No. 18-_____

IN THE
Supreme Court of the United States

ANTHONY CASANOVA
Petitioner,

v.

MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari
to the United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE A. PAGAC
(Counsel of Record)
STATE APPELLATE DEFENDER OFFICE
645 GRISWOLD, SUITE 3300
Detroit, MI 48226
(313) 256-9833

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QUESTION PRESENTED

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Casanova respectfully petitions that a writ of certiorari issue to review the judgment below. Before Petitioner Casanova's trial, the trial court denied a motion to suppress his confession. App. 38a – 39a. The highest state court to review the merits was the Michigan Court of Appeals, which affirmed in an unpublished decision issued February 27, 2018. App. 1a-5a. The Michigan Supreme Court denied Petitioner Casanova's application for leave to appeal in an order dated September 12, 2018. App. 6a.

STATEMENT OF JURISDICTION

Mr. Casanova seeks review of the September 12, 2018 judgment of the Michigan Supreme Court. App. 6a. 28 U.S.C. § 1257 grants this Court jurisdiction.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V

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

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Overview

Within hours of learning that his newborn son had died, Anthony Casanova was subjected to an intense, custodial interrogation by Detective Nanna, a twenty-year veteran with the Muskegon County Sheriff's Department. Detective Nanna did not read Mr. Casanova his *Miranda* rights until nearly three hours of interrogation had passed. After Mr. Casanova made incriminating admissions, the officer advised Mr. Casanova of his *Miranda* rights, then elicited the same incriminating statements. The prosecution buttressed these admissions with controversial medical testimony that went essentially unchallenged at trial.

Background

On October 26, 2012, Anthony Casanova's girlfriend, Julie Striker, gave birth to Tyler, their first child together. (T 9/24/14, 16) He and his ex-wife had previously adopted twin daughters, whom he continued to help raise. (T 9/24/14, 53) Mr. Casanova had previously been told he could not have children, so he was overjoyed with Tyler's birth. (T 9/24/14, 46)

About two months after Tyler was born, on January 4, 2013, Mr. Casanova began the day by rising at 3:30 a.m., then worked a half-day shift at a shipping company. (M 4/11/14, 35; T 9/24/14, 26) He left his shift early due to his back pain and fatigue, as he had only slept four hours the previous night. (T 9/24/14, 49; 9/23/14, 135)

Around 1:15 p.m., Ms. Striker went to work, leaving Tyler with Mr.

Casanova. (T 9/24/14, 26) When she arrived at work at 2:50 p.m., Ms. Striker received a text message photo from Mr. Casanova of Tyler asleep in his Pack N' Play. (T 9/24/14/, 30-31)

Around the same time, Tyler began to cry, so Mr. Casanova went over to his Pack N' Play and picked him up. (T 9/23/14, 163) He then walked over to the sliding doors to let the family dog outside. (T 9/23/14, 163) When the dog scratched at the door to be let in, Mr. Casanova opened the door while carrying Tyler in his right hand. (T 9/23/14, 163) The dog came through the door, went through Mr. Casanova's legs, then circled back around, causing Mr. Casanova to lose balance and drop Tyler as he fell. (T 9/23/14, 163) Mr. Casanova grabbed on to Tyler as he fell to try to prevent him from reaching the floor, but Tyler landed on the floor and hit the right side of his head. (Audio 15:38, 17:14; T 1/4/13,[1] 4, 5) Mr. Casanova fell on top of Tyler and crushed him under his weight. (Audio 17:14; T 1/4/13, 5; T 9/23/14, 163)

Tyler became unresponsive and Mr. Casanova immediately dialed 911. (T 9/23/14, 168) The paramedics were dispatched to the home around 3:59 p.m. (T 9/23/14, 175) When police arrived, they found Mr. Casanova on his hands and knees at Tyler's feet, crying hysterically. (T 9/23/14, 162, 182)

Immediately after Tyler's death, the police questioned a distraught Mr. Casanova and Ms. Striker at the hospital. (T 9/23/14, 171-172) Ms. Striker told the

[1] T 1/4/13 refers to an unofficial transcript of the police interrogation which resulted in Mr. Casanova's confession. This transcript was prepared by appellate defense counsel for the courts' convenience, and is included in the appendix at 7a-37a. At least one omission was identified in this transcript during the course of the post-conviction litigation, where Mr. Casanova told Detective Nanna around the 1:40:52 mark of the interrogation that he lied about dropping Tyler. (See EH 6/21/16, 56, 59-60)

officers that there had never been any incidents where Mr. Casanova might have handled Tyler roughly or assaulted him. (T 9/24/14, 51) The police asked Mr. Casanova to come to the station for further questioning. (M 4/11/14, 20)

The Interrogation

Mr. Casanova's brother took him to the police station and left him there at about 7:00 p.m., with the expectation that Mr. Casanova would call to be picked up. (T 9/25/14, 125) Detective Nanna questioned Mr. Casanova for nearly three hours in a small interview room, videotaping the entire interrogation. (T 9/24/14, 73) After hearing Mr. Casanova's initial description of the incident, Detective Nanna repeatedly told Mr. Casanova that he did not believe him. (Audio 18:50, 20:10, 20:43, 21:48, 22:15, 22:34, 22:50, 23:10, 23:52, 24:43, 25:14, 25:35, 36:12, 37:57; T 1/4/13 5-9)

Detective Nanna initially told Mr. Casanova he was not under arrest. (Audio 4:00; T 1/4/13, 1) Throughout the interrogation, Mr. Casanova repeatedly asked whether he would be allowed to go home; the detective consistently responded his ability to leave would depend on what Mr. Casanova told him. (Audio 40:27, 1:00:14, 1:02:50, 1:16:50, 1:19:50, 1:33:53; T 1/4/13, 10, 12, 15, 16, 19; M 4/11/14, 53)

Detective Nanna delayed Mr. Casanova's request to see Ms. Striker, prohibited Mr. Casanova from answering his phone, and confiscated the phone from him. (T 1/4/13, 21; M 4/11/14, 53) Detective Nanna also seized Mr. Casanova's jacket. (M 4/11/14, 53) He evaded Mr. Casanova's multiple requests to use the restroom, telling him to just "sit tight." (Audio 1:50-2:07; T 1/4/13, 21-24) When

Detective Nanna finally agreed to let Mr. Casanova use the restroom, he required that a police officer accompany him. (M 4/11/14, 53)

The detective repeatedly told Mr. Casanova that he needed to be consistent with what an autopsy would show. **(**Audio 20:10, 23:10, 37:57; T 1/4/13, 6-9) The detective also advised that the prosecutor was his "friend" (Audio 40:38, 42:23; T 1/4/13, 10); that the detective would talk to the prosecutor (T 1/4/13, 30); that the detective would "go to bat" for him (T 1/4/13, 18); and he told him countless times that he would "help" him. (T 1/4/13, 8, 10, 11, 14, 15-18)

After almost two hours of questioning without *Miranda* warnings, Mr. Casanova gave a new account of how Tyler died. He told Detective Nanna that he had been "sitting on the bed with [Tyler] and just kind of bouncing him off the bed. It's an air mattress." (Audio 1:43:30; T 1/4/13, 19-20) He told the detective that he did this "seven or eight times," after which Tyler fell unconscious. (Audio 1:46:10; T 1/4/13, 21) Detectives later corroborated that the surface of the air mattress was very hard when sat upon. (T 9/24/14, 93; T 9 25/14, 75)

Detective Nanna next told Mr. Casanova that he had just called the medical expert who reported that the injuries were not just from bouncing off the bed. (Audio 1:59:00; T 1/4/13, 23) When Mr. Casanova did not waver from this version of the events, the detective said he did not believe him because the injuries were not consistent with bouncing the child off of an air mattress. (Audio 1:59-2:00; T 1/4/13, 22-24) The detective said there was "no way" the injuries happened in the manner Mr. Casanova described (Audio 2:01; T 1/4/13, 24), and accused Mr. Casanova of

"sugarcoating" the incident. (Audio 2:04, T 1/4/13, 26)

As Mr. Casanova was being handcuffed, he asked Detective Nanna if he would still help him by speaking on his behalf to the prosecutor. (Audio 2:42:10; T 1/4/13, 27) Detective Nanna responded that he would, but told Mr. Casanova that he needed to be honest with him because "it's gonna show on the autopsy." Detective Nanna then began to question Mr. Casanova further, asking, "Is there anything else? I need to know now. I need to know or else it's going to look really bad for you." (Audio 2:42:22, T 1/4/13, 27)

At that point, Mr. Casanova told Detective Nanna that he might have also squeezed Tyler "a little bit too hard." (Audio 2:42:46; T 1/4/13, 28) Detective Nanna pursued this line of questioning further, telling Mr. Casanova to "sit down for a second." He asked Mr. Casanova a series of specific questions about when Mr. Casanova had squeezed the child, how the squeezing affected the child's breathing, and whether Mr. Casanova was standing or sitting on the bed when the squeezing occurred. (T 1/4/13, 28) Mr. Casanova stated, "I kind of picked him up because he was crying and I was like, please stop crying, please, I need some sleep. And I was squeezing him and that's when I started bouncing him hard off the bed." (Audio 2:43:20; T 1/4/13, 28) At that juncture, the detective delivered *Miranda* warnings. (Audio 2:43:20; T 1/4/13, 28)

Thereafter, Mr. Casanova repeated that he had squeezed Tyler twice and he "kinda lost his breath." (Audio 2:44:30; T 1/4/13, 28-29) He also repeated that he had bounced Tyler on the bed, with his back hitting the bed. (Audio 2:46:25; T 1/4/13, 29-

30)

Defense Motion to Exclude Confession

Mr. Casanova moved to exclude the confession. At a pre-trial motion hearing, the trial court held that while Mr. Casanova came to the police station voluntarily, "circumstances changed" at 7:32 on the audio recording, where Mr. Casanova repeatedly asked if he was going home and Detective Nanna said it depended on what he said during the interview. (M 4/11/14, 53-54) At that point, the court concluded, "a reasonable person… would not feel that they were free to terminate the interrogation and leave." (M 4/11/14, 54) The court reinforced that position with numerous other details including Detective Nanna's seizure of Mr. Casanova's phone and forbidding Mr. Casanova from speaking with his girlfriend. (M 4/11/14, 54) The court thereby suppressed Mr. Casanova's statements from the point at which he was in custody until Detective Nanna provided his *Miranda* warnings. (M 4/11/14, 55)

The court, however, denied Mr. Casanova's motion to suppress his statements made after Detective Nanna administered his *Miranda* warnings. (M 4/11/14, 57, 62; App 38 – 49a) The trial court reasoned for its decision:

> Throughout that interview he'd been talking about bouncing the child off a mattress or something to that effect. Now we move into actually squeezing the child too hard. So he's telling him something different, so there's nothing unequivocal about the statement no, that he wanted to somehow terminate the interrogation and also could be interpreted as no, I don't want to tell you the same thing I've been telling you, and that's important also in the context of what *Siebert* was concerned about, because *Siebert* was concerned about the situation. And

> again, I've seen those situations too, where the investigating officer takes a confession supposedly in a pre-custody setting, then give the *Miranda* warnings and the confession is essentially repeated. That is not what happened here. This Defendant gave a different story as to what transpired between he and the alleged victim after the *Miranda* warnings were given than before. And so the *Siebert* concerns aren't really manifest here as far as I'm concerned.
>
> * * *
>
> Now fortunately for my determination this has been preserved on an audio recording because after listening to the context of that conversation and the tone of voice the detective had when he abruptly stopped the process and gave *Miranda*, and the fact that he was standing up – actually it looked to me like the detective was putting on his coat and he was getting ready to go because he was going to go and execute this search warrant. So that evidenced to me there was no contemplation on the officers part that he was going to now take a post-*Miranda* repeat of a confession that was made pre-*Miranda*. He was going to leave, and when the Defendant started talking about the squeezing, the officer stopped and said, well, wait a minute, you know, I'm gonna give you *Miranda* now and then he did question him after that.
>
> So this appears to me, this business about not *Mirandizing* him or not giving him *Miranda* warnings . . . I don't think there was anything calculated about that, I don't think there was anything flagrant about that on the officers part, I don't think there was anything intentional on his part or anything done specifically to undermine the protections that are afforded by *Miranda*. (M 4/11/14 55-58)

Mr. Casanova filed an interlocutory appeal, challenging the trial court's refusal to suppress the entire confession, which the Michigan Court of Appeals denied. In light of the impending admission of portions of the confession, Mr.

Casanova sought to admit the entire confession, while still preserving his objection to its admission. (M 4/21/14; T 9/23/14, 6) At trial, the jury watched the entire videotape of the interrogation. (T 9/24/14, 91)

The State's Forensic Testimony

Forensic pathologist, Dr. Joyce DeJong conducted an autopsy on Tyler's body. She described Tyler's injuries, and opined that these injuries were not consistent with a short fall (T 9/25/14, 57); were not consistent with Mr. Casanova's explanation of falling on top of the baby (T 9/25/14, 57); and were inflicted rather than accidental (T 9/25/14, 20, 35-37). In fact, she said the entire pattern of injuries bore "the hallmarks of abusive inflicted injuries" (T 9/25/14, 31), and that "violent forces" caused the injuries. (T 9/25/14, 35) She stated that retinal hemorrhages are "almost exclusively seen in inflicted injuries." (T 9/25/14, 34) She added that the head injuries were acute, meaning that they had occurred on the date of Tyler's death. (T 9/25/14, 42)

Although Dr. DeJong conceded that Tyler's skull must have hit something "very hard," she did not rule out the possibility that the object it hit was an air mattress (T 9/25/14, 63), which was the prosecution's theory of how Mr. Casanova caused Tyler's death. Defense counsel failed to call a single expert witness to dispute the scientific basis for these conclusions and conceded in his closing argument that Dr. DeJong's testimony "was devastating for the Defense." (T 9/25/14, 143)

Mr. Casanova was convicted of first-degree felony murder, predicated on

first-degree child abuse. He was sentenced to life imprisonment without parole.

Motion to Remand and Motion for New Trial

Post-conviction, Mr. Casanova moved for remand on the grounds that his trial counsel was constitutionally ineffective for failing to investigate the validity of the prosecution's medical evidence and the supportability of Mr. Casanova's version, which prejudiced Mr. Casanova's defense. (Brief in Support of Motion to Remand, 2/28/16) After a protracted evidentiary hearing involving testimony from Mr. Casanova's trial attorney and four different expert witnesses (three from the defense and one from the prosecution), the trial court denied Mr. Casanova's Motion for New Trial.

Court of Appeals Opinion

The Michigan Court of Appeals affirmed Mr. Casanova's convictions. The court did not address whether the post-*Miranda* statements should have been suppressed, but simply held that any error in admitting Mr. Casanova's post-*Miranda* statements was harmless given the other evidence admitted, which the court stated "overwhelmingly established defendant's guilt." (3a)

The court further held Mr. Casanova's trial attorney did not perform deficiently since counsel consulted with an expert prior to trial. (5a) The Court of Appeals adopted the Circuit Court's opinion and order regarding deficient performance. (5a) The Court of Appeals did not address the prejudice prong of the trial court's *Strickland* analysis.

Michigan Supreme Court

On September 12, 2018, the Michigan Supreme Court denied Mr. Casanova's application for leave to appeal. (6a)

Reasons for Granting the Petition

This Court should grant the petition because it provides an opportunity to resolve the circuit split that exists following this Court's decision in *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), as to the appropriate test for determining when statements made after midstream *Miranda* warnings must be suppressed. Resolution of this issue is vital to preserving the Fifth Amendment right against self-incrimination.

The right against self-incrimination is guaranteed by the United States Constitution. U.S. Const., Am. V. Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily waives that right. *Miranda v. Arizona*, 384 U.S. 436, 444; 86 S.Ct. 1602; 16 L.Ed. 2d 694 (1966). The Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. *Id.* at 479.

More than thirty years ago, in *Oregon v. Elstad,* this Court considered the efficacy of *Miranda* warnings administered after a suspect had already been questioned without first being properly advised of his *Miranda* rights. *Oregon v.* Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). This Court held, "[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." *Id.* at 314.

In that case, the police suspected that 18-year-old Elstad had committed a robbery, and arrived at his home with a warrant. After allowing him to dress, and with his mother nearby in the kitchen, an officer questioned Elstad in his living room and elicited Elstad's admission that he was at the house during the robbery. *Id.* at 301.

The officers transported Elstad to the police station, administered his *Miranda* warnings, and elicited the incriminating statements. This Court concluded that the earlier questioning did not taint the subsequent *Miranda* warnings for several reasons. First, the officer's initial questioning at Elstad's home was minimal. The interrogation was much more intensive after Elstad was read his *Miranda* rights. The change in location – from Elstad's living room to the police station – and the passage of about an hour between questioning further served to distance the improper questioning and bolster the effectiveness of the subsequent warnings.

In *Missouri v. Seibert,* 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), this Court again considered the efficacy of *Miranda* warnings given midstream of an interrogation. There, after thirty to forty minutes of interrogation, without *Miranda* warnings, Ms. Seibert made incriminating statements. *Id.* at 605. The interrogating officer took a 20-minute break, then subsequently advised Ms. Seibert of her rights and elicited the same incriminating statements. *Id.* Those statements were pivotal to Ms. Seibert's subsequent murder conviction. Notably, the interrogating officer deliberately decided not to advise Ms. Seibert of her Fifth

Amendment rights. He was following protocol, to "question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Id.*

A plurality of Justices held that the midstream reading of *Miranda* rights after a thorough interrogation were insufficient to satisfy the protections of the Fifth Amendment. *Id.* at 617. Justice Souter reasoned, "it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 613. The plurality distinguished the case from *Elstad*, which it considered "a good-faith *Miranda* mistake." *Id.* at 615. The plurality announced a set of factors to determine whether a subsequent post-*Miranda* statement could still be considered voluntary:

> 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.

Justice Kennedy filed a concurrence, adding the fifth vote for suppression. *Id.* at 618. While he adamantly disavowed the officer's deliberate subversion of *Miranda* in this case, he determined the plurality's approach was too broad and would unreasonably restrict law enforcement efforts. *Id.* at 620-622. Rather, Justice Kennedy advocated considering first the subjective intent of the interrogating officer. *Id.* at 622. If the two-step method were deliberately deployed, as in *Seibert*,

then Justice Kennedy advocated suppression of post-*Miranda* statements "related to the substance of prewarning statements... unless curative measured are taken before the post warning statement is made." *Id.* at 622. Possible curative measures include "a substantial break in time and circumstances" or explicit advisement that the prewarning statements were likely inadmissible. *Id.* at 622.

A. There is an acknowledged conflict concerning the appropriate test to determine the admissibility of statements made after midstream *Miranda* warnings.

In *Seibert*, this Court granted certiorari "to resolve a split in the Courts of Appeals" concerning the question-first police tactic. *Seibert*, 542 U.S. at 607. Following the plurality opinion in *Seibert*, the lower courts continue to struggle with the appropriate rule, resulting in inconsistent rulings on suppression and a lack of clear guidance for law enforcement professionals.

1. A majority of circuits follow Justice Kennedy's concurrence and require deliberate subversion of *Miranda* by police in order to warrant suppression.

People v Marks, 430 U.S. 188, 193; 97 S. Ct. 990 (1977) instructs, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Applying the *Marks* rule, a majority of circuits have concluded Justice Kennedy's concurrence reflects the "narrowest grounds" of the Court's holding in *Seibert* and therefore seek first to determine the subjective intent of the

interrogating officers when evaluating the efficacy of post-warning statements made when *Miranda* warnings are administered midstream. *Marks*, 430 U.S. at 193.

For example, in *United States v. Mashburn*, 406 F.3d 303 (4th Cir. 2005), the Fourth Circuit considered, whether defendant-appellant Mashburn's "initial, unwarned statements rendered involuntary the statements Mashburn made *after* receiving and waiving *Miranda* rights." *Id.* at 306. Federal agents in that case arrested Mashburn outside his home, while he possessed methamphetamine and a gun. An agent held him outside for about fifteen minutes, while others executed a search warrant of his home. The agent then brought Mashburn back into his house, handcuffed.

While inside, one of the agents advised Mashburn that he faced ten years in prison but could help himself by accepting responsibility and assisting law enforcement. Another agent then asked Mashburn two or three questions, before they realized he had never received his *Miranda* warnings. The agents issued the warnings, then elicited again the incriminating statements he had just provided. *Id.* at 305.

The Fourth Circuit adopted Justice Kennedy's approach as the holding in *Seibert*. *Id.* at 308. Finding no indication the agents deliberately withheld *Miranda* warnings, the court simply applied *Elstad* and determined Mashburn's admissions were made knowingly and voluntarily. *Id*. at 309.

This approach is also followed by the Second Circuit (*see United States v. Capers,* 627 F.3d 470 (2nd Cir. 2010)), Third Circuit (*see United States v. Naranjo*,

426 F.3d 221 (3rd Cir. 2005)), Fifth Circuit (*see United States v. Sinclair*, 169 Fed.Appx. 919 (5th Cir. 2006)), Eighth Circuit (*see United States v. Ollie*, 442 F.3d 1135 (8th Cir. 2011), and Eleventh Circuit (*see United States v. Street*, 472 F.3d 1298 (11th Cir. 2006).

2. A minority of circuits apply the *Seibert* plurality's test.

Some circuits have struggled to consistently apply either the *Seibert* plurality's approach or Justice Kennedy's approach. For instance, while the Eighth Circuit has established Justice Kennedy's approach as controlling, the court in *Ollie*, *supra,* noted that in past cases, it had applied both the plurality approach and Justice Kennedy's approach, seeking congruence between the two tests. *Ollie*, 442 F.3d at 1142, citing *United States v. Fellers,* 397 F.3d 1090, 1098 (8th Cir. 2005) The *Ollie* court also explained that unanswered questions remain; for instance, it remains unanswered "which party bears the burden of proof as to deliberateness and what the burden should be." *Ollie*, 442 F.3d at 1142.

Some circuits remain undecided as to which test is controlling. For example, in *United States v. Rodriguez-Preciado*, 399 F.3d 1118 (9th Cir. 2005), the Ninth Circuit explained "[w]e need not decide whether we are bound to follow the plurality opinion in *Seibert* or only that opinion as limited by Justice Kennedy, because *Seibert* did not address the issue raised in this case." Judge Berzon's dissenting opinion in that case highlights the discord that remains in *Seibert's* wake:

> I therefore believe we must address the midstream *Miranda* warning given to Rodriguez-Pericado during his interrogation on June 27. The propriety of those warnings – and of the interrogation elicited thereafter – turns on

> what rule, if any, the fractured Supreme Court handed down in *Missouri v. Seibert*... I would follow the reasoning of the *Seibert* plurality. *Id.* at 1133.

The First Circuit likewise had "declined to determine whether *Seibert's* reach is limited to cases in which the police set out to subvert a suspect's *Miranda* rights because the post-*Miranda* statement at issue... was admissible even under the *Seibert* plurality's more context-sensitive test." *United States v. Verdugo*, 617 F.3d 565 (1st Cir. 2010).

The Seventh Circuit, while once applying Justice Kennedy's approach in *United States v. Stewart*, 388 F.3d 1079, 1086-90 (7th Cir. 2004), questioned that approach in a more recent case, *United States v Heron*, 564 F.3d 879, 884–85 (7th Cir. 2009). In *Herron,* the Seventh Circuit held a defendant's confessions were admissible after the reading of his *Miranda* warnings following a prior unwarned confession. The court, however, did not simply apply Justice Kennedy's deliberateness test to determine the statement's admissibility. Rather the court questioned the applicability of *Marks'* narrowest ground edict since Justice Kennedy's concurrence and the plurality did not have a "common denominator."

Given the facts of Herron's case, however, the court affirmed the district court's denial of his suppression motion, holding his confession was admissible, under either the plurality's approach, Justice Kennedy's approach, or *Elstad*.

The *Heron* court determined that the *Marks* rule did not apply to *Seibert* because Justice Kennedy's concurrence did not reach a "common denominator" with the plurality. Specifically, the Seventh Circuit reasoned that "Justice Kennedy's

intent-based test was rejected by both the plurality opinion and the dissent…" *Id.* at 884. In contrast to Justice Kennedy's approach, the Seventh Circuit opined that a *Seibert* analysis should be "defendant focused." *Id.* at 885.

The Sixth Circuit has likewise rejected Justice Kennedy's concurrence as controlling, concluding that *Marks* is inapplicable, and adopted the *Seibert* plurality's analysis as the appropriate test. In *United States v. Ray,* 803 F. 3d 244 (2015), the Sixth Circuit noted the preference for a rule focused on the defendant's reasonable belief as opposed to the officer's subjective intent in matters of Constitutional jurisprudence.

The Sixth and Seventh Circuits are joined by the Tenth Circuit in their rejection of Justice Kennedy's intentionality test followed by most circuits. In *United States v Carrizales-Toledo*, 454 F.3d 1142 (2006), the Tenth Circuit held the defendant's initial, unwarned questioning did not taint his later statements made after border patrol agents advised him of his *Miranda* rights, and that his initial statements were made voluntarily. Like the courts in *Heron* and *Ray*, the Tenth Circuit declined to apply the *Marks* rule to Justice Kennedy's dissent in *Seibert* as that rule only applies "when one opinion is a logical subset of other, broader opinions." *Id.* at 1151, citing *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). Additionally as noted by the concurring circuits who apply the plurality test, and notably by Judge Berzon in her dissenting opinion in *Rodriguez-Preciado*, 399 F.3d at 1138-1141, following Justice Kennedy's concurrence is particularly problematic as seven justices disagreed that the focus should lie with the

interrogating officer's subjective intent. *Id.* at 1151. The court thus applied the plurality's multi-factor test and concluded Mr. Carrizales-Toledo's post-*Miranda* statements were not tainted by the earlier pre-*Miranda* questions. *Id.* at 1151.

As reflected in the various approaches throughout the circuits, this issue remains inconsistent and produces disparate results. Where the plurality's test may compel suppression in one state, it may go virtually unchallenged based solely on the articulated subjective intent by an officer in another.

B. In this case, under either test, the interrogating officer's tactic deprived Mr. Casanova of his Fifth Amendment right self-incrimination and his statement should have been suppressed.

Under either the *Seibert* plurality's test or Justice Kennedy's concurrence, Mr. Casanova's post-*Miranda* statements should have been suppressed. His confession was inadmissible because his *Miranda* rights were not administered until after he had confessed, and the midstream delivery of those warnings did not salvage the coerced nature of the interrogation and render the post-warning portion of the confession admissible.

Each of the factors identified by the *Seibert* plurality compels suppression of Mr. Casanova's confession:

1. **"[T]he completeness and detail of the questions and answers in the first round on interrogation."** *Seibert,* 542 U.S. at 615.

Mr. Casanova was thoroughly interrogated for more than two hours in the first round of interrogation. His interrogation was the inverse of that in *Elstad*, where the minimal nature of the first interrogation vis-à-vis the more thorough

post-warning interrogation compelled this Court's conclusion that the pre-warning interrogation did not render the second interrogation involuntary.

2. **"[T]he overlapping content of the two statements."** *Seibert,* 542 U.S. at 615.

For more than two hours, Detective Nanna berated Mr. Casanova that he was withholding the truth. He refused to accept Mr. Casanova's explanation that Tyler's injuries were caused by an innocent fall and told him that explanation would be debunked by the medical evidence. Concurrently Detective Nanna pledged his willingness to help Mr. Casanova, if only he would confess the truth.

As the interrogation appeared to conclude, Mr. Casanova implored Detective Nanna to help him, as he had promised. Detective Nanna agreed he would help, but that he needed to know the whole story.

The following exchange occurred between Mr. Casanova and Detecitve Nanna:

> Q: Is there anything else? I need to know now. I need to know. Or else it's gonna look really bad for you.
> A: Yeah. I might've squeezed him a little too hard.
> Q: You were squeezing him too?
> A: A little too hard.
> Q: Sit down for a second. You don't mind if Corporal Vandersalt stays in here, do you?
> A: No.
> Q: You ever squeeze him today too?
> A: A little bit too hard.
> Q: And is that when he quit breathing?
> A: No, that's not when he quit breathing. Just I feel like, I kinda picked him up because he was crying and I was like, please stop crying , please, you know, I need some sleep. And I was squeezing him and that's when I started bouncing him hard off the bed.

Q: And you were standing up at that point, you weren't sitting next to him?
A: No, I was –
Q: Oh, you were still down next to him?
A: Yeah.

At this point, after more than two hours of intense custodial interrogation, Detective Nanna advised Mr. Casanova of his *Miranda* rights, which he waived.

The following exchange occurred:

Q: So, do you wanna tell me what you were just telling me?
A: No.
Q: You were squeezing him? How many times were you squeezing him?
A: Just twice.
Q: What happened when you squeezed him? What did he do?
A: He kinda lost his breath.
Q: Where were your hands?
A: I just had my arms wrapped around his stomach or head and just –
Q: Well, did you have him like this? Did you have him like this? How did you have him?
A: Kinda like – like in a bear hug.
Q: So you had him in a bear hug and you were squeezing him? Telling, "please, please" right?
A: Yeah, but I let him go. And then he was fine. And then he started crying some more.
Q: And that's when you started throwing him?
A: I bounced him off the bed.
Q: Okay, just a second ago you said you squeezed him like that twice?
A: Yeah.
Q: Okay. So you squeezed him in a bear hug twice and kinda quit breathing and you let him go and then he started breaking again? Both times?
A: Yep.

Both rounds of interrogation involved the details of the supposed squeezing of Tyler. And both rounds of interrogation involved the details of the supposed bouncing of Tyler onto the air mattress.

3. **"[T]he timing and setting of the first and the second."** *Seibert,* 542 U.S. at 615.

The entirety of Mr. Casanova's interrogation occurred in a single room at the police station. The interrogations also proceeded continuously with no gap in time.

4. **"[T]he continuity of police personnel."** *Seibert,* 542 U.S. at 615.

Detective Nanna alone conducted both segments of Mr. Casanova's interrogation. The only difference in personnel between the two-plus hour initial interrogation and the second interrogation is that a non-speaking second officer was present in the room during the second portion to assist with transport. Detective Nanna alone handled both portions of the interrogation.

5. **"[T]he degree to which the interrogator's questions treated the second round as continuous with the first."** *Seibert,* 542 U.S. at 615.

As reflected in the exchange between Mr. Casanova and Detective Nanna, transcribed in factor three, *supra,* the interrogations proceeded in linear, continuous fashion with complete overlap. Immediately after Mr. Casanova confessed to squeezing his son, he received his *Miranda* warnings and Detective Nanna asked him, "So, do you wanna tell me what you were just telling me?" Detective Nanna then ignored Mr. Casanova's negative response and continued to interrogate him with leading questions.

Under Justice Kennedy's two-part analysis, Mr. Casanova's confession must also be suppressed. Detective Nanna's decision not to aggressively interrogate Mr. Casanova for hours without first advising Mr. Casanova of his *Miranda* rights can only be characterized as deliberate subversion of *Miranda*. Detective Nanna's error cannot be characterized as a rookie mistake or good-faith *Miranda* error, particularly given his more than twenty years of experience. (T 9/24/14, 65)

Further, no corrective measures were taken to cure the taint of his extensive pre-warning interrogation. There was no "substantial break in time and circumstances," and Detective Nanna did not advise Mr. Casanova as to the likely inadmissibility of his prior statements. *Seibert*, 544 U.S. at 622. In fact, when Mr. Casanova tried to invoke his right not to answer Detective Nanna's question, it was completely ignored.

C. The Michigan courts unreasonably applied this Court's precedent in holding Mr. Casanova's post-warning statement was admissible despite the midstream *Miranda* warnings.

The trial court's reasoning in support of its order denying Mr. Casanova's suppression motion is factually flawed and defies this Court's precedent in *Elstad* and *Seibert.* The court erroneously concluded that Mr. Casanova "told [Detective Nanna] something different than what he had been saying throughout the course of the interview that started around 7:00." True, Mr. Casanova previously denied any wrongdoing, but his evolving explanation as to what happened was a direct response to Detective Nanna's repeated assertion that he was withholding the truth, and implying that he would only help Mr. Casanova if his story changed.

Further, Mr. Casanova's pre-warning statement that he squeezed his child is seemingly what propelled Detective Nanna to administer his *Miranda* rights. And that is precisely what Detective Nanna asked Mr. Casanova post-warning: "So, do you wanna tell me what you were just telling me? … You were squeezing him? How many times were you squeezing him?" Also contrary to the court's findings, Detective Nanna interrogated Mr. Casanova about bouncing Tyler on the air mattress both before and after advising Mr. Casanova of his *Miranda* rights.

The trial court's conclusion that "*Seibert* concerns aren't really manifest here as far as I'm concerned," is clearly erroneous and constitutes an abuse of discretion. Indeed the concerns paramount to this Court's opinions in *Elstad* and *Seibert* are evident in this case. Given the laborious pre-warning interrogation, it is clear that Mr. Casanova was not aware he could refuse to talk to Detective Nanna at the time his rights were administered and he was not aware that the statements he made over the previous two-three hours were inadmissible. By the time his rights were administered, the proverbial "cat was sufficiently out of the bag," and his waiver was therefore involuntary. *Elstad*, 470 U.S. at 303.

The Michigan Court of Appeals elected not to conduct any Fifth Amendment analysis in its opinion and simply rendered any error harmless beyond a reasonable doubt in light of the strength of the other evidence admitted against Mr. Casanova. This reasoning is flawed particularly in light of the connection between Mr. Casanova's involuntary statements and the incredible medical testimony relied upon by the court. Dr. DeJong opined that mechanism described Mr. Casanova in

his coerced confession was consistent with the medical evidence. On remand, Mr. Casanova presented multiple experts to refute that opinion. Dr. DeJong's testimony was not challenged at trial, however, due to his attorney's ineffectiveness. The controversy behind opinions like Dr. DeJong's – for example, that Tyler's injuries could only be caused by intentional force – is widely recognized and established. *See, e.g., People v Ackley*, 497 Mich 390-391; *see also* Haberman, *Shaken Baby Syndrome: A Diagnosis that Divides the Medical World*, New York Times <http://www.nytimes.com/2015/09/14/us/shaken-baby-syndrome-a-diagnosis-that-divides-the-medical-world.html?_r=0> (accessed August 28, 2017); *see also* Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury,* available free online at: <https://www.law.uh.edu/hjhlp/volumes/Vol_12_2/Guthkelch.pdf> (accessed August 28, 2017)

The courts below unreasonably applied *Elstad* and *Seibert* in deeming Mr. Casanova's post-warning statement admissible even though he was not given *Miranda* warnings until after the detectives had extracted incriminating statements from him. This petition gives this Court the opportunity to clarify the rule that should apply when *Miranda* warnings are given long after an interrogation begins. Therefore, this Court should grant Mr. Casanova's petition for writ of certiorari.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Mr. Casanova asks that this Honorable Court grant him a writ of certiorari.

Respectfully submitted,

/s/ Christine A. Pagac

CHRISTINE A. PAGAC
(Counsel of Record)
STATE APPELLATE DEFENDER OFFICE
645 GRISWOLD, SUITE 3300
Detroit, MI 48226
(313) 256-9833

Attorney for Petitioner

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