

No. 39039-6 II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

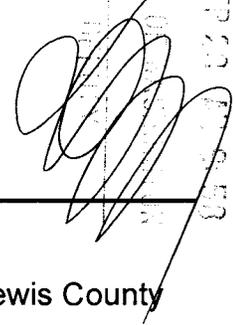
Respondent,

vs.

TONY CURTIS HICKMAN,

Appellant.

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STATE OF WASHINGTON  
BY \_\_\_\_\_



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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

## ARGUMENT

The defendant offers two arguments on appeal, both regarding the admission of his statements to Detective Borden at the Lewis County Sheriff's Office. He argues that the statements were inadmissible and his confession uncorroborated. The state will address each in turn.

### **I. Missouri V. Seibert Does Not Bar the Admission Of The Defendant's Post-Warning Statements.**

First, the defendant claims that the trial court should have applied the United States Supreme Court's holdings in *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643, (2004), to bar the admission of statements made to Detective Borden before the detective administer Miranda warnings. He contends the detective's failure to either read the Miranda warnings at the inception of his interview of the defendant, or to provide some type of curative measures in addition to the warnings, vitiated all admissions made after the Miranda warnings had been given. This argument fails because the detective's use of the two-step interview

process in this case is distinguishable from the process struck down in *Missouri v. Seibert*.

Motions to suppress are necessarily fact-specific. Thus, it is essential to examine the facts lying behind the *Seibert* holding before simply applying the holding alone to the trial court's suppression ruling. This examination should reveal the inapplicability of that holding to the facts before this court.

#### **A. The *Seibert* Holding**

In *Seibert*, the police woke the suspect, Ms. Seibert, at a hospital where her son was being treated for burns he suffered in a house fire that the police suspected Ms. Seibert had set. *Seibert*, 542 U.S. at 604 (plurality opinion). The police took Ms. Seibert to their station and, following established practice, deliberately refrained from providing Miranda warnings to her until they had elicited a full confession. *Seibert*, 542 U.S. at 604-05. After Ms. Seibert made incriminating statements, thirty to forty minutes into the interview, the police advised her of her Miranda rights, obtained a waiver from her, and then resumed their interrogation. The ensuing questioning rehashed topics covered in the first unwarned interrogation. *Seibert*, 542 U.S. at 606. The police pressed Ms. Seibert into providing the equivalent responses as she had

provided earlier, openly relying on her earlier statements to elicit a second admission. This second confession was used to convict her. Seibert, 542 U.S. at 605-06.

A plurality of the Supreme Court characterized the police officer's use of this "two-step" interview technique as "systematic, exhaustive, and managed with psychological skill." Seibert, 542 U.S. at 616. Justice Kennedy, in a concurring opinion, described the post-warning interview as a "cross-examination." And both he and the plurality characterized the police's interview as an indistinguishable period of questioning, although the interviewer conducted two periods of questioning divided by his administering the Miranda warnings. The plurality observed that this officer conducted the first interrogation as a continuation of the second by referencing the suspect's earlier statements so extensively that "a reasonable person in the suspect's shoes would not have understood [the Miranda warnings] to convey a message that she retained a choice about continuing to talk." Seibert, 542 U.S. at 617. Once the officer had treated the two-part interrogation as one conversation, "it would have been unnatural [for the suspect] to refuse to repeat at the second stage what had been said before." *Id.*

The plurality refused to see find that the use of Miranda warnings in these circumstances was meaningful. They rejected the idea that "mere recitation of the litany suffices to satisfy Miranda in every conceivable circumstance." Seibert, 542 U.S. at 611.

According to the Court, when a suspect wholly incriminates himself, a midstream warning may be useless to "reasonably convey that he could choose to stop talking." Seibert, 542 U.S. at 612.

"By any objective measure, applied to circumstances exemplified here, 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. Seibert, 542 U.S. at 613.

As a result, "[t]he threshold issue when interrogators question first and warn later is whether it would be reasonable to find that in these circumstances the warnings could function effectively... " Seibert, 542 U.S. at 611-12. "For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification ... for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." Seibert, 542 U.S. at 612.

In ruling, the *Seibert* Court distinguished its earlier decision in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). Examining slightly different facts in that case, the Court

held that a suspect who has answered unwarned, uncoercive questions may validly waive his rights and provide an admissible statement after being warned. This varying outcome resulted from the Court finding that a reasonable person in *Elstad*'s position could have seen the police station questioning as a new and distinct experience from the earlier, unwarned questioning in his home. Thus, the station house Miranda warnings could have been viewed "as presenting a genuine choice whether to follow up on the earlier admission." *Seibert*, 542 U.S. at 615-16.

Factually, the *Seibert* Court distinguished *Elstad* on the grounds that the first, unwarned statement obtained in *Elstad* was brief, was not the product of custodial interrogation, was not the result of coercion, and the causal relationship between the suspect's two statements were attenuated. *Seibert*, 542 U.S. at 614-15. In contrast to the officers' failure to give warnings in *Elstad*, the officer's conduct in *Seibert* was at "the opposite extreme..." *Seibert*, 542 U.S. at 615-16. Using the two-step interrogation method, the officer was able to obtain, essentially an unknowing confession from the Ms. Seibert. The plurality held that this method intrinsically undermines Miranda's goal of protecting against the admission of coerced confessions, and under the circumstances

before it, the warnings were ineffective to achieve Miranda's intended purpose. Seibert, 542 U.S. at 609-11. Justice Kennedy similarly observed, "This tactic relies on an intentional misrepresentation of the protection that Miranda offers and does not serve any legitimate objectives that might otherwise justify its use." Seibert, 542 U.S. at 620-621. He continued, "The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Seibert, 542 U.S. at 621 (*quoting Moran v. Burbine*, 475 U.S. 412, 423-424, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). For this reason, the Court held that in *Seibert's* circumstances the Miranda warnings were inadequate and that his postwarning statements were inadmissible. Seibert, 542 U.S. at 617.

The Court's holding consisted of a plurality opinion and Justice Kennedy's concurring opinion, in which he agreed with the plurality's reasoning but concluded that its test for determining whether midstream Miranda warnings were effective was too broad. Seibert, 542 U.S. at 629, 124 S.Ct. 2601 (Kennedy, J., concurring). Instead, Justice Kennedy advocated barring a defendant's

statement only where a *deliberate* "two-step interrogation technique was used in a calculated way to undermine the Miranda warning." *Id.* Justice Kennedy recognized that there may be some occasions where linked interviews or a "two-step" interrogation might be justified. But "When an interrogator uses this deliberate, two-step strategy, predicated upon violating Miranda during an extended interview, post-warning statements that are related to the substance of pre-warning statements must be excluded absent specific, curative steps." *Id.* With this caveat, Justice Kennedy also ruled that the all of Ms. Seibert's confessions were inadmissible as violating Miranda.

It is this holding by Justice Kennedy that is controlling in *Seibert* *U.S. v. Williams*, 435 F.3d 1148, 1157-58 (9<sup>th</sup> Cir. 2006). Where no opinion receives a majority in a case, only the narrowest holding of those justices affirming the trial court's ruling is supported by a majority of the court. Since Justice Kennedy's opinion represents the narrowest holding, *Seibert* only prohibits admission of a suspect's incriminating statements when the police *deliberately* elicited those statements using a two-step strategy predicated upon violating Miranda. See *Williams*, 435 F.3d 1148 at 1157-58. "In situations where the two-step strategy was not deliberately

employed, *Elstad* continues to govern the admissibility of post-warning statements." *Williams*, 435 F.3d at 1158.

The facts presented by this case do not warrant a similar outcome as in *Seibert* as they are distinguishable from those presented in that opinion. Detective Borden's purpose in conducting the interview of Mr. Hickman, his manner of conducting it, and the reasonable effect on Mr. Hickman's choice to confess are all in contrast to those of the *Seibert* officer and defendant. Detective Borden had a legitimate purpose to use a two-part interview format and he lacked any intent to thwart the effectiveness of the Miranda warnings. His actions simply did not rise to the level of the reprehensible behavior shown by the officer in *Seibert*. More importantly, the format of the interview did not undermine the effectiveness of the two sets of Miranda warnings that Detective Borden provided.

**B. Detective Borden's Use Of A Two-Step Strategy Was Not A Deliberate Attempt To Undermine The Miranda Warnings.**

First, Detective Borden's purpose for using the two-step interview format is distinguishable from that criticized by the Supreme Court in *Seibert*. The Ninth Circuit Court of Appeals in *U.S. v. Williams* described the manner for determining whether an

interrogator used the two-step format "in a calculated way to undermine the Miranda warning." Seibert, 542 U.S. at 622 (J. Kennedy concurring). The *Williams* opinion states that courts "should consider any objective evidence or available expressions of subjective intent suggesting that the officer acted deliberately to undermine and obscure the warning's meaning and effect." Williams, 435 F.3d at 1160. "Such objective evidence would include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." Williams, 435 F.3d at 1159.

Turning to the subjective evidence in the record, the detective on several occasions during the 3.5 hearing clearly established that the two-part interview format was a result of his desire to register Mr. Hickman before he conducted a criminal investigation, and not to obtain a confession. In very clear language he testified to this fact: "my intent when we started was to simply get him properly registered." RP 20. This was not a hidden intent. He informed Mr. Hickman of this purpose and that he would be Mirandized before the criminal portion of the interview. RP 14. Nor was it a contrived or pretextual purpose; at the 3.5

hearing he noted that he has a statutorily mandated obligation to register undocumented sex offenders. RP 21. He further explained that either Mirandizing Mr. Hickman before registering him, or reversing the order of the interviews, might jeopardize his ability to register Mr. Hickman and place Mr. Hickman in immediate violation of the law. Detective Borden noted that if Mr. Hickman "had asked for an attorney or had refused to answer any question, then I couldn't have had him fill out any forms but [sic] he wouldn't have been properly registered." RP 20. Furthermore, it is apparent that the detective himself didn't realize the legal import of his questions at this stage of the interview until Mr. Hickman's defense attorney drew out the conclusion from him. Detective Borden testified that he didn't view the re-registration questions as seeking information that would be "detrimental" to the defendant's interests. RP 18-19. He viewed the questions as merely part of his first duty to collect the minimum information necessary to complete the registration form. RP 18-20. This purpose for holding a pre-warning interview is vastly different than the nature of the *Seibert's* officer's purpose when he administered the mid-stream warnings to Ms. Seibert.

The objective evidence in the record also indicates Detective Borden did not deliberately use the dual interview to obtain a forced

confession. "The timing, setting and completeness of the prewarning interrogation" conducted by the detective is substantial dissimilar to the one examined in *Seibert*. Williams, 435 F.3d at 1159. Mr. Hickman arrived at the Lewis County Sheriff's Office for the interview not after being taken into custody, but in response to an appointment time set up by the detective and Mr. Hickman when he telephoned the detective. RP 13, 57. The detective informed him that the purpose of the meeting was to both "get his registration taken care of" and to discuss "where he had been living." *Id.* At the sheriff's office, the detective informed him that the interview would occur in two parts and that before the second, criminal part the detective would administer to him Miranda warnings. RP 14.

The first part of the interview was short; ending approximately seven minutes after Mr. Hickman arrived at the office. RP 13-14. It consisted of the detective asking him for his new address, placing this address into the database, and having Mr. Hickman sign the form. RP 14. Although the court found that Mr. Hickman was in custody during this period, it is hard to characterize this first interview as an interrogation. In fact, while Detective Borden testified that he would have placed Mr. Hickman in custody if he left the interview, there is no evidence in the record

that he informed Mr. Hickman of this fact, nor is there any basis that Mr. Hickman, or any reasonable person, would have believed this was the case. The record indicates the interview was a sterile exchange in the nature of dialogue conducted at a routine, bureaucratic appointment. It clearly was not "systematic, exhaustive, and managed with psychological skill..." nor deliberately employed to soften the impression that the Miranda warnings might otherwise have had on the defendant.

The timing of Detective Borden's administration of the Miranda warnings also illustrates the lack of a deliberate attempt "to obscure both the practical and legal significance of the admonition when finally given." Seibert, 542 U.S. at 602. The Seibert plurality found that the two-step interviewer's technique of waiting for the particularly opportune time to give the warnings – "after the suspect has already confessed" – jeopardizes the warnings' effectiveness. Seibert, 542 U.S. at 611. This, however, was not true of Detective Borden's interview. Mr. Hickman's statement that he was living at a new address did not trigger the detective to Mirandize Mr. Hickman. Instead, the detective Mirandized Mr. Hickman at the beginning of his criminal investigation, as he had informed Mr. Hickman he would do. By alerting the defendant to his plan to give the warnings

mid-interview, at the initiation of the "criminal" stage, he called the defendant's attention to the fact that his next set of questions were for a different purpose. The structured meeting between the Detective and Mr. Hickman, and the introduction of the Miranda warnings in this structure are not consistent with an "intentional misrepresentation of the protection that Miranda offers." Seibert 542 U.S. at 620-621.

The third type of objective evidence suggested by the *Williams* court as an indication of deliberate use of the two-step interview method is "the overlapping content of the pre- and postwarning statements." Williams, 435 F.3d at 1159. This evidence deserves the greatest attention since much of the *Seibert* court's reasoning was grounded on the affect that the officer's continuous sequence of questioning likely had on the effectiveness his Miranda warnings. The *Seibert* majority emphasized that the officer's practice of confronting "the defendant with her inadmissible prewarning statements and push[ing] her to acknowledge them" functionally destroyed any separation between the sequences of questioning. Seibert, 542 U.S. at 621. Justice Kennedy explained the psychological effect of this practice: "Reference to the prewarning statement was an implicit suggestion that the mere

repetition of the earlier statement was not independently incriminating." *Id.* As evidence of the effectiveness of this tactic, the plurality noted that the ultimate confession by Ms. Seibert was largely a repeat of her unwarned confession. *Seibert*, 542 U.S. at 613. Here, while no time separated the pre and post warning interrogations by Detective Borden, the content of the interrogations was materially distinct. The Detective did not use the tactic described by the Seibert court.

The lack of any attempt by Detective Borden to overlap the administrative and criminal phase of his interview is manifested first by him informing Mr. Hickman that the interview would concern different subject matters. RP 14. Thus, Mr. Hickman was made aware that each portion was for a different purpose, the second criminal. More significantly, the nature of the questioning also changed. While in the first interview the detective simply asked Mr. Hickman his current address, in the second Detective Borden inquired into "where he had been living and what times he had lived at different places." RP 16. He asked whether he had been living at 701 North Tower, a location that had not been raised in the administrative portion of the interrogation. RP 58. The detective also confronted him with the fact that he had checked on his living

location and that the North Tower address did not exist. It was only at this point that Mr. Hickman confessed that the North Tower address was incorrect and that he no longer resided at the South Tower address. RP 17.

The record thus reveals that Detective Borden did not simply ask the same questions to Mr. Hickman in the second interview as he had in the first. He addressed a different time period and different living locations. He introduced the time period immediately after the defendant left the Tower residence, and challenged him about whether this was a North Tower or South Tower address. Admittedly, the detective did inquire about Mr. Hickman's current residence in the second interview, but this evidence was excluded by the trial court.

Furthermore, in this second interview, Detective Borden introduced independent knowledge of Mr. Hickman's change of address. This provided an independent basis for Mr. Hickman to confess that didn't exist in the administrative interview. And most importantly, the detective made no reference to Mr. Hickman's earlier statement that he was living in a new address, on Vienna Street. In no way did he use this earlier statement to influence the defendant to make the further confession that he had been living in

parks, trailers, and at friends houses at the same time his registration showed a Tower address. RP 17, 77. More broadly, the record is devoid of any indication that Detective Borden was tactically linking the two interviews at all. Although the interviews were as contemporaneous as the ones examined in *Seibert*, they were distinct in their nature, content, and in how they were presented to Mr. Hickman. These distinctions do not support that Detective Borden was deliberately employing a "police strategy adapted to undermine the Miranda warnings." *Seibert*, 542 U.S. at 616-17. They instead show that the two-part interview was employed for a "legitimate objective" that justified its use – to bring the defendant back in compliance with the law while at the same time investigating the defendant's possible lack of compliance. See *Seibert*, 542 U.S. at 621 (J. Kennedy concurring).

**C. *U.S. V. Torres-Lona* Supports the State's Application of *Missouri V. Seibert* to the Present Case.**

The federal Eighth Circuit Court drew similar distinctions in a case also involving contemporaneous administrative and criminal interviews. In *U.S. v. Torres-Lona*, 491 F.3d 750 (8<sup>th</sup> Cir. 2007), ICE agents arrested Mr. Torres-Lona during a search of an apartment complex for persons using counterfeit immigration

documents. The defendant was taken into custody when he couldn't produce immigration documents. Torres-Lona, 491 P.3d at 753. Upon searching Torres-Lona, the agents discovered a social security card that Torres-Lona stated belonged to him although it was unsigned. Torres-Lona, 491 P.3d at 753. Without Mirandizing the suspect, the agents asked him about the card and his employment. The agents then drove Torres-Lona to his place of employment and to the ICE office. During these drives, the agents asked him more questions about his immigration status and then Mirandized him once they reached the office. *Id.* Torres-Lona waived his rights. After the interview, the agents charged Torres-Lona with making a material false statement to immigration officers. Torres-Lona, 491 P.3d at 754.

At trial, the district court refused to suppress any of Torres-Lona's post-Miranda statements. On appeal, the circuit court affirmed. The Eighth Circuit court distinguished the case from *Siebert*, finding that the agents had not deliberately used the administrative interview to determine whether the suspect was an illegal alien as part of a two-part interrogation. The court noted that "the present case involves a post warning false statement rather than a post warning confession...the agents here had an interest in persuading Torres-Lona to answer their questions truthfully so that they could better understand his immigration status... there is

nothing to suggest that the ICE agents confronted Torres-Lona with his prior false statement in an effort to have it repeated, nor was Torres-Lona's post Miranda statement identical to the one he made earlier." Torres-Lona, 491 P.3d at 758.

The court concluded that "these circumstances are more consistent with an agent seeking to discover the truth about Torres-Lona's immigration status than one attempting to induce him to make another false statement." *Id.*

Likewise, the circumstances of Detective Borden's interview of Mr. Hickman are more consistent with the detective re-registering the defendant than a malicious police interrogation strategy. As such, the defendant's statements are not subject to the *Seibert* holding and were admissible at trial. Torres-Lona, 491 F.3d at 758.<sup>1</sup>

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<sup>1</sup> Admission of the defendant's statements are still subject to the Supreme Court's holding in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). See *Seibert*, 542 U.S. at 622. Mr. Hickman neither argued to the trial court nor to this court on appeal that this holding barred his statements. Consequently, the state merely notes that the record supports that Mr. Hickman's statements were not coerced and, therefore, are not excluded by the Supreme Court's analysis provided in *Elstad*. See *State v. Broadaway* 133 Wn.2d 118, 132, 942 P.2d 363, 372 (1997) (The relevant inquiry for determining coercion is whether the Defendant's will was overborne).

**D. Detective Borden's Use of a Two-Step Interrogation Method Did Not Undermine the Effectiveness of His Miranda Admonishment.**

If this court finds that Detective Borden's use of the two-part technique was a deliberate means to gain a Mirandized confession, the next inquiry is "whether [the] Miranda warnings delivered midstream could have been effective enough to accomplish their object given the specific facts of the case."- Seibert, 542 U.S. at 616 (plurality opinion). *See also, Williams*, 435 F.3d at 1160. The state turns to that inquiry now. Based on many of the same distinctions already noted, the record supports that the Miranda warnings given by Detective Borden were effective.

Both the *Seibert* plurality and Justice Kennedy concluded that the police in that case used the two-step interrogation to obfuscate the import of the Miranda protections. The factor primarily relied upon by the court to come to that conclusion was that "a reasonable person in [Seibert's] shoes would not have understood [the midstream Miranda warnings] to convey a message that she retained a choice about continuing to talk." Seibert, 542 U.S. at 617. In part, this end-run around Miranda was achieved by eliminating any meaningful break between one portion of the interview and the other, either through the passage of time or

by a verbal warning given to the defendant. *Seibert*, 542 U.S. at 616

This factor is absent here due to the different manner that Detective Borden conducted the interview with Mr. Hickman from that conducted by the officer interviewing Ms. Seibert. Detective Borden's interview was not a continuous "unwarned sequence of questioning" punctuated by the officer dispensing the Miranda warnings as an afterthought. *Seibert* 542 U.S. at 612 n.4. The interview was more akin to separate interviews, joined only by their temporal proximity. As noted, Detective informed Mr. Hickman that the interview would be conducted in two parts, the second being a criminal investigation. Further, he notified Mr. Hickman that Miranda warnings would be given at the beginning of this criminal interview. And when he finished the first, administrative, phase, Detective Borden did in fact inform Mr. Hickman that he was beginning the criminal investigation. These actions provided the break or separation absent in *Seibert*. By distinguishing the two portions of the interview, the detective gave meaning to the Miranda warnings that didn't exist in *Seibert* because the warning was given midstream of an otherwise continuous period of questioning. By differentiating the interview portions by their

purpose, Detective Borden telegraphed that the statements made in each would carry different consequences. Thus, when he provided the warnings only in the criminal interview they had import and effect. The warnings provided in the second interview offered Mr. Hickman a “genuine choice whether to follow up on [his] earlier admission.” Seibert, 542 U.S. at 615-16.

Detective Borden also, as already noted, did not foster an impression that his criminal investigation was a mere continuation of his administrative questioning by referencing back to the confession already given. In the first portion of the interview, the detective did ask Mr. Hickman to incriminate himself when he asked him for his current address. However, a reasonable person might not even consider this question to be seeking a confession to the crime as it was given in the context of completing a standard form. Nor did the detective pressure him to answer, or make repeated inquires regarding the information. And most significantly, after receiving this information, the detective did not refer to the incriminating statement during the criminal investigation portion of the interview. There was no attempt by the detective to convince the defendant to repeat his pre-warning statements. In fact, his inquiry regarded a broader time period and particularly whether Mr.

Hickman had lived on North or South Tower Avenue. A reasonable person could have seen this questioning, although briefly separated in time from the administrative interview, as a new and distinct experience from the earlier questioning by Detective Borden. This was not a continuing course of interrogation.

A reasonable person could also conclude that the statements made in the administrative portion of the interview could not be used against him criminally because they were made outside the criminal investigation portion of the interview. Nor did he reflexively repeat his statement during the criminal investigation. Mr. Hickman's confession was separate from his statements given for re-registration, which the court excluded. It was only when Detective Borden noted the error on Mr. Hickman's prior registration document that Mr. Hickman offered that he had been living at different locations for some time. RP 17, 58. Thus, this is not a situation, as in *Seibert*, where a defendant might conclude that he had already told the officer everything that he needs to know so there is no reason to assert his rights upon repeated questioning. Whatever psychological affect reduces a person's reluctance to repeat a confession once made does not apply to Mr. Hickman's statements regarding his whereabouts between the time he left the

Tower residence and took up residence on Vienna. This cat was not out of the bag. Mr. Hickman could have simply refused to address this related, but different, subject. There was no reason for him to feel compelled by his prior statement regarding his Vienna street residence to provide additional information about his whereabouts. In fact, the opposite is true. The nature of the second interview, the detective distinguishing it from the first interview, the repeated Miranda warnings, and the varying questions should have conveyed to Mr. Hickman that his post-warning statements might be "independently incriminating." Seibert, 542 U.S. at 621 (J. Kennedy concurring). This was not true in *Seibert* where when the police were finished there was little, if anything, of incriminating potential left unsaid." Seibert, 542 U.S. at 616.

The manner in which Detective Borden administered the Miranda warnings also supports their effectiveness in the present case. Administered within the administrative -- criminal structure of the interview, the warnings did not "mean less when recited mid-interrogation" after inculpatory statements had been obtained. Seibert, 542 U.S. at 620 (J. Kennedy concurring). Given the detective's reference to the warnings in his overview of the meeting,

his Mirandizing Mr. Hickman could not be seen as an afterthought. The warnings were linked to the "criminal" portion of the interrogation, giving them particular meaning. In addition, the detective twice provided the warnings to Mr. Hickman, once at the beginning of the second portion of the interview and once before recording his statement. This served to underline the enduring significance of the warnings and gave Mr. Hickman an additional opportunity to refuse to make any statements. At each point, he knowingly waived his rights.

**E. Detective Borden's Use of the Two-Step Interview Technique Was For a Legitimate Purpose.**

In these respects, the facts of the case are more like those considered by the Supreme Court in *Elstad* than those at issue in *Seibert*. In *Elstad*, the first, unwarned statement obtained by the police was brief, was not the product of custodial interrogation, was not the result of coercion, and the causal connection between the first and second responses to the police were attenuated. Correspondingly, the Court found that "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression given the facts of that case. *Seibert*, 542 U.S. at 619-620 (J

Kennedy concurring) (*quoting Elstad*, 470 U.S. at 308). Examining this holding, Justice Kennedy noted that it is not pragmatic to expect all statements gathered by officers to be Mirandized. He observed that non-Mirandized statements collected for legitimate reasons by officers conducting investigations should not jeopardize later Mirandized statements. Reviewing several recent Supreme Court holdings, he concluded, " They [the holdings] recognize that admission of evidence is proper when it would further important objectives without compromising Miranda's central concerns." *Seibert*, 542 U.S. at 619 (J. Kennedy concurring). The same reasoning applies to Detective Borden's use of the two-step interview here to achieve an administrative purpose. Mirandizing a sex offender should not be required when officers conduct a strictly administrative interview to register sex offenders that have failed to keep their registration current.

In the final analysis, Mr. Hickman's argument places a round peg in a square hole. His bare application of the *Seibert* holding to the detective's interview of him seemingly raises an issue of admissibility. But a comparison of the *Seibert* facts to those established at the CrR 3.5 hearing and at trial shows his argument to be forced. Once the facts behind the holding are examined and

measured against the detective's actions in conducting the interview, Mr. Hickman's argument loses any sustainability. The character of the detective's interview simply does not implicate the same concerns as were raised in *Seibert* by Justice Kennedy and the rest of the majority Justices.

## **II. The Record Establishes The Corpus For The Crime of Failure to Register.**

Mr. Hickman's second argument claims that the trial court failed to establish the corpus delicti of the Failure to Register crime by independent evidence. His argument is grounded on the state's reliance at trial on his admissions that he no longer lived at his registered address, but he ignores the other evidence of guilt presented by the state. Because this additional evidence establishes that a crime was committed, his argument fails.

Under the corpus delicti rule, a trial court may not admit a defendant's extrajudicial confession unless there is independent prima facie proof that someone has committed the crime charged. *State v. Cobelli*, 56 Wn.App. 921, 924, 788 P.2d 1081 (1989). A prima facie showing requires evidence of sufficient circumstances supporting a logical and reasonable inference that the charged crime occurred. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 578-

79, 723 P.2d 1135 (1986). In determining whether there is sufficient corpus delicti evidence, we assume the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. State v. Aten, 130 Wn.2d 640, 658, 927 P.2d 210 (1996).

Mr. Hickman raised the present argument at his trial when he objected to admission of his statements that he was not residing at the location listed on his sex offender registration form. The trial court overruled the objection stating,

"The registration was 701 North Tower. Detective Borden went to 701 North Tower. There is nothing there. There is no residence there. That in and of itself is sufficient. So the corpus argument fails for that reason. There was sufficient testimony that there was a violation, he was not properly registered prior to the statements made by Mr. Hickman." RP 81-82.

On appeal, Mr. Hickman now argues that the "North Tower" entry on the sex offender registration form was an error made by the sheriff's department and not by Mr. Hickman. He cites evidence in support of that conclusion.

However, Mr. Hickman ignores other evidence in the record indicating it was Mr. Hickman who listed North Tower as his residence address. Detective Borden testified that a sex offender's address is provided at registration by the offender, not the sheriff's

office. RP 54. So, it is unlikely that the Sheriff's office mistakenly supplied the North Tower entry on the registration form submitted into evidence. While this fact does not rule out a scrivener's error, Mr. Hickman's statements at his meeting with the detective largely do. The detective testified that Mr. Hickman provided his current address as being on North Tower when they spoke on October 16. RP 58. It is again unlikely that both the sheriff's office and Mr. Hickman switched North for South at different times. It is more reasonable to conclude, looking at the evidence in the light favorable to the state, that Mr. Hickman provided the North Tower address at each meeting at the sheriff's office.

Furthermore, Detective Borden also testified that Mr. Hickman "admitted, 'No, I wasn't living on North Tower. I was living on South Tower up until the first of July of 2008.'" RP 17. This shows Mr. Hickman's knowledge that the North Tower entry was incorrect and indicates he provided this false address to the sheriff's office at the time of registration. Based on this evidence, the trial court, assuming the truth of the State's evidence and all reasonable inferences from it, could conclude that "701 N. Tower" entry was not attributable to the sheriff. Thus, the registration form combined with Detective Borden's testimony that he had visited 701

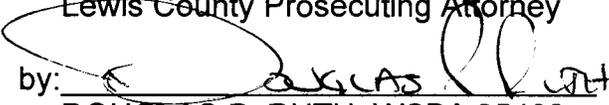
North Tower and not found Mr. Hickman residing there is objective proof that the crime was committed.

CONCLUSION

For the foregoing reasons, this court should affirm Mr. Hickman's conviction.

RESPECTFULLY submitted this 25 day of September, 2009.

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by:   
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Attorney for Respondent

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,	)	NO. 39039-6 II
Respondent,	)	
vs.	)	
	)	
TONY CURTIS HICKMAN	)	DECLARATION OF
Appellant.	)	SERVICE
	)	
	)	
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Douglas P. Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On September 25, 2009, the appellant was served with a copy of the **Respondent's Brief** by hand-delivery to the attorney for Appellant at the name and address indicated below:

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STATE OF WASHINGTON  
CLERK OF COURT  
CLERK OF COURT  
CLERK OF COURT

DATED this 25 day of September 2009, at Chehalis, Washington.

  
\_\_\_\_\_  
DOUGLAS P. RUTH  
Lewis County Prosecuting Attorney's Office