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"No Earlier Confession to Repeat": *Seibert*, *Dixon*, and Question-First Interrogations†

Lee S. Brett*

Abstract

The Supreme Court's 2004 decision in Missouri v. Seibert *forbade the use of so-called question-first interrogations. In a question-first interrogation, police interrogate suspects without giving* Miranda *warnings. Once the suspect makes incriminating statements, the police give the warnings and induce the suspect to repeat their earlier admissions.*

Lower courts are increasingly interpreting a per curiam Supreme Court case, Bobby v. Dixon*, to significantly limit the scope and applicability of* Seibert*. These courts claim that post-warning statements need only be suppressed under* Seibert *when there is an "earlier confession to repeat." In this Note, I argue that this reading of* Dixon *is erroneous for three reasons. First, the language that lower courts seize upon was obiter dictum. Second, the rule created by a categorical reading of* Dixon *is unworkable. And third, a limiting reading is inconsistent with the specific dangers of question-first interrogations and the rationales identified in the* Seibert *decision. When police undermine the effectiveness of* Miranda *warnings by using*

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question-first tactics, any statements made after the warnings should be suppressed.

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INTRODUCTION

On October 24, 2011, Bobby Johnson went to a police station to speak with detectives about the robbery and murder of a motel clerk in Charlotte, North Carolina.[1] After Johnson arrived, police escorted him to a locked room and interrogated him.[2] Detectives suspected Johnson of involvement, but refrained from giving him *Miranda* warnings for more than four hours.[3]

Within about twenty minutes of the interview beginning, two detectives showed Johnson DNA evidence which purported to establish his guilt.[4] The detectives confronted Johnson with a variety of interrogation tactics.[5] They spoke to Johnson with apparent certainty that he was guilty: "Where we stand right now as a law enforcement agency . . . is that there's no question anymore. That's the meat and potatoes right there for the case [pointing at the DNA analysis]. That's enough to charge you with murder right now. Right now."[6] They feigned sympathy

1. State v. Johnson, 795 S.E.2d 625, 627–28 (N.C. Ct. App. 2017), *modified and aff'd*, 821 S.E.2d 822 (N.C. 2018), *cert. denied*, 140 S. Ct. 122 (2019). The author participated in this case on petition to the Supreme Court for a writ of certiorari.

2. *Id*. at 628.

3. *See id*. (noting that the interview began at 9:50 am); *id*. at 632 (recording that a detective read Johnson his *Miranda* rights at 2:14 pm); *see also* Miranda v. Arizona, 384 U.S. 436, 467–73 (1966) (outlining procedural requirements for police interrogations).

4. *See Johnson*, 795 S.E.2d at 628 (stating that police showed Johnson the DNA report at 10:11 am).

5. *See id*. at 628–33 (describing the interrogation in detail).

6. *Id*. at 628.

with Johnson: "If the shooting was an accident, if Anita backed into the gun and 'pow, holy shit,' you didn't mean for that to happen, now's the time to talk about it."[7] They cajoled him to cooperate: "The time to get on the bus and get the best seat is now."[8] Both detectives alternated between brow-beating[9] and offering help.[10]

The reason for the detectives' failure to give *Miranda* warnings is not explicit from the record, but circumstantial evidence suggests that warnings were deliberately withheld.[11] At one point in the interview, a detective seemed to ask Johnson to confirm that he was not in custody[12]:

> Detective Ward asked Defendant if he thought he was going to be able to go home "today." When Defendant answered that he did not, he was told, "Then you're under arrest for murder." Detective Whitworth told him: "If you don't believe that you can get up and walk out of here, then I have no choice. You just told me that you believe you're going to jail." Detective Ward then asked Defendant: "Did you just say that, yes or no?" Defendant responded: "Yes sir." Detective Ward responded: "Then I'm going to have to place you under arrest and then I've got some stuff to do before I continue. Because to be voluntary you've got to believe you can walk out of here."[13]

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7. *Id*.

8. *Id*. at 630.

9. *See id*. at 631 ("'You did what you did.' 'You're full of shit.' 'You're done.'").

10. *See id*. at 633 ("Detective Ward assured Defendant he did not 'have a problem taking the stand of behalf of a defendant.'").

11. *See id*. at 631 (detailing how police attempted to get Johnson to admit that he was not in custody).

12. If Johnson was not in custody, police would not be required to issue *Miranda* warnings. *See* Berkemer v. McCarty, 468 U.S. 420, 434 (1984) (holding that *Miranda* applies only when a person is "subjected to custodial interrogation").

13. State v. Johnson, 795 S.E.2d 625, 631 (N.C. Ct. App. 2017).

Even after this conversation—during which Johnson twice stated that he did not think he could leave—the detectives did not Mirandize Johnson for at least another two hours.[14]

Regardless of *why* the police withheld *Miranda* warnings, it appears clear from the record that police wore down Johnson's resistance during the four unwarned hours of the interview.[15] Johnson consistently denied involvement throughout this period.[16] But he seemed to progressively despair.[17] The detectives repeatedly told Johnson that the DNA evidence was incontrovertible evidence of his guilt:

> Defendant was told that DNA analysts do not make mistakes, and he needed to "do the right thing." Defendant was told that the DNA evidence was "pretty damning, that puts you there." Defendant responded "That put me there, man. That right there just took my life. That right there just took my life."[18]

Johnson began to signal that he wanted to help: "I don't want to be in prison the rest of my damn life."[19] But he continued to deny involvement.[20] Detectives urged him to "get the best seat on the bus," and Johnson said that he was trying to.[21] Johnson began crying.[22] He told detectives that he felt sick, spat into a

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14. *See id.* at 631–33 (recording that Johnson stated that he could not leave twice at some point before 12:20 pm, and that he was given *Miranda* warnings at 2:14 pm). This Note adopts the common practice of using "Mirandize" as a verb, meaning the issuance of the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966).

15. *See id.* at 628–33 (detailing Johnson's increasingly emotional and desperate responses to police questioning).

16. *See id.* (listing repeated, consistent denials of involvement until after *Miranda* warnings).

17. *See id.* (describing Johnson's signs of distress, such as crying, silence, nausea, and putting his head in his hands).

18. *Id.* at 629.

19. *Id.*

20. *See id.* at 630 ("Defendant was then asked again if he had shot Anita, or had been with the person who had, and Defendant again replied, 'no.' Defendant was told that the detectives did not believe him, and Defendant replied, 'I know you don't.'").

21. *Id.*

22. *Id.*

trash can, and repeated, "I'm about to lose my life."[23] Police intensified the pressure, apparently sensing the end: "There's only one thing to do in this room." "You know it's over." "You are almost there."[24]

The detectives left Johnson alone for about forty minutes and permitted him a bathroom break.[25] When the interview resumed, the detectives formally arrested Johnson.[26] One detective explained to Johnson why he did this: "I felt like I had to make you a believer, you weren't believing us. I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."[27]

After arresting Johnson, the detectives still did not give him *Miranda* warnings for another eleven minutes.[28] Twenty minutes after he received warnings, Johnson gave up: "I'm already dead, should I just kill myself all the way?"[29] He told the detectives: "I wasn't the gunman," and named two others.[30]

The *Johnson* case illustrates the use of a police technique known as "question-first, warn-later" interrogation.[31] In a "question-first" interrogation, police interrogate a suspect without providing *Miranda* warnings.[32] Once the suspect

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23. *See id.* (describing Johnson's tears, nausea, and statement).

24. *Id.* at 631.

25. *Id.* at 632.

26. *Id.*

27. *Id.* at 633.

28. *Id.* at 632.

29. *Id.* at 633.

30. *Id.*

31. *See* Eric English, Note, *You Have the Right to Remain Silent. Now Please Repeat Your Confession:* Missouri v. Seibert *and the Court's Attempt to Put an End to the Question-First Technique*, 33 PEPP. L. REV. 423, 439 (2006) (describing "question-first" interrogations). This technique is also sometimes called "midstream Miranda," "Miranda in the middle," or "two-step interrogation," but this Note will use "question-first" for internal consistency. See United States v. Pacheco-Lopez, 531 F.3d 420, 422 (6th Cir. 2008) (referring to "Miranda-in-the-middle"); United States v. Williams, 435 F.3d 1148, 1150 (9th Cir. 2006) (using "two-step" and "midstream Miranda" nomenclature).

32. English, *supra* note 31, at 424.

incriminates herself, police give the *Miranda* warnings and induce the suspect to repeat her confession.[33] Not knowing that the earlier statements were inadmissible, the suspect invariably does so.[34] Five Supreme Court justices condemned this practice in *Missouri v. Seibert*,[35] concluding that "the question-first tactic effectively threatens to thwart *Miranda*'s purpose" by "draining the substance out of *Miranda*."[36]

The *Seibert* decision, however, caused a great deal of confusion.[37] Because the Court failed to muster a majority, federal and state courts alike are divided on whether the plurality opinion or Justice Kennedy's concurrence should govern.[38] The Supreme Court has not clarified the issue.[39] Indeed, the only Supreme Court decision to substantively cite and apply *Seibert* actually added to the confusion.[40] In *Bobby v. Dixon*,[41] a per curiam decision, the Supreme Court noted that *Seibert* did not apply because there was "no earlier confession to repeat."[42] Lower courts seized upon this language, and now increasingly find that *Seibert* does not apply if no confession was elicited during the unwarned portion of an interrogation.[43] Rather than engaging with a detailed analysis of either the

33. *Id*. at 442.

34. *See id*. (explaining suspects' reasonable assumptions about unwarned confessions).

35. 542 U.S. 600 (2004).

36. *Id*. at 617.

37. *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, 1105 (2013) (detailing conflict over the governing decision).

38. *See id*. at 1106–17 (discussing confusion in federal and state courts in the wake of *Seibert*).

39. *See, e.g.*, Wass v. Idaho, 138 S. Ct. 2706, 2706 (2018) (denying certiorari to petitioner seeking clarification on the meaning of *Seibert*).

40. *See* Bobby v. Dixon, 565 U.S. 23, 31 (2011) (per curiam) (distinguishing *Seibert* because there was "no earlier confession to repeat").

41. 565 U.S. 23 (2011) (per curiam).

42. *Id*. at 31.

43. *See, e.g.*, People v. Krebs, 452 P.3d 609, 647 (Cal. 2019) (finding *Seibert* inapplicable because officer "advised defendant of his *Miranda* rights *before* defendant confessed").

plurality or concurrence tests, these courts treat *Dixon* as a per se rule which narrows the scope of *Seibert*.[44]

This Note argues that lower courts' reliance on dictum from *Dixon* is gravely misplaced.[45] The *Seibert* decision was a response to police gamesmanship "dedicated to draining the substance out of *Miranda*."[46] To assert that *Seibert* only applies where there is "no earlier confession to repeat" is to dramatically limit the scope and applicability of the decision.[47] Using the *Johnson* case to provide concrete examples, this Note also explains why drawing the line at "confessions" fails to accurately apply the rule in *Seibert*.[48] Question-first interrogations which compromise the effectiveness of *Miranda* warnings should result in suppression of post-warning statements, regardless of whether there was an "earlier confession to repeat."[49]

Part I of this Note begins by tracing the background of and developments in the law of confessions, from voluntariness to *Miranda* and beyond.[50] Part II discusses the *Seibert* decision in detail, noting confusion in lower courts about the governing opinion before endorsing the plurality test.[51] Despite the uncertainty surrounding the governing opinion in *Seibert*, this Note identifies "effectiveness" as the linchpin of both Justice Souter's plurality opinion and Justice Kennedy's concurring opinion.[52] Part II looks to both opinions to identify three interrelated threats created by question-first interrogations: timing, confusion, and the "cat out of the bag" problem.[53] In a broader sense, Part II considers two rationales motivating the

44. *See, e.g.*, United States v. Iles, 753 F. App'x 107, 110 (3d Cir. 2018) ("Furthermore, *Seibert* does not apply because Iles did not make any incriminating statements before she signed the *Miranda* waiver.").

45. *See infra* Part III and accompanying text.

46. *Seibert*, 542 U.S. at 617.

47. *Dixon*, 565 U.S. at 31; *see infra* Part III and accompanying text.

48. *See infra* Part III and accompanying text.

49. *See infra* Part IV and accompanying text.

50. *See infra* Part I and accompanying text.

51. *See infra* Part II and accompanying text.

52. *See infra* Part II.A.2 and accompanying text.

53. *See infra* Part II.A.5 and accompanying text.

Seibert decision: disapproval of police gamesmanship, and avoidance of false confessions.[54] Part II examines *Bobby v. Dixon*, and—more importantly—the lower courts' interpretations of *Dixon*, which treat dictum ("no earlier confession to repeat") as a per se modification of *Seibert*.[55] Part III argues that lower courts' readings of *Dixon* are erroneous in light of the text of *Dixon*, the practical limitations of a categorical reading, and the dangers and rationales identified in Part II.[56] Finally, Part IV highlights the continued importance of the issue, and recommends that advocates raise *Seibert* issues on appeal in order to obtain clarification from the Supreme Court.[57]

I. THE LAW OF CONFESSIONS

A. *Background*

Confessions are a critical part of our justice system.[58] Other types of evidence—physical evidence, for example—are not always available.[59] And even the best physical evidence often lacks the context and comprehensiveness of a confession.[60] Imagine that a man is charged with driving under the influence after he was discovered asleep in his car. Blood samples or a

54. *See infra* Part II.A.6 and accompanying text.

55. *See infra* Part II.B and accompanying text.

56. *See infra* Part III and accompanying text.

57. *See infra* Part IV and accompanying text.

58. *See* Maryland v. Shatzer, 559 U.S. 98, 108 (2010) (calling confessions "essential to society's compelling interest in finding, convicting, and punishing those who violate the law"); Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16, 16 (1961) ("Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual . . . .").

59. *See* David Crump, *Why Do We Admit Criminal Confessions into Evidence?*, 43 SEATTLE U. L. REV. 71, 75 (2019) (noting that arson is "virtually impossible to prove without confessions," because "the most telling evidence is obliterated by the crime itself").

60. *See id.* at 88 (discussing narrative weaknesses in prosecutions which lack confessions, even where there is physical evidence).

Breathalyzer might confirm that the man was intoxicated at the time of arrest, but cannot confirm whether the man was driving. But if the suspect tells police that he had five or six drinks at the bar, started to drive home, and then pulled over to sleep, then the evidence is all in one place and there is little room for doubt.

There is great narrative appeal to confessions.[61] Trial lawyers have long known that storytelling is a critical part of persuading a jury.[62] Confessions tell the story straight from the horse's mouth.[63] Physical evidence has to be interpreted by experts, and sometimes those experts disagree about the meaning of the evidence.[64] But inculpatory information directly from the defendant is difficult for a layperson to parse or rationalize.[65] This explains why law enforcement officers routinely interrogate suspects and seek confessions.[66] As Justice White noted:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . The admissions of a defendant come from the actor

61. *See id.* at 87 (describing "juror expectations about coherent narratives" as one justification for admitting confessions into evidence).

62. *See* SAM SCHRAGER, THE TRIAL LAWYER'S ART 210 (1999) ("Jury trials are storytelling contests . . . . Professional judges would not be receptive to the craft's method of telling stories. Lay jurors are.").

63. *See* Crump, *supra* note 59, at 74 (noting that confessions offer evidence which is "not publicly available and that would not be accessible to anyone but the perpetrator . . . .").

64. *See, e.g.*, Woodfox v. Cain, 609 F.3d 774, 810 (5th Cir. 2010) (recounting divergent testimony from fingerprint experts about the source of a print).

65. *See* Crump, *supra* note 59, at 74 (observing that confessions might be considered "good evidence" because they "come from a person who usually knows the truth").

66. *See* Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEGAL STUDS. 93, 97 (1994) (discussing routine use of interrogation techniques designed to elicit confessions).

> himself, the most knowledgeable and unimpeachable source of information about his past conduct."[67]

Confessions, however, are not an unmitigated good.[68] If improperly obtained, they can serve as a nail in an innocent person's coffin.[69] The Innocence Project, for example, reports that between 15 and 25 percent of DNA-exonerated defendants confessed prior to their trials.[70] Although this might seem counterintuitive to laypersons,[71] courts have long recognized potential reliability concerns.[72] The development of English and American law reflects increasing judicial caution about the admissibility of criminal confessions.[73]

B. *Voluntariness*

For most of American history, the primary legal challenge to a confession was the claim that it had been involuntary.[74] English and American courts at common law rejected confessions extracted by threats, violence, or promises.[75]

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67. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).

68. *See* Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 6–8 (2006) (lauding confessions but noting the "potential for police misconduct and abuse").

69. *See* David K. Shipler, *Why Do Innocent People Confess?*, N.Y. TIMES, Feb. 26, 2012, at SR6 (describing police interrogation tactics that result in false confessions).

70. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCH. 215, 216 (2005).

71. *See* Shipler, *supra* note 69, at SR6 ("Intuition holds that the innocent do not make false confessions.").

72. *See* Dickerson v. United States, 530 U.S. 428, 432–33 (2000) (discussing early English cases on confessions).

73. *See* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.1(c) (4th ed. 2018) (describing Supreme Court responses to police conduct of interrogations).

74. *See* OTIS H. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 20 (1973) (explaining the exclusion of involuntary confessions at common law).

75. *See* WAYNE R. LAFAVE ET AL., *supra* note 73, at § 6.2 (describing development of voluntariness doctrine at common law).

Eventually, these common law principles were constitutionalized via the Self-Incrimination Clause of the Fifth Amendment[76] and the Due Process Clause of the Fourteenth Amendment.[77]

The voluntariness doctrine served to curb some of the most egregious abuses of police authority in interrogation rooms.[78] But commentators criticized the doctrine, noting that case-by-case factual inquiries failed to provide clear and prospective guideposts for police or courts.[79] By the 1960s, the Supreme Court had grown increasingly dissatisfied with the deterrent effect of voluntariness on police conduct.[80] The Court also expressed frustration with the murky line-drawing required by the voluntariness doctrine.[81]

C. Miranda v. Arizona

In 1966, the Warren Court decided to draw a brighter line.[82] *Miranda v. Arizona*[83] was a seminal development in American

76. *See* U.S. CONST. amend. V; Bram v. United States, 168 U.S. 532, 542 (1897) (stating that the issue of involuntary confessions implicates the Fifth Amendment).

77. *See* U.S. CONST. amend. XIV; Brown v. Mississippi, 297 U.S. 278, 286 (1936) (calling the use of confessions obtained by state torture a "clear denial of due process").

78. *See* Eve B. Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 3 (2015) (noting that existing voluntariness doctrine "allow[s] courts to step in when particularly egregious problems arise").

79. *See, e.g.*, Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981) (criticizing the "vagueness" of the fact-specific "totality of the circumstances" test).

80. *See* Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102–03 (explaining how the "subtle and elusive" voluntariness doctrine made "some automatic device" for controlling police interrogations inevitable).

81. *See* Haynes v. Washington, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques . . . offensive to due process is, at best, a difficult one to draw . . . .").

82. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (concluding that "proper safeguards" were necessary to "combat [the inherently compelling] pressures" of custodial interrogation).

83. 384 U.S. 436 (1966).

criminal procedure and constitutional law.[84] The case involved four consolidated conviction appeals.[85] The defendant in each case incriminated himself during a police interrogation.[86]

The Supreme Court decided to require police to provide a slew of warnings before any custodial interrogation.[87] A suspect had to be advised of (1) the right to remain silent; (2) the potential use of any statement as evidence against him; (3) the right to an attorney; and (4) the right to have an appointed attorney if indigent.[88] If police failed to obtain a valid waiver of these rights, then statements made by the defendant could not be used against him at trial.[89]

Animating these new procedural safeguards was mounting alarm at sophisticated police interrogation practices.[90] The *Miranda* Court cited shocking abuses, including the use of lit cigarette butts to secure incriminating statements from a witness.[91] The Court emphasized that even in the absence of physical brutality, *any* custodial interrogation "exacts a heavy toll on individual liberty and trades on the weakness of individuals."[92] Although some interrogations still involved physical brutality, "the modern practice of in-custody

84. *See* Michael Edmund O'Neill, *Undoing* Miranda, 2000 BYU L. REV. 185, 185 (calling *Miranda* an "icon of the Warren Court's transformation of American criminal procedure").

85. *See Miranda*, 384 U.S. at 491–99 (listing facts of four consolidated appeals).

86. *See id*. at 445 ("[Each case] thus share[s] salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.").

87. *See id*. at 444 (summarizing holding).

88. *See id*. ("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 the right to an attorney, either retained or appointed.").

89. *Id*.

90. *See id*. at 444–56 (introducing the need to curb "overzealous" police conduct before describing police interrogation techniques).

91. *Id*. at 446.

92. *Id*. at 455.

interrogation is psychologically rather than physically oriented."[93]

The Court was deeply disturbed by a series of psychologically manipulative techniques described in police training texts.[94] Training materials encouraged police to isolate the suspect, to "[deprive him] of every psychological advantage," and to act as if the guilt of the suspect was already known.[95] The texts encouraged various techniques designed to elicit confessions.[96] First, police might feign sympathy: "Joe, you probably didn't go looking out for this fellow with the purpose of shooting him."[97] If this didn't work, there was "Mutt and Jeff," commonly known as "good cop, bad cop."[98] In this technique, one police officer would play "the relentless investigator, who knows the suspect is guilty and is not going to waste any time."[99] The other police officer would feign kindness, urging cooperation so as to stave off the hardhearted tactics of the other.[100] Other techniques involved outright trickery, such as holding fake witness line-ups with coached "witnesses" who identified the suspect,[101] or offering false legal advice.[102] When "kindness and stratagems" failed, the training texts encouraged police to turn to "dogged persistence," interrogating "steadily and without relent" to "dominate his subject and overwhelm him with the inexorable will to obtain the truth."[103]

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93. *See id*. at 445–48 (tracing "incommunicado" police interrogation practices including "the third degree").

94. *See id*. at 448–56 (describing interrogation techniques which "trade . . . on the weakness of individuals"). Interestingly, many of these practices were still in use in 2011 during the Johnson case, forty-five years after the *Miranda* decision. *See* State v. Johnson, 795 S.E.2d 625, 628–33 (N.C. Ct. App. 2017) (describing interrogation of Bobby Johnson).

95. Miranda v. Arizona, 384 U.S. 436, 450 (1966).

96. *Id.* at 448 & n.8.

97. *Id.* at 451–52.

98. *Id*. at 452.

99. *Id*.

100. *Id*.

101. *Id.* at 453.

102. *Id*. at 455.

103. *Id*. at 451.

Although such tactics were not technically coercive under the voluntariness doctrine,[104] the Supreme Court thought that they nevertheless jeopardized the Fifth Amendment and were "equally destructive of human dignity."[105] The *Miranda* Court also expressed concerns about the reliability of aggressive techniques, warning that psychological manipulation could induce suspects to falsely implicate themselves.[106] The Court described multiple cases in which defendants of "limited intelligence" had confessed to crimes that they never committed.[107] Because of the privilege against self-incrimination, the human dignity interests, and the concerns about reliability, the Court mandated warnings in order to "dispel the compulsion inherent in custodial surroundings."[108] Absent such warnings, a confession could not "truly be the product of . . . free choice."[109]

D. *Limitations on the* Miranda *Exclusionary Rule*

Miranda's sweeping language suggested that a violation of *Miranda* was a violation of the Fifth Amendment.[110] The Supreme Court subsequently narrowed the scope and importance of *Miranda* significantly.[111]

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104. *See id.* at 457 ("In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest.").

105. *See id.* ("To be sure, this is not physical intimidation, but it is equally destructive of human dignity.").

106. *See id.* at 455 & n.24 (warning about the danger of false confessions).

107. *Id.*

108. *Id.* at 458.

109. *Id.*

110. *See id.* at 457–67 (describing applicability of the Fifth Amendment to custodial interrogations in detail).

111. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 444 (1974) (distinguishing a *Miranda* violation from a Fifth Amendment violation).

First, the Supreme Court asserted that *Miranda*'s protections were broader than the Fifth Amendment itself.[112] *Miranda* was recast as a mere prophylactic rule designed to insulate Fifth Amendment protections by presuming coercion in the absence of warnings.[113] Notwithstanding the presumption, a violation of *Miranda* was not necessarily a violation of the Fifth Amendment.[114]

Given this revised interpretation, the Court permitted various exceptions for the exclusion of statements obtained in violation of *Miranda*.[115] Statements taken in violation of *Miranda* could still be used to impeach a witness' testimony.[116] *Miranda* warnings were also not required when public safety was jeopardized.[117] Finally—and most relevant to this Note—the Supreme Court sharply limited the exclusionary rule associated with *Miranda*.[118]

In *Oregon v. Elstad*,[119] a teenaged burglary suspect was briefly questioned at his parent's home without receiving

112. *See id.* ("[*Miranda*'s] procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure [sic] that the right against compulsory self-incrimination was protected.").

113. *See* Oregon v. Elstad, 470 U.S. 298, 306 n.1 (1985) ("A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of unwarned statements.").

114. *See id.* at 306 (noting that *Miranda* exclusion "may be triggered even in the absence of a Fifth Amendment violation").

115. *See* Paul G. Alvarez, Comment, *Taking Back* Miranda: *How* Seibert *and* Patane *Can Keep "Question-First" and "Outside* Miranda*" Interrogation Tactics in Check*, 54 CATH. U. L. REV. 1195, 1202–20 (2005) (summarizing exceptions and carveouts to the *Miranda* doctrine).

116. *See* Harris v. New York, 401 U.S. 222, 224 (1971) (permitting the use of excluded statements to impeach witness testimony).

117. *See* New York v. Quarles, 467 U.S. 649, 657–58 (1984) ("We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.").

118. *See Elstad*, 470 U.S. at 305–07, 309–14 (limiting the *Miranda* exclusionary rule by rejecting the "fruit of the poisonous tree" and "cat out of the bag" arguments).

119. 470 U.S. 298 (1985).

Miranda warnings.[120] The suspect, Elstad, implicated himself.[121] Approximately one hour later, he was Mirandized and interrogated at the police station.[122] Elstad again implicated himself, this time in writing.[123]

Before trial, Elstad moved to suppress both his unwarned and warned statements.[124] He offered two arguments for the suppression of the written confession: First, he argued that it should be excluded under the "fruit of the poisonous tree" doctrine because the written statement was functionally the product of the earlier, unwarned statement.[125] Second, he argued that the unwarned verbal statement at his parents' house had let the "cat out of the bag."[126] Elstad claimed that the psychological effect of making an earlier inculpatory statement undermined the voluntariness of the later, warned confession.[127] Because he had already implicated himself, he did not think that he could "get the cat back in the bag" by denying responsibility.[128]

The Supreme Court flatly rejected both arguments.[129] In rejecting Elstad's first argument, the Court explained that the "fruit of the poisonous tree" doctrine was only tied to *constitutional* violations.[130] Because *Miranda* violations were not constitutional violations, the *Miranda* exclusionary rule afforded only "preventive medicine," which "provides a remedy

120. *See id*. at 301 (recounting that Elstad said, "Yes, I was there" after police accused him of involvement in the burglary).

121. *Id.*

122. *Id*. at 301–02.

123. *Id.*

124. *Id*. at 302.

125. *See id*. at 302–03 (summarizing defendant's arguments).

126. *Id.*

127. *Id*. at 311 (citing United States v. Bayer, 331 U.S. 532, 540 (1947)).

128. *See id*. (explaining the "cat out of the bag" argument).

129. *See id.* at 305–07, 311–12 (rejecting the "fruit of the poisonous tree" argument and the "cat out of the bag" argument).

130. *See id*. at 305 ("Respondent's contention that his confession was tainted by the earlier failure of police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation.").

even to the defendant who has suffered no identifiable constitutional harm."[131]

The Supreme Court also rejected Elstad's "cat out of the bag" argument.[132] Although an accused might *think* that he cannot "get the cat back in the bag" after implicating himself, this fell short of official coercion.[133] The Court refused to recognize "the psychological impact of voluntary disclosure of a guilty secret . . . as state compulsion."[134] Such a rule would be "speculative and attenuated at best," because "[i]t is difficult to tell with certainty what motivates a suspect to speak."[135] Finally, treating "cat out of the bag" statements as coerced would deprive police of highly probative evidence that might have been the result of free will.[136]

E. Miranda *Survives*

Miranda's steady erosion at the hands of the Burger and Rehnquist Courts led many commentators to think that the doctrine rested on unsteady ground.[137] If *Miranda* was a mere

131. *Id.* at 307; *see* United States v. Patane, 542 U.S. 630, 634 (2004) (declining to apply exclusionary doctrine to physical "fruits" discovered via a *Miranda* violation).

132. Oregon v. Elstad, 470 U.S. 298, 311–12 (1985).

133. *See id.* at 312 ("There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequence of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question . . . .").

134. *Id.*

135. *Id.* at 313–14.

136. *See id.* at 312 ("When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.").

137. *See* Linda Greenhouse, *Justices Reaffirm* Miranda *Rule, 7–2; A Part of "Culture,"* N.Y. TIMES, June 27, 2000, at A1, A18 ("*Miranda* had appeared to be in jeopardy . . . because of the court's perceived hostility to the original decision."); JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 199–222 (1993) (advocating the overruling of *Miranda* based on its purported constitutional illegitimacy); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law*

"prophylactic rule," was it then unenforceable on the states? And could it be overruled by an act of Congress? In *Dickerson v. United States*,[138] the Supreme Court answered both questions in the negative.[139]

Dickerson involved a 1968 statute that purported to overrule *Miranda*.[140] Although the statute was virtually ignored by the executive branch and the judicial branch for decades,[141] the Fourth Circuit in 1999 applied the statute and admitted a confession obtained in violation of *Miranda*.[142]

Chief Justice Rehnquist, a longtime critic of *Miranda*, penned the 7–2 decision that retained the doctrine.[143] The Court held that *Miranda* was a "constitutional decision," which was applicable to the states and could not be overruled by statute.[144] Citing stare decisis, the Court declined to overrule *Miranda* on its own.[145] Chief Justice Rehnquist noted that *Miranda* was

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Enforcement, 50 STAN. L. REV. 1055, 1126–32 (1998) (urging the end of the "grand social experiment" of *Miranda*).

138. 530 U.S. 428 (2000).

139. *Id*. at 432.

140. *See* Crime Control Act of 1968, Pub. L. No. 90-351, § 701, 82 Stat. 210 (codified at 18 U.S.C. § 3501), *invalidated by* United States v. Dickerson, 530 U.S. 428 (2000) ("[A] confession . . . shall be admissible in evidence if it is voluntarily given.").

141. *See* Davis v. United States, 512 U.S. 452, 463–64 (1994) (Scalia, J., dissenting) ("[W]ith limited exceptions [§ 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago.").

142. *See* United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000) (rejecting Justice Department's argument that § 3501 was unconstitutional).

143. *See* Greenhouse, *supra* note 137, at A1 (calling Chief Justice Rehnquist an "early and tenacious" critic of *Miranda*); *Dickerson*, 530 U.S. at 431 (ascribing authorship of opinion to Chief Justice Rehnquist).

144. *See Dickerson*, 530 U.S. at 432 ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.").

145. *See id*. at 443 ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

"embedded in routine police practice to the point where the warnings have become part of our national culture."[146]

Dickerson guaranteed *Miranda*'s continued vitality and constitutionality.[147] Just four years later, though, *Miranda* came once more under attack.[148]

II. THE SUPREME COURT REJECTED QUESTION-FIRST, WARN-LATER INTERROGATION TACTICS

A. Missouri v. Seibert

In *Missouri v. Seibert*,[149] the Supreme Court encountered "a new challenge to *Miranda*."[150] Police officers in Rolla, Missouri, deliberately refrained from giving a murder suspect *Miranda* warnings.[151] She was interrogated in custody for thirty to forty minutes before she admitted that she had been involved in the death of a mentally ill teenager.[152] After giving Seibert a smoke break, police turned on a tape recorder, issued *Miranda* warnings, and obtained a waiver of rights.[153] They then invited her to repeat her confession: "Ok [sic] [Pa]trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we? Now, in discussion you told us, you told us that there was an understanding about Donald."[154]

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146. *Id.*; *see* Victor Li, *Think You Have the Right: The 50-Year Story of the* Miranda *Warning*, 102 A.B.A. J. 34, 37 (2016) (recounting that *Miranda*'s cultural influence has been so prolific that "Russian TV shows have Russian police giving the Russian equivalent of the warning even though there's no such requirement in Russian law" (quotations omitted)).

147. *See* Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1121 (2001) (describing *Dickerson* as "plac[ing] *Miranda* upon a more secure, constitutional footing").

148. *See* Missouri v. Seibert, 542 U.S. 600, 609 (2004) (describing a "new challenge to *Miranda*").

149. 542 U.S. 600 (2004).

150. *Id.* at 609.

151. *Id.* at 604–05.

152. *Id.*

153. *Id.*

154. *Id.*

Before trial, Seibert moved to suppress the entirety of the interrogation.[155] The interrogating officer stated during the suppression hearing that he made a "conscious decision" to withhold *Miranda* warnings.[156] He told the court that he had been trained to interrogate in this way: "[Q]uestion first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'"[157] Rolla police officers testified that this strategy was not limited to their department: the Police Law Institute, a training organization, was among several national groups that advocated "question-first" interrogation practices.[158]

The trial court suppressed the prewarning statements, but admitted everything that Seibert told police after she received *Miranda* warnings.[159] The Missouri Court of Appeals affirmed, concluding that the case was governed by the U.S. Supreme Court's decision in *Oregon v. Elstad*.[160] The Supreme Court of Missouri reversed, distinguishing *Elstad* because the first elicited statement was nearly continuous with the second, and because the police intentionally deprived Seibert of the opportunity to knowingly and intelligently waive her *Miranda* rights.[161]

On appeal to the U.S. Supreme Court, five justices agreed that the question-first, warn-later interrogation violated Seibert's *Miranda* rights.[162] Unfortunately, the Court failed to marshal a majority.[163] Four Justices—Souter, Ginsburg, Stevens, and Breyer—offered the plurality opinion.[164] Justice

155. *Id.* at 605.

156. *Id*. at 605–06.

157. *Id*. at 606.

158. *Id*. at 609–10.

159. *Id*. at 606.

160. *Id.* See *supra* Part I.D for a discussion of *Elstad*.

161. Missouri v. Seibert, 542 U.S. 600, 606 (2004).

162. *Id*. at 604, 618 (Kennedy, J., concurring).

163. *Id*. at 604 (plurality opinion).

164. *Id*. Justice Breyer also wrote a separate concurrence but joined the plurality opinion in full. *Id.* at 617 (Breyer, J., concurring). Justice Breyer's concurrence primarily concerned his view that *Miranda* violations could bear "fruit of the poisonous tree," contrary to the holding of *Elstad*. *Compare id.*

Kennedy concurred only in the judgment.[165] And four Justices—O'Connor, Rehnquist, Scalia, and Thomas—dissented.[166]

1. Federal and State Courts Are Divided About the Governing Opinion in *Seibert*

Before analyzing the *Seibert* decision in detail, it is important to note that federal and state courts are divided on *Seibert*'s governing opinion.[167] *Seibert* was a plurality decision, so courts apply the "narrowest grounds" doctrine to decide which opinion speaks for the Supreme Court.[168] In *Marks v. United States*,[169] the Supreme Court explained: "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 . . . ."[170]

Because Justice Kennedy claimed that he was deciding on narrower grounds than the plurality,[171] most federal circuits interpret his concurrence as the opinion of the Court.[172] Seven

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(arguing that a "fruits" test is "sound and workable"), *with* Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("[T]he *Miranda* presumption . . . does not require that the statements and their fruits be discarded as inherently tainted."). Because this view is outside the scope of this Note, I will not discuss Justice Breyer's concurrence in any more detail.

165. *Seibert*, 542 U.S. at 618 (Kennedy, J., concurring).

166. *Id*. at 622 (O'Connor, J., dissenting).

167. *See* Rodriguez, *supra* note 38, at 1095 (describing confusion in circuit courts about the meaning of *Seibert*).

168. *Id*. at 1108.

169. 430 U.S. 188 (1977).

170. *Id*. at 193.

171. *See* Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring) ("In my view, [the plurality test] cuts too broadly . . . . I would apply a narrower test . . . .").

172. *See* Reyes v. Lewis, 833 F.3d 1001, 1029 (9th Cir. 2016) (describing Justice Kennedy's concurrence as "the clearly established rule under *Seibert*"); United States v. Moore, 670 F.3d 222, 230 (2d Cir. 2012) (using plurality factors to apply Justice Kennedy's concurrence); United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007) (applying Justice Kennedy's concurrence); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006) (same); United

circuit courts have adopted this view: the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh.[173] Other circuit courts, however, observe that Justice Kennedy's approach was specifically disavowed by nearly *every other justice*.[174] The Sixth Circuit treats the plurality opinion as governing,[175] while four other circuits—the First, Seventh, Tenth, and D.C.—confusedly apply both opinions.[176] This is a problem of some consequence, as the plurality and the concurrence tests can sometimes lead to divergent results.[177]

Confusion about *Seibert* also abounds in state courts.[178] The high courts of at least thirteen states and two U.S. territories

States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006) ("Because *Seibert* is a plurality decision and Justice Kennedy concurred in the result on the narrowest grounds, it is his concurring opinion that provides the controlling law."); United States v. Naranjo, 426 F.3d 221, 231–32 (3d Cir. 2005) (applying Justice Kennedy's opinion based on narrowest grounds doctrine); United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005) (applying Justice Kennedy's concurrence).

173. *See supra* note 172 and accompanying text.

174. *See, e.g.*, United States v. Heron, 564 F.3d 879, 885 (7th Cir. 2009) ("The only thing we know for sure is that at least seven members of the Court rejected an intent-based approach . . . ."). Justice Breyer was the sole member who voiced any measure of support for Justice Kennedy's opinion. *See Seibert*, 542 U.S. at 617 (Breyer, J., concurring) ("I also agree with Justice Kennedy's opinion insofar as it . . . makes clear that a good-faith exception applies.").

175. *See* United States v. Ray, 803 F.3d 244, 272 (6th Cir. 2015) (adopting plurality test).

176. *See* United States v. Faust, 853 F.3d 39, 48 n.6 (1st Cir. 2017) (noting that the First Circuit has previously applied both tests but has no "definitive reading"); United States v. Straker, 800 F.3d 570, 617 (D.C. Cir. 2015) (refusing to take a side in the *Seibert* debate before analyzing defendant's claim with both tests); United States v. Lee, 618 F.3d 667, 678 (7th Cir. 2010) (noting that the circuit has not picked a test before applying both tests); United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) (criticizing, strongly, other courts' adoptions of Justice Kennedy's concurrence before applying both tests).

177. *See* United States v. Sanchez-Gallegos, 412 F. App'x 58, 73 n.2 (10th Cir. 2011) (Ebels, J., concurring) (noting that the plurality approach might have yielded a different result than Justice Kennedy's test).

178. *See* Petition for Writ of Certiorari at 26–27, Johnson v. North Carolina, 140 S. Ct. 122 (2019) (No. 18-1542) (describing confusion in state and territorial courts). The author participated in researching and drafting this petition while he was a summer associate.

apply Justice Kennedy's test.[179] And the high courts of at least thirteen states and the District of Columbia apply the plurality opinion or apply both decisions.[180] In states without a high court decision, intermediate appellate courts wade into the debate,

179. *See* Jackson v. State, 427 S.W.3d 607, 617 (Ark. 2013) (noting no evidence that failure to warn was "purposeful"); Verigan v. People, 420 P.3d 247, 255 (Colo. 2018) ("We conclude that Justice Kennedy's opinion . . . is the controlling law."); Ross v. State, 45 So. 3d 403, 422 n.9 (Fla. 2010) (focusing on concurrence in analysis); State v. Abbott, 812 S.E.2d 225, 231 (Ga. 2018) (reversing its 2007 adoption of the *Seibert* plurality opinion); People v. Angoco, 2007 Guam 1, 21 (2007) (concluding that "the concurrence of Justice Kennedy is the holding of *Seibert*"); State v. Wass, 396 P.3d 1243, 1248 (Idaho 2017) (adopting concurring opinion as the holding of *Seibert*); People v. Lopez, 892 N.E.2d 1047, 1069 (Ill. 2008) (adopting concurrence); Jackson v. Commonwealth, 187 S.W.3d 300, 309 (Ky. 2006) (applying concurrence); State v. Nightingale, 58 A.3d 1057, 1067 (Me. 2012) (describing the circuit split before adopting concurrence); Robinson v. State, 19 A.3d 952, 964–65 (Md. 2011) (applying concurrence); State v. Collings, 450 S.W.3d 741, 755 (Mo. 2014) ("There was no . . . evidence demonstrating [the police chief] deliberately tried to skirt the protections of *Miranda*."); State v. Ruiz, 179 A.3d 333, 342 (N.H. 2018) ("[Justice Kennedy's] narrower test controls under the Federal Constitution."); El Pueblo de Puerto Rico v. Millán Pacheco, 182 D.P.R. 595, 634–35 (P.R. 2011) (concluding that *Seibert* applies only to those cases in which the state deliberately subverts *Miranda*); Carter v. State, 309 S.W.3d 31, 38 (Tex. Crim. App. 2010) (adopting concurrence); Secret v. Commonwealth, 819 S.E.2d 234, 244 (Va. 2018) (same).

180. *See* People v. Krebs, 452 P.3d 609, 645–46 (Cal. 2019) (describing circuit split before applying both decisions); State v. Donald, 157 A.3d 1134, 1143 n.8 (Conn. 2017) ("[W]e find the plurality's approach more persuasive . . . ."); Hairston v. United States, 905 A.2d 765, 781–82 (D.C. 2006) (applying plurality); Sutherland v. State, No. 222, 2006, 2007 Del. LEXIS 582, at *5–6 (Del. Jan. 9, 2007) (applying plurality factors in unpublished decision); Kelly v. State, 997 N.E.2d 1045, 1054–55 (Ind. 2013) (applying plurality); State v. Jones, 151 P.3d 22, 35 (Kan. 2007) (listing plurality factors without mention of intent before concluding interrogation was not custodial); State v. Juranek, 844 N.W.2d 791, 803–04 (Neb. 2014) (applying plurality test); Carroll v. State, 371 P.3d 1023, 1034–35 (Nev. 2016) (same); State v. Filemon V., 412 P.3d 1089, 1098–99 (N.M. 2018) (same); State v. Farris, 849 N.E.2d 985, 994 (Ohio 2006) ("We agree with the *Seibert* plurality and dissent that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis."); State v. Sabourin, 161 A.3d 1132, 1141 (R.I. 2017) (listing plurality factors in dictum); State v. Navy, 688 S.E.2d 838, 842 (S.C. 2010) ("In our view, that deliberate [police] practice was not determinative in *Seibert*."); State v. Dailey, 273 S.W.3d 94, 107 (Tenn. 2009) (applying both tests); State v. Brooks, 70 A.3d 1014, 1019–20 (Vt. 2013) (applying plurality test).

casting their lots with the plurality,[181] the concurrence,[182] or neither opinion.[183] And at least two states, frustrated by the confusion in federal courts, turned to state constitutional privileges to avoid the fray altogether.[184] Notwithstanding this state of affairs, the Supreme Court rejected several recent invitations to clarify the governing opinion.[185]

2. Both Opinions Focus on the Effectiveness of *Miranda* Warnings

Given the uncertainty about the exact meaning of *Seibert*, it is important to carefully consider the tests set forth in both the plurality opinion and Justice Kennedy's concurrence. At root, what the opinions share in common is the idea that question-first interrogations violate *Miranda* because they

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181. *See* Crawford v. State, 100 P.3d 440, 447–50 (Alaska Ct. App. 2004) (applying plurality factors after criticizing a subjective test); People v. Gamez, No. 324199, 2016 Mich. App. LEXIS 197, at *30–31 (Mich. Ct. App. Feb. 2, 2016) (analyzing *Seibert* issue using plurality factors).

182. *See* White v. State, 179 So. 3d 170, 191 (Ala. Crim. App. 2013) (adopting an Eleventh Circuit opinion which designated the concurrence as the governing opinion); State v. Zamora, 202 P.3d 528, 534–35 & n.8 (Ariz. Ct. App. 2009) ("We agree . . . that Justice Kennedy's concurring opinion is controlling . . . ."); State v. Bruce, 169 So. 3d 671, 678 (La. Ct. App. 2015) ("[T]he holding of *Seibert* is found in Justice Kennedy's opinion concurring in judgment"); State v. Hickman, 238 P.3d 1240, 1244 (Wash. Ct. App. 2010) (holding that the concurring opinion is the constitutional rule of *Seibert*).

183. *See* State v. Gomez, No. 2-123 / 11-0350, 2012 Iowa App. LEXIS 427, at *30 (Iowa Ct. App. June 13, 2012) ("Under any of the tests enunciated in *Seibert*, the admissions made on these occasions were admissible."); *see also* Commonwealth v. Charleston, 16 A.3d 505, 525 (Pa. Super. Ct. 2011) (finding that *Seibert* was not precedential because Justice Kennedy's opinion was not a "logical subset" of the plurality opinion).

184. *See* State v. O'Neill, 936 A.2d 438, 454 (N.J. 2007) ("The shifting sands of federal jurisprudence provide no certainty concerning the standard . . . . Judges and police officers, however, must have workable standards . . . ."); *see also* State v. Vondehn, 236 P.3d 691, 702–04 (Or. 2010) (adopting plurality via parallel state constitutional grounds).

185. *See generally* State v. Wass, 396 P.3d 1243 (Idaho 2017), *cert. denied*, 138 S. Ct. 2706 (2018); Johnson v. State, 821 S.E.2d 822 (N.C. 2018), *cert. denied*, 140 S. Ct. 122 (2019) (rejecting certiorari for two cases asking to clarify the *Seibert* opinion).

undermine the effectiveness of the warnings.[186] But the opinions differ in their preferred method of assessing the harm to effectiveness.[187] The plurality created an objective five-factor test centered on the suspect, urging consideration of (1) the completeness and detail of the questions and answers in the first round of interrogation; (2) the overlapping content of the two statements; (3) the timing and setting of the first and second statements; (4) the continuity of police personnel; and (5) the degree to which the interrogator's questions treated the second round as a continuation of the first.[188]

The plurality distilled its objective test from a factual comparison of the *Seibert* interrogation with the interrogation from *Elstad*.[189] Because *Elstad* appeared to control the issue in the lower courts, the Supreme Court sought to distinguish it.[190] In *Elstad*, a young man made unwarned inculpatory statements to police officers in the living room of his parents' house.[191] He was arrested and transported to the sheriff's department headquarters.[192] Approximately an hour later, he waived his

186. *See* Missouri v. Seibert, 542 U.S. 600, 611–12 (2004) (plurality opinion) ("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.* at 620 (Kennedy, J., concurring) ("The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given.").

187. *Compare id.* at 615 (plurality opinion) (offering objective five-factor test to gauge effectiveness of *Miranda* warnings), *with id.* at 622 (Kennedy, J., concurring) (asserting that deliberate violations accompanied by no "curative measures" should result in suppression).

188. *See id.* at 615–16 (plurality opinion) (listing five factors "that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object").

189. *See id.* at 615 (attributing five factors to "[t]he contrast between *Elstad* and this case").

190. *See* State v. Seibert, No. 23729, 2002 Mo. App. LEXIS 401, at *14–22 (Mo. Ct. App. Jan. 30, 2002) (analyzing and applying *Elstad* as controlling precedent); *see also supra* Part I.D.

191. *See* Oregon v. Elstad, 470 U.S. 298, 301 (1985) (describing facts).

192. *Id.*

Miranda rights and confessed to involvement in a burglary.[193] The Supreme Court held that the subsequent waiver was valid because it could not be the "fruit" of the unwarned statements.[194] In so doing, the *Elstad* court also rejected the "cat out of the bag" theory accepted by the Oregon Court of Appeals.[195]

The *Seibert* plurality distinguished *Elstad* using its five-factor test.[196] In *Elstad*, the questioning in the suspect's living room was "a markedly different experience" from the interrogation at the station house.[197] Police had only gone to Elstad's house in order to arrest him, and they had only elicited a "laconic" admission.[198] *Seibert*, by contrast, presented a single "systematic, exhaustive" interrogation "managed with psychological skill."[199] There was no real distinction between the first and second interrogations of Patrice Seibert.[200] Her sole respite between interrogations lasted only 15 to 20 minutes, and then the police conducted the second interrogation in the same exact place as the first.[201] The same officer was present throughout both phases of questioning,[202] and the warned portion of the interrogation specifically referred to the unwarned portion ("Now, in discussion you told us . . . there was

193. *Id*. at 301–02.

194. *See id*. at 305 ("Respondent's contention that his confession . . . must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation.").

195. *See id*. at 302–03, 310–14 (noting procedural history and discussing the argument).

196. *See Seibert*, 542 U.S at 614–17 (comparing *Elstad* and *Seibert* before listing five-factor test).

197. *Id*. at 615.

198. *Id*. at 614.

199. *Id*. at 616.

200. *See id*. at 616–17 ("It would have been reasonable to regard the two sessions as part of a continuum . . . .").

201. *Id*.

202. *Id*. Although not explicitly mentioned by the *Seibert* Court, this factor also appears in *Elstad*: the two officers who went to Elstad's house also interrogated him at the station house. Oregon v. Elstad, 470 U.S. 298, 301–02 (1985).

an understanding about Donald.").[203] Based on its analysis, the *Seibert* court concluded that the post-warning statements were inadmissible.[204]

While the plurality's test was objective and suspect-centered, Justice Kennedy's test was subjective and officer-centered.[205] Kennedy thought that the critical distinction in *Elstad* was the good faith of police officers.[206] In his view, the *Elstad* Court refused to suppress the defendant's confession because police mistakenly, rather than deliberately, withheld *Miranda* warnings.[207] Justice Kennedy thought *Seibert* was distinguishable because there, police officers deliberately sought to violate *Miranda*.[208] He concluded that only "deliberate violation[s]" of *Miranda* should be punished, because they "obscure both the practical and legal significance of the admonition when finally given."[209] In his view, statements obtained via the deliberate use of a two-step strategy should be suppressed absent "curative steps," such as a substantial break in time and circumstances coupled with another *Miranda* warning, or an explanation that the earlier unwarned statement cannot be used.[210]

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203. Missouri v. Seibert, 542 U.S. 600, 616–17 (2004).

204. *Id*. at 617.

205. *See id.* at 622 (Kennedy, J., concurring) ("I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.").

206. *Id*.

207. *See id*. at 619 ("The suspect had not received a *Miranda* warning before making the statement, apparently because it was not clear whether the suspect was in custody at the time."). The plurality also read *Elstad* as relating to good-faith *Miranda* mistakes, but did not limit question-first interrogations to cases involving a deliberate failure to warn. *See id*. at 615 (plurality opinion) ("[I]t is fair to read *Elstad* . . . as a good-faith *Miranda* mistake . . . posing no threat to warn-first practice generally").

208. *See id*. at 620 (Kennedy, J., concurring) ("This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*.").

209. *Id*.

210. *Id*. at 622.

3. Justice Kennedy's Concurring Opinion Is Not the "Narrowest"

Although a majority of federal circuit courts have adopted Justice Kennedy's opinion, the narrowest grounds doctrine does not compel them to do so.[211] Because the Supreme Court in *Marks* never explained how courts should decide which opinion is the "narrowest," lower courts have applied at least three different approaches.[212] The "implicit consensus" approach labels a decision as narrow and therefore controlling if it is a "logical subset" of other, broader opinions.[213] The "fifth vote" approach considers which opinion was critical in securing a majority judgment.[214] Finally, the "issue by issue" approach "counts noses" to determine if five justices (including from the dissents) agree on a given legal question.[215]

Justice Kennedy's opinion is not the "narrowest" under two out of three approaches.[216] Only by resorting to a high level of generality could Justice Kennedy's opinion be described as a

211. *See* United States v. Heron, 654 F.3d 879, 884–85 (7th Cir. 2009) ("Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree."). *But see* United States v. Williams, 435 F.3d 1148, 1157–58 (9th Cir. 2006) (concluding that Justice Kennedy's opinion was the narrowest under *Marks* because it was a "logical subset" of the plurality opinion).

212. *See* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 806–19 (2017) (recording three different approaches taken by lower courts in response to *Marks*' scant guidance).

213. *See* King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("[O]ne opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions.").

214. *See* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 694 n.7 (3d Cir. 1991), *aff'd in part, rev'd in part on other grounds*, 505 U.S. 833 (1992) (directing lower courts to treat as controlling "the opinion of the Justice or Justices who concurred on the narrowest grounds necessary to secure a majority").

215. *See* United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011) (permitting the counting of dissenting votes if those votes "establish a majority on the relevant issue").

216. *See* Williams, *supra* note 212, at 808–19 (describing three approaches).

"logical subset" of the plurality opinion.[217] After all, the plurality explicitly rejected Justice Kennedy's view that only deliberate question-first interrogations should result in exclusion.[218] Counting noses with the "issue by issue" approach yields the same conclusion, because *seven* justices agreed that examining subjective intent was the wrong approach.[219] The most plausible argument for Justice Kennedy's opinion to be controlling under *Marks* is via the "fifth vote" approach.[220] However, that approach is controversial because—as it did in *Seibert*—it can assign precedential weight to the opinion of a single justice.[221]

Even if Justice Kennedy's opinion can be designated as the "narrowest," the *Marks* doctrine has been harshly criticized by jurists[222] and academics[223] alike. In 2018, the Supreme Court granted certiorari on a case that questioned the continued viability of *Marks*.[224] Although the justices signaled

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217. *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943, 1983 (2019) (explaining that "endorsement of a 'broader' proposition does not necessarily or logically entail an implicit endorsement of any 'narrower' proposition"); *see also* United States v. Davis, 825 F.3d 1014, 1021 (9th Cir. 2016) (criticizing and overruling an overly-general "results-based" approach to the "implicit consensus" theory).

218. Missouri v. Seibert, 542 U.S. 600, 616 n.6 (2004) (plurality opinion) ("Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent . . . .").

219. *See id.* (rejecting consideration of officer intent); *id.* at 624 (O'Connor, J., dissenting) ("The plurality's rejection of an intent-based test is also, in my view, correct.").

220. *See id.* at 618 (Kennedy, J., concurring) (providing the fifth vote for a majority judgment).

221. *See* Dague v. City of Burlington, 935 F.2d 1343, 1360 (2d Cir. 1991) (calling it an "anomaly" when "the views of one justice" become "the law of the land").

222. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (recording that *Marks* rule in *Bakke* "so obviously baffled and divided the lower courts that have considered it"); *Davis*, 825 F.3d at 1020 ("In the nearly forty years since *Marks*, lower courts have struggled to divine what the Supreme Court meant by 'the narrowest grounds.'").

223. *See* Re, *supra* note 217, at 1944–47 (arguing that *Marks* is "wrong, root and stem"); Williams, *supra* note 212, at 822 (asserting that the Supreme Court is as divided as lower courts on the proper application of the *Marks* rule).

224. Hughes v. United States, 138 S. Ct. 1765, 1771–72 (2018).

dissatisfaction with the narrowest grounds doctrine at oral arguments,[225] they ultimately left *Marks* undisturbed.[226] Perhaps it was for the same reason that Justice Breyer indicated: "If you ask me to write something better than *Marks*, I don't know what to say."[227]

Because the *Marks* narrowest grounds doctrine does not require the adoption of Justice Kennedy's opinion, and because the continued vitality of *Marks* is in question, it is appropriate to consider which opinion is better suited to assessing the effectiveness of *Miranda* warnings in a question-first interrogation.

4. The Plurality Opinion Better Assesses the Effectiveness of *Miranda* Warnings

Justice Kennedy's subjective approach is commendable for its theoretical simplicity. That quest for simplicity appears to have motivated his concurring opinion.[228] Justice Kennedy wrote: "*Miranda*'s clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity."[229] Justice Kennedy's approach also adopts an eminently pragmatic view[230] of law enforcement which makes room for fallible officers to make mistakes while engaged in the "often competitive enterprise of ferreting out crime."[231]

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225. *See* Justin Marceau, *Argument Analysis: "We Know How to Get to Five,"* SCOTUSBLOG, https://perma.cc/Q46K-U5LK (last visited Oct. 18, 2020) (recording that "several justices and the attorneys seemed frustrated with the imperfect set of options" regarding the *Marks* rule).

226. *Hughes*, 138 S. Ct. at 1772 (deciding the case on its sentencing merits despite "extensive briefing and careful arguments" about *Marks*).

227. Marceau, *supra* note 225.

228. *See Seibert*, 542 U.S. at 622 (Kennedy, J., concurring) (criticizing plurality opinion because a multifactor test "undermine[s] [*Miranda*'s] clarity").

229. Missouri v. Seibert, 542 U.S. 600, 622 (2004).

230. *See id.* at 620 (praising *Elstad* for its "balanced and pragmatic approach to enforcement of the *Miranda* warning").

231. *See* Johnson v. North Carolina, 333 U.S. 10, 14 (1948) (coining "competitive enterprise" phrase).

But there are two immediately apparent problems with the good-faith approach. First, although the good-faith approach is simple in theory, it forces courts to plumb the subjective intent of police officers, which will rarely be as easy as it was in *Seibert*.[232] As Justice O'Connor noted in dissent: "[F]ocusing constitutional analysis on a police officer's subjective intent [is] an unattractive proposition that we all but uniformly avoid."[233] This is why the Supreme Court has declined to consider subjective officer intent in other areas of criminal procedure.[234]

The second problem with the good-faith test is that the officer's intent has no measurable effect on the experience of the suspect.[235] For example, if police officers withheld *Miranda* warnings during the first portion of Seibert's interrogation out of forgetfulness, poor training, or fatigue, Patrice Seibert would likely have still understood the interrogation in the same exact way.[236] If Justice Kennedy's primary concern was with "obscur[ing] the practical and legal significance" of *Miranda* warnings, how does that change when the obfuscation is unintentional?[237]

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232. *See Seibert*, 542 U.S. at 616 n.6 (plurality opinion) ("[T]he intent of the officer will rarely be as candidly admitted as it was here . . . .").

233. *See id.* at 625–26 (O'Connor, J., dissenting) (agreeing with plurality's rejection of subjective intent consideration).

234. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 737 (2011) (noting that the Supreme Court has "almost uniformly rejected invitations to probe subjective intent" in the Fourth Amendment context); Whren v. United States, 517 U.S. 806, 812–13 (1996) (rejecting consideration of officer intent in pretextual traffic stops); Horton v. California, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.").

235. *See Seibert*, 542 U.S. at 624 ("Thoughts kept inside a police officer's head cannot affect [the suspect's] experience [of interrogation].").

236. *See id.* at 625 ("A suspect who experienced exactly the same interrogation as Seibert, save for a difference in the undivulged, subjective intent of the interrogating officer . . . would not experience the interrogation any differently.").

237. *See id.* at 620 (Kennedy, J., concurring) ("The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given.").

By contrast, the plurality opinion is purely concerned with objective factors which undermine the effectiveness of *Miranda* warnings.[238] As a result, it avoids both of the pitfalls of Justice Kennedy's approach. In practical terms, the plurality test permits courts to consider the *conduct* of both the interrogators and the suspect, rather than having to assess the inner thoughts of police officers.[239] By training the five-factor test on the suspect's receipt of *Miranda* warnings, the *Seibert* plurality creates a more appropriate framework for assessing their effectiveness.[240]

5. The *Seibert* Court Identified Three Specific Dangers of Question-First Interrogations

Although both the objective plurality test and the subjective good-faith concurrence differ in their approaches, both opinions concluded that the question-first interrogation in *Seibert* violated *Miranda* because it undermined the effectiveness of the warnings.[241] Together, the opinions highlight three specific and interrelated threats created by question-first interrogations.

The first threat identified in *Seibert* is timing: by waiting for a "particularly opportune time to give [warnings]," interrogators can reduce or eliminate their effectiveness.[242] Delayed warnings seem to lack any independent meaning: if a suspect talks to police for hours, how could he think that "he had a genuine right to remain silent, let alone persist in so believing

238. *Id.* at 615–16 (plurality opinion).

239. *See id.* at 625–26 (O'Connor, J., dissenting) (describing the "unattractive proposition" of divining officer intent).

240. *See id.* at 615–16 (plurality opinion) (centering inquiry on suspect's experience of *Miranda* warnings).

241. *See id.* at 611 ("The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed."); *id.* at 621 (Kennedy, J., concurring) ("The technique used in this case distorts the meaning of *Miranda* . . . . The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and *effect*." (emphasis added)).

242. *See id.* at 611 (plurality opinion) (describing timing problem).

once the police began to lead him over the same ground again?"[243]

Second, delayed warnings actively imbalance and confuse suspects. Sudden effusions of legalese partway through an interrogation can cause "perplexity" or "bewilderment."[244] This threat might be called "*Miranda* as a sword," because the use of the *Miranda* warnings serves to intimidate or rattle a suspect rather than to soberly advise the suspect of her rights.[245] It would indicate that things have gotten serious—that we were just talking before, but now you are in real trouble and you have the right to remain silent and anything you say can and will be used against you in a court of law, and you have the right to an attorney, but if you cannot afford one, one will be appointed for you, and if you understand these rights and wish to waive them, sign right here. As the *Seibert* plurality noted, a midstream recitation of *Miranda* actually suggests the opposite of what it is intended to achieve: "[T]elling a suspect that 'anything you say can and will be used against you,' without specifically excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail."[246] This formulation of *Miranda* is not a warning. It is a forceful shove at the edge of a cliff.

Finally, there is the "cat out of the bag" problem: suspects who implicate themselves in the unwarned portions of the interview will be unlikely to think that they can actually remain silent.[247] Not knowing that their earlier confession is

243. *Id.*

244. *See id.* (discussing likely reactions of interrogated suspects).

245. *See* Petition for Writ of Certiorari at 5, Johnson v. North Carolina, 140 S. Ct. 122 (2019) (No. 18-1542) ("By strategically timing the formal arrest almost five hours into their interrogation, the detectives transformed *Miranda* from a shield into a sword.").

246. Missouri v. Seibert, 542 U.S. 600, 613 (2004).

247. *See id.* ("Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think that he had a genuine right to remain silent . . . ."); *see also id.* at 620 (Kennedy, J., concurring) ("The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained.").

inadmissible, they are likely to waive their rights and incriminate themselves again after receiving *Miranda* warnings.[248] This argument was flatly rejected in *Elstad*.[249] The *Elstad* Court called the argument "speculative and attenuated," because it required the Court to assume that the warned admission emerged from the unwarned confession.[250] To the extent that such a psychological "cat out of the bag" effect existed, the Court refused to "endow . . . the psychological effects of *voluntary* unwarned admissions with constitutional implications . . . ."[251]

But both the plurality and the concurrence in *Seibert* resuscitated the argument, at least as far as question-first interrogations are concerned.[252] Justice Souter limited *Elstad*'s rejection of "cat out of the bag" to apply only "on the facts of that case": "*Elstad* rejected the 'cat out of the bag' theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda*, determined the character of the later, warned confession."[253] Justice Souter continued that *Elstad* only rejected "cat out the bag" for situations involving a "good faith *Miranda* mistake" which posed "no threat to warn-first practice generally."[254]

With the *Elstad* obstacle cleared, Justice Souter identified "cat out of the bag" as a threat created by question-first interrogations.[255] He noted, "[W]ith one confession in hand before the warnings, the interrogator can count on getting its

248. *See id*. at 622 (suggesting that officers could explain the likely inadmissibility of a prewarning custodial statement in order to cure a deliberate question-first interrogation).

249. *See id*. at 627 (O'Connor, J., dissenting) ("We rejected [the cat out of the bag theory] outright.").

250. Oregon v. Elstad, 470 U.S. 298, 313 (1985).

251. *Id.* at 311.

252. *See Seibert*, 542 U.S. at 627–28 (O'Connor, J., dissenting) (accusing the plurality of ignoring *Elstad*'s outright rejection of the "cat out of the bag" argument).

253. *Id*. at 615 (plurality opinion).

254. *Id*.

255. *See id*. at 613, 617 (asserting that *Miranda* warnings will become less effective after a suspect makes inculpatory statements).

duplicate, with trifling additional trouble."[256] Justice Souter continued: "Upon hearing warnings . . . *just after making a confession*, a suspect would hardly think he had a genuine right to remain silent . . . ."[257] If a suspect previously made an inculpatory statement during a question-first interrogation, it would be "unnatural to refuse to repeat at the second stage what had been said before."[258]

Although Justice Kennedy's short concurrence engaged the "cat out of the bag" argument less explicitly, he too characterized *Elstad* as a case about good-faith neglect, rather than deliberate subversion, of *Miranda*.[259] Justice Kennedy agreed with the plurality that "*Miranda* warnings will tend to mean less when recited midinterrogation, *after inculpatory statements have already been obtained*."[260] As a result, a majority of the *Seibert* Court recognized "cat out the bag" as a specific danger created by question-first interrogations. [261]

6. Two Rationales Motivated the Seibert Court's Disapproval of Question-First Interrogations

Setting aside the specific threats created by question-first interrogations, the Supreme Court in *Seibert* appeared to be motivated by two general rationales: disapproval of police gamesmanship and concern about the risk of false confessions.

The first apparent rationale is the Court's disapproval of gamesmanship. Fighting crime is a "competitive enterprise."[262] As with any competition, the participants often stretch the rules

256. *Id*. at 613.

257. *Id*. (emphasis added).

258. *Id*. at 617.

259. *See id*. at 619–20 (Kennedy, J., concurring) (limiting *Elstad* to factual circumstances suggestive of good faith by the police in that case).

260. *Id*. at 620 (emphasis added).

261. *See id*. at 604 (plurality opinion) (noting that four Justices joined the plurality); *id*. at 618 (Kennedy, J., concurring) (adding one Justice).

262. *See* Johnson v. United States, 333 U.S. 10, 14 (1948) (calling law enforcement "the often competitive enterprise of ferreting out crime").

as far as possible in order to gain an advantage.[263] This sometimes means that police manipulate Supreme Court precedents to comply with the letter of the law while evading its spirit.[264] In *Seibert*, the Court pushed back against gamesmanship that went too far.[265] By implementing question-first techniques, the police treated the Supreme Court's decision in *Elstad* as an open invitation to violate *Miranda*.[266] In response, the *Seibert* Court decried a "police strategy adapted to undermine the *Miranda* warnings,"[267] and urged: "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."[268] The Court added that police could not make an "end run" around *Miranda*.[269]

Gamesmanship may have been an especially compelling rationale for the Supreme Court in light of the history of *Miranda*.[270] Although law enforcement agencies protested in the wake of *Miranda*,[271] they very quickly adapted to the new

263. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 407–08 (1999) (discussing police adaptations to *Miranda*).

264. *See* Weisselberg, *supra* note 147, at 1122 (describing police training which circumvented *Miranda* by treating it as a "weak rule of evidence" rather than a "constitutional command").

265. *See* Missouri v. Seibert, 542 U.S. 600, 604 (2004) (holding that statements elicited from "midstream recitation of warnings" were inadmissible).

266. *See id*. at 609–11 (discussing prevalence of police training practices distilled from *Elstad*); *see also* State v. Batts, 195 P.3d 144, 156 (Ala. Ct. App. 2008) (explaining that question-first interrogations were an effort to "take advantage" of *Elstad*).

267. *Seibert*, 542 U.S. at 616.

268. *Id*. at 617.

269. *See id*. at 606 (using "end run" language from lower courts).

270. *See* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1217 (2001) (explaining the Supreme Court's failure post-*Miranda* to restrict police adaptations to the decision).

271. *See* LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 176 (1983) (quoting the Philadelphia police commissioner as stating, "I do not believe the Constitution was designed as a shield for criminals.").

playing field.[272] For example, the Reid Technique—a widely-used interrogation training program cited extensively in *Miranda*—was updated to account for developments in the law.[273] The legal section of a Reid Technique workbook, published in 1989, offered "[c]ommon [m]isconceptions" about *Miranda*, an article from law professor Fred Inbau about the "[l]aw on [c]riminal [i]nterrogation," and an advertisement for a legal periodical for law enforcement agencies.[274]

Of course, there is nothing wrong with the police knowing the law.[275] But after *Miranda*, police departments developed techniques designed specifically to reduce the effectiveness of the warnings.[276] Richard A. Leo, an expert on police interrogation, noted that police learned to neutrally deliver warnings,[277] downplay their significance,[278] and offer benefits in exchange for waivers of rights.[279] Some departments even began questioning "outside *Miranda*," telling suspects that their statements could not be used against them or were "off the record," and then obtaining incriminating statements for use in subsequent impeachment.[280]

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272. *See* Leo & White, *supra* note 263, at 408 ("[D]uring the three decades following *Miranda*, interrogators have become even more sophisticated in overcoming the obstacles to a successful interrogation.").

273. JOHN E. REID & ASSOCS., INC., THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION: LEGAL SECTION 1–17 (1989).

274. *Id*.

275. *See* Malcolmson v. Gibbons, 23 N.W. 166, 168 (Mich. 1885) ("An officer of justice is bound to know what the law is . . . .").

276. *See* Leo & White, *supra* note 263, at 431–70 (discussing police adaptations to *Miranda* and its progeny).

277. *Id*. at 432–33.

278. *Id*. at 433–39.

279. *Id*. at 440–47.

280. *See id*. at 460–61 (describing "questioning 'outside *Miranda*'"). This particular technique was a response to the *Harris* decision, which permitted testimony taken in violation of *Miranda* to be used for impeachment purposes. Harris v. New York, 401 U.S. 222, 224 (1971).

Although the Court in *Seibert* was arguably less committed to *Miranda* than the Warren Court,[281] it was still not prepared to permit the blatant tactics of the Rolla, Missouri police department.[282] Previous innovations in interrogations toed the line, but question-first interrogations simply went too far.[283] In *Seibert*, the police attempted to deprive the defendant of a right guaranteed to her by the *Miranda* decision.[284] *Miranda* was intended to enable a "free and rational" choice before self-incrimination, but question-first interrogations had exactly the opposite purpose: to undermine that "free and rational choice."[285]

The second rationale is the prevention of false confessions.[286] Interestingly, this rationale never appears explicitly in any of the *Seibert* opinions.[287] Nor was the subject raised directly by the parties or the various *amici*.[288] The omission in briefs is curious, and might reflect a lessened public awareness about false confessions at the time that *Seibert* was

281. *See* United States v. Patane, 542 U.S. 630, 644 (2004) (permitting the use of physical evidence obtained from *Miranda* violations on the same day that the Court decided *Seibert*).

282. Missouri v. Seibert, 542 U.S. 600, 604 (2004).

283. *Compare id.* at 617 (rejecting question-first interrogation practices because they make *Miranda* warnings ineffective), *with id.* at 609 (calling police-obtained waivers of *Miranda* rights a "virtual ticket of admissibility").

284. *See id.* at 617 ("[T]he question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted . . . .").

285. *Id.* at 611.

286. *See* Kassin, *supra* note 70, at 219–22 (discussing psychological research on false confessions in police interrogation context); Joshua M. Stewart et al., *The Prevalence of False Confessions in Experimental Laboratory Simulations*, 36 BEHAV. SCI. & L. 12, 22 (2018) (finding in meta-analysis of experimental simulations that 47 percent of study participants could be induced to falsely confess).

287. *See Seibert*, 542 U.S. at 604–17 (omitting mention of false confessions).

288. *See* Brief for the American Civil Liberties Union as Amicus Curiae Supporting Respondent at 18 n.5, Missouri v. Seibert, 542 U.S. 600 (2004) (No. 02-1371) (mentioning false confessions solely in an amicus brief citation to a newspaper article).

argued and decided.[289] The Supreme Court, however, was certainly aware of the phenomenon: as far back as the 1960s, the *Miranda* decision—reaffirmed extensively by the plurality and concurring opinions in *Seibert*[290]—stated that even in the absence of physical coercion, overly-aggressive police tactics could "give rise to a false confession."[291] And only a few years after *Seibert* was decided, the Supreme Court admitted frankly that "there is mounting empirical evidence that [interrogation] pressures can induce a frighteningly high percentage of people to confess to crimes they never committed."[292]

Whether question-first interrogation practices really do increase the risk of false confessions is unclear.[293] Based on the logic of *Seibert*, however, the more that the *Miranda* warnings are obscured, the more unlikely it is that a suspect will perceive a choice to invoke her rights to silence or counsel.[294] As a result, a suspect will remain in the psychologically coercive,

289. *But see* Saul Kassin, *False Confessions and the Jogger Case*, N.Y. TIMES, Nov. 1, 2002, at A31 (discussing false confessions in 2002 op-ed about the Central Park Four).

290. *See Seibert*, 542 U.S. at 608–09 (explaining constitutional importance of *Miranda*); *id.* at 621 (Kennedy, J., concurring) ("The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest.").

291. Miranda v. Arizona, 384 U.S. 436, 455 & n.24 (1966).

292. Corley v. United States, 556 U.S. 303, 321 (2009).

293. *But see* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 278–83 (2008) (using empirical studies to argue that the *Miranda* doctrine generally has had little to no success in stemming the problem of false confessions); Kassin, *supra* note 70, at 218 (finding that innocent suspects were more likely to waive *Miranda* rights); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1092–94 (2010) (noting that 40 exonerated defendants had *all* waived their *Miranda* rights, and arguing that *Miranda* is often an obstacle to challenging false confessions). Although these discussions undermine the false confession rationale somewhat, empirical studies of *Miranda* are notoriously difficult to undertake. For example, it is probably impossible to quantify how many false confessions were *avoided* because suspects invoked their rights after warnings.

294. *See* Missouri v. Seibert, 542 U.S. 600, 617 (2004) (noting that a person subjected to question-first interrogation would not have understood "that she retained a choice about continuing to talk").

"police-dominated atmosphere," increasing the chances of a false confession.[295]

B. Bobby v. Dixon

Since *Seibert* was decided in 2004, the Supreme Court has only substantively[296] applied it in a single case, *Bobby v. Dixon*.[297] The defendant, Archie Dixon, murdered a man in order to steal his car.[298] While investigating the murder, police spoke to Dixon on three occasions.[299] On the first occasion—a chance encounter—they spoke to him while he was at the police station (Dixon's car had been impounded).[300] Police advised Dixon of his *Miranda* rights, and he declined to be interviewed without a lawyer present.[301]

Next, detectives arrested Dixon for forging the victim's signature on a check and questioned him intermittently for about forty-five minutes out of a three-hour span.[302] They deliberately did not advise him of his *Miranda* rights because they were worried that he would refuse to speak to them again.[303] Dixon implicated himself in the forgery by admitting that he had signed the check, but denied any knowledge of the murder victim's disappearance.[304]

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295. *See Miranda*, 384 U.S. at 445 (attributing self-incrimination to "police-dominated atmosphere").

296. A few Supreme Court cases cite to *Seibert* outside of the question-first context. *See* United States v. Patane, 542 U.S. 630, 647 (2004) (Souter, J., dissenting) (citing *Seibert* in dissent to protest narrowing of *Miranda* exclusionary doctrine); J.D.B. v. North Carolina, 564 U.S. 261, 286 (2011) (Alito, J., dissenting) (using *Seibert* to praise clarity of the *Miranda* rule).

297. *Dixon*, 565 U.S. at 30–32.

298. *Id.* at 24.

299. *Id*. at 25.

300. *Id*.

301. *Id*.

302. *Id*. at 25–26.

303. *See id*. at 25 ("Prior to the interrogation, the detectives had decided not to provide Dixon with *Miranda* warnings for fear that Dixon would again refuse to speak with them.").

304. *Id*. at 25–26.

Four hours later, Dixon was interrogated again.[305] This time, police told Dixon that his co-conspirator had led them to the body.[306] Dixon signed a waiver of rights and spoke to police for about half an hour.[307] The police obtained a tape recorder, and then advised him of his rights again.[308] During this second portion of the interrogation, Dixon admitted to murdering the victim.[309]

At trial, Dixon's confession to murder was excluded.[310] The Ohio courts reversed, concluding that the confession was admissible because Dixon received *Miranda* warnings.[311] Dixon was convicted of murder and a host of other charges, and was sentenced to death.[312] On collateral appeal, the Sixth Circuit issued a writ of habeas corpus.[313] In part, the Sixth Circuit concluded that Dixon's confession to murder was the product of a "two-step interrogation" under the recently decided *Seibert* case.[314] In so ruling, the Sixth Circuit concluded that the relevant interrogations were the interrogation after Dixon was arrested for forgery (and suspected in the disappearance of the victim), and the interrogation that occurred four hours later after police discovered the victim's body.[315] In a tortured, one-paragraph analysis, the Sixth Circuit mangled both *Elstad* and *Seibert*.[316] It offered a brief, generalized discussion of the

305. *Id*. at 26.

306. *Id*.

307. *Id*.

308. *Id*.

309. *Id*.

310. *See id*. ("At Dixon's trial, the Ohio trial court excluded both Dixon's initial confession to forgery and his later confession to murder.").

311. *See id*. at 27 (noting that Ohio Court of Appeals reversed suppression of murder confession during interlocutory appeal); State v. Dixon, 656 N.E.2d 1, 5 (Ohio Ct. App. 1995) (permitting the use of the confession under *Elstad*); State v. Dixon, 805 N.E.2d 1042, 1049–52 (Ohio 2004) (same).

312. Bobby v. Dixon, 565 U.S. 23, 27 (2011).

313. *Id*.

314. *Id*. at 30.

315. *See* Dixon v. Houk, 627 F.3d 553, 555–56 (6th Cir. 2010), *rev'd sub nom*. Bobby v. Dixon, 565 U.S. 23 (2011).

316. *See id*. (describing *Elstad* and *Seibert*).

rule from *Seibert*, applied neither the concurrence nor the plurality tests, and then flatly concluded: "*Elstad* itself is clear, and *Seibert* simply reinforced its meaning."[317]

The Supreme Court, writing per curiam, reversed.[318] It distinguished *Seibert*, concluding that Dixon had not been subjected to a two-step interrogation.[319] The analysis primarily involved the plurality opinion from *Seibert*, but also included scattered quotes from Justice Kennedy's concurrence.[320] Seemingly applying the objective plurality test, the Court appeared to consider only the second, third, and fifth factors: the overlapping content of the two statements, the timing and setting of the first and second interrogations, and the interrogators' treatment of the second interrogation as continuous with the first.[321] Applying the second factor, there was no "overlapping content of the two statements."[322] In Dixon's first interrogation, he flatly denied involvement in the victim's disappearance.[323] By contrast, he confessed to murder in his second interrogation.[324] Turning to the third factor, the "timing and setting" also militated against a question-first interrogation.[325] There were four hours between the interrogations, and in that time Dixon was transported back to jail and then back to the police station.[326] He may have also

317. *Id.* at 557.

318. *Dixon*, 565 U.S. at 24.

319. See *id.* at 31–32 (distinguishing *Seibert*).

320. *See id.* (quoting both plurality and concurring opinions from *Seibert*).

321. *See id.* (considering overlapping content, timing and setting, and interrogator treatment of the second interrogation as continuous with the first without explicitly referring to the test).

322. Missouri v. Seibert, 542 U.S. 600, 615 (2004).

323. *See* Bobby v. Dixon, 565 U.S. 23, 26 (2011) ("[I]n this case Dixon steadfastly maintained . . . that he had 'nothing whatsoever' to do with Hammer's disappearance.").

324. *See id.* ("Indeed, Dixon *contradicted* his prior unwarned statements when he confessed to Hammer's murder.").

325. *Seibert*, 542 U.S. at 615.

326. *See Dixon*, 565 U.S. at 31–32

> Four hours passed between Dixon's unwarned interrogation and his receipt of *Miranda* rights, during which time he traveled from the police station to a separate jail and back again; claimed to have

spoken with his lawyer during that time.[327] Finally, the Court applied the fifth factor to find that the interrogators' questions had not treated the second round as continuous with the first.[328] The detectives who questioned Dixon neither referred to nor leveraged anything produced in the first interview.[329] As the Supreme Court noted: "Nor is there any evidence that police used Dixon's earlier admission to forgery to induce him to waive his right to silence later: Dixon declared his desire to tell police what happened . . . before the second interrogation session even began."[330]

Although the Court did not explicitly consider the plurality's two other factors, it is possible to apply those factors as well. [331] The first factor (completeness and detail of the questions and answers) is neutral. Although the questions asked in both interviews overlapped,[332] the answers did not.[333] The fourth factor (continuity of police personnel) is inconclusive.[334] One of the detectives present at the second interview had also been present at the first interview, but the other one had not.[335]

> spoken to his lawyer; and learned that police were talking to his accomplice and had found [the victim's] body.

327. *See id*. (noting that Dixon claimed to have spoken to his lawyer before the second, warned interrogation).

328. *Seibert*, 542 U.S. at 615.

329. *Dixon*, 565 U.S. at 31.

330. *Id*.

331. *See Seibert*, 542 U.S. at 615 (listing the first and fourth factors, which were not discussed in *Dixon*).

332. State v. Dixon, 805 N.E.2d 1042, 1049 (Ohio 2004) (noting that "[t]he police were focused primarily on Hammer's disappearance" during the first interview).

333. *See Dixon*, 565 U.S. at 31 (noting that Dixon denied involvement in the first interview, but confessed to murder in the second interview).

334. *See* Missouri v. Seibert, 542 U.S. 600, 615 (2004) (describing fourth plurality factor).

335. *See Dixon*, 805 N.E.2d at 1049 (listing Detectives Snow and Kulakoski as the interviewing officers at the first interview, and Detectives Kulakoski and Leiter at the second).

Interestingly, the *Dixon* Court offered little in the way of analysis applying Justice Kennedy's good-faith concurrence.[336] Although it dutifully noted that Justice Kennedy offered a "narrower test," the decision did not appear to apply that test in considering whether police deliberately deprived Dixon of his *Miranda* rights.[337] Perhaps it was unnecessary to consider, because the police quite clearly had done so in the second interview.[338] Despite this, Justice Kennedy would likely have been satisfied by the subsequent "curative measures": a "substantial break in time and circumstances" between the prewarning statement and the *Miranda* warning.[339]

Although the *Dixon* court never clarified which opinion it considered governing, it was quite clear under either test that Dixon was never deprived of an effective *Miranda* warning as *Seibert* contemplated.[340] Because this case was a fact-laden, per curiam decision, *Dixon* has not generally been regarded as a sea change (or really any change) in *Miranda* jurisprudence.[341]

A single line in *Dixon*, however, has proved troublesome. Nested among its rapid reversal of the Sixth Circuit opinion, the Supreme Court distinguished *Seibert* by writing, "[U]nlike in *Seibert*, there is no concern here that police gave Dixon *Miranda*

336. *See* Bobby v. Dixon, 565 U.S. 23, 30–33 (2011) (omitting any detailed discussion of police intent).

337. *See id.* at 30–31 (registering Kennedy's "narrower test," but not seeming to apply it).

338. *See Dixon*, 805 N.E.2d at 1049 ("Kulakoski, after consulting with Snow, decided not to advise Dixon of his *Miranda* rights because the detectives believed that Dixon would invoke his right to counsel if he were issued *Miranda* warnings.").

339. *See Seibert*, 542 U.S. at 622 (Kennedy, J., concurring) ("[A] substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.").

340. Of course, under Justice Kennedy's good-faith test, the effectiveness would have resulted from "curative measures." *Id.*

341. *See* Madhavi M. McCall et al., *Criminal Justice and the 2011–2012 United States Supreme Court Term*, 14 FLA. COASTAL L. REV. 239, 250 n.63 (2013) (omitting any discussion of *Bobby v. Dixon* and seven other per curium criminal justice decisions).

warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat."[342]

1. "No Earlier Confession to Repeat" in Lower Courts

Since *Dixon* was decided in 2011, a number of lower courts have started treating this offhand sentence ("no earlier confession to repeat") as a per se rule that limits the application of *Seibert* to cases involving an unwarned confession.[343] According to this reading of *Dixon*, if the suspect fails to make a confession during the unwarned portion of a question-first interrogation, then *Seibert* does not apply.[344]

This reading of a single line from *Dixon* is very interesting. It might suggest that lower courts are attempting to avoid the confusing *Seibert* decision.[345] Given the ongoing circuit split about the governing opinion in *Seibert*, courts might be trying to resort to a "quick fix" rather than wade into the furor about the narrowest grounds doctrine.[346] This thesis would be particularly plausible if all of the courts categorically applying *Dixon* came from jurisdictions which had not adopted a governing *Seibert* opinion.[347] But this is not the case: some courts that apply the line from *Dixon* come from jurisdictions

342. *Dixon*, 565 U.S. at 31.

343. *See, e.g.*, Currie v. Graham, 17-cv-1227, 2019 U.S. Dist. LEXIS 98796, at *8–9 (E.D.N.Y. June 12, 2019) (describing *Dixon*'s holding as permitting non-incriminatory statements, compared to *Seibert*'s "getting a suspect to confess before warnings").

344. *See* State v. Clifton, 892 N.W.2d 112, 131 (Neb. 2017) ("[E]ssential to a *Miranda* violation under *Seibert* is an inculpatory prewarning statement that somehow overlaps with statements made in the postwarning interrogation.").

345. *See* United States v. Salazar, No. CR 18-3500, 2020 U.S. Dist. LEXIS 18477, at *90–105 (D.N.M. Jan. 31, 2020) (describing *Seibert* and confusion in the Tenth Circuit about how to apply it).

346. *See supra* Part II.A.3.

347. *See* People v. Krebs, 452 P.3d 609, 646 (Cal. 2019) (distinguishing *Seibert* and declining to pick the plurality or the concurrence); People v. Mitchell, 822 N.W.2d 224, 224 (Mich. 2012) (echoing the line from *Dixon* despite Michigan not having decided which opinion in *Seibert* applies).

that formally adopted Justice Kennedy's opinion,[348] and others are from jurisdictions that selected the plurality opinion as governing.[349] Perhaps this phenomenon suggests that courts remain confused about the *Seibert* decision, even after the jurisdiction's appellate courts purport to settle the matter.[350] The line from *Dixon* might provide an attractive opportunity to escape the issue altogether.

2. The Magnitude of the Problem Is Unclear

Whatever the cause, "no earlier confession to repeat" is steadily gathering adherents in the lower courts. Three state high courts now endorse this view.[351] Two federal circuits have also stamped the *Dixon* line with a modicum of imprimatur. In 2018, an unpublished Third Circuit decision echoed the phrase from *Dixon*,[352] and in 2019 the Sixth Circuit deemed the Michigan Supreme Court's reading of *Dixon* "not unreasonable"

348. *See, e.g.*, *Currie*, 2019 U.S. Dist. LEXIS 98796, at *8–9 (restricting *Seibert* with *Dixon* in the Second Circuit, which adopted the concurring opinion).

349. *See, e.g.*, *Clifton*, 892 N.W.2d at 131 (echoing the line from *Dixon* in a jurisdiction that adopted the plurality opinion).

350. *See* State v. Abbott, 812 S.E.2d 225, 231 (Ga. 2018) (overruling its own 2007 adoption of the plurality test).

351. *See Krebs*, 452 P.3d at 647 (citing *Dixon* and adding: "Significantly, [the police officer] advised defendant of his *Miranda* rights *before* defendant confessed"); *Mitchell*, 822 N.W.2d at 224 (citing *Dixon* and declining to apply *Seibert* because there was "no earlier confession to repeat"); *Clifton*, 892 N.W.2d at 131 ("[E]ssential to a *Miranda* violation under *Seibert* is an inculpatory prewarning statement that somehow overlaps with statements made in the postwarning interrogation.").

352. *See* United States v. Iles, 753 F. App'x 107, 110 (3d Cir. 2018) (citing *Dixon* and explaining in dictum that *Seibert* "does not apply because [the defendant] did not make any incriminating statements before she signed the *Miranda* waiver"); *see also* Reyes v. Lewis, No. 12-56650, 2016 U.S. App. LEXIS 15147, at *30 (9th Cir. Aug. 17, 2016) (Callahan, J., dissenting) (claiming that "[if] 'there was no earlier confession to repeat,' *Seibert* would not apply . . . .").

on habeas review.[353] Other federal and state courts have more assertively adopted a categorical reading of *Dixon*.[354]

The exact magnitude of the problem is unclear. Analyzing lower court opinions which apply *Dixon* can be especially difficult given the brevity of those decisions.[355] For example, a *Seibert* argument is sometimes dispensed with in a single sentence on appeal.[356] This makes it difficult to tell whether the court is properly distinguishing *Seibert* on the facts, or applying a categorical reading of *Dixon*.[357]

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353. *See* Mitchell v. McLaren, 933 F.3d 526, 538–40 (6th Cir. 2019) (rejecting habeas petitioner's argument that "the absence of a pre-warning confession is not the end of the [*Seibert*] analysis," because the Michigan Supreme Court's reading of *Dixon* was "not unreasonable").

354. *See* United States v. Espinoza, 15-CR-30077, 2015 U.S. Dist. LEXIS 169570, at *11 n.2 (D.S.D. Dec. 17, 2015) (claiming in dictum that *Dixon* said there is no "impermissible two step interrogation because during the first interrogation the defendant maintained he did not commit the crime"); Sorto v. Stephens, H-10-CV-613, 2015 U.S. Dist. LEXIS 132302, at *39–40 (S.D. Tex. Sept. 30, 2015), *vacated and remanded on other grounds,* 716 F. App'x 366 (5th Cir. 2018) (claiming that *Dixon* "mandates rejection" of a *Seibert* claim because there was no earlier confession to repeat); Jenkins v. Lee, 11cv6806, 2014 U.S. Dist. LEXIS 112168, at *61–62 (S.D.N.Y. Aug. 11, 2014) (finding *Seibert* inapplicable because the defendant maintained innocence during the unwarned interrogation); United States v. Breal, 12-20152, 2012 U.S. Dist. LEXIS 192003, at *21 (S.D. Fla. Nov. 20, 2012) (distinguishing *Seibert* because defendant provided no inculpatory statements regarding the crime under investigation); State v. Martinez, 2 CA-CR 2012-0057, 2012 Ariz. App. Unpub. LEXIS 1446, at *11 (Ariz. Ct. App. Nov. 28, 2012) (stating that the "reasoning in *Seibert* did not apply to a case in which a defendant did not confess until after he had received *Miranda* warnings"); People v. Cabrera, G056329, 2020 Cal. App. Unpub. LEXIS 4087, at *29 (Cal. Ct. App. June 29, 2020) ("[A]ppellant did not confess to shooting [the victim] until [after receiving *Miranda* warnings]. Accordingly, the *Seibert* decision is of no help to him.").

355. *See* United States v. Lewis, No. 17-CR-168, 2018 U.S. Dist. LEXIS 200286, at *17 (E.D. Wis. Aug. 24, 2018) (disposing of a *Seibert* argument with the quote from *Dixon* and one other sentence).

356. *See, e.g.*, *Iles*, 753 F. App'x at 110 ("Furthermore, *Seibert* does not apply because [the defendant] did not make any incriminating statements before she signed the *Miranda* waiver.").

357. *Compare, e.g.*, Foddrell v. Lavalley, 12 Civ. 6562, 2016 U.S. Dist. LEXIS 105905, at *23–25 (S.D.N.Y. Aug. 5, 2016) (using *Dixon* properly in a single paragraph analysis of a *Seibert* issue), *with* Sorto v. Stephens, H-10-CV-613, 2015 U.S. Dist. LEXIS 132302, at *39–40 (S.D. Tex. Sept. 30,

Although the actual prevalence of the issue is unclear, treating a single line from *Dixon* as a categorical rule is erroneous. *Seibert* should apply regardless of whether there was an "earlier confession to repeat."

III. *SEIBERT* OUGHT TO APPLY TO QUESTION-FIRST INTERROGATIONS, REGARDLESS OF WHETHER AN EARLIER CONFESSION WAS ELICITED

A. *"No Earlier Confession to Repeat" Was Dictum, Not a Holding of* Dixon

As a textual matter, lower courts' reliance on "no earlier confession to repeat" is misplaced because that phrase was mere dictum.[358] The phrase arises in *Dixon* as one factor among many used to distinguish *Seibert*.[359] Nowhere in *Dixon* did the Supreme Court state that a question-first interrogation is impossible if a suspect does not confess during the unwarned portion of the interview.[360] Based on the circumstances of Dixon's case, the Court simply factored the lack of an earlier confession into its consideration of the "overlapping content" of the two interviews.[361]

As discussed in Part II.B, the *Dixon* Court applied a truncated version of the plurality *Seibert* test.[362] The Court

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2015) (claiming that *Dixon* "mandates rejection" of a *Seibert* claim if there is no earlier confession to repeat).

358. *See* Bobby v. Dixon, 565 U.S. 23, 31–33 (2011) (distinguishing *Seibert* on the basis of three different plurality test factors); *see also Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "obiter dictum" as "a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

359. *See Dixon*, 565 U.S. at 31–33 (discussing other facts that distinguished *Seibert*).

360. *See id.* at 23–33 (lacking any per se rule that limits *Seibert* where there is no "earlier confession to repeat").

361. *See id.* at 31–33 (using "no earlier confession to repeat" language amidst a generalized comparison between *Seibert* and *Dixon*).

362. *See id.* (discussing "overlapping content," the timing and setting of the first and second interview, 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) (creating plurality test).

considered the second, third, and fifth factors (without specifically referencing any test) in concluding that Dixon was not subjected to a question-first interrogation.[363] Because the Court concluded that no question-first interrogation had taken place, *Elstad*, and not *Seibert*, applied.[364]

B. *Drawing the Line at "Confessions" Would Make* Seibert *Unworkable*

As a practical matter, reading *Seibert* to exclude question-first interrogations that fail to elicit "confessions" in the unwarned phase would be as unworkable as it is incorrect. Courts would be dragged into litigating the meaning of the word "confession," rather than applying *Miranda*'s bright-line rule.

A "confession" generally refers to "a criminal suspect's oral or written acknowledgement of guilt, often including details about the crime."[365] Patrice Seibert's statement to police—that she knew the victim was supposed to die in a fire—is consistent with this definition.[366] Not all inculpatory information, however, comes in the form of a full-throated confession.[367] Prosecutors are often able to use neutral statements or denials by suspects as proof of culpability.[368]

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363. *See Dixon*, 565 U.S. at 23 ("In this case, no two-step interrogation of the type that concerned the Court in *Seibert* undermined the *Miranda* warnings Dixon received.").

364. *See id*. at 32–33 (upholding Ohio Supreme Court's application of *Oregon v. Elstad*).

365. *Confession*, BLACK'S LAW DICTIONARY (11th ed. 2019).

366. *See Seibert*, 542 U.S. at 604 (admitting responsibility to police).

367. *See* Mitchell v. MacLaren, 933 F.3d 526, 539 (6th Cir. 2019) (recounting that a suspect did not "confess," but admitted to being at the location of a murder on the night that it occurred); Pollard v. Parris, No. 20-00017, 2020 U.S. Dist. LEXIS 86821, at *68 (M.D. Tenn. May 18, 2020) (observing that the defendant's pre-warning statements "arguably implicated" him in a murder, but fell short of a "full-blown confession").

368. *See* 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 804.06 (2d ed. 1997) (noting that neutral statements may still be admissible under the penal interest exception to hearsay).

Consider what happened in the *Johnson* case.[369] For more than four hours, Bobby Johnson was interrogated by Charlotte-Mecklenburg police without first receiving *Miranda* warnings.[370] He consistently denied involvement, but many of the things that he said could have significant inculpatory value in the hands of a prosecutor.[371] For example, Johnson said: "That [DNA evidence] put me there, man. That right there just took my life. That right there just took my life."[372] "I want to help you bad."[373] "I'm about to lose my life."[374] "I'm tore apart. I'm destroyed right now."[375] Johnson also told police, "I don't want to be in prison the rest of my damn life," and said he felt sick to his stomach.[376] None of these statements are "confessions," as lower courts categorically applying *Dixon* require.[377] But all of them have inculpatory value, in that they tend to make Johnson look guilty.

This point helps to illustrate why the *Miranda* exclusionary rule makes no subtle distinctions based on content.[378] When statements are suppressed under *Miranda*, all of the unwarned

369. *See supra* INTRODUCTION.

370. *See* State v. Johnson, 795 S.E.2d 625, 628 (N.C. Ct. App. 2017) ("Approximately four hours after entering the interview room, Defendant was placed under arrest for murder, and approximately ten minutes later, after additional conversation, he was read his *Miranda* rights and signed a waiver of those rights.").

371. *See* WEINSTEIN & BERGER, *supra* note 368, § 804.06 (noting that even neutral statements can be inculpatory).

372. *Johnson*, 795 S.E.2d at 629.

373. *Id.* at 630.

374. *Id.*

375. *Id.* at 631.

376. *Id.* at 630.

377. *See Mitchell*, 933 F.3d at 539 (upholding the Michigan Supreme Court's categorical reading of *Dixon*, which found *Seibert* inapplicable because of the lack of a confession despite multiple inculpatory statements by the defendant).

378. *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) ("[U]nless and until [*Miranda*] warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against him." (emphasis added)).

statements are suppressed.[379] This rule is eminently more logical and workable. Imagine the absurdity of a situation in which *Miranda* exclusion only applied to unwarned "confessions."

> SUSPECT: I didn't do anything. I was at the bar all night; how would I have killed anyone? . . .
>
> SUSPECT: Alright, I did it. He owed me money.

In this scenario, if *Miranda* exclusion only applied to "confessions," then a trial court could only exclude: "Alright, I did it." The second part of his answer ("He owed me money.") would still be admissible. So would the other statement: "I didn't do anything. I was at the bar all night." Neither of these statements are "acknowledgements of guilt," but they both have significant inculpatory value.[380] "He owed me money" provides the prosecution with a motive; "I was at the bar all night" is an alibi which could later be disproved.

In short, drawing a line at "confessions" fabricates an eminently unworkable rule from an unsound reading of *Dixon*.

C. *The Specific Dangers and Rationales Identified in* Seibert *Apply Regardless of Whether Police Elicited a Confession in the Unwarned Portion of the Interview*

Lower courts' interpretations of *Dixon* are inconsistent with the three specific dangers identified in *Seibert:* (1) timing; (2) confusion; and (3) "cat out of the bag."[381] Notwithstanding the language from *Dixon*, all three threats created by question-first interrogations still apply even in the absence of an unwarned confession.

The first threat is timing.[382] The longer the unwarned portion of the interview, the more unlikely it is that a suspect in

379. *Id.*

380. *See* BLACK'S LAW DICTIONARY, *supra* note 365 (defining confessions).

381. *See supra* Part II.A.5.

382. *See* Missouri v. Seibert, 542 U.S. 600, 611 (2004) (describing the reduction in effectiveness when interrogators wait for a "particularly opportune time" to give *Miranda* warnings).

a custodial interrogation setting will perceive a meaningful right to silence or counsel.[383] This threat is present regardless of whether a suspect has confessed to the police. Once again, the *Johnson* case illustrates this phenomenon. Police subjected Johnson to intense interrogation for more than four hours before giving him *Miranda* warnings.[384] During that time, Johnson was in a "police-dominated atmosphere," entirely isolated from the outside world.[385] How could the warnings have been effective under those circumstances? How could Johnson have perceived a meaningful choice about speaking or invoking his rights?

The second threat is confusion.[386] According to the *Seibert* plurality, a midstream recitation of legal rights is likely to disorient a suspect and throw the suspect off-balance.[387] This threat is actually *heightened* where a suspect has not made an earlier confession.[388] Otherwise, why would the police need to disorient or confuse the suspect? Using *Miranda* as a "sword" can be particularly effective when the suspect's will is about to break down.[389] The warnings function as a "forceful shove," not an advisement about legal rights.[390]

The *Johnson* case also illustrates the confusion phenomenon. Although Johnson maintained his innocence in the unwarned portion of his interview, the prolonged interrogation eroded his will.[391] The detectives then arrested him and Mirandized him "to make [him] understand that this

383. *See id.* at 620 (Kennedy, J., concurring) ("The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given.").

384. State v. Johnson, 795 S.E.2d 625, 628 (N.C. Ct. App. 2017).

385. *See Miranda*, 384 U.S. at 445 (describing "incommunicado interrogation of individuals in a police-dominated atmosphere").

386. *See Seibert*, 542 U.S. at 613 (plurality opinion) (discussing "perplexity" and "bewilderment" caused by midstream warnings).

387. *Id.*

388. *See supra* Part II.A.5.

389. *See supra* Part II.A.5.

390. *See supra* Part II.A.5.

391. *See Johnson*, 795 S.E.2d at 628–33 (relating Johnson's escalating reactions to questioning, including that he felt suicidal).

isn't going to go away."[392] The formal arrest and issuance of warnings pushed Johnson over the edge: he denied involvement for four hours, but implicated himself only twenty minutes after receiving *Miranda* warnings.[393]

The last threat of question-first interrogations identified in *Seibert* is the "cat out of the bag" problem.[394] This occurs because of the psychological effects of disclosure: the bubbles don't go back into the bottle after you uncork champagne.[395] This threat is arguably not present when a suspect fails to make *any* inculpatory statements during the unwarned portion of the interrogation. For example, if a suspect were to remain silent for the entire unwarned portion of the interview, there would likely be no psychological compulsion created by his reticence. However, if a suspect makes inculpatory statements which fall short of full confessions, there still may be a "cat out of the bag" problem. Once a suspect makes statements that he believes are incriminating, the suspect might think that he has no meaningful choice but to continue talking.[396]

Although it is difficult to know for sure, this threat might have been present in the *Johnson* case as well.[397] After making repeated incriminating statements (that fell short of confessions), Johnson might have been subject to lingering

392. *Id.* at 633.

393. *Id.* at 632–33 (noting that Johnson confessed only about twenty minutes after receiving *Miranda* warnings).

394. *See* Missouri v. Seibert, 542 U.S. 600, 613 (2004) ("Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think that he had a genuine right to remain silent . . . .").

395. *See* Oregon v. Elstad, 470 U.S. 298, 311 (1985) (describing a "subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag, and in so doing, has sealed his own fate"). Note that this argument was rejected in *Elstad*. *See* 470 U.S. at 311–12. But as Part II.A.5 observes, it remains alive and well in the *Seibert* context.

396. *See supra* Part II.A.5.

397. *See* State v. Johnson, 795 S.E.2d 625, 628–33 (N.C. Ct. App. 2017) (recounting repeated inculpatory statements short of confessions).

psychological compulsion from his "conviction that he has let the cat out of the bag, and in so doing, has sealed his own fate."[398]

Finally, the *Seibert* Court's apparent rationales apply regardless of whether a confession was elicited in the unwarned portion of the interview.[399] If the Supreme Court in *Seibert* was reacting to gamesmanship by police departments, exempting interrogations that failed to produce unwarned confessions does not make any sense. Such a rule would only *encourage* gamesmanship, because police could simply interrogate "outside *Miranda*" until the suspect approached the breaking point.[400] Like Johnson, the suspect might make inculpatory statements that fall short of confessions.[401] Like Johnson, the suspect might show increasing signs of physical and emotional distress.[402] And like in Johnson's case, the police might withhold *Miranda* warnings until a confession becomes imminent.[403]

The false confession rationale similarly applies whether or not the suspect confessed during the unwarned portion of the interview. Question-first interrogations compromise the effectiveness of *Miranda* warnings, potentially increasing the likelihood of a false confession.[404] Imagine that Bobby Johnson was innocent.[405] After being confronted with evidence which

398. *Elstad*, 470 U.S. at 311.

399. *See supra* Part II.A.6.

400. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132–40 (1998) (describing police interrogation practices "outside *Miranda*").

401. *Johnson*, 795 S.E.2d at 628–33 (describing Johnson's reactions to questioning).

402. *Id*.

403. *Id*. at 632.

404. *See supra* Part II.A.6.

405. The plausibility of this scenario depends on the accuracy of the DNA test provided to the Charlotte-Mecklenburg Police Department. *See Johnson*, 795 S.E.2d at 627 ("[T]he DNA analysis indicated that only one in 16,600,000 African-Americans could have been the contributor of the DNA recovered from under [the victim's] fingernails, and that Defendant was one of those African Americans [sic] who could have contributed that DNA . . . ."); Mandy Locke et al., *Scathing SBI Audit Says 230 Cases Tainted By Shoddy Investigations*, RALEIGH NEWS & OBSERVER (Aug. 19, 2010, 2:00 AM), https://perma.cc/B8AH-22WV (last updated Feb. 15, 2015) (describing decades of substandard forensic practices at the North Carolina state crime lab). *See generally* Matthew Shaer,

purported to guarantee his conviction, and after making repeated statements which appeared inculpatory, Johnson might have concluded that the best thing to do was to confess, whether it was true or not: "I'm already dead, should I just kill myself all the way?"[406]

CONCLUSION

Seibert was a 2004 case.[407] More than fifteen years later, some police officers continue to conduct question-first interrogations.[408] As a result, a reading of *Dixon* that constrains the applicability of *Seibert* can have real consequences for criminal defendants. It can be the difference between a suppressed statement and an admitted one, which in turn might be the difference between "not guilty" and "guilty."

Any criminal procedure decision, of course, has consequences for criminal defendants. But the consequences imposed by lower courts' interpretations of *Dixon* are rooted in an erroneous reading of that case. To treat a single line from *Dixon* as a categorical rule that limits the scope of *Seibert* is to misread both decisions. The dangers created by "question-first" interrogations potentially exist regardless of whether police succeeded in obtaining an unwarned confession. And the rationales of the *Seibert* Court in striking down question-first

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The False Promise of DNA Testing, ATLANTIC (June 2016), https://perma.cc/KJ7A-RA8D (last visited Oct. 18, 2020) (discussing growing awareness of methodological problems with forensic DNA evidence).

406. *Johnson*, 795 S.E.2d at 633.

407. Missouri v. Seibert, 542 U.S. 600 (2004).

408. *See* United States v. Bradley, 370 F. Supp. 3d 458, 473 (M.D. Pa. 2019), *vacated*, 959 F.3d 551 (3d Cir. 2020) (suppressing custodial interrogation taken in violation of *Seibert*); United States v. Palacio, No. TDC-18-0619, 2019 U.S. Dist. LEXIS 215114, at *26–39 (D. Md. Dec. 12, 2019) (suppressing statements because of a *Seibert* violation); People v. Penelton, No. 2-17-0408, 2019 Ill. App. Unpub. LEXIS 1694, at *15–21 (Ill. App. Ct. Sept. 12, 2019) (applying Justice Kennedy's concurrence to suppress postwarning statements); State v. Gallegos, No. 78401, 2020 Nev. Unpub. LEXIS 201, at *6 (Nev. Feb. 21, 2020) (applying plurality test to affirm suppression of post-*Miranda* statements); United States v. Gasaway, No. 19-cr-27, 2019 U.S. Dist. LEXIS 193512, at *13–20 (W.D. Ky. Nov. 6, 2009) (suppressing statements after careful consideration of plurality factors).

practices are similarly applicable even when such practices do not result in unwarned confessions.

The uncertain repose of *Seibert* complicates this problem. Lower courts might be especially eager to avoid a *Seibert* analysis altogether because of the confusion about the governing opinion in that case. By treating "no earlier confession to repeat" as a per se rule, they can simply say that *Seibert* does not apply. As a result, crystalline clarity can only come from the Supreme Court.

The Supreme Court, however, has rejected multiple recent petitions for certiorari on the *Seibert* decision. One case, *Wass v. Idaho*,[409] asked the Court to decide whether the plurality opinion or Justice Kennedy's concurrence was the governing opinion in *Seibert*.[410] Although it was relisted several times and attracted some public interest,[411] the Court denied certiorari.[412] Bobby Johnson's case—the facts of which were discussed throughout this Note—similarly failed to obtain a writ of certiorari in 2019.[413]

The Supreme Court should affirm the plurality opinion as the governing *Seibert* decision. Because the plurality opinion focuses on the experience of the suspect, rather than the intent of the officer, it is a more workable standard for measuring the effectiveness of *Miranda* warnings. The Supreme Court should also emphasize that a pre-warning confession is not a necessary condition for a *Seibert* violation. Clarification of the *Dixon* and

409. 138 S. Ct. 2706 (2018).

410. *See* Petition for Writ of Certiorari at i, Wass v. Idaho, 138 S. Ct. 2706 (2018) (No. 17-425) ("When an officer 'questions first,' is the admissibility of the suspect's post-warning statement governed by the four-judge plurality's objective, suspect-focused test, or Justice Kennedy's subjective, officer-focused test?" (citations omitted)).

411. *See Wass v. Idaho*, SCOTUSBLOG, https://perma.cc/4AA9-HZEX (last visited Oct. 18, 2020) (profiling the case on popular Court-watching blog and recording five relists).

412. *See Wass*, 138 S. Ct. at 2706 (denying certiorari).

413. *See* Johnson v. North Carolina, 140 S. Ct. 122, 122 (2019) (denying certiorari).

Seibert issues will resolve confusion in lower courts about the meaning of those decisions.[414]

In order to increase the likelihood of appellate clarification, advocates in lower courts should seek to suppress statements taken during question-first interrogations, even if—and especially if—those statements possess inculpatory value but fall short of confessions. It may well be that defense attorneys are not raising *Seibert* issues or preserving them on appeal, thinking that the lack of an unwarned confession makes *Seibert* inapplicable. Although some lower courts have already reached the issue, other courts might (and should) reach opposite conclusions, increasing the chances of resolution in the nation's highest court.

At the conclusion of Justice Souter's opinion in *Seibert*, he wrote, "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."[415] Question-first interrogations are stratagems, even when there is "no earlier confession to repeat."[416] When they "drain the substance" from *Miranda* by depriving warnings of their effectiveness, any statements elicited after *Miranda* warnings should be excluded.

414. Although a detailed discussion of *Marks* is outside the scope of this Note, a case clarifying *Seibert* might also potentially serve as a vehicle for reexamining the narrowest grounds doctrine. *See supra* Part II.A.3.

415. Missouri v. Seibert, 542 U.S. 600, 617 (2004).

416. *See* Bobby v. Dixon, 565 U.S. 23, 31 (2011) (distinguishing *Seibert* in part on the basis of "no earlier confession to repeat").