reason to perpetuate the current state of confusion and uncertainty.

Finally, the State belatedly—and half-heartedly—suggests that "there is *some reason* to believe that Petitioner was, in fact, given *Miranda* warnings." Opp. 4 (emphasis added). But the State waived that argument by not asserting it below. Rather, it litigated the case on the theory that Officer Ramirez's questioning came within the booking exception, see Tex. Ct. Crim. App. Br.; Tex. Ct. Crim. App. Surreply Br.; Tex. Ct. App. Br., and that is the basis on which the courts below ruled. The State's thirteenth-hour assertion provides no basis for withholding review.

Despite its strained efforts, Texas is unable to identify any reason this Court should not decide a question that plainly is important and recurring and that has left the lower courts divided and confused. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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