No. 17-425

In The
Supreme Court of the United States

SHAWN WILLIAM WASS,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LAWRENCE G. WASDEN
Attorney General of Idaho

PAUL R. PANTHER
Chief, Criminal Law Division

KENNETH K. JORGENSEN*
JOHN C. MCKINNEY
Deputy Attorneys General
CRIMINAL LAW DIVISION
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400
ken.jorgensen@ag.idaho.gov
Attorneys for Respondent

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Did the Idaho Supreme Court err in holding that the four-justice plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004), was not controlling?

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INTRODUCTION

Shawn William Wass petitions this Court for a writ of certiorari, seeking review of the Idaho Supreme Court's application of the rule in *Marks v. United States*, 430 U.S. 188, 193 (1977) (the holding of a fragmented court is the position taken by justices who concurred "on the narrowest grounds"), to discern the holding from the fragmented opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004). The Idaho court concluded that the narrowest holding in *Seibert* was Justice Kennedy's concurring opinion and not Justice Souter's plurality opinion. Pet. App. 14a. The court reasoned that, because Justice Kennedy would apply the standard in *Oregon v. Elstad*, 470 U.S. 298 (1985), where, like here, the officer did not engage in a two-stage interrogation tactic to undermine the efficacy of the *Miranda* warnings, the test announced in *Elstad*, and not that announced by the four-justice plurality in *Seibert*, controlled. Pet. App. 14a-15a.

In so applying *Marks* to *Seibert* the Idaho Supreme Court joined the overwhelming majority of federal courts of appeals and state courts (26 in all) that have reached the same conclusion. Although a few courts have applied the *Seibert* plurality opinion in all instances where *Miranda* warnings are given after an unwarned statement is obtained, no court has found the *Seibert* plurality to be controlling under the *Marks* "narrowest grounds" standard.

A few courts have concluded that no opinion in *Seibert* is controlling but decided that the plurality is

more persuasive. But if those courts are correct that *Seibert* produced no binding precedent, the Idaho Supreme Court's decision to apply *Elstad* instead of the non-binding *Seibert* plurality cannot be said to be error. A few other courts adopted the *Seibert* plurality without even mentioning the *Marks* narrowest-ground test. Only one court has applied *Marks* and found the *Seibert* plurality controlling. There is no reason to grant review here because of one outlier opinion.

STATEMENT OF THE CASE

1. Officer Drake approached Wass, who was standing behind a car in a closed sportsman's access. Pet. App. 2a. Wass verbally identified himself and, in response to the officer's questions, denied there was anything illegal in the car. Id. Using his mobile computer, Officer Drake learned Wass was wanted on two outstanding warrants. Pet. App. 2a-3a. Officer Drake informed Wass of the warrants and "placed him in wrist restraints." Pet. App. 3a. "Officer Drake again asked Wass if there was anything illegal in Wass' vehicle. This time Wass admitted that there were syringes in the vehicle. At the time of this admission, Wass had not been informed of his *Miranda* rights." Id. Officer Drake "immediately realized" that by asking a question without *Miranda* warnings he had made "a mistake." Id.

Officer Drake then placed Wass in his police car and visually inspected Wass' car without entering it,

but saw no contraband. Id. After "approximately two minutes" Officer Drake returned to his police car and informed Wass of his *Miranda* rights. Id. Wass stated he understood his rights. Id. "Officer Drake then asked Wass if, with those rights in mind, Wass still wanted to tell him about anything illegal in Wass' vehicle. Wass again stated that there were syringes in the vehicle." Id. Officer Drake then searched Wass' vehicle and found contraband, including a syringe with methamphetamine in it. Pet. App. 3a-4a.

2. The State of Idaho charged Wass with possession of a controlled substance (methamphetamine). Pet. App. 4a. Prior to trial, Wass filed a motion to suppress all admissions and confessions made to law enforcement and all evidence seized from the vehicle on the basis of an alleged violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Pet. App. 4a. The trial court denied Wass' suppression motion, ruling that the officer did not "'tactically'" obtain a pre-*Miranda* confession, did not "'coerce'" the confession and did not use improper tactics to obtain the confession, and therefore the subsequent *Miranda* warnings and waiver were sufficient to "'cure the failure to administer [the warnings] the first time.'" Pet. App. 4a-5a (quoting the district court opinion).

Pursuant to a plea agreement, Wass entered a conditional guilty plea to possession of a controlled substance (methamphetamine), reserving the right to appeal the denial of his suppression motion. Pet. App. 5a.

3. On appeal, the Idaho Supreme Court affirmed Wass' conviction against the claim that the trial court erred in denying his motion to suppress his post-*Miranda* statement. The Idaho Supreme Court reviewed this Court's seminal "question-first" decisions in *Elstad*, 470 U.S. 298, and *Seibert*, 542 U.S. 600. To discern the holding in *Seibert*, where there was no clear majority, the Idaho Supreme Court applied the rule set forth in *Marks*, 430 U.S. 188, and determined that Justice Kennedy's concurrence represents the holding of the Court because it was the "position taken by those Members who concurred in the judgments on the narrowest grounds." Pet. App. 14a (quoting *Marks*, 430 U.S. at 193).

Utilizing Justice Kennedy's concurring opinion as the holding of *Seibert*, the Idaho Supreme Court explained that *Seibert* did not apply to Wass' case because (1) there was no evidence presented to the trial court indicating that the officer's "use of a two-stage interrogation technique" was intentionally done "as a tactic to induce a confession[,]" and (2) "all of the evidence presented to the [trial] court indicates that Officer Drake made a mistake questioning Wass before giving him his *Miranda* rights, realized his mistake, and immediately attempted to correct his mistake by giving Wass his *Miranda* warnings and questioning him again." Pet. App. 14a-15a. Because *Seibert* did not apply under the facts of the case, the *Elstad* standard applied and the statements were not suppressible. Pet. App. 15a.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to review the Idaho Supreme Court's decision in this case. The Idaho Supreme Court's ruling was correct under both of the common methods of applying the *Marks* "narrowest grounds" test. Although a small minority of courts have applied the *Seibert* plurality to cases involving non-deliberate successive interrogations, none of those courts has articulated a basis for finding that opinion controlling under *Marks*. There is no need to correct the one outlier decision holding the *Seibert* plurality controlling under *Marks* in this case. Nor is there any need to hold the case pending the disposition of *Hughes v. United States*, No. 17-155 (cert. granted Dec. 8, 2017), which presents the question of how *Marks* applies "where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other." *Id*. at i.

I. This Case Comes Out The Same – *Elstad* Controls – Under Both Ways Of Applying The *Marks* Rule

The Idaho Supreme Court applied the *Marks* rule to this Court's fractured opinion in *Seibert*. Pet. App. 8a-14a. It concluded that Justice Kennedy's concurrence, which would apply the holding of *Elstad* except where officers employ an "intentional tactic to induce a confession," was "the more narrow holding" and therefore controlling. Pet. App. 14a. Because the facts of this case did not involve use of an intentional tactic to induce a confession, "*Seibert* does not apply to

this case" and "*Elstad* governs our analysis." Pet. App. 14a-15a. Wass "did not contend" that his confession was involuntary under *Elstad*, and therefore the district court correctly denied the motion to suppress. Pet. App. 15a. That holding faithfully applied *Marks* to *Seibert*.

Courts have taken two approaches to what constitutes the narrowest opinion under *Marks*, with some courts focusing on the "*reasoning*" of separate non-majority opinions and others focusing on the "ultimate *results*." *See* Pet. at 25 (quotations omitted, emphasis in original). *See also* Pet. for Writ of Cert. 12-16, *Hughes*, *supra*, No. 17-155. Under neither the "reasoning" nor "results" analyses of the "narrowest grounds" standard is the *Seibert* plurality opinion controlling. Rather, under either standard the Idaho Supreme Court properly applied *Elstad* instead of the four-justice plurality in *Seibert* on the facts of this case.

A. The Fractured Opinion In *Seibert*

This Court first addressed the question of obtaining a *Miranda* waiver and statement after a prior unwarned statement in *Oregon v. Elstad*, 470 U.S. 298 (1985). The Court stated that it "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." *Id*. at 314. The Court explained that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice

to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.* at 314. The Court then held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id*. at 318.

Almost 20 years later, in *Seibert*, the Court revisited the question of whether statements made after *Miranda* warnings may be suppressed on the basis of a prior *Miranda* violation. Justice Souter's plurality opinion, joined in by Justices Stevens, Ginsburg and Breyer, started with the "threshold issue" of whether the warnings "could function 'effectively' as *Miranda* requires" when police use a "question first and warn later" tactic. *Seibert*, 542 U.S. at 611-612. The plurality concluded, "[b]ecause the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible." *Id*. at 617. According to the plurality, the facts which differentiated the effectiveness of midstream *Miranda* warnings in *Elstad* from *Seibert* were "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the

timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id*. at 615.

Concurring in the judgment in *Seibert*, Justice Kennedy explained, "[t]he plurality concludes that *whenever* a two-stage interview occurs, admissibility of the postwarning statement should depend on 'whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object' given the specific facts of the case." *Id.* at 621 (quoting *id*. at 615) (emphasis added). Justice Kennedy took a more limited view, stating that the plurality's test "cuts too broadly" and would undermine "*Miranda's* clarity." *Id.* at 622. He would "apply a narrower test" applicable only where "the two-stage interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.* "[U]nless the deliberate two-stage strategy has been employed," the admissibility of post-warning statements "should continue to be governed by the principles of *Elstad*." *Id*.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented, concluding that the two-stage interrogation procedure should be analyzed "under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad*[,]" but agreeing with the plurality in rejecting Justice Kennedy's "intent-based test" of whether "the use of the 'two-stage interrogation technique' was 'deliberate' or 'calculated.'" *Id*. at 624, 626-627.

This review shows that both the four-Justice plurality and the four-Justice dissent presented opinions applicable in all "two-stage interrogation" cases. The plurality would, in all cases with a prior unwarned statement, apply an effectiveness test as a "threshold" inquiry, before applying the *Elstad* standard. The dissenting justices would have in all such cases directly applied the *Elstad* standard. In Justice Kennedy's opinion the admissibility of post-warning statements would continue to be governed by the principles of *Elstad* unless a deliberate two-stage strategy has been employed.

B. Under The "Results" Standard, *Elstad* Applies To Cases Where The Officer Did Not Engage In A Deliberate Two-Stage Interrogation Tactic

Where, as here, there was no deliberate two-stage tactic employed by the police, five of the Justices in *Seibert* (the dissent and Justice Kennedy) believed the *Elstad* opinion would solely control. Application of the "results" test does not require detailed legal analysis; it requires a court to count to five. The Idaho Supreme Court correctly applied the "results" standard when it concluded that Justice Kennedy's test would control in cases such as this one.

Wass, relying on a dissenting opinion, contends that the Idaho Supreme Court misapplied the results test because " 'there are likely to be cases where relief would be granted under Justice Kennedy's test but not

the plurality's test.'" Pet. 27-28 (quoting *Reyes v. Lewis*, 833 F.3d 1001, 1008 (9th Cir. 2016) (Callahan, J., dissenting from rehearing *en banc*)). This analysis misses the point. Even assuming the underlying premise that Justice Kennedy announced a different standard (focused on "curative measures") than the plurality's standard (focused on "effectiveness"), and assuming there are hypothetical facts where these different standards could lead to different outcomes, that difference only matters when officers deliberately employed a two-step interrogation technique. Where, as here, officers did *not* deliberately employ that technique, five Justices in *Seibert* would hold that the applicable standard is *Elstad*.[1]

For this reason, the appellate courts that have applied a results-based narrowest-grounds standard have universally concluded that Justice Kennedy's opinion is narrower and, therefore, controls. *See United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007); *United States v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2006); *United States v. Mashburn*, 406 F.3d 303, 308-309 (4th Cir. 2005); *United States v. Nunez-Sanchez*,

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[1] The United States has noted that "it is difficult to identify actual litigated fact patterns in which the police harbor a subjective intent to undermine *Miranda*, as Justice Kennedy would require, but where the second warned statement would be admissible under the plurality's 'effective warnings' approach but not Justice Kennedy's 'curative measures' approach." Br. in Opp. at 16, *Hill v. United States*, No. 09-740 (Apr. 2, 2010). In any event, this case does not involve a deliberate two-step interrogation. Whether or not five Justices agreed upon a test for *that* set of cases is irrelevant.

478 F.3d 663, 668 n.1 (5th Cir. 2007); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157-1158 (9th Cir. 2006); *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006); *White v. State*, 179 So.3d 170, 191 (Ala. Crim. App. 2013); *State v. Zamora*, 202 P.3d 528, 535 (Ariz. Ct. App. 2009); *Jackson v. State*, 427 S.W.3d 607, 616-617 (Ark. 2013); *People v. Camino*, 116 Cal. Rptr. 3d 173, 182 (Cal. Ct. App. 2010); *Ross v. State*, 45 So.3d 403, 422 (Fla. 2010); *People v. Lopez*, 892 N.E.2d 1047, 1069 (Ill. 2008); *State v. Gomez*, 820 N.W.2d 158, 2012 WL 2122266, at *8 (Iowa Ct. App. 2012) (unpublished); *Jackson v. Commonwealth*, 187 S.W.3d 300, 309 (Ky. 2006) (quoting *Callihan v. Commonwealth*, 142 S.W.3d 123, 125-126 (Ky. 2004)); *State v. Bruce*, 169 So.3d 671, 678 (La. Ct. App. 2015); *People v. Bush*, No. 330077, 2017 WL 2797758, at *15 (Mich. Ct. App. June 27, 2017) (unpublished); *State v. Nightingale*, 58 A.3d 1057, 1067 (Me. 2012); *Robinson v. State*, 19 A.3d 952, 964 (Md. 2011); *State v. Gaw*, 285 S.W.3d 318, 323-324 (Mo. 2009); *Pueblo v. Millan Pacheco*, 182 D.P.R. 595, 634-635 (P.R. 2011); *Martinez v. State*, 272 S.W.3d 615, 626 (Tex. Crim. App. 2008); *State v. Fleurie*, 968 A.2d 326, 332-333 (Vt. 2008); *Kuhen v. Com.*, 733 S.E.2d 667, 672-673 (Va. Ct. App. 2012); *State v. Rhoden*, 356 P.3d 242, 246 (Wash. Ct. App. 2015).

C. Under The "Reasoning" Approach, No Opinion In *Seibert* Is Controlling, Which Leaves *Elstad* As Governing Precedent

The State of Idaho does not dispute that if the "reasoning" standard controls, Justice Kennedy's reasoning did not garner five votes. Whether this standard is the right one is likely to be decided by this Court in *Hughes*, *supra*. But even if this standard governs lower courts, it would lead to the same outcome as the "results" test when applied to *Seibert*. Wass does not contend, and no court has held, that the *Seibert* plurality's reasoning was accepted by five Justices – particularly as applied to cases where police did not deliberately use a two-stage interrogation technique. Under the reasoning test, then, *Seibert* did not produce a controlling opinion. That leaves *Elstad* as the only controlling opinion from this Court on warned statements that follow unwarned statements.

The Idaho Supreme Court therefore did not err by applying *Elstad* here. Resolution of the conflict over how *Marks* applies would not affect the outcome of this case.

II. The Asserted Conflict Among The Lower Courts Does Not Justify Review Of The Idaho Supreme Court's Ruling

At least 26 courts, including the Idaho Supreme Court, have applied this Court's standards for interpreting a fractured opinion and concluded that Justice Kennedy's concurrence represents the holding in

Seibert. This means, as the Idaho Supreme Court concluded, that *Elstad* controls the analysis in two-stage interrogations unless officers have deliberately withheld *Miranda* warnings in a tactical manner. A few courts have instead applied the *Seibert* plurality when assessing the validity of a warned confession that followed a non-deliberate unwarned confession. The existence of those decisions does not warrant this Court's review of the Idaho Supreme Court's straightforward and correct application of *Marks* to *Seibert*. Only one state high court or federal court of appeals has applied *Marks* and concluded that the *Seibert* plurality controls in a case such as this one. None of the other decisions applying the *Seibert* plurality ruled that that opinion is controlling precedent under *Marks*. There is no reason to grant this certiorari to correct one outlier opinion.

1. Two courts applied the "reasoning" approach to *Marks*, decided there is no binding holding from *Seibert*, and then adopted the plurality because they deemed it more persuasive. In *United States v. Ray*, 803 F.3d 244, 270-273 (6th Cir. 2015), the Sixth Circuit concluded that because both the plurality and the dissent rejected Justice Kennedy's analysis, it did not represent the holding of the Court. That court also, however, rejected the premise that the plurality opinion was controlling. *Id.* Instead, the court stated that, because it was "left with a situation where the plurality and dissent each received only four votes, we conclude that *Seibert* did not announce a binding rule of law with respect to the admissibility standard for

statements given subsequent to midstream *Miranda* warnings." *Id.* at 272. The court adopted the plurality's effectiveness test because it found it more persuasive. *Id.* This same analysis was employed by the Connecticut Supreme Court in *State v. Donald*, 157 A.3d 1134, 1143 n.6 (Conn. 2017).

As discussed above, however, if *Seibert* did not produce a controlling opinion, *Elstad* remains the governing precedent from this Court on the issue – regardless of how persuasive a court may find one or another of the opinions in *Seibert*. In all events, these two courts – like the 26 courts on the Idaho Supreme Court's side – agree that the *Seibert* plurality is *not* binding precedent from this Court.

2. Three courts have applied the *Seibert* plurality but did not make any specific reference to or consideration of *Marks* or this Court's "narrowest ground" standard for discerning a holding from a fractured opinion. *See State v. Juranek*, 844 N.W.2d 791 (Neb. 2014) (distinguishing *Seibert* on its facts without mentioning Justice Kennedy's concurrence or *Marks*); *State v. Farris*, 849 N.E.2d 985 (Ohio 2006) (expressly rejecting Justice Kennedy's concurrence in *Seibert* but not applying *Marks*); *State v. Navy*, 688 S.E.2d 838 (S.C. 2010) (finding statements suppressible under both plurality and Justice Kennedy's concurrence, without applying *Marks*). It cannot be said that the Idaho Supreme Court's application of *Marks* conflicts with these courts' rulings when these courts did not mention or purport to apply *Marks*' narrowest-ground test.

Other considerations also diminish the significance of these courts' rulings. The Ohio Supreme Court's decision in *Farris* may well have been based on the Ohio Constitution. *See Farris*, 849 N.E.2d at 520-529 (noting that the Ohio Constitution "provides greater protection to criminal defendants" than the federal constitution, and stating that it "agrees with the *Seibert* plurality," not that it is bound by the plurality). The Nebraska Supreme Court in *Juranek* found the case "readily distinguishable from *Missouri v. Seibert*" based on facts making the warned statement admissible under both the plurality test and Justice Kennedy's test. 844 N.W.2d at 803-804. And the South Carolina Supreme Court in *Navy* rejected the state's contention that the officers acted in "good faith" – meaning the statement was plainly inadmissible under Justice Kennedy's test. 688 S.E.2d at 842. In short, neither the Nebraska nor South Carolina rulings turned on which test applied; and the Ohio ruling was arguably based on the state constitution.

3. That leaves the Georgia Supreme Court's decision in *State v. Pye*, 653 S.E.2d 450 (Ga. 2007). In *Pye*, the Georgia Supreme Court analyzed *Seibert* in a footnote. It concluded that Justice Kennedy's opinion did not control because the other Justices disagreed with his reasoning; and then it stated that it "will consider the analysis presented in the plurality opinion to be that mandated by the United States Supreme Court." *Id*. at 453 n.6. The court did not explain why a plurality opinion can impose a "mandate[]" or why *Elstad* did not control in the absence of a majority holding in

Seibert. For the reasons discussed in Section I, *supra*, the Georgia Supreme Court erred in holding that a plurality opinion controls instead of a prior majority ruling on the same topic. There is no reason to grant certiorari here because a different state high court, with little analysis, issued an outlier ruling.

4. Wass contends (Pet. 16) that three additional courts – the D.C. Court of Appeals and the Indiana and Vermont Supreme Courts – have held that the *Seibert* plurality controls but analysis of those decisions shows that the courts did not actually embrace the *Seibert* plurality. In *Hairston v. United States*, 905 A.2d 765, 778-782 (D.C. 2006), the D.C. Court of Appeals affirmed the district court, which had found suppression improper under both the *Seibert* plurality and "Justice Kennedy's narrower test." A year later, the D.C. Court of Appeals concluded that Justice Kennedy's concurrence was the narrowest opinion in *Seibert*, and thus controlling, and held "'that *Seibert*, rather than overruling *Elstad*, carved out an exception to [it] for cases in which a deliberate, two-stage strategy was used by law enforcement to obtain the postwarning confession.'" *Ford v. United States*, 931 A.2d 1045, 1052 (D.C. 2007) (brackets original, quoting *United States v. Carter*, 489 F.3d 528, 535 (2d Cir. 2007)).

In *Kelly v. State*, 997 N.E.2d 1045, 1054-1055 (Ind. 2013), the Indiana Supreme Court was concerned that the officers referred to Kelly's prior, un-*Mirandized* statement three times during the post-*Miranda* interview. These references "inevitably diluted the potency of the *Miranda* warning such that it was powerless to

cure the initial failure to warn, even if it was a good-faith mistake." *Id.* The court applied the "effectiveness" factors of the *Seibert* plurality and concluded that "a reasonable person in the suspect's shoes would not have understood [the *Miranda* warning] to convey a message that she retained a choice about continuing to talk." *Id*. The court further clarified that "Officers may still, under *Elstad*, cure a good-faith mistake by administering a proper warning before proceeding with further questioning" but held "that such a cure was impossible when it was followed by explicit references to a pre-warning incriminating statement." *Id*. at 1055.

By affirming that *Elstad*'s coercion test is the standard for judging good-faith mistakes, *vis-à-vis* the *Seibert* plurality's "effectiveness" test, the court in *Kelly* effectively embraced an analysis consistent with Justice Kennedy's concurring opinion in *Seibert*. *See Seibert*, 542 U.S. at 621-622 (Justice Kennedy concurring in the judgment) ("The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-stage interrogation technique was used in a calculated way to undermine the *Miranda* warning."). Applied to Wass' case – where there has never been an assertion that the officer's failure to initially give *Miranda* warnings was more than a mistake and the prior statement was not used in the warned interview to secure a confession – the analysis and holding of *Kelly* suggest application of the *Elstad* "voluntariness" (or "coercion") standard and an ultimate holding that Wass' post-*Miranda* statements are admissible – which is what the Idaho Supreme Court did in this case.

Wass also cites *State v. Brooks*, 70 A.3d 1014, 1019-1020 (Vt. 2013), as "adopting the plurality's test." Pet. 16. However, the Vermont Supreme Court actually applied the standard previously articulated by it in *State v. Fleurie*, 968 A.2d 326, 334 (Vt. 2008). In *Fleurie* the Vermont Supreme Court noted there "was no majority opinion in *Seibert*," applied the standard in *Marks*, and concluded that "[i]f warnings were not intentionally withheld, both Kennedy and the *Seibert* plurality would apply the *Elstad* framework." *Id.* at 332-333. Contrary to Wass' claim, therefore, Vermont applied *Marks* and reached the same conclusion as the Idaho Supreme Court.[2]

* * * * *

The Court granted certiorari in *Hughes v. United States* to resolve how *Marks* is applied to find the narrowest holding of a fragmented decision by this Court. And it is true that a few of the decisions applying the *Seibert* plurality did so through application of the "reasoning" test, which this Court in *Hughes* may reject or bless. But there is no reason to hold this petition

[2] Wass also notes that the Supreme Court of Oregon adopted the *Seibert* plurality under its state constitution and claims the court of appeals of Alaska has adopted the "plurality's test." Pet. 17 n.9. The former is irrelevant and in the latter the Alaska Court of Appeals found the statements suppressible under *both* the plurality and the dissent in *Seibert*. *Crawford v. State*, 100 P.3d 440, 450 (Alaska Ct. App. 2004) ("We further conclude that Crawford's post-*Miranda* statements must be suppressed even under the broader reading of *Elstad* advocated by the *Seibert* dissenters."). The Alaska court did, however, apparently conclude that the concurring opinions of Justices Kennedy and Breyer need not be applied. *Id.* at 448 n.24.

pending the outcome of *Hughes*. The plurality opinion in *Seibert* is not controlling under either the results or the reasoning test. To the contrary, *Elstad* controls under both tests in cases such as this where officers did not employ a question first, warn later strategy. The Idaho Supreme Court therefore did not err by concluding that *Elstad* was the controlling authority under the *Marks* analysis, and *Hughes* will not change that.

CONCLUSION

The State of Idaho respectfully requests this Court to deny Wass' Petition for Writ of Certiorari.

Respectfully submitted,

LAWRENCE G. WASDEN
Attorney General of Idaho

PAUL R. PANTHER
Chief, Criminal Law Division

KENNETH K. JORGENSEN*
JOHN C. MCKINNEY
Deputy Attorneys General
CRIMINAL LAW DIVISION
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400
ken.jorgensen@ag.idaho.gov
Attorneys for Respondent

**Counsel of Record*