Seventh Circuit Review

Volume 8 | Issue 1 Article 5

9-1-2012

Taking Two-Steps Around Miranda: Why the Seventh Circuit Should Abandon the Intent-Based Test

Nicholas A. J. Betts
IIT Chicago-Kent College of Law

SEVENTH CIRCUIT REVIEW Volume 8, Issue 1 Fall 2012

TAKING TWO-STEPS AROUND *MIRANDA*: WHY THE SEVENTH CIRCUIT SHOULD ABANDON THE INTENT-BASED TEST

NICHOLAS A. J. BETTS*

Cite as: Nicholas A. J. Betts, *Taking Two-Steps Around* Miranda: *Why the Seventh Circuit Should Abandon the Intent-Based Test*, 8 SEVENTH CIRCUIT REV. 99 (2012), *at* http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v8-1/betts.pdf.

INTRODUCTION

Inspector Harry Callahan is not pleased with the Supreme Court.[1] The fictional San Francisco homicide detective, famously portrayed by Clint Eastwood in the film *Dirty Harry*, has just captured a sadistic serial killer known as Scorpio.[2] There is just one problem: Scorpio's Fourth, Fifth, Sixth, and Fourteenth Amendment[3] rights were violated when Callahan kicked in his door and searched his home without a warrant, denied him medical treatment, and tortured him in order to elicit a confession.[4] Also, because Callahan failed to read Scorpio the *Miranda* warnings, crucial evidence discovered subsequent to the confession would have to be suppressed.[5] When told that the charges have been dropped because Scorpio's constitutional rights were

* J.D candidate, May 2013, Chicago-Kent College of Law; University of Illinois at Chicago, M.B.A., May 2010; University of Illinois at Urbana-Champaign, B.S., Psychology, May 2001.

[1] DIRTY HARRY (Warner Bros. 1971).

[2] *Id*.

[3] U.S. Const. amends. IV, V, VI & XIV.

[4] DIRTY HARRY (Warner Bros. 1971).

[5] *Id*.

violated, Callahan growls: "Well I'm all broke up about that man's rights."[6] Callahan then weighs in on the exclusionary rule: "Well then, the law is crazy."[7]

It is, of course, preposterous (although admittedly entertaining) that a seasoned homicide detective would be so ignorant of Supreme Court criminal procedure jurisprudence that the serial killer is to go free because the inspector has blundered.[8] However, in the decades following the release of *Dirty Harry*, police departments in the United States were encouraging their officers not to brazenly flout the mandates of the Supreme Court like Inspector Callahan, but to craft techniques to circumvent the protections that the Court had bestowed on suspects in criminal investigations.[9] One such technique was the two-step interrogation.[10]

The two-step interrogation was most recently presented to the United States Court of Appeals for the Seventh Circuit in *United States v. Johnson*.[11] In *Johnson*, the defendant appealed, *inter alia*, the District Court for the Western District of Wisconsin's denial of a motion to suppress his post-arrest statements.[12] The defendant sought the suppression of the statements based on the United States Supreme Court's holding in *Missouri v. Seibert*.[13] *Seibert* directly addressed the

[6] *Id*.

[7] *Id*.

[8] *Id*. *See* People v. Defore, 242 N.Y. 13, 21 (1926) (Cardozo, J., famously stating: "The criminal is to go free because the constable has blundered.").

[9] *See generally* 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 (1999).

[10] *See* Oregon v. Elstad, 470 U.S. 298, 328–29 (1985) (Brennan, J., dissenting) (quoting Arthur S. Aubry & Rudolph R. Caputo, CRIMINAL INTERROGATION 290 (3d ed. 1980)) ("Standard interrogation manuals advise that '[t]he securing of the first admission is the biggest stumbling block.' If this first admission can be obtained, 'there is every reason to expect that the first admission will lead to others, and eventually to the full confession.'").

[11] 680 F.3d 966 (7th Cir. 2012).

[12] *Id*. at 978. *See* United States v. Johnson, 354 F. Supp. 2d 904 (D.Wis. 2005).

[13] 542 U.S. 600 (2004); *Johnson*, 680 F.3d at 978–79.

two-step interrogation technique, where investigators would withhold *Miranda* warnings during custodial questioning until a confession was obtained.[14] After confessing, the suspect would be advised of their *Miranda* rights and investigators would proceed to elicit an identical (and now admissible) statement.[15]

Seibert was a deeply divided plurality opinion that produced two potential tests for evaluating the admissibility of two-step interrogations.[16] Justice Souter wrote for a four-Justice plurality, announcing a multi-factor test to determine whether *Miranda* warnings "delivered midstream could be effective."[17] Justice Kennedy, concurring only in the judgment of the Court, wrote separately, arguing for an intent-based test that examined whether law enforcement used the procedure deliberately.[18]

In *Johnson*, the Seventh Circuit found that the defendant was not entitled to relief under *Seibert*, stating as dictum: "We have yet to determine which [*Seibert*] test governs in this circuit."[19] This is an understatement. The Seventh Circuit has struggled to consistently apply one *Seibert* test over another, frustrating any lower court's search for viable binding precedent. This Note will summarize the Supreme Court's decisions in *Miranda* and *Seibert*, examine the Seventh Circuit's inconsistent application of *Seibert*, and advocate for the abandonment of the intent-based test espoused by Justice Kennedy in his concurring opinion in *Seibert*.[20]

[14] *Id*. *at* 604; Miranda v. Arizona, 384 U.S. 436 (1966).
[15] Missouri v. Seibert, 542 U.S. 600 (2004).
[16] *Id*.
[17] *Id*. at 615.
[18] *Id*. at 618–22
[19] *Johnson*, 680 F.3d at 978–79.
[20] *See* Miranda v. Arizona, 384 U.S. 436 (1966); *Seibert*, 542 U.S. 600.

I. MIRANDA

In 1966, the Supreme Court handed down its decision in *Miranda v. Arizona*.[21] *Miranda* held that statements made by a suspect as a result of custodial interrogation are inadmissible unless law enforcement first warns the suspect of certain constitutional rights.[22] Specifically, the suspect must be "clearly informed" that: (1) he has the right to remain silent; (2) anything he says can and will be used against him in court; (3) he has the right to consult with an attorney before the interrogation and to have an attorney present during interrogation; and (4) if he cannot afford an attorney, one will be appointed to represent him.[23] *Miranda* did not mandate that the warnings must be given exactly as written in the opinion, but law enforcement must follow "procedures which are at least as effective in apprising accused persons of their right[s]."[24]

In order for a suspect's statement to be introduced in court, the prosecution must prove by a preponderance of the evidence that *Miranda* rights were waived.[25] A waiver is valid only when the suspect voluntarily, knowingly, and intelligently relinquishes his rights.[26] To assess the validity of a waiver, courts must consider the totality of the circumstances surrounding the interrogation;[27] relevant factors include the suspect's age, physical and mental condition, intelligence and education, and familiarity with the criminal justice system.[28]

[21] 384 U.S. 436.
[22] *Id*. at 467–73.
[23] *Id*.
[24] *Id*. at 467.
[25] Colorado v. Connelly, 479 U.S. 157, 168 (1986).
[26] *Miranda*, 384 U.S. at 444.
[27] Moran v. Burbine, 475 U.S. 412, 421 (1986).
[28] *See e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979)

II. SEIBERT

In *Missouri v. Seibert* the Court held that the "two-step" interrogation technique undermines the effectiveness of the *Miranda* warnings and thus invalidates a suspect's waiver.[29] The Court noted that technique of "interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*."[30]

A. The Facts

Patrice Seibert's twelve year-old son Jonathan, who suffered from cerebral palsy, died in his sleep.[31] Fearing she would be charged with neglect, Seibert, along with two of her sons (and some of their friends), schemed to burn down the family's trailer home with Jonathan's body inside.[32] To dispel any suspicion that Jonathan had been left unsupervised, the plan also included allowing Donald Rector, a mentally ill teenager living with the family, to perish in the fire.[33]

Seibert was arrested five days after the fire was set, at the hospital bedside of one of her sons, who was severely burned during the commission of the arson.[34] Prior to the arrest, Officer Richard Hanrahan of the Rolla, Missouri police department, instructed the arresting officer to not read Seibert the *Miranda* warnings.[35] At the police station, Seibert was left alone in an interrogation room for fifteen to twenty minutes.[36] Without reading Seibert the *Miranda* warnings, Hanrahan interrogated her for thirty to forty minutes, during which time Seibert confessed that she knew that Rector's death was

[29] Missouri v. Seibert, 542 U.S. 600 (2004).
[30] *Id*. at 609.
[31] *Id*. at 604.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.

part of the arson plot.[37] After a fifteen to twenty minute break, Hanrahan advised Seibert of the *Miranda* warnings, activated an audio recorder, and asked her to repeat her confession.[38]

At times during the second interrogation, Hanrahan confronted Seibert with specific admissions she had made during the initial interrogation, pressuring her to admit that she knew there "was [an] understanding about Donald [Rector]."[39] Referring to the initial interrogation, Hanrahan asked Seibert: " 'Trice, didn't you tell me that [Rector] was supposed to die in his sleep?"[40] Ultimately, Seibert's warned (*i.e.*, post-*Miranda*) statement, subsequent to a detailed thirty to forty minute unwarned interrogation, resulted in Seibert being charged with first-degree murder.[41]

B. Lower Court Decisions

Before trial in the Circuit Court of Pulaski County, Seibert sought the suppression of both statements.[42] The trial court suppressed the initial statement but admitted the statement made after the *Miranda* recitation.[43] Seibert was convicted of second-degree murder.[44]

On appeal, the Missouri Court of Appeals held that the two-step interrogation was indistinguishable from *Oregon v. Elstad*, in which a suspect was *inadvertently* not read *Miranda* warnings during a brief initial questioning.[45] *Elstad* held that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions

[37] *Id*. at 605.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 606.
[44] *Id*.
[45] *Id*.; Oregon v. Elstad, 470 U.S. 298, 314 (1985).

that precluded admission of the earlier statement."[46] Thus, there is no presumption of coercive effect where the suspect's initial statement was voluntary.[47] *Elstad* directed courts to examine the totality of the circumstances in evaluating the voluntariness of the post-warning statement.[48] The Missouri Court of Appeals upheld the trial court's decision, finding that Seibert's second statement was voluntary per *Elstad*.[49]

The Missouri Supreme Court reversed, holding that both of Seibert's statements should have been excluded because Hanrahan's initial interrogation was lengthy and detailed, and the specific admissions of Seibert's initial statement were exploited by Hanrahan in the second interrogation as he urged her to repeat her confession.[50] The court distinguished *Elstad*, in that Hanrahan had *deliberately* withheld advising Seibert of her *Miranda* warnings as opposed to an unintentional violation.[51]

The State of Missouri petitioned the United States Supreme Court; certiorari was granted to answer the question of whether a deliberate withholding of *Miranda* warnings mandates the suppression of post-warning statements.[52]

C. The Plurality Opinion

Seibert's conviction was reversed and remanded in a five to four plurality decision.[53] The plurality, Justices Souter, Stevens, Ginsburg and Breyer, held that the two-step interrogation tactic employed by Hanrahan required the suppression of Seibert's second statement,

[46] *Elstad*, 470 U.S. at 314.

[47] *Id*. at 318.

[48] *Id*.

[49] State of Missouri v. Seibert, No. 23729, 2002 WL 114804 at *8–9 (Mo. Ct. App. 2002) (unpublished).

[50] *See Seibert*, 542 U.S. at 606.

[51] *Id*.

[52] *Id*. at 607.

[53] *Id*.

finding that "the object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed."[54] The Court noted that the reason for the technique's nationwide popularity was obvious: "to get a confession the suspect would not make if he understood his rights at the outset."[55] The Court reasoned that "[u]pon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again."[56] For the plurality, the threshold issue was whether in these types of circumstances the warnings could function "effectively" as *Miranda* requires.[57]

The plurality found five factors determinative as to whether "warnings delivered midstream" could be effective: (1) "the completeness and detail of the questions and answers in the first round of interrogation;" (2) "the overlapping content of the two statements;" (3) "the timing and setting of the first and the second [interrogations];" (4) "the continuity of police personnel;" and (5) "the degree to which the interrogator's questions treated the second [interrogation] as continuous with the first."[58]

Applying these factors to the facts of Seibert's case, the Court found relevant that the unwarned interrogation took place at the police station; that the questioning was "systematic, exhaustive, and managed with psychological skill;" and that the two interrogations were separated by only 15 to 20 minutes and conducted in the same location.[59] Particularly bothersome to the plurality was that "[n]othing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led [Seibert] through a

[54] *Id*. at 611.
[55] *Id*. at 613.
[56] *Id*.
[57] *Id*. at 611–12.
[58] *Id*. at 615.
[59] *Id*. at 616.

systematic interrogation."[60] The result, the Court concluded, was that "a reasonable person in the [Seibert's] shoes would not have understood [the *Miranda* warnings] to convey a message that she retained a choice about continuing to talk."[61]

D. Justice Kennedy's Concurrence

Justice Kennedy joined in the judgment, but wrote a separate concurring opinion, believing that the plurality's objective inquiry from the perspective of the suspect, which would apply in the both intentional and unintentional two-stage interrogations, was too broad.[62] Justice Kennedy advocated a narrower test applicable only when "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning."[63] Justice Kennedy described circumstances in which unintentional two-step interrogations may occur:

> An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection.[64]

Thus, according to Justice Kennedy, unless a court finds that the procedure was deliberate, *Elstad* controls, requiring an inquiry only into whether the statements were made voluntarily and without coercion.[65]

---

[60] *Id*.
[61] *Id*. at 617.
[62] *Id*. at 621–22.
[63] *Id*. at 622.
[64] *Id*. at 620.
[65] *Id*. at 622.

Justice Kennedy's test, with its deliberateness requirement, also provided that "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."[66] Curative measures are measures "designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver," such as "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement."[67] While two tests emerged from *Seibert*, the facts of the case mandated suppression of the second statement under both standards.

III. SEIBERT'S PROGENY IN THE SEVENTH CIRCUIT

A. Stewart I, II, and III

On November 9, 2004, the Seventh Circuit decided *United States v. Stewart*.[68] The defendant, Timothy Stewart appealed his conviction for armed bank robbery and use of a firearm during a crime of violence, contending that the admission of his confession at trial violated *Seibert*.[69] Stewart was detained after police established a checkpoint near the recently-robbed bank, because he matched the description of the suspect and because he could not provide a plausible explanation of where he was going or where he had been during the time of the robbery.[70] Stewart voluntarily got into the car of two Evansville, Indiana police detectives and asked them to "drive" and to

[66] *Id*.
[67] *Id*.
[68] 388 F.3d 1079 (7th Cir. 2004) (*Stewart I*).
[69] *Id*. at 1081.
[70] *Id*. at 1082.

"take [him] downtown."[71] When one of the detectives asked him why, Stewart responded: "Well, you're going to arrest me anyway."[72]

While being transported to the police station, the detectives questioned Stewart for approximately five minutes.[73] At the police station, the questioning continued for twenty minutes, with two FBI agents participating in the interrogation; Stewart subsequently confessed to committing the robbery.[74] At this point, one of the detectives read Stewart the *Miranda* warnings; Stewart signed a waiver, answered questions for another hour, and made a tape-recorded confession.[75] The confession was admitted at trial and Stewart was convicted.[76]

On appeal, the Seventh Circuit concluded:

> On the record before us . . . we cannot determine whether the admission of Stewart's confession was improper under *Seibert*, or, if not improper under *Seibert*, whether the initial unwarned confession would flunk the voluntariness standard of *Elstad* . . . More specifically, the record does not speak to whether the two-step interrogation in this case was deliberately used in circumvention of *Miranda*. If it was, then the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge, requiring an inquiry into the sufficiency of the break in time and circumstances between the unwarned and warned confessions.[77]

[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*. at 1083.
[76] *Id*.
[77] *Id*. at 1091.

Remanding the case for further evidentiary findings, the court indicated it would apply a hybrid of the two tests established in *Seibert*.[78]

On remand, the District Court for the Southern District of Indiana held an evidentiary hearing and found that Stewart's interrogation was not an "end run" around *Miranda*.[79] The court stated: "There is no evidence that the [Evansville Police Department] has ever had a policy which employs the two-step interrogation technique, nor evidence that the EPD has ever trained or instructed their officers to employ such a technique."[80] Stewart again appealed.[81]

In *Stewart II*, the Seventh Circuit held that the district court's analysis was improperly narrowed to whether the Evansville Police Department had an official policy encouraging two-step interrogation or provided training instructing officers to use the technique.[82] The court found that "[t]hese considerations are potentially relevant to the broader question of officer intent but by themselves are by no means dispositive of the issue."[83]

Because the district court's decision did not make factual findings necessary to determine whether the two-step interrogation was calculated, the court again remanded the case, with instructions for the district court to make more specific findings regarding whether "the officers intentionally withheld *Miranda* warnings as part of a deliberate strategy to elicit inculpatory statements in circumvention of *Miranda*."[84]

The district court entered Supplemental Findings of Fact and Conclusions of Law, ruling that the two-step procedure was not a deliberate "end run" around *Miranda*, because the lead investigator did

[78] *Id*. at 1092.
[79] United States v. Stewart, 191 F. Appx 495, 496 (7th Cir. 2006) (*Stewart II*).
[80] *Id*. at 498.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.

not believe Stewart was in custody because Stewart requested to enter the detectives' car and demanded to be driven to the police station.[85]

The Seventh Circuit, in *Stewart III*, affirmed the judgment of the district court, holding that "[t]he question of whether the interrogating officer deliberately withheld *Miranda* warnings will invariably turn on the credibility of the officer's testimony in light of the totality of the circumstances surrounding the interrogation. This is a factual finding entitled to deference on appeal."[86] The court added: (1) that "the government bears the burden of proving the police did *not* deliberately withhold the warnings until after they had an initial inculpatory statement in hand"; (2) that delayed *Miranda* warnings do not always "give rise to an inference of deliberateness"; and (3) that "the lack of overlap between the warned and unwarned statements is evidence that the interrogator did not deliberately use a two-step strategy designed to circumvent *Miranda*."[87]

The Seventh Circuit's analyses in the *Stewart* cases invoke a hybrid of the *Seibert* plurality's factor-based test and Justice Kennedy's deliberateness requirement.[88] *Stewart* provides that, when the tactic is intentional, the second statement in a two-step interrogation should be presumptively excluded.[89] However, this presumption can be overcome by a showing that the *Miranda* warnings were "effective;" a showing that can be made by applying the plurality's factor-based test.[90] However, "[w]here the initial

[85] United States v. Stewart, 536 F.3d 714, 719 (7th Cir. 2008) (*Stewart III*).

[86] *Id*. at 719–20.

[87] *Id*. at 719–22. *See* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.8(b) n.49 (West 3d ed. 2012).

[88] *See* United States v. Stewart, 388 F.3d 1079 (7th Cir.2004); United States v. Stewart, 191 F. Appx 495 (7th Cir. 2006); United States v. Stewart, 536 F.3d 714 (7th Cir. 2008).

[89] United States v. Stewart, 536 F.3d 714 (7th Cir. 2008). *See* Eric English, Note, *You Have the Right to Remain Silent. Now Please Repeat Your Confession: Missouri v. Seibert and the Court's Attempt to Put an End to the Question-First Technique*, 33 PEPP. L. REV. 423, 462–63 (2006).

[90] *Id*.

violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*."[91]

B. Heron

Less than one year after *Stewart III* was decided, the Seventh Circuit was again confronted with a two-step interrogation in *U.S. v. Heron*.[92] In *Heron*, the district court admitted the defendant's second statement, using Justice Kennedy's intent-based test.[93] The Seventh Circuit held that the statement was admissible under either test, stating that there was "no need here to resolve once and for all what rule or rules governing two-step interrogations can be distilled from *Seibert*."[94] However, announcing a departure from the *Stewart* hybrid test, the *Heron* court invoked the *Marks* standard regarding plurality decisions.[95] The *Marks* standard provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[96] The *Heron* court concluded that when a concurrence that provides the vote necessary to reach a majority does not provide a "common denominator" for the judgment, the *Marks* rule is inapplicable.[97] Since only Justice Breyer's concurrence could possibly be read to support Justice Kennedy's test, "[the intent-based test] is obviously not the 'common denominator' that *Marks* was talking about."[98]

---

[91] United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir.2004).

[92] 564 F.3d 879 (7th Cir. 2009).

[93] *Id*. at 883–84.

[94] *Id*. at 885.

[95] *Id*. at 883–85.

[96] Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation omitted).

[97] *Heron*, 564 F.3d at 884.

[98] *Id*. at 885.

The *Heron* court conceded that a "defendant-focused" effects test "may be in some tension with our decision in *Stewart*," and also characterized the court's holding in *Stewart I* as mere "tentative statements."[99] The court stated that "nothing in the *Seibert* plurality opinion condemns us to a mechanical counting of items on a list. We must instead examine each one of them for the light it throws on the central inquiry: *whether the later Miranda warnings were effective*."[100] The court in *Heron* therefore clearly indicated (albeit in dicta) its preference for the effects test and forecasted a potential abandonment of both the hybrid and intent-based test.[101]

C. Other Seventh Circuit Decisions

Subsequent Seventh Circuit decisions reveal that the issue is far from resolved. In *United States v. Dixie*, the court (citing *Stewart I*) stated "we have previously explained that Justice Kennedy's separate concurrence represents the narrowest ground of the decision";[102] in *United States v. Lee*, the court cited *Heron*: "[T]his Court has yet to choose which test should govern";[103] in *United States v. Littledale*, citing *Stewart III*: "There can be no finding of an improper two-step interrogation . . . unless the officers *deliberately* withheld *Miranda* warnings until after the suspect confessed";[104] in *United States v. Vallar*: "We have construed *Seibert* as holding 'that post-warning statements are inadmissible if they duplicate pre-warning statements intentionally elicited in an effort to evade *Miranda* ";[105] and, most

[99] *Id*.

[100] *Id*. at 887 (emphasis added).

[101] *See id*.

[102] 382 F. App'x 517, 520 (7th Cir. 2010).

[103] 618 F.3d 667, 678 (7th Cir.2010) (applying both the tests of the plurality opinion and Justice Kennedy's concurrence in *Seibert*, without determining which is controlling).

[104] 652 F.3d 698, 702 (7th Cir. 2011).

[105] 635 F.3d 271, 285–86 (7th Cir. 2011).

recently, in *Johnson*: "We have yet to determine which [*Seibert*] test governs in this circuit."[106]

IV. THE INTENT-BASED TEST SHOULD BE ABANDONED

While seven circuit courts have expressly chosen the intent-based test;[107] other circuits have properly noted the difficulties in determining the proper test arising from *Seibert*.[108] The intent-based test should be abandoned by the Seventh Circuit, because (1) the *Marks* rule regarding plurality decisions does not mandate courts to adopt the intent-based test; (2) the intent-based test is contrary to precedent because subjective intent has never before been relevant for purposes of *Miranda* and criminal procedure in general; and (3) the intent-based test furthers the harmful erosion of *Miranda's* protections.

A. The Marks Rule Regarding Plurality Decisions is Inapplicable

The *Marks* rule holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[109] However, in practice, the *Marks* rule has

[106] United States v. Johnson, 680 F.3d 966, 978–79 (7th Cir. 2012).

[107] *See, e.g.*, United States v. Carter, 489 F.3d 528, 536 (2d Cir. 2007); United States v. Kiam, 432 F.3d 524, 532 (3d Cir. 2006); United States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006); United States v. Williams, 435 F.3d 1148, 1158 (9th Cir. 2006); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006); United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005); United States v. Briones, 390 F.3d 610, 613–14 (8th Cir. 2004).

[108] *See, e.g.*, United States v. Jackson, 608 F.3d 100, 103–04 (1st Cir. 2010); United States v. Pacheco–Lopez, 531 F.3d 420, 427 n. 11 (6th Cir. 2008); United States v. Carrizales–Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006).

[109] Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976).

significant limitations.[110] The Supreme Court has noted that "[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it."[111]

In *Seibert*, Justice Kennedy's concurrence states that the relevant inquiry is subjective deliberateness on the part of law enforcement, not the objective effectiveness factors of the plurality opinion.[112] However, three of the four Justices in the plurality and the four dissenting Justices expressly rejected consideration of the interrogator's intent.[113] Writing for the dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, stated:

> [T]he plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer. . . . The plurality's rejection of an intent-based test is . . . correct . . . [b]ecause voluntariness is a matter of the suspect's state of mind [and]. . . [t]houghts kept inside a police officer's head cannot affect that experience. . . . [F]ocusing constitutional analysis on a police officer's subjective intent [is] an unattractive proposition that we all but uniformly avoid.[114]

This demonstrates that, although Justice Kennedy cast the fifth and deciding vote for the judgment of the Court, his concurring opinion is not the narrowest holding supported by a majority of the Court as required by *Marks*.[115] As a dissenting judge on the Ninth Circuit has explained, "all but one of the central points of *Seibert* enjoys the

[110] *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (stating that the *Marks* rule is "more easily stated than applied to the various opinions supporting the result").

[111] Nichols v. United States, 511 U.S. 738, 745–46 (1994).

[112] Missouri v. Seibert, 542 U.S. 600 (2004).

[113] *Id*.

[114] *Id*. at 623–626.

[115] *See id*.; Marks v. United States, 430 U.S. 188 (1977).

support of five Justices: The rejection of subjective intent enjoys the assent of at least seven Justices."[116]

Because the *Marks* rule is not dispositive as to which *Seibert* opinion is controlling, courts are not bound to adopt or even incorporate Justice Kennedy's intent-based test when analyzing two-step interrogations.

B. The Intent-Based Test is Contrary to Precedent

While Justices O'Connor, Stevens, and Thomas dissented in judgment from the plurality, Justice O'Connor's opinion stands boldly, alongside three members of the plurality, for a rejection of the intent-based test proposed by Justice Kennedy.[117] In Justice O'Connor's opinion, the intent-based test is contrary to the Fifth Amendment in that the "[f]reedom from compulsion [that] lies at the heart of the Fifth Amendment . . . requires us to assess whether a suspect's decision to speak truly was voluntary."[118] Additionally, according to Justice O'Connor, the Court has unequivocally "reject[ed] an intent-based test in several criminal procedure contexts,"[119] such as *New York v. Quarles*,[120] and *Whren v. United States*.[121] An examination of these and other cases makes clear that the subjective intent of law enforcement should never be a relevant inquiry.

Quarles carved out an exception to *Miranda* that allowed law enforcement to question a suspect without providing *Miranda* warnings when public safety is a concern; responses to the questioning are admissible at the suspect's trial.[122] The Court believed that "police officers can and will distinguish almost instinctively between

---

[116] United States v. Rodriguez-Preciado, 399 F.3d 1118, 1141 (9th Cir. 2005) (Berzon, J., dissenting).

[117] *Seibert*, 542 U.S. at 622–628 (O'Connor, J., dissenting).

[118] *Id*. at 624.

[119] *Id*. at 626.

[120] 467 U.S. 649, 656 (1984).

[121] 517 U.S. 806, 813–14 (1996).

[122] *Quarles*, 467 U.S. 649.

questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."[123] The Court made clear that the application of the public safety exception to *Miranda* "should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer."[124]

Whren held that the Fourth Amendment does not prohibit pretextual traffic stops.[125] Prior to *Whren*, some courts used a test that focused solely on the motivation of the law enforcement official for initiating the traffic stop;[126] however, subjective motivation—often criticized for its difficulty in administration—was contrary to prior decisions holding that reasonableness per the Fourth Amendment was not a subjective inquiry.[127] The *Whren* court definitively stated that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[128]

In *Berkemer v. McCarty*, the Court affirmed the application of *Miranda* to driving under the influence cases.[129] The Court held, with regard to *Miranda*, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time;" rather, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[130]

Moran v. Burbine held that pursuant to the Fifth and Sixth Amendments, law enforcement has no obligation to inform a suspect who has not requested an attorney that one is present and wishes to

[123] *Id*. at 658–59.

[124] *Id*. at 656.

[125] *Whren*, 517 U.S. at 813–14 .

[126] *See* Margaret M. Lawton, *The Road to Whren and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917 (2008).

[127] *Id*. at 813–15.

[128] *Id*. at 813.

[129] 468 U.S. 420 (1984).

[130] *Id*. at 421–22. *See also* Stansbury v. California, 511 U.S. 318, 323–324 (1994) (A custody determination "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.").

speak to the suspect.[131] The Court held that, "whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his [*Miranda*] rights."[132]

In *Beckwith v. United States*, the Court held that *Miranda* warnings were not required to be given to a suspect who made incriminating statements to IRS agents during non-custodial questioning at the suspect's home.[133] The Court stated that the agents' subjective belief that the suspect was the focus of a criminal investigation was irrelevant in determining whether the questioning was custodial.[134]

Even in *United States v. Leon*, a case that, according to one commentator, "likely reflects the Supreme Court's greatest deference to police officer intent,"[135] the Court demanded an objective standard—the officer's reasonable reliance—to excuse acting on a warrant that was later invalidated.[136]

More recently in *Yarborough v. Alvarado*, the Court reinforced its preference for objectivity regarding *Miranda*, stating plainly: "The *Miranda* custody inquiry is an objective test . . . The objective test furthers 'the clarity of [*Miranda's*] rule'"[137]

The above cases make clear that the subjective intentions of law enforcement should not be a relevant inquiry in determining whether statements elicited during two-step interrogations should be admissible.

---

[131] 475 U.S. 412, 423–26 (1986).

[132] *Id*. at 423.

[133] 425 U.S. 341 (1976).

[134] *Id*. at 346–47.

[135] Joëlle Anne Moreno, *Faith-Based Miranda?: Why the New Missouri v. Seibert Police "Bad Faith" Test is a Terrible Idea*, 47 ARIZ. L. REV. 395, 416 (2005).

[136] 468 U.S. 897, 922 (1984).

[137] Yarborough v. Alvarado, 541 U.S. 652, 667 (2004) (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984)).

C. The Intent-Based Test Erodes Miranda's Protections

The intent-based test erodes the protections of *Miranda* by creating a hopeless situation where defendants must convince courts that specific police officers acted in bad faith by initially withholding the Miranda warnings. This allegation can be easily rebutted by the officer's testimony that the conduct was inadvertent. Situations are common where the status of the individual as witness or suspect is unclear at the time of interrogation, or where the custodial status of the individual is murky. These circumstances allow an officer to color his conduct as unintentional and place an undue burden on the defendant to prove otherwise. This incorrectly diverts the analysis from what is most fundamental to the *Miranda* warnings: Whether a reasonable person in the suspect's shoes would have meaningfully understood the warnings to convey the message that they retained a real choice about continuing to speak.[138] The objective criteria of the plurality's factor based test in *Seibert* furthers this objective by requiring circumstances be such that the individual can truly reflect on their decision to invoke their constitutional right to remain silent and to have counsel present during questioning.

CONCLUSION

Because the intent-based test is not controlling, is contrary to precedent, and diminishes the protections endowed upon suspects in criminal investigations by the *Miranda* decision, the Seventh Circuit should take the next opportunity to abandon this test.

[138] *See* Miranda v. Arizona, 384 U.S. 436, 468–69 (1966).