"CAN YOU SAY THAT AGAIN?": A COMPARATIVE ANALYSIS OF CIRCUIT COURTS' INTERPRETATIONS OF MID-STREAM INTERROGATION WARNINGS

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I. INTRODUCTION

When people watch crime shows on TV, they often see police informing criminals they have a right to remain silent once they have been arrested. But what if the person is not a criminal? What if they are not read their *Miranda* rights but confess to a crime? Crime shows and movies make everything seem so black and white, but there is a lot of gray areas when it comes to *Miranda* rights. What happens when a person is detained, questioned, and read his or her *Miranda* rights then asked to repeat what they have already said? The practice of law enforcement officers interrupting an interrogation to administer *Miranda* rights and then resuming questioning is commonly referred to as the "question-first" technique, or "*Miranda*-in-the-middle."[1]

The Fifth Amendment protects individuals from self-incrimination.[2] The right against self-incrimination is commonly understood by the public as the right to remain silent recited in *Miranda* warnings to those under arrest.[3] As stated by Chief Justice Rehnquist in 1974, "virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . . .'"[4] However, most people do not understand that courts have also interpreted the Fifth Amendment as a shield from coerced confessions and improper interrogation methods.[5]

Statements made during an interrogation and prior to the reading of *Miranda* rights (pre-*Miranda* statements) are inadmissible in court,[6] but there

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[*] J.D. Candidate, May 2021, University of Louisville Brandeis School of Law. I would like to thank my family, friends, and mentors for believing in me. I want to dedicate this Note to my parents, Brian and Erika Johnson. Their sacrifices, unwavering support, and encouragement motivate me every day.

[1] *See, e.g.*, United States v. Crisp, 371 F. App'x 925, 927–28 (10th Cir. 2010).

[2] U.S. CONST. amend. V.

[3] *See* Tracey Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 256 (2016).

[4] Michigan v. Tucker, 417 U.S. 433, 439 (1974).

[5] Maclin, *supra* note 3, at 259–260 (quoting U.S. CONST. amend. V) (alteration in original).

[6] *See* Joshua I. Rodriguez, Note, *Interrogation First,* Miranda *Warnings Afterward: A Critical Analysis of the Supreme Court's Approach to Delayed* Miranda *Warnings*, 40 FORDHAM URB. L.J. 1091, 1093–94 (2013) (discussing defendant's post-*Miranda* statements being held admissible by Nebraska

is uncertainty in the admissibility of post-*Miranda* statements made when the question-first technique has been utilized.[7] That technique has been used by law enforcement to circumvent the protection of *Miranda* warnings by creating an illusion of obligation in hopes of compelling the suspect to repeat their previous statements.[8] The Supreme Court has only addressed this issue of *Miranda*-in-the-middle in *Missouri v. Seibert*.[9] "A plurality of the Court set forth factors for the courts to consider when determining whether *Miranda* rights delivered in the middle of an interrogation are effective . . . ."[10] *Seibert* has resulted in a lack of uniformity among lower courts on how they should address *Miranda*-in-the-middle and whether statements post-*Miranda* should be suppressed.[11]

The purpose of this Note is to propose a clear and uniform resolution as to how *Miranda*-in-the-middle conflicts should be adjudicated. Courts should adopt the five-factor test specified in the plurality opinion of *Seibert*.[12] That test examines the totality of circumstances surrounding the interrogation as opposed to the narrower approach formulated by Justice Kennedy, which relies solely on the subjective intent of the interrogator.[13] Part II of this Note will explore the background of *Miranda* rights by discussing the history of self-incrimination and relevant precedent leading to the *Miranda v. Arizona* decision. Next, this Note will examine decisions prior to *Seibert*. Part III will compare the avenues the circuits have taken when adjudicating this issue and explore the different outcomes and laws that have followed due to the *Seibert* holding. Finally, this Note will propose a clear and uniform resolution as to how *Miranda*-in-the-middle conflicts should be adjudicated.

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district court because "the police did not use a question-first procedure calculated to elicit" a confession from defendant).

[7] *Id.*

[8] Adam Herron, Note, *Miranda: Efficacy, the "Question First, Warn Later" Approach, and Special Populations*, 66 BAYLOR L. REV. 189, 194–95 (2014).

[9] *See* Missouri v. Seibert, 542 U.S. 600 (2004).

[10] United States v. Hoyer, No. 3:18-CR-000216-RGJ, 2019 U.S. Dist. LEXIS 181299, at *8–9 (W.D. Ky. Oct. 18, 2019).

[11] *See* Rodriguez, *supra* note 6, at 1145.

[12] *See infra* Part IV.

[13] *See Seibert*, 542 U.S. 600, 608 (2004).

II. HISTORY

A. Development of the Right Against Self-Incrimination

Our modern right against self-incrimination is rooted in English jurisprudence.[14] The origin of the right against self-incrimination can be traced back to the trial of John Lilburn in 1637.[15] John Lilburn refused to incriminate himself, calling his refusal to answer questions regarding himself in criminal matters a fundamental right.[16] Lilburn's principles gained popularity in England and influenced the framers of the Constitution.[17] Thus, the right against self-incrimination was implanted in the Fifth Amendment of the Bill of Rights.[18] As the scope of the right against self-incrimination developed over time, the Fifth Amendment was interpreted to include the right to remain silent during custodial interrogations.[19]

Interrogations are used by law enforcement to get criminals, or those suspected of a crime, to confess their guilt.[20] They have been utilized throughout history to elicit confessions from suspects.[21] An interrogation "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[22] Confessions have become a critical component of our criminal legal system, and interrogation tactics allow law enforcement to elicit, in some circumstances, conclusive confessions.[23] Therein lies the question: Are confessions truly voluntary during an interrogation?[24] "As one author articulated, '[B]y any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked and manipulated

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[14] Eric English, Note, *You Have the Right to Remain Silent. Now Please Repeat Your Confession:* Missouri v. Seibert *and the Court's Attempt to Put an End to the Question-First Technique*, 33 PEPP. L. REV. 423, 425 (2006).

[15] Miranda v. Arizona, 384 U.S. 436, 458–59 (1966).

[16] *Id.* at 459.

[17] *Id.* at 459–60.

[18] *Id.* at 460–61.

[19] English, *supra* note 14, at 426.

[20] Tracey Maclin, *Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B.U.L. REV. 1387, 1388 (2015) (reviewing GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND (2012)).

[21] *See Miranda*, 384 U.S. at 436.

[22] Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[23] Ronald J. Rychlak, *Baseball, Hot Dogs, Apple Pie, and* Miranda *Warnings*, 50 TEX. TECH L. REV. 15, 18 (2017).

[24] *Id.* at 19.

from a suspect by a detective who has been trained in a genuinely deceitful art.'" [25]

Historically, confessions were permitted in court despite law enforcement's methods of eliciting such confessions or any violation of the suspect's rights.[26] The Supreme Court first ruled in 1987 that involuntary confessions were inadmissible as evidence under the Fifth Amendment.[27] The Court held that a defendant's confession of murder was inadmissible because, for a confession to be admissible, it must be extracted without "any sort of threats or violence, . . . direct or implied promises . . . , nor by the exertion of any improper influence."[28]

Next, in *Brown v. Mississippi*, the Court reiterated that, after evaluating the totality of circumstances, when a confession is procured through police violence, it could not be entered into evidence.[29] The Court held that coerced confessions are void under the Due Process Clause of the Fourteenth Amendment.[30] The decision of the Court also sought to prevent the abuse of justice by law enforcement.[31] In *Brown*, the defendants were subjected to whippings and other physical abuses until they confessed to a murder of which they were suspected.[32] The defendants' confessions were void because the actions taken to obtain the confessions were "revolting to the sense of justice" and "offend[ed] [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[33] Similarly, in *Ashcraft v. Tennessee,* when a defendant was questioned for more than thirty-six hours without a break, sleep, or rest, the Court ruled the confession to be involuntary due to the defendant's mistreatment.[34]

B. Development of Miranda *Warnings*

On June 13, 1966, the Supreme Court decided *Miranda v. Arizona*, establishing that all criminal suspects must be informed of their rights before interrogation.[35] The landmark case established a bright-line test to abolish

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[25] *Id.* at 16 (citing DAVID SIMON, HOMICIDE: A YEAR OF KILLING ON THE STREETS 208 (1991)).

[26] *Id.* at 18.

[27] Bram v. United States, 168 U.S. 532, 542 (1897).

[28] *Id.* at 542–43 (citing 3 WILLIAM OLDNALL RUSSELL, RUSSELL ON CRIMES 478 (6th ed.1896)).

[29] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

[30] *Id.* at 287.

[31] *Id.*

[32] Michael J. Zydney Mannheimer, *The Two Mirandas*, 43 N. KY. L. REV. 317, 320 (2016).

[33] *Brown*, 297 U.S. at 286.

[34] *See* Ashcraft v. Tennessee, 327 U.S. 274 (1946).

[35] *The Miranda Rights Are Established*, HISTORY (Nov. 24, 2009), https://www.history.com/this-day-in-history/the-miranda-rights-are-established [https://perma.cc/9CVX-AW9X].

abuses of law enforcement and governmental power.[36] The Court established procedural safeguards to protect suspects' Fifth Amendment privilege against self-incrimination.[37] The Court gave explicit guidance to law enforcement to ensure their interrogation methods do not violate constitutional rights:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[38]

Moreover, "whether exculpatory or inculpatory, [any statements] stemming from [a] custodial interrogation of the defendant [may not be used at trial] unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[39] The *Miranda* holding, in effect, decreases the likelihood of false confessions, prevents law enforcement from violating laws they are meant to uphold, raises the esteem in which the public holds the administration of justice, and makes police and prosecutors more zealous in the search for objective evidence.[40] Most importantly, the holding in *Miranda* safeguards suspects' Fifth Amendment rights outside the courtroom.[41]

C. Oregon v. Elstad

In *Oregon v. Elstad*, officers came to the defendant's home to arrest him for burglary.[42] During the arrest, one officer spoke with the defendant's

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[36] Herron, *supra* note 8, at 193.
[37] Miranda v. Arizona, 384 U.S. 436, 444 (1966).
[38] *Id.* at 444–45.
[39] *Id.* at 444.
[40] Herron, *supra* note 8, at 193.
[41] *Miranda*, 384 U.S. at 460–61.
[42] Oregon v. Elstad, 470 U.S. 298, 300 (1985).

mother while the other officer remained in the living room with the defendant.[43] The defendant made an incriminating statement to a detective in his living room after the detective asked him if he knew why the detectives were there.[44] An hour after the defendant was transported to the police station, he was advised of his *Miranda* rights and then made a complete statement regarding the burglary.[45] The defendant was convicted of first-degree burglary, but the Court of Appeals reversed due to an insufficient lapse of time between his pre-*Miranda* and post-*Miranda* statements.[46] The Supreme Court "granted certiorari to consider the question whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police obtained an earlier voluntary but unwarned admission from the defendant."[47]

Upon review, the Court established a voluntary standard to evaluate the admissibility of post-warning statements in a *Miranda*-in-the-middle issue.[48] The Court explained, "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by an actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."[49] In determining voluntariness, the Court found that a "subsequent administration of *Miranda*" suffices to ensure the second warned statement is voluntary.[50] "The fact finder may reasonably conclude that the suspect made a rational and intelligent choice to waive or invoke his rights" once *Miranda* has been recited.[51]

Despite the defendant's argument that he was not able to fully waive his rights because he was not informed that his previous statements could not be held against him, the Court has "never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness."[52] Instead, the "relevant inquiry" is whether the second post-*Miranda* statement was given voluntarily when no unconstitutional coercion

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[43] *Id.* at 300–01.
[44] *Id.* at 301.
[45] *Id.*
[46] *Id.* at 302–03.
[47] *Id.* at 303.
[48] *Id.* at 309.
[49] *Id.*
[50] *Id.* at 314.
[51] *Id.*
[52] *Id.* at 316.

was present, such as violence.[53] Thus, the Court found that because the suspect chose to continue talking to law enforcement after being informed of his rights, his statements were made voluntarily.[54] Therefore, the second statement was admissible.[55]

D. Missouri v. Seibert

1. Plurality Opinion

The Court addressed *Miranda*-in-the-middle in *Missouri v. Seibert* after police officers employed a "question[-]first" interrogation.[56] The defendant allegedly devised a scheme to conceal the neglect of her bedridden son after he passed away.[57] The defendant, along with her older son, decided to burn their mobile home with her deceased son inside to hide the body.[58] A mentally ill teenager was also in the home at the time and died in the fire.[59] Seibert was arrested and questioned by police for approximately thirty to forty minutes without the administration of *Miranda* warnings.[60] Once Seibert confessed, she was given a twenty-minute break.[61] After the break, she was Mirandized and police "obtained a signed waiver of her rights."[62] The line of questioning from the officer then resumed.[63] After she was charged with first-degree murder, Seibert sought to exclude both the pre-warning and post-warning statements.[64] "At the suppression hearing," the interrogating officer admitted to purposely withholding the *Miranda* warnings, "an interrogation technique he had been taught."[65]

The trial court admitted the post-warning statements but rejected the pre-warning statements.[66] The Missouri Court of Appeals affirmed, but the Supreme Court of Missouri reversed, stating the interrogation was "nearly continuous" and the second statement was "clearly the product of the invalid

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[53] *Id.* at 318.
[54] *Id.*
[55] *Id.*
[56] Missouri v. Seibert, 542 U.S. 600, 604 (2004).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 605.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 605–06.
[66] *Id.*

first statement."[67] The court distinguished the circumstances of the case from *Elstad* in that the police officers deliberately withheld *Miranda* warnings from Seibert to evoke a confession.[68]

The Supreme Court granted certiorari.[69] A plurality of the Court recognized that the question-first technique for interrogations allows police to retrieve confessions that suspects would not make had they "understood [their] rights at the outset."[70] After confessing, a "suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again."[71] Thus, the Court set forth factors to determine whether a *Miranda* warning was effective.[72] These include: (1) "the completeness and detail of the questions and answers in the first round of questioning"; (2) "the two statements' overlapping content"; (3) "the timing and setting of the first and second" statements; (4) "the continuity of police personnel"; and (5) "the degree to which the interrogator's questions treated the second round as continuous with the first."[73]

Here, Seibert's interrogation was "systematic, exhaustive, and managed with psychological skill."[74] When applying the factors to Seibert's interrogations, all factors favor suppression of post-*Miranda* statements.[75] First, the questions were detailed and thorough enough before the warning such that there were no remaining incriminating statements that Seibert had not already given to officers.[76] Next, the second line of questioning was a continuation of the prior questions, and officers referenced responses given in the first line of questioning.[77] Furthermore, both interrogations took place at the police station with the same officers, and there were only fifteen to twenty minutes between the warned and unwarned segments.[78] Lastly, "It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before."[79] After analyzing the factors, the

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[67] *Id.*
[68] *See id.*
[69] *Id.* at 607.
[70] *Id.* at 613.
[71] *Id.*
[72] *Id.* at 614–15.
[73] *Id.* at 615.
[74] *Id.* at 616.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 616–17.

Court decided that under the circumstances, *Miranda* was not effective and no suspect in the defendant's shoes would have been able to understand that statements made during the unwarned segment could not be used against her or that she retained the choice to continue talking to the interrogators or cease the conversation.[80]

The Court recognized that the circumstances of *Seibert* were distinguishable from *Elstad*.[81] In *Elstad*, the "brief stop in the living room . . . . was not to interrogate the suspect but to notify his mother for the reason of his arrest," and the Court determined there was no evidence of coercion.[82] The officer's failure to Mirandize in *Elstad* was an "'oversight' that 'may have been the result of confusion' as to whether the brief exchange qualified as 'custodial interrogation' or . . . may have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with the defendant's mother."[83] Therefore, the *Miranda* warnings could have still fulfilled their purpose, unlike in Seibert's case. Thus, Seibert's post-warning statements were inadmissible.[84]

2. Justice Breyer's Concurrence

Justice Breyer concurred with the majority in *Seibert* but believed the Court should follow a more straightforward approach.[85] Instead of using the factors enumerated, Breyer believed "courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith."[86] Justice Breyer argued that a simpler approach would be more advantageous than a "complex exclusionary rule" and that the plurality approach, in practice, would be equivalent to a fruits test.[87] Accordingly, when applying Justice Breyer's analysis, Seibert's post-warning statements are inadmissible because the delay in warning was not in good faith.[88] He believed the plurality's approach was too narrow of a test because there was no good faith exception.[89] Thus, according to the plurality, *Miranda* warnings are only

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[80] *Id.* at 617.

[81] *Id.* at 614–16.

[82] *Id.* at 614 (quoting Oregon v. Elstad, 470 U.S. 298, 315–16 (1985)).

[83] *Id.* (quoting *Elstad*, 470 U.S. at 315–16) (alteration in original).

[84] *Id.* at 617.

[85] *Id.* (Breyer, J., concurring).

[86] *Id.* (Breyer, J., concurring).

[87] *Id.* at 618 (Breyer, J., concurring). The evidence must be suppressed that is obtained as a result of a constitutional violation according the "fruit of the poisonous tree" unless "intervening events break the causal connection." *Id.* (Breyer, J., concurring).

[88] *Id.* (Breyer, J., concurring).

[89] *Id.* (Breyer, J., concurring).

effective when there are curative measures such as a lapse in time, change in venue, change of interrogating officers, or a difference in the line of questioning between the warned and unwarned statements.[90]

3. Justice Kennedy's Concurrence

Justice Kennedy also concurred in judgment but believed the plurality's approach was too broad.[91] He was afraid that applying the plurality's factors to "every two-step interrogation may serve to undermine" the clarity of *Miranda*.[92] Instead, Justice Kennedy proposed a narrower test: whether or not *Miranda*-in-the-middle was used "in a calculated way to undermine the *Miranda* warning."[93] Under his approach, if police used a deliberate two-step interrogation, then the statements post-warning would be admissible only when curative measures were taken to ensure that a reasonable person would understand the effect of *Miranda* or if an explanation is given to the suspect that their pre-warning statements are inadmissible and cannot be held against them.[94]

When the two-step strategy is utilized, post-warning statements would be inadmissible if related to the pre-warning statements unless curative measures were taken.[95] 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 the *Miranda* waiver."[96] His examples included a substantial lapse in time and circumstances between the pre-warning statements and post-warning statements, so long as "it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn."[97] An explanation or additional warning explaining the inadmissibility of the pre-warning statement could also suffice as a curative measure.[98]

Justice Kennedy believed the interrogation technique the officers used with Seibert undermined *Miranda*, and thus he agreed with the plurality that, given the intent of the officers and that no curative measures were taken, the statements at issue were inadmissible.[99] He emphasized that, though there are

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[90] *Id.* (Breyer, J., concurring).
[91] *Id.* at 622 (Kennedy, J., concurring).
[92] *Id.* (Kennedy, J., concurring).
[93] *Id.* (Kennedy, J., concurring).
[94] *Id.* (Kennedy, J., concurring).
[95] *Id.* (Kennedy, J., concurring).
[96] *Id.* (Kennedy, J., concurring).
[97] *Id.* (Kennedy, J., concurring).
[98] *Id.* (Kennedy, J., concurring).
[99] *Id.* (Kennedy, J., concurring).

exceptions for violations of *Miranda*, the constant variable regarding admissibility is whether the evidence compromises *Miranda's* core principles.[100] Therefore, the "scope of the *Miranda* suppression remedy depends on a consideration of those legitimate interests and on whether the admission of the evidence under the circumstances would frustrate *Miranda's* central concerns and objectives."[101]

Furthermore, Justice Kennedy referenced *Elstad* and stated that he believed the *Elstad* holding "reflect[ed] a balanced and pragmatic approach to enforcement of the *Miranda* warning."[102] He argued that *Elstad* was distinguishable from *Seibert* in that the police officer's question-first technique used when interrogating Seibert was a deliberate strategy to undercut *Miranda*.[103] In *Elstad*, however, there was uncertainty as to when the suspect made the brief statements in his living room if he was in custody and warning was required.[104] Moreover, the questioning officer in *Elstad* did not rely on the statements prior to *Miranda* for the post-warning interrogation.[105] Thus, "'neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression' given the facts of [*Elstad*]."[106] In all, Justice Kennedy focuses more on the subjective intent behind law enforcement's use of the question-first technique, unlike the plurality's "objective inquiry from the perspective of the suspect[,]" and does not consider whether the interrogation technique was intentional.[107]

3. Dissent

Justice O'Connor, joined by Justices Scalia and Thomas, dissented.[108] The dissent agreed with the plurality on two preliminary questions.[109] First, the "fruit of the poisonous tree" theory does not result in admissibility of Seibert's statements.[110] Second, the dissent agreed with the plurality's conclusion that the "subjective intent of the interrogating officer" should not

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[100] *Id.* at 619 (Kennedy, J., concurring).
[101] *Id.* (Kennedy, J., concurring).
[102] *Id.* at 620 (Kennedy, J., concurring).
[103] *Id.* (Kennedy, J., concurring).
[104] *Id.* at 619 (Kennedy, J., concurring).
[105] *Id.* at 621 (Kennedy, J., concurring).
[106] *Id.* at 619–20 (Kennedy, J., concurring) (quoting Oregon v. Elstad, 470 U.S. 298, 308 (1985)).
[107] *Id.* at 621 (Kennedy, J., concurring).
[108] *Id.* at 623 (O'Connor, J., dissenting).
[109] *Id.* (O'Connor, J., dissenting).
[110] *Id.* (O'Connor, J., dissenting).

be the focus of the analysis.[111] However, the dissenting Justices believed the "plurality [gave] insufficient deference to *Elstad* and that Justice Kennedy place[d] improper weight on subjective intent."[112] The dissent would have analyzed the two-step interrogation process using the same voluntariness test set forth in *Elstad*.[113]

In applying the *Elstad* test, the Court would first need to determine whether Seibert's initial statement was voluntary or coerced.[114] If the first statement was not voluntary, then "the court must examine whether the taint dissipated through the passing of time or a change in circumstances."[115] Changes in circumstances are determinative as to whether the coercion carried over from the first statement to the second statement.[116] If the fact-finder determines the second statement is involuntary after evaluating the totality of the circumstances, then despite the *Miranda* warnings, the second statement should be suppressed.[117] Justice O'Connor would have left the analysis to the Missouri courts to conduct on remand but noted that the interrogator's references to Seibert's unwarned statements during the warned portion of the interrogation suggest the second statement was involuntary.[118] Thus, Justice O'Connor's approach considers the actions of law enforcement when evaluating the circumstances but does not focus on the subjective intent of the officers.[119] However, the dissent's approach has been criticized for failing to "adequately condemn or limit the question-first tactic."[120]

4. *Seibert's* Effect on *Elstad*

The *Seibert* plurality did not overrule *Elstad* but limited its application.[121] The plurality instructed that, when evaluating *Miranda*-in-the-middle issues, the first five factors from the *Seibert* analysis should be used to determine whether the *Miranda* warning was effective.[122] Next, if *Miranda* were effective according to the factors, the court would determine if the second statement was voluntary using the *Elstad* analysis.[123] However, if the warning

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[111] *Compare id.* at 621 (Kennedy, J., concurring) *with id.* at 623 (O'Connor, J., dissenting).
[112] *Id.* at 629 (O'Connor, J., dissenting) (emphasis omitted).
[113] *Id.* at 628 (O'Connor, J., dissenting).
[114] *Id.* (O'Connor, J., dissenting).
[115] *Id.* (O'Connor, J., dissenting).
[116] *Id.* (O'Connor, J., dissenting).
[117] *Id.* (O'Connor, J., dissenting).
[118] *Id.* at 629 (O'Connor, J., dissenting).
[119] *Id.* (O'Connor, J., dissenting).
[120] English, *supra* note 14, at 455.
[121] *Id.*
[122] *Id.* at 455–56.
[123] *Id.* at 456.

was "not effective under the *Seibert* factors, the second statement is inadmissible without reference to [*Elstad*]."[124]

Under Justice Kennedy's approach, courts should apply *Elstad* when *Miranda*-in-the-middle resulted from a good-faith violation on behalf of the interrogator.[125] Justice Kennedy's analysis in *Seibert* would only apply to interrogators' intentional use of *Miranda*-in-the-middle and deliberate violations.[126]

III. ANALYSIS

Despite the Supreme Court's attempt to clarify how to adjudicate *Miranda*-in-the-middle, *Seibert* created greater confusion among the lower courts.[127] *Seibert* was a plurality opinion, meaning that no one opinion had the support of the majority of the justices.[128] It resulted in circuit courts applying different standards for addressing *Miranda*-in-the-middle.[129] Some of the circuit courts follow Justice Kennedy's approach, while others use a combination of his approach and the plurality's approach.[130] Due to the confusion as to which approach applies—the plurality's or Justice Kennedy's concurring opinion—many courts acknowledge both approaches but decline to articulate which is controlling.[131]

When the Supreme Court issues a plurality opinion, courts are supposed to base subsequent decisions on the "narrowest grounds" of the holding.[132] 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 . . . ."[133] Regarding *Seibert*, many lower courts have interpreted Justice Kennedy's approach to be the narrowest ground of the holding.[134] Moreover, Justice Kennedy refers to his own approach as narrower than the plurality's approach.[135] Other courts have

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[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Herron, *supra* note 8, at 198 ("The Court was trying to clear up the confusion related to the question-first technique, but it backfired.").

[128] *Id.*

[129] *See* Rodriguez, *supra* note 6, at 1105.

[130] *Id.*

[131] *See, e.g.*, United States v. Pacheco-Lopez, 531 F.3d 420, 427 n.11 (6th Cir. 2008).

[132] Herron, *supra* note 8, at 199.

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

[134] *See* Herron, *supra* note 8, at 199.

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

determined his approach to be narrower because it only requires the court to inquire as to the officer's subjective intent when using the question-first technique and then inquire as to whether any curative measures were taken to resolve the issue, as opposed to the five-factor test.[136]

A. Narrow and Broad: Application of the Plurality's and Justice Kennedy's Approaches

The First, Sixth, Seventh, and Ninth Circuit Courts of Appeals refer to both approaches in *Seibert* when adjudicating this issue. For example, the First Circuit in *United States v. Verdugo* first examined the effectiveness of the *Miranda* warning the defendant received.[137] Though the court did not define the multi-factor test set forth in *Seibert*, they did distinguish the facts of the case from *Seibert*.[138] For instance, police asked the defendant in *Verdugo* a limited number of questions before administering *Miranda* and, one hour later, the interrogating officer asked more incriminating questions at a different location.[139] Thus, the court utilized the first factor, which examines the "completeness and detail of the questions" being asked;[140] the third factor, which examines the timing and location between the questioning;[141] and the fifth factor, which looks to whether the line of questioning in the second round was continuous with the first.[142] After analyzing the circumstances using the basic concepts from the five-factor test, the court held that circumstances did "not call into serious question the effectiveness of the *Miranda* warnings . . . . The district court therefore committed no error in refusing to suppress [the defendant's] post-*Miranda* statements based on *Seibert*."[143]

The First Circuit judges also acknowledged Justice Kennedy's approach.[144] As previously stated, Justice Kennedy's concurrence first considers whether the interrogation approach was deliberate by examining the interrogating officer or officers' subjective intent.[145] If there was no

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[136] English, *supra* note 14, at 456–57.

[137] United States v. Verdugo, 617 F.3d 565, 575 (1st Cir. 2010).

[138] *See id.*

[139] *Id.*

[140] *Seibert*, 542 U.S. at 601; *see also Verdugo*, 617 F.3d at 575 (finding "Verdugo was asked only a limited number of questions before he was read his *Miranda* rights").

[141] *Seibert*, 542 U.S. at 602; *see also Verdugo*, 617 F.3d at 575 (finding "the bulk of the post-*Miranda* questioning occurred at a different location than the pre-*Miranda* questioning").

[142] *Seibert*, 542 U.S. at 602; *see also Verdugo*, 617 F.3d at 575 (finding "Verdugo made his second statement . . . over an hour after [the first statement]").

[143] *Verdugo*, 617 F.3d at 575.

[144] *Id.*

[145] *See Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

deliberate "two-step interrogation" used by law enforcement, then the *Elstad* test should govern whether or not post-warning statements are admissible.[146] The *Elstad* test set a voluntary standard for uncoerced confessions.[147] If both the pre-warning and post-warning statements were voluntarily made, then a simple failure to administer *Miranda* will not render the warned statement inadmissible.[148]

In *Verdugo*, there was no finding that the interrogators deliberately used the question-first technique because all that was asked of the defendant prior to *Miranda* was whether he owned a cellphone that was ringing at the time he was arrested.[149] Since the violation was not deliberate, the court then assessed whether the post-*Miranda* statement was involuntary.[150] The post-Miranda statement was determined to be voluntarily made because there were "no traces of 'brutality[,] [p]sychological duress, threats, [or] unduly prolonged interrogation.'"[151] Therefore, the First Circuit came to the same conclusion following Justice Kennedy's approach, and the court found the defendant's post-*Miranda* statements admissible.[152]

At first glance, the Ninth Circuit decided that courts should look to the "objective circumstances the plurality cited" to conclude whether the mid-stream *Miranda* warning was effective and look to the "curative measures characterized by Justice Kennedy . . . 'to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning[.]'"[153] The court chose to rely on both approaches for multiple reasons.[154] First, the court noted that Justice Kennedy failed to articulate how to determine "whether an interrogator used a deliberate question-first technique."[155] The court reiterated one of the plurality's concerns with Justice Kennedy's approach, which was that the intent of the interrogator would rarely be admitted as it was in *Seibert*.[156] Thus, the Ninth Circuit found that, to prove the officers' intent, courts should consider any subjective and objective evidence.[157] However, the court then expressed "that there is rarely,

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[146] English, *supra* note 14, at 455–56.

[147] *Id.* at 437–38.

[148] *Id.*

[149] *Verdugo*, 617 F.3d at 574.

[150] *Id.* at 575.

[151] *Id.* (quoting United States v. Jackson, 608 F.3d 100, 102 (1st Cir. 2010) (alteration in original)).

[152] *Id.* at 576.

[153] United States v. Williams, 435 F.3d 1148, 1160 (9th Cir. 2006) (quoting Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring)).

[154] *Id.* at 1158–60.

[155] *Id.* at 1158.

[156] *Id.*

[157] *Id.*

if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed."[158] This suggests that any use of the question-first technique is a deliberate violation.

Moreover, the Ninth Circuit decided that where an interrogator deliberately withheld *Miranda* warnings, courts should look to both the plurality's multi-factor test and Justice Kennedy's curative measures to determine if, under the circumstances, the warnings were effective when determining whether the post-warning statement is admissible.[159] Thus, the court merged the plurality's approach and Justice Kennedy's concurrence.[160]

The Tenth Circuit acknowledged the difficulty of navigating the *Seibert* holding in *United States v. Carrizales-Toledo*.[161] The court noted that, in following precedent, lower courts should adopt the position on the narrowest grounds when following plurality opinions.[162] But, "[w]hen the plurality and concurring opinions take distinct approaches, and there is no 'narrowest opinion' representing the 'common denominator of the Court's reasoning,'" navigating *Seibert* and its progeny "becomes problematic."[163] The circuit took issue with only applying Justice Kennedy's "arguably" more narrow approach because his subjective approach was rejected by all other Justices of the Court.[164] However, instead of clarifying which opinion of *Seibert* governed its holding, the court held that in their particular case the statements of the defendant were admissible under either test.[165]

The downside of not articulating which approach is controlling is that the application of both approaches could result in opposing conclusions.[166] In some cases, the interrogator may not have deliberately withheld a *Miranda* warning; therefore, the statements should not be suppressed under Justice Kennedy's approach.[167] Conversely, if one analyzes the circumstances

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[158] *Id.* at 1159.

[159] *Id.* at 1160.

[160] *See id.*

[161] 454 F.3d 1142, 1151 (10th Cir. 2006).

[162] *Id.*

[163] *See id.* (quoting King v. Palmer, 950 F.2d 711, 781 (D.C. Cir. 1991) (Silberman, J., concurring)).

[164] *Id.*

[165] *Id.* ("This case does not require us to determine which opinion reflects the holding of *Seibert* . . . since Mr. Carrizales-Toledo's statements would be admissible under the tests proposed by the plurality and by the concurring opinion.").

[166] United States v. Sanchez-Gallegos, 412 F. App'x 58, 73 n.2 (10th Cir. 2011) (Ebel, J., concurring); *see* United States v. Zubiate, No. 08-CR-507 (JG), 2009 U.S. Dist. LEXIS 14706, at *26 (E.D.N.Y. Feb. 25, 2009) (stating that, even though the facts did not satisfy the *Seibert* plurality test, because the officers "actions were not 'calculated' to undermine the effectiveness of the *Miranda* warning[,]" the defendant's statement would not be suppressed).

[167] *See* Missouri v. Seibert, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring).

surrounding the interrogations according to the multi-factor test advanced by the plurality, the conclusion could be different.[168]

B. Circuits That Solely Apply Justice Kennedy's Approach

The other circuits have adhered to Justice Kennedy's test to determine the admissibility of a suspect's statements.[169] The Second Circuit attempted to hone in on Justice Kennedy's intent-based approach and give lower courts more clarification on how to determine whether the interrogator deliberately withheld *Miranda* warnings.[170] Since Justice Kennedy did not determine when a two-step interrogation was executed deliberately, the Second Circuit looked to see how other circuits had established a deliberate violation.[171] The court noted that the Eleventh Circuit has relied upon "the totality of the circumstances[,] including 'the 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'" to determine deliberateness.[172] Comparably, the Fifth Circuit found that deliberateness can be inferred from the circumstances surrounding the interrogation and placed emphasis on factors such as coercion, improper tactics, or evidence that suggests the interrogators acted with "aggressiveness or hostility."[173] The Second Circuit proceeded to lay out three objective factors to use to analyze whether interrogators deliberately withheld *Miranda*: (1) whether there was "overlap between the suspect's first and second statements"; (2) whether "different officers questioned the suspect at different locations, and the second officer was not aware of the suspect's previous inculpatory statement"; and (3) whether "the post warning questioning was not a continuation of the prewarning questioning."[174]

Furthermore, the Second Circuit noted that, when the court is tasked with the difficulty of proving an officer's state of mind, their three factors could be used to determine a deliberate use of *Miranda*-in-the-middle, but they do not constitute an exhaustive list.[175] There are other factors to consider "when

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[168] *See Sanchez-Gallegos*, 412 F. App'x at 73 n.2 (Ebel, J., concurring).

[169] United States v. Capers, 627 F.3d 470, 476 (2d Cir. 2010).

[170] *Id.* at 478–80.

[171] *See id.* at 479 (holding that the Second Circuit "join[s] [its] sister circuits in concluding that a court should review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence").

[172] *Id.* at 478 (quoting United States v. Street, 472 F.3d 1298, 1314 (11th Cir. 2006)).

[173] *Id.* (citing United States v. Nunez-Sanchez, 478 F.3d 663, 668–69 (5th Cir. 2007)).

[174] *Id.* (citing United States v. Carter, 489 F.3d 528, 536 (2d Cir. 2007)).

[175] *Id.*

seeking to divine whether the officers' actions are sufficiently indicative of a deliberate circumvention of *Miranda* to require that the defendant's statements must be suppressed."[176]

The court then moved to answering the unsettled question as to who bears the burden of proof in showing the deliberate intent of the interrogator.[177] The court decided the "burden rests on the prosecution to disprove deliberateness."[178] The court noted that the Eighth Circuit also places the same burden of proof on the prosecution despite the general disdain for requiring a party to prove a negative.[179] Additionally, the court also weighed in on the "quantum of proof necessary" that the government must provide to establish the interrogation method was not deliberate.[180] The prosecution must disprove a deliberate violation by "a preponderance of the evidence."[181] The court decided on this standard because "imposing a higher burden of proof would do little to mitigate prosecutorial overreaching while at the same time concealing troves of probative evidence from the eyes of the jury."[182]

The varying interpretations of Justice Kennedy's approach have resulted in greatly contrasting results among some circuits.[183] In *Seibert*, the interrogating officer admitted to intentionally using the question-first technique; hence Justice Kennedy decided the first step in his approach was to determine whether the violation was intentional.[184] The Third Circuit held that, when an officer testified to withholding *Miranda* warnings as part of a technique to elicit a confession, it was clear the officer was intentionally trying to evade *Miranda*.[185] Therefore, the suspect's statements were presumptively inadmissible.[186] Furthermore, the lack of curative measures solidified the presumption.[187] In contrast, the Eleventh Circuit, in a similar factual scenario as the Third Circuit encountered, held that despite three interrogating officers admitting to intentionally withholding *Miranda* warnings, there is no presumption of inadmissibility regarding the suspect's statements post-*Miranda*.[188]

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[176] *Id.*
[177] *Id.* at 479.
[178] *Id.*
[179] *Id.* (citing United States v. Ollie, 442 F.3d 1135, 1143 (8th Cir. 2006)).
[180] *Id.* at 480.
[181] *Id.*
[182] *Id.* (citing Lego v. Twomey, 404 U.S. 477, 489 (1972)).
[183] Rodriguez, *supra* note 6, at 1116.
[184] *See id.* at 619–20.
[185] United States v. Green, 541 F.3d 176, 191 (3d Cir. 2008).
[186] *Id.*
[187] *Id.* at 192.
[188] *See* United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1133 (11th Cir. 2006).

C. Confusion Within the Eighth Circuit

The Eighth Circuit applied the plurality's approach in one case, and then two months later decided to alter its analysis to focus on Justice Kennedy's approach.[189] In *United States v. Hernandez-Hernandez*, the court applied the *Seibert* factors to the case without any explanation of Justice Kennedy's concurrence.[190] When *United States v. Briones* was adjudicated two months later, the court gave deference to Justice Kennedy's opinion because it was of narrower grounds, and did not even apply the facts of the case to the plurality's test.[191] The court referenced *Hernandez-Hernandez* in a footnote and explained that the outcome of *Briones* would have been the same under the multi-factor test set forth by the plurality.[192] The court's only explanation for the change in the analysis was that Justice Kennedy's approach was narrower, but it failed to explain why his approach was not used two months earlier.[193]

IV. RESOLUTION

The confusion and lack of uniformity stemming from *Seibert* have resulted in inconsistent rulings, unpredictable law, and confusion as to how to handle *Miranda*-in-the-middle issues.[194] A uniform approach is vital not only for judicial economy but also as a matter of public policy.[195] The differing approaches allow police to take advantage of suspects, thus creating potential loopholes in law enforcement interrogation practices.[196] The federal courts should hold all law enforcement and suspects to a similar standard to ensure proper justice for all.

Miranda warnings are a part of American culture,[197] and their effectiveness should not hinge upon an individual's geographic location.[198] Circuit "disuniformity" should not promote a society in which a person, depending on where they live, may be subjected to different law enforcement

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[189] *Compare* United States v. Hernandez-Hernandez, 384 F.3d 562 (8th Cir. 2004) *with* United States v. Briones, 390 F.3d 610 (8th Cir. 2004).

[190] *Hernandez-Hernandez*, 384 F.3d at 566.

[191] *Briones*, 390 F.3d at 613–15.

[192] *Id.* at 614 n.3.

[193] *See id.*

[194] Rodriguez, *supra* note 6, at 1096.

[195] *See generally id.*

[196] *See* discussion *supra* Part III.A.

[197] Rychlak, *supra* note 23, at 27 (citing Dickerson v. United States, 530 U.S. 428, 443 (2000) (Rehnquist, C. J.)).

[198] Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1151 (2012).

tactics and substantive law when dealing with a fundamental right of all United States citizens.[199] Not only does the lack of uniformity create the potential for forum shopping, it results in a waste of judicial resources and creates a lack of security for citizens.[200] A degree of variation is natural among circuits but, as *Marbury v. Madison* teaches, it is the Supreme Court's job to interpret constitutional rights. When the Court fails to instill relative certainty with unsettled issues, circuit court judges can shape law based on their own beliefs.[201] Hence, there is a need for an unvarying approach.

The major downfall of both approaches is that they rely too heavily on judges' discretion.[202] The plurality's test is too vague in the sense that the factors are not defined enough.[203] How much time should pass between the pre-warning and post-warning statements? Can interrogators not refer back to any subjects that were brought up pre-warning? Is a change in location really necessary? Justice Kennedy's approach is also vague because it requires judges to determine whether an interrogator deliberately employed a question-first technique, but leaves lower courts no instruction on how to interpret an interrogator's subjective intent.[204] As Justice O'Connor pointed out in the dissenting opinion of *Seibert*, leaving the courts to ascertain police officers' intent would be a waste of judicial resources, and it does not take into account the suspect's state of mind.[205]

As previously discussed, it is evident that even the circuits that adhere only to Justice Kennedy's approach still produce contrasting holdings despite using the same test.[206] Hence, Justice Kennedy's approach lacks the clarity necessary to create a solid precedent for lower courts to follow. *Miranda* was enacted to protect citizens and deter police misconduct.[207] Moreover, the overarching goal of *Elstad* and *Seibert* was to eliminate interrogation abuses and to condemn the question-first technique.[208] By attempting to determine the subjective intent, Justice Kennedy's approach inadvertently creates a loophole for interrogators to testify that they did not purposely withhold *Miranda* when that was, in fact, their intent.[209]

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[199] *Id.* at 1153.
[200] *Id.* at 1153–55.
[201] *Id.* at 1157.
[202] *See* discussion *supra* Part III.A.
[203] *See* discussion *supra* Part II.D.1.
[204] Missouri v. Seibert, 542 U.S. at 600, 622 (2004).
[205] *Id.* at 625–26.
[206] *Supra* Part III.B.
[207] *See* Rychlak, *supra* note 23, at 23–24.
[208] *See generally supra* Parts II.C & D.
[209] United States v. Williams, 435 F.3d 1148, 1158 (9th Cir. 2006).

Furthermore, Justice Kennedy disagreed with the plurality approach in that it was too complex, but after examining the lack of uniformity in which his test has been interpreted by the circuit courts, it is clear that his approach failed to resolve the complexity of *Miranda*-in-the-middle issues.[210] In addition, all other Justices expressly condemned Justice Kennedy's focus on the interrogating officer's subjective intent.[211] This concrete disapproval among the other Justices does not inspire confidence that Justice Kennedy's approach is the most suitable.

I propose that aspects from both the plurality's approach and Justice Kennedy's approach in *Seibert*—as well as the *Elstad* approach—should be combined to form a universal test. The responsibility of avoiding admissibility of statements should rest on the interrogators. I agree with the Ninth Circuit that there is rarely a legitimate reason to withhold a suspect's *Miranda* warnings during an interrogation; therefore, inquiring into an officer's subjective intent is not beneficial to the court.[212] When law enforcement starts questioning a suspect before administering warnings, the interrogator must issue an additional explanation to the defendant after *Miranda* that clearly informs the suspect that any prior statements made before the warnings cannot be used against him or her and are not admissible in court. Law enforcement could even be required to have the suspect sign a form memorializing the suspect's understanding that their prior statements are not admissible to eliminate any possible ambiguity as to whether the suspect was properly informed.

The *Miranda* warning, in combination with an additional explanation, should suffice to ensure that the taint of the previous questioning does not carry over. This is similar to what Justice Kennedy proposed as a curative measure and what the Court held in *Elstad*.[213] In *Elstad*, the Court stated that the *Miranda* warning was sufficient to correct any attempt to circumvent a suspect's rights.[214] Suspects must understand their constitutional rights, but when a defendant voluntarily decides to continue speaking with an officer post-*Miranda* and has been fully explained his or her rights, there is no reason the statements should be held inadmissible. As the Court in *Elstad* pointed out:

> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means

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[210] *Supra* Part III.B.

[211] *Supra* Part III.A.

[212] United States v. Williams, 435 F.3d 1148, 1159 (9th Cir. 2006).

[213] *Supra* Parts II.C & D.

[214] Oregon v. Elstad, 470 U.S. 298, 316 (1985).

> calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question.[215]

Furthermore, the Supreme Court "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness."[216] It could be said that virtually every person today understands they have the right to remain silent;[217] thus, after a full explanation of his or her rights, there should be no additional need to evaluate the circumstances of a confession if a suspect continues to freely speak with interrogators.

V. CONCLUSION

In conclusion, courts, suspects, and lawyers would benefit from uniformity in the adjudication of *Miranda*-in-the-middle issues. Although the Supreme Court has attempted to provide guidance, there needs to be a more conclusive method of resolving these issues to ensure that all citizens' rights against self-incrimination are protected. It is clear, even amidst the lower courts' differing approaches to *Seibert*, that all courts agree that the question-first or *Miranda*-in-the-middle technique should not be used to circumvent *Miranda*.[218]

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[215] *Elstad*, 470 U.S. at 312.

[216] *Id.* at 316.

[217] Maclin, *supra* note 20, at 1389.

[218] English, *supra* note 14, at 466.