Journal of Criminal Law and Criminology

Volume 95
Issue 3 *Spring*

Article 9

Spring 2005

Missouri v. Seibert: Two-Stepping towards the Apocalypse

Stewart J. Weiss

0091-4169/05/9503-0945
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 95, No. 3
Printed in U.S.A.

MISSOURI V. SEIBERT: TWO-STEPPING TOWARDS THE APOCALYPSE

Missouri v. Seibert, 124 S. Ct. 2601 (2004)

I. INTRODUCTION

In *Missouri v. Seibert*, the Supreme Court ruled that a police officer's use of the "question first" (a.k.a. "two-step") interrogation technique rendered the warnings required by *Miranda v. Arizona*[1] ineffective and that the resulting statement must be held inadmissible at trial.[2] The Court affirmed the Missouri Supreme Court's decision that this practice, which involves withholding the *Miranda* warnings until a suspect has already given a statement and then prompting the suspect to repeat the unwarned statement, was wrongly used in Patricia Seibert's post-arrest interrogation to defeat the purpose of the *Miranda* warnings.[3] The Court distinguished its earlier ruling in *Oregon v. Elstad* which permitted a defendant's confession to be admitted into evidence despite the fact that he had made a prior self-incriminating statement before receiving his *Miranda* warnings.[4] In *Seibert*, the Court based its decision not on the traditional analysis of whether the respective statements were voluntary or coerced, but rather on whether the *Miranda* warning, when given midstream, was truly effective.[5] The plurality ruled that a waiver of *Miranda* rights could be given voluntarily but that the structure of a two-step interrogation could still render that waiver invalid by confusing the suspect as to the "nature of his rights and the consequences of abandoning them."[6]

The Court did not overrule *Elstad*, but rather it added a new level of analysis to determine the effectiveness of *Miranda* warnings given mid-stream. Although the Court vigorously criticized police who use the "two-

[1] 384 U.S. 436 (1966).
[2] 124 S. Ct. 2601 (2004).
[3] *Id.* at 2607.
[4] 470 U.S. 298 (1985).
[5] *Seibert*, 124 S. Ct. at 2611.
[6] *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986)).

step" interrogation technique as an "end-run" around *Miranda*, it chose not to implement a clear rule barring this technique in all cases.[7]

This note argues that instead of solving the troubling issues which brought this case before the Court, the *Seibert* opinion added another layer of ungainly analysis to an already abstruse process. The Court left police without a clear rule of conduct and gave lower courts the unenviable task of determining not just whether a suspect's *Miranda* rights were waived voluntarily but also whether the warnings themselves were effective given the "totality of the confusion" surrounding a custodial interrogation.

II. BACKGROUND: THE EVOLUTION OF *MIRANDA*'S EXCLUSIONARY RULE

A. *MIRANDA* AND ITS MANY EXCEPTIONS

Until 1966, the predominant standard for determining whether a defendant's confession could be admitted at trial was the Due Process Clause of the Fourteenth Amendment.[8] In the decades before *Miranda*, the Court rested the question of admissibility of confessions on whether it believed the defendant's "will was overborne" during interrogation.[9] To accomplish this inquiry, the Court examined the "totality of the circumstances" surrounding the defendant's interrogation and confession, taking into account not only the conduct of the interrogators but also the impact on the accused.[10] Despite applying this test on a regular basis,[11] the Court struggled to articulate a clear standard for determining when a suspect's will was overborne. In the years leading up to the *Miranda* decision, the Court acknowledged that an evolving desire for fairness in police procedure had complicated the Court's efforts to articulate a precise due process test for involuntary confessions.[12] Although the *Miranda* decision eclipsed due process as the governing standard for police interrogations, the "totality of the circumstances" analysis remains the basis of all inquiries into the voluntariness of a challenged confession.[13]

Throughout the decade preceding *Miranda*, the Court evinced a strong concern that coercive interrogation techniques produced unreliable and

---

[7] *Id.* at 2607.

[8] Dickerson v. United States, 530 U.S. 428, 433 (2000).

[9] *Id.* at 434.

[10] Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973).

[11] In the three decades leading up to *Miranda*, the Court applied this test in thirty different cases. *Dickerson*, 530 U.S. at 434.

[12] Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 115 (1998).

[13] *Dickerson*, 530 U.S. at 434.

untrustworthy confessions.[14] Furthermore, coercive police tactics offended a community's "sense of fair play and decency."[15] These dual concerns culminated in the Court's *Miranda* decision. The *Miranda* Court acknowledged that a custodial interrogation is an inherently coercive atmosphere which "exacts a heavy toll on individual liberty and trades on the weakness of individuals."[16] The Court recognized that a suspect placed in such a situation was especially likely to waive his Fifth Amendment privilege against self-incrimination.[17] To prevent potential infringements of suspects' Fifth Amendment rights, the Court established "concrete constitutional guidelines for law enforcement agencies and courts to follow."[18] These guidelines clearly stated that a confession would be inadmissible at trial if the defendant had not first been informed that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[19] If the accused invoked these rights at any time during an interrogation, the police had to respect this request and stop the interrogation. Any failure by the police to comply would trigger the exclusionary rule, rendering any resulting statement inadmissible in a court of law.[20]

However, soon after declaring these clear "constitutional guidelines," the Supreme Court created a number of exceptions to *Miranda*'s exclusionary rule. In *Harris v. New York*, the Court refused to completely exclude a statement given by a defendant despite the fact that he was not provided the *Miranda* warnings.[21] Instead of deeming the statement inadmissible because of this violation, the Court ruled that it could be used by the prosecution to impeach the defendant's testimony, but not in the case-in-chief.[22] Because the defendant did not claim his statement was coerced, the Court determined the statement was trustworthy[23] and voluntary under the totality of the circumstances test and therefore did not

---

[14] Spano v. New York, 360 U.S. 315, 320 (1959); *see also* Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960).

[15] Rochin v. California, 342 U.S. 165, 173 (1952).

[16] Miranda v. Arizona, 384 U.S. 436, 455 (1966).

[17] *Id.* at 439.

[18] *Id.* at 442.

[19] *Id.* at 479.

[20] *Id.* at 469.

[21] 401 U.S. 222 (1971).

[22] *Id.* at 224.

[23] *Id.*

warrant complete exclusion.[24] In *Michigan v. Tucker*, the Court allowed the admission of testimony from a witness identified by a statement taken in violation of *Miranda*.[25] Justice Rehnquist, writing for the majority, noted that although the police did disregard the commands of *Miranda*, they did not violate the underlying Fifth Amendment rights which the *Miranda* Court had set out to protect.[26] The idea that *Miranda*'s exclusionary rule is an overinclusive command which "sweeps more broadly than the Fifth Amendment" is the foundation of almost all the *Miranda* exceptions.[27] Ten years later, the Court's ruling in *New York v. Quarles* created a "public safety" exception to *Miranda*.[28] The Court determined that police were not required to provide *Miranda* warnings to a suspect if they had a reasonable concern for the public's safety.[29] The next year, in *Oregon v. Elstad*, the Court established the exception reconsidered in *Missouri v. Seibert*.[30]

B. *OREGON V. ELSTAD*—ADMITTING A VOLUNTARY CONFESSION GIVEN AFTER A MID-STREAM *MIRANDA* WARNING

1. Majority Ruling

Elstad addressed the question of whether the Fifth Amendment requires suppression of a voluntary statement made after a suspect has waived his *Miranda* rights if the suspect had given an earlier, voluntary but unwarned statement to police.[31] The Court ruled that the second statement, if given in the absence of coercion, was admissible.[32] The case was brought by a defendant convicted of burglary by the State of Oregon.[33] Upon arrest, the defendant had a brief conversation with police at his house in which he

---

[24] Weisselberg, *supra* note 12, at 127.

[25] 417 U.S. 433 (1974).

[26] *Id.* at 445-46.

[27] Oregon v. Elstad, 470 U.S. 298, 306 (1985).

[28] 467 U.S. 649, 651 (1984).

[29] *Id.* at 656. In *Quarles*, police apprehended a rape suspect who they believed was armed. *Id.* at 651-52. Finding the suspect to be unarmed, the police, without providing the *Miranda* warnings, asked the suspect where he had put his gun. *Id.* at 652. The suspect subsequently showed the officers where he had left the gun. *Id.* The Court allowed the admission of both the gun and the defendant's statement into evidence. *Id.* at 659-60.

[30] *Elstad*, 470 U.S. 298.

[31] *Id.* at 300. The majority opinion was written by Justice O'Connor and joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and White.

[32] *Id.* at 318.

[33] *Id.* at 300.

admitted to being involved in a burglary.[34] However, the defendant was not given the *Miranda* warnings until he was taken to the police station, at which point he waived his rights and gave a full confession.[35] The trial court refused to suppress the defendant's post-warning statement despite the fact that he made an incriminating statement before receiving the *Miranda* warnings.[36] The Oregon Court of Appeals reversed the trial court on the grounds that the defendant's initial, unwarned confession had "let the cat out of the bag" and created a coercive situation from which the defendant believed he could not escape, save for repeating his unwarned confession.[37]

On review, the United States Supreme Court reversed the Oregon Court of Appeals.[38] The Court ruled that because both of the defendant's statements were given voluntarily, *Miranda*'s broad exclusionary rule should not apply to the second, warned statement.[39] Citing the absence of "any coercion or improper tactics," the Court determined that the dual rationales for the *Miranda* warning, ensuring the trustworthiness of testimony and deterring impermissible police behavior, were not pressing in this case.[40] The Court distinguished cases in which *actual* physical or verbal coercion was used to elicit an unwarned statement from cases like Elstad's, in which a simple failure to warn created an irrebuttable "presumption of compulsion."[41] In cases where the first statement was actually coerced (an "involuntary" confession), the Court conceded that the "taint" of the coercive tactics could render the second statement involuntary.[42] In such cases, it advocated a strict examination of a number of different factors to determine if this "taint" dissipated before the second statement was given.[43] In contrast, the Court explained that any inadvertent or unintentional delay in implementing the "prophylactic *Miranda* procedures" could be redeemed simply with a defendant's "voluntary and informed waiver" if there was no evidence of actual coercion.[44] Applying this standard to the defendant, the Court found that Elstad's second

---

[34] *Id.* at 301. After the arresting officer informed the defendant that he believed the defendant had participated in a burglary, the defendant replied "Yes, I was there." *Id.*

[35] *Id.*

[36] *Id.* at 302.

[37] *Id.* at 303.

[38] *Id.* at 300.

[39] *Id.* at 308.

[40] *Id.*

[41] *Id.* at 314.

[42] *Id.* at 310.

[43] *Id.* The factors include time elapsed between confessions, the change in the location of the interrogation, and any change in the identity of the interrogator. *Id.*

[44] *Id.* at 309.

statement was voluntary because neither interrogation had any "earmarks of coercion" and the interrogating officers did not exploit the inadmissible first statement to elicit the post-warning statement.[45] Thus, even though the failure to warn cast a *presumption* of compulsion on Elstad's first statement, the effect of this *presumed* coercion was completely dissipated by Elstad's voluntary waiver of his *Miranda* rights.[46] Looking forward, the Court declined to establish strict guidelines for when courts should apply this new exception.[47] Instead it resorted back to the traditional test for voluntariness under the Fourteenth Amendment, the "totality of the circumstances" analysis.[48]

To understand the Court's opinion in *Seibert*, it is important to examine the arguments that the *Elstad* Court found unpersuasive. First, the Court rejected classifying a post-warning confession as a "fruit" of an inadmissible pre-warning statement.[49] It found Elstad's analogy to the Fourth Amendment's "fruit of the poison tree" doctrine unpersuasive.[50] The Court clearly distinguished evidence gained in an illegal search from evidence gained through an unwarned confession.[51] According to the Court, an illegal search is in itself unconstitutional, while interrogating a suspect without providing the *Miranda* warnings does not itself rise to the level of a constitutional violation until evidence from that interrogation is brought into court.[52] Expanding on this notion, the Court stated that suspects do not have a constitutional right to the *Miranda* warnings, only to the underlying rights they mention.[53] The Court also rejected the Oregon Court of Appeals' "cat out of the bag" argument.[54] The Court stressed that *Miranda* only protects defendants from coercive interrogations, not any other factors which might compel a suspect to confess.[55] The Court refused, in its words, to give the "psychological effects of *voluntary* unwarned admissions constitutional implications."[56] By ruling that the

---

[45] *Id.* at 316.

[46] *Id.* 310-11.

[47] *Id.* at 318.

[48] Although the majority never used the exact phrase, they instruct lower courts to consider "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntaries of his statements." *Id.*

[49] *Id.* at 307.

[50] *Id.* at 306.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 305.

[54] *Id.* at 311.

[55] *Id.* at 312.

[56] *Id.* at 311.

stress of having previously confessed was too "speculative and attenuated"[57] to have a discernable impact on the decision to confess again, the Court effectively stuffed the cat back in the bag and threw it into the river. Finally, the Court dismissed Elstad's argument that the police should have explained that his pre-warning statement could not be used against him.[58] Noting that police have enough trouble determining when to give *Miranda* warnings in the first place, the Court declined to impose a special duty to provide this supplemental warning when police believe they may have violated *Miranda*'s directions.[59]

2. Brennan's "Apocalyptic" Dissent

In a dissent that exceeded the majority opinion by over thirty pages in length, Justice Brennan railed against the conclusions of the majority which he felt had dealt a "potentially crippling blow to *Miranda*."[60] Justice Brennan warned that allowing police departments to indirectly avoid *Miranda*'s directives invited widespread use of tactics "inconsistent with ethical standards and destructive to personal liberty."[61]

Justice Brennan assailed the majority's arguments, starting with its assertion that the coercive taint of an unwarned statement did not pass on to a second, warned statement.[62] Justice Brennan cited *Clewis v. Texas*[63] which deemed a second, warned statement inadmissible if it was obtained in "one continuous process" with the first statement.[64] Justice Brennan advocated placing the burden of proof that the warned confession was obtained independently of the previous, inadmissible confession on the prosecution.[65] He then disputed the rejection of the "cat out of the bag" argument. Citing *Darwin v. Connecticut*,[66] Justice Brennan noted that the Court had previously recognized that a confession could be improperly compelled by the "existence of [an] earlier confession."[67] Justice Brennan pointed out another flaw in the contention that a voluntary *Miranda* waiver

---

[57] *Id.* at 313.

[58] *Id.* at 316.

[59] *Id.*

[60] *Id.* at 319 (Brennan, J., dissenting). Justice Brennan's dissent was joined by Justice Marshall. Justice Stevens wrote a separate dissent. *Id.* at 364.

[61] *Id.* at 320 (Brennan, J., dissenting) (quoting Nardone v. United States, 308 U.S. 338, 340 (1939)).

[62] *Id.* at 322 (Brennan, J., dissenting).

[63] 386 U.S. 707, 710 (1967).

[64] *Elstad*, 470 U.S. at 325 (Brennan, J., dissenting).

[65] *Id.* (Brennan, J., dissenting).

[66] 391 U.S. 346, 350-51 (1968).

[67] *Elstad*, 470 U.S. at 326 (Brennan, J., dissenting).

would cure any coercive taint: it does not consider whether the suspect realizes his first statement cannot be used against him.[68] This lack of understanding calls into question whether a suspect ignorant of this fact can make a "rational and intelligent choice" to waive his rights and whether the waiver is truly "an act of free will."[69] Finally, Justice Brennan took issue with the argument that unwarned statements should only be excluded from evidence if elicited through actual coercion, "improper tactics," or "inherently coercive methods" which "undermine the suspect's ability to exercise his free will."[70] Rejecting the conclusion that *Miranda* warnings are not themselves guaranteed by the Constitution, Justice Brennan asserted that a failure to provide *Miranda* warnings *is in itself* an improper tactic "calculated to undermine the suspect's ability to exercise his free will."[71]

In addition to responding to the majority's arguments, Justice Brennan dedicated pages of his dissent to examining the practical implications of the Court's ruling.[72] He described in detail the "question first" procedure, which although not used on the suspect in *Elstad*, would become the crux of the *Seibert* case.[73] Fearing intentional "question first" or "two-step" interrogation would become a widespread practice, Justice Brennan advocated a bright line exclusionary rule for both the unwarned and subsequent, warned statements to deter improper withholding of *Miranda* warnings.[74] Anything less would remove police officers' incentive to provide the warnings.[75] The majority pejoratively referred to Justice Brennan's "apocalyptic tone" and dismissed his concerns as unfounded.[76]

C. CIRCUIT SPLITS: WHAT IF A VIOLATION IS INTENTIONAL?

Although *Elstad* directed courts to focus solely on the voluntariness of a defendant's waiver in cases where the initial failure to warn was inadvertent, it did not provide clear direction on how to rule when the failure to warn was a deliberate choice on the part of the interrogating officers. Without this clear direction, lower courts struggled to formulate

---

[68] *Id.* at 337 (Brennan, J., dissenting).

[69] *Id.* (Brennan, J., dissenting). These sentiments were expressed more successfully twenty years later in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004).

[70] *Elstad*, 470 U.S. at 342 (Brennan, J., dissenting).

[71] *Id.* at 345 (Brennan, J., dissenting).

[72] *Id.* at 328-32, 344-45, 357-59 (Brennan, J., dissenting).

[73] *Id.* at 328-30 (Brennan, J., dissenting).

[74] *Id.* at 356-57 (Brennan, J., dissenting).

[75] *Id.* (Brennan, J., dissenting).

[76] *Id.* at 318 n.5.

just results in cases where the police intentionally ignored *Miranda*'s commands.

1. Carter *and* Gale*—Blocking the "End-Run"*

Four years after *Elstad*, the Eighth Circuit confronted this question and ruled that both the warned and unwarned statements should be suppressed. In *United States v. Carter*, the defendant challenged the admissibility of a statement he made after he was interrogated for an hour and a half regarding a workplace theft.[77] The postal inspectors conducting Carter's interrogation provided the *Miranda* warnings only after he had already made incriminating statements.[78] After receiving the warnings, he waived his rights and submitted a written confession admitting his guilt.[79] Despite the fact that Carter's second confession was voluntarily given, the Eighth Circuit examined the "totality of the circumstances" and found the case factually distinct from *Elstad*.[80] Noting that Carter's interrogation was one continuous process and that there was no doubt as to the custodial nature of the questioning, the court determined that this case was different enough from *Elstad* to warrant suppressing both the warned and unwarned statements.[81] The court did not contend that Carter's second statement was involuntary, but rather expressed its disapproval with the inspectors' failure to warn, calling the practice an impermissible "end-run" around *Miranda*.[82] In an interesting twist, the Eighth Circuit cited Justice O'Connor's dismissal of Justice Brennan's *Elstad* dissent as "apocalyptic" (i.e. hysterical and unrealistic) to prove that the Supreme Court did not intend cases like *Carter* to fall under *Elstad*'s forgiving shelter.[83]

Three years later, the District of Columbia Circuit encountered a case more factually similar to *Elstad* and upheld the admission of a post-warning statement. In *United States v. Gale*, the court ruled that police questioning during a drug arrest was analogous to the inadvertent questioning that occurred in *Elstad*.[84] Finding the error on the part of the arresting officers to be inoffensive to due process, the court allowed the post-warning statement to stand.[85] However, the court contemplated what it would do if

---

[77] 884 F.2d 368 (8th Cir. 1989).
[78] *Id.* at 369.
[79] *Id.*
[80] *Id.* at 373-74.
[81] *Id.* at 373.
[82] *Id.*
[83] *Id.*
[84] 952 F.2d 1412, 1418 (D.C. Cir. 1992).
[85] *Id.* at 1417.

confronted by a situation more akin to the *Carter* case: "[w]e do not of course sanction the police officers' failure promptly to advise appellant of his *Miranda* rights following his arrest; we find no evidence of a deliberate 'end run' around *Miranda* and, consequently, no error in the district court's refusal to suppress appellant's fourth statement."[86] Thus, two federal courts of appeals supported, at least in principle, the idea that a post-warning statement should be excluded from evidence if the failure to warn was a deliberate attempt to avoid the directives of *Miranda*.

2. Esquilin *and* Orso*—Post-Warning Statements Admissible under* Elstad

Nearly a decade would pass before this issue reemerged in the federal courts of appeals. This time around, the *Elstad* decision fared better. In *United States v. Esquilin*, the First Circuit affirmed the admission of a voluntary post-warning statement made by a defendant arrested on drug charges.[87] The defendant asserted that *Elstad* was not applicable in this case because his interrogation was "one continuous process" and that the arresting officers' failure to warn constituted an "improper tactic."[88] The court ruled that a pre-warning statement did not need to be separated in time from a second, post-warning statement, unless the first statement was actually physically or psychologically coerced.[89] If the first statement was coerced, a lapse in time would help determine whether the coercion passed on to the second statement. But because Esquilin's pre-warning statement was deemed voluntary, no such interval was required.[90] The court then moved on to the defendant's alternate argument, that a deliberate failure to warn was an "improper tactic" which taints any subsequent statements with a presumption of compulsion, regardless of voluntariness.[91] The court disagreed with Esquilin's contention that the meaning of the "improper tactics" referred to in *Elstad* could be separated or distinguished from the truly coercive tactics described elsewhere in the opinion.[92] Finally, the

---

[86] *Id.* at 1418.

[87] 208 F.3d 315, 321 (1st Cir. 2000).

[88] *Id.* at 319. Esquilin argued that he was subjected to one long interrogation which was distinct from the two separate questionings that occurred in *Elstad*. *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 319-20; *see Elstad*, 470 U.S. at 314 ("[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion.").

[92] *Esquilin*, 208 F.3d at 320. "If we read *Elstad* as a coherent whole, it follows that 'deliberately coercive or improper tactics' are not two distinct categories, as Esquilin would have it, but simply alternative descriptions of the type of police conduct that many render a suspect's initial, unwarned statement involuntary." *Id.* Thus, a police action would not be

court noted that the unstated, subjective intent of the arresting officer should not be factored into the calculus of voluntariness because it could not have impacted Esquilin's decision to give his second statement.[93]

In *United States v. Orso*, the Ninth Circuit was presented with a case in which the subjective intent of the arresting officer was clear.[94] The arresting postal inspector admitted he intentionally withheld the *Miranda* warnings from the defendant after she had been arrested, handcuffed, and notified of the accusations against her.[95] In his words: "[w]e wanted to eventually speak with Miss Orso and thought that if we Mirandized her right away that she might not want to speak with us."[96] Although this appears to be the type of "end-run" decried by both Justice Brennan in his *Elstad* dissent and the Eighth Circuit in *Carter*, the court directly applied *Elstad*.[97] And upon finding that Orso's second statement was given voluntarily, the court deemed it admissible.[98] Orso contended that such a deliberate failure to warn should cast a "taint" on all evidence and testimony acquired thereafter, in the same way the "fruit of the poison tree" doctrine prohibits the admission of evidence found in the course of an illegal search.[99] The court briefly reconsidered this argument, which was dealt with in *Elstad*, and affirmed that the "fruits" doctrine is inapplicable to Fifth Amendment cases.[100] Following the First Circuit in *Esquilin*, the court also quickly dispensed with the suggestion that "improper tactics" could be separated from the question of voluntariness.[101]

D. THE IMPACT OF *DICKERSON*: RECONSTITUTIONALIZING *MIRANDA*

In the year 2000, the United States Supreme Court confronted a challenge to *Miranda* which had loomed on the horizon for thirty-two years. In 1968, Congress passed the Omnibus Crime Control and Safe

---

considered an "improper tactic" forbidden by *Elstad* unless it rendered the suspect's statement involuntary. *Id.* at 321.

[93] *Id.* The court reasoned that a suspect cannot take into consideration what he has no way of knowing.

[94] 266 F.3d 1030 (9th Cir. 2001).

[95] *Id.* at 1034.

[96] *Id.*

[97] *Id.* at 1034-35.

[98] *Id.* at 1040.

[99] *Id.* at 1034.

[100] *Id.* at 1035. In footnote 3, the court rhetorically asks why the "fruits" doctrine does not apply to the Fifth Amendment in light of the Supreme Court's 2000 ruling in *Dickerson v. United States*, 530 U.S. 428 (2000). *Orso*, 266 F.3d at 1034-35 n.3. For a discussion of the tension between *Dickerson* and *Elstad*, see *infra* notes 112-16 and accompanying text.

[101] *Orso*, 266 F.3d at 1036.

Streets Act.[102] Section 3501 of the Act required judges to admit all voluntary confessions into evidence and established a procedure for determining whether a confession was given voluntarily.[103] The Act instructed judges to consider a number of factors including many of the elements dealt with in the *Miranda* warnings.[104] However, § 3501 clearly stated that none of these factors alone were determinative of voluntariness and that the final decision would be left up to the trial judge.[105] By granting this discretion, Congress effectively eliminated the "presumption of compulsion" that a failure to warn triggered by *Miranda*.[106] Although § 3501 was a direct attempt by Congress to overturn *Miranda*, neither the Department of Justice nor the courts advocated its application for more than three decades.[107] However, in 2000, the Fourth Circuit ruled that the *Miranda* warnings were not constitutionally required, and that § 3501 was an acceptable substitute for the judge-created warnings in *Miranda*.[108]

The Supreme Court, in a seven to two opinion, reversed the Fourth Circuit in *Dickerson v. United States*, and declared that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress . . . ."[109] The Court acknowledged that it was bound to uphold acts of Congress which create rules of evidence and procedure for federal courts, but not acts which violate constitutionally guaranteed rights.[110] The Court explained that the *Miranda* warnings, although "prophylactic" in function, safeguarded a constitutionally guaranteed right

---

[102] George C. Thomas, III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture*?, 2002 CRIME & JUST. 203, 205 (2002); *see* 18 U.S.C. § 3501 (1968).

[103] *Id.*

[104] The Act suggested that judges consider:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

Dickerson, 530 U.S. at 436 (quoting 18 U.S.C. § 3501 (1968)).

[105] *Id.*

[106] Thomas & Leo, *supra* note 102, at 205.

[107] Charles D. Weisselberg, *Panel Five: Deterring Police from Deliberately Violating* Miranda*: In the Stationhouse After* Dickerson, 99 MICH L. REV. 1121, 1131-32 (2001).

[108] Thomas & Leo, *supra* note 102, at 205.

[109] *Dickerson*, 530 U.S. at 432.

[110] *Id.* at 437.

and were therefore "constitutionally based."[111] The Court then moved on to the intellectually treacherous territory of the exceptions it had established in cases like *Harris*, *Tucker*, *Quarles*, and *Elstad*. Rather than disturbing the foundation of these decisions, the Court simply noted that the exceptions "illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable."[112] Probably sensing that this was not a wholly satisfactory justification, the Court expanded its explanation by focusing on the *Elstad* exception.[113] In the lower court decision, the Fourth Circuit seized on the following sentence in *Elstad* to prove that the *Miranda* warnings are not constitutionally required: "'the *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.'"[114] The Fourth Circuit reasoned that since the rule is broader than the right which it protects, it would inevitably be implemented in situations in which a suspect's Fifth Amendment rights were not threatened.[115] The Court made a definite, if not fully elucidating, response to this argument by stating that "[o]ur decision in that case—refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[116]

Thus *Dickerson* brought *Miranda* into the new century with a reinvigorated constitutional foundation but also some murky dicta regarding its exceptions.

III. MISSOURI V. SEIBERT

A. FACTUAL BACKGROUND

1. The Death of Jonathan Seibert and Donald Rector

On February 12, 1997 Patrice Seibert of Rolla, Missouri awoke to find that her severely disabled son, Jonathan, had died in his sleep.[117] Seibert

---

[111] *Id.* at 440.

[112] *Id.* at 441.

[113] *Id.*

[114] United States v. Dickerson, 166 F.3d 667, 690 (4th Cir. 1999) (quoting Oregon v. Elstad, 470 U.S. 298, 306-07 (1985)).

[115] *Id.*

[116] *Dickerson*, 530 U.S. at 441.

[117] State v. Seibert, No. 23729, 2002 Mo. App. LEXIS 401, at *2 (Mo. Ct. App. Jan. 30, 2002).

did not call the police or other authorities because Jonathan had bedsores.[118] Fearing that she would be charged with neglect, Seibert enlisted the help of her older son Darian and a friend of his to cover up Jonathan's death by setting fire to Seibert's trailer home.[119] During the planning of the crime, it was decided that Donald Rector, a mentally ill teenager who also lived with Seibert, would be left in the trailer so as to prevent the appearance that Jonathan had been left unattended. [120] Later that afternoon, Seibert gave Darian and his friend money to buy gasoline to use in setting the fire, sent her two youngest sons to church, packed a bag for herself and left the trailer.[121] Darian and his friend returned and set fire to the trailer, killing Donald Rector and severely burning Darian in the process.[122]

2. The Arrest and Interrogation of Patrice Seibert

Five days later, Rolla Police Officer Richard Hanrahan asked the St. Louis Police to arrest Seibert, who was visiting Darian in the burn ward of St. Louis Hospital.[123] Hanrahan asked arresting officer Kevin Clinton specifically not to provide Seibert with the *Miranda* warnings upon arrest.[124] Seibert was arrested at 3:00 a.m. and transported to an interrogation room in St. Louis County.[125] Hanrahan waited approximately fifteen to twenty minutes before entering the room to, in his words, "give her a little time to think about the situation."[126] Hanrahan then questioned Seibert, without providing the *Miranda* warnings, for thirty to forty minutes.[127] During this questioning, Hanrahan spoke in a conversational tone, at one point lightly squeezed Seibert's arm, and repeatedly prompted Seibert to admit that she had intended Donald to die in the fire.[128] Seibert admitted her role in the crime and was then given a twenty minute break in which she smoked a cigarette and drank some coffee.[129] Hanrahan then returned to the interrogation room with a tape recorder, gave Seibert her *Miranda* warnings, and began questioning her again.[130] He began the

---

[118] *Id.* at *3; State v. Seibert, 93 S.W.3d 700, 701 (Mo. 2002).
[119] *Seibert,* 2002 Mo. App. LEXIS 401, at *2.
[120] *Id.* at *3-4.
[121] *Id.* at *4.
[122] *Id.* at *5.
[123] *Id.* at *13.
[124] *Id.*
[125] *Id.*
[126] *Id.* (internal quotations omitted).
[127] Missouri v. Seibert, 124 S. Ct. 2601, 2606 (2004).
[128] *Id.*
[129] *Seibert,* 2002 Mo. App. LEXIS 401, at *14.
[130] *Seibert,* 124 S. Ct. at 2606.

interrogation by referring to the previous conversation, "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?"[131] When Seibert's confession diverged from her previous statement, Hanrahan reminded her of what she had said to him earlier.[132]

Hanrahan later testified that he made a "conscious decision" to withhold Seibert's *Miranda* warnings and that Seibert's second, taped confession was "largely a repeat of information . . . obtained" in the first, unwarned interrogation.[133]

B. PROCEDURAL HISTORY

At trial, Seibert requested that both her first and second confessions be suppressed.[134] The court suppressed the first, but not the second statement and convicted Seibert of second-degree murder.[135] The Missouri Court of Appeals affirmed the trial court's decision to admit the second statement, finding Seibert's case to be indistinguishable from *Esquilin* and *Orso*.[136]

The Supreme Court of Missouri subsequently reversed the court of appeals.[137] The Missouri Supreme Court found *Elstad* and its progeny not controlling because Hanrahan deliberately withheld the *Miranda* warnings, and the interrogation was more or less one continuous process.[138] The court ruled that an intentional violation of *Miranda* warrants a stricter standard of exclusion than an "inadvertent" violation like that in *Elstad*.[139] Reasoning that such intentional violations deserve a strong rebuke, the court determined that Officer Hanrahan's conduct comprised an impermissible "end-run" around *Miranda* which rendered Seibert's second statement involuntary and inadmissible.[140]

---

[131] *Id.*

[132] *Id.* When Seibert claimed she believed Donald was not supposed to die in the fire, Hanrahan prompted her by asking, "'Trice, didn't you tell me that he was supposed to die in his sleep?" *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] State v. Seibert, No. 23729, 2002 Mo. App. LEXIS 401, at *22 (Mo. Ct. App. Jan. 30, 2002). The court of appeals considered these federal cases persuasive authority because Seibert's claims dealt with constitutional issues. *Id.* For background on these cases, see *supra* notes 87-101 and accompanying text.

[137] State v. Seibert, 93 S.W.3d 700, 701 (Mo. 2002).

[138] *Id.* at 706.

[139] *Id.* at 704.

[140] *Id.* at 706-07.

The United States Supreme Court granted certiorari on Seibert's case to resolve the circuit split caused by the conflict between *Esquilin*, *Orso*, and *Carter*.[141]

C. THE UNITED STATES SUPREME COURT

1. The Plurality Opinion

Writing for a four justice plurality, Justice Souter began his opinion affirming the Missouri Supreme Court with a brief summary of the *Miranda* warnings' constitutional basis.[142] Justice Souter stressed the importance of the warnings as both a valuable protection for defendants and an effective tool for police and prosecutors.[143] Justice Souter then examined the "two-step" interrogation technique used by Officer Hanrahan to elicit Seibert's confession.[144] After noting that many police training programs advocate "two-step" interrogation as a way to question suspects "outside of *Miranda*," the Court concluded that this practice deprives suspects of adequate notice of their constitutionally guaranteed rights.[145]

The plurality accepted *Elstad*'s premise that in cases involving a mid-stream *Miranda* warning, the admissibility of the second statement is governed at least in part by whether it was voluntarily given.[146] However, rather than examining whether Seibert's second statement was in fact voluntary, the plurality chose to focus on the efficacy of the *Miranda* warnings themselves. Justice Souter asserted that the goal of a two-step interrogation is to impel a suspect to make statements she would not otherwise make if she fully understood her rights.[147] The plurality doubted whether after giving a full, incriminating statement, a suspect would actually believe that she still had the right to remain silent.[148] More likely, the suspect would be confused as to how remaining silent could benefit her if she has already spoken.[149] Barring a direct explanation that the pre-

---

[141] Missouri v. Seibert, 124 S. Ct. 2601 (2004).

[142] *Id.* at 2607-08. Justice Souter's plurality was joined by Justices Stevens, Ginsberg, and Breyer.

[143] *Id.* at 2608. Justice Souter noted that withholding the warnings almost always excludes a statement, while a voluntarily given waiver serves as "virtual ticket of admissibility." *Id.*

[144] *Id.* at 2608-09.

[145] *Id.* at 2610.

[146] *Id.* at 2610 n.4.

[147] *Id.* at 2610-11.

[148] *Id.* at 2611.

[149] *Id.*

warning statement cannot be used, the Court doubted whether a suspect's waiver of her Fifth Amendment rights could actually be "knowing" as well as "voluntary."[150] According to Justice Souter, the inevitable result of a "two-step" interrogation is to "deprive a defendant of knowledge essential to [her] ability to understand the nature of [her] rights and the consequences of abandoning them."[151]

Justice Souter then took pains to distinguish this case from *Elstad*. Citing a number of factual differences, the plurality determined that the warning provided in *Elstad* presented a "genuine choice whether to follow up on the earlier admission," thus rendering the post-warning statement admissible under the "knowing" standard.[152] Using these distinctions, Justice Souter outlined a rough factor test to determine whether the mid-stream warning effectively communicated Seibert's rights and thereby presented her with a genuine choice to waive them.[153] The factors are as follows:

> 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.[154]

Given that Seibert was interrogated by the same officer, in the same location, with only a short break in between statements, and that the interrogating officer used the first, unwarned statement to prompt the second, warned statement, the plurality concluded that the interrogation was one continuous process designed to confuse Seibert about the existence and extent of her rights.[155] The plurality also singled out Hanrahan's failure to inform Seibert that her first statement could not be used in court as an aggravating factor in the Court's calculus.[156]

Although both the petitioner and the respondent framed the central issue of the case as whether an intentional violation of *Miranda* warrants

---

[150] *Id.*

[151] *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986)) (internal quotations omitted).

[152] *Id.* at 2612. The Court noted that the two statements in *Elstad* were separated in time, given in different locations, given to different officers, and the interrogating officer made no effort to use the first statement to elicit the second statement. *Id.* at 2611-12.

[153] *Id.* at 2612.

[154] *Id.* at 2612-13.

[155] *Id.*

[156] In footnote 7, Justice Souter cautioned that such an advisement would not necessarily have cured the defects of the interrogation, but noted that the lack thereof "blunt[ed] the efficacy of the warnings and point[ed] to a continuing, not a new, interrogation." *Id.* at 2612 n.7.

automatic exclusion of the resulting statements, the plurality did not advocate conducting an inquiry into the subjective motivations of the interrogating officer.[157] In *Seibert*, the interrogating officer admitted to trying to evade the strictures of *Miranda*, but the plurality recognized this was an unusual case.[158] Rather than depend on the police to be forthright about the motivations behind their interrogation procedures, the plurality directed lower courts to examine the objective facts of the interrogation to determine whether a suspect would reasonably understand her rights and could make a voluntary and knowing waiver.[159]

2. Concurring Opinions

Justice Breyer joined in the opinion of the Court but also authored a concurring opinion which advocated borrowing the "fruits of the poisonous tree" doctrine from Fourth Amendment jurisprudence.[160] Justice Breyer took this position despite the fact that the *Elstad* Court specifically rejected such an appropriation.[161] He advocated applying the "fruits" doctrine to *Miranda* violations because police departments and prosecutors are already very familiar with the doctrine and its implications.[162] Based on this analysis, Justice Breyer concluded that the plurality's requirement of an effective *Miranda* waiver would in practice function exactly like the "fruits" doctrine.[163]

In a separate concurring opinion, Justice Kennedy noted that the two-step interrogation technique did not pass the balancing test the Court had used when assessing previous exceptions to *Miranda*'s exclusionary rule.[164] Justice Kennedy asserted that admitting statements elicited by a two-step interrogation gives far too much weight to the needs of law enforcement while significantly undermining the protections given to suspects' Fifth Amendment rights.[165] However, Justice Kennedy felt that the Court's decision prescribed too broad a rule and that the multi-factor analysis

---

[157] *Id.* at 2612 n.6.

[158] *Id.* ("[T]he intent of the officer will rarely be as candidly admitted as it was here . . . .").

[159] *Id.* at 2612.

[160] *Id.* at 2613 (Breyer, J., concurring).

[161] *See supra* notes 49-53 and accompanying text.

[162] *Seibert*, 124 S. Ct. at 2613 (Breyer, J., concurring).

[163] *Id.* at 2613-14 (Breyer, J., concurring). The "fruit of the poisonous tree" doctrine requires the causal connection between an officer's unconstitutional behavior and any subsequent admissions by a suspect to be broken by intervening events. *Id.* (Breyer, J., concurring).

[164] *Id.* at 2615 (Kennedy, J., concurring).

[165] *Id.* (Kennedy, J., concurring).

proposed by the plurality should only come into play in cases where the interrogating officer intentionally violated *Miranda*.[166]

3. O'Connor's Dissent

Justice O'Connor began her dissent by applauding the plurality's decision not to force fit the "fruit of the poisonous tree" doctrine into the Fifth Amendment as well as its decision not to let the subjective intent of the interrogating officer determine the admissibility of a confession.[167] Nevertheless, Justice O'Connor accused the plurality of "devour[ing]" her *Elstad* opinion.[168] Justice O'Connor took the plurality to task for resurrecting the "cat out of the bag" argument, which she resoundingly rejected in *Elstad*.[169] Justice O'Connor believed the plurality's argument that mid-stream warnings confuse defendants into confessing was indistinguishable from the repudiated notion that defendants could be "coerced" by the psychological pressure of having already made a statement.[170] Justice O'Connor concluded her dissent with an endorsement of the *Elstad* standard and a suggestion that Seibert could have made a strong case for suppression of her second statement under *Elstad*'s voluntariness test.[171]

IV. ANALYSIS: *ELSTAD* DEVOURED OR JUST POORLY DIGESTED?

In the following section, this Note will explore how the *Seibert* decision will impact the *Elstad* exception, consider the challenges courts will face in applying the standards set forth in the decision, and attempt to forecast the effect the decision will have on police interrogation procedures. The *Seibert* Court struggled to find a solution that would discourage the "two-step" interrogation process without disturbing the tenuous balance struck in *Dickerson*. In the end, the Court managed to reach a just outcome for Patrice Seibert, but in doing so it established a confusing and ungainly standard for police and courts to follow.

---

[166] *Id.* at 2616 (Kennedy, J., concurring).

[167] *Id.* at 2616-17 (O'Connor, J., dissenting). Justice O'Connor's dissent was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. *Id.*

[168] *Id.* at 2616 (O'Connor, J., dissenting).

[169] *Id.* at 2619 (O'Connor, J., dissenting).

[170] *Id.* (O'Connor, J., dissenting).

[171] *Id.* at 2619-20 (O'Connor, J., dissenting). Justice O'Connor noted that in Seibert's case, Officer Hanrahan used the pre-warning statement to prompt and direct the second statement. This fact could be used to call into question the voluntary nature of her second confession. *Id.* at 2620.

A. HOW THE PLURALITY RESURRECTED BRENNAN'S DISSENT IN WORD BUT NOT DEED

1. What the Plurality Didn't Do: Overturn Elstad *or its Reasoning*

In the end, the Court found Patricia Seibert's post-warning statement to be inadmissible without considering whether it was made voluntarily. The plurality explicitly deferred on the question of voluntariness because it was not necessary to the decision.[172] As Justice O'Connor pointed out in her dissent, this case could have been resolved with the same outcome upon remand by simply using the *Elstad* standard of voluntariness.[173] But the Court wanted to go further and clearly state its disapproval of the "two-step" interrogation technique. In the process of doing so, the plurality resurrected the voice of, but not the reasoning behind, Justice Brennan's forceful dissent in *Elstad.* Just as Justice Brennan decried the inherent dishonesty of the "two-step" interrogation process and stressed that "'giving [] the *Miranda* warnings before reducing the product of the day's work to written form could not undo what had been done or make legal what was illegal,"[174] so the plurality in *Seibert* concluded its opinion by declaring "[s]trategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."[175] Although the *Seibert* plurality talked as tough as Justice Brennan, it recognized that most of Justice Brennan's legal arguments were too tenuous to stand on twenty years after *Elstad.* In the end, the *Seibert* Court declined to establish a bright line exclusionary rule covering all statements taken after an initial unwarned interrogation, which was, according to Justice Brennan, the only acceptable solution.[176] Despite Justice O'Connor's protestations that the plurality had "devoured" the decision in *Elstad, Seibert* left the earlier decision muddied but still standing.

The *Seibert* plurality clearly abandoned most of Justice Brennan's legal arguments. The Court could not apply the "fruit of the poisonous tree" doctrine because *Dickerson,* which reaffirmed *Miranda*'s "constitutional underpinnings,"[177] nevertheless ruled a *Miranda* violation insufficient to trigger the same protections as an illegal search under the

---

[172] *Id.* at 2613 n.8.

[173] *Id.* at 2619-20 (O'Connor, J., dissenting); *see supra* note 171 and accompanying text.

[174] Oregon v. Elstad, 470 U.S. 298, 330 (1985) (Brennan, J., dissenting) (quoting People v. Bodner, 75 A.D.2d 440, 448 (N.Y. App. Div. 1980) (internal quotations omitted)).

[175] *Seibert*, 124 S. Ct. at 2613.

[176] *Elstad*, 470 U.S. at 356-57 (Brennan, J., dissenting).

[177] Dickerson v. United States, 530 U.S. 428, 440 n.4 (2000).

Fourth Amendment.[178] Justice Brennan's argument that a failure to warn was in itself an "improper tactic" sufficient to trigger a presumption of compulsion was left by the wayside.[179] As established in *Esquilin* and *Orso*, the *Elstad* majority did not intend "improper tactics" to be read as distinct or separate from truly coercive tactics which overbear the will of the suspect.[180] Finally, the plurality was careful not to invoke the psychological impact of an unwarned confession on the suspect. Although it based its opinion on the premise that an initial failure to warn could confuse a suspect, the plurality took pains to avoid the conclusion that a previous confession could psychologically pressure the suspect into confessing anew.[181]

Despite the urgings of many of the briefs supporting the respondent, the plurality did not base its decision on the fact that Officer Hanrahan violated *Miranda* intentionally.[182] Although *Elstad* could be read to indicate that an officer's good faith is a factor in considering the admissibility of the second statement, the *Seibert* Court decided not to examine the subjective intent of the arresting officer.[183] Instead, it recommended objectively examining the suspect's state of mind during the interview using the method described below.

2. What the Plurality Did Do: Create a New Test

a. The "Totality of the Confusion"

Elstad, like all of the previous exceptions to *Miranda*, directed courts to the default pre-*Miranda* standard for admissibility: whether the confession was voluntary under the "totality of the circumstances" test.[184] Some police departments, including Officer Hanrahan's, saw the *Elstad* exception as a loophole which gave them license to withhold the *Miranda*

---

[178] *See supra* notes 113-16 and accompanying text.

[179] *Elstad*, 470 U.S. at 342 (Brennan, J., dissenting).

[180] *See supra* notes 89-101 and accompanying text.

[181] However, Justice O'Connor's dissent asserted that the plurality did not step carefully enough and ended up making the "cat out of the bag" argument again anyway. *Seibert*, 124 S. Ct. at 2619 (O'Connor, J., dissenting).

[182] *See* Brief for Respondent at 25-34, Missouri v. Seibert, 124 S. Ct. 2601 (2004) (No. 02-1371); Brief Amici Curiae of Former Prosecutors, Judges and Law Enforcement Officials, Supporting Respondent at 23-27, *Seibert* (No. 02-1371); Brief for the American Civil Liberties Union, the ACLU of Eastern Missouri, and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Respondent at 7-24, *Seibert* (No. 02-1371).

[183] *Seibert*, 124 S. Ct. at 2613 n.6.

[184] *See supra* note 48 and accompanying text.

warnings until after they had extracted the information they were seeking from a suspect.[185] As demonstrated in *Esquilin* and *Orso*, lower courts scrutinized this dubious practice but nevertheless found the suspects' post-warning statements to be voluntary and therefore admissible under the "totality of the circumstances test."[186] Confronted with a standard that encouraged improper police tactics, but unwilling to overrule *Elstad*, the plurality found a novel way out. The Court did not do away with the voluntariness test required by *Elstad*, but rather added a mandatory objective inquiry into the suspect's state of mind during the interrogation. This new standard will be referred to hereinafter as the "totality of the confusion" test.[187] By adding this extra level of analysis, the plurality implicitly repudiated the notion that a failure to provide the *Miranda* warnings could always be rectified simply by a voluntary waiver.[188]

As mentioned above, Justice Souter focused his opinion on the effectiveness of a *Miranda* warning given mid-stream.[189] He noted that the object of the "two-step" interrogation technique is to render the *Miranda* warnings ineffective by casting doubt over whether the suspect has a real choice to continue to talk or not.[190] Other commentators have noted that this is the goal of all *Miranda* violations, to prevent the suspect from seeing "the *Miranda* warning and waiver requirements as a crucial transition point in the questioning or as an opportunity to terminate the interrogation."[191] In *Miranda*, the Court noted that if the police extract an incriminating statement while questioning a defendant outside the presence of an attorney, "a heavy burden rests on the Government to demonstrate that the defendant *knowingly and intelligently* waived his privilege against self-incrimination."[192] Rather than focus on the voluntary nature of Patrice Seibert's post-warning statement, Justice Souter in effect questioned

---

[185] "At the suppression hearing, Officer Hanrahan testified that he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Seibert*, 124 S. Ct. at 2607.

[186] *See supra* notes 87-101 and accompanying text.

[187] This term is wholly the author's invention and is simply meant to serve as shorthand for the plurality's multifactor test.

[188] *Seibert*, 124 S. Ct. at 2610.

[189] *See supra* text accompanying notes 146-59.

[190] *Seibert*, 124 S. Ct. at 2610.

[191] Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 435 (1999).

[192] Miranda v. Arizona, 384 U.S. 436, 475 (1966) (emphasis added).

whether the "two-step" interrogation process prevented her waiver from being knowing and intelligent.[193]

The definition of what constitutes a knowing and intelligent waiver was best articulated in *Moran v. Burbine*: "the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it."[194] This requisite awareness has two essential components: that "at all times [the suspect] knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction . . . ."[195] Another core element of a knowing and intelligent waiver is that the suspect understands that she has the option *not* to waive her rights.[196] After considering what information was required for a knowing and intelligent waiver, the Court in *Moran* ruled that a defendant was not entitled to any more information than that contained in the *Miranda* warning itself.[197] The Court noted that the warning explains the nature of the defendant's rights (right to remain silent, right to counsel) and the consequences for waiving them (everything said can be used against the defendant in a court of law).[198] However, the *Moran* Court did not contemplate the possibility that the *Miranda* warnings *themselves* could be given in a manner which separated them so completely from their intended meaning that they would fail to convey even this base level of information. By focusing on the effectiveness of the warnings, Justice Souter questioned whether a warning given after the suspect had already confessed could reasonably be assumed to engender the understanding necessary for a valid waiver.[199] In Patrice Seibert's case, the Court decided it could not.[200] The plurality's decision established a new test to determine if a suspect had the requisite knowledge, understanding, and clarity of mind to render her waiver effective.

---

[193] *Seibert*, 124 S. Ct. at 2610-11.

[194] 475 U.S. 412, 421 (1986).

[195] *Id.* at 422.

[196] Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1043 (1988).

[197] *Id.* at 1048. The *Moran* Court declined to find the defendant's waiver invalid despite the fact that he was kept unaware that a lawyer had been retained for him. The Court concluded that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Moran*, 475 U.S. at 422.

[198] *Moran*, 475 U.S. at 422.

[199] Missouri v. Seibert, 124 S. Ct. 2601, 2611 (2004).

[200] *Id.* at 2612-13.

The Court did not explicitly declare that it was establishing a new test for "two-step" interrogations, but rather listed a number of generalized facts with which it intended to compare the interrogations in *Seibert* and *Elstad*.[201] These "relevant facts" include the following:[202]

- 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 interrogations;
- The continuity of police personnel conducting the interrogation;
- The degree to which the interrogator's questions treated the second round of questioning as continuous with the first;
- Whether the suspect was informed that the pre-warning statement could not be used.[203]

Applying these factors, Justice Souter distinguished Patrice Seibert's double interrogation from the brief questioning in *Elstad*.[204] Seibert was questioned for thirty to forty minutes regarding the details of the crime and her involvement in it.[205] Officer Hanrahan repeated many questions from the first interrogation in the second session.[206] The first and second interrogations were conducted in the same room and separated by only fifteen to twenty minutes, during which Seibert did not leave the interrogation room.[207] Hanrahan began the second session by clearly stating that he and Seibert had already been discussing the events of the crime.[208] Finally, Hanrahan gave no indication to Seibert that her first statement was not admissible in court.[209] Justice Souter determined that the aggregate of these factors "must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in

---

[201] *Id.* at 2612.

[202] *Id.*

[203] *Id.* The plurality mentioned this last variable separately but described it as a significant, yet not wholly determinative factor in the analysis. *Id.*

[204] *Id.*

[205] *Id.* at 2606.

[206] *Id.*

[207] State v. Seibert, No. 23729, 2002 Mo. App. LEXIS 401, at *14 (Mo. Ct. App. Jan. 30, 2002).

[208] Officer Hanrahan began the second, taped interrogation by stating "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" *Seibert*, 124 S. Ct. at 2606.

[209] *Id.* Hanrahan's constant reference to the first statement argues against this even being a conceivable assumption on Seibert's part. *Id.*

the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."[210] According to the Court, Hanrahan's decision to use the "two-step" interrogation technique convinced Patrice Seibert that the right to remain silent could not logically apply to her.[211]

b. Applying the "Totality of the Confusion" to *Elstad*'s Progeny

The Court did not explicitly declare that it had created a new test or when exactly this test should be applied. But considering the methodical approach it took in comparing *Seibert* and *Elstad*, it is clear that lower courts are to perform this analysis in cases involving a mid-stream warning. The courts should apply the test regardless of whether the failure to warn was seemingly inadvertent (as in *Elstad*) or admittedly intentional (as in *Seibert*). The plurality's conclusion suggests a sliding scale for the "totality of the confusion," with *Seibert* at one end and *Elstad* the other. It is safe to assume that if the Court had applied the "totality of the confusion" test in *Elstad*, it would have found the warning effective and the defendant's waiver knowing and intelligent. However, a harder question is how this test would have affected the outcome of the lower court decisions which led up to *Seibert*.

In the *Carter* case, the defendant admitted to stealing from his workplace after being interrogated by postal inspectors for fifty-five minutes.[212] After the defendant admitted to stealing bearer checks and allowed agents to search his wallet (in which the inspectors found one of the missing checks and cash), the inspectors provided the *Miranda* warnings.[213] After waiving his rights, the defendant immediately wrote a confession admitting his guilt.[214] The postal inspectors interrogated the defendant thoroughly and completely regarding the nature of the crime and his involvement in it.[215] His second statement was a written reiteration of his first oral statement. The two statements were given in the same room, to the same personnel, without any break in between.[216] There is no indication that the interrogating inspectors informed the defendant that his previous statement could not be used against him in a court of law. Given the confluence of these facts, a court could reasonably conclude that the

---

[210] *Id.* at 2613.
[211] *Id.*
[212] United States v. Carter, 884 F.2d 368, 369 (8th Cir. 1989).
[213] *Id.*
[214] *Id.*
[215] *Id.* at 373.
[216] *Id.* at 369, 373.

Miranda warnings were not the significant turning point in the interrogation that they were intended to be. In this case the "totality of the confusion" test would likely bar the admissibility of the second statement.

United States v. Gale presents a very different scenario.[217] In this case, the arresting officer pulled over the defendant's car and asked the defendant if he had any drugs.[218] After the defendant acknowledged that he did and showed the drugs to the officer, he was placed under arrest.[219] Before searching the defendant, the officer asked him if he had any more drugs.[220] The defendant responded that he had drugs stashed in the crotch of his pants and in the trunk of this car.[221] The defendant was then taken to the police station where he remained in a holding cell for fifty minutes, after which the arresting officer took him to an interview room and informed him of his *Miranda* rights.[222] The defendant waived his rights and told the officer that he planned to sell the drugs to earn money before he began a restrictive probation program for a previous narcotics conviction.[223] This case leans towards the *Elstad* end of the confusion spectrum. The same police officer conducted both interrogations and neglected to inform the defendant that the pre-warning statements could not be used in court. [224] However, the officer's initial questioning consisted of simply asking the defendant twice if he had any drugs.[225] Furthermore, the defendant's pre- and post-warning statements dealt with two distinct subjects: whether he possessed any drugs and what he planned to do with them, respectively.[226] The two statements were given to the same officer, but in very different environments and separated by at least an hour.[227] Although the defendant in *Gale* might have believed he was already sufficiently incriminated, it is reasonable to conclude that he did not have to speak further. The post-warning interrogation was sufficiently separated in time, space, and content to

---

[217] 952 F.2d 1412 (D.C. Cir. 1992).

[218] *Id.* at 1413-14.

[219] *Id.* at 1414.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] However, since the statement led to the discovery of incriminating evidence, it is doubtful this warning would have influenced the defendant's decision to provide a second statement. It should be noted that under the Supreme Court's recent decision in *United States v. Patane* this evidence would be admissible despite the fact that it was obtained through an unwarned statement. 124 S. Ct. 2620 (2004).

[225] *Gale*, 952 F.2d at 1414.

[226] The court in *Gale* noted this difference when it distinguished the case from *Carter*. *Id.* at 1418.

[227] *Id.* at 1414.

convey that this was a distinct experience in which the defendant could consider his rights anew.

The *Esquilin* case involves a more complex situation. The defendant in *Esquilin* allowed two police officers and a drug sniffing dog to search his hotel room.[228] When the dog discovered a small plastic bag containing white powder, the officer conducting the search asked the defendant what was in the bag.[229] The defendant responded that the bag contained cocaine.[230] The police stopped questioning the defendant, who had not been given his *Miranda* warnings, and waited for a Maine DEA agent to arrive.[231] When the agent arrived, the police officers informed him that the defendant had not been given the *Miranda* warnings.[232] The agent proceeded to question the defendant without administering the warnings.[233] In response to a question about why he was in Maine, the defendant stated that he had come up from New York City to sell the cocaine.[234] The DEA agent subsequently read the defendant the *Miranda* warnings from a printed card, after which the defendant accepted the agent's invitation to waive his rights and give a statement.[235] In this case, two different official personnel questioned the defendant before providing the *Miranda* warnings. There was no temporal separation between the defendant's first statement to the DEA agent and his warned confession. The case also refers to the second confession as being "detailed," implying that it included information from the unwarned statements plus additional information.[236] As with the previous two cases, there is no indication that the interrogator informed the defendant that his pre-warning statements could not be used against him. Using the *Seibert* factors, it appears that the defendant in *Esquilin* could successfully argue that the warnings were not effective and his waiver was invalid.

Finally, the *Orso* case offers the most difficult application of the "totality of the confusion" test. In *Orso*, a woman suspected of robbing a postal worker was transferred to the custody of two federal postal inspectors after being arrested by local police on an unrelated charge.[237] During the

---

[228] United States v. Esquilin, 208 F.3d 315, 317 (1st Cir. 2000).
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] United States v. Orso, 266 F.3d 1030, 1032 (9th Cir. 2001).

drive to the inspectors' office, one of the inspectors spoke to the defendant for twenty-five to thirty-five minutes about the robbery of the postal worker.[238] The inspector admonished the defendant not to respond as he described the evidence against her.[239] While the inspector spoke, the defendant made a number of incriminating statements that conceded her involvement in the crime.[240] Ten minutes after arriving at the postal inspectors' office, the inspectors read the defendant her *Miranda* rights which she immediately waived.[241] The defendant subsequently confessed to the robbery during an hour and a half interview with the postal inspectors.[242] This case is distinct from the other lower court decisions for a number of reasons. First, the initial interrogation did not consist of any actual questions, just statements by the inspector.[243] The defendant's unsolicited responses to the inspector's statements, although incriminating, were less than clear admissions of guilt. The two interrogations were separated by approximately ten minutes but conducted in different settings.[244] As with all of the other cases, the suspect was not told that her first statement could not be used against her. However, given the informal nature of the first interrogation, the incomplete nature of her admissions, and the change in venue, it is conceivable that a court could find that the defendant would reasonably view the second interview as a separate event from her discussion in the car.

c. The Seventh Circuit Takes *Seibert* for a Test Drive: *United States v. Stewart*

In November of 2004, the United States Court of Appeals for the Seventh Circuit ruled on *United States v. Stewart*.[245] Defendant Timothy Stewart appealed his conviction for armed bank robbery in part on the

---

[238] *Id.*

[239] *Id.* The officer admitted to lying about much of the evidence to the defendant. *Id.*

[240] *Id.* When informed of the potential sentence she could face, the defendant responded, "Oh, I can do five years." *Id.* After being told the letter carrier who had been robbed had identified the defendant, she said, "Well, if the letter carrier said it's me, then it must be me." *Id.* And finally, when the inspector described the defendant's alleged accomplice, she replied, "Oh, the gold-toothed boy." *Id.* This was the extent of Orso's pre-*Miranda* statements to the police. *Id.*

[241] *Id.* at 1033.

[242] *Id.*

[243] The Ninth Circuit noted that under *Miranda* "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect" are considered an interrogation. *Id.* (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

[244] *Id.*

[245] 388 F.3d 1079 (7th Cir. 2004).

grounds that the admission of his confession violated *Seibert*.[246] After reviewing the facts surrounding the defendant's arrest and interrogation, the court determined that the record was not complete enough to perform the *Seibert* analysis and remanded the case to the district court for further consideration.[247]

In October of 2001, a man wearing a mask and armed with a rifle robbed a bank in Evansville, Indiana.[248] The robber escaped in a white car and was later seen running away from the direction of the bank and scaling a wall.[249] Defendant Stewart was detained at a perimeter checkpoint because he resembled the description of the suspect and because he provided a questionable explanation for his whereabouts during the robbery.[250] When two Evansville police detectives arrived at the scene twenty minutes later, Stewart voluntarily got into their car without any prompting from the detectives.[251] Stewart asked the detectives to drive him downtown because he believed they intended to arrest him, although he denied any involvement in the robbery.[252]

During the five minute drive from the perimeter checkpoint to the police station, the detectives questioned the defendant about the robbery.[253] The defendant once again denied involvement.[254] Upon arriving at the police station, the detectives took Stewart to an interrogation room and again asked him if he was involved in the robbery.[255] The defendant continued to deny participating in the robbery, but eventually admitted to providing another man, supposedly named Duel Felders, with the weapon and the getaway car.[256] After Stewart made this initial admission, two FBI agents joined in the interrogation.[257] Stewart subsequently became emotionally agitated and admitted to committing the robbery himself without any accomplices.[258] Only at this point, fifty-five minutes after

---

[246] *Id.* at 1081.

[247] *Id.* at 1091-92.

[248] *Id.* at 1081.

[249] *Id.* The car was discovered in an alley adjacent to the bank, abandoned with the keys in the ignition and a red dye stain, presumably from a dye pack, on the front seat of the car. *Id.* at 1082.

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

being arrested, thirty-five minutes after being taken into custody by the detectives, and twenty minutes after the station house interrogation began, one of the detectives provided Stewart with the *Miranda* warnings.[259] Stewart signed a waiver form and proceeded to answer questions for another hour, after which he gave a tape-recorded statement.[260] At trial Stewart's taped confession was admitted into evidence and played for the jury, which found him guilty.[261]

Stewart challenged his conviction on the grounds that the confession should have been suppressed because the interrogating officers used the two-step interrogation technique dealt with in *Seibert*.[262] The *Seibert* decision was issued while Stewart's appeal was being briefed and the Seventh Circuit attempted to apply the new precedent.[263] However, the court of appeals interpreted *Seibert* in a manner contrary to the expressed positions of eight Supreme Court Justices. Judge Sykes of the Seventh Circuit concluded that the only discernable principle to emerge from the mix of opinions in *Seibert* was that the "totality of the confusion" factor test should only be applied in cases where the failure to warn was intentional.[264] She reasoned that Justice Kennedy's concurring opinion effectively limited the reach of the plurality's holding to such intentional violations of *Miranda*.[265] According to Judge Sykes, if the confession was not elicited through a deliberate attempt to avoid *Miranda*, the *Elstad* standard for voluntariness should govern.[266] Precedent does give lower courts the discretion, but not a mandate, to limit the scope of plurality opinions to the holding of a concurring fifth vote.[267] Judge Sykes took this course, despite

---

[259] *Id.*

[260] *Id.* at 1082-83. During the taped statements, the interrogating detective repeatedly referred to prior questioning. *Id.* at 1083. The detective asked the defendant: "You have admitted to committing that robbery, is that correct?" and later prompted the defendant by stating: "You had told us that you had test drove that car." *Id.* However, the court noted that it is unclear whether these references pertain to statements made before or after the *Miranda* warnings were provided. *Id.*

[261] *Id.*

[262] *Id.* at 1081.

[263] *Id.* at 1086.

[264] *Id.* at 1090.

[265] *Id.*

[266] *Id.*

[267] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court *may* be viewed as that position taken by those members who concurred in judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)) (emphasis added).

the fact that Justice Kennedy alone advocated an inquiry into an interrogating officer's subjective motivations.[268]

After stating that the admission of a confession which violated the *Seibert* factor test would be a clearly prejudicial error, Judge Sykes concluded that she did not have enough information to determine whether Stewart's confession was inadmissible under *Seibert*.[269] Sykes indicated that the known facts of the case pointed to a violation of *Seibert*, but felt there were too many holes in the record to make such a ruling.[270] Sykes remanded the case to the district court to determine first if the interrogating officers violated *Miranda* intentionally and only then to conduct the "totality of the confusion" test with an expanded factual record.[271]

This decision awkwardly truncates the Court's ruling in *Seibert*. The desire to avoid an inquiry into the subjective motivations of interrogating officers was the single thread which unified the plurality and dissent in *Seibert*. Judge Sykes's ruling disregarded the purpose of the *Seibert* plurality's new test. Rather than determine if an interrogation was an intentional violation of *Miranda*, the "totality of the confusion" test asks if an interrogation so confused a suspect as to the nature of his rights that he could not make an effective waiver. It is an objective examination of the suspect's state of mind, not that of the interrogating officer. As noted by Justice Souter, this was a deliberate decision: "[b]ecause the intent of the officer will rarely be as candidly admitted as it was here . . . the focus is on facts apart from intent."[272] In dissent, Justice O'Connor endorsed excluding the subjective intent of interrogating officers from consideration because it could not impact a suspect's decision to confess.[273] An undeclared intention on the part of an interrogating officer could not affect a suspect's understanding of his rights or his decision to voluntarily waive them.[274] Indeed, if the interrogating officers in *Elstad* had harbored a secret intention to confuse the suspect but conducted themselves in the same exact manner,

---

[268] All of the other Justices signed on to opinions rejecting such inquiries. *See* Missouri v. Seibert, 124 S. Ct. 2601, 2613 n.6 (2004); *id.* at 2617 (O'Connor, J., dissenting).

[269] *Stewart*, 388 F.3d at 1091.

[270] *Id.*

[271] *Id.* at 1092. Sykes specifically noted that the content of the post-warning/pre-taped confession was not included in the record. *Id.* at 1091. Without this information, Sykes could not determine the extent to which the pre- and post-warning statements overlapped. *Id.*

[272] *Seibert*, 124 S. Ct. at 2613 n.6.

[273] *Id.* at 2617 (O'Connor, J., dissenting).

[274] *Id.* at 2617-18 (citing Moran v. Burbine, 475 U.S. 412, 422 (1986)). Only the officer's outward conduct, which could be perceived by the suspect could impact the suspect's decision.

Elstad's post-warning statement would still have been admissible under *Seibert*.[275] Conversely, if Officer Hanrahan had not intended to extract an unwarned statement from Patrice Seibert but still referred back to her pre-warning confession during the taped interrogation, Seibert would have nevertheless been sufficiently confused about the nature of her rights to bar admission of her second statement.[276]

Thus, Judge Sykes disregarded an essential component of the "totality of the confusion" test. She instructed the trial court to determine on remand whether the interrogating detectives' failure to warn was intentional, and only if they do so find, to continue on to the "totality of the confusion" test.[277] If the trial court eventually finds that the failure to warn was unintentional, the central command of *Seibert* will be unjustly ignored. Yet, this case is a clear example of the type of behavior the *Seibert* plurality aimed to deter. The arresting officer, the interrogating detectives, and the FBI agents who joined in the interrogation all failed to provide Stewart with his *Miranda* warnings until he had already been questioned for twenty minutes and fully confessed to the robbery.[278] The detectives who questioned Stewart during the ride to the police station continued the interrogation in the station house.[279] There was no break between the questioning in the detectives' car and the questioning in the station house.[280] There is a genuine question whether the interrogating detectives made references to the pre-warning statement during the post-warning interrogation, and there is no indication that the suspect was informed that his first confession could not be used against him.[281] Given these facts, it appears that Stewart has a strong case that the admission of his confession violated *Seibert* regardless of the subjective intent of his interrogators. Only time will tell if the *Seibert* plurality's intentions will be carried out by the lower court.

---

[275] *See Leading Cases*, 118 HARV. L. REV. 248, 315 (2004).

[276] *Id.*

[277] United States v. Stewart, 388 F.3d 1079, 1092 (7th Cir. 2004).

[278] *Id.* at 1082.

[279] *Id.*

[280] *Id.*

[281] *Id.* at 1083. During the taped interrogation, a detective references prior statements by the suspect, but the record is unclear as to whether these statements were made before or after the *Miranda* warnings. *Id.* This is one of the issues the judge remanded to the lower court for further determination. *Id.* at 1092.

B. IMPLICATIONS

1. Questioning "Outside Miranda*": A Case Study in Non-compliance*

Despite the *Seibert* Court's decision not to base its ruling on the intentional nature of Officer Hanrahan's failure to warn, no one doubts that "two-step" interrogations are usually a deliberate attempt to avoid the strictures of *Miranda*. There is no data available on how common "two-step" interrogations are in our nation's police departments. As a consequence, it is difficult to predict the impact that the *Seibert* holding will have on law enforcement and suspects' rights in the future. However, research has been done into the prevalence of questioning "outside *Miranda*" and the police training methods which encourage this practice.[282] The phrase questioning "outside *Miranda*" covers a number of different practices, but usually refers to officers continuing an interrogation after a suspect has either invoked her right to remain silent or requested counsel.[283] The way that police departments have reacted to court decisions concerning this practice provides a valuable window into how law enforcement may react to the ruling in *Seibert*.

The practice of questioning "outside *Miranda*" emanated from what commentators call the "new vision" of *Miranda*.[284] This "new vision" considers the traditional warnings mere prophylactic safeguards which are not in themselves constitutionally required.[285] The exceptions created by the *Tucker*, *Harris*, and *Quarles* cases led police to believe that *Miranda* did not bar them from questioning a suspect after she invokes her rights so long as they did not seek to use the resulting confession or evidence in the prosecution's case-in-chief.[286] The *Harris* exception did the most to further this belief by allowing statements made after an invocation to be used for impeachment purposes.[287] As a result, many police departments determined that once a suspect has invoked *Miranda*, they have "little to lose and perhaps something to gain" by continuing to question the suspect.[288]

To further this goal, police departments began to adapt their interrogation techniques to exploit the exceptions created by the Supreme Court. Interrogators learned how to give the *Miranda* warnings in a manner

---

[282] *See infra* text accompanying footnotes 286-301; *see also* Leo & White, *supra* note 191, at 431-47, 460-63.

[283] Weisselberg, *supra* note 107, at 1124.

[284] Weisselberg, *supra* note 12, at 126.

[285] *Id.*

[286] *See supra* text accompanying notes 21-29.

[287] Weisselberg, *supra* note 12, at 126.

[288] *Id.* at 127.

that de-emphasizes their importance, reducing them to a simple bureaucratic formality or treating their waiver as a *fait accompli* not requiring the suspect's direct participation.[289] If these techniques do not deter the suspect from invoking her rights, then the interrogator will try to blunt the impact of the invocation by asking the suspect to speak "off the record."[290] At this point, the interrogator is aware that whatever information the suspect volunteers cannot be used for the case-in-chief, but *can* be used for impeachment purposes.[291] It is highly unlikely that a criminal suspect would be aware of this nuance.[292] To capitalize on this loophole, police training materials have promoted a number of techniques to induce a suspect to continue talking after invoking her rights.[293] By far the most deceptive technique is to tell a suspect that since she has invoked her rights, she can no longer incriminate herself.[294] This induces suspects to effectively abandon the protections they have just invoked because they are unaware of the consequences of speaking further, thus mutating the *Miranda* warnings from a procedural safeguard into a tool for extracting impeachment material.[295] The undeniable goal of all these techniques is to deceive suspects as to the significance of the warnings and the nature of their rights. As one police instructor candidly admitted, "[w]e are con men . . . and con men never tell the mark they've been had."[296]

Charles Weisselberg, a University of California at Berkeley Clinical Professor of Law, studied the impact a series of court cases dealing with questioning "outside *Miranda*" had on the training procedures of California police departments.[297] He first examined *People v. Peevy* in which the California Supreme Court upheld the *Harris* exception even in cases

---

[289] Leo & White, *supra* note 191, at 433, 437.

[290] Weisselberg, *supra* note 12, at 189.

[291] *Id.* at 126.

[292] *Id.* at 161.

[293] These include asking the suspect if they can question her about issues unrelated to the crime in question, asking if they can question the suspect in an informal "one-on-one" basis, and asking if they could continue to discuss the matter without formally recording it. All of these are techniques designed to elicit a voluntary response from the suspect which the prosecution can later use to prove that the statement was not coerced and therefore available for impeachment. Cal. Attorneys for Criminal Justice, Miranda *Violations, Police Training and Voluntariness: Recent Developments*, *at* http://www.cacj.org/policy_statements/policy_statement_12.htm (last visited Oct. 15, 2004).

[294] Weisselberg, *supra* note 12, at 160.

[295] *Id.* at 161-62.

[296] Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 266 (1996).

[297] Weisselberg, *supra* note 107, at 132-40.

involving a deliberate violation of *Miranda*.[298] Although the court allowed a statement elicited in violation of *Miranda* to be admitted for impeachment purposes, it clearly rejected the notion that the *Miranda* warnings were optional.[299] In fact, the *Peevy* court specifically referred to police having an affirmative duty to cease questioning when a suspect invokes their right to counsel and called a violation of this duty illegal.[300] However, this did not prevent a division of the California Department of Justice from citing the *Peevy* decision as endorsing the practice of questioning "outside *Miranda*."[301] This division, the California Commission on Peace Officer Standards and Training ("POST"), produced a training video endorsing questioning "outside *Miranda*" which cited the decision's outcome and disparaged the critical sections of the opinion as non-binding dicta imposing no duty on California police.[302] Similar sentiments were expressed in training materials promulgated in the wake of *Peevy* by the California Attorney General's Office, the Orange County District Attorney's Office, and the Alameda County District Attorney's Office.[303]

Weisselberg noted that two cases turned the tide on questioning "outside *Miranda*" in California, *Dickerson* and *California Attorneys for Criminal Justice v. Butts*.[304] In many ways the Ninth Circuit's opinion in *Butts* anticipated the *Dickerson* ruling by declaring that although *Miranda* "is a prophylactic rule, not a constitutional right," it "cannot be viewed entirely apart from the constitutional rights it protects."[305] The Court spoke strongly against intentional violations of *Miranda* and opened the door for the strongest sanction yet proposed for such a violation, the potential for civil liability.[306] By declaring that "officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions,"[307] the Ninth Circuit cast the specter of § 1983 liability over the *Miranda* debate.[308] In response to *Butts* and *Dickerson*, law enforcement organizations began to change their tune. The California

---

[298] 953 P.2d 1212 (Cal. 1998).

[299] *Id.* at 1224.

[300] *Id.*

[301] Weisselberg, *supra* note 107, at 1128, 1137.

[302] *Id.* at 1137.

[303] *Id.* at 1140, 1144-45, 1145.

[304] 195 F.3d 1039 (9th Cir. 1999). For the sake of perspective, it should be noted that Weisselberg was counsel for the named plaintiff in this case.

[305] *Id.* at 1045.

[306] *Id.* at 1050.

[307] *Id.*

[308] It should be noted that Weisselberg's study was published before the decision in *Chavez v. Martinez*, 538 U.S. 760 (2003). *See infra* text accompanying note 317.

Attorney General's Office Sourcebook was amended to inform officers that a "deliberate or intentional violation of *Miranda* is an extremely risky tactic in California" which could easily lead to any resulting statements being excluded for all purposes (including impeachment) and the officer being sued by the defendant.[309] Other organizations, including the California District Attorney's Association and numerous local police departments subsequently issued warnings against going "outside *Miranda*," citing the threat of civil liability.[310]

Weisselberg concluded his study with a recommendation that courts should impose a strong exclusionary rule for statements gathered as a result of a deliberate violation of *Miranda* and should extend § 1983 liability to officers who question "outside *Miranda*."[311] However, in the end, he contends that the only way to completely eliminate questioning "outside *Miranda*" is to rely on the leadership of police chiefs and sheriffs to establish strong policies within departments forbidding the practice.[312]

When looked at in retrospect, it is evident that California's law enforcement organizations considered questioning "outside *Miranda*" a legitimate and useful tool even after the California Supreme Court deemed it illegal. It took a statement from the United States Supreme Court as well as the threat of civil liability before training procedures were revised to demonstrate a new respect for *Miranda*'s tenets.

2. Looking Forward: A Clouded Horizon

In light of Weisselberg's study, it is doubtful that *Seibert* will serve as an effective deterrent for the "two-step" interrogation process. To effect a true change in law enforcement procedures, the courts must establish clear guidelines with real consequences. The Court in *Seibert* did neither. The "totality of the confusion" test is a fuzzy analysis which has the potential for vastly divergent outcomes. Furthermore, the meaningful consequences which could deter violations have been done away with by recent Supreme Court decisions.

One of the benefits of the *Miranda* warnings is that it gave police, prosecutors, and judges a clear standard to evaluate the admissibility of

---

[309] Weisselberg, *supra* note 107, at 1143.

[310] *Id.* at 1142, 1149.

[311] *Id.* at 1156-57. Weisselberg concedes that § 1983 liability would have a limited, mainly symbolic impact. Noting the unsympathetic nature of the potential plaintiff and the low possibility of significant financial damages, Weisselberg did not foresee many § 1983 suits actually being brought.

[312] *Id.* at 1162.

confessions.[313] The alternative to *Miranda*, the default "totality of the circumstances" test for voluntariness, has not been refined beyond the "soft value laden standard" that has been used since the 1930s.[314] The Court's decision in *Seibert* not only upholds the use of this imprecise standard in cases of deliberate failures to warn but also complicates the analysis by adding another factor test to the equation. The recent decision in *United States v. Stewart* indicates that lower courts have received a muddled message on how to apply this test and will proceed with undue caution in applying *Seibert*.[315] In contrast, Professor Weisselberg's study demonstrates that law enforcement agencies do not respond with caution when confronted with judicial uncertainty.[316] Without a clear edict from the Supreme Court, police will err on the side of aggressive interrogation. This is especially true if police know that their misconduct will not invite negative consequences. In the past two terms, the Court has foreclosed the use of the two "sticks" proven to be most effective in deterring *Miranda* violations, civil liability under § 1983 and the exclusion of derivative evidence. In *Chavez v. Martinez*, the Court ruled that a failure to provide *Miranda* warnings before interrogating a suspect, regardless of whether it was deliberate, cannot alone be grounds for a § 1983 civil suit if the resulting statement is not used in the criminal defendant's trial.[317] *United States v. Patane*, decided on the same day as *Seibert*, ruled that physical evidence obtained from a defendant's unwarned statement could be used in the prosecution's case-in-chief.[318] The combined effect of these two decisions is to reinforce the notion that police have little to lose and perhaps something to gain by going forward with a "two-step" interrogation or other techniques which violate the spirit of *Miranda* and *Dickerson*.

When asked about the probable effect of the *Seibert* decision, University of Michigan Law Professor Yale Kamisar predicted that the plurality's weak standard would do little to change police procedure: "[n]ow, the police trainers can just emphasize more refined ways to get around *Miranda*,"[319] and the *Seibert* test will be ripe for manipulation. Of the factors the Court listed in its analysis, none are necessary but some carry more weight than others. Whether the interrogating officer informs

---

[313] Weisselberg, *supra* note 12, at 167.

[314] *Id.*

[315] *See supra* notes 245-81 and accompanying text.

[316] *See* Weisselberg, *supra* note 12, at 184.

[317] 538 U.S. 760 (2003).

[318] 124 S. Ct. 2620 (2004).

[319] Terry Carter, Miranda *Still a Puzzle for High Court*, 3 A.B.A. J. E-REPORT 5 (July 2, 2004).

the defendant that her previous statement could not be used against her for any purpose appears to be a very persuasive factor.[320] But as noted above, police interrogators have become very adept at de-emphasizing the importance of clear and significant pieces of information, like the *Miranda* warnings themselves.[321] It is easy to imagine scenarios in which an officer fully interrogates a suspect, provides the *Miranda* warnings, and then explains: "OK, lets start from the very beginning. Everything you already said, that was 'off record' and it won't be used in your trial. So if you want to clarify anything, you know, make sure that you didn't skip anything or lie to me about anything, this is your opportunity to set everything straight for the record." Police departments could also make small but seemingly meaningful changes to their interrogation procedures to manipulate the "totality of the confusion" test. They could switch interview rooms, trade out interviewers, and carefully plan the content of both interviews. Interrogators could use the first unwarned interview to prime a suspect by placing them at the crime scene, locating evidence, and identifying accomplices. The second interview would then get to the heart of the suspect's specific involvement. At this point, the police will have squeezed everything they are allowed to out of the pre-warning statement and just might get a full confession from the second.[322]

3. A Proposed Alternative to the Confusion

Whenever the Court approaches a challenge to police procedures, it must balance the rights of criminal defendants with law enforcement's need to effectively investigate crimes and interrogate suspects.[323] However, the Court's decision in *Seibert* does little to benefit criminal suspects, and much to make the job of police, prosecutors, and especially judges more complex. An imperfect, but more effective solution would be to abandon *Seibert*'s multi-factor test in favor of two clear directives:

1) Each suspect must be clearly informed, as part of her *Miranda* warnings, that whatever statements she had made up to the point of warning are inadmissible at trial.

2) Any reference to pre-warning statements made by the interrogator in the course of a post-warning interrogation will be considered prima facie

---

[320] Justice Souter noted that the absence of "a formal addendum warning that a previous statement could not be used. . . is clearly a factor that blunts the efficacy of a the warnings and points to a continuing, not a new, interrogation." United States v. Seibert, 124 S. Ct. 2601, 2613 n.7 (2004).

[321] *See supra* text accompanying notes 289-96.

[322] Under *Harris*, *Tucker*, and *Patane*.

[323] *See* Michigan v. Tucker, 417 U.S. 433, 450-51 (1974).

evidence that the suspect was misled as to the nature of her rights, thus rendering any subsequent statements inadmissible.

Adopting the first directive was suggested and quickly rejected in *Elstad* with the same backhanded tone used to dismiss Justice Brennan's prescient dissent.[324] And as noted above, such a mandate could still be circumvented by skilled interrogators. But replacing a subjective factor test with clear duties increases the likelihood that these commands will be codified in departmental behavior and less subject to manipulation. If the warning contained in the first directive were integrated into the *Miranda* recitation, it would also be included in the forms police departments require suspects to sign to prove that they were given and understood the warnings. Suspects would receive information essential to a clear understanding of their rights and police would have clear proof of this understanding to use in court. The second directive, more than any other factor, bridges the gap between an interrogator's actions and the suspect's perceptions without delving into subjective intentions. When an interrogator refers back to a suspect's pre-warning statements, he is clearly and objectively connecting inadmissible evidence to potentially admissible evidence. This is a verifiable act that could be easily established in court and directly prohibited by police training. These two directives would not only strike a better balance between suspects' rights and law enforcement's needs, but also substantially reduce the use of the "two-step" interrogation technique.

V. CONCLUSION

The *Seibert* plurality undertook a difficult task. It sought to do away with a distressing police practice without disturbing the precedents that fostered the practice. Although the Court felt strongly that "two-step" interrogations violated the spirit of *Miranda*, it was not willing to supplant *Elstad* with a clear bright line rule. Instead it welded a new factor test onto the rusty front of the "totality of the circumstances" machinery. The likelihood of this decision having a positive impact on police procedures is slim to none. As Justice Brennan noted in his *Elstad* dissent "[to] forbid the direct use of methods . . . but to put no curb on their full *indirect* use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty."[325] With this ruling, the Court likely did

[324] "Such a warning is neither practicable nor constitutionally necessary." Oregon v. Elstad, 470 U.S. 298, 316 (1985); *see supra* notes 58-59 and accompanying text.

[325] 470 U.S. at 320 (Brennan, J., dissenting) (citing Nardone v. United States, 308 U.S. 338, 340 (1939)) (emphasis added) (internal quotations omitted).

little to promote the rights of suspects and much to increase the "totality of the confusion."

Stewart J. Weiss*

* I would like to thank Professors Ronald Allen and John Heinz for their insights and guidance. I also extend my sincerest thanks to my friends and family who have supported me unflaggingly.