No. 21-5795

IN THE

Supreme Court of the United States

ETHAN GUILLEN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF CRIMINAL LAW AND PROCEDURE PROFESSORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are fifty-eight law professors and scholars at U.S. law schools who teach, research, and write about criminal law and criminal procedure. They share a common interest in ensuring a proper, practical application of this Court's precedent stemming from *Miranda v. Arizona*.

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SUMMARY OF ARGUMENT

Since 2004, this Court's plurality decision in *Missouri v. Seibert*, 542 U.S. 600 (2004) has been subject to widely conflicting interpretations. A number of lower courts, claiming to follow *Marks v. United States*, 430 U.S. 188 (1977), have applied Justice Kennedy's concurrence, and the subjective test set forth therein, on the mistaken premise that it is the narrowest ground supporting the *Seibert* holding, even though it is the opinion of only a single Justice. Other courts, grappling with the lack of a common denominator between the *Seibert* plurality opinion and Justice Kennedy's concurrence, have chosen to apply the objective test adopted by the plurality. Other courts have adopted a hybrid test consisting of elements of both opinions.

The lack of any uniform rule governing the admissibility of post-*Miranda* confessions has resulted in disparate and inequitable treatment for criminal defendants like Ethan Guillen, who, for whatever reason, make incriminatory statements prior to receiving a *Miranda* warning. In the absence of clear guidance, the protections afforded by

Miranda's warning requirements have been eroded. This Court should therefore grant the petition for *certiorari* to clarify the proper test that should apply to guard against the admission of tainted confession evidence.

Vigorous *Miranda* protections are particularly important for adolescents such as 18-year-old Ethan Guillen. A growing body of research has illuminated an unacceptably high rate of false confessions among teenage criminal defendants, who are especially vulnerable to coercive, if not illegal, interrogation techniques. Where a false confession has been admitted into evidence, no amount of recanting or scientifically sound exculpatory evidence can guarantee a fair trial. And even where a confession cannot be shown to be false, confession evidence carries a heavy biasing effect that colors the minds of investigators and juries alike.

ARGUMENT

I. THIS CASE DEMONSTRATES THE INAPPLICABILITY OF THE *MARKS* PRINCIPLE TO *SEIBERT* WHERE THERE IS NO COMMON DENOMINATOR BETWEEN THE RATIONALE OF THE PLURALITY AND CONCURRING OPINION.

In *Marks*, this Court articulated a standard for lower courts to follow when assessing the precedential effect of a plurality opinion–namely, that the holding of a plurality decision should "be viewed as th[e]

position taken by those [m]embers who concurred in the judgment on the narrowest grounds."[2]

However, *Seibert* illustrates the limits of *Marks'* principle. Courts interpreting *Seibert* under the *Marks* principle have been unable to agree on which opinion represents the narrowest grounds supporting the decision of those who concurred in the judgment, leading to a split among the lower courts as to the precedent established by *Seibert*.

A. The *Seibert* Ruling Resulted in No Clear Consensus.

The *Seibert* court found in favor of the appellee-defendant through the judgment of five justices: a four-member plurality and Justice Kennedy's solo concurrence. There, defendant challenged the admissibility of her post-*Miranda* statements where she confessed, received *Miranda* warnings, and again repeated her confession.[3] The *Seibert* plurality held that, for any two-stage interview, the sufficiency of *Miranda* warnings hinged upon five 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, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."[4]

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[2] *Marks v. United States*, 430 U.S. 188, 193 (1977).
[3] *Missouri v. Seibert*, 542 U.S. 600, 604-06 (2004).
[4] *Id.* at 615.

Concurring only in the judgment, Justice Kennedy found that, in a two-stage interrogation, the admissibility of the post-*Miranda* warning should not hinge upon an "objective inquiry from the perspective of the suspect," as the plurality concluded.[5] Rather, admissibility of the post-warning statement should depend upon whether an officer intentionally withheld *Miranda* warnings to undermine the protection's efficacy.[6] When there is a finding that the officer intentionally delayed a *Miranda* warning, post-warning statements must be excluded under *Miranda* unless the police took "specific, curative steps," such as: (1) "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning;" and (2) "an additional warning that explains the likely inadmissibility of the prewarning custodial statement."[7] In determining whether officers employed a deliberate two-step strategy to circumvent *Miranda*, courts consider evidence of the officer's subjective state of mind, such as the officer's testimony.[8]

B. Justice Kennedy's Concurrence Does Not Provide the Narrowest Grounds for the Decision.

Select appellate courts, including the Tenth Circuit in *Guillen*, have applied the *Marks* principle to *Seibert* to conclude that Justice Kennedy's concurrence is the

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[5] *Id.* at 621-22 (Kennedy, J. concurring).
[6] *Id.*
[7] *Id.* at 622.
[8] *See, e.g., United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006).

controlling opinion.[9] Under *Marks*, where "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."[10]

The Tenth Circuit applied *Marks* and concluded that Justice Kennedy's concurrence fit within the *Seibert* plurality ruling on the admissibility of confessions following midstream *Miranda* warnings.[11]

Though Justice Kennedy's concurrence is narrower than the plurality opinion in some respects, his opinion is also broader in other, critical circumstances.[12]

Justice Kennedy's concurrence narrows the *Seibert* plurality in instances where police officers do not use

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[9] *E.g., United States v. Guillen*, 995 F.3d 1095, 1125 (10th Cir. 2021)("[t]here is a coherent way to apply *Marks* here, which no doubt explains why most courts have reached the same conclusion: Justice Kennedy's concurrence in *Seibert* is the controlling opinion from that case."); *United States v. Capers*, 627 F.3d 470, 476 (2nd Cir. 2010); *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *Williams*, 435 F.3d at 1158; *United States v. Naranjo*, 426 F.3d 221, 231 (3d Cir. 2005); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007).

[10] *Marks,* 430 U.S. at 193 (internal quotation marks omitted).

[11] *Guillen*, 995 F.3d. at 1119.

[12] *See, e.g., Edwards v. United States*, 923 A.2d 840, 848, n.10, n.02-CE-1068 (D.C. 2007) ("As the government points out, Justice Kennedy's test is narrower than the plurality's in that it would only apply to the deliberate use of a two-step procedure, but, within that subset of cases, it is broader in that it would not allow admission of a suspect's statements unless curative steps were taken even if a court determined that the *Miranda* warnings could function effectively.").

a deliberate two-step interrogation strategy.[13] Imagine a scenario where a suspect produces a detailed confession while seated in a police station and the questioning officer fails to appreciate that the suspect is in fact in custody. The officer then *Mirandizes* the suspect and elicits a substantially similar confession post-*Miranda*.

Given the significant overlap of the two rounds of interrogation, the continuous nature of the questioning, the continuity of police personnel, and the extent to which the second round of interrogation followed the first, the suspect's confession would almost certainly be inadmissible.[14] Meanwhile, under Justice Kennedy's concurrence, the confession would be admissible because the officer did not use a deliberate two-step interrogation strategy.[15]

But Justice Kennedy's concurrence is broader than the *Seibert* plurality in cases where police officers use a deliberate two-step interrogation strategy.[16] Justice Kennedy found that post-warning statements "related to the substance of prewarning statements must be excluded absent specific, curative steps" where police officers use a deliberate two-step interrogation strategy.[17] On the other hand, under the *Seibert* plurality, such post-warning statements can be admissible even without specific, curative steps.[18] A

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[13] *See id.*
[14] *See Seibert*, 542 U.S. at 616.
[15] *See Seibert*, 542 U.S. at 620 (Kennedy, J., concurring) ("An officer may not realize that a suspect is in custody and warnings are required.").
[16] *See Edwards*, 923 A.2d at 848.
[17] *See Seibert*, 542 U.S. at 621.
[18] *See id.*

hypothetical is again instructive here: assume that a police officer questions a suspect – first outside and then inside his home. Using a deliberate two-step interrogation strategy, the officer asks an open-ended question, obtains a general confession, *Mirandizes* the suspect, and then elicits a detailed confession. The suspect's second confession would be inadmissible under Justice Kennedy's concurring opinion because the officer did not take any "specific, curative steps."[19] However, the same post-warning confession, under the *Seibert* plurality, would likely be admitted where the questions and answers in the first round of interrogation were neither complete nor detailed, the two confessions did not feature much overlap, and though there was a change in the setting of the interrogations, neither of which took place at a police station.[20]

The disparate application of the *Seibert* plurality and Justice Kennedy's concurrence is not merely academic conjecture.[21] This exact scenario has been borne out in *Morse v. Nevada*.[22] In that case, the Supreme Court of Nevada deemed a post-warning admission following an earlier, pre-warning statement admissible without citing to Justice Kennedy's concurrence or addressing "the deliberateness question it poses."[23] The *Morse* court

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[19] *See id.*

[20] *See id.* at 616.

[21] *See Morse v. Nevada Attorney General*, 687 F. App'x 662, 663 (9th Cir. 2017).

[22] *Morse v. Nevada*, No. 55271, 2011 WL 2748846 (Nev., July 14, 2011).

[23] *Morse*, 687 F. App'x at 663; *see also State v. Medley*, 787 S.E.2d 847, 852-53 (S.C. Ct. App. 2016); *United States v. Lawton*, 216 F. Supp. 3d 1281, 1294-95 (D. Kan. 2016); *Fernandez v. Lee*, No. 10

deemed the *Miranda* warnings preceding the interview effective under the *Seibert* plurality where the "discussion in the vehicle was informal, conversational, and frequently veered away from the topic of [Defendant's] 'mistake'" and where, "[u]pon entering the more formal setting of the interview room, [Defendant] would have faced a genuine choice about whether to continue speaking."[24] In upholding the denial of defendant's *habeas* petition, the Ninth Circuit held that the Supreme Court of Nevada's opinion was not an unreasonable application of the *Seibert* plurality.[25] The Ninth Circuit added that if it were reviewing the case *de novo* under Justice Kennedy's concurrence, it "might well have" deemed the post-warning statement inadmissible because the officer employed neither of the curative measures identified by Justice Kennedy.[26] Specifically, the Ninth Circuit noted that it "might well have concluded that the 'break in time and circumstances between the prewarning statement and the Miranda warning,' was insufficient to ensure that [Defendant] could 'distinguish the two contexts and appreciate that the interrogation ha[d] taken a new turn.'"[27] The Ninth Circuit likewise determined that at no point did the detective "warn [Defendant] that his statements in the police car were likely inadmissible."[28]

Civ. 9011(ALC) (JCF), 2012 WL 4473294, at *11 (S.D.N.Y., July 12, 2012); *United States v. Price*, No. 04-40035-SAC, 2004 WL 2457858, at *4-*5 (D. Kan., Oct. 22, 2004).

[24] *Morse*, 2011 WL 2748846, at *2.

[25] *See id.*

[26] *Morse*, 687 F. App'x at 664.

[27] *Seibert*, 542 U.S. at 622.

[28] *See id.*

Blanket application of the *Marks* principle to *Seibert* creates the illogical result where certain post-warning statements that may be admissible under the *Seibert* plurality could be inadmissible under Justice Kennedy's concurrence. Yet some post-warning statements that could be admissible under Justice Kennedy's concurrence may be inadmissible under the *Seibert* plurality.[29]

II. COURTS ADOPTING JUSTICE KENNEDY'S *SEIBERT* CONCURRENCE RUN AFOUL OF THIS COURT'S WELL-ESTABLISHED *MIRANDA* PRECEDENT.

This Court's long-established precedent in *Miranda* and Justice Kennedy's *Seibert* concurrence are profoundly at odds.[30] In *Miranda*, this Court established that "a [Miranda] warning is a clearcut fact . . . [designed] to insure that the individual knows he is free to exercise the privilege [against self-

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[29] *See, e.g.*, *Reyes v. Lewis*, 833 F.3d 1001, 1008-09 (9th Cir. 2016) (Callahan, J., dissenting) ("There are likely to be cases involving deliberate *Miranda* violations where most of the plurality's 'effectiveness factors' are met but, because no explanation of the prewarning statement's inadmissibility or other 'specific, curative step' was taken, Justice Kennedy's curative measures requirement isn't."); *People v. Verigan*, 488 P.3d 75, 82 (Colo. App. 2015), *aff'd on other grounds*, 420 P.3d 247 (Colo. 2018) ("Because, no matter the facts of a given case, the four-justice plurality and Justice Kennedy would apply wholly different rules, neither the plurality's five-factor test, nor Justice Kennedy's rule, nor any part of either, enjoyed the assent of five justices.").

[30] *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *Seibert*, 542 U.S. 600.

incrimination]."[31] The *Miranda* requirement is measured objectively and the "proper inquiry [is] whether a reasonable person in the suspect's position would have understood his situation as the functional equivalent of formal arrest."[32] Lower courts applying Justice Kennedy's *Seibert* concurrence have improperly held that an officer's subjective intent can be outcome determinative when assessing whether a deliberate violation of *Miranda* has occurred in a question-first interrogation.[33]

A. Under This Court's *Miranda* Precedent, an Officer's Subjective Intent Should Not Be Outcome-Determinative.

This Court's persistent findings that an officer's subjective intentions should not determine whether an individual's *Miranda* rights have been violated are

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[31] *See Miranda*, 384 U.S. at 469.

[32] *See United States v. Guillen*, No. 17-CR-1723 (WJ), 2018 WL 2075457 (D.N.M.), *11 (D.N.M. May 3, 2018) (citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)).

[33] *See United States v. Stewart*, 536 F.3d 714, 720 (7th Cir. 2008) (affirming district court finding that officer's subjective intent evidenced no deliberate attempt to circumvent *Miranda* notwithstanding officer's admission that he should have given *Miranda* warnings earlier but chose not to); *Naranjo*, 223 F. App'x at 168-69 (affirming district court finding that officer did not deliberately delay *Miranda* warnings because the officer testified that he believed *Miranda* warnings were not required until the suspect was under arrest, even though the officer had handcuffed and interrogated the suspect at length).

in direct conflict with Justice Kennedy's subjective-based deliberateness test in *Seibert*.[34]

In *Rhode Island v. Innis*, this Court concluded that any words or actions that the police should know would be reasonably likely to elicit incriminating responses would be analyzed by focusing primarily upon the perceptions of the suspect, rather than the intent of the police.[35] This Court reasoned that "[t]his focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police."[36] In *Lornitis v. State*, the district court noted that "[w]hile *Innis* recognizes that the officer's subjective intent may tend to prove the objective effect of his words or actions, the prescribed inquiry is whether the officer should have known that his words or actions were 'reasonably likely to elicit incriminating responses.'"[37]

The subversion of *Miranda* and its progeny carries illogical consequences for Ethan Guillen and countless others similarly situated. This Court clearly delineated the boundaries for establishing when police conduct violates an individual's Fifth

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[34] *See, e.g.*, *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Lornitis v. State*, 394 So. 2d 455, 458 (Fla. Dist. Ct. App. 1981); *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

[35] *Innis*, 446 U.S. at 301.

[36] *Id.*

[37] *Lornitis*, 394 So. 2d at 458; *see also Quarles,* 467 U.S. at 655-56 ("[T]he application of the [public safety] exception [to *Miranda* warnings] . . . should not . . . depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer.").

Amendment right against self-incrimination.[38] Yet Justice Kennedy's concurrence in *Seibert* has muddled these boundaries by focusing the analysis on an intent-based test that unduly favors an officer's subjective belief.

B. Courts Routinely Credit an Officer's Statements Regarding Subjective Intent Over Objective Evidence of a *Miranda* Violation.

Most courts have held that both objective and subjective evidence should inform whether an officer engaged in a deliberate two-step interrogation strategy.[39] However, in weighing objective evidence against subjective intent, courts have credited officers' testimony regarding their subjective intent to conform with *Miranda* requirements even where the "objective factors considered by the Court [] tend[ed] to weigh in favor of a finding of 'deliberateness.'"[40] In *Neri v. Hornbreak*, the California Central District admitted post-warning statements based on the officers' subjective intent even though the officers transported

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[38] *See, e.g.*, *Miranda*, 384 U.S. at 436; *Dickerson v. United States*, 530 U.S. 428 (2000); *Innis*, 446 U.S. at 291; *Quarles*, 467 U.S. at 655-56.

[39] *See, e.g., United States v. Williams*, 681 F.3d 35, 41 (2nd Cir. 2012); *Capers*, 627 F.3d at 482.

[40] *Neri v. Hornbreak*, 550 F. Supp. 2d. 1143, 1162 (C.D. Cal. 2008); *see State v. Fleurie*, 968 A.2d 326, 333 (Vt. 2008) (admitting defendant's post-warning statements because it was not "clear that the officers intended to undermine the efficacy of *Miranda* warnings" notwithstanding the court's finding that "the initial unwarned custodia[n] interrogation was no mere oversight or good-faith mistake.").

the suspect to the police station, held her for seven hours and interrogated her for an additional hour and a half.[41] Even more, once the officers secured a pre-warning confession, they finally issued the *Miranda* warning and, within minutes, asked the suspect to repeat her pre-warning statements.[42]

In *Ramirez-Marentes v. Ryan*, the California district court refused to find an intentional subversion of *Miranda* where officers conducted a three-hour interrogation and "pressed" defendant for incriminating information.[43] If courts continue their overreliance on an officer's subjective testimony, lower courts are unlikely to recognize subversions of *Miranda* unless an officer explicitly testifies to doing so.[44]

III. THE HYBRID APPLICATION OF THE *SEIBERT* PLURALITY AND JUSTICE KENNEDY'S CONCURRENCE FURTHER ERODES KEY *MIRANDA* PROTECTIONS.

Lower courts' hybrid application of the *Seibert* plurality and Justice Kennedy's concurrence have worsened already disparate suppression outcomes for defendants and created an uncertain set of standards for law enforcement officers.

The incongruous application of the *Seibert* decisions has allowed rules governing interrogations and

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[41] *Hornbreak*, 550 F. Supp. 2d. at 1161.
[42] *Id.*
[43] *Ramirez-Marentes v. Ryan*, No. SACV-05,551 GHK (CW), 2010 WL 2902524, at *5-6, 20 (C.D. Cal. 2010).
[44] *Fleurie*, 968 A.2d at 333 (citing *Seibert*, 542 U.S. at 605-06); *see also, Hornbeak*, 550 F. Supp. 2d at 1162.

criminal convictions to turn on geographical boundaries. In *State v. Martinez*, the Arizona Court of Appeals applied a composite test consisting of the *Seibert* plurality and Justice Kennedy's concurrence in the case of a murder suspect who alleged that the police engaged in a deliberate two-step interrogation technique to sidestep *Miranda*.[45] The *Martinez* court considered whether any curative measures were taken as the sixth factor after the *Seibert* plurality's five-factor objective test.[46] Tellingly, the Arizona appeals court concluded that the *Seibert* plurality's factors favored admission of the suspect's post-warning statement while the lack of any curative measures "weigh[ed] against admissibility."[47] The hybrid test, "taken as a whole," still compelled the admission of defendant's post-warning statements.[48]

In *State v. Martinez*, the Arizona Court of Appeals combined the *Seibert* plurality factors with the curative measures mentioned in Justice Kennedy's concurrence to determine whether police officers used a deliberate two-step strategy.[49] The court ultimately concluded that the plurality's factors favored admission of the suspect's post-warning statement, while the lack of curative measures favored exclusion.[50] Such a hybrid test creates further confusion and again demonstrates that post-warning statements can be admissible under the *Seibert*

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[45] *State v. Martinez*, No. 1 CA-CR 13-0107, 2014 WL 5342708, at *5-*7 (Ariz. App., Oct. 21, 2014).
[46] *See id.*
[47] *See id.* at *7.
[48] *See id.*
[49] *Martinez*, 2014 WL 5342708, at *5-*7.
[50] *See generally, id.*

plurality but inadmissible under Justice Kennedy's concurrence.[51]

In the Seventh Circuit, the appellate court issued three opinions across four years to determine the admissibility of a suspected bank robber's post-warning statements.[52] In *United States v. Stewart*, the district court read the *Seibert* plurality's balancing test into Justice Kennedy's allowance for "curative steps."[53] The Seventh Circuit then thrice considered the application of the *Seibert* plurality and Justice Kennedy's concurrence before ultimately admitting defendant's post-warning statements.[54] Though the *Stewart* court applied a hybrid approach, the evident confusion within the Seventh Circuit only worsened in *United States v. Heron* when the court "conclude[d] that the *Marks* rule is not applicable to *Seibert*."[55]

The Seventh Circuit is not alone in issuing persistently unclear guidance.[56] The Third, Fourth,

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[51] *See, e.g., Lewis,* 833 F.3d at 1008.

[52] *See United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004) (finding district court evidence insufficient to establish whether officers deliberately employed a two-step strategy to circumvent *Miranda*) (*Stewart I*); *United States v. Stewart*, 191 F. App'x 495 (7th Cir. 2006) (directing the District Court to make specific findings into officer intent) (*Stewart II*); *Stewart*, 536 F.3d at 714 (issuing final opinion admitting defendant's post-warning statements) (*Stewart III*).

[53] *See Stewart I*, at 1090.

[54] *See Stewart I*; *Stewart II*; *Stewart III*.

[55] *See U.S. v. Heron*, 564 F.3d 779, 884 (7th Cir. 2009).

[56] *See Edwards*, 923 A.2d at 848 n.10 ("[t]he Seventh Circuit seems to favor applying a hybrid of the two tests"); *see also* Locke Houston, *Miranda-in-the-Middle: Why Justice Kennedy's Subjective Intent of the Officer Test in Missouri v. Seibert is*

Fifth, and Eighth Circuit courts apply varying iterations of Justice Kennedy's concurring opinion.[57] Decisions from the Fifth Circuit in particular vacillate between a strict and hybrid application of Justice Kennedy's concurrence with the *Seibert* plurality opinion.[58] In *United States v. Courtney*, the Fifth Circuit considered Justice Kennedy's concurrence controlling as the holding of the *Seibert* opinion and applied it to find that the passage of time between the first and second interrogations constituted a "curative measure" sufficient to allay *Miranda* concerns.[59] Conversely, in *United States v. Nuñez*, the Fifth Circuit found no evidence of a deliberate attempt to circumvent *Miranda* and instead focused upon the voluntariness of each interrogation stage.[60]

Differences in suppression outcomes carry steep consequences for defendants and law enforcement across the nation. If the volume of cases analyzing the *Seibert* plurality and concurrence is any indication, the two-step interrogation is a frequent

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Binding and Good Public Policy, 82 MISSISSIPPI LAW JOURNAL 1129, 1146-50 (2013).

[57] *See* Houston, *supra* note 56, at 1146-50.

[58] *See id.* at 1146-47 ("as the circuit stands today, it seems to be leaning more towards an application of Justice Kennedy's subjective intent of the officer test, with concern for Miranda efficacy as an afterthought.").

[59] *See United States v. Courtney*, 463 F.3d 333, 338-39 (5th Cir. 2006) (finding that time elapsed between questioning proved to be a "curative measure" where officers interviewed the suspect three times over the course of a calendar year and that a "reasonable person" would ultimately consider the *Miranda* warnings sufficient as provided).

[60] *See United States v. Nuñez,* 478 F.3d 663, 668-69 (5th Cir. 2007).

phenomenon.[61] The discord between circuit courts and disparate outcomes among even the same circuits underscores the sheer unpredictability of a fundamental constitutional right: the Fifth Amendment protection against self-incrimination. Amici urge this Court to issue clear guidance on the application of the *Seibert* decisions and to discourage courts from further chipping away at a fundamental constitutional safeguard.

IV. IN DECIDING WHETHER TO GRANT *CERTIORARI*, THIS COURT SHOULD CONSIDER THE ALARMINGLY HIGH PERCENTAGE OF PEOPLE, PARTICULARLY YOUNG ADULTS, WHO ARE SUSCEPTIBLE TO COERCIVE INTERROGATION TECHNIQUES AND FALSELY CONFESS.

Because of the disparate applications of *Seibert* by the lower courts, coercive interrogation strategies, like the intentional question-first, warn-later technique, continue to erode *Miranda* protections at a time when, according to research and recent scientific findings, those protections should be strengthened to counteract such coercive tactics.[62] Though precise percentages are unknown, studies show that 20% to 25% of convicted individuals, later exonerated, had falsely confessed to police.[63] These outcomes occur because the suspect is exposed to highly suggestive

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[61] Pet. App. A at 35-37.

[62] *See, e.g.,* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 SAGE J. 112 (2014).

[63] *See id.*

interrogation tactics and "acquiesces [in order to] escape [from] a stressful situation.[64]"

A. Modern Police Interrogations Result in High Rates of False Confessions.

Even absent extreme police behavior, innocent people confess to crimes they did not commit.[65] Modern studies recognize that confessions may be coerced, where "custodial police interrogation, by its very nature, isolates and pressures the individual."[66]

The manner in which an interrogation is conducted may heighten the likelihood of a false confession. Interrogation tactics championed by the Reid Technique, a leading interrogation method employed by law enforcement throughout the United States, are especially problematic.[67] Two commonly used elements of the Reid Technique are "minimization," the attempted lowering of stakes, and "maximization," an increased focus on the suspect's fear and guilt.[68] Minimization includes situations where a police officer strongly asserts accusations of guilt, stating that such guilt can already be

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[64] Saul M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 J. LAW & HUMAN BEHAVIOR 7, 14 (2010).

[65] *See, e.g.,* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 906-907 (2004).

[66] *Corley v. United States*, 556 U.S. 303, 305 (2009) (citing *Dickerson v. United States*, 530 U.S. 428, 435 (2000)).

[67] Kassin, et al., *supra* note 64, at 12-13; *see also* Brandon Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 428-29 n.16 (2014).

[68] *See* Kassin, *supra* note 64, at 12.

established through evidence obtained, and the refusal to accept a statement of denial.[69] Maximization, in contrast, is intended to lead the suspect to believe establishing guilt is inevitable, often through creating a situation in which the suspect feels hopeless.[70] Trickery and deception are both examples of maximization as well as cornerstones of many police manuals, and long deemed legal by the United States Supreme Court and various state court systems.[71] Tellingly, in 2017, one of the largest consulting groups responsible for training U.S. law enforcement, Wicklander-Zulawski & Associates, ceased all instruction of the Reid Technique in recognition of its disastrous effects.[72] The unexpected number of false confessions since the early 1990s also led to the implementation of mandatory videotaped interrogations in twenty-five states.[73]

What is worse, false confessions are likely to occur primarily in "more serious cases, especially

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[69] *Id.*

[70] *Id.*

[71] *Id.*; *see also Frazier v. Cupp*, 394 U.S. 731, 738-39 (1969); *Commonwealth v. Selby*, 420 Mass. 656, 663-64 (Mass. 2004) (finding that although trickery and deception are disfavored, they do not necessarily lead to involuntary confessions.).

[72] *See Leading Police Consulting Group Will No Longer Teach the Reid Technique*, Innocence Project (2017), *available at* https://innocenceproject.org/police-consultants-drop-reid-technique/.

[73] *See* David Coffey, *Why do people confess to crimes they didn't commit?*, Livescience (2020), *available at* https://www.livescience.com/why-people-fasely-confess-to-crimes.html.

homicides."[74] In a study of 125 DNA exonerations in cases with false confessions, the "overwhelming majority," or 81%, occurred in murder cases.[75]

B. Teenagers Falsely Confess at Higher Rates Due to Their Age and Susceptibility.

1. *Age*

Adolescents are among the most vulnerable populations with respect to false confessions.[76] Research has shown that 49% of false confessions exonerated by DNA evidence were from people under 21 years of age.[77] According to the National Registry of Exonerations, 36% of individuals exonerated for wrongful convictions involving false confessions were 18 years or younger at the time of their alleged crime.[78] The percentage is 9.88% for those above the age of 19.[79]

Teenagers are also more likely than adults to waive their *Miranda* rights.[80] This may result from the

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[74] Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1065 (2010).
[75] *Id.* at 1066.
[76] The National Registry of Exonerations, *available at* https://www.law.umich.edu/special/exoneration/Pages/about.aspx.
[77] Coffey, *supra* note 73.
[78] The National Registry of Exonerations, *supra* note 76.
[79] *Id.*
[80] Jason Mandelbaum and Angela Crossman, *No illusions: Developmental considerations in adolescent false confessions*, CYF News (2014) (Citing Redlich, Silverman, Chen, & Steiner (2004), *available at*

likelihood that adolescents will misunderstand the warning.[81] In one study, of the 66 DNA exonerations involving false confessions, 23 were juveniles and at least 22 were mentally impaired or mentally ill.[82] All 66 exonerees had waived their *Miranda* rights.[83] Courts have also questioned a teenager's ability to invoke their constitutional rights, particularly regarding their ability to waive their rights voluntarily, knowingly, and intelligently.[84]

2. *Susceptibility*

Unsurprisingly, adolescents are more likely to base their decisions on immediate, rather than long-term, consequences.[85] This suggests that teenagers will likely make decisions different from those they would have made as adults.[86] Experts attribute juvenile false confessions to the use of police interrogation tactics intended for adults.[87] Specifically, Bowman

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https://www.apa.org/pi/families/resources/newsletter/2014/12/adolescent-false-confessions.).

[81] Viljoen, J. L., Klaver, J., & Roesch, R., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, Law and Human Behavior, 29(3), 253, 254 (2005).

[82] Garrett, *supra* note 67 at 400 n.16.

[83] *Id.* at 402.

[84] Oberlander, L. B., & Goldstein, N. E., *A review and update on the practice of evaluating Miranda comprehension*, 19 (4) BEHAVIORAL SCIENCES & THE LAW, 453-461 (2001).

[85] *See generally*, Grisso, T., Steinberg, L., Woolard, J. et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW HUMAN BEHAVIOR 333-363 (2003).

[86] *Id.*

[87] *Why are Youth Susceptible to False Confessions*?, Innocence Project (2015) (Listing the tactics as coercion, false promises of leniency, and deception about evidence.), *available at*

found that "[t]he interrogation process is inherently coercive. It is psychologically difficult [] even for strong, intelligent people to withstand."[88] Particularly for teenagers, when such strategies are "impose[d upon] an individual who is young, who is intellectually vulnerable, the capacity of the person to withstand the process is easily overcome."[89] Take the case of Martin Tankleff, a 17-year-old suspect who was wrongfully convicted of murdering his parents.[90] Tankleff affirmed his innocence repeatedly during multiple hours of a custodial interrogation until the questioning officer informed him of purported testamentary evidence from Tankleff's father, solicited while his father was seriously injured but before his passing, where he alleged that Tankleff attacked his mother.[91] Influenced by his father's apparent testimony, Tankleff ultimately confessed to the crime.[92]

C. False Confessions Carry a Heavy Biasing Effect.

A false confession, even once retracted or proven to result from police coercion, can alter the entire course of an investigation and trial. In the investigation

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https://innocenceproject.org/why-are-youth-susceptible-to-false-confessions/.

[88] *Id.*

[89] *Id.*

[90] Maurice Possley, *Martin Tankleff*, The National Registry of Exonerations (2020), *available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3675.

[91] *Id.*

[92] *See id.*

phase, "[o]nce a suspect confesses, police often close the investigation, deem the case solved, and overlook exculpatory information – *even if* the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation."[93] At the trial stage, jurors give disproportionate weight to confession evidence and fail to adequately discount retracted false confessions or those that have been shown to result from coercion.[94] False confession evidence is even powerful enough to overcome highly probative evidence, including exculpatory DNA results.[95]

CONCLUSION

Amici respectfully request that the Petition for *Certiorari* be granted.

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[93] Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431, 437 (2012) (emphasis added).

[94] *See id*. at 433-34; *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 961-62 (2004) (study of 125 proven false confession exonerations from the post-*Miranda* era).

[95] Saul M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 J. LAW & HUMAN BEHAVIOR 4, 23 (2010).

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