No. _____

IN THE

SUPREME COURT OF UNITED STATES

TACY JONES - PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a 37-day delay in presentment requires dismissal under the Due Process Clause of the Fifth Amendment?
2) Whether the use of pre-*Mirandized* questioning attempting to obtain a waiver of *Miranda* Rights is permissible under *Missouri v. Seibert*?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the Appendix (APP 1) to the petition and is reported at 70 F.4th 1109.

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided this case was June 15, 2023. APP 1. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 19, 2023. APP 60. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides that no person "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." U.S. Const. amend. V.

The Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On November 17, 2020, Tracy Jones, and others on federal warrants, was arrested as part of a "sweep" conducted of the Martin, South Dakota area, at roughly 12:30 pm. APP 2, 34. Roughly two hours after her arrest, she was interrogated for roughly 44 minutes. APP at 2. To start the interrogation, there was significant pre-*Miranda* discussion with Tracy, specifically:

SPECIAL AGENT DAN COOPER: -- okay? So you're under federal arrest. Obviously what's going to happen here today, we're trying to sort through just with everything going on with the pandemic and all those kind of things as far as your transport and where you're going to end up here temporarily. Might be tribal jail, but eventually will be in Rapid City. Whether that's tonight, tomorrow, whatever, okay? Because you're under arrest, I'm going to read you your rights so you understand this, okay?

TRACY JONES: Okay.

SPECIAL AGENT DAN COOPER: And if you have any questions of me, ask. I'd like to explain the situation to you –

TRACY JONES: Uh-huh.

SPECIAL AGENT DAN COOPER: -- at least at a minimum before we leave here today –

TRACY JONES: Okay.

SPECIAL AGENT DAN COOPER: -- kind of knowing what your options are, things like that –

TRACY JONES: Okay.

SPECIAL AGENT DAN COOPER: -- okay? The charge that you're charged with is a federal meth conspiracy. And it's a ten-year mandatory minimum, okay? What that means, unless you already know what that means –

TRACY JONES: Not really.

SPECIAL AGENT DAN COOPER: Okay. What that means is, if you were convicted of the charge that you're charged with right now, okay, a federal judge has to sentence you to ten years or more –

TRACY JONES: Okay.

SPECIAL AGENT DAN COOPER: -- okay?

TRACY JONES: Okay.

SPECIAL AGENT DAN COOPER: There is only a few ways to alleviate that, to clear that up.

TRACY JONES: Okay.

> SPECIAL AGENT DAN COOPER: And that's strictly Tracy Jones Wilcox's decision --
>
> TRACY JONES: Uh-huh.
>
> SPECIAL AGENT DAN COOPER: -- okay? She's the only one that can do that --
>
> TRACY JONES: Uh-huh.
>
> SPECIAL AGENT DAN COOPER: -- okay? If we go that route, because you decide to go that route, we talk truthfully, then we can do things on the federal side in front of the judge at some point that says, Okay, Judge, you can go below that ten year, okay? And I can explain any of that to you if you want.
>
> TRACY JONES: Okay.

See APP 7; R. Doc. 150; The pre-*Miranda* portion of the interrogation lasted roughly 2 minutes. *Id.* After the pre-*Miranda* portion of the interrogation, Jones was read her *Miranda* Rights and consented to answer questions without a lawyer present. APP 30.

Tragically, Tracy was then detained at the Pennington County Jail for 36 additional days without due process of law. APP 25. When finally presented to a magistrate judge on December 23, (37 days after being taken into federal custody), United States Magistrate Judge Daneta Wollman plainly stated what happened: "For some reason we were not notified -- our office wasn't -- that she was taken into custody. So we are well past even 30 days." IA Tr. 10:6-8; APP 35. Tracy was released on a Personal Recognizance bond at her initial appearance. APP 13.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Court is faced with two questions that are matters of great public importance and resolve circuit splits that currently exist. This Petition seeks that the Court issue a writ of certiorari to set the standard for seeking redress of a violation of a defendant's rights to be promptly presented before a judge. Further, this Petition seeks that the Court issue a writ of

certiorari to address the scope of *Missouri v. Seibert* in analyzing law enforcement's use of pre-*Mirandized* deceptive and coercive interrogation techniques to elicit a waiver of *Miranda* rights.

I. A 37-day delay in presentment requires dismissal under the Due Process Clause of the Fifth Amendment.

In this case, the Eighth Circuit agreed with the government's concession, that "no doubt, the 37-day delay between Jones's arrest and her initial appearance before a magistrate judge violated [Federal] [R]ule [of Criminal Procedure] 5(a)." APP 3. The Panel correctly analyzed that a violation of Jones' substantive due process rights would properly lead to a dismissal (*id*.), it incorrectly interpreted circuit case law in finding that the government conduct at play did not amount to a violation of Jones' substantive due process rights.

Over and over again it has been highlighted that "the Due Process Clause was intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (*quoting DeShaney v. Winnebago County Dept. of Social Servs*., 489 U.S. 189, 196 (1989)).

> "[D]ue process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience in the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process." (quoting *Rochin v. California*, 342 U.S. 165 (1952).

Breithaupt v. Abram, 352 U.S. 432, 436 (1957).

The Federal Circuit Courts recognizing substantive due process right of prompt presentment focus on the totality of the circumstances. *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998). The question of whether a delay in presentment is so egregious that it "shocks the conscience" and violates substantive due process rights is a question of law. The Ninth, Eighth, Seventh and Fifth Circuits, have held that post-arrest detentions of 114-days, 57-

days, 38-days, 18-days, and 96-days have sufficiently shocked the conscious to establish a substantive due process violation. (*Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992); *Armstrong*, 152 F.3d at 581-582; *Hayes v. Faulkner Cty.*, 388 F.3d 669, 675 (8th Cir. 2004); *Coleman v. Frantz*, 754 F.2d 719, 723-24 (7th Cir. 1985); *Jauch v. Choctaw Cnty.*, 874 F.3d 425, 427 (5th Cir. 2017)).

In this case, the facts support a finding that the Government's conduct shocks the conscience. At the initial appearance, the prosecution opposed pretrial release and argued to keep Ms. Jones in custody for at least three additional days to arrange witness testimony. R. Doc. 104 at 9:23-25. The district court denied the prosecution's request for more time yet allowed the prosecution to proffer facts to support its argument. As support for her argument the prosecution cited a complaint against Brett Schrum in which Ms. Jones was not a named party and a "number of conspiracies" for which the prosecution presented no support. Doc 104 at 10:18-25. Notwithstanding all of these facts and the factors under 18 U.S.C. § 3142, the magistrate judge ordered Ms. Jones' pretrial release. This Court can and should presume that had Ms. Jones been timely presented to the magistrate judge, she would have had her liberty restored over a month earlier. This is egregious. This is callous. This is wanton disregard for the value of human life and liberty.

During the hearing on Defendant's Motion to Dismiss with Prejudice and To Suppress held on April 26, 2021, the law enforcement officers showed no remorse or regret and took no responsibility for their violation of the law. *See* R. Doc. 113. They appeared nonchalant throughout the hearing. In typical fashion of those being held accountable for misdeeds, they

minimized their actions,[1] utilized progressive truth-telling and selective memory.[2] They blatantly denied what they had done.[3] Special Agent Cooper testified that the US Attorney's office did not have adequate internal procedures in place to ensure the statutory requirements are met. MT at 31:6-11. He also placed the blame on the "magistrate superior court" for establishing the inadequate procedure. *Id.* Special Agent Amiotte admitted during the COVID-19 pandemic while the other law enforcement agencies were aggressively implementing more safeguards, the federal agents removed the only possible step they had in place to ensure compliance with Rule 5(a) which was to rely on the court scheduling clerk to let them know when to bring defendants to court. R. Doc 149 at 77:24-78:11. It was only at this point that the government was unable to further deny the obvious, and it blatantly admitted that it violated the law. MT 142:25-143:4.

Ms. Jones' substantive due process violation is an ever-present and troubling regularity in the District of South Dakota that is known all too well. See *United States v. Theus*, II, CR-20-10045 (D.S.D. March 19, 2021) (defendant experienced a 1(6)(double check whether it is 15 or 16 day delay)-day delay in presentment; district court denied motion to dismiss indictment, AUSA sanctioned for misrepresenting facts to the district court, case ultimately dismissed due to defendant's death); *United States v. Bobtail Bear*, CR-14-10011 (D.S.D. May 19, 2021 & Oct.

[1] MT 31:18-32-15, characterizing a violation of statutory law as a mere mistake due to confusion between which of two phone numbers might be used to contact the magistrate's office.

[2] MT 29:12-21, Special Agent Cooper minimized his actions by nonchalantly deflecting whether he made a "routine phone call." He states that all the other officers gave a "standard answer" that they could not remember whether they made the call, yet he could remember precise details about the interrogation with Ms. Jones such as the time it began, which was not record stamped on the recording.

[3] MT 30:8-10, the prosecutor asks, "As you sit here today, did you believe someone did call the courts and notify them?" To which Special Agent Cooper responds "yes." See also R. Doc. 122 at 4, United States Memorandum in Opposition to Defendant's Motion to Dismiss/Suppress which states "According to the agents, notification was made."

15, 2021) (defendant experienced seven-day delay in presentment, the district court dismissed indictment as the delay was "not purposeful, but due to personnel, training, and communication issues, slip ups, and poor policies"). The Eighth Circuit overlooks and fails to adequately respond to the pervasive pattern of egregious conduct that amounts to wanton disregard of the value of human life and liberty occurring in the District of South Dakota.

Indeed, as reasoned by the Ninth Circuit Court of Appeals, a circuit split currently exists on what remedy is available for a delay in presentment, and by what standards such should be adjudged. *See United States v. Dominguez-Caicedo,* 40 F.4th 938, 951 (9th Cir. 2022) ("The Second and Eighth Circuits have outright rejected dismissal of the indictment as a remedy for violation of Rule 5, with holdings that appear to foreclose dismissal even in egregious circumstances. . . . However, we are bound by *Bayless* and *Jernigan*, both of which determined that dismissal could be a remedy for particularly egregious violations of Rule 5 where no other relief is available."). This case provides an opportunity for this Court to resolve that circuit split.

Jones does not ask this Court to announce that the Constitution or Rule 5 compels a specific time limit for the bounds of substantive due process. Rather we ask this Court to provide some degree of certainty so lower courts may establish prompt-presentment procedures with confidence that they are constitutionally effective. The Court has previously addressed questions that are akin to what we are asking, however none have directly addressed whether substantive due process is offended with a pervasive and persistent pattern occurring within District Courts.

II. Pursuant to *Missouri v. Seibert*, the use of pre-*Mirandized* questioning to procure a Waiver of *Miranda rights,* invalidates the waiver of *Miranda Rights*.

Jones' case is becoming all too common. Since this Court decided *Miranda v. Arizona, 384 U.S. 436 (1966)*, some law enforcement officers have found ways to neutralize its protections. One of those ways is by delivering the required warnings in the middle of or after a

custodial interrogation, which was addressed by this Court in *Missouri v. Seibert, 542 U.S. 600 (2004)*.

Seibert was a fractured opinion. The *Seibert* plurality articulated a five-factor test to decide based on objective standards whether midstream *Miranda* warnings are constitutionally effective. In a concurring opinion, Justice Kennedy articulated an arguably narrower, subjective test to evaluate whether statements following midstream *Miranda* warnings are constitutionally tainted: "If the deliberate two-step strategy has been used, post-warning statements that are related to the substance of pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring) (emphasis added).

Since *Seibert*, courts have failed to uniformly apply which test applies in a particular case. Seven federal circuits—the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh—apply Justice Kennedy's subjective-intent test.[4] Four federal circuits—the First, Sixth, Seventh, and Tenth—apply the plurality opinion or apply both tests.[5] You see the same patchwork at the state level.[6]

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[4] *See United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007); *United States v. Naranjo*, 426 F.3d 221, 231–32 (3rd Cir. 2005); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007); *Reyes v. Lewis*, 833 F.3d 1001, 1029 (9th Cir. 2016); *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006).

[5] *See United States v. Verdugo*, 617 F.3d 565, 575 (1st Cir. 2010) (declining to decide which test applies); *United States v. McConer*, 530 F.3d 484, 498 (6th Cir. 2008) (applying both tests); *Heron*, 564 F.3d at 885 (applying both tests); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (applying both tests after explaining that the "narrowest opinion" in *Seibert* was unclear because seven justices had rejected Justice Kennedy's concurrence).

[6] At least ten states' high courts—those in Idaho, Georgia, Missouri, Arkansas, Maine, Maryland, Florida, Illinois, Texas, and Kentucky—have endorsed Justice Kennedy's concurring opinion in *Seibert*. *See State v. Wass*, 396 P.3d 1243, 1248 (Idaho 2017); *State v. Abbott*, 812 S.E.2d 225, 231 (Ga. 2018) (reversing its 2007 adoption of the *Seibert* plurality opinion); *State v. Collings*,

Likewise, and likely of more important in this Petition, a split of both federal and state courts exists as to whether a prewarning interrogation triggers *Seibert* regardless of whether the defendant made an inculpatory statement before receiving the *Miranda* warnings. *See, e.g., Edwards v. United States*, 923 A.2d 840, 842 (D.C. 2007) (applying *Seibert* despite no prewarning inculpatory statement); *Robinson*, 19 A.3d at 955–56 (applying *Seibert* even though defendant consistently proclaimed his innocence); *Martinez*, 272 S.W.3d at 624 ("It is immaterial to our consideration whether incriminating statements emerged from the unwarned interrogation."); *United States v. Iles*, 753 F. App'x 107, 110 (3d Cir. 2018) ("*Seibert* does not apply because [the defendant] did not make any incriminating statements before she signed the *Miranda* waiver."); *People v. Mitchell*, 822 N.W.2d 224, 224 (Mich. 2012) (declining to apply *Seibert* because there was "no earlier confession to repeat"); *State v. Clifton*, 892 N.W.2d 112, 131 (Neb. 2017) (same).

While the courts have grappled with the *Seibert* fracture, interrogation techniques have evolved to exploit the judicial confusion. This case presents the Court with an opportunity to provide clarity and redress to much of the post-*Seibert* confusion by determining whether the

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450 S.W.3d 741, 755 (Mo. 2014); *Jackson v. State*, 427 S.W.3d 607, 617 (Ark. 2013) (no evidence that failure to warn was "purposeful"); *State v. Nightingale*, 58 A.3d 1057, 1067 (Me. 2012); *Robinson v. State*, 19 A.3d 952, 964–65 (Md. 2011); *Ross v. State*, 45 So. 3d 403, 422 n.9 (Fla. 2010) (focusing on concurrence in analysis); *People v. Lopez*, 892 N.E.2d 1047, 1069 (Ill. 2008); *Martinez v. State*, 272 S.W.3d 615, 621, 626–27 (Tex. Crim. App. 2008) (describing both opinions before applying concurrence); *Jackson v. Commonwealth*, 187 S.W.3d 300, 309 (Ky. 2006). At least five states' high courts—those in Indiana, Nebraska, Ohio, South Carolina, and Vermont—and the highest court in the District of Columbia have adopted the Seibert plurality's approach. *See Kelly v. State*, 997 N.E.2d 1045, 1054–55 (Ind. 2013); *State v. Juranek*, 844 N.W.2d 791, 803–04 (Neb. 2014); *State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006); *State v. Navy*, 688 S.E.2d 838, 842 (S.C. 2010) ("In our view, that deliberate [police] practice was not determinative in *Seibert*."); *State v. Brooks*, 70 A.3d 1014, 1019–20 (Vt. 2013); *Hairston v. United States*, 905 A.2d 782 (D.C. 2006).

plurality's objective test or Justice Kennedy's concurrence governs custodial interrogations prior to the delivery of *Miranda*.

In this case, it is undisputed that Tracy was in custody. However, there was a key portion of the interrogation which took place prior to *Miranda* warnings being given, which was plainly intended to elicit a waiver of *Miranda*. Specifically, that portion of the interrogation included advisements during questioning that Tracy was being charged with a ten-year mandatory minimum, that she had almost no options, but if she would cooperate and speak with them, "we can do things on the federal side in front of the judge at some point that says, Okay, Judge, you can go below that ten year[.]" The Eighth Circuit panel opinion focused on the fact that the pre-*Miranda* portion of the interrogation was "brief and narrow in scope" and that a confession was not elicited prior to the *Miranda* warning being given. APP. 7. Both are true, however, the inquiry required by *Seibert* is not necessarily focused on length or whether a confession was given prior to the *Miranda* warning being given, but rather "[t]he *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given." *Id.*, at 620 (Kennedy, J., concurring in result). The fact that the questioning was brief and narrowly tailored to solely entice Tracy to waive her *Miranda* rights does not distinguish it from *Seibert*; it implicates it more. The Court is forced to answer the question of whether the discussion of cooperation prior to a waiver of *Miranda*, for the purpose of seeking a waiver of *Miranda* in a custodial interrogation, in the form of a two-step interrogation, is a constitutionally permissible approach to obtain a valid waiver of *Miranda*.

In this case, it is obvious that the interrogation tactics used were coercive and deceptive with the end goal of a waiver of *Miranda*. However, the waiver that law enforcement obtained from Tracy was invalid. Law enforcement was plainly implying that her cooperation would be

the only way she could reasonably expect to serve less than ten years in prison, in an attempt to convince her that she should waive her *Miranda* rights prior to them being given.

This interrogation tactic forestalled and decreased the likelihood for Tracy to invoke her *Miranda* rights. That conversation *may* have been constitutionally effective if done *after* she was informed of her *Miranda* rights and waived them, but it plainly crosses the line when the pre-*Mirandized* interrogation is used to procure an initial waiver of those rights. The aforementioned precedent coupled with the facts of this case, all establish that the waiver Ms. Jones supplied was not a product of free choice, rather it was one made from the volatile influence of deception and coercion.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, and having done so, should reverse the conviction or remand this case to the district court with direction to suppress Jones' statement if she chooses to withdraw her guilty plea pursuant to Fed. R. of Crim Pro. 11(a)(2).

Dated this 19th day of September, 2023.

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