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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

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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

I. INTRODUCTION

Imagine police approaching and asking questions of a person suspected of murdering a mentally disabled child. Assume that the suspect voluntarily responds to the officers' questions and confesses to the gruesome crime. At that point, she is read her *Miranda* warnings and again voluntarily confesses. The first confession, made before the suspect had been advised of her rights as required by *Miranda v. Arizona*[1] is generally inadmissible.[2] Under what circumstances should she also be saved from her second statement, made only after she was aware of her rights? This was essentially the question posed to the Supreme Court in *Missouri v. Seibert*,[3] and the answer depends on which Justice you ask.

According to four Justices, such a statement is admissible only if, after applying an amorphous multi-factor test, the *Miranda* warnings could still serve their purpose.[4] Four other Justices would admit the second confession because both of the suspect's statements were in fact "voluntary" under established precedent.[5] The remaining Justice, whose view might be the most important of all, would admit the statement as long as police did not "deliberately" fail to deliver a *Miranda* warning to the suspect at the outset.[6] Confused? So are many of the lower courts that have tried to glean the proper rule from this case and apply it.

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1. 384 U.S. 436 (1966).
2. *See id.*; Missouri v. Seibert, 124 S. Ct. 2601, 2605 (2004) (plurality opinion).
3. 124 S. Ct. at 2601.
4. *See Seibert*, 124 S. Ct. at 2609-13 (plurality opinion).
5. *See id.* at 2616 (O'Connor, J., dissenting).
6. *See id.* at 2614-16 (Kennedy, J., concurring).

This case note first briefly and generally examines the history, beginning in England, of the present-day Fifth Amendment right against self incrimination. In particular, it traces the development of the right in the custodial interrogation context from *Miranda v. Arizona*,[7] to the successive confession case of *Oregon v. Elstad*,[8] to the split in the circuits that followed. Part III analyzes in some detail the Court's recent decision in *Missouri v. Seibert*,[9] with an emphasis on distinguishing between the approaches taken by the plurality, concurring, and the dissenting Justices. This section also discusses some of the highlights and criticisms of the approaches advocated in each opinion. In part IV, this note examines cases applying *Seibert* to illustrate its impact on lower courts thus far, and those courts' attempts to formulate a workable rule. The article concludes by evaluating the potential impact on law enforcement and the actual impact of the ruling on the person described in the opening, Patrice Seibert.

II. THE BACKDROP TO *SEIBERT*: AN OVERVIEW OF THE RIGHT[10] AGAINST SELF-INCRIMINATION

A. Confessions and Self-Incrimination Law Prior to Miranda v. Arizona

Like many American legal traditions, our modern day right against self-incrimination has its roots in English jurisprudence.[11] Much has been written about the history and policy behind this right, and detailed treatment of such issues is beyond the scope of this case note.[12] However, it is interesting to note that the establishment of the right is often traced to Englishman John Lilburne,[13] who refused to incriminate himself in

7. 384 U.S. 436 (1966).

8. 470 U.S. 298 (1984).

9. 124 S. Ct. at 2601.

10. Although some refer to the right against self incrimination as a "privilege," it is better viewed as a right because it is guaranteed by the Constitution. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION vii (1968).

11. *See Miranda*, 384 U.S. at 459; *see also* MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 1-20 (1980) (providing the historical framework for the creation of the Fifth Amendment).

12. For a well respected discussion of these issues see LEVY, *supra* note 10, and BERGER, *supra* note 11, at 1-23.

13. Justice Warren spelled the name "Lilburn" in his majority opinion in *Miranda*, but Professors Berger and Levy spell the name "Lilburne." *See Miranda*, 384 U.S. at 459; LEVY, *supra* note 10, at 271; BERGER, *supra* note 11, at 16.

proceedings during the early Seventeenth Century.[14] At least partly as a result of Lilburne's persistence, the right became widely recognized across England, and by the Nineteenth Century, common law courts had extended it to include a right to remain silent during interrogation.[15]

This trend undoubtedly influenced colonial America as evidenced by the number of states that adopted the right in their constitutions and the fact that the First United States Congress included the protection in the Bill of Rights.[16] The right appears in the Fifth Amendment to the United States Constitution and guarantees that no person be forced to speak "unless he chooses to . . . in the unfettered exercise of his own will."[17] Case law has since interpreted that right to include the right to remain silent during custodial interrogation.[18] Although the seeds of self-incrimination law were imported from the other side of the Atlantic, they took hold in America and thrived as more and more courts recognized that "'[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."[19] Courts also sought to firmly establish the right because, from a policy perspective, they recognized that the reliability of coerced confessions is suspect and there is a "deep-rooted feeling that the police must obey the law while enforcing the law.'"[20]

Practically speaking, prior to the Court's landmark decision in *Miranda v. Arizona* in 1966, the Court analyzed confessions under the due process clause of the Fourteenth Amendment with the goal of excluding statements

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14. *Miranda*, 384 U.S. at 459. Interestingly, *Miranda* also noted that the privilege may have existed during Biblical times. *See id.* at 458 n.27; *see also* BERGER, *supra* note 11, at 15 (noting that "history quite appropriately recognizes Lilburne's service as a special catalyst in the movement to abolish the oath"). Although the court eventually recognized that Lilburne could not be forced to incriminate himself, it did not do so until he had completed a lengthy contempt sentence. BERGER, *supra* note 11, at 18-19.

15. *See* Bram v. United States, 168 U.S. 532 (1897); *see also* BERGER, *supra* note 11, at 21 (noting the effect of the post-Lilburne era on the legal system of the American colonies).

16. BERGER, *supra* note 11, at 22-23. Concerning inclusion of the right in the Constitution, Chief Justice Earl Warren eloquently explained that "[t]he privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history." Quinn v. United States, 349 U.S. 155, 161 (1955).

17. Malloy v. Hogan, 378 U.S. 1, 8 (1964); *see* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

18. *See Malloy*, 378 U.S. at 8. The right was considered to be so important that it was codified in the Nineteenth Century: "You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you." *See Bram*, 168 U.S. at 550.

19. *Miranda*, 384 U.S. at 480 (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).

20. Spano v. New York, 360 U.S. 315, 320-21 (1959).

obtained by measures "revolting to the sense of justice."[21] The focal point of this approach, often referred to as the "due process voluntariness test," was whether the statement was voluntarily made.[22] In applying this test, courts considered a confession voluntary if, under a totality of the circumstances, it was "the product of a rational intellect and a free will"[23] and the police had not overborne the free will of the suspect.[24]

This "due process voluntariness test" prevailed from 1936 when the Court decided *Brown v. Mississippi*[25] until the *Miranda* decision in 1966.[26] Over the course of the thirty years that it applied the voluntariness test, the Court began to recognize some of its shortcomings, most significantly its inability to provide clear guidance for lower courts and law enforcement.[27] In addition, particularly troubling to the Warren Court was the fear that the voluntariness test was not effective in regulating coercive interrogation tactics.[28]

Reflecting these concerns, the Warren Court set the stage for a sweeping change two years prior to *Miranda* by deciding two cases involving the Sixth Amendment right to counsel.[29] Although both cases involved the right to counsel, they were relevant because prior to the first case, *Massiah v.*

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21. Brown v. Mississippi, 297 U.S. 278, 286 (1936). In *Brown*, the police coercion in eliciting statements was particularly extreme, involving the whipping and hanging of defendants. *Id.* at 281-83.

22. *See* Haynes v. Washington, 373 U.S. 503, 513-14 (1963); Payne v. Arkansas, 356 U.S. 560 (1958); Ward v. Texas, 316 U.S. 547 (1942); *see also* KENNETH W. STARR, FIRST AMONG EQUALS 192 (2002) (emphasizing that the key inquiry was "whether the defendant had been *forced* to incriminate himself").

23. Blackburn v. Alabama, 361 U.S. 199, 208 (1960). In *Blackburn*, the Court considered both physical intimidation and psychological pressure to be prohibited. *Id.* at 206.

24. Rogers v. Richmond, 365 U.S. 534, 544 (1961); *see also Haynes*, 373 U.S. at 513-14 (applying a totality of the circumstances test).

25. 297 U.S. at 278.

26. Karen S. DesRoches, Comment, *Whither Went* Miranda*?*, 20 SUFFOLK U. L. REV. 1229, 1231 (1986); *see also* BERGER, *supra* note 11, at 125-26 (explaining the development of confession law from *Brown* to *Miranda*).

27. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 621 (6th ed. 2000) (noting that "[t]he word voluntary . . . had to be defined anew in every case"); *see also* Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring) ("[T]he practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned . . . .").

28. WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 48 (2001) (emphasizing that "the due process test could not completely eliminate" torture and extreme abuses because "lower courts were unwilling to credit suspects' truthful testimony relating to abusive interrogation practices.").

29. *See* Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

United States,[30] deprivation of counsel was considered as part of the broader totality of the circumstances under the due process voluntariness test.[31] But in those cases, the Court shifted gears by holding that violations of the Sixth Amendment right to counsel required suppression of both pre-indictment[32] and post-indictment[33] statements.[34] In making this change, the Court foreshadowed "that the right to remain silent arose from the privilege against self-incrimination secured by the [F]ifth [A]mendment."[35]

B. A Sweeping Change: The Miranda *Decision*

In *Miranda v. Arizona*,[36] the Supreme Court recognized by a five-to-four margin that custodial interrogation is inherently coercive and that the accused must be apprised of his or her Fifth and Sixth Amendment rights, including the right to remain silent, before any police interrogation.[37] The immediate effect of this case on the judiciary was that it signaled the end of the voluntariness analysis. And for Ernesto Miranda, the adoption of a new standard was a gift from the High Court because under the prior standard "there was no doubt that Miranda's confession would have been admissible."[38]

More importantly in the broader context of criminal justice, *Miranda* announced an easy-to-apply, if not controversial, test that required law enforcement to read a set of warnings, which included the right to remain silent, prior to custodial interrogation.[39] By creating this test, the Court

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30. 377 U.S. at 201.

31. *See, e.g.*, Crooker v. California, 357 U.S. 433, 438-41 (1958), *overruled by* Miranda v. Arizona, 384 U.S. 436 (1966).

32. *Escobedo*, 378 U.S. at 490-91.

33. *Massiah*, 377 U.S. at 206.

34. *Id.*; *Escobedo*, 378 U.S. at 490-91.

35. Bettie E. Goldman, Note, Oregon v. Elstad*: Boldly Stepping Backwards to Pre-*Miranda *Days*, 35 CATH. U. L. REV. 245, 251 (1985).

36. 384 U.S. at 436.

37. *Id.* at 478-79. The Court emphasized the coercive nature of custodial interrogation by stating "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455. Although the *Miranda* decision stands as a stark turning point in Supreme Court jurisprudence, the decision did not come as a complete surprise. *See* WHITE, *supra* note 28, at 48. In fact, prior to *Miranda*, the Court's increased concerns about suspects' rights signaled that such a change was on the horizon. *Id.* ("As the Court's sensitivity to the psychological impact of custodial interrogation practices expanded, its concern for regulating interrogation tactics . . . increased."). While the Court's willingness to adopt a different standard can primarily be explained by those concerns, the petitioners' proposals likely played at least some role. *See* LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 137 (1983).

38. STARR, *supra* note 22, at 192. Starr explains that "the police in *Miranda* had not engaged in the kind of heavy-handed methods that in many cases had led courts to conclude that the confessions received had indeed been 'coerced.'" *Id.*

39. *Miranda*, 384 U.S. at 444; BERGER, *supra* note 11, at 130 (noting that "criticism burst forth after the *Miranda* ruling was handed down"). One reason the test was controversial is illustrated by

expressly extended the Fifth Amendment right against self incrimination beyond the courtroom to include custodial interrogations as well.[40] The Court further held that confessions obtained without *Miranda* warnings or a valid waiver of the warnings could not be admitted against a defendant at trial.[41] Although exceptions to *Miranda* were necessarily created over time, the test remains a fixture of the criminal justice system.[42]

It seems clear that the Court's goal in *Miranda* to create a bright line test was successful. But while the Court then recognized the need to establish "concrete constitutional guidelines for law enforcement agencies and courts to follow," the Court now must address new challenges to *Miranda* such as the ones posed by the law enforcement tactics present in *Missouri v. Seibert.*[43] Nonetheless, *Miranda* is recognized as the Warren Court's landmark criminal law decision and remains good law today.[44] In fact, its language has become such a part of our nation's psyche that "children are more likely to recognize the *Miranda* warnings than the Gettysburg Address."[45]

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the fact that Miranda's statements were excluded. In fact, the *Miranda* standard does require suppression of many statements that would have been admissible under the voluntariness analysis. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 305 (1985).

With regard to specific warnings required by the Court, it said that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Miranda*, 384 U.S. at 444. In adopting this language, the Court seemed to draw on the petitioner's statement at oral argument. *See* BAKER, *supra* note 37, at 137.

40. *See Miranda*, 384 U.S. at 460-61. Many commentators agree that *Miranda* extended "the law far beyond the familiar text of the Fifth Amendment." STARR, *supra* note 22, at 191.

41. *Miranda*, 384 U.S. at 478-79. The Court provided that a defendant could waive the rights guaranteed under *Miranda*, as long as the waiver was knowingly, voluntarily, and intelligently made. *See id.* at 444.

42. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 651 (1984) (recognizing an exception to *Miranda* if public safety is compromised by strict compliance with the warnings); Harris v. New York, 401 U.S. 222, 224-26 (1971) (holding that although statements made pre-*Miranda* cannot be used in the prosecution's case in chief, they can be used to impeach).

43. *Miranda*, 384 U.S. at 442; *accord* Missouri v. Seibert 124 S. Ct. 2601 (2004).

44. *See, e.g.*, Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1001 (2001).

45. THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING xv (Richard A. Leo & George C. Thomas III eds., 1998); *see also* Dickerson v. United States, 530 U.S. 428, 443 (2000) (emphasizing that *Miranda* is so "embedded in routine police practice" that it has "become part of our national culture").

1. *Oregon v. Elstad*

In the decades following, *Miranda* the Supreme Court was called on often to interpret *Miranda*'s requirements in different contexts. One such case was *Oregon v. Elstad*,[46] where the Court addressed the same broad issue faced in *Seibert*: whether a suspect's second confession was admissible despite the fact that the first confession lacked *Miranda* warnings.[47] In *Elstad*, police officers went to the home of James Elstad to arrest him in connection with a burglary.[48] While escorting Elstad from his home, one officer asked a question relating to the crime, prior to reading *Miranda* warnings, and Elstad responded with an incriminating statement.[49] He was then transported to the police station where he was given *Miranda* warnings one hour later.[50] Elstad executed a waiver of his *Miranda* rights and confessed a second time.[51]

Writing for a six-member majority, Justice O'Connor announced a voluntariness standard for evaluating uncoerced confessions elicited from "two-step" interrogation procedures.[52] Under that test, if the unwarned statement is not coerced, and therefore voluntary under the Fifth Amendment, the second confession will be admitted as long as it is voluntarily made.[53] In other words, if both pre-warning and post-warning statements are voluntarily made, a "simple failure" to administer *Miranda* warnings will not affect the admissibility of the warned statement.[54] On the issue of voluntariness, the Court noted that the act of simply reciting *Miranda* warnings is generally enough to ensure that the second, warned statement is in fact voluntary.[55] In sum, "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned

46. 470 U.S. 298 (1985).

47. *See id.* at 300. The key difference is that *Elstad* involved a good-faith *Miranda* violation while in *Seibert* the Court was faced with an intentional violation. *See infra* Part III.A.

48. *Elstad*, 470 U.S. at 300-02.

49. *Id.* Specifically, the officer told Elstad that he suspected that Elstad was responsible for the burglary, and Elstad replied, "Yes, I was there." *Id.* at 301. Whether Elstad was in custody or not when he made the incriminating statement was not an issue because the state conceded that he was. *Id.* at 302.

50. *Id.* at 301.

51. *Id.* at 301-02.

52. *Id.* at 309. Chief Justice Burger, and Justices White, Blackmun, Powell, and Rehnquist joined in the majority opinion. *Id.* at 299.

53. *Id.* at 309 ("[T]he admissibility of any subsequent statement should turn . . . solely on whether it is knowingly and voluntarily made.").

54. *Id.*

55. *Id.* at 314.

statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement."[56] Applying its test to *Elstad*, the Court found that the suspect's unwarned statements were not unconstitutionally coerced, and were therefore voluntary.[57] In considering the second part of the test, the Court also found the warned confession to be voluntary and therefore admissible.[58]

One aspect of Justice O'Connor's opinion that has carried over to subsequent cases, including *Seibert*, is her rejection of the fruit of the poisonous tree analysis in the successive confession context.[59] In favoring the voluntariness approach, Justice O'Connor concluded that the fruits analysis does not operate in the *Miranda* context as it does with the Fourth Amendment.[60] She reasoned that a violation of the Fourth Amendment, which triggered use of the fruits analysis, was a constitutional violation, but a violation of *Miranda* was not.[61] The Court clarified that "*Miranda* . . . sweeps more broadly than the Fifth Amendment itself . . . [and] may be triggered even in the absence of a Fifth Amendment violation."[62] This part of the opinion apparently remains in force despite the fact that the Court recently held in *Dickerson v. United States* that *Miranda* warnings are constitutionally required.[63] Interestingly, the Court in *Dickerson* did not question *Elstad*'s refusal to apply the fruit of the poisonous tree analysis and noted that "[o]ur decision in [*Elstad*] . . . simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[64]

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56. *Id.*

57. *Id.* at 314-16.

58. *See id.*

59. *Id.* at 306-09. She retained this view in *Seibert*. *See* discussion *infra* Part III.F. In essence, the fruit of the poisonous tree doctrine requires the exclusion of illegally obtained evidence, unless the "taint" of illegality can be purged. *See* Wong Sun v. United States, 371 U.S. 471, 487-89 (1963). The Court in *Wong Sun* elaborated that the focal point of the analysis is whether the illegally obtained evidence "has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 221 (1959)).

60. *Elstad*, 470 U.S. at 306-09.

61. *Id.* at 305-06. "[Elstad's] contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation." *Id.* at 305.

62. *Id.* at 306.

63. *See* Dickerson v. United States, 530 U.S. 428 (2000).

64. *Id.* at 441. All members of the Court in *Seibert*, save Justice Breyer, agreed that the fruit of the poisonous tree analysis should not apply in that case. *See* discussion *infra* Part III.

The *Elstad* Court's rejection of the fruit of the poisonous tree analysis was not absolute, as O'Connor conceded that the fruits analysis was appropriate in cases where the unwarned statement was involuntary as a result of unconstitutional coercion.[65] In addition to not being absolute, the majority's rejection of the fruits analysis, in most circumstances, was not unanimous. Justices Brennan and Marshall, who joined in a dissenting opinion, endorsed the fruits analysis and felt that the majority's refusal to apply the fruits analysis had "deliver[ed] a potentially crippling blow to *Miranda*."[66]

In fact, Justice Brennan disagreed with virtually every conclusion reached by the majority.[67] For example, in his view, a confession elicited in violation of *Miranda* should create a presumption that the second statement was involuntary.[68] He would have applied a set of factors similar to those announced in *Seibert* to determine whether the warned statement should be admitted.[69] After it was decided, *Elstad* received criticism from those apparently agreeing with Justice Brennan's grim prediction about its detrimental effect on *Miranda* and on suspects' rights. The primary complaint was *Elstad*'s potential to undermine *Miranda*'s purpose and clarity.[70] According to one critic: "Instead of recognizing the limitations of the judicial process or promoting judicial economy, *Elstad* sacrifices the precision of *Miranda* and promises once again to sink lower courts in a mire of inquiries into voluntariness."[71] One effect of the discontent following

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65. *See Elstad*, 470 U.S. at 309.

66. *Id.* at 319 (Brennan, J., dissenting). Justice Brennan would have applied the fruit of the poisonous tree analysis because in his view the Fifth Amendment requires that police give *Miranda* warnings, and therefore a failure to give *Miranda* warnings was a constitutional violation that should be subject to the fruits analysis. *See id.* at 347-49. Although the view that *Miranda* is constitutionally required was subsequently adopted by the Court in *Dickerson*, the Justices in *Seibert* nonetheless soundly rejected the fruits analysis by an 8-1 margin with only Justice Breyer endorsing the test. *See* Missouri v. Seibert, 124 S. Ct. 2601 (2004).

67. *See Elstad*, 470 U.S. at 319-21 (Brennan, J., dissenting).

68. *See id.* at 335.

69. *See id.* at 339-41. Justice Brennan would have considered whether there was a significant lapse in time between the confessions, whether they took place in the same location, and whether the suspect was informed that the unwarned statement could not be used against him. *See id.* All three of these factors are "*Seibert* factors." *See Seibert*, 124 S. Ct. at 2612 (plurality opinion).

70. *See, e.g.*, Goldman, *supra* note 35, at 275-77 (criticizing *Elstad* as "depart[ing] from the underlying values of both *Miranda* and the fifth amendment," creating an incentive for police misconduct, and eliminating *Miranda*'s bright-line rule in these kinds of cases); Claudia R. Barbieri, Oregon v. Elstad *Revisited: Urging State Court Judges to Depart From The U.S. Supreme Court's Narrowing of* Miranda, 4 UDC/DCSL L. REV. 63, 67 (1998) ("Several scholars agree with Justice Brennan and accuse the Court of dramatically narrowing *Miranda's* original intent almost to the point of non-existence.").

71. Leading Cases, *Right Against Self-Incrimination—Consecutive Confessions*, 99 HARV. L. REV. 141, 147 (1985). The article goes on to state that "judicial inquiries into the voluntariness of confessions are both time-consuming and imprecise." *Id.* at 146. *But see* United States v. Carter,

Elstad was that some state courts chose to interpret their state constitutions as being inconsistent with *Elstad* because they provided more protection for suspects.[72] The result is that those states essentially rejected *Elstad* in favor of their own test for admissibility, with some bearing a resemblance to the approach taken in *Seibert*.[73]

2. In the Wake of *Elstad*, a Split in the Circuits Emerged

Certiorari was granted in *Seibert* to resolve a split among the circuits.[74] The split reflected disagreement between courts over how to treat cases where police intentionally failed to give *Miranda* warnings to suspects, something the *Elstad* Court was not faced with.[75] Eventually, two primary approaches emerged and examples of each are discussed in turn. In *United States v. Carter*[76] the Court of Appeals for the Eighth Circuit affirmed a district court decision to suppress a confession in a two-stage interrogation case.[77] The court cited *Elstad* for two rules. First, that "[i]f the unwarned statement is voluntary, then a subsequent warned confession may be admissible if the prior statement is not the result of 'deliberately coercive or improper tactics.'"[78] And second, that the subsequent, warned statement

884 F.2d 368, 374 (8th Cir. 1989) (providing an example of a case that limits *Elstad* in order to avoid the undesirable effects discussed above).

72. Barbieri, *supra* note 70, at 64. State supreme courts are allowed to interpret their own constitutions as providing more protection against law enforcement activity than the Federal Constitution as interpreted by the United States Supreme Court. *See id.* (citing Michigan v. Long, 463 U.S. 1032, 1041 (1983); Oregon v. Hass, 420 U.S. 714, 719 (1975)). For a discussion of the approach taken by one state, see Katherine E. McMahon, *"Cat-Out-of-the-Bag" & "Break-in-the-Stream-of-Events": Massachusetts' Rejection of* Oregon v. Elstad *for Suppression of Warned Statements Made After a* Miranda *Violation*, 20 W. NEW ENG. L. REV. 173 (1998) (critiquing that state's attempts to reject the Court's holding in *Elstad*). For an example of an approach taken by another state, see *infra* note 170.

Although several states including Massachusetts, Tennessee, and Hawaii have interpreted their own constitutions as rejecting the *Elstad* rationale, most states have followed *Elstad*. Barbieri, *supra* note 70, at 69-72.

73. *See infra* note 170.

74. *Seibert* 124 S. Ct. at 2607.

75. *See infra* notes 76-130 and accompanying text.

76. 884 F.2d at 368.

77. *See id.* at 372-75. In *Carter*, the suspect was questioned by postal investigators in his boss' office where he made incriminating statements prior to being read *Miranda* warnings. *Id.* at 369.

78. *Id.* at 372 (quoting Oregon v. Elstad, 470 U.S. 298, 314 (1985)). The court's discussion of *Elstad* is apparently dicta since it held that, in the alternative, the confession was the fruit of an unconstitutional search. *Id.* at 374; *see also* United States v. Esquilin, 208 F.3d 315, 320 (1st Cir. 2000) (commenting that this part of the *Carter* opinion is dicta), *overruled in part by Seibert*, 124 S. Ct. at 2601. The court in *Carter* also noted that an *Elstad* defense was apparently not raised at trial,

must also be voluntary in order to be admissible.[79] The court dismissed the first rule by assuming *arguendo* that Carter's first confession was voluntary.[80] The more important issue was whether the second, warned statement was voluntary, and the court attempted to distinguish *Elstad* on its facts.[81]

In distinguishing the cases, the court focused on the issue of the time elapsed between the warned and unwarned statements.[82] It emphasized that "*Elstad* seemed chiefly concerned by the notion that a suspect is incapable of making a 'subsequent voluntary and informed waiver . . . for some indefinite period' once *Miranda* has been violated."[83] In *Elstad*, the warned and unwarned statements were about one hour apart, but the interrogation in *Carter* was continuous, with no break between the unwarned confession and the warned confession.[84] So the court considered the second, warned confession to be "part and parcel" of the first and, as a result, involuntary under *Elstad*.[85]

Although the court emphasized the timing issue, the court's underlying concern seemed to be the intentional nature of the *Miranda* violation.[86] The court concluded that the officer's approach to "'get[ting] practically all that you want out of a person before you ever give them the *Miranda* rights'" should not be allowed.[87] It concluded that "*Elstad* did not go so far as to fashion a rule permitting this sort of end run around *Miranda*" and refused to admit the post-warning statements.[88] From a judicial economy perspective, the court aptly noted that admitting the statement in *Carter* could promote further intentional *Miranda* violations and require courts to analyze, under *Elstad*, whether statements are voluntary or not, an analysis that *Miranda* was created to replace.[89] By refusing to admit the statement in *Carter*, the court hoped to send a message to police that such deliberate *Miranda*

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but it did not address this issue because it held that under *Elstad* the second confession was not admissible. *See Carter*, 884 F.2d at 372.

79. *Carter*, 884 F.2d at 372-73.

80. *Id.* at 373.

81. *See id.*

82. *See id.* at 373-74.

83. *Id.* at 373 (quoting *Elstad*, 470 U.S. at 309).

84. *See id.* at 373.

85. *See id.*

86. *See id.*

87. *Id.* (citation omitted).

88. *Id.* One dissenting judge thought that Carter was not in custody when the statements were elicited but would have nonetheless found this case indistinguishable from *Elstad*. *Id.* at 376 (Beam, J., dissenting).

89. *Id.* at 374 (majority opinion) ("If the police are permitted . . . to ignore *Miranda* until after they obtain a confession, the courts will once again be embroiled in the endless case-by-case voluntariness inquiries *Miranda* was designed to prevent, and the ease-of application rationale enunciated by the Supreme Court will be largely nullified.").

violations are not beneficial.[90] And as a result, the court intended not only to protect the rights of the accused, but also to perform fewer *Elstad* analyses, which involve difficult voluntariness evaluations.[91]

Another case applying a similar rationale was *United States v. Gale*,[92] where the Circuit Court of Appeals for the District of Columbia ruled that a subsequent, warned statement was admissible.[93] Although the court construed *Elstad* in the same manner as the court in *Carter*, it distinguished *Carter*'s facts.[94] And in contrast to *Carter*, the court ultimately held that, under *Elstad*, the warned statement was voluntarily made and there was no evidence that the prior statements were coerced.[95]

Unlike *Carter*, the key issue in *Gale* was whether the pre-warning statement was voluntary.[96] In concluding that it was, the court rejected the argument that Gale's unwarned statements were coerced because he was "faced with a police presence 'that was intimidating and inherently coercive.'"[97] The court responded by noting that custodial interrogation by its nature is somewhat coercive but that *Elstad* requires "'actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will.'"[98] And because the district court found no "deliberate police tactics" of this type, the pre-warning statement was not violative of *Elstad*.[99]

The court went on to distinguish *Carter* on the issue of whether the post-warning statement was voluntary.[100] In *Gale*, the warned statement was not made "on the heels" of the unwarned statement because it was elicited

90. *See id.*

91. *See id.*

92. 952 F.2d 1412 (D.C. Cir. 1992).

93. *Id.* at 1418.

94. *See id.* at 1417-18. Since *Gale* distinguished *Carter* on its facts, it was unclear, at least to one court, whether *Gale* approved of the holding in *Carter*. *See* Davis v. United States, 724 A.2d 1163, 1169 n.9 (D.C. Cir. 1998). Most other circuit courts of appeal, except for the ones discussed *infra*, took an approach similar to *Carter* and *Gale* when interpreting *Elstad*. *See, e.g.*, United States v. McCurdy, 40 F.3d 1111, 1117-18 (10th Cir. 1994) (distinguishing *Carter* because of the intentional violation there, but applying virtually the same analysis).

95. *Gale*, 952 F.2d at 1417.

96. *See id.* at 1417-18.

97. *Id.* at 1417 (quoting Brief for Appellant at 32, *Gale*, 952 F.2d 1412 (No. 91-3038)).

98. *Id.* at 1417 (quoting Oregon v. Elstad, 470 U.S. 298, 309 (1985)). The court noted that, logically, *Elstad* must require more than the kind of "coercion" that will always be present in custodial interrogation, because if every custodial interrogation were considered coercive under *Elstad* "the failure to give *Miranda* warnings before one statement would *always* undo a later statement given after such warnings, thereby fatally undermining the rule of *Elstad* itself." *Id.*

99. *Id.*

100. *Id.* at 1417-18.

almost one hour later.[101] As a result, the concern voiced in *Carter* that the suspect could not make a "voluntary and informed waiver . . . for some indefinite period' once *Miranda* has been violated"[102] was not present in the same way in this case.[103] Lastly, the court noted that the officer in *Gale* asked only one improper question and the questions were different in the warned and unwarned phases of questioning.[104] All of this led to the conclusion that the police did not make the deliberate "end run" around *Miranda* that the authorities did in *Carter*.[105]

The other approach taken by the circuit courts of appeal is illustrated by *United States v. Orso*[106] and *United States v. Esquilin*.[107] In *Esquilin*, the First Circuit Court of Appeals affirmed the district court's decision to admit a warned statement after *Miranda* warnings were intentionally withheld.[108] The court rejected the argument that this case was distinguishable from *Elstad* on the grounds that there was only one interrogation and no separation in time between the unwarned and the warned phases.[109] The court held that "the lapse of time between interrogations is relevant only when the statement obtained in violation of *Miranda* was actually coerced."[110]

More importantly, the court considered Esquilin's argument that deliberate *Miranda* violations, such as those present there, should automatically constitute "improper tactics" under *Elstad*.[111] The court acknowledged that *Elstad* did not define "deliberately coercive or improper tactics" and attempted to interpret the term in harmony with *Elstad's*

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101. *Id.* at 1418. In fact, the one-hour lapse is similar to *Elstad*. *See supra* note 50 and accompanying text.

102. United States v. Carter, 884 F.2d 368, 373 (quoting *Elstad*, 470 U.S. at 309).

103. *See Gale*, 952 F.2d at 1418.

104. *Id.*

105. *Id.* As a result, the second confession was not involuntary, and was admissible. *See id.*

106. 266 F.3d 1030 (9th Cir. 2001), *overruled in part by* Missouri v. Seibert, 124 S. Ct. 2601 (2004).

107. 208 F.3d 315 (1st Cir. 2000), *overruled in part by Seibert*, 124 S. Ct. at 2601.

108. *See id.* at 319-20.

109. *Id.* at 319 (citing Oregon v. Elstad, 470 U.S. 298, 310-11 (1985)).

110. *Id.* The court was applying the section of *Elstad* that said, "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Elstad*, 470 U.S. at 310. *But see Gale*, 952 F.2d at 1417-18 (considering the timing issue even though the first statement was not involuntarily made); United States v. Carter, 884 F.2d 368, 373-74 (8th Cir. 1989) (same). *Esquilin* conflicts with *Seibert* where timing was among the list of factors applied. *See Seibert*, 124 S. Ct. at 2612 (plurality opinion).

111. *Esquilin*, 208 F.3d at 320. Recall that *Elstad* held that an unwarned statement must be voluntary and cannot be the product of "improper tactics." *See Elstad*, 470 U.S. at 314. Although the district court did not make an express finding that the officer's *Miranda* violation was deliberate, the court of appeals made that assumption based on the facts and concluded that the district court did the same. *See Esquilin*, 208 F.3d at 320 n.5.

"emphasis on voluntariness" by comparing the phrase to similar wording used throughout the opinion.[112]

Ultimately, the court concluded that "improper tactics" simply described tactics that are "coercive."[113] "[R]ead[ing] *Elstad* as a coherent whole, it follows that 'deliberately coercive or improper tactics' are not two distinct categories . . . but simply alternative descriptions of the type of police conduct that may render a suspect's initial, unwarned statement involuntary."[114] In reaching this conclusion, the court recognized that although *Carter* did not involve the interpretation of the specific phrase at issue in this case, it did hold that an intentional *Miranda* violation could invalidate a warned confession even when neither the unwarned or the warned confessions were coerced.[115] But the court construed that part of *Carter* to be dicta and was not persuaded by it.[116] As a result, it held that "Esquilin's unwarned admissions . . . were not rendered involuntary by 'deliberately coercive or improper tactics.'"[117]

In a very similar case, *United States v. Orso*,[118] the Ninth Circuit Court of Appeals affirmed the district court's decision to admit a warned confession that was elicited after an unwarned one.[119] In *Orso*, as in *Esquilin* and *Carter*, the *Miranda* violation was intentional.[120] In reaching its conclusion, the court construed *Elstad*'s requirements in a two-part analysis. First, if the pre-warning statement is actually coerced, then subsequent statements must be suppressed unless the "violation was sufficiently attenuated."[121] But if the pre-warning statement was voluntary, the court should admit the post-warning statement unless *it* was

112. *Esquilin*, 208 F.3d at 320.

113. *Id.*

114. *Id.*

115. *See id.* (citing *Carter*, 884 F.2d at 372-77).

116. *See id.* In addition, the court in *Esquilin* stated that *Carter*'s criticism of a case-by-case voluntariness analysis was facially inconsistent with *Elstad*. *Id.* This comment is arguably somewhat off-base since *Carter* was merely recognizing the strong policy argument in favor of discouraging intentional *Miranda* violations. *See supra* notes 86-90 and accompanying text.

117. *Esquilin*, 208 F.3d at 321.

118. 266 F.3d 1030 (9th Cir. 2001), *overruled in part by* Missouri v. Seibert, 124 S. Ct. 2601 (2004).

119. *Id.* at 1040.

120. *See id.* at 1033-34. In *Orso*, the suspect was questioned without being given *Miranda* warnings while being escorted by postal inspectors to the Postal Inspection Service office. *Id.* at 1032. The government conceded that Orso was in custody while in the postal inspector's vehicle, and both the district court and the Ninth Circuit held that she was subject to interrogation. *See id.* at 1033-34.

121. *Id.* at 1035 (quoting United States v. Wauneka, 770 F.2d 1434, 1440 (1985)).

involuntary.[122] The court found both the pre-warning and post-warning statements to be voluntary so it found no reason to suppress the post-warning statement.[123]

In order to reach that conclusion, the court followed *Esquilin* in concluding that the intentional withholding of *Miranda* warnings does not constitute "improper tactics" as the court interpreted *Elstad*.[124] The court's analysis reads like a close paraphrase of *Esquilin* when it emphasizes voluntariness as the "overriding theme" and compares similar phrases throughout the opinion.[125]

These cases illustrate that the overarching difference between the circuits seems to be that an intentional *Miranda* violation would be enough to make a prior statement involuntary under *Carter* and *Gale*,[126] while *Orso* and *Esquilin* take the view that deliberately withholding *Miranda* warnings is not, by itself, an "improper tactic" under *Elstad* that would make a statement involuntary.[127] Of the four cases, three involved an intentional withholding of *Miranda* warnings. In *Carter*, the court condemned the deliberate violation and suppressed the statement.[128] But in both *Orso* and *Esquilin*, the courts emphasized that they were not endorsing intentional *Miranda* violations, but that they did not violate *Elstad*.[129] The Court in *Seibert* ultimately rejected that approach.[130]

III. ANALYSIS OF *MISSOURI V. SEIBERT*

A Introduction and Facts

In 2004, the Court decided three cases in addition to *Seibert* in an apparent effort to clarify *Miranda* in light of current police practices from across the country.[131] Among the three, only *Fellers v. United States* favored suspects' rights, while the other two, *United States v. Patane* and

122. *Id.*

123. *Id.* at 1040.

124. *See id.* at 1037-38.

125. *See id.* at 1036-37. In fact, the opinion includes an extended quote from *Esquilin*. *Id.* at 1037 (quoting United States v. Esquilin, 208 F.3d 315, 320 (1st Cir. 2000), *overruled in part by* Missouri v. Seibert, 124 S. Ct. 2601 (2004)).

126. *See supra* notes 86-105 and accompanying text.

127. *See supra* notes 106-25 and accompanying text.

128. *See* United States v. Carter, 884 F.2d 368, 373 (8th Cir. 1989).

129. *See supra* notes 112-16, 121-23 and accompanying text.

130. *See infra* Part III.

131. *See* United States v. Patane, 542 U.S. 630 (2004); Yarborough v. Alvarado, 541 U.S. 652 (2004); Fellers v. United States, 540 U.S. 519 (2004).

Yarborough v. Alvarado, upheld the police action at issue.[132] As discussed *infra*, the Court evened the scorecard by denouncing the question-first, give *Miranda* warnings later police technique used in *Seibert*.[133]

The facts of *Seibert* center on Patrice Seibert's conviction for murder.[134] Seibert's son Jonathan, who was severely disabled as a result of cerebral palsy, died in her care in February of 1997.[135] Jonathan's body was covered in bedsores and Seibert feared charges of neglect so she apparently consented to a plan to cover up Jonathan's death.[136] The plan, devised by Seibert and her teenage sons, was to incinerate Jonathan's body in the process of burning the family's mobile home.[137] In order to avoid the appearance that Jonathan had been left alone, the plan called for mentally ill teenager Donald Rector to be present in the home at the time of the fire.[138] The plan, executed by one of Seibert's sons and a friend, resulted in Donald's death.[139]

The primary issue in the case centered on the police tactic used when Seibert was questioned five days later.[140] When Seibert was arrested, her *Miranda* warnings were intentionally withheld prior to her being questioned for thirty to forty minutes at the police station.[141] After making an incriminating statement, she was given a twenty-minute break after which she was given *Miranda* warnings and asked to repeat her admission.[142]

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132. *Compare* Missouri v. Seibert, 124 S. Ct. 2601 (2004) (suppressing second statement when intentional two-step interrogation technique was used), *and Fellers*, 540 U.S. at 519 (unanimously rejecting police practice of interrogating indicted suspects without first telling them they have a right to a lawyer), *with Patane*, 542 U.S. at 630 (refusing to suppress the physical fruits of a statement made by a suspect who told the officer not to read him his rights because he already knew them), *and Yarborough*, 541 U.S. at 652 (refusing to create a special rule for minors undergoing police questioning).

133. *See infra* notes 150-63 and accompanying text.

134. *Seibert*, 124 S. Ct. at 2605-06 (plurality opinion).

135. *Id.* at 2606; State v. Seibert, 93 S.W.3d 700, 701 (Mo. 2000) (noting that Jonathan "could not walk, talk or feed himself").

136. *Seibert*, 124 S. Ct. at 2605 (plurality opinion); State v. Seibert, 93 S.W.3d at 701.

137. *Seibert*, 124 S. Ct. at 2605 (plurality opinion).

138. *Id.* Rector was living with the family at the time. *Id.*

139. *Id.*

140. *Id.* at 2606.

141. *Id.* Officer Hanrahan testified at a suppression hearing that he specifically instructed the arresting officer not to advise Seibert of her *Miranda* rights. *Id.* The officer stated that he consciously chose to withhold warnings in hopes of getting a confession. *Id.*; *see* State v. Seibert, 93 S.W.3d at 702. He utilized this technique because his department, as well as others he had worked for, trained officers to use it. State v. Seibert, 93 S.W.3d at 702.

142. *Seibert*, 124 S. Ct. at 2606 (plurality opinion). Respondent incriminated herself by admitting that she was aware that Donald was supposed to die in the fire. *Id.*; *see infra* APPENDIX A.

Seibert waived her *Miranda* rights and officer Hanrahan continued to question her, this time recording her answers.[143] When officer Hanrahan confronted respondent with her prior admission, she repeated it.[144]

B. The Road to the Final Court

A trial court in Rolla, Missouri, admitted Seibert's inculpatory post-warning statements and she was convicted of second-degree murder.[145] On appeal, the Missouri Court of Appeals applied *Elstad* and found that despite the intentional *Miranda* violation, Seibert's warned statement was voluntarily made and therefore admissible.[146] However, the Missouri Supreme Court distinguished *Elstad* on the basis of the intentional violation in this case.[147] Applying an intent-based approach similar to the Eighth Circuit in *Carter*, the Court held the tactics here to be "undeniably an 'end run' around *Miranda*."[148] As a result, it suppressed the post-warning statement and reversed the conviction.[149]

C. The Plurality's Approach

1. Snapshot of the Holding: Statement Suppressed

The plurality opinion, written by Justice Souter, was joined by Justices Stevens, Ginsburg, and Breyer.[150] These "liberal" justices agreed with each other several times on criminal justice issues in 2004.[151] Justice Kennedy,

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143. *Seibert*, 124 S. Ct. at 2606 (plurality opinion).

144. *Id.* Officer Hanrahan began the second stage of the interrogation by saying, "'Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?'" *Id.* It was clear that "Seibert was reminded of the statements she made during the first [unwarned] stage." State v. Seibert, 93 S.W.3d at 702. Officer Hanrahan also phrased his questions based on respondent's pre-warning statements. *See id.*; *see infra* APPENDIX A.

145. *Seibert*, 124 S. Ct. at 2606 (plurality opinion).

146. State v. Seibert, No. 23729, 2002 WL 114804, at *8 (Mo. Ct. App. Jan. 30, 2002).

147. State v. Seibert, 93 S.W.3d 700, 704 (Mo. 2003).

148. *Id.*

149. *Id.* at 707.

150. *Seibert*, 124 S. Ct. at 2605 (plurality opinion). Justice Souter authored three majority or plurality criminal justice opinions this term. *See* United States v. Dominguez Benitez, 124 S. Ct. 2333 (2004) (requiring a defendant challenging his guilty plea on grounds the court committed plain error to show a reasonable probability that, but for this error, he would not have entered the plea); Sabri v. United States, 124 S. Ct. 1941 (2004) (finding a federal bribery statute constitutional and resolving a split between the circuits); United States v. Banks, 124 S. Ct. 521 (2003) (holding that an interval of fifteen to twenty seconds from officers' announcement of search warrant before forced entry into a home was reasonable, given the risk of possible destruction of evidence).

151. For example, these four Justices helped form the majority in Groh v. Ramirez, 124 S. Ct. 1284 (2004) (invalidating a search where the search warrant application described the persons and things to be seized, but the search warrant itself did not). Also, these four collectively dissented in

who provided the fifth vote for suppression, concurred in the judgment only.[152] One result of this split, discussed in more detail later, is that more Justices disagree with the plurality's analysis than agree with it. Placing that issue aside, the plurality's primary holding was that the *Miranda* warnings recited after Seibert's unwarned confession were not effective, so her subsequent confession was inadmissible.[153]

2. The Plurality's Concerns about the Question-First Technique

The overarching theme of the plurality opinion is that the four Justices are troubled by the prevalence and purpose of the "question-first" tactic "which by any objective measure reveal[s] a police strategy adapted to undermine the *Miranda* warnings."[154] The plurality noted that there are no statistics that detail how widely the technique is used, but concluded that it is "of some popularity" after examining the several cases that had dealt with that tactic and similar practices and citing a number of police training organizations that advocate the technique.[155] The fact that the technique is

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Yarborough v. Alvarado, 124 S. Ct. 2140 (2004), and *United States v. Patane*, 124 S. Ct. 2620 (2004), both interpreting *Miranda* as discussed *supra* in note 132, in addition to several other criminal law cases. *See* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (Stevens, J., dissenting); Beard v. Banks, 124 S. Ct. 2504 (2004) (Stevens, J., dissenting); Hiibel v. Sixth Judicial Dist. Ct. of Nev., 124 S. Ct. 2451 (2004) (Breyer, J., dissenting).

In the other cases interpreting *Miranda* last term, two resulted in a split of the Court similar to *Seibert*. In *Yarborough*, Justice Kennedy wrote the majority opinion which was joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and O'Connor. *Yarborough*, 124 S. Ct. at 2140. As noted above, the four liberal Justices dissented. *Id.* This split is the same as *Seibert* except that Justice Kennedy's conclusion is joined by the dissenters from *Seibert*. *Id.* The split of the Court in *Patane* is identical to *Yarborough* with different Justices penning the opinions for the respective sides. *Pantane*, 124 S. Ct. at 2624.

152. *See Seibert*, 124 S. Ct. at 2605 (plurality opinion). Justice Kennedy filed an opinion concurring in the judgment, and Justice O'Connor filed a dissenting opinion joined by Chief Justice Rehnquist, and Justices Scalia and Thomas. *Id.* When the Supreme 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 judgment on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 159, 169 n. 15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)). The narrowest grounds in this case appear to be the approach taken in Justice Kennedy's concurring opinion, discussed *infra* in Part IV.B.

153. *Seibert*, 124 S. Ct. at 2605 (plurality opinion).

154. *Id.* at 2612.

155. *Id.* at 2608-09 & nn.2-3. The plurality acknowledged that although most police manuals do not advocate the question-first tactic, several groups including the Police Law Institute and the California Commission on Peace Officer Standards and Training apparently teach similar practices. *See id.* at 2609 & n.2. Officer Hanrahan also testified at trial that the question-first tactic is taught by a national training organization and has been used by other police departments he had worked for.

widely used came as no surprise to the plurality: "the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset."[156] The plurality acknowledged that the technique is effective, but stressed that effectiveness has never been the deciding factor for admissibility.[157]

Even more significant to the plurality was the fact that the question-first tactic undermines the purpose of *Miranda*.[158] In denouncing the tactic, the opinion emphatically stated that "[s]trategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."[159] The very purpose of *Miranda*, according to the plurality, is to target "'interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice' about speaking."[160] The question-first method does just that because the suspect may simply become "bewildered," which is "an unpromising frame of mind for knowledgeable decision."[161] More specifically, the plurality predicted that if a suspect is not informed that unwarned statements are inadmissible, he could reasonably assume "that what he has just said will be used."[162] With its disdain for the technique obvious for the reasons discussed above, the plurality sets out to develop a test to eliminate it.[163]

State v. Seibert, 93 S.W.3d 700, 702 (Mo. 2002). After the Court's decision, several law enforcement organizations denied using or teaching the technique, including the International Association of Chiefs of Police. *See* Jerry Markon, *Police Tactic to Sidestep* Miranda *Rights Rejected*, WASHINGTON POST, June 29, 2004, at A1.

156. *Seibert*, 124 S. Ct. at 2610-11 (plurality opinion).

157. *See id.* The "question-first" method is widely acknowledged as being more effective than giving *Miranda* warnings first. *See* Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447, 517 (2002) (noting that "[t]he most obvious advantage to questioning a suspect without first giving warnings is that" the suspect is less likely to assert the right to silence).

Implicit in this statement by the plurality is that other forms of questioning are surely effective but violate the Fifth Amendment.

158. *Seibert*, 124 S. Ct. at 2613 (plurality opinion).

159. *Id.*

160. *Id.* at 2607 (quoting Miranda v. Arizona, 384 U.S. 436, 464-465 (1966)). According to the plurality, the focus is "'simply whether the warnings reasonably conve[y] . . . his rights as required by *Miranda*.'" *Id.* at 2610 (quoting Duckworth v. Eagan, 492 U.S. 195, 203 (1989)).

161. *Id.* at 2611.

162. *Id.* This argument is basically just a reworded statement of the "cat out of the bag" approach which was rejected by the Court in *Elstad*. That approach recognizes that "the coercive impact of the . . . [unwarned statement] remains, because in a defendant's mind it has sealed his fate." State v. Elstad, 658 P.2d 552, 554 (1983), *rev'd*, 470 U.S. 298 (1985). Justice O'Connor correctly points out in her dissent that the plurality's test ignores *stare decisis* by implicitly adopting this approach. *See Seibert*, 124 S. Ct. at 2618-19 (O'Connor, J., dissenting); *see also infra* note 270 and accompanying text.

163. *See Seibert*, 124 S. Ct. at 2610 (plurality opinion).

3. The Plurality's Arguably Vague Test: Did *Miranda* Warnings Fulfill Their Purpose?

Recognizing the effect of question-first tactics on *Miranda*, the plurality held that the "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the [*Miranda*] *warnings could function 'effectively' as Miranda requires.*"[164] In other words, the Court needs to determine whether "the warnings [could] effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture."[165] If not, then formal issuance of warnings cannot be effective.[166]

In adopting this "effectiveness" test, the plurality (except for Justice Breyer) expressly rejected application of the fruit of the poisonous tree analysis in this context.[167] By summarily rebuffing the fruits analysis, the Court avoided a potentially difficult issue that some commentators had predicted would arise after the Court held *Miranda* to be constitutionally required in *Dickerson*.[168] The approach taken here sidesteps the problems with that test, while focusing on the more salient issue: the effectiveness of *Miranda*. However, as Justice Breyer recognizes, this test will likely be very similar in effect to a fruits analysis.[169]

4. The Plurality Announces Five Factors to Assist in Applying Its Test

To determine whether *Miranda* warnings given mid-interrogation are effective as described above, the plurality identified five factors to consider.[170] First, the plurality looked at "the completeness and detail of the

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164. *Id.* (emphasis added). Note that this is not a bright line rule, but requires a more complex and subjective case-by-case analysis. *See id.* at 2615-16 (Kennedy, J., concurring).

165. *Id.* at 2610 (plurality opinion).

166. *Id.* "In a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective." *Id.* at 2610 n.4.

167. *Id.* at 2610 n.4.

168. *See The Supreme Court: 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 314-16 (2004).

169. *Seibert*, 124 S. Ct. at 2613 (Breyer, J., concurring).

170. *Id.* at 2612 (plurality opinion). Apparently dissatisfied with *Elstad*, some states interpreted their state constitutions as providing more protection from police failure to give *Miranda* warnings. *See* Barbieri, *supra* note 70, at 67. Several states that took such action formulated standards similar to those announced by the plurality in *Seibert*. *See, e.g.*, State v. Smith, 834 S.W.2d 915, 919-20 (Tenn. 1992) (establishing a nine-factor totality of the circumstances test that includes consideration of whether coercive tactics were used, the temporal proximity of the statements, the location of the interrogation, and the identity of the interrogators among others).

questions and answers in the first round of interrogation."[171] Second, it considered "the overlapping content of the two statements."[172] Third, it found important the "timing and setting of the first and second [statements]."[173] Fourth, it looked at "the continuity of police personnel."[174] Lastly, the plurality considered "the degree to which the interrogator's questions treated the second round as continuous with the first."[175] Another factor that was not announced with the others, but nevertheless was considered by the plurality, was whether the formal warning included notice that previous statements could not be used.[176] The plurality does not hold that such a warning is sufficient to make an ensuing statement admissible, "but its absence is clearly a factor" in determining whether there is a continuing interrogation or a new session.[177]

5. Applying the Factors to *Seibert*

In applying the factors to the case at bar, the plurality concluded that the second statement was inadmissible because at the time Seibert was given the *Miranda* warnings they could not have been effective.[178] First, the unwarned questions were detailed and amounted to a complete interrogation.[179] The plurality noted, "[w]hen the police were finished there was little, if anything, of incriminating potential left unsaid."[180]

As to the overlapping content of two statements, it was reasonable for the suspect to view the two interrogation sessions as part of a continuum, "in which it would have been unnatural to refuse to repeat at the second stage what had been said before."[181] The statements were substantially the same in the warned and unwarned interrogations.[182] The timing and setting of the

171. *Seibert*, 124 S. Ct. at 2612 (plurality opinion). The plurality does not specify how complete or how detailed the questions must be. It also does not address the situation where questions may be very detailed but incomplete, or the situation where the questioning is complete but not detailed.

172. *Id.* As one court has noted, the plurality does not provide "explicit guidance" as to what this factor means. United States v. Kiam, 343 F. Supp. 2d 398, 408 (E.D. Pa. 2004).

173. *Seibert*, 124 S. Ct. at 2612 (plurality opinion). The only guidance the Court gives as to this factor is that an interrogation in the same place with only a fifteen to twenty minute break was too close in time and setting. *Id.* The lack of precision as to this factor begs the question of what happens when the warned and unwarned confessions are very close in time but are elicited in different locations, or elicited at the same location but after a substantial break.

174. *Id.*

175. *Id.*

176. *Id.* at 2612-13 & n.7.

177. *Id.*

178. *Id.* at 2612-13.

179. *See id.* at 2612.

180. *Id.*

181. *Id.* at 2613.

182. *See id.*

first and the second statements also weighed in favor of invalidating the warned statement because both statements were given in the police station with "a pause of only fifteen to twenty minutes."[183] Likewise, the plurality reached the same result applying the continuity of police personnel factor because the same officer conducted both interviews.[184]

In addition, the second round of questioning could be reasonably viewed as continuous with the first.[185] "The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given."[186] Also relevant to the Court was the fact that Officer Hanrahan gave no warnings to Seibert that her prior statements could not be used.[187]

6. The Plurality Rejects an Intent-Based Test As Too Troublesome

The plurality distinguished *Oregon v. Elstad*[188] as a case involving a "good-faith *Miranda* mistake."[189] Specifically, the plurality noted "[a]t the opposite extreme [of *Elstad*] are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings."[190] The *Elstad* court did conclude that "a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" does not invalidate the process.[191] But *Elstad* did not expressly conclude that the officer's state of mind was determinative.[192] That case simply held that a good-faith mistake was corrected by subsequent *Miranda* warnings.[193]

183. *Id.* at 2612 (noting that "[t]he unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill").

184. *Id.*; *see also infra* APPENDIX A (demonstrating that the same officer conducted both interrogation sessions).

185. *Seibert*, 124 S. Ct. at 2612-13 (plurality opinion).

186. *Id.* at 2613.

187. *Id.* at 2612; *see also infra* APPENDIX A (containing excerpts from of the second interrogation session).

188. 470 U.S. 298 (1985). The facts of *Elstad* are summarized *supra* at notes 47-51 and accompanying text.

189. *Seibert*, 124 S. Ct. at 2612 (plurality opinion).

190. *Id.*

191. *Elstad*, 470 U.S. at 309.

192. *Seibert*, 124 S. Ct. at 2612 (plurality opinion).

193. *Id.*

Regarding the issue of officer intent, Seibert proposed a test that would exclude all evidence obtained through deliberate or objectively unreasonable *Miranda* violations.[194] The plurality implicitly agreed with the respondent that clear evidence of intent can aid the inquiry.[195] But the plurality emphasized officer intent is not determinative and serves merely as a factor to consider.[196] Justice Souter explained that "[b]ecause the intent of the officer will rarely be as candidly admitted as it was [in *Seibert*] . . . the focus [should be] on facts apart from intent that show the question-first tactic at work."[197] In her dissenting opinion, Justice O'Connor applauded the plurality for rejecting an intent-based test.[198] Although the plurality expressly rejected an approach that required an inquiry into officer intent, lower courts applying the plurality test have fairly construed it as rejecting use of the question-first tactic, which is an intentional *Miranda* violation.[199]

The plurality's denunciation of an intent-based test rejected the rationale of the Missouri Supreme Court insofar as that court emphasized the officer's subjective intent in distinguishing *Elstad* and reaching its holding.[200] Justice Kennedy, concurring in the judgment, disagreed with the plurality on this point and would suppress the second statement when the two-step interrogation technique is used in "a calculated way to undermine the *Miranda* warning."[201]

7. The Plurality Further Distinguishes *Elstad*

Because the plurality's test is not based on evidence of officer intent, it is the application of the five factors, and not the intentional nature of the violation, that provide the Court better grounds to distinguish *Elstad*.[202] Applying the factors to *Elstad*, the Court concluded that the first and second

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194. *See* Brief for Respondent at 24-29, *Seibert*, 124 S. Ct. 2601 (No. 02-1371), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_03/1371resp.pdf. This is Justice Kennedy's test. *Seibert*, 124 S. Ct. at 2615 (Kennedy, J., concurring).

195. *See Seibert*, 124 S. Ct. at 2612 n.6 (plurality opinion); Brief for Respondent, *supra* note 194, at 24-29 ("When evidence of subjective intent is available . . . [it can] aid the inquiry."). Such evidence was available in *Siebert* because the officer testified that he intentionally withheld *Miranda* warnings. *See id.* at 2606.

196. *Seibert*, 124 S. Ct. at 2612 n.6 (plurality opinion).

197. *Id.*

198. *Id.* at 2617-18 (O'Connor, J., dissenting).

199. *See infra* Part IV.B. Those cases recognize that use of the question-first tactic can be established without evaluating the officer's intent. More astute lower courts have nonetheless focused on officer intent when applying *Seibert* because they viewed Justice Kennedy's concurring opinion to be the narrowest grounds of the Court's holding. *See infra* Part IV.B.2.

200. State v. Seibert, 93 S.W.3d 700, 703-07 (Mo. 2002).

201. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).

202. *See id.* at 2612 n.6 (plurality opinion).

questionings in that case created a "markedly different experience."[203] Accordingly, the warnings given in *Elstad* were effective under the circumstances.[204]

8. The Plurality Concludes that Seibert's Warned Statement is Inadmissible

Because warnings were not adequately given, Seibert's warned statement had to be excluded whether or not it was made voluntarily; therefore, the plurality did not discuss whether the statement was voluntary.[205] The State of Missouri argued that the two-stage interrogation should be allowed as long as the unwarned statement is not admitted in the case in chief and the subsequent statement is voluntary.[206] The Court implicitly rejected that argument by ending the analysis once the *Miranda* warnings were found to be inadequate in this case.[207]

The plurality summed up its holding by saying: "Because the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible."[208]

9. Critique of the Plurality's Approach

The plurality's approach is well-intentioned but is ultimately somewhat vague.[209] The problem seems to arise from the plurality's desire to curb the

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203. *Id.* at 2612. In reaching that conclusion, the Court noted that that there was a significant break in time and a change in location between confessions. *Id.* Also, a different officer conducted the post-warning interrogation, which did not include reference to the unwarned statement. *Id.*

204. *Id.*

205. *See id.* at 2613 n.8.

206. *See* Brief for Petitioner at 11-17, *Seibert*, 124 S. Ct. 2601 (No. 02-1371), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_03/1371Pet.pdf. Respondent countered by citing a number of cases emphasizing that *Miranda* warnings must be given before interrogation. *See, e.g.*, Texas v. Cobb, 532 U.S. 162, 171 (2001) ("[T]here can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination . . . before authorities may conduct custodial interrogation."); *see also* Brief Amici Curiae of Former Prosecutors et al., Supporting Respondent at 6, *Siebert*, 124 S. Ct. 2601 (No. 02-1371), 2003 WL 22359207 (citing cases emphasizing that *Miranda* warning must be given before interrogation).

207. *See Seibert*, 124 S. Ct. at 2613 (plurality opinion).

208. *Id.*

209. As the notes above point out, the plurality's factors are arguably ill-defined, but no court applying them has yet voiced any criticism of them or has seemed to struggle to apply them. *See infra* Part IV.B.

use of the troubling question-first tactic without focusing on officer intent. Dismissing a test that inquires about the intent of the officer as too difficult, the plurality instead implements another difficult-to-apply test based on a list of ill-defined factors.[210] The reasons for rejecting an intent-based test are sound, but the plurality's amorphous test does more to empower judges to impose their subjective opinions without providing them much concrete direction. Additionally, the plurality does not apply the fruit of the poisonous tree test in this case although its approach seems quite similar.[211]

D. Justice Kennedy's Approach

Justice Kennedy concurred in the judgment but found the plurality's test too broad.[212] He explained that the plurality's test "envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations," a test that in his view "cuts too broadly."[213] In his opinion he rejected the plurality's approach, denounced the question-first tactic, distinguished *Elstad*, and then proposed and applied his own test.[214] Justice Kennedy criticized the plurality's decision to employ a multi-factor test to every two-stage interrogation, whether or not the violation of *Miranda* is intentional, because such an approach undermines one of the greatest strengths of *Miranda*, its clarity.[215]

Next, Justice Kennedy argued that the question-first tactic used in *Seibert* should not be recognized as a valid exception to *Miranda*.[216] Although this proposition is hardly controversial, Justice Kennedy supported his rejection of the *Seibert* tactic by stating that valid exceptions to *Miranda*

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210. *Seibert*, 124 S. Ct. at 2612 (plurality opinion).

211. *See id.* at 2617 (O'Connor, J., dissenting) (pointing out that the plurality's approach examines the same facts as a fruits analysis). The factors themselves are similar to an examination of whether taint has dissipated.

212. *Id.* at 2614, 2616 (Kennedy, J., concurring) (noting that the plurality test cuts too broadly). Other courts have also found Justice Kennedy's test to be narrower. *See, e.g.*, United States v. Aguilar, 384 F.3d 520, 525 (8th Cir. 2004). Although it is narrower than the plurality approach, it is a different test that requires something additional that the plurality does not—a determination of intent.

213. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring). When the Supreme 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 judgment on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 148 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)). Since Justice Kennedy's approach is narrower, it is the holding of the Court.

214. *See Seibert*, 124 S. Ct. at 2614-16 (Kennedy, J., concurring).

215. *Id.* at 2616. Justice Kennedy emphasized that as a result of its bright-line rule, *Miranda* has become "an important and accepted element of the criminal justice system." *Id.* at 2614 (citing Dickerson v. United States, 530 U.S. 428 (2000)).

216. *See id.* at 2615.

recognize that evidence should be admitted when "it would further important objectives without compromising *Miranda*'s purpose.[217] He then pointed out that the technique used in *Seibert* distorts *Miranda*'s objectives and "furthers no legitimate countervailing interest."[218] In addition, Justice Kennedy noted that *Seibert* illustrates the temptation for abuse inherent in the two-step questioning technique.[219]

Such temptations for abuse were not present in *Elstad*, which Justice Kennedy distinguished as not involving deliberate use of the question-first technique.[220] Justice Kennedy further distinguished *Elstad* by recognizing that the unwarned confession was used to elicit the second confession in *Seibert*, the suspect in *Seibert* was confronted with her unwarned statements, and also that Seibert was subjected to an extended interview.[221]

Since *Seibert* raised issues that *Elstad* was not intended to control, Justice Kennedy felt that a different test should apply to cases such as *Seibert*.[222] He concluded that *Elstad* should continue to govern the admissibility of post-warning statements as long as the deliberate question-first interrogation technique was not employed.[223] But when the two-step strategy is deliberately used in a calculated way to undermine *Miranda*, "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."[224]

Appropriate curative measures should 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."[225] Justice Kennedy went on to illustrate appropriate curative measures.[226] For example, "a substantial break in time and circumstances" between the two interrogations "may suffice in most circumstances" because "it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn."[227] In addition, an explanation that the pre-warning statement is likely

217. *Id.* at 2614.
218. *Id.* at 2615.
219. *Id.*
220. *See id.*
221. *See id.* at 2615-16.
222. *Id.*
223. *Id.* at 2616.
224. *Id.* at 2615-16. Under this approach, examination of the officer's intent is implicit in the analysis according to both the plurality and the dissent. *See supra* Part III.C; *infra* Part III.F.
225. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).
226. *Id.* at 2616.
227. *Id.*

inadmissible may be sufficient.[228] By recognizing that these curative measures can make a second, warned statement admissible, Justice Kennedy refused to find that the tactics used in *Seibert* are "inherently wrong."[229] This section of Justice Kennedy's opinion has been described by at least one commentator as an "instructional manual" for police to get a second, warned statement into evidence when a suspect had already made an earlier unwarned statement.[230] However, this argument ignores the fact that one of the essential functions of the Court is to provide guidance for law enforcement to perform its duties within the strictures of the Constitution.[231]

In applying his test to the facts of *Seibert*, Justice Kennedy concluded that because officer Hanrahan admitted that he deliberately used the question-first tactic to circumvent *Miranda* and the post-warning statements were essentially just a repeat of the first, the first part of the test was satisfied.[232] Justice Kennedy went on to hold that since no curative steps had been taken, the statement must be suppressed.[233]

As a result, Justice Kennedy reached the same conclusion as the plurality but did so by applying a narrower approach.[234] It is more narrow because he dispenses with the objective multi-factor test for "effectiveness," in favor of a test that evaluates only whether the failure to give *Miranda* warnings was deliberate or not.[235] And while this approach is superficially appealing because it applies an already established test, the fact that seven Justices disagree with it highlights its unpopularity with the Court. Further, it requires courts to find that an officer subjectively intended to violate *Miranda* and used the question-first technique.[236] As both the plurality and dissent point out, this simply will not be possible much of the time.[237]

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228. *See id.* This was also a factor considered by the plurality, but the plurality concluded that:

> We do not hold that a formal addendum warning that a previous statement could not be used would be sufficient to change the character of the question-first procedure to the point of rendering an ensuing statement admissible, but its absence is clearly a factor that . . . points to a continuing, not a new, interrogation.

Id. at 2612 n.7 (plurality opinion).

229. Terry Carter, Miranda *Still a Puzzle for the High Court*, ABA J. eREPORT, July 2, 2004, 3 NO. 26 A.B.A. J. E-Report 5 (Westlaw).

230. *See* Marcia Coyle, *2003-2004 Term: Supreme Court Review: Flexing Muscle and Wisdom*, NAT'L L.J., Aug, 2, 2004, at S1, S6; *see also infra* Part IV.B.

231. *See, e.g.*, Muehleman v. Florida, 484 U.S. 882, 887 (1987) (Marshall, J., dissenting) ("We owe it to law enforcement officials and the courts to establish clearly the line across which constitutional error lies.").

232. *See Seibert*, 124 S. Ct. at 2615 (Kennedy, J., concurring).

233. *Id.* at 2616.

234. *See id.*

235. *See id.* at 2615-16; *see also* United States v. Stewart, 388 F.3d 1079, 1089 (7th Cir. 2004) (applying *Seibert*).

236. *Seibert*, 124 S. Ct. at 2615-16 (Kennedy, J., concurring).

237. *See id.* at 2618 (O'Connor, J., dissenting) (discussing the plurality's argument as well).

E. Justice Breyer's Concurring Opinion

In a brief concurring opinion, Justice Breyer proposed that "[c]ourts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith."[238] Justice Breyer joined the plurality's opinion in full because he felt that its test would function the same as his in practice.[239] He explained that, in his view, the plurality's test will function as a fruits analysis in practice because "truly 'effective' *Miranda* warnings on which the plurality insists, . . . will occur only when certain circumstances . . . [such as the plurality's factors] intervene between the unwarned questioning and any postwarning statement."[240] He advocated the "fruits" approach because, in his view, it would be practicable and relatively simple for lower courts since they are already familiar with the fruits analysis.[241] Justice Breyer's approach varies in two important ways from the approach taken by both the plurality and dissent. First, it is a "good faith" test that requires the Court to examine the officer's intent.[242] Second, he would apply the fruits approach, which both the plurality and dissent dismissed.[243] Interestingly, Justice Breyer also agreed with Justice Kennedy's opinion "insofar as it is consistent with this approach and makes clear that a good-faith exception applies."[244]

F. Justice O'Connor's Dissent

Justice O'Connor's dissent was joined by Chief Justice Rehnquist and Justices Scalia and Thomas.[245] The opinion began with Justice O'Connor voicing her disagreement with the plurality's treatment of *Elstad*, which she considered to be on point.[246] She then discussed the common ground

238. *Id.* at 2613 (Breyer, J., concurring).

239. *Id.* at 2613-14.

240. *Id.* at 2613.

241. *Id.*

242. *Id.* An intent-based approach was rejected by both the plurality and the dissent. *See supra* Part III.C; *infra* Part III.F.

243. *See Seibert*, 124 S. Ct. at 2610 n.4 (plurality opinion) ("[T]he Court in *Elstad* rejected the . . . fruits doctrine for analyzing the admissibility of a subsequent warned confession following 'an initial failure . . . to administer the warnings required by *Miranda*.'" (quoting Oregon v. Elstad, 470 U.S. 298, 300 (1985)); *Id.* at 2616-17 (O'Connor, J., dissenting).

244. *Id.* at 2614 (Breyer, J., concurring).

245. *Id.* at 2616 (O'Connor, J., dissenting).

246. *Id.* at 2616 (accusing the plurality of "devour[ing]" *Elstad*). Justice Rehnquist also joined Justice O'Connor's majority opinion in *Elstad*. *Elstad*, 470 U.S. at 299.

between her view and that taken by the plurality.[247] For example, she agreed with the plurality that the fruit of the poisonous tree doctrine developed in Fourth Amendment cases cannot be used to make Seibert's confession inadmissible.[248] She argued that this analysis is inapplicable for several reasons.[249] First, in *United States v. Patane*,[250] the Court chose not to extend the fruit of the poisonous tree analysis to physical fruits of a *Miranda* violation.[251] Second, Justice O'Connor concluded that precedent required rejection of the fruits analysis in this context by citing the majority opinion she authored in *Elstad* nearly twenty years earlier.[252]

Justice O'Connor went on to note that under the plurality's approach, courts would be forced to examine the same facts as they would in a fruits analysis.[253] But she also pointed out that the plurality's test is not the same as a fruits analysis because it considers those facts for different reasons than it would in a fruits analysis.[254] Namely, in applying a fruits analysis, courts examine facts in order to balance the deterrence value of excluding evidence with the social cost that exclusion has on criminal prosecutions.[255] But the plurality used the facts to make a "psychological judgment regarding whether the suspect ha[d] been informed effectively of her right to remain silent."[256]

The second point of agreement between Justice O'Connor's dissent and the plurality is that both rejected a test that required courts to determine the subjective intent of the interrogating officers.[257] Justice O'Connor pointed out that this approach is sound because the voluntariness of a suspect's statement is a function of his state of mind.[258] And the intent of the

247. *Seibert*, 124 S. Ct. at 2616-18 (O'Connor, J., dissenting).

248. *Id.* at 2616-17 (O'Connor, J., dissenting).

249. *Id.*

250. 124 S. Ct. 2620 (2004).

251. *Id.* at 2631 (Kennedy, J., concurring); *see also* Dickerson v. United States, 530 U.S. 428, 441 (2000) (noting that the Court's decision not to apply the fruits doctrine in *Elstad* "simply recognizes . . . that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment").

252. *Seibert*, 124 S. Ct. at 2616 (O'Connor, J., dissenting).

253. *Id.* at 2617.

254. *Id.*

255. *Id.* at 2617 (citing Nix v. Williams, 467 U.S. 431, 442-43 (1984)).

256. *Id.* (emphasis omitted); *see also The Supreme Court: 2003 Term—Leading Cases*, *supra* note 168, at 312 (agreeing that although the two approaches each consider how an unwarned statement impacts the warned one, the reasons are different).

257. *Seibert*, 124 S. Ct. at 2617-18 (O'Connor, J., dissenting). Since Justice Kennedy's "deliberate violation" approach requires an inquiry into an interrogator's intent, Justice O'Connor would reject it. *See id.*

258. *Id.* at 2617.

interrogator does not affect a suspect's state of mind.[259] She explained that "[a] suspect who experienced the exact same interrogation as Siebert, save for a difference in the undivulged, subjective intent of the interrogating officer when he failed to give *Miranda* warnings, would not experience the interrogation any differently."[260]

Justice O'Connor also argues that policy mandates rejection of an intent-based test. An inquiry into subjective intent is an "unattractive proposition" largely because of the potential for waste of judicial resources.[261] The difficulties that accompany an intent-based test have led the Court to reject it in other criminal procedure contexts as well.[262]

Justice O'Connor concluded that since Officer Hanrahan's intent "could not by itself affect the voluntariness of [Seibert's] confession" it should not be considered.[263] Although Officer Hanrahan openly admitted his intentions in this case, intent will often not be so easily established.[264]

Because Justice Kennedy's approach centers on whether the two-step interrogation technique was "deliberate" and "calculated" Justice O'Connor rejected it because it requires a determination of intent.[265] In particular, she criticizes Justice Kennedy's approach as adding the troublesome step of determining the officer's intent to the existing inquiry as to the adequacy of *Miranda* warnings and whether the statement was voluntary.[266] Justice O'Connor concluded that under Justice Kennedy's test, courts "will be forced to conduct the kind of difficult, state-of-mind inquiry that we normally take pains to avoid."[267]

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259. *Id.* at 2617-18; *accord*, United States v. Esquilin, 208 F.3d 315, 321 (1st Cir. 2000), *overruled in part by Seibert*, 124 S. Ct. at 2601 (noting that a suspect is free invoke his right to remain silent regardless of the officer's intent).

260. *Seibert*, 124 S. Ct. at 2618 (O'Connor, J., dissenting). Justice O'Connor supports her argument by citing cases that have applied the same rule in different criminal procedure contexts. *Id.* (citing Stansbury v. California, 511 U.S. 318, 324-25 (1994) (per curiam) (holding that whether a suspect is considered to be in custody is not affected by the police officer's subjective intent)).

261. *Id.* ("'[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'") (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)).

262. *Id.* For example, the Court rejected an intent-based test when creating the "public safety" exception to *Miranda*. *Id.* (citing New York v. Quarles, 467 U.S. 649 (1984); Whren v. United States, 517 U.S. 806 (1996)).

263. *Id.*

264. *Id.*

265. *Id.* at 2618-19 ("This approach untethers the analysis from facts knowable to . . . the suspect."). The plurality rejects Justice Kennedy's approach for the same reason. *See id.* at 2612 n.6 (plurality opinion).

266. *Id.* at 2618-19 (O'Connor, J., dissenting).

267. *Id.* at 2619.

Justice O'Connor strongly disagreed with the plurality's decision to "ignore[] the dictates of *stare decisis*" and create its own test for determining the admissibility of Seibert's statement because she felt that *Elstad* controls.[268] In particular, Justice O'Connor argued that the approach taken by the plurality is essentially the same as the approach adopted by the Oregon Court of Appeals but rejected by the U.S. Supreme Court in *Elstad*.[269] That approach accepts the argument that "the 'lingering compulsion' inherent in a defendant's having let the 'cat out of the bag' [by making the first confession] required suppression."[270] That approach was rejected by the Supreme Court in *Elstad* because to allow it "would 'effectively immuniz[e] a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver.'"[271] The Court in *Elstad* concluded that such a rule would simply be too detrimental to legitimate police activity.[272] Justice O'Connor went on to emphasize that even if the plurality disagreed with the balance struck in *Elstad* between suspects' rights and police interests, that is not grounds for refusing to follow that case.[273]

Justice O'Connor proposed to analyze confessions elicited by the two-step interrogation procedure under the voluntariness standard she announced in *Elstad*.[274] Under that approach, the ultimate issue is whether the statements were voluntarily made.[275] That approach also allows a court to consider the actions of the officer as part of the totality of the circumstances.[276] Significantly, Justice O'Connor acknowledges that *Seibert* may be distinguishable from *Elstad* because Officer Hanrahan's tactic to

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268. *Id.*

269. *Id.* (describing the "cat out of the bag" approach).

270. *Id.* at 2619 (quoting from Oregon v. Elstad, 470 U.S. 298, 311 (1984)). The Oregon Court of Appeals aptly described the "cat out of the bag" approach by stating "the coercive impact of the unconstitutionally obtained statement remains, because in the defendant's mind it has sealed his fate." State v. Elstad, 658 P.2d 552, 554 (Or. Ct. App. 1983), *quoted in Seibert*, 124 S. Ct. at 2619 (O'Connor, J., dissenting). The idea first appeared in United States v. Bayer, 331 U.S. 532, 540 (1947) ("[A]fter an accused has once let the cat out of the bag . . . he is never thereafter free of the psychological and practical advantages of having confessed.").

271. *Seibert*, 124 S. Ct. at 2619 (O'Connor, J., dissenting). Although the plurality opinion can be read generally to endorse this kind of approach, it never goes so far as to hold that a suspect would always be "immunized" against the consequences of his warned statement. To the contrary, the plurality emphasized that as long as the warnings could be effective when given to the suspect, his second statement could be validly admitted. *See id.* at 2610 (plurality opinion).

272. *Id.* at 2619. (O'Connor, J., dissenting).

273. *Id.*

274. *Id.*; *see also supra* Part II.C.1 (discussing *Elstad*).

275. *Seibert*, 124 S. Ct. at 2619 (O'Connor, J., dissenting) ("[I]f Seibert's first statement is shown to have been involuntary, the court must examine whether the taint dissipated through the passing of time or a change in circumstances . . . . In addition, Seibert's second statement should be suppressed if she showed that it was involuntary despite the *Miranda* warnings.").

276. *Id.*

"'exploit the unwarned admission to pressure [the suspect] into waiving his right to remain silent'" was not used in *Elstad*.[277] Such a tactic may have made Seibert's warned confession involuntary, and thus inadmissible under *Elstad*.[278] Justice O'Connor would have the Missouri court apply this analysis on remand.[279] Since Justice O'Connor left open the possibility that Seibert's second statement could have been involuntary, her opinion is not completely inconsistent with the holding of the plurality.[280]

While Justice O'Connor's approach is defensible under existing precedent, one weakness is that it fails to adequately condemn or limit the question-first tactic.[281] The voluntariness approach she endorses is the approach currently used by courts in the question-first context and most courts have been reluctant to find the warned confession involuntary on facts similar to *Seibert*.[282] If the Court had affirmed that approach here, it would have done little to discourage the use of the question-first tactic.

IV. IMPACT OF *MISSOURI V. SEIBERT* ON PRECEDENT, LOWER COURTS, LAW ENFORCEMENT, AND PATRICE SEIBERT

A. Effect on Oregon v. Elstad

The *Seibert* plurality did not go so far as to overrule *Elstad*, but did limit its application, potentially in a severe way.[283] In explaining the relationship between *Seibert* and *Elstad*, the plurality proposed the following analysis: in

277. *Id.* at 2620 (quoting Oregon v. Elstad, 470 U.S. 298, 316 (1985)).

278. *Id.* Justice O'Connor notes that similar police tactics have been relevant to the issue of whether a confession is voluntary. *See id.* (citing Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that police lies told to a suspect in order to get him to confess bear on the issue of voluntariness); Moran v. Burbine, 475 U.S. 412, 422 (1986) (similar)).

279. *Seibert*, 124 S. Ct. at 2619 (O'Connor, J., dissenting).

280. *See id.* In fact, the way Justice O'Connor formulated the *Elstad* test makes it possible that the result reached by courts will be the same most of the time, even in cases of deliberate use of the two-step interrogation method, whether they apply her approach or Justice Kennedy's approach.

281. *See id.* at 2618-19.

282. *See, e.g.*, United States v. Esquilin, 208 F.3d 315, 320 (1st Cir. 2000) (rejecting the argument that intentional *Miranda* violations amount to "improper tactics" under *Elstad* and finding the warned statement voluntary), *overruled in part by Seibert*, 124 S. Ct. at 2601; Davis v. United States, 724 A.2d 1163, 1170 (D.C. Cir. 1998) (recognizing that police actions in the case intentionally violated *Miranda*, but that under the totality of circumstances the warned statement was voluntary).

283. *Seibert*, 124 S. Ct. at 2610 n.4 (plurality opinion); *see also* United States v. Aguilar, 384 F.3d 520, 523 (8th Cir. 2004) (commenting that *Seibert* limits *Elstad*); United States v. Stewart, 388 F.3d 1079, 1087 (7th Cir. 2004) (similar); United States v. Khan, 324 F. Supp. 2d 1177, 1185 (D. Colo. 2004) (similar).

two-step interrogation cases, first apply the multi-factor test to determine "whether in the circumstances the *Miranda* warnings given could reasonably be found effective."[284] If the warnings were effective using the *Seibert* factors, then the court can determine if the statement was voluntary under *Elstad*.[285] But if the warnings were not effective under the Seibert factors, the second statement is inadmissible without reference to *Elstad*.[286] Under this approach, *Elstad* survives *Seibert* but is applied only if *Seibert* does not require suppression.[287]

When to apply *Elstad* is perhaps more clear under Justice Kennedy's test.[288] Using that approach, courts should apply *Seibert* to "deliberate" violations, and *Elstad* to "good-faith" violations.[289] As a result, courts will probably more commonly apply *Elstad* under Justice Kennedy's approach because it may prove hard to consistently prove "deliberate" officer intent.[290]

B. Interpreting the Case: A Survey of Seibert*'s Impact on Lower Courts*

When the Supreme 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 judgment on the narrowest grounds.'"[291] Because *Seibert* failed to produce a majority, its impact will depend on how courts construe the narrowest grounds for its holding.[292] Justice Kennedy himself regards his approach as narrower, and because it applies only in the case of intentional *Miranda* violations, he is likely correct.[293] Many courts that have applied *Seibert* agree, typically explaining that his approach is narrower because it merely requires an inquiry into officer intent and curative measures as opposed to a potentially unwieldy multi-factor test.[294] Since Justice Kennedy's approach is narrower than the one taken by the plurality,

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284. *Seibert*, 124 S. Ct. at 2610 n.4 (plurality opinion). This is the plurality's test.

285. *See id.*

286. *Id.*

287. *See id.*

288. *See supra* Part III.D.

289. *See Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).

290. *See supra* notes 257-64 for Justice O'Connor's criticism of an intent-based test.

291. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

292. *See id.*

293. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring) (explaining that the plurality's test "envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations" a test that in his view "cuts too broadly").

294. *See, e.g.*, Callihan v. Kentucky, 142 S.W.3d 123, 126 (Ky. 2004); *see infra* Part IV.B.2.

his view is the holding of the Court for purposes of applying *Seibert* to subsequent cases.[295]

It is interesting to note that Justice Kennedy's approach is narrower even though his test requires an inquiry into officer intent, something additional that the plurality approach does not require.[296] In addition, the fact that Kennedy's approach is narrower leads to a somewhat unusual and anomalous result: the holding of the Court is the position taken by only one Justice, with whom every other member of the High Court (except Justice Breyer) disagrees.

Many lower courts have not recognized, or at least not discussed, the narrowest-grounds issue in *Seibert*. In fact, when faced with a *Seibert*-type issue, some courts have simply applied the plurality's rule and multi-factor test without much discussion of Justice Kennedy's concurrence.[297] Others appear to have erred on the safe side and have given nearly equal treatment to both tests.[298] Still other courts have correctly held Justice Kennedy's intent-based test to be the proper approach and have emphasized it while also attempting to address the goals of the plurality approach as well.[299]

1. Cases Primarily Applying the Plurality's Test

In analyzing *Seibert*, several courts have applied the plurality's factors without discussing the narrowest-grounds issue or giving much weight to Justice Kennedy's test. One case that exemplifies this approach is *United States v. Hernandez-Hernandez* [300] where the Eighth Circuit Court of Appeals applied the plurality's test in distinguishing its case from *Seibert*.[301] Without mentioning the narrowest-grounds issue, this court cited Justice Kennedy's opinion when it concluded that there was no deliberate *Miranda* violation.[302] Despite the isolated citation to his opinion, the court failed to identify or apply the second part of Justice Kennedy's test by examining

295. *See Marks*, 430 U.S. 188 at 193.
296. *See Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).
297. *See infra* Part IV.B.1. Among these, many have not even mentioned the narrowest-holding issue.
298. *See infra* Part IV.B.2.
299. *See infra* Part IV.B.2.
300. 384 F.3d 562 (8th Cir. 2004).
301. *Id.* at 565-67.
302. *Id.* at 566 (citing Missouri v. Seibert, 124 S. Ct. 2601, 2616 (2004) (Kennedy, J., concurring)).

whether the statement was voluntary.[303] This case also illustrates that even within the same circuit some cases discuss Justice Kennedy's approach more than others.[304]

Similarly, in *United States v. Renken*,[305] a federal district court applied the plurality's test while only paying lip service to Justice Kennedy's approach.[306] Along the way, this court referred to the plurality's test as the holding of "the Court" on numerous occasions and never addressed the fact that *Seibert* failed to produce a majority approach.[307] Apparently blinded, this court actually claimed that *Seibert* "set forth clear guidelines governing the admissibility of a confession elicited through use of question-first [techniques]" while ignoring the narrowest-grounds issue.[308] And in this case, applying the proper analysis may have led to a different result. There was no evidence that this case involved an intentional *Miranda* violation, which is not determinative under the plurality approach but is under Justice Kennedy's test.[309] So under a strict application of Justice Kennedy's test, the court should have applied *Elstad* here.[310] To the extent that an *Elstad* analysis would have yielded a different result, the court's error is arguably not harmless.[311]

Not deterred by a lack of officer intent, as it should have been, the court applied the *Seibert* plurality's factors and concluded that because the second round of questioning was continuous with the first, the second confession had to be suppressed.[312] The only mention of Justice Kennedy's test is buried in a footnote where the court makes the perplexing comment that

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303. *See id.* Recall that when there is no "deliberate" *Miranda* violation, Justice Kennedy would apply the *Elstad* voluntariness test. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring). The Court simply did not do that here.

304. *Compare Hernandez-Hernandez with* United States v. Briones, 390 F.3d 610 (8th Cir. 2004), discussed *infra* in Part IV.B.2.

305. No. 02 CR 1099, 2004 WL 2005833 (N.D. Ill. Aug. 26, 2004).

306. *Id.* at *4.

307. *Id.* at *1-*4. The Court simply applied the plurality's test without a discussion of the narrowest grounds for its holding as required by *Marks v. United States*, 379 F.3d 1114 (9th Cir. 2004). *See Renkin*, 2004 WL 2005833, at *1-*4.

308. *Renkin*, 2004 WL 2005833, at *2.

309. *See supra* Parts III.C, III.D.

310. *See supra* Part III.D.

311. Note that a confession is more likely to be admitted under the *Elstad* standard, which only requires that the statements be made voluntarily. One possible explanation for this court's failure to apply Justice Kennedy's test here is that its application likely would have resulted in admitting the confession, a result the court was uncomfortable with.

312. *Renken*, 2004 WL 2005833, at *4 ("[A]s in *Seibert*, the circumstances indicate that 'it would have been reasonable to regard the two sessions as part of a continuum.'"). Although the plurality's factors are arguably vague, this court applied them with relative ease. *See id.* at *4; *supra* notes 170-77 and accompanying text. In that respect, this case is representative of virtually all cases applying *Seibert*. No court to date has yet vocalized its dissatisfaction with the factors.

there was no evidence that any curative measures were taken.[313] This was an apparent attempt to meet Justice Kennedy's test.[314] This footnote is nonsensical because once the court concluded that there was no "deliberate" violation, the issue of curative measures is moot under Justice Kennedy's test.[315]

These two cases are not alone in their decision to focus on the plurality test.[316] In particular, courts that have only briefly mentioned *Seibert* in order to distinguish it have been more likely to only discuss the plurality opinion.[317] Similarly, in *United States v. Khan*[318] a federal district court in Colorado held that it was "not persuaded that Khan's statements . . . were made voluntarily" because of the coercive atmosphere created by the FBI agents.[319] But the court went on to hold that even if the statements were voluntary, the *Seibert* plurality test would require suppression of the statements because the government failed to establish that the mid-interrogation *Miranda* warnings "could have served their purpose."[320] *Khan* does not mention Justice Kennedy's opinion at all or its test, but this may be more excusable since the case was decided on other grounds.[321]

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313. *Renken*, 2004 WL 2005833, at *4 n.6.

314. *Id.*

315. *See* Missouri v. Seibert, 124 S. Ct. 2601, 2616 (2004) (Kennedy, J., concurring).

316. *See, e.g.*, United States v. Price, No. 04-40035-SAC, 2004 WL 2457858, at *3-4 (D. Kan. Oct. 22, 2004) (applying the plurality's factors and implicitly rejecting Justice Kennedy's approach by saying "[t]he appropriate analysis as to admissibility of the post-*Miranda* statements is not whether the officer acted in good faith"); Crawford v. State, 100 P.3d 440, 450 (Alaska Ct. App. 2004) ("Employing the analysis adopted by the plurality in *Seibert*, we conclude that this midstream administration of *Miranda* warnings [was not] effective[]."). In *Crawford*, the court also held that the warned confession was involuntary under *Elstad*, so applying Justice Kennedy's approach likely would not have changed the result. *Crawford*, 100 P.3d at 450. However, the court did not even go so far as to mention that approach. *See id.*

317. *See* Reinert v. Larkins, 379 F.3d 76, 91 (3d Cir. 2004) (discussing only the plurality's test before finding the case indistinguishable from *Elstad*); United States v. Wilson, No. 04-CR-88-C, 2004 WL 1946409, at *4-5 (W.D. Wis. Aug. 30, 2004) (similar); *see also* State v. Starcher, No. 2004CA00025, 2004 WL 2955219 (Ohio Ct. App. Dec. 20, 2004) (discussing only the plurality approach in a case where the court found *Seibert* inapplicable because the defendant did not implicate herself during the pre-warning interrogation). However, at least one court that quickly distinguished *Seibert* implicitly considered Justice Kennedy's test. In *United States v. Libby*, No. CRIM.04-26-B-W, 2004 WL 1701042, at *6 (D. Me. July 30, 2004), a federal district court in Maine applied the plurality's factors but further emphasized that the deliberate two-step interrogation technique employed in *Seibert* was absent from its case.

318. 324 F. Supp. 2d 1177 (D. Colo. 2004).

319. *Id.* at 1189-90.

320. *Id.* at 1190.

321. *See id.* Apparently the court did not give as much attention to these issues because it found the statements to be involuntary.

2. Cases that have Applied Both the *Seibert* Plurality Approach and Justice Kennedy's Approach

Several methods have emerged among courts applying both tests, reflecting a varying quality of analysis. Representative of one type of case is *United States v. Aguilar*,[322] where a Colorado district court emphasized the plurality test but also mentioned that the Kennedy concerns were met.[323] After applying the plurality's factors and holding that the "*Miranda* warnings . . . did not serve the[ir] purpose," the court acknowledged, almost as an afterthought, that Justice Kennedy's test was narrower.[324] But the court concluded that this case also satisfied Justice Kennedy's test because "the method and timing of the two interrogations establish intentional, calculated conduct by the police" and no curative measures were taken.[325]

Other courts have emphasized Justice Kennedy's approach while applying the plurality test secondarily. For example, in *United States v. Briones*,[326] the Eighth Circuit recognized that "[b]ecause Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."[327] Finding no evidence of a "deliberate" *Miranda* violation, the court properly considered whether the statements were voluntarily made under *Elstad*.[328] Relegating the plurality test to a footnote, the court added "[the suspect's] statements would also be admissible under the multifactor test fashioned by the *Seibert* plurality."[329] This case correctly applies Justice Kennedy's test, and demonstrates how the Eighth Circuit has altered its analysis since *Hernandez-Hernandez* decided two months earlier.[330]

Still others seemed to have stumbled upon the correct result despite an utter failure to correctly apply *Seibert*. The most interesting such case is *In*

322. 384 F.3d 520 (8th Cir. 2004).

323. *See id.* at 523-26.

324. *Id.* at 525.

325. *Id.*

326. 390 F.3d 610 (8th Cir. 2004).

327. *Id.* at 613 (citing Romano v. Oklahoma, 512 U.S. 1, 9 (1994); Marks v. United States, 430 U.S. 188, 193 (1977)).

328. *Id.* at 614.

329. *Id.* at 614 n.3.

330. *Compare* United States v. Hernandez-Hernandez, 384 F.3d 562 (8th Cir. 2004) (applying the plurality test), *with Briones*, 390 F.3d at 613-14 (applying Justice Kennedy's test). Notably, Judge Heaney participated in both cases. *See Hernandez-Hernandez*, 384 F.3d at 563; *Briones*, 390 F.3d at 611. One state court case that is similar to *Briones* is *Callihan v. Commonwealth*, 142 S.W.3d 123, 126 (Ky. 2004). In *Callihan*, the Kentucky Supreme Court mentioned both tests before concluding, without much discussion, that "the narrowest grounds are those set forth in Justice Kennedy's concurring opinion." *Id.* at 126. Because the record was devoid of any finding of intent, that court would have remanded for a hearing on that issue if it had not disposed of the case on other grounds. *See id.* at 126, 128. Because the court ultimately decided the case on other grounds, the narrowest-grounds discussion is dicta.

re W.J.L.[331] where an Ohio appellate court attempted to distinguish *Seibert* by applying only the plurality factors of its choice.[332] In its analysis, the court did not even mention two of the five factors announced by the *Seibert* plurality, namely the completeness of the first round of questioning and the overlapping content of the questions.[333] Nonetheless, the court held this case distinguishable from *Seibert* because the factors it applied led it to the conclusion that no intentional *Miranda* violation had occurred.[334] Even more perplexing, the court immediately went on to conclude that "[s]imply put, under the totality of the circumstances, there was no reason to believe that Lyon's second statement was not voluntarily made."[335] This conclusion completely ignores the *Seibert* plurality test, which the court purported to apply, and implicitly applies the *Elstad* test.[336] Although the Ohio court in this case discussed some of the plurality's factors, it ultimately failed to apply that test as the other cases have done.[337] However, even though the court fails to mention Justice Kennedy's test at all, it reached the result that test requires. Because there was no evidence of an intentional *Miranda* violation, Justice Kennedy would apply the *Elstad* voluntariness test, which in effect is what this court did.[338]

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331. No. 2003 CA 81, 2004 WL 1588090 (Ohio Ct. App. July 16, 2004).

332. *Id.* at *2. In applying some of the factors, the court found that the interrogations were in different places and conducted by different people, and that at least fifteen minutes elapsed between the interrogations so the sessions were not continuous. *Id.* Note that the fifteen minutes between interrogations was actually shorter than the twenty minute break given in *Seibert*, which logically weighs in favor of finding the second confession continuous with the first.

333. *Id.* The court noted only that the first interview was "short." *Id.*

334. *Id.* This test would satisfy Justice Breyer's proposed test and Justice Kennedy's test, but officer intent is not the focus of the plurality's analysis.

335. *Id.* at *2.

336. *See supra* notes 52-55 for a discussion of the *Elstad* test. This part of the opinion is defensible only if the court first reached the conclusion that the plurality test was satisfied and then went on to hold that the statement was voluntary. The plurality actually endorsed this kind of analysis. *See supra* notes 284-87 and accompanying text. But if the court was applying such an approach, it did not do so clearly. *See In re* W.J.L., 2004 WL 1588090, at *2 (discussing *Seibert* factors and concluding in the same paragraph that "[s]imply put, under the totality of the circumstances, there was no reason to believe that Lyon's second statement was not voluntarily made").

337. *See, e.g.*, United States v. Renken, No. 02 CR 1099, 2004 WL 2005833, at *3 (N.D. Ill. Aug. 26, 2004) (interpreting the ultimate question under *Seibert* to be "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires" (citing Missouri v. Seibert, 124 S. Ct. 2601, 1610 (2004))). The decision to give such little credence to *Seibert* does not seem to be influenced by the court's desire to admit the confession, because under the formulation of *Seibert* described above the second confession would probably have been admissible.

338. *See In re W.J.L.*, 2004 WL 1588090, at *2.

A final category of cases cogently and creatively tries to interpret *Seibert* and apply the proper test to the facts. In *United States v. Stewart*,[339] the Seventh Circuit examined in some detail both the plurality and Kennedy approaches and held that intentional use of the question-first tactic creates a presumption that the warned statement be excluded.[340] But in its view, that presumption could be overcome by a showing that in applying the plurality's multi-factor test, the *Miranda* warnings were "effective" as given.[341] The court went on to note that Justice Kennedy cast the deciding vote "to depart from *Elstad*, but only where the police set out deliberately to withhold *Miranda* warnings."[342] As a result, if the *Miranda* violation was not the result of a deliberate question-first strategy, *Elstad* should apply.[343]

The Seventh Circuit's analysis in *Stewart* gives credence to both the plurality and Kennedy approaches but highlights the unfortunate result that courts will have to determine officer intent in successive interrogation cases, an analysis that was rejected by at least seven Justices.[344] A federal district court in Pennsylvania took a similar approach in *United States v. Kiam*[345] by synthesizing the relevant opinions in *Seibert* into a three-step analysis.[346] The first step comes from Justice Kennedy's test: determine whether police deliberately used the question-first technique.[347] Then apply the plurality's five-factor test to determine if the case is more like *Seibert* or *Elstad*.[348] And lastly, if the court finds the case more like *Seibert*, it should determine if sufficient curative measures were taken.[349] Apparently, the court adopted this approach because it was bound by precedent, but it questioned the wisdom of an intent-based test.[350]

This approach is similar to the approach of the Seventh Circuit in *Stewart*, with the additional requirement that curative measures must be taken.[351] Because the curative measures analysis is similar in effect to the plurality's multi-factor test, the circuit court seemed to indicate that they

339. 388 F.3d 1079 (7th Cir. 2004).

340. *Id.* at 1090.

341. *Id.*

342. *Id.*

343. *See id.*

344. *See id.* The fact that the Seventh Circuit had to remand the case for a hearing on the issue of officer intent demonstrates why the intent-based analysis is disfavored. *See id.* at 1091-92.

345. 343 F. Supp. 2d 398 (E.D. Pa. 2004).

346. *Id.* at 408-09.

347. *Id.* at 408.

348. *Id.* at 409.

349. *Id.*

350. *See id.* at 409 n.16 (noting that the "subjective dimension" of Justice Kennedy's test is a "dimension the jurisprudence has wisely sought to avoid").

351. *See id.* at 409.

overlapped.[352] These courts have taken somewhat different approaches to interpreting *Seibert*, but in practice their approaches will likely operate in much the same way. While neither court's approach may be perfect, these courts should be commended for first recognizing the plurality opinion issue, and second, for their creative attempts to reconcile and integrate Justice Kennedy's test with the plurality approach. And at least one thing is certain: courts must apply Justice Kennedy's narrower test in some form, and courts that have failed to do so have undoubtedly misconstrued *Seibert*.[353]

C. *Impact on Law Enforcement*

Exactly how many law enforcement agencies are effected by *Seibert* is unclear. For agencies and departments not using the question-first technique this decision will have little effect, since it targets only intentional violations of *Miranda*.[354] Of course, agencies that made it policy to utilize the question-first technique will have to change their procedures.[355] The number of agencies advocating and employing this technique is debatable. The *Seibert* plurality concluded that use of the question-first technique is widespread.[356] However, the cases and articles cited by the plurality to reach that conclusion primarily document the prevalence of police misconduct in general, and do not even mention the question-first technique.[357] As a result, its conclusion is at least somewhat uncertain and it is impossible to know exactly how sweeping the effects of *Seibert* will be.

Even for agencies using the question-first technique, *Seibert* may not spell the death knell for all question-first type tactics. Justice Kennedy's test saddles courts with the difficult task of finding that an officer deliberately violated *Miranda*.[358] If intent cannot be established, as will presumably be

352. *See* United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir. 2004).

353. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

354. *See supra* Part IV.C.

355. In cases where use of the technique is policy, it should be relatively easy to prove the intentional nature of the violation.

356. *See* Missouri v. Seibert, 124 S. Ct. 2601, 2608-09 (2004).

357. *See id.* at 2608-09 & nn.2-3. The plurality does list several cases where police employed the technique. *Id.* But because that list only includes five cases, four of which represent the split in the circuits, it does not support the conclusion that the practice is widespread. *See id.* The plurality also cites to police manuals and training tools that purport to use the technique, and while this shows that some police departments are using the technique, it fails to convince that the technique is actually widespread. *See id.*

358. There is an apparently fine line between an intentional violation and a mere omission of the warnings.

the case quite often, the *Elstad* voluntariness rule will govern.[359] And over the past nineteen years, courts have typically been reluctant to find statements made after *Miranda* warnings to be involuntary.[360]

Courts applying the plurality's test in some capacity essentially have a judgment call over whether the *Miranda* warnings could have been effective as given.[361] As a result, the plurality's arguably vague factors will provide courts a way to distinguish *Seibert*, if they are so inclined. This is where the vagueness of the factors could pose a problem for courts and an opportunity for law enforcement. For example, if the unwarned questioning is not particularly detailed,[362] occurs in a different location than the warned statement,[363] is performed by different officers, and there is a break of more than twenty minutes, the door is open for a court to distinguish *Seibert*.[364] One could imagine that the situation just described might be very different from *Seibert*, especially from the perspective of an overwhelmed suspect.

D. Effect on Patrice Seibert: Conviction Overturned

The most direct result of the Court's decision in *Seibert* was that Patrice Seibert's warned confession was suppressed.[365] In so holding, the Court affirmed the decision of the Missouri Supreme Court to overturn her conviction, and she cannot be retried with the benefit of either of her confessions.[366] So this admitted murderer is perhaps, for now, the greatest beneficiary of the Court's decision.

V. CONCLUSION

Missouri v. Seibert was challenging for the Court partly because of the obvious conflict between the interests of law enforcement and protection of suspects' rights, and even more importantly because a majority of the Court wanted to repudiate the question-first technique without fashioning a test based on either officer intent or the fruit of the poisonous tree analysis.[367]

Reflecting this difficulty, none of the approaches voiced by members of the Court in *Seibert* is without its flaws. Although the plurality wisely avoids an intent-based approach, it would have courts apply an amorphous

359. *See Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).

360. *See supra* Part II.C.

361. *See Seibert*, 124 S. Ct. at 2610 (plurality opinion).

362. For example, a to-the-point-question of guilt or innocence.

363. Perhaps in a police car on the way to the station.

364. The result is that the court will likely apply *Elstad*, whose voluntariness test is much harder for a suspect to meet. *See* Oregon v. Elstad, 470 U.S. 298 (1985).

365. *See Seibert*, 124 S. Ct. at 2613 (plurality opinion).

366. *Id.*

367. *Id.* at 2610 n.4, 2612.

test that requires examination of ill-defined factors to determine whether *Miranda* warnings could be "effective" as given.[368] That test seems to provide lower courts with little real guidance and gives judges discretion to impose their will in determining whether a case is similar enough to *Seibert* to suppress a statement.[369] Whether or not this concern manifests itself remains to be seen as early cases have not recognized this shortcoming.[370]

Justice Kennedy's approach is problematic because it requires courts to determine the intent of police officers, which both the plurality and the dissent agree would be impossible in many cases.[371] Meanwhile, Justice Breyer briefly proposed an approach that has already been rejected by the Court in *Elstad*.[372] Perhaps the best approach is the one taken by the dissenting Justices who would simply apply precedent and admit the second statement if voluntarily made.[373] The primary difficulty with this approach is that it does not appear to firmly reject the troubling and apparently widespread question-first technique.[374] To the extent that the dissenters would allow a finding that a warned confession (such as the one in *Seibert*) could be involuntary simply because the question-first technique is used, it might be the best approach.

Aside from the arguments for and against the tests described above, lower courts have struggled to interpret the proper test to take from *Seibert*.[375] Some courts have completely disregarded, or too quickly dismissed, Justice Kennedy's approach, which courts are now recognizing contains the narrowest test and is thus the holding of the Court.[376] But cases such as *Kiam* wisely apply the Kennedy test and integrate the plurality factors as well.[377] Perhaps the best approach is the one taken by the Seventh Circuit in *Stewart*: if police deliberately violate *Miranda* by seeking a confession before warning, a presumption attaches that a later, warned statement be excluded unless rebutted by evidence that the *Miranda* warnings were nonetheless effective under the plurality's test.[378]

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368. *See id.* at 2610-12.
369. *See supra* Part III.C.9.
370. *See supra* Part IV.B.
371. *See Seibert*, 124 S. Ct. at 2617-18 (O'Connor, J., dissenting); *see also supra* Part III.D (discussing Justice Kennedy's opinion).
372. *Seibert*, 124 S. Ct. at 2613-14 (Breyer, J., concurring).
373. *See id.* at 2619 (O'Connor, J., dissenting).
374. *See supra* Part III.F.
375. *See supra* Part IV.B.
376. *See supra* Part IV.B.1.
377. *See* United States v. Kiam, 343 F. Supp. 2d 398, 409-10 (E.D. Pa. 2004).
378. *See* United States v. Stewart, 388 F.3d 1079, 1089 (7th Cir. 2004).

Whatever the approach, courts that refuse to apply Justice Kennedy's intent-based test are ignoring *stare decisis*, and in cases where officer intent cannot be established,[379] this mistake may affect the result and courts will not be shielded by the protection of harmless error. Amidst the lower court chaos, at least one thing seems clear: if a court can establish that the question-first technique was intentionally used to "circumvent *Miranda*," it will suppress the post-warning statement. And at the end of the day, this should signal an end to the question-first tactic, a result that a majority of the Court intended.[380] But critics will correctly point out that this is true only to the extent that officer intent can be discovered by the court, which is a difficult proposition.[381]

APPENDIX A

Excerpts from Seibert's interrogation that took place after *Miranda* warnings were given.[382]

> [Officer] Hanrahan: "Now, in discussion you told us, you told us that there was a[n] understanding about Donald."
>
> Seibert: "Yes."
>
> Hanrahan: "Did that take place earlier that morning?"
>
> Seibert: "Yes."
>
> Hanrahan: "And what was the understanding about Donald?"
>
> Seibert: "If they could get him out of the trailer, to take him out of the trailer."
>
> Hanrahan: "And if they couldn't?"

379. This will be the case much of the time, according to the plurality and dissent. *See Seibert*, 124 S. Ct. at 2617-18 (O'Connor, J., dissenting).

380. *See Seibert*, 124 S. Ct. at 2612 (plurality opinion); *id.* at 2616 (Kennedy, J., concurring).

381. *See id.* at 2618 (O'Connor, J., dissenting).

382. *Id.* at 2606 (plurality opinion) (internal quotations omitted) (emphasis added).

Seibert: "I, I never even thought about it. I just figured they would."

Hanrahan: " 'Trice, *didn't you tell me that he was supposed to die in his sleep*?"

Seibert: "If that would happen, 'cause he was on that new medicine, you know . . . ."

Hanrahan: "The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?"

Seibert: "Yes."

Eric English[383]

383. J.D., Pepperdine University School of Law, magna cum laude, 2005; B.A., Seattle Pacific University, magna cum laude, 2002. I would like to thank my loving wife Trisha for her endless patience, and the PEPPERDINE LAW REVIEW staff for their hard work in editing this article.