MIRANDA-IN-THE-MIDDLE: WHY JUSTICE KENNEDY'S SUBJECTIVE INTENT OF THE OFFICER TEST IN *MISSOURI V. SEIBERT* IS BINDING AND GOOD PUBLIC POLICY

INTRODUCTION

Suppose that police officers obtain a warrant to arrest a suspect for a recent burglary that occurred in a nearby grocery store. Police arrive at the suspect's home and inform him that they are arresting him for the burglary. They ask questions about his involvement in the crime without providing *Miranda* warnings. The suspect then admits that he had been at the store when the burglary took place. If the police then take him to the police station, place him in an interrogation room, give him *Miranda*

warnings and obtain a second confession, can the second confession be used against the suspect at trial to prove his guilt?

Under previous Supreme Court precedent established in *Oregon v. Elstad*,[1] the post-warning statements from the hypothetical above would likely be admissible as long as they were voluntary and uncoerced.[2] In *Elstad*, the Supreme Court faced a problem similar to the previous fact pattern and explicitly struck down the argument that *Miranda* violations deserved a "fruit of the poisonous tree" analysis.[3] The Court decided, instead, that the threshold question of admissibility should turn on whether the statement made by the suspect was voluntary.[4] Therefore, as long as a Mirandized statement was voluntary, it would be admissible.

The Supreme Court faced another issue of two-phase interrogations, with an added twist, almost two decades later in the case of *Missouri v. Seibert*.[5] In *Seibert*, police officials found the loophole that the *Elstad* decision left behind, and officers nationwide developed procedural protocol that adopted manipulative strategies that deliberately violated the *Miranda* requirement. Police would intentionally withhold *Miranda* rights, obtain an unwarned confession, pause the interrogation, return to the suspect, provide *Miranda* warnings after a short break, and obtain a second confession based on the information the suspect provided prior to receiving *Miranda* warnings. The Supreme Court in *Seibert* did not approve of the intentional manipulation of the *Miranda* requirement and held that the second confession obtained post-*Miranda* should be suppressed along with the first one.[6] The Court, however, could not reach a majority decision as to *why* the second confession should have been excluded.

Justice Kennedy's opinion concurring in the judgment represents the narrowest opinion handed down in *Seibert*, as it forms a narrow exception for deliberate police conduct to the already established voluntariness test in *Elstad*. Justice

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[1] 470 U.S. 298 (1985).

[2] *Id.* at 314, 318.

[3] *Id.* at 306 ("A procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine.").

[4] *Id.* at 318.

[5] 542 U.S. 600 (2004).

[6] *Id.* at 617, 622.

Kennedy's test requires a fact-finding court to look at the subjective intent of the officer in order to determine whether or not he made a "calculated" decision to circumvent the *Miranda* warnings.[7] If he did, the second confession, in addition to the unwarned confession, would be suppressed absent curative measures designed to ensure that the suspect had received effective warnings.[8] Furthermore, Justice Kennedy's opinion concurring in the judgment is essentially a subset of the plurality opinion in that its curative measures will only apply to deliberate attempts to skirt the *Miranda* requirement.[9] The objective factor test proposed by the plurality, on the other hand, would apply to all instances where *Miranda* warnings have been inserted into the middle of the interrogation—whether deliberate or accidental.

Justice Kennedy's test is also controlling under the *Marks* rule[10] and should be applied when courts face law enforcement abuse of *Miranda*-in-the-middle interrogations. His subjective test furthers law enforcement interest in controlling and preventing crime while narrowly targeting the problem of unlawful manipulation of *Miranda* warning requirements. In keeping with Supreme Court precedent, Justice Kennedy keeps *Miranda* narrow and does not create a "fruit of the poisonous tree" application to the *Miranda* doctrine.

Part I of this Comment will explore the Supreme Court's jurisprudence regarding *Miranda* warnings up to *Missouri v. Seibert*. Part II will analyze and discuss the resulting split among circuits due to the various application styles of the *Seibert* decision. The argument that Justice Kennedy's opinion is binding and good public policy will unfold in Part III, along with the policy rationale and positive ramifications that will result from application of the subjective intent of the officer test. Part IV will address the main counterarguments and concerns that application of Justice Kennedy's subjective intent of the officer test may raise,

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[7] *Id*. at 622 (Kennedy, J., concurring in the judgment).

[8] *Id.* ("Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.").

[9] *Id.* ("The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two step strategy was employed.").

[10] *See infra* Part III.A.

and Part V will explore an application analysis of when and how Justice Kennedy's or Justice Souter's test could be outcome determinative and why it matters.

I. Background

A. Miranda v. Arizona *and the Requirement of Notification*

In 1966, the United States Supreme Court decided *Miranda v. Arizona*,[11] a case involving custodial interrogation of suspects by law enforcement. *Miranda* was a combination of four different cases, in which each defendant was interrogated without having first been notified of his right against self-incrimination and right to counsel under the Fifth Amendment.[12] The Supreme Court held that, in order to protect a defendant's right against self-incrimination, the prosecution could not use any incriminating statements as evidence against the defendant at trial unless law enforcement officials had taken "procedural safeguards" to ensure that a suspect was appropriately notified of his rights.[13]

The Court reasoned that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[14] In order to protect against these pressures, according to the Supreme Court, an accused must be appropriately notified of his rights, and if he chooses to invoke those rights, the police must honor his decision to do so.[15] As a result, if a suspect is not notified of his right to remain silent, his right to counsel, or the effect of a waiver of those rights, the statements ultimately elicited cannot be admissible at trial as incriminating evidence against the defendant. Consequentially, any unwarned statement made would be appropriately suppressible and excluded from evidence.

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[11] 384 U.S. 436, 445 (1966).
[12] *Id.* at 457.
[13] *Id.* at 444.
[14] *Id.* at 467.
[15] *Id.*

B. After Miranda*:* Oregon v. Elstad *and the Trend Toward Keeping Miranda Narrow*

Soon after *Miranda* was decided, the Supreme Court held that material substance revealed in an un-*Mirandized* statement could be utilized in a different form other than self-incriminating testimony at trial in *Michigan v. Tucker*.[16] In *Tucker*, the defendant gave an un-*Mirandized* statement that indicated that he was with his friend, Henderson, on the night that a neighborhood woman was raped and beaten.[17] After speaking with Henderson, police began to question the credibility and reliability of Tucker's story.[18] The federal district court decided that Henderson's testimony should be excluded because it was only obtained as a result of information obtained in Tucker's first unwarned statement.[19] The Sixth Circuit affirmed that decision. The Supreme Court felt differently, however, and stated that the prosecution is not required "to refrain from all use of those [unwarned] statements."[20] Consequentially, the Court kept *Miranda* narrow—when it had the opportunity to expand it—by allowing derivative witness testimony derived from unwarned statements to be admissible as evidence at trial.

About twenty years after *Miranda* was decided, the Supreme Court faced a unique situation in which a defendant had received *Miranda* warnings, but only after he had already made an incriminating statement.[21] In *Oregon v. Elstad*, a witness to a neighborhood burglary reported Michael Elstad to police for potential involvement in the crime.[22] After obtaining an arrest warrant, police went to Elstad's home, and upon arrival, informed the suspect that he was reported to have been involved in the recent neighborhood burglary.[23] Elstad admitted that he was at the home the day it had been burglarized, but his admission preceded his *Miranda* rights.[24] Elstad ultimately received

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[16] 417 U.S. 433, 452 (1974).
[17] *Id.* at 436-37.
[18] *Id.*
[19] *Id.* at 437.
[20] *Id.* at 452.
[21] Oregon v. Elstad, 470 U.S. 298 (1985).
[22] *Id.* at 300.
[23] *Id.* at 300-01.
[24] *Id.*

Miranda warnings once he reached the police station, about an hour later, but he argued that both his unwarned and warned confessions should be suppressed due to a "fruit of the poisonous tree" or a "cat . . . out of the bag" theory.[25]

The Supreme Court, following *Tucker*, declined to adopt and apply a "fruit of the poisonous tree" analysis to *Miranda* violations and instead held that admissibility of Mirandized confessions should turn "solely on whether [the confession] is knowingly and voluntarily made."[26] The Court reasoned that "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment."[27] Furthermore, the Court went on to hold that as long as law enforcement had not employed "deliberately coercive or improper tactics" when interrogating a defendant, if the defendant made a volitional, albeit unwarned, incriminating statement, later provision of *Miranda* warnings should cure any taint that may have resulted.[28] Hence, as long as a defendant's incriminating statement was voluntary, the fact that it was made prior to receiving *Miranda* warnings would not further poison the latter confession absent intentional police misconduct.[29]

The Supreme Court's reasoning in *Tucker* and *Elstad* was further extended in *United States v. Patane*,[30] which was decided the same day as *Seibert*. In *Patane*, the Court decided that physical fruits of an un-Mirandized statement are also not excludable, as the *Miranda* warnings do not fall under the "fruit of the poisonous tree" analysis like Fourth Amendment search and seizures.[31] Although this decision was a plurality decision like *Seibert*, five members of the court agreed that the physical evidence of the weapon found was not automatically suppressed just because it was found as a result of the un-Mirandized

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[25] *Id.* at 301, 303-04.

[26] *Id.* at 309.

[27] *Id.* at 306. Fourth Amendment violations, absent specific exceptions, usually require application of the exclusionary rule and the "fruit of the poisonous tree" doctrine.

[28] *Id.* at 314. The Court references "deliberately coercive" tactics. *See id.* These tactics are arguably the same tactics and protocol used by police in *Missouri v. Seibert*. *See infra* Part I.C.

[29] *Id.*

[30] 542 U.S. 630 (2004).

[31] *Id.* at 636-37 (Thomas, J., plurality opinion).

statement. This holding further kept *Miranda* narrow and restricted because it only required suppression of un-Mirandized statements that were testimonial in nature and did not extend to actual derivative physical evidence or use of other substance derived from the statement. Thus, before and up until the day *Seibert* was handed down, the Supreme Court repeatedly rejected opportunities to further broaden and expand *Miranda* by keeping it narrow and specific instead.

C. After Elstad*: The Loophole Police Found and the Splintered Decision of* Missouri v. Seibert

In *Missouri v. Seibert*, police officers arrested Patrice Seibert when they suspected her of burning her own home in order to cover up the death of her son who had cerebral palsy.[32] When police arrested her, they did not provide her with *Miranda* warnings because they had a strategy whereby they would withhold a suspect's *Miranda* warnings until after he or she had already confessed, in hopes of maximizing confessions received.[33] The officer questioned Seibert without warnings, and after she confessed, he gave her a twenty-minute coffee and cigarette break before returning to provide her with *Miranda* rights.[34] After the break, the officer began questioning Seibert based on the information she had previously provided before receiving *Miranda* warnings.[35] She ultimately confessed again—making the second confession a warned confession under *Miranda*.[36] A five-member majority of the Supreme Court decided that Seibert's second, warned confession should be suppressed, but the majority could not reach an agreement as to *why* the second confession should be excluded from evidence.

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[32] Missouri v. Seibert, 542 U.S. 600, 604 (2004) (Souter, J., plurality opinion). Because Seibert's son had bedsores when he died, she feared charges of child neglect. She decided to burn down her home in order to avoid being charged with child neglect. In order to make it look like an accident, she and her accomplices left a mentally ill teenager in the home. *Id.*

[33] *Id.* at 605-06.

[34] *Id.* at 605.

[35] *Id.*

[36] *Id.*

1. Justice Souter and the Plurality Opinion

In his plurality opinion, Justice Souter reasoned that Seibert's warned confession should be suppressed because the *Miranda*-in-the-middle questioning technique rendered the warnings she received ineffective.[37] Justice Souter said, "[W]hen *Miranda* warnings are inserted in the midst of a coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"[38] As such, the plurality opinion was concerned with the efficacy the *Miranda* warnings ultimately provided to a suspect in a *Miranda*-in-the-middle interrogation and his ability to understand and appreciate the warnings and the magnitude of waiving them.[39]

Justice Souter opined that the best way to determine whether or not *Miranda* warnings inserted in the middle of an interrogation were effective would be to look at a list of factors to see if the warnings were effective from an objectively reasonable suspect's point of view.[40] After analyzing the factors set forth, if the suspect could have reasonably understood his rights under *Miranda*, then the confession would be admissible. If the warnings were not effectively given and received under the totality of the circumstances, the confession would be inadmissible under the plurality's factor test for failing to effectively present a suspect with his rights under the Constitution.

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[37] *Id* at 604.

[38] *Id*. at 613-14.

[39] *Id*. at 611-12. "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.*

[40] *Id*. at 615. The factors that the plurality listed were:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id.

2. Justice Breyer's Concurring Opinion

Justice Breyer, although joining Justice Souter and the plurality's reasoning, also wrote a separate concurring opinion. Justice Breyer was an advocate of applying a "fruits" analysis to the *Miranda* doctrine.[41] Application of the "fruits" doctrine to *Miranda* was explicitly rejected in *Elstad*,[42] but Justice Breyer agreed with the plurality and signed on to the opinion because he "believe[ed] the plurality's approach in practice would function as a 'fruits' test."[43] Justice Breyer also argued, however, that "[c]ourts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith."[44] Justice Breyer's reference to the good faith of the officer raises an inference that he contemplated a different result when the officer failed to warn in good faith, and thus seems to have Justice Kennedy's test in the back of his mind as well.

3. Justice Kennedy's Opinion Concurring in the Judgment

Justice Kennedy agreed with the plurality that the second, warned confession made by Seibert should have been suppressed.[45] However, Justice Kennedy opined that, because the plurality's test would apply to both intentional and unintentional two-stage interrogations, the test "cut[] too broadly."[46] Therefore, Justice Kennedy decided that *Elstad* should continue to be controlling precedent as long as police officers did not design a "two-step interrogation technique . . . in a calculated way to undermine the *Miranda* warning."[47] Under Justice Kennedy's approach, if an interrogator used a deliberate method aimed at circumventing the *Miranda* requirement, the post-warning statement should not be admissible unless that officer took "curative measures" to ensure that the defendant understood and appreciated the warning.[48]

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[41] *Id.* at 617-18 (Breyer, J., concurring).
[42] *See* Oregon v. Elstad, 470 U.S. 298, 306-07 (1985); *see also supra* note 26.
[43] *Seibert*, 542 U.S. at 618 (Breyer, J., concurring).
[44] *Id.* at 617.
[45] *Id.* at 618 (Kennedy, J., concurring in the judgment).
[46] *Id.* at 622.
[47] *Id.*
[48] *Id.*

Although Justice Kennedy never explicitly outlined a test telling courts how to determine deliberation, a subjective intent of the officer test can be, and has often been, implied from his analysis. Justice Kennedy argued that the plurality's objective factor test was too broad in that it would apply to every two-step interrogation.[49] Only intentional *Miranda*-in-the-middle violations, according to Justice Kennedy, should be treated differently than *Elstad* precedent. As such, he believed that curative measures were only necessary if police subjectively and deliberately withheld *Miranda* until they obtained a confession.[50] If an officer has intentionally withheld *Miranda* warnings in a calculated attempt to obtain a confession, the confession obtained after the warning was provided will likely be suppressed unless the officer took curative measures, which resemble the plurality's objective factors, to ensure that a suspect understood his rights and that the warnings ultimately given were effective.[51] If the subjective intent to avoid *Miranda* is absent, however, Justice Kennedy opined that confessions should continue to be governed by the voluntariness standard of *Elstad*.[52]

4. Justice O'Connor and the Dissenting Opinion

In her dissent in *Missouri v. Seibert*, Justice O'Connor expressed her sentiments that Seibert's confession, and other two-step interrogations, should continue to be determined by the voluntariness rule set forth in *Elstad*.[53] She disagreed with the plurality in that she believed that Justice Souter gave "insufficient deference to *Elstad*."[54] However, Justice O'Connor did state that she agreed with the plurality's rejection of a "fruit of the poisonous

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[49] *Id.* ("[A] multifactor test that applies to every two-stage interrogation must serve to undermine that clarity [of *Miranda*].").

[50] *Id.*

[51] *Id.* ("Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver."). Justice Kennedy's curative measures, while seemingly non-exhaustive, included a lengthy time gap between the interrogations or an explicit statement to the defendant that what had previously been said could not be used against him. *See id.*

[52] *Id.*

[53] *Id.* at 622-23 (O'Connor, J., dissenting).

[54] *Id.* at 629.

tree" analysis and its rejection of a test centered on the subjective intent of the officer, as opposed to the test created by Justice Kennedy.[55] Arguing against a subjective test, Justice O'Connor articulated that Seibert's confession should have been governed by the voluntariness standard set forth in *Elstad*.[56] She further argued that the subjective intent of the officer does not have any effect on the voluntariness of the confession from the viewpoint of the defendant, and as such, should not be taken into consideration.[57] Justice O'Conner stated that inquiring into the subjective intent of the officer, as Justice Kennedy's opinion would mandate, would waste valuable judicial resources, take up unnecessary amounts of time, and rarely be as easily identifiable as it was in *Seibert*.[58] Thus, Justice O'Connor opined that two-step investigations should continue to be governed by the voluntariness standard set forth in *Elstad*.

5. Similarities and Differences Across the Board

Differences between Justice Souter's plurality opinion and Justice Kennedy's opinion concurring in the judgment concern the type of test that each Justice wants to apply when faced with a *Miranda*-in-the-middle interrogation. Both Justice Souter and Justice Kennedy were concerned with police manipulation of the *Miranda* requirement, but Justice Kennedy's test is structured around the subjective intent of the officer so that inquiry into the efficacy of the *Miranda* warnings will only be triggered once a police officer has deliberately violated *Miranda*.[59] Justice Souter, on the other hand, wanted all *Miranda*-in-the-middle interrogations to be analyzed from the suspect's objective point of view since he is more concerned about the objective efficacy of the *Miranda* warnings, as opposed to subjective officer intent.[60]

Both Justice Souter's and Justice Kennedy's tests included objective factors that closely resembled one another. However, Justice Souter wanted to look for each of these factors when there

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[55] *Id.* at 624.
[56] *Id.* at 625.
[57] *Id.*
[58] *Id.* at 626.
[59] *Id.* at 622 (Kennedy, J., concurring in the judgment).
[60] *Id.* at 615 (Souter, J., plurality opinion).

had been any type of *Miranda*-in-the-middle interrogation, whereas, Justice Kennedy only wanted to look to the factors if the police had made a calculated attempt to avoid the *Miranda* requirement. Thus, both Justices agreed that objective factors concerning efficacy of warnings should be considered, but they disagreed as to when the objective factors should come into play.

While Justice O'Connor agreed with the plurality that the test should not be based on the officer's subjective intent, the dissenting Justices believed that the exclusion or admission of confessions should continue to be governed by the voluntariness standard set forth in *Elstad*. Justice Kennedy agreed with Justice O'Connor that *Elstad* should be given great deference; however, he argued that a narrow exception for intentional violations of *Miranda* by law enforcement should be taken into consideration. Therefore, both Justice Kennedy and Justice O'Connor believed that *Elstad* should continue to be controlling, but Justice Kennedy argued that a small part of *Elstad* should be carved out when a deliberate violation had occurred.

II. THE CIRCUIT SPLIT RESULTING FROM THE PLURALITY OPINION IN *MISSOURI V. SEIBERT*

A. Circuits Following the Objective Factor Test Established by the Plurality

In the plurality opinion, Justice Souter focused on objective circumstances surrounding the interrogation to determine whether the *Miranda* warnings a suspect received were effective. Although never explicitly stated, the Sixth Circuit Court of Appeals applied Justice Souter's plurality opinion from *Seibert* in cases involving *Miranda*-in-the-middle interrogations. More specifically, the analysis set forth by the Sixth Circuit usually involved whether or not a suspect was effectively apprised of his *Miranda* rights, which is the main driving force behind Justice Souter's plurality opinion.

In *United States v. Pacheco-Lopez*,[61] Pacheco-Lopez was arrested when he was found in a home that police were authorized to search. The officers spoke with him about his identity and

[61] 531 F.3d 420 (6th Cir. 2008).

where he was from before providing him with the requisite *Miranda* warnings.[62] It was not until after admitting that he illegally drove a vehicle into the United States that the officers gave him *Miranda* warnings.[63] The Sixth Circuit held that "[a]n analysis of the sequence of events surrounding Lopez's interrogation compel[led its] conclusion that the warning was ineffective."[64] As such, the court focused on the objective surrounding circumstances of the interrogation and the efficacy of the *Miranda* warnings from the suspect's point of view—mirroring the test that Justice Souter set forth in his plurality opinion.

Furthermore, in *Pacheco-Lopez*, Judge Griffin—the sole dissenting judge—disagreed with his fellow judges, claiming, "[T]he majority clearly errs by applying the *Seibert* (plurality opinion) 'effectiveness' factors in the absence of a factual finding that police deliberately attempted to evade the safeguards of *Miranda*."[65] Judge Griffin thought that Justice Kennedy's subjective test should control and that use of objective factors to determine efficacy should not be triggered unless a subjective intent to circumvent the *Miranda* requirement was evident. Though the majority of the *Pacheco-Lopez* court was not explicit in identifying the analysis it employed for the two-stage interrogations, the dissenting judge makes his disapproval of the majority's application of objective factor analysis known.

The Sixth Circuit handed down another decision similar to *Pacheco-Lopez* one day later in its decision of *United States v. McConer*.[66] In *McConer*, the court analyzed the situation in a similar fashion to that of *Pacheco-Lopez* in that it went through

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[62] *Id.* at 422.

[63] *Id.*

[64] *Id.* at 427.

[65] *Id.* at 431 (Griffin, J., dissenting). Judge Griffin goes further to say that "the *Seibert* plurality opinion is not precedentially binding. . . . Nonetheless, the majority applies Justice Souter's opinion as if it were precedent without the restriction of Justice Kennedy's concurrence. Moreover, the majority has impermissively engaged in de novo factfinding, which is normally the province of the trial court." *Id.* at 431-32. He continues to say that even if the law was concerned with the efficacy of the warnings, the defendant clearly understood his rights under *Miranda* because he invoked his right to silence after he received the warnings. *Id.* at 432.

[66] 530 F.3d 484 (6th Cir. 2008).

several of the factors listed by the plurality opinion in *Seibert*.[67] One difference in this case, however, was that the Sixth Circuit added a one-sentence afterthought regarding Justice Kennedy's opinion concurring in the judgment.[68] The court still focused on the efficacy of the *Miranda* warnings in the middle of an interrogation (rather than the subjective intent of the officer), and in so doing, the court looked to the factors set forth by the plurality opinion to determine the defendant's understanding and the efficacy of those warnings.

B. Circuits Following Justice Kennedy's Subjective Intent of the Officer Test

The Third, Fourth, Fifth, and Eighth Circuit Courts of Appeals apply a subjective intent of the officer test when determining whether or not a *Miranda*-in-the-middle interrogation was a deliberate attempt to circumvent *Miranda* warnings. A handful of other circuits claim to be applying Justice Kennedy's concurring opinion as well, but ultimately do not apply a subjective intent of the officer analysis and instead apply an objective, totality-of-the-circumstances standard.

In *United States v. Latz*,[69] the Third Circuit applied the subjective test set forth by Justice Kennedy when it determined that the interrogating officer did not deliberately intend to circumvent the *Miranda* requirement.[70] Because the interrogating officer provided testimony exemplifying a lack of subjective intent to skirt the *Miranda* requirements, the Third Circuit quickly determined that *Seibert* did not apply and moved forward to the

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[67] *Id.* at 496-98. In fact, the court notes specifically that one factor is missing from this case making the outcome different from that of *Seibert*. The court states, "[T]he factor primarily relied upon by the *Seibert* plurality is absent here, which was that 'a reasonable person in [Seibert's] shoes would not have understood [the midstream *Miranda* warnings] to convey a message that she retained a choice about continuing to talk.'" *Id.* at 498. Hence, the statement reiterates the argument that the Sixth Circuit has focused on the objective efficacy of the *Miranda* warnings.

[68] Maybe the court took Judge Griffin's dissent in *Pacheco-Lopez* into consideration.

[69] 162 F. App'x 113 (3d Cir. 2005).

[70] *Id.* at 120. The court looked to determine "whether Kauffman's failure to provide *Miranda* warnings was a 'simple failure to administer the warnings rather than an intentional withholding that was part of a larger, nefarious plot.'" *Id.*

analysis under the voluntariness standard of *Elstad*.[71] Under Justice Kennedy's subjective test, when there is no evidence to discredit the officer's testimony about the subjective intent of the investigation, *Elstad* still governs. In *United States v. Shaird*,[72] further employing Justice Kennedy's subjective intent test, the Third Circuit inferred that the officer deliberately intended to circumvent *Miranda* because testimony of the officer "compel[led] the conclusion that he knew that *Miranda* prohibited the unwarned interrogation of the men in the van, but that he questioned them anyway in the hope that one of them would 'fess up.'"[73] The court inferred his subjective intent from his testimony, and it discredited his statement that he did not deliberately violate *Miranda*.[74] The court suppressed the incriminating statement as a result of a finding of deliberate circumvention of *Miranda* because the officer had not taken further curative measures to remedy any resultant taint of the un-Mirandized confession.[75]

Additionally, in *United States v. Mashburn*,[76] the Fourth Circuit applied a strict analysis of Justice Kennedy's concurring opinion. In *Mashburn*, police officers began to interrogate Mashburn before they realized they had failed to provide him with *Miranda* warnings.[77] Once they realized their mistake, the officers ceased questioning and then provided Mashburn with the requisite warnings.[78] The court of appeals further upheld the district court's finding that there was no evidence establishing that "the agents' failure to convey *Miranda* warnings to Mashburn was deliberate or intentional."[79] Therefore, even though a *Miranda*-in-the-middle interrogation took place, the Fourth Circuit, following Justice Kennedy's subjective intent analysis, upheld the district court's finding that the officer lacked a

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[71] *Id.*

[72] 463 F. App'x 121 (3d Cir. 2012).

[73] *Id.* at 124.

[74] *Id.* at 124-25.

[75] *Id.* at 125.

[76] 406 F.3d 303 (4th Cir. 2005).

[77] *Id.* at 305.

[78] *Id.*

[79] *Id.* at 309 ("[T]he Court finds no intent in the case on the part of [Agent] Brown. The Court can't find . . . any intent to do wrong.").

"calculated" intent to circumvent the *Miranda* requirement because of the lack of subjective evidence supporting that contention and adjudicated the case according to the *Elstad* precedent.[80]

In *United States v. Courtney*,[81] the Fifth Circuit Court of Appeals agreed that Justice Kennedy concurred in the opinion on the narrowest grounds, and as such, represented the holding of the Supreme Court in *Seibert*.[82] In *Courtney*, the suspect had been interviewed three times over the course of a full calendar year.[83] The court noted that the fact of whether or not the police officers had behaved deliberately was unimportant because the passage of time was sufficient to constitute one of the curative measures, as set forth by Justice Kennedy.[84] However, the court went further to put this situation into the perspective of "a reasonable person" and noted that the *Miranda* warnings ultimately provided seemed to function effectively.[85] This raises concern as to the Fifth Circuit's application of *Seibert*, however, because Justice Souter and the plurality were much more concerned with the efficacy of the warnings than was Justice Kennedy. Even though the Fifth Circuit claims to apply Justice Kennedy's analysis, application is somewhat blurry.

Furthermore, in *United States v. Nunez-Sanchez*,[86] the Fifth Circuit stated that there was "no evidence of a deliberate attempt to employ a two-step strategy."[87] The court does, however, continue to say that the surrounding circumstances indicate that both stages of the interrogation were voluntary.[88] Therefore, the Fifth Circuit, while possibly on the border between a strict analysis of Justice Kennedy and the creation of a hybrid combination of Justice Kennedy's opinion concurring in the judgment and Justice Souter's plurality opinion, as the circuit

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[80] *Id.*; *see also* Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment).

[81] 463 F.3d 333 (5th Cir. 2006).

[82] *Id.* at 338.

[83] *Id.* at 335-36.

[84] *Id.* at 339.

[85] *Id.*

[86] 478 F.3d 663 (5th Cir. 2007).

[87] *Id.* at 668.

[88] *Id.* at 668-69.

stands today, it seems to be leaning more towards an application of Justice Kennedy's subjective intent of the officer test, with concern for *Miranda* efficacy as an afterthought.

In the Eighth Circuit, the Circuit Court of Appeals also applied Justice Kennedy's subjective intent of the officer test when determining deliberation of violations of *Miranda*. For example, in *United States v. Ollie*,[89] the Eighth Circuit Court of Appeals recognized the difficulties that could come with application of Justice Kennedy's subjective intent–based test by noting that "determining the officer's state of mind at the time of the interrogation can be difficult."[90] The Eighth Circuit, however, continued to apply the subjective intent test despite that difficulty. In *United States v. Torres-Lona*,[91] the defendant was stopped because officers believed he was a member of a local gang.[92] The court of appeals upheld the findings of the lower district court on clear error review that the officer "did not believe he was required to administer a *Miranda* warning when he took Torres-Lona into custody."[93] The Eighth Circuit applies a true form of Justice Kennedy's subjective intent test by giving great deference to the district court for its fact-finding capabilities and will only overturn a finding of subjective and "calculated" intent to circumvent *Miranda* in the event of clear error.[94]

C. Circuits Claiming to Follow Justice Kennedy but Actually Creating a Hybrid Test Resembling the Plurality's Objective Factor Test

In his opinion concurring in the judgment, Justice Kennedy articulates a test structured around determining the subjective intent of the officer and whether or not he had intention to circumvent the *Miranda* requirement. Some circuit courts of appeals, like the Second, Ninth, and Eleventh, recognize that

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[89] 442 F.3d 1135 (8th Cir. 2006).

[90] *Id.* at 1142.

[91] 491 F.3d 750 (8th Cir. 2007).

[92] *Id.* at 753.

[93] *Id.* at 758.

[94] Subjective analyses usually lend themselves to a higher standard of deference to the trial court's findings. *See infra* Part V.A.

under the *Marks* rule[95], Justice Kennedy's opinion is technically controlling as it concurs in the judgment on the narrowest grounds. These courts of appeals, however, do not correctly apply the subjective intent of the officer test as articulated by Justice Kennedy. Instead, they apply the test to resemble the objective factor test from Justice Souter's plurality opinion. Essentially, these circuits are drawing on Justice Souter's objective factors (which were designed for making efficacy determinations of *Miranda* warnings from a suspect's point of view) to evaluate the subjective intent of the officer under Justice Kennedy's approach.

The Second Circuit, in *United States v. Capers*,[96] noted that Justice Kennedy's opinion was controlling under the *Marks* rule[97], but the judges went further to say that whether or not an officer deliberately circumvented the *Miranda* requirement should be judged by the totality of the circumstances.[98] In *Capers*, police officers set up a sting operation in order to catch a postal worker stealing money orders.[99] Once the alarm was triggered and the officers realized that the money order was being stolen, the officers handcuffed Capers and began asking him questions without first providing *Miranda* rights.[100] Even though the officer testified that he did not provide the *Miranda* warnings from the outset because he wanted to track down the evidence of the money orders,[101] the Second Circuit Court of Appeals claimed that the officer's reasoning was not "legitimate" and that "[t]here is no exception to *Miranda* that allows a delay in giving *Miranda* warnings in order to preserve evanescent evidence."[102]

The court later identified a totality-of-the-circumstances test for determining deliberation as "guided by, but not limited to, the

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[95] *See infra* Part III.A.

[96] 627 F.3d 470 (2d Cir. 2010).

[97] *See infra* Part III.A.

[98] *Id.* at 479.

[99] *Id.* at 472.

[100] *Id.* at 472-73.

[101] *Id.* at 473. Another individual was also involved in the stealing of the money orders with Capers. *See id.* at 472.

[102] *Id.* at 480. The court went on to say, "The only legitimate reason to delay intentionally a *Miranda* warning until after a custodial interrogation has begun is to protect the safety of the arresting officers or the public—neither of which was at issue [in *Capers*]." *Id.* at 481.

five factors identified by the plurality in *Seibert*."[103] In fact, the dissenting judge in *Capers* expressed his concern that the majority of the court "undermin[ed] Justice Kennedy's controlling opinion in *Seibert* and replac[ed] it with the objective 'effectiveness' test proposed by the non-controlling *Seibert* plurality opinion."[104] The court made a similar analysis in *United States v. Moore*[105] by stating that they would "use the plurality's five factors not to weigh the effectiveness of the later *Miranda* warnings, but to shed light on the detectives' intent."[106] The Second Circuit seems to create a hybrid test by substituting the five objective factors set forth by Justice Souter in the plurality opinion for the subjective intent of the officer test set forth by Justice Kennedy in his opinion concurring in the judgment in *Seibert*.

The Ninth Circuit Court of Appeals follows the same type of rationale as the Second Circuit. The Ninth Circuit, in *United States v. Williams*,[107] held that in order to determine whether a police officer made a "calculated" attempt to circumvent the *Miranda* requirement, "courts should consider whether objective evidence and any available subjective evidence, such as the officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning."[108] The court further stated that objective evidence that should be considered includes "timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements."[109] The type of objective evidence that the court is

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[103] United States v. Williams, 681 F.3d 35, 44 (2d Cir. 2012). In *Williams*, the Second Circuit again identified that Justice Kennedy's concurring opinion is controlling law, but further said that they are following the *Capers* test, which "sets forth the general test that in order to determine deliberateness 'a court should review the totality of the objective and subjective evidence surrounding the interrogations.'" *Id.* at 43 (citing *Capers*, 627 F.3d at 479).

[104] *Capers*, 627 F.3d at 485 (Trager, J., dissenting). The dissent goes further to attack the majority court for applying a de novo standard of review. *Id.* at 489 ("Having recognized that Justice Kennedy's concurring opinion in *Seibert* controls, this case should be easily resolved based entirely on the district court's factual findings.").

[105] 670 F.3d 222 (2d Cir. 2012).

[106] *Id.* at 230.

[107] 435 F.3d 1148 (9th Cir. 2006).

[108] *Id.* at 1158.

[109] *Id.* at 1159.

encouraging—and perhaps instructing—district courts to consider is pulled directly from the plurality opinion authored by Justice Souter.[110] Even though the court noted that "Justice Kennedy envisioned a deliberateness test that focuses on intent,"[111] the opinion goes on to discuss the totality of the circumstances, objective factors, and the idea that most reasons for delaying *Miranda* warnings will be illegitimate.[112]

In a case handed down one year later, the Ninth Circuit again used a totality-of-the-circumstances analysis to determine whether or not an investigator deliberately circumvented the *Miranda* requirement, but the court used a clear error standard of review upon appeal.[113] This clear error standard of review creates even more confusion, however, because usually an objective totality-of-the-circumstances test should receive de novo review as a matter of law, whereas a subjective test would receive clear error review as a matter of fact.

The Eleventh Circuit joined the Second and Ninth Circuits in applying a hybrid test of both Justice Kennedy's subjective test and Justice Souter's objective analysis when determining if there has been a two-phase interrogation "used in a calculated way to undermine *Miranda*."[114] In *United States v. Street*,[115] the Eleventh Circuit Court of Appeals, after claiming that Justice Kennedy's opinion concurring in the judgment was the narrowest concurrence and representative of the Court's holding in *Seibert*, went further to say that determination by totality of the

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[110] In his plurality opinion, Justice Souter lays out the following factors to use when determining efficacy of *Miranda* warnings:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Missouri v. Seibert, 542 U.S. 600, 615 (2004) (Souter, J., plurality opinion).

[111] *Williams*, 435 F.3d at 1158.

[112] *Id.* at 1159 ("[T]here is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed. Instead, the most plausible reason for the delay is an *illegitimate* one, which is the interrogator's desire to weaken the warning's effectiveness.").

[113] United States v. Narvaez-Gomez, 489 F.3d 970, 974 (9th Cir. 2007).

[114] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

[115] 472 F.3d 1298 (11th Cir. 2006).

circumstances is desired when there has been a "question first" tactic used.[116] Thus, when analyzing the deliberateness of the two-phase interrogation in *Street*, the court focused on the objective facts surrounding the interrogation, as opposed to the subjective intent of the officer.[117]

Keeping in line with its own precedent, the Eleventh Circuit again used a totality-of-the-circumstances test when determining deliberation four years later in the case of *United States v. Sagoes*.[118] The court of appeals ultimately determined officer intent under the totality of the circumstances, which included "timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements."[119] After looking at objective factors, the *Sagoes* court determined that the facts of the case did not lend themselves to a *Seibert* analysis, as the detective did not have a deliberate decision to circumvent the *Miranda* requirement.

D. Circuits that Have Yet to Determine Which Seibert *Opinion to Follow*

Even though *Missouri v. Seibert* was handed down almost a decade ago, some circuit courts have yet to firmly identify which test to apply when faced with facts and situations involving *Miranda*-in-the-middle interrogations.

The First Circuit Court of Appeals has yet to make a definitive ruling regarding the applicable test from *Seibert*. In the 2010 case of *United States v. Jackson*,[120] police were searching for guns that they believed were illegally traded for drugs.[121] When the police arrived at Jackson's home, they asked him where the guns were located, to which Jackson responded that they were in a

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[116] *Id.* at 1314.

[117] *Id.* More specifically, the court looked at the fact that the interrogating agent had given Street an incomplete and unfinished version of the *Miranda* warnings. *Id.* From this objective evidence, the court concluded that there was no deliberate attempt to circumvent the *Miranda* requirement. *Id.*

[118] 389 F. App'x 911 (11th Cir. 2010) (per curiam).

[119] *Id.* at 914 (quoting *Street*, 472 F.3d at 1314) (internal quotation marks omitted).

[120] 608 F.3d 100 (1st Cir. 2010).

[121] *Id.* at 101.

cereal box in the apartment refrigerator.[122] The police did not provide Jackson with his *Miranda* rights until he was at the police station.[123] On appeal, the First Circuit decided not to articulate a controlling test because they found that the statements would be admissible under both subjective and objective tests set forth in *Seibert*.[124]

Furthermore, two years later, in 2012, the First Circuit still chose not to articulate which opinion in *Seibert* they identify as controlling. In *United States v. Widi*,[125] the court explicitly noted that it "has not settled on a definitive reading [of *Seibert*]," but the judges went on to hold that, under the facts of that case, "the statements . . . at issue pass[ed] either version of the *Seibert* test."[126] Hence, when the First Circuit Court of Appeals has been faced with a two-phase interrogation, the court often applies both tests and reaches the same outcome—reducing the need to articulate a specific controlling test. This pattern will likely continue until application of the two tests will reveal a different outcome that is dependent on the test applied.

The Seventh Circuit Court of Appeals, like the First, has yet to determine which *Seibert* opinion is applicable. This circuit, however, focuses its reasoning on an interpretation of *Marks* that requires a "common denominator"[127] before a plurality opinion can be viewed as the legitimate holding of the Court. In *United States v. Heron*,[128] the Seventh Circuit stated that the *Marks* rule regarding plurality opinions was inapplicable to *Seibert*.[129] The court specifically stated that when "a concurrence that provides the fifth vote necessary to reach a majority does not provide a 'common denominator' for the judgment, the *Marks* rule does not help to resolve the ultimate question."[130] In *Heron*, because Justice Kennedy was likely the only justice who advocated a subjective intent of the officer test for *Miranda*-in-the-middle

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[122] *Id.*
[123] *Id.* at 102.
[124] *Id.* at 103-04.
[125] 684 F.3d 216 (1st Cir. 2012).
[126] *Id.* at 221.
[127] *See infra* note 142 and accompanying text.
[128] 564 F.3d 879 (7th Cir. 2009).
[129] *Id.* at 884.
[130] *Id.*

interrogations, the court determined that Justice Kennedy's opinion could not, as a whole, be taken "as the narrowest ground on which a majority of the Court could agree."[131] Therefore, because at least seven other justices did not agree that a subjective intent test should govern two-stage interrogations,[132] the Seventh Circuit argued that labeling Justice Kennedy's opinion as controlling would be difficult. Instead, the court, like the First Circuit, applied both tests to the facts of *Heron* and found that both tests yielded the same result—that Heron's statements were admissible.[133] In May of 2012, the Seventh Circuit again chose not to explicitly articulate which *Seibert* analysis was controlling.[134]

The Tenth Circuit falls in stride with the Seventh and the First Circuits in that it too has yet to articulate which *Seibert* analysis is controlling. In *United States v. Carrizales-Toledo*,[135] the court, like the Seventh Circuit, focused on the same lack of a "common denominator."[136] Here, the court interprets *Marks* as producing a holding from a plurality opinion "only when one opinion is a logical subset of other, broader opinions."[137] The Tenth Circuit, like the Seventh, argues that a majority of the court rejected Justice Kennedy's opinion concurring in the judgment because of his subjective, intent-based test. However, in *Carrizales-Toledo*, the court decided that identifying a particular

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[131] *Id.* ("Justice Kennedy's intent-based test was rejected by both the plurality opinion and the dissent in *Seibert*.").

[132] Justice Breyer made an exception for adding a "fruits" test to the *Miranda* doctrine when the failure to warn was "in good faith." *See* Missouri v. Seibert, 542 U.S. 600, 617 (2004) (Breyer, J., concurring). This suggests that Justice Breyer might comply with a subjective-intent test.

[133] *Heron*, 564 F.3d at 885.

[134] In *United States v. Johnson*, 680 F.3d 966 (7th Cir. 2012), the Seventh Circuit admitted that they had yet to determine which *Seibert* test was applicable because the result would be the same under both tests. *Id.* at 978-79 ("As in *Lee*, we need not determine which test applies at this juncture because the facts of this case do not meet the requirements of either test.").

[135] 454 F.3d 1142 (10th Cir. 2006).

[136] *Id.* at 1151.

[137] *Id.* One could argue, however, that Justice Kennedy's opinion is indeed a subset of a larger and broader opinion, namely that of Justice Souter and the plurality opinion. *See infra* Part III.A.ii.

test was not necessary, noting that the result would not be dependent on the test articulated.[138]

A few years later, the Tenth Circuit, in *United States v. Crisp*,[139] while still failing to clearly identify the applicable *Seibert* test, applied a standard of clear error review.[140] This standard of review, while not conclusive, is indicative of a subjective approach conceiving of the issue as a question of fact for trial courts that an appellate court will not overrule absent clear error. An objective test, however, would likely receive lesser deference on appeal and would receive de novo review. As such, the Tenth Circuit, while claiming that they are not choosing an applicable test just yet, applied a standard of review that is most conducive to Justice Kennedy's subjective, intent-based test. Although it may be too soon to determine exactly which direction the circuit is going, this standard of review suggests adoption of a Justice Kennedy subjective-intent analysis or a hybrid approach.

III. ARGUMENT

A. Justice Kennedy's Opinion Is Binding Under the Marks *Rule*

1. Justice Kennedy's Opinion Is the Narrowest Ground of Concurrence

In *Missouri v. Seibert*,[141] five members of the United States Supreme Court agreed that Patrice Seibert's confession, even though made after receiving requisite *Miranda* warnings, should have been suppressed. The facts of *Seibert* involved an intentional *Miranda*-in-the-middle interrogation designed to circumvent the *Miranda* requirement. The Court, however, did not have five Justices who agreed on the precise rationale as to why the confession should be excluded. As a result, the Court handed down a plurality opinion, with a total of four Justices signing on to

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[138] *Carrizales-Toledo*, 454 F.3d at 1151 ("This case does not require us to determine which opinion reflects the holding of *Seibert*, however, since Mr. Carrizales-Toledo's statements would be admissible under the tests proposed by the plurality and by the concurring opinion.").

[139] 371 F. App'x 925 (10th Cir. 2010).

[140] *Id.* at 929.

[141] 542 U.S 600 (2004).

Justice Souter's opinion, leaving Justice Kennedy solely concurring in the result.

In *Marks v. United States*, the Supreme Court stated that where there is no majority decision to establish legal precedent, the holding of the Court would be reflected in the opinion of the Justices who concurred in the judgment on the narrowest grounds.[142] In *Marks*, the Supreme Court noted that even though the *Memoirs*[143] Court only had a three-member plurality, that plurality still set forth binding legal precedent because it was concurring on the narrowest grounds because it was a subset of the broader rule derived from the other opinions concurring in the judgment.[144] Applying the *Marks* rule to the plurality decision of *Seibert*, and according to several Circuit Courts of Appeals, Justice Kennedy's opinion concurring in the judgment fits that narrow mold.

The Fourth Circuit Court of Appeals explained that "[u]nlike the plurality opinion which announced a multi-factor test that would apply to both intentional and unintentional two-stage interrogations,"[145] Justice Kennedy's opinion in *Seibert* was narrower in that his test would apply "only in the infrequent case in which the two-step interrogation technique was used in a *calculated* way to undermine the *Miranda* warning."[146] In other words, only when police officers deliberately provide *Miranda* warnings in a way that undermines their purpose will analysis of admissibility of the defendant's statement escape the test established in *Elstad* and move to the *Seibert* test, requiring that curative measures be taken before the statement can be rendered

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[142] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

[143] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen., 383 U.S. 413 (1966).

[144] *Marks*, 430 U.S. at 193-94. In other words, the *Marks* rule states that in order to find the controlling law from a plurality decision, the lower courts should look to the narrowest ground of concurrence to determine where people agree. That smaller, narrower portion on which the majority of the court will agree will become binding legal precedent.

[145] United States v. Mashburn, 406 F.3d 303, 308 (4th Cir. 2005).

[146] *Id*. at 308-09 (quoting *Seibert*, 542 U.S. at 616) (emphasis added).

admissible.[147] If laid out in a Venn diagram, Justice Kennedy's subjective test effectively coincides and overlaps with the plurality opinion when there has been an intentional runaround of the *Miranda* requirement—making his test narrower than the broad test proposed by the plurality that would apply to *all Miranda*-in-the-middle interrogations.

2. Justice Kennedy's Opinion Is a Subset of the Plurality Opinion

In addition to using the language of the "narrowest grounds" of concurrence, courts also analyze the *Marks* rule by asking whether a concurrence's rationale is a "subset" of a plurality's rationale. Justice Kennedy's opinion is essentially a subset of the test set forth by Justice Souter. In his plurality opinion, Justice Souter's five-factor test applies to "both intentional and unintentional two-stage interrogations."[148] Thus, any two-stage interrogation would face the factor test proposed by the plurality, and the court would not take into consideration the reasoning behind it. Because all *Miranda*-in-the-middle interrogations would be subjected to the objective factor test, deliberate two-stage interrogations—Justice Kennedy's concern—will also fall into the plurality's broad interpretation and would be subjected to the objective test. The plurality's broader criteria would encompass and contain the deliberate interrogations, effectively making Justice Kennedy's test a smaller piece of the plurality's larger idea.[149]

Justice Kennedy's exemplar curative measures, due to the indication that they are not exhaustive, closely resemble the five-factor test proffered by Justice Souter as well. Justice Kennedy's test, however, is narrower because these curative measures will only be triggered in the case of deliberate and intentional *Miranda* violation and circumvention.[150] The five-factor test from the plurality opinion, contrarily, will be used whenever there has been

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[147] *Seibert*, 542 U.S at 622 (Kennedy, J., concurring in the judgment).

[148] *Id.* at 621-22.

[149] Imagining a Venn diagram for this subset analysis works just like the Venn diagram would for determining the narrowest ground of concurrence in the plurality. *See* discussion *supra* p. 1055.

[150] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

any type of *Miranda*-in-the-middle interrogation, for whatever reason, whether it be an unintentional mistake or an intentional attempt to obtain an unlawful, unwarned confession. As a result, when faced with a two-stage interrogation, courts could inevitably get to the curative measures that resemble the factors laid forth by the plurality if there is a deliberate violation of *Miranda*. However, they would only be able to apply those factors in one specific type of *Miranda*-in-the-middle interrogation—not any and all of them.

Again, this goes back to Justice Souter's subjection of all *Miranda*-in-the-middle interrogations to five objective factors, whereas Justice Kennedy would only subject "calculated" *Miranda* violations to his curative measures.[151] Both Justice Kennedy and Justice Souter want to look at the events surrounding the interrogation, but they differ as to when they need to look at them. Justice Kennedy's idea that objective curative measures should only be triggered when there has been an intentional violation of *Miranda* is narrower than Justice Souter's test because the plurality factors will be triggered any time there is a two-stage interrogation.

3. Justice Kennedy's Opinion Controls Under the Common Denominator Analysis

Courts also look for a "common denominator" when analyzing a concurrence under the *Marks* rule. Some circuits, as predicted, have not adopted the Kennedy opinion as controlling quite as readily as other circuits because they do not see a "common denominator" among the Justices in the majority. The Tenth Circuit, for example, stated that the lack of a "common denominator" between the opinions makes the *Marks* rule difficult to apply to *Seibert*.[152] The court reasoned that because a majority of the Court rejected Justice Kennedy's subjective intent of the officer test, it would be troubling to conclude that the Kennedy opinion is binding and controlling precedent when likely seven or

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[151] *Id.*

[152] United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) (internal quotation marks omitted).

eight other justices disagree with his approach.[153] The Seventh Circuit expressed similar sentiments in *United States v. Heron* and decided that the *Marks* rule was not applicable to *Seibert* due to the lack of a majority of Justices agreeing to a subjective intent analysis.[154] The court expressed this concern, however, just a few short years after expressly and explicitly holding that Justice Kennedy's concurrence was indeed the narrowest opinion and, as a result, controlling.[155]

Although the Tenth and Seventh Circuits raise plausible arguments concerning a lack of a majority conceding to a subjective intent analysis test, the arguments are not well founded. These circuits seem to focus more on the subjective intent of the officer test rather than focusing on the true common denominator between the plurality and concurring opinion—which is that objective curative measures should be applied when there has been a calculated decision to circumvent the *Miranda* warnings. As previously discussed, the common denominator within the majority of the Court can be found where the opinions intersect and overlap. The overlap between the opinions includes the idea that subjective and calculated decisions to conduct *Miranda*-in-the-middle interrogations to avoid warning a suspect should be subjected to objective curative measures to ensure the efficacy of the warnings received.

Therefore, there actually is a common denominator between the two opinions that comprise a majority of the Court. The opinions share the common denominator that when law enforcement officials have made a deliberate decision to withhold *Miranda* rights until after a defendant has confessed, both Justice Souter and Justice Kennedy would look to objective circumstances

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[153] *Id.*; *see also* discussion of Justice Breyer's concurring opinion *supra* Part I.C.ii. The fact that Justice Breyer contemplated an exception when the failure to warn was "in good faith" insinuates that he might agree with a subjective intent analysis, but this is not conclusive. *See supra* Part I.C.ii.

[154] United States v. Heron, 564 F.3d 879 (7th Cir. 2009). The Seventh Circuit stated, in *Heron*, that it was "a strain at best to view [Kennedy's] concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree." *Id.* at 884.

[155] The Seventh Circuit originally stated that Kennedy's opinion was controlling in *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004). The court claimed that "*Elstad* appears to have survived *Seibert*," which insinuates that Kennedy's opinion—which carved out an exception to *Elstad* for situations like *Seibert*—is controlling. *Id.*

to determine whether or not the *Miranda* warnings ultimately rendered were effective. Moreover, a common denominator between a majority of the Court and the dissenting justices has never been a requirement in order to make valid precedent.

B. Justice Kennedy's Opinion in Seibert *Is Good Public Policy*

1. A Narrow Remedy for a Narrow Problem: Deliberate Circumvention of *Miranda*

Justice Kennedy's opinion in *Seibert* is not only controlling under all of the approaches to the *Marks* rule, but it is also the more desirable test to use when determining admissibility of statements made in a *Miranda*-in-the-middle interrogation. *Elstad* is a logical and sound legal precedent, and Justice Kennedy's test accords it the deference it deserves. In *Elstad*, the Supreme Court was concerned about protecting law enforcement's ability to prevent and punish criminal activity.[156] Thus, the Court held that the admissibility of an incriminating statement made by a defendant should turn on whether or not the defendant gave that statement voluntarily.[157] If the defendant voluntarily gave a confession, that confession should be admissible so long as the police did not use improper or coercive techniques to elicit it.[158] Justice Kennedy sought to apply the *Elstad* test to two-stage interrogations, just like Justice O'Connor and the dissent, but he only wanted to apply the *Elstad* test when there was an absence of calculated motive to circumvent *Miranda*.[159] Justice Kennedy's subjective intent test targeted exactly the "deliberately coercive or improper tactics" that Justice O'Connor and the majority

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[156] Oregon v. Elstad, 470 U.S. 298, 312 (1985). The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunized a suspect who responded to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. "This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Id.*

[157] *Id.* at 318.

[158] *Id.* at 314. In *Elstad*, Justice O'Connor opined that the statement should be admissible provided that it was voluntary and that no "deliberately coercive or improper tactics" had been used to obtain it. *Id.* These tactics are arguably those that were used in *Seibert*.

[159] Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring).

discussed and predicted in *Elstad* that would render a second warned statement invalid.[160]

The problem in *Seibert* concerned police officials who followed a widespread protocol where officers were taught to interrogate a suspect without *Miranda* warnings, obtain a confession, take a break, Mirandize the suspect, and obtain the same confession again. This *Miranda*-in-the-middle strategy was used because police found the loophole in the *Miranda* doctrine that *Elstad* left open and used it to manipulate the requirement to their advantage. Justice Kennedy, in *Seibert*, responded specifically to this strategy of *Miranda* abuse by police personnel (abuse that was arguably predicted in *Elstad*), all while holding the principles of *Elstad* firm.

He distinguished the intentional interrogation, which he termed "deliberate," from the unintentional two-step interrogation that could follow from a "rookie mistake" or another extenuating circumstance.[161] As a result, his opinion was narrowly tailored to follow the *Elstad* precedent, while solving the specific and narrow issue of *Miranda* manipulation by police evident in *Seibert*. By making *Seibert* an exception to the preexisting *Elstad*, Justice Kennedy respected judicial precedent while closing the loophole left behind by an otherwise sound precedent. According to Justice Kennedy, *Elstad* is still controlling as long as there has been no subjectively deliberate violation of *Miranda* rights. His test creates a narrow exception to *Elstad* for this specific and exact problem that the officers in *Seibert* were exploiting.

2. Preserving *Elstad*'s Rejection of the Fruit-of-the-Poisonous-Tree Analysis

In *Oregon v. Elstad*, the Supreme Court had an opportunity, as it had many times before, to expand and broaden the scope of the *Miranda* doctrine and its requirements. Resisting the opportunity, the Court kept the *Miranda* requirement narrow by deciding not to adopt a "fruit of the poisonous tree" or a "cat out of the bag" theory with regard to investigations with *Miranda* rights

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[160] *Elstad*, 470 U.S. at 314; *see also supra* note 154.

[161] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

inserted in the middle.[162] This was done, and rightfully so, to further protect and promote legitimate law enforcement interest in crime prevention and control by not punishing officers for innocent mistakes that could have lead to a voluntary incriminating statement by the defendant. Applying a fruit-of-the-poisonous-tree analysis to the *Miranda* doctrine would have not only reverted back from the established line of precedent that the Court had been building, but also, it would have made criminal law enforcement's ability to obtain legitimate confessions much more difficult and sensitive.

In *Seibert*, even though the plurality factors were not a per se "fruits" test, Justice Breyer wrote separately to say that he agreed with the plurality's reasoning because "in practice [it] will function as a 'fruits' test."[163] Justice Kennedy's subjective intent of the officer test, on the other hand, did not revive this implicit or look-alike "fruit of the poisonous tree" test under *Miranda*. Justice Kennedy's test, by creating a narrow exception to *Elstad*, does not inhibit or further impede police officers from obtaining and using incriminating statements when there has been a two-stage interrogation—as long as the questioning was not deliberately designed in a manner to maximize confessions obtained. By preserving the Supreme Court's previous rejection of the "fruits" test in *Miranda*, Justice Kennedy's subjective intent of the officer test rejects the implicit "fruits" test and promotes legitimate and honest law enforcement practices while helping the officers catch criminals, but punishing them if they manipulate the system with the specific and narrow technique of *Miranda*-in-the-middle.

3. Preventing Confusion in the Application of *Miranda*

Justice Souter's test, in contrast with Justice Kennedy's, seems to implicitly overrule *Elstad* without expressly acknowledging it. By subjecting every *Miranda*-in-the-middle interrogation to an objective, factor analysis in order to determine efficacy of *Miranda* warnings, the plurality opinion seems to undermine *Elstad*'s treatment of two-stage interrogations by making it either irrelevant or moot. If the plurality test is

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[162] *Elstad*, 470 U.S. at 307.

[163] *Seibert*, 542 U.S. at 618 (Breyer, J., concurring).

followed, it will become difficult to distinguish when an objective inquiry into the efficacy of the warnings from *Seibert* is required or when determination of the voluntariness of the incriminating information analysis from *Elstad* is required. By not explicitly overruling *Elstad*, the plurality opinion effectively creates two separate and competing tests for *Miranda*-in-the-middle interrogations.

Prior to *Seibert*, *Elstad* was the general rule applicable to two-stage interrogations in that it applied to all *Miranda*-in-the-middle investigations in which admissibility of pre- and post-warned statements were evaluated by the voluntariness of the confession given. In *Seibert*, on the other hand, Justice Souter wanted to apply his *Seibert* factor test to all two-step questioning procedures. In so doing, the *Elstad* analysis will either fall by the wayside or will compete with *Seibert* for application to *Miranda*-in-the-middle situations. As a result, determining which test to apply would be difficult and would likely depend on a case-by-case basis, if any differentiation could be made at all. Having two competing and distinguishable tests for the same type of problem leads to undesirable results, as it can create a lack of uniformity in application and inconsistent results dependent upon the jurisdiction in which the case may fall. The plurality opinion, therefore, is incomplete in that it creates a new test without leaving instructions as to what to do with the old one.

Justice Kennedy's test, as previously noted, is specifically tailored to correct the problem of police manipulation of *Miranda* rights, as evident in *Seibert*. He makes a small exception to the otherwise still valid *Elstad* voluntariness approach when there has been intentional conduct on behalf of law enforcement to give *Miranda* the runaround. Justice Kennedy's test follows and upholds judicial precedent while correcting the specific problem prevalent in *Seibert*. His test does not create competition with *Elstad*, as it will only come into play in that narrow exception when police officers have deliberately tried to avoid the *Miranda* requirement. Justice Kennedy fills in the gap left by *Elstad* by carving out a narrow exception to it.

4. Balancing Respect for the Rights of Arrestees with Recognition that Police Must Have Authority to Combat Crime

In addition to the technical aspects left unfinished or unanswered in the plurality opinion, the trend toward keeping the *Miranda* requirement narrow will yield desirable results for criminal law enforcement. Prior to *Seibert*, as evident in *Tucker*, *Elstad*, and *Patane*, the Supreme Court had been reluctant to extend and expand the *Miranda* requirements and exclusions stemming from those requirements so that proper police conduct would not be inhibited or prevented. Both *Tucker* and *Patane* indicated that even though an unwarned statement given by a suspect should be suppressed, evidence derived from the statement is not, by nature of the un-Mirandized confession, automatically excluded from evidence.[164] In fact, the Court seems to condone effective law enforcement use of unwarned information as long as the information was not obtained in a deliberate or coercive manner.

By keeping *Miranda* narrow, police officers will be better able to use confessions obtained to combat crime as long as they were not obtained in a willful and calculated violation of a defendant's *Miranda* rights. Using Justice Souter's objective analysis will require that all *Miranda*-in-the-middle investigations undergo a heightened objective scrutiny (when compared to the voluntariness standard that was previously prevalent in *Elstad*) to determine whether or not a suspect was appropriately advised of his rights. This test can lead to suppression of confessions lawfully obtained and freedom for criminals who voluntarily and lawfully admitted their guilt.

Suppose, for example, that in the heat of the moment, a young police officer is frantically trying to secure evidence from his first arrest by asking where any drugs are hidden and accidentally fails to notify a suspect of his *Miranda* rights. If he returns to the defendant within five minutes, Mirandizes him, and obtains the same incriminating evidence, the defendant will have a very strong argument that the small lapse of time between interrogations, the continuity of the police personnel, and the fact

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[164] *See supra* notes 19, 30 and accompanying text.

that both series of questions were asked in the same location rendered the warnings ineffective under a reasonably objective suspect's point of view. Under Justice Souter's test, the subjective intent of the officer here—that it was his first arrest and that he was frantically trying to locate narcotics—will not be factored into the equation. As a result, the otherwise guilty criminal may have the confession suppressed due to the objective test's failure to account for officer logic and reasoning.

This type of result leads to the unintended consequence of failing to take into account an officer's subjective intent. As a society, people want guilty criminals to be caught, punished, and locked away. Citizens, though, do not want civil liberties violated. Allowing the courts to review the subjective intent of the officer will keep fewer lawful confessions from falling through the cracks of the criminal justice system and will allow police to better control and prevent criminal activity. As Justice O'Connor originally stated in *Oregon v. Elstad*, "[A]dmissions of guilt by wrongdoers, *if not coerced*, are inherently desirable."[165] As long as an officer is not manipulating the *Miranda* system and effectively deceiving the suspect, admissions of guilt should be admissible.

Justice Souter's approach will suppress more confessions and will make crime control a much more difficult process. As previously explained, if an officer's subjective intent is not taken into account, an accidental two-stage interrogation due to a rookie mistake or a mistake in judgment can lead to suppression of an otherwise valid confession of a guilty criminal. The confession ultimately obtained will still receive appropriate scrutiny under *Elstad* and other judicial precedent concerning *Miranda* efficacy, like *Prysock*,[166] if the officer was deemed to have unintentionally violated the *Miranda* warnings. Concern about the suspect's point of view should not hinder acceptance of Justice Kennedy's opinion because his reasoning does not fail to provide for inquiry into the voluntariness aspect of the confession from the suspect's point of view contingent upon an unintentional *Miranda* violation.

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[165] *Elstad*, 470 U.S. at 305 (emphasis added).

[166] California v. Prysock, 453 U.S. 355 (1981) (per curiam).

IV. RESPONSES TO COUNTERARGUMENTS

A. Justice Kennedy's Subjective Test Is Warranted in These Circumstances Given the Narrowness of the Problem

Justice O'Conner, in her dissent in *Seibert*, agreed with the plurality's decision against adoption and application of a subjective intent of the officer test in criminal interrogations.[167] The dissenting justices disagreed with the intent-based test proposed by Justice Kennedy, reasoning that the subjective intent of the officer would not change the voluntariness, or lack thereof, from the suspect's point of view when providing a confession.[168] In fact, Justice O'Conner said that "[a] suspect who experienced exactly the same interrogation as Seibert, 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."[169] The dissenters, thus, argued that the subjective intent of the interrogating officer had no effect on the voluntariness of a suspect's ultimate confession and should not be taken into consideration.[170] The subjective intent of the officer, Justice O'Connor argued, would not change the ultimate experience of the suspect and, thus, could not have a bearing on the outcome and end result of the interrogation session.[171] However, contrary to what Justice O'Connor suggests, due to the specific and narrow nature of the problem evident in *Seibert*, the solution to the *Miranda* manipulation should be equally narrow and specific.

Bad faith conduct on behalf of the police is especially undesirable, and the small and narrow subjective test proposed by Justice Kennedy will ferret out those specific acts of bad faith and deliberate culpability on behalf of police officers. The issue evident in *Seibert* involved a systematic violation of suspects' *Miranda* rights. Police units were deliberately developing protocol that enabled, and in fact, encouraged circumvention of the *Miranda*

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167 Missouri v. Seibert, 542 U.S. 600, 624 (2004) (O'Connor, J., dissenting).

168 *Id.*

169 *Id.* at 625.

170 *Id.*

171 *Id.*

requirement when interrogating suspected criminals.[172] This deliberate attempt to "cheat" the *Miranda* system by designing a two-step interrogation stratagem is such a specific problem that a specific solution was warranted. Use of Justice Kennedy's narrow subjective test targets this nuanced and specific problem that police departments were creating while promoting and furthering crime control with proper police interrogation strategies. Additionally, Justice Kennedy's test in *Seibert*, admittedly, will be "infrequent," as most police units hopefully do not have this sort of unlawful protocol in place.[173] Justice O'Conner's argument that *Elstad* should control all two-stage interrogations, consequentially, will likely be the end result in most cases since most will not render the subjective intent of the officer subject to a *Seibert* analysis.

Justice O'Conner further argued that requiring trial courts to set out "on an expedition into the minds of police officers" would be an inappropriate use of judicial economy and resources.[174] However, determining subjective intent is not foreign to trial courts, as other tests require this exploration into the minds of an individual as well. In fact, in *Hernandez v. New York*,[175] a trial judge reviewed a prosecutor's subjective intent in determining whether or not a peremptory strike was used discriminatorily when selecting a jury during voir dire, and the determination of the trial judge is subjected to review for clear error on appeal.[176] Even though *Hernandez* leaves open a claim for Equal Protection in the event that a prosecutor subjectively uses a peremptory strike against a juror on the basis of race,[177] analysis into the subjective intent of the prosecutor can be analogous to the inquiry into the subjective intent of the police officer when conducting the interrogation, as equal protection claims can apply to both policing and trial procedure. While determining the credibility of the prosecutor or officer can potentially be challenging, if either offers a legitimate or valid reason for behavior, a judge can review the

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[172] *Id.* at 604 (Souter, J., plurality opinion).

[173] *Id.* at 622 (Kennedy, J., concurring in the judgment).

[174] *Id.* at 626 (O'Connor, J., dissenting).

[175] 500 U.S. 352 (1991).

[176] *Id.* at 365-67 (Kennedy, J., plurality opinion).

[177] Such preemptive strikes are prohibited by *Batson v. Kentucky*, 476 U.S. 79 (1986).

credibility of the officer's subjective intent in a suppression motion. Suppression motions for evidence are so frequent that this one determination by a judge will not be unduly burdensome on the trial court as suggested by Justice O'Connor.

The decision regarding the subjective intent will essentially boil down to whether the officer's testimony is credible and reliable. Determining subjective intent will not use or exploit any more resources than are already being used in the trial process. Furthermore, the subjective intent analysis provides for a review for clear error when appealed. Because appellate judges will be unable to dive back into the facts of the case, as they would on a de novo review, this test arguably *preserves* judicial economy at the appellate level.

B. Justice Kennedy's Opinion Does Not Preclude Inquiry into the Efficacy of Miranda *Warnings*

Justice Kennedy's intent-based test does not neglect the concern that the *Miranda* warnings ultimately received by a suspect will be ineffective. If a police officer conducts a two-stage interrogation with a manifested intent to skirt the *Miranda* requirement by providing it at an opportune time to obtain a confession, Justice Kennedy's test will move to the *Seibert* analysis and will require that curative measures be taken to ensure that a suspect is effectively apprised of his rights if and when he receives them.[178] Justice Kennedy joined the plurality on the argument that efficacy of the *Miranda* warnings after a calculated attempt to avoid them is a concern that can only be remedied by ensuring efficacy of the warnings ultimately received with objective curative measures.[179] Thus, if an officer makes a subjective intent to conduct a *Miranda*-in-the-middle interrogation, Justice Kennedy's test will ensure efficacy of the warnings a suspect ultimately receives due to the requirement of curative measures.

Furthermore, if a subjective intent of the officer is not found, the analysis will switch to *Elstad*, which has an existing line of separate judicial precedent that ensures that a suspect receives

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[178] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

[179] *Id.*

effective and adequate warnings. Efficacy requirements must be met in order to render the *Miranda* warnings received appropriate. Prior to *Siebert*, however, Supreme Court precedent held a weak standard by not requiring police officers to issue the *Miranda* warnings in a talismanic way that ensured that a suspect had full understanding of those warnings, arguably keeping the *Miranda* efficacy requirement to a minimal standard.[180] In *California v. Prysock*,[181] for example, the Supreme Court held that as long as the substance of the *Miranda* warnings was conveyed, the warnings would be effective.[182] More specifically, the Court noted that the *Miranda* requirement was not "talismanic," and as long as the suspect received the substance and "meat" of the *Miranda* warning, the incriminating statement ultimately made would be admissible if it was found to be voluntary.[183] Even though this is admittedly a weak standard for *Miranda* efficacy, it is the standard that the Supreme Court has chosen and has enforced for almost three decades.

Additionally, in *Duckworth v. Eagan*,[184] the Supreme Court again reaffirmed what was previously stated in *Prysock*: As long as the substance of the *Miranda* warnings were presented, the warnings were effective.[185] Thus, if the *Elstad* analysis is triggered by a lack of a deliberate or intentional circumvention of *Miranda*, a suspect could pursue *Miranda* efficacy claims under an existing line of precedent designed to ensure that a suspect is adequately informed of his rights.[186] By requiring an objective inquiry into the surrounding circumstances of a *Miranda*-in-the-middle investigation, the plurality is imputing a heightened efficacy standard into the *Miranda* requirement—something the Supreme Court has repeatedly rejected in its cases. In sum, Justice Kennedy's test does not neglect or preclude an efficacy

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[180] *See* discussion of *Tucker*, *Patane*, and *Elstad supra* pp. 1134-36.

[181] 435 U.S. 355 (1981) (per curiam).

[182] *Id.* at 359-60.

[183] *Id.* at 359.

[184] 492 U.S. 195 (1989).

[185] *Id.* at 203.

[186] A suspect will be able to argue efficacy of *Miranda* warnings under *Prysock* and *Duckworth*, two distinct, yet equally important lines of precedent that are designed to ensure that the suspect receives the substance of the *Miranda* warnings or the functional equivalent of those warnings.

inquiry, but rather allows a traditional efficacy analysis to go forward under the Court's established precedents.

V. WHY *SEIBERT* MATTERS

A. When the Seibert *Test Is Outcome Determinative*

Although both the objective and subjective tests proposed by the majority members of the Court in *Seibert* often lead to the same result, the real difference shows its face when the case makes its way through the court system on appeal. For example, looking back to *United States v. Capers*,[187] the Second Circuit claimed to be following Justice Kenney's subjective intent of the officer test, but in reality applied a test more similar to Justice Souter's objective factor test. The result would have been drastically different for the parties had the true subjective-intent test been applied. In *Capers*, the interrogating officer stated that the reason he failed to give Capers the initial *Miranda* warnings was because he wanted to find evidence of the stolen money orders before they were lost.[188] The trial court apparently thought the officer's testimony was credible because it found that the officers "did not have the 'specific intent' to circumvent Capers' *Miranda* rights."[189]

Had the Second Circuit Court of Appeals truly been applying the subjective intent of the officer test, however, the appellate court would have been required to hold the lower court's finding of fact as true and correct absent clear error. With such a high threshold to overcome, the Second Circuit, as the dissenting judge in *Capers* pointed out, should have upheld the finding of the trial court with regard to the subjective intent of the officer.[190] By applying a totality-of-the-circumstances test, however, the Second Circuit allowed themselves to conduct a seemingly de novo review in conjunction with the factors test and reverse the trial court's finding of a lack of subjective intent on behalf of the officer.[191] This misapplication is troublesome because it gives incorrect deference

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187 627 F.3d 470 (2d Cir. 2010).
188 *Id.* at 473.
189 *Id.* at 474.
190 *Id.* at 489 (Trager, J., dissenting).
191 *Id.*

to the findings of the trial court, which is acting in accordance with its fact-finding duty. As previously discussed, the subjective intent test should receive a clearly erroneous standard of review, as opposed to de novo, as in *Capers*. Had it been correctly applied, prosecutors would likely have been able to use the incriminating statement against Capers for theft of the money orders via the postal system. As such, the standard of review that a case receives on appellate review can have a drastic effect on the final outcome of the case for the parties.

Another instance in which the outcome of the case would have been affected by the test applied at trial is the case of *United States v. Pacheco-Lopez* in the Sixth Circuit.[192] Although not expressly, and as pointed out by the dissenting judge, the court applied the objective test set forth by Justice Souter in *Seibert* by looking to the factors surrounding the interrogation of the defendant who was found at a home that was subjected to a valid search warrant.[193] The interrogating officer questioned the suspect upon arrival at the home regarding his identity and how he got to that location.[194] The Sixth Circuit Court of Appeals, without looking into the subjective intent of the officer, held that because of the circumstances surrounding the investigation, the defendant's *Miranda* warnings were ineffective and the incriminating statements should be suppressed as a result.[195] Because the trial court applied an objective factor analysis test when looking at the *Miranda*-in-the-middle interrogation, the appellate court applied de novo review to the case.

The lower court in *Pacheco-Lopez* held that the officer's initial questioning of Pacheco-Lopez did not qualify as an interrogation requiring *Miranda* and suggested that the questioning met the "booking exception" to *Miranda*.[196] The Sixth Circuit Court of Appeals disagreed.[197] By not taking the subjective intent of the officer into account, however, the court failed to recognize that the officer's initial questioning—regarding the identity of the

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[192] United States v. Pacheco-Lopez, 531 F.3d 420 (6th Cir. 2008).
[193] *Id.* at 431-32 (Griffin, J., dissenting).
[194] *Id.* at 422-23 (majority opinion).
[195] *Id.* at 429.
[196] *Id.* at 423, 421.
[197] *Id.* at 424.

defendant—could have been the officer's mistaken belief that his questions would qualify under a *Miranda* exception. Had the officer legitimately believed that his questions were valid under the exception and his testimony found credible, the subjective intent of the officer test, as designed by Justice Kennedy, would have permitted the admission of the incriminating statements. Because the court, functioning under the objective-factor test, failed to take the officer's intentions into account, the incriminating statement of an otherwise guilty person was suppressed.

B. Deliberate Circumventions of Miranda *Not Involving a Two-Step Interrogation Stratagem*

Justice Kennedy's subjective intent of the officer test requires suppression of any incriminating testimonial statements made by the suspect if the officer has designed a two-step interrogation with intentions of obtaining incriminating statements to use to prove guilt at trial. This raises a further question: What if the interrogating officer deliberately circumvents the *Miranda* requirement not to obtain a confession for trial but for some other reason—such as obtaining physical evidence or impeachment testimony—and a second, warned interrogation occurs and incriminating statements are obtained? In other words, what if a police officer intentionally withheld *Miranda* warnings for the sole purpose of finding derivative physical *evidence* (not testimony), but instead the officer eventually obtains the incriminating *testimony* during a second interrogation.

For example, suppose officers are investigating an armed robbery. What if an officer deliberately interrogated the suspect without first providing *Miranda* warnings with the sole intent to find the location of the gun used in the robbery, but the suspect simply confesses to the crime? If the officer then warns the suspect and re-interrogates without curative measures, would a second confession be admissible?

A strict reading of Justice Kennedy's test suggests it would. Under a strict view of Justice Kennedy's approach, only statements obtained by deliberate violation of *Miranda* as a part of a two-step interrogation stratagem would be excluded—not any statements the officer "luckily" obtained when he withheld

Miranda warnings to find physical evidence.[198] In his opinion in *Seibert*, Justice Kennedy targeted and remedied the specific problem of unlawful *Miranda* manipulation by the police in obtaining a confession. According to Justice Kennedy, "When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an *extended interview*, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps."[199] Justice Kennedy's reference to an "extended interview" and "statements" indicates that he was referencing two-stage interrogations where the officer intentionally withholds *Miranda* with the intent of later administering the warnings to obtain the same incriminating statements in a second interview for use at trial—like the one evident in *Seibert*.[200] Justice Kennedy further admonishes a "two-step interrogation technique . . . used in a calculated way to undermine the *Miranda* warning."[201]

Consequentially, a strict reading of *Siebert* and Justice Kennedy's specific references to *Miranda*-in-the-middle *interrogations* leads to the conclusion that the subjective intent of the officer test should be applied only when an officer intentionally withheld *Miranda* with the intention of later administering warnings to obtain more incriminating testimony in a second interview to prove guilt at trial. Thus, if the officer violated *Miranda* for any purpose other than to obtain incriminating testimony in a second interview, the special rules in *Seibert* would not apply.[202]

If a broader interpretation were applied to Justice Kennedy's opinion in *Seibert*, it would likely unfold in a way that would

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[198] *But cf.* Elwood Earl Sanders, Jr., *Breaching the Citadel: Willful Violations of Miranda After* Missouri v. Seibert, 10 APPALACHIAN J.L. 91, 105, 115 (2011) (discussing that the main aspect of *Seibert* was "willingness" to violate *Miranda* as opposed to a specific strategy to obtain incriminating confessions for use at trial and that *Seibert* should be applied to any willful violations of *Miranda*).

[199] Missouri v. Seibert, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring in the judgment) (emphasis added).

[200] *Id.*

[201] *Id.* at 622.

[202] This derivative evidence obtained in violation of *Miranda* would not be suppressed because *Miranda* does not have a fruit-of-the-poisonous-tree analysis. *See* discussion of the Supreme Court's rejection of the "fruit of the poisonous tree" analysis to *Miranda supra* Part I.B.

impute the "fruit of the poisonous tree" doctrine to *Miranda*, which, as previously discussed, the Court has repeatedly declined to do. In fact, Justice Kennedy structured his test so that a narrow exception could be carved out of *Elstad*—not to apply more strict requirements to *Miranda*. A straightforward reading of his opinion reveals that its purpose was to follow the *Elstad* precedent by preserving its general rule and rejecting a "fruit of the poisonous tree" analysis for *Miranda*. Justice Kennedy designed a narrow exception to *Elstad* for deliberate conduct, indicating that he wants to keep a "fruit of the poisonous tree" analysis separate from *Miranda*.

In sum, only officers who have violated *Miranda* as a part of a "two-step *interrogation* technique" with the intention of withholding *Miranda* warnings to obtain incriminating testimony will be subjected to analysis under *Seibert*—not if their intent was to find physical evidence.[203] Concededly, this narrow reading of Justice Kennedy's subjective intent of the officer test could be thought contrary to public policy as it could open the door for deliberate *Miranda* violations with the intent of obtaining derivative evidence.[204] That view, however, is really premised on a rejection of the Court's precedent that rejects exclusion of derivative evidence flowing from *Miranda* violations. If there is a problem, it is with those decisions, not with Justice Kennedy's approach in *Seibert*. As the law stands now, a strict reading of Justice Kennedy's opinion respects established precedent and compels the conclusion that curative measures should be employed only when police officials have deliberately withheld *Miranda* warnings as part of a two-step stratagem to obtain incriminating statements in a second, warned interview.[205]

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[203] *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment) (emphasis added).

[204] Sanders uses this argument as logic for his assertion that all "willful" violations should be subjected to *Seibert* analysis. Sanders, Jr., *supra* note 198, at 105, 115 (arguing that *Seibert* should apply to statements for impeachment purposes and for derivative evidence).

[205] *But cf. supra* notes 193, 199.

CONCLUSION

The Supreme Court, in *Missouri v. Seibert*, left the circuits with a splintered decision and imprecise instructions on what to do when *Miranda*-in-the-middle interrogations take place. As a result, the circuits have applied the objective and subjective tests set forth in the opinions sporadically and inconsistently. Under the *Marks* rule, Justice Kennedy's subjective intent of the officer test is controlling and binding precedent. A few circuits recognize this and correctly apply the test while other circuits fail to recognize that Kennedy's opinion is controlling or misapply the test he set forth. In particular, some circuits claim to be applying Justice Kennedy's subjective intent test, but in application, the test unfolds to look more like Justice Souter's objective factor test. As such, the result from a situation with a *Miranda*-in-the-middle interrogation will seemingly be dependent upon which circuit your case happens to have the fortune, or misfortune, of falling in.

There should be no mistake. Justice Kennedy's rule set forth in *Seibert* is controlling under the *Marks* rule and, as such, should be applied. The deliberate circumvention of the *Miranda* requirement was a narrow problem involving the exploitation of a loophole in the framework created by *Oregon v. Elstad*. Justice Kennedy's test narrowly targets that problem, while keeping in line with judicial precedent by crafting a narrow exception to *Elstad*'s rule, rather than by disregarding the rule entirely.

Justice Kennedy's subjective-intent test is also good public policy. Kennedy's approach enables police to investigate and prevent crime, as long as police do not deliberately attempt to circumvent *Miranda* with a two-step stratagem. By contrast, the objective-factor test, laid out by the plurality, could inhibit effective police work by failing to take into account the subjective intent of the officer.[206] Courts may suppress more incriminating statements and set more guilty criminals free under a free-floating, totality-of-the-circumstances approach.

Justice Souter's objective-factor test also creates a competing test with *Elstad* while leaving behind no guidance on when the rival tests would apply. Determining whether to apply to

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[206] For example, the surrounding circumstances could work greatly against the favor of police, while the police actually never intended a *Miranda* violation.

voluntariness standard set forth in *Elstad* or the totality-of-the-circumstance test set forth in *Seibert* could lead to even further inconsistency and confusion among the circuits. Justice Kennedy's subjective intent of the officer test, on the other hand, is quite clear. Overall, Justice Kennedy's approach leads to the most desirable and consistent results by following Supreme Court precedent while promoting effective police work.

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