Fordham Urban Law Journal

Volume 40, *Number* 3 2013 *Article* 6

COOPER-WALSH COLLOQUIUM, LEGITIMACY AND ORDER: ANALYZING POLICE-CITIZEN INTERACTIONS IN THE URBAN LANDSCAPE

Interrogation First, Miranda Warnings Afterward: A Critical Analysis of the Supreme Court's Approach to Delayed Miranda Warnings

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INTERROGATION FIRST, *MIRANDA* WARNINGS AFTERWARD: A CRITICAL ANALYSIS OF THE SUPREME COURT'S APPROACH TO DELAYED *MIRANDA* WARNINGS

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The two-step interrogation tactic at issue in Missouri v. Seibert *exemplifies gaming by observing a rule while undermining its purpose.*[1]

The Seibert *opinions have sown confusion in federal and state courts, which have attempted to divine the governing standard that applies in successive interrogation cases involving warned and unwarned confessions.*[2]

1. Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1439 (2011).

2. State v. O'Neill, 936 A.2d 438, 453 (N.J. 2007).

INTRODUCTION

On August 6, 2010, Russell Hart was arrested in Nebraska on a parole violation originating in California.[3] At the local jail, a police officer asked Hart what the underlying charge was with respect to the parole violation.[4] Hart stated that he had failed to register as a sex offender in California.[5] A deputy sheriff then asked Hart how long he had lived in Nebraska.[6] When Hart responded that he had lived in Nebraska for approximately one month, another officer asked Hart if he had registered in Nebraska.[7] Hart responded that he had not registered.[8] At this point, the questioning, which had included no mention of *Miranda* warnings, paused while the police left to discuss Hart's statement regarding his failure to register.[9] Believing Hart had indicated an "Adam Walsh" violation under 42 U.S.C. §§ 16901–16991 by failing to register, the police quickly confirmed their suspicion with the Marshall's Office in Lincoln, Nebraska, and returned to the interrogation room.[10]

3. United States v. Hart, No. 4:10CR3088, 2010 WL 5422900, at *1 (D. Neb. Nov. 30, 2010).

4. *Id.*

5. *Id.* Hart had to register as a sex offender because he was convicted of rape in 1975, which required the convict to register subsequently as a sex offender in the state where he resides. *See* 18 U.S.C. § 2250(a) (2006); *see also* United States v. Hart, No. 4:10CR3088, 2010 WL 5422900 (D. Neb. Nov. 30, 2010), *adopted by* 4:10CR3088, 2010 WL 5422638 (D. Neb. Dec. 23, 2010); Indictment 18 U.S.C. § 2250(a), United States v. Hart, No. 8:10CR60 (D. Neb. Aug. 18, 2010), 2010 WL 6307345; Brief in Support of Motion for Variance from the Sentencing Guidelines, United States v. Hart, No. 10CR03088 (D. Neb. Apr. 28, 2011), 2011 WL 7327472 [hereinafter Brief in Support of Motion for Variance]. After Hart's parole, he was alternately either homeless or incarcerated and suffered from drug use, a bipolar condition, and depression. Brief in Support of Motion for Variance. Brief in Support of Motion for Variance, *supra*. On July 10, 2010, Hart finished serving a prison term for a prior parole violation, and was released from prison. *Id.* The following day, Hart boarded a bus and came to McCook, Nebraska, where three of his siblings were living. *Id.* The U.S. Marshal Service in Lincoln, Nebraska, was soon contacted by the U.S. Marshal Service in Fresno, California, and was told that Hart had an outstanding parole violation warrant for failing to register as a sex offender in California. Motion to Suppress Statements and Request for Evidentiary Hearing and Oral Argument, United States v. Hart, No. 10CR03088 (D. Neb. Sept. 30, 2010), 2010 WL 6307346, at *1 . Hart was subsequently arrested. *Id.*

6. *Hart*, 2010 WL 5422900, at *1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

Thirty minutes after questioning Hart about his failure to register in Nebraska, the same group of police officers resumed their interrogation.[11] First, the police officers asked Hart if he would answer a few questions, which he agreed to do, and then presented Hart with a *Miranda* waiver, which he signed.[12] Next, the police asked Hart how long he had lived in Nebraska and if he had registered as a sex offender in Nebraska.[13] Hart repeated his earlier statement, stating he had lived in Nebraska for about a month and had not registered as a sex offender.[14] The District Court denied Hart's motion to suppress his post-*Miranda* statements, reasoning that the police did not use a question-first procedure calculated to elicit a post-*Miranda* confession from him.[15]

The admissibility of post-*Miranda* statements in question-first cases is governed by the United States Supreme Court's decision in *Missouri v. Seibert*.[16] This Note considers the treatment of mid-interrogation *Miranda* warning cases by the Federal Courts of Appeals in the wake of the United States Supreme Court's plurality opinion in *Seibert*[17] and suggests how greater consistency, efficiency, and fidelity to the law might be achieved in future cases. The Court described the question-first procedure as a "technique of withholding warnings until after interrogation succeeds in eliciting a confession," which causes the subsequent *Miranda* "warnings [to] be ineffective in preparing the suspect for successive interrogation, close in time and similar in content."[18] When the warnings following an earlier unwarned statement are held ineffective, a statement or confession offered after that warning is inadmissible.[19] In *Seibert*, the Court issued a plurality opinion to which four Justices joined. Justice Kennedy's concurrence provided the deciding fifth vote.[20] The five Justices disagreed, however, as to how effectiveness should be

11. *Id.*
12. *Id.*
13. *Id.* at *1.
14. *Id.*
15. *Id.* at *5–6.
16. 542 U.S. 600, 611–14 (2004).
17. *Id.* at 604–22.
18. *Id.* at 613.
19. *Id.* at 622 (Kennedy, J., concurring). Under *Seibert*, every violation of *Miranda* does not require suppression of the evidence obtained. *Id.* at 618–19. Rather, "[e]vidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are furthered by its introduction." *Id.* at 618–19.
20. *Id.* at 618–21.

determined.[21] In *Seibert*, the plurality uses a multifactor test to determine whether a suspect's apprehension of the *Miranda* warning was rendered ineffective by the interrogator's use of a question-first procedure.[22] In contrast, Justice Kennedy articulates a "narrower test" that applies only to deliberate question-first procedures.[23] Further, while the *Seibert* plurality places the burden of showing admissibility on the prosecution,[24] Justice Kennedy's opinion is silent on the matter.[25] Thus circuit courts in the wake of *Seibert* have disagreed as to whether the intent of the police responsible for the question-first procedure or the impact on the defendant of a police question-first procedure controls.[26]

The conflict among circuit courts in question-first cases stems from various disagreements. Circuits disagree as to whether the plurality or Justice Kennedy's concurrence provides the narrowest grounds of the Supreme Court's decision, and thus which opinion states the controlling rule.[27] Moreover, the choice of factors determining whether the use of the mid-interrogation warning was "deliberate" in a particular case, in addition to their proper application, has been fraught with conflict.[28] Lower courts also misconstrue the various policies underlying *Miranda*, such as dispelling the inherently coercive atmosphere of custodial interrogations,[29] deterring improper police conduct, and preserving the trustworthiness of confessions.[30]

This Note seeks to clarify the complexity of *Seibert* and explain the failure of lower courts to accurately apply its precepts. It goes on to suggest a solution to this problem that reflects the wisdom of Justice Kennedy's view.

Part I of this Note discusses the development of the Supreme Court's question-first procedure jurisprudence, including a discussion

21. *Id.* at 622.

22. *Id.* at 611–14 (plurality opinion).

23. *Id.* at 622 (Kennedy, J., concurring).

24. *Id.* at 609 n.1 (plurality opinion) (The burden of showing admissibility rests, of course, on the prosecution" (quoting Brown v. Illinois, 422 U.S. 590, 604 (1975))). The plurality in *Seibert* also places the burden of proving the effectiveness of the *Miranda* waiver at a preponderance of the evidence. *Id.*

25. *Id.* at 618–22 (Kennedy, J., concurring); *see* United States v. Capers, 627 F.3d 470, 478 (2d Cir. 2010) (citing United States v. Williams, 435 F.3d 1148, 1158 n.11 (9th Cir. 2006)).

26. *See, e.g.*, United States v. Pacheco-Lopez, 531 F.3d 420 (6th Cir. 2008).

27. *See infra* Part II.A.

28. *See infra* Parts Part II.B, II.C.

29. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

30. Oregon v. Elstad, 470 U.S. 298, 308–09 (1985).

of question-first procedures generally; the development of the *Miranda* warning; the facts in *Seibert* that led to the Supreme Court's focus on the question-first procedure; and the Supreme Court's treatment of *Miranda* violations through question-first procedures.

Part II analyzes ten circuit courts' applications of *Seibert* in light of the considerations and analysis applied by Justice Kennedy in his concurrence, as well as the burden of proof required of the prosecution, if any, to show that police did not apply a deliberate two-step interrogation technique. Throughout this analysis, this Note examines the facts present in the circuit cases as they relate to those in *Seibert*.

Lastly, Part III argues that Justice Kennedy's approach, which is followed by the Second, Third, Fourth, Fifth, Eighth, and Eleventh Circuits, should be controlling. Second, within the set of circuits following Justice Kennedy's concurrence, this Note supports an approach followed only by the Fifth and Eleventh Circuits as particularly faithful to Justice Kennedy's concurrence, even though Justice Kennedy's concurrence does not explicitly advance any factors.[31] Third, this Note seeks to clarify the proper application of the factors to be used by lower courts to comply with Justice Kennedy's concurrence.[32] Finally, this Note attempts to bring order to the inconsistent and inefficient jurisprudence surrounding evaluations of potentially improper question-first procedures.[33] In the aftermath of *Seibert*, circuit courts have used widely divergent and inconsistent criteria to evaluate whether a particular question-first procedure violates *Miranda*. The criteria used by circuit courts often contradict the central concerns and considerations advanced by Justice Kennedy's concurrence. Moreover, the inconsistency in the circuit courts' treatment of question-first cases provides poor guidance to police and sows confusion in the lower courts. This Note suggests a simple and more coherent standard in accordance with Justice Kennedy's concurrence.

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

32. *See id.* For example, circuit courts have also incorrectly approached the issues of whether a burden of proving a deliberate violation of *Miranda* should exist and whether the suspect or law enforcement must bear such a burden. *See infra* Part III.C.vi.

33. *See infra* Part III.

I. UNDERSTANDING THE ORIGINS OF QUESTION-FIRST JURISPRUDENCE

To provide context to the standards applied by courts in question-first cases, I provide a brief overview of the development of Supreme Court case law regarding custodial interrogations and *Miranda* warnings. I then discuss the circumstances in *Seibert*, which led to the apparently deliberate two-step interrogation of the defendant.[34]

A. The Right Against Self-Incrimination and *Miranda v. Arizona*

Prior to *Miranda*, courts evaluated the admissibility of confessions under a voluntariness test, which the Supreme Court developed from the Fifth Amendment[35] and the Fourteenth Amendment[36] to the United States Constitution.[37] In *Haynes v. Washington*, the Supreme Court held that a suspect's custodial statements were involuntary where they had been obtained by "techniques and methods offensive to due process" or under circumstances precluding a suspect from exercising "a free and unconstrained will."[38] In 1966, however, the Supreme Court held in *Miranda v. Arizona* that statements made by a defendant while under custodial interrogation may not be used against him at trial, unless the prosecution proved that law enforcement took certain procedural steps to protect the defendant's constitutional right against self-incrimination.[39] Specifically, the Court in *Miranda* required law enforcement to advise custodial suspects of their right to remain silent and their right to counsel before and during interrogation.[40] In response, Congress attempted to overrule *Miranda* by passing 18 U.S.C. § 3501 (1968).[41]

34. *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring).

35. U.S. CONST. amend. V.

36. U.S. CONST. amend. XIV.

37. Haynes v. Washington, 373 U.S. 503 (1963); *see also* Chambers v. Florida, 309 U.S. 227 (1940).

38. 373 U.S. at 514–15.

39. 384 U.S. 436 (1966).

40. *Id.* at 467–70.

41. 18 U.S.C. § 3501 reads, in relevant part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. . . . (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant . . . (2) whether such defendant knew the

Subsequently, in *United States v. Dickerson*, the Supreme Court examined 18 U.S.C. § 3501 and the *Miranda* opinion to determine whether the *Miranda* court had announced a constitutional rule.[42] The Court held that *Miranda* announced a constitutional rule that replaced the traditional totality-of-the-circumstances voluntariness test,[43] and invalidated 18 U.S.C. § 3501, reasoning that the statute must be invalid if *Miranda* continues to be the law.[44] Given the Court's reaffirmation of *Miranda* in *Dickerson*, the admissibility of statements made by a suspect during interrogation remains dependent upon the provision of *Miranda* warnings by police.[45]

B. *Oregon v. Elstad*

The Supreme Court first addressed the question-first procedure in *Oregon v. Elstad*.[46] In *Elstad*, a police officer visited the home of an eighteen-year-old male suspect in a burglary.[47] Without giving *Miranda* warnings, the officer asked whether the young man knew another man implicated in the robbery.[48] After the suspect replied in the affirmative, the police officer informed the suspect that he believed the suspect was involved in the robbery, to which the suspect

> nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501 (1968), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).

42. *Dickerson*, 530 U.S. at 437.

43. *Id.* at 438–43 (holding that *Miranda* and its progeny govern the admissibility of statements made during custodial interrogation in both state and federal courts).

44. *Id.* at 432 (finding *Miranda* to be a constitutional decision of the Court, which may not be overruled by an Act of Congress).

45. *Id.* at 444; *see also* Missouri v. Seibert, 542 U.S. 600, 608 (2004) (finding that by adequately and effectively apprising a suspect that his rights and the exercise of those rights must be fully honored, *Miranda* "reduce[s] the risk of a coerced confession and [] implement[s] the Self–Incrimination Clause" (quoting Chavez v. Martinez, 538 U.S. 760, 790 (2003)) (internal quotation marks omitted)).

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

47. *Id.* at 300–01.

48. *Id.* at 301.

again replied in the affirmative.[49] The police subsequently drove the suspect to the police station, gave him a full set of warnings and elicited another confession, consistent with the first admission.[50]

To determine whether the subsequent warned confession should be inadmissible at trial, the *Elstad* Court determined that "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made."[51] Specifically, the Supreme Court reasoned that the officer's unwarned interrogation of the suspect was an oversight, and therefore "had none of the earmarks of coercion."[52] This directly contradicted the Oregon State Supreme Court's position that, since the unwarned statement to the officer took place during a series of questions, the "cat was sufficiently out of the bag to exert a coercive impact on [the defendant's] later admissions," rendering them inadmissible.[53] In response, the United States Supreme Court emphasized that "[a]bsent deliberate coercion or improper tactics in obtaining an unwarned statement, a careful and thorough administration of *Miranda* warnings cures the condition that rendered the unwarned statement inadmissible."[54] As a result, the Supreme Court reversed the Oregon State Supreme Court's decision to suppress the suspect's later warned confession, despite the fact that the suspect's first admission was unwarned and the interrogation had proceeded in two steps, with an unwarned confession at the first step and a subsequent Mirandized confession at the second step.

The difference between the determination of the Oregon Supreme Court and that of the United States Supreme Court in *Elstad* lies in the different perspective each side takes to evaluate whether the police conducted a deliberately coercive question-first procedure. While the Oregon court focuses on the coercive effect of the prior unwarned confession on later admissions, the Supreme Court disregards this consideration and instead focuses exclusively on whether the police officers' execution of the unwarned and subsequent warned interrogations of a suspect were "deliberately coercive."[55]

49. *Id.*
50. *Id.* at 301–02.
51. *Id.* at 318.
52. *Id.* at 316
53. *Id.* at 303 (quoting State v. Elstad, 658 P.2d 552, 555 (Or. Ct. App. 1983)).
54. *Id.* at 299.
55. *Id.* at 314 ("[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion.").

C. *Missouri v. Seibert*

In *Seibert*, a defendant was suspected of involvement in the burning of a mobile home to conceal the circumstances of her son's death in his sleep.[56] Police arrested the defendant but failed to administer her *Miranda* warnings and questioned her for over half an hour, which resulted in the suspect's confession that her son was actually supposed to die in the fire.[57] Police then gave the defendant a twenty-minute break, returned to administer her *Miranda* warnings, and obtained a waiver.[58]

The interrogating officer then resumed questioning the suspect, confronting her with her pre-*Miranda* statements and getting her to repeat the information she had revealed earlier.[59] At trial, the officer testified that he made a conscious decision to withhold *Miranda* warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given, pursuant to an interrogation technique the officer was taught.[60] Because the Court held that the *Miranda* warnings, which were given mid-interrogation after the defendant provided an unwarned confession, were ineffective, the suspect's subsequent repeated confession was inadmissible at trial.[61]

1. Description of Question-First Technique

The Court described the question-first procedure as a police practice in custodial interrogations that calls for giving no warnings of the rights to silence and counsel until interrogation has produced an incriminating statement.[62] Though such a statement is generally inadmissible as it results from a violation of *Miranda*,[63] the interrogating officer follows the statement with *Miranda* warnings and then leads the suspect to cover the same ground a second time.[64] Because this question-first procedure does not effectively comply with *Miranda's* constitutional requirement,[65] the Supreme Court held

56. Missouri v. Seibert, 542 U.S. 600, 604 (2004).
57. *Id.* at 604–05.
58. *Id.* at 605.
59. *Id.*
60. *Id.* at 605–06.
61. *Id.* at 622 (Kennedy, J., concurring).
62. *Id.* at 604 (plurality opinion).
63. Miranda v. Arizona, 384 U.S. 436, 492 (1966).
64. *Seibert*, 542 U.S. at 604.
65. *See id.* at 609.

that a statement repeated after a warning in such circumstances is inadmissible.[66] In *Seibert*, the Court stated that the technique of interrogating in successive, unwarned and warned phases raised a new challenge to *Miranda*.[67] At the time of *Seibert*, the question-first procedure was widespread, having been included in police training nationwide.[68] Though the question-first procedure's prevalence in police training has decreased nationwide post-*Seibert*,[69] police training advocacy of the procedure has not ceased entirely.[70]

The question-first procedure undermines the effectiveness of the eventual *Miranda* warning because a suspect cannot understand initially that she has a right against self-incrimination once a she has already incriminated herself during the pre-*Miranda* stage.[71] Further, it is unlikely that a suspect can retain the understanding that *Miranda* provides when the interrogator leads the suspect through her previous unprotected statements.[72] Finally, it is unlikely that a suspect will understand that she has the right to stop the

66. *Id.* at 604; *see also* Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1269 (2007).

67. *Seibert*, 542 U.S. at 609.

68. *Id.* at 609–11; *see also* Miriam S. Gohara, *A Lie for A Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 800 n.59 (2006).

69. Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1553–54 (2008).

70. *Id.* This commentator provides evidence that formal training dissuading police from providing *Miranda* warnings has occurred since *Seibert*:

> If the truth is that custodial interrogation without *Miranda* waivers does not violate the Constitution, does not violate the *Miranda* evidentiary rule, and does not constitute deterrable misconduct, any statements thus obtained have legitimate investigative and evidentiary uses:
> - Neutralize safety threats . . .
> - Locate weapons and evidence . . .
> - Identify witnesses . . .
> - Incriminate accomplices . . .
> - PC for search warrant . . .
> - PC for arrest . . .
> - Impeach inconsistent trial testimony . . .
>
> Might knowledge of the truth about *Miranda* sometimes cause an interrogating officer to conclude that s/he might have something to gain through custodial interrogation without waivers?

Id. (quoting L.A. CNTY. DIST. ATTORNEY'S OFFICE, SECRET PASSAGES, THE TRUTH ABOUT *MIRANDA* 10–12 (2005)).

71. *Seibert*, 542 U.S. at 613 n.5.

72. *Id.*

interrogation, since she has already provided unprotected incriminating statements.[73]

2. Seibert *Question-First Analysis*

The Supreme Court's majority decision in *Seibert* to exclude the suspect's confession was formed from a plurality, comprised of Justices Souter, Stevens, Ginsburg, and Breyer,[74] and a concurrence by Justice Kennedy.[75] Rather than focus on the intent of the police officer that executed the question-first procedure, the plurality held "that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."[76]

To decide whether the defendant's warned confession in *Seibert* should be suppressed, the plurality in *Seibert*

> laid out five factors to be weighed when analyzing the effectiveness of the warning: (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" interrogation, (4) "the continuity of police personnel," and (5) "the degree to which the interrogator's questions treated the second round as continuous with the first."[77]

Toward the end of the plurality's opinion, the plurality applied this standard to the facts, which, it argued, collectively undermined the *Miranda* protection. Significantly, the plurality equivocated with respect to whether this standard should be evaluated in terms of its police tactics or creating a coercive impact from the perspective of the suspect.[78] First, the initial unwarned interrogation was described as "systematic, exhaustive, and managed with psychological skill," leaving "little, if anything, of incriminating potential left unsaid."[79] This satisfied the plurality's first factor, which evaluated the completeness and detail of the questions and answers in the first

73. *Id.*

74. Justice Breyer joined in the plurality opinion fully, but also filed a concurring opinion. *Id.* at 617–18 (Breyer, J., concurring).

75. *Id.* at 617–22 (Kennedy, J., concurring).

76. *Id.* (plurality opinion).

77. United States v. Capers, 627 F.3d 470, 475 (2d Cir. 2010) (quoting *Seibert*, 542 U.S. at 615).

78. *Seibert*, 542 U.S. at 616–17.

79. *Id.* at 616.

round of interrogation.[80] Second, because *Seibert* repeated her statements almost verbatim during both the unwarned and warned confessions, the content of the two statements clearly overlapped, thereby satisfying the second factor.[81] Third, the plurality described the warned phase of questioning as proceeding after a pause of only fifteen to twenty minutes, in the same place as the unwarned segment.[82] The short time between both interrogations and the fact that each of the interrogations took place in the station house fulfilled the timing and setting factor of the plurality approach.[83]

Fourth, the same officer who had conducted the first phase recited the *Miranda* warnings, thereby continuing the police presence of the pre-*Miranda* questioning into the post-*Miranda* stage. Fifth, the interrogating officers referenced the suspect's pre-*Miranda* statement during the post-*Miranda* stage when she made a statement at odds with her unwarned confession.[84] Additionally, the interrogating officer said nothing to counter the probable misimpression arising from the warning that anything Seibert said could be used against her, nor did the officer actually advise Seibert that her prior confession could not be used against her.[85] This demonstrated the degree to which the interrogator's questions treated the second round as continuous with the first, satisfying the fifth factor.[86] Lastly, the plurality did not undertake any curative measures analysis.[87]

Justice Kennedy's concurring opinion differs in certain key respects from the plurality opinion. Specifically, Justice Kennedy argues that statements obtained from police use of a question-first procedure should only be suppressed where the police conducted the question-first procedure deliberately. Justice Kennedy's approach narrows the plurality's approach in holding that the plurality's test

> envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 605 (noting police testimony stating "Trice, didn't you tell me that he was supposed to die in his sleep?" (internal quotation marks omitted)); *cf.* Oregon v. Elstad, 470 U.S. 298, 316 (1985) (finding that interrogating officers did not use the suspect's pre-*Miranda* statements to pressure the suspect into waiving the right to remain silent).

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

86. *Id.* at 616–17.

87. *Id.*

> stage interrogations. In my view, this test cuts too broadly. . . . 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.[88]

Additionally, according to Justice Kennedy's concurrence, if a court finds that the police executed a deliberate two-step interrogation, the court must also evaluate whether any curative measures took place afterwards to render the suspect's confession admissible.[89] These curative measures include allowing time to pass between interrogations, changing personnel, and changing location. The five-Justice majority held that post-*Miranda* statements, subsequent to a pre-*Miranda* interrogation, were inadmissible where mid-interrogation *Miranda* warnings were ineffective.[90] Unlike Justice Kennedy, the plurality did not address curative measures as a separate step. Additionally, the plurality was unclear as to whether effectiveness should be determined by the intent of the police responsible for the question-first procedure or the impact on the defendant of the question-first procedure.[91]

Notably, Justice Kennedy shifts to addressing the impact on the defendant of the question-first procedure when evaluating curative measures, which he argues "should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and . . . waiver."[92] Indeed, a key difference between the *Seibert* plurality and Justice Kennedy lies in the focus of each. In *Seibert*, the plurality resurrected the Oregon State Supreme Court's focus in *Elstad* on an unwarned confession's impact on a suspect to determine whether an improper question-first procedure occurred.[93] This focus on the defendant, however, was too "broad" for Justice Kennedy, who was concerned that punishing unintentional failures to initially provide *Miranda* would fail to deter improper police conduct.[94] Thus, in contrast to the four-Justice plurality's approach, Justice Kennedy concluded that the statements

88. *Id.* at 621–22 (Kennedy, J., concurring).

89. *Id.* at 622.

90. *Id.* at 616 (plurality opinion).

91. *See generally id.* at 600; *see also infra* Part III.A.

92. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

93. *See id.* at 617 (plurality opinion) ("These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.").

94. *Id.* at 622 (Kennedy, J., concurring).

repeated after later warnings would not be admissible if a deliberate question-first procedure was employed, where the administration of *Miranda* warnings occurred after a prior unwarned confession.[95] Additionally, Justice Kennedy held that upon use of a question-first procedure with the intention of violating *Miranda* during an extended interview, post-*Miranda* statements that are related to the substance of pre-*Miranda* statements must be excluded unless police take specific, curative steps to reestablish the effectiveness of the *Miranda* warning.[96] In *Seibert*, Justice Kennedy found that the police executed a deliberate question-first procedure and failed to take curative measures to render the *Miranda* warning effective.[97] As a result, the Court excluded the suspect's post-*Miranda* statements.

Part II will examine the approaches of circuit courts that seek to follow either the *Seibert* plurality or Justice Kennedy's concurring opinion and, among those circuits that follow Justice Kennedy's concurrence, Part II will examine their approaches to the considerations that Justice Kennedy applied.

II. CONFLICT OVER THE PROPER APPLICATION OF *MISSOURI V. SEIBERT*

The circuit courts have different approaches to evaluating whether police employed a question-first strategy. Six circuits follow Justice Kennedy's view and ask whether the violation was deliberate. The remaining circuits either apply the plurality alone or use both tests concurrently, or combine parts of the two, and usually decline to decide which approach controls.[98] In either case, the circuits usually decline to decide which approach controls.[99]

This circuit split results in inconsistent suppression holdings in question-first cases, unpredictable law, and unclear guidance to law

95. *Id.*

96. Justice Kennedy held in *Seibert* that if "deliberate, two-step strateg[ies], predicated upon violating *Miranda* during an extended interview" were used, the Court must determine whether "specific, curative steps" were taken to obviate the violation that occurred. *Id.* at 621.

97. *Id.* at 622.

98. Thompson v. Runnels, 657 F.3d 784, 796-97 (9th Cir. 2011); United States v. Sanchez-Gallegos, 412 F. App'x 58 (10th Cir. 2011); United States v. Verdugo, 617 F.3d 565, 575 (1st Cir. 2010); United States v. Heron, 564 F.3d at 879, 885–86 (7th Cir. 2009); United States v. McConer, 530 F.3d 484, 498 (6th Cir. 2008). *But see* United States v. Richardson, 657 F.3d 521, 524–25 (7th Cir. 2011).

99. *See* United States v. Pacheco-Lopez, 531 F.3d 420, 427 n.11 (6th Cir. 2008); United States v. Carrizales-Toledo, 454 F.3d 1142, 1152 (10th Cir. 2006).

enforcement personnel. This Part illustrates the circuit split by first examining the two-pronged approach of circuit courts that apply both the plurality approach and Justice Kennedy's professedly narrower inquiry into whether the question-first procedure was deliberately executed by police, then by examining the more common approach of the circuit courts that follow Justice Kennedy's narrower inquiry exclusively.

The circuit courts also have three different approaches to applying Justice Kennedy's inquiry into whether a question-first procedure was deliberately executed.[100] Finally, this Part examines the circuits' varying treatment of the considerations and criteria used by the lower courts to evaluate the deliberateness of question-first procedures. The approaches of the circuit courts that follow the plurality and those that follow Justice Kennedy's concurrence each have their strengths and weaknesses.[101] Similarly, the approaches of the circuit courts to the factors comprising Justice Kennedy's approach and other considerations involved in question-first cases also have strengths and weaknesses.[102] Subsequently, Part II reviews praise and criticism of these approaches through the combined lenses of the policies underlying *Miranda* and the principle of stare decisis.[103]

A. Plurality v. Intent

1. Circuits that Apply the Plurality Approach to Evaluate Question-First Procedures

Five circuits apply either solely the plurality approach or concurrently apply both the plurality and Justice Kennedy's deliberateness test to question-first procedures. Specifically, the First Circuit,[104] Sixth Circuit,[105] Seventh Circuit,[106] Ninth Circuit,[107] and

100. Differences arise in Justice Kennedy's view when it is considered alone and when the plurality is also considered. Although the plurality also varies somewhat in application across the circuits, these differences are less pronounced and are not examined here.

101. *See infra* Part II.A.

102. *See infra* Part II.B.

103. *Seibert*, 542 U.S. at 619–20 (Kennedy, J., concurring); Oregon v. Elstad, 614 U.S. 298, 308 (1995) (citing Michigan v. Tucker, 417 U.S. 433, 445 (1974)).

104. United States v. Verdugo, 617 F.3d 565, 575 (1st Cir. 2010) (declining to determine whether *Seibert's* reach is limited to cases in which the police set out to subvert a suspect's *Miranda* rights because the post-*Miranda* statement at issue was admissible even under the *Seibert* plurality's more context-sensitive test); *see also* United States v. Jackson, 608 F.3d 100, 104 (1st Cir. 2010).

105. United States v. McConer, 530 F.3d 484, 498 (6th Cir. 2008) (applied both Justice Kennedy's test and the plurality's test). *But see* United States v. Flack, No. 3:08-CR-108, 2009 WL 5031320 (E.D. Tenn. Dec. 11, 2009).

106. In the wake of *Seibert*, the Seventh Circuit has applied both a combination of the intent-focused approach and the plurality's approach. In *United States v. Heron*, the Seventh Circuit indicated that *Seibert* focused on the effectiveness of *Miranda* warnings, while applying both an "intent-based test" and a "defendant focused" test. 564 F.3d 879, 885–86 (7th Cir. 2009); *see also* United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir. 2004) (indicating that "at least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry . . . has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second," and further indicating that *Seibert* might not control "[w]here the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings"). In cases that have been decided subsequent to *Heron,* the Seventh Circuit has adopted an intent-based approach to address two-step interrogations, which favors *Elstad's* voluntariness inquiry over *Seibert*'s effectiveness inquiry. *Elstad*, 470 U.S. at 318; *see also* United States v. Hernandez, No. 11-CR-360, 2012 WL 601869, at *2 (N.D. Ill. Feb. 23, 2012). Note that an important rationale undergirding the Seventh Circuit's approach to question-first procedures is Justice Breyer's concurrence in *Seibert*, which argues that Justice Kennedy's focus is on intent. Specifically, Justice Breyer held that the intent of law enforcement to conduct a question-first procedure determined whether a suspect's post-*Miranda* confession was voluntary, as opposed to whether the *Miranda* warning was effective. *Seibert*, 542 U.S. at 617-18 (Breyer, J., concurring).

Accordingly, the Seventh Circuit has appeared to adopt Justice Kennedy's intent-based inquiry in *Seibert*, but applied it to *Elstad's* inquiry into whether a suspect's post-*Miranda* confession was voluntary. This Note, however, does not endorse this approach, as it does not deter improper police conduct because, like the plurality approach in *Seibert*, it is defendant-focused. The Seventh Circuit's approach is novel, given its efficient merging of *Seibert* into the effectiveness of *Miranda* and *Elstad's* inquiry into the voluntariness of a suspect's post-*Miranda* confession. However, this Note does not favor this approach, as it does not deter improper police conduct, since like the plurality it is defendant-focused, and because it does not address which criteria should be used by courts to determine whether a question-first procedure was deliberate. Though the Seventh Circuit steadfastly applied the plurality's and Justice Kennedy's tests, respectively, for over five years, in recent years, the Seventh Circuit has appeared to move towards the latter intent-based approach. *See* United States v. Ambrose*,* 668 F.3d 943 (7th Cir. 2012); United States v. Richardson*,* 657 F.3d 521, 524–25 (7th Cir. 2011); United States v. Littledale*,* 652 F.3d 698, 702 (7th Cir. 2011); United States v. Swanson*,* 635 F.3d 995, 1004 (7th Cir. 2011); *see also* United States v. Pettigrew, 455 F.3d 1164 (10th Circ. 2006). The Seventh Circuit's use of the intent-based approach to determine the voluntariness of a suspect's post-*Miranda* statements, however, is a significant change from *Seibert*'s inquiry into the effectiveness of the *Miranda* warning (subsequent to a prior pre-*Miranda* statement). For example, in *United States v. Swanson*, the Seventh Circuit demonstrated its use of the intent-based approach to determine the voluntariness of a suspect's confession rather than the effectiveness of the *Miranda* warning. 635 F.3d at 1004. In particular, the Court reasoned that the suspect's initial statements were involuntary because police conducted a deliberate question-first procedure, and because subsequent curative measures, such as "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators[,]" did not

Tenth Circuit[108] apply either the plurality or Justice Kennedy's approach, or both, usually because both tests yield the same result.[109] To discern the correct *Seibert* holding, most circuit courts follow the Supreme Court's decision in *United States v. Marks*, holding that

> 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.[110]

Some courts applying the *Marks* rule, however, disregard the focus on police intent in Justice Kennedy's concurrence because seven other Justices rejected intent as grounds for determining whether an illegal question-first procedure has occurred.[111]

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insulate the suspect's subsequent post-*Miranda* statements from the "taint" of the prior involuntary statement. *Id.* (citing *Elstad,* 470 U.S. at 310, 314); *see also Stewart*, 388 F.3d at 1089 ("[T]ruly 'effective' *Miranda* warnings . . . will occur only when certain circumstances—a lapse in time, a change in location or interrogating officer, or a shift in the focus of the questioning—intervene between the unwarned questioning and any postwarning statement." (quoting *Seibert*, 542 U.S. at 618 (Breyer, J., concurring)) (internal quotation marks omitted)).

107. Thompson v. Runnels, 657 F.3d 784, 796-97 (9th Cir. 2011) (finding that the plurality and Justice Kennedy's concurrence must be "read together"); *cf.* United States v. Williams, 435 F.3d 1148, 1158 (9th Cir. 2006) ("[B]oth the plurality and Justice Kennedy agree that where law enforcement officers *deliberately* employ a two-step interrogation to obtain a confession and where separations of time and circumstance and additional curative warnings are absent or fail to apprise a *reasonable person* in the suspect's shoes of his rights, the trial court should suppress the confession. This narrower test—that excludes confessions made after a deliberate, objectively ineffective mid-stream warning—represents *Seibert's* holding.").

108. United States v. Sanchez-Gallegos, 412 F. App'x 58, 72 (10th Cir. 2011) (finding that Justice Kennedy's concurrence is the narrowest grounds for the Supreme Court's decision to suppress).

109. United States v. Pacheco-Lopez, 531 F.3d 420, 427 n.11 (6th Cir. 2008) (declining to resolve the issue because the statement would be suppressed under any applicable framework); United States v. Carrizales-Toledo, 454 F.3d 1142, 1152 (10th Cir. 2006) (holding there was no need to decide because statement is admissible under either test); *see also* Edwards v. United States, 923 A.2d 840, 848 (D.C. 2007) ("[T]here is some disagreement concerning the precise analysis that *Seibert* mandates . . . [but] the statements in this case should have been suppressed under either standard.").

110. Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

111. *See* United States v. Heron, 564 F.3d 879, 885 (7th Cir. 2009) (arguing that Justice Kennedy's intent-based test in *Seibert* was not the narrowest approach "that *Marks* was talking about" because only Justice Kennedy and Justice Breyer supported an intent-based test to evaluate question-first procedures"); United States v. Rodriguez-Preciado, 399 F.3d 1118, 1133–48 (9th Cir. 2005) (Berzon, J., dissenting) (arguing that Justice Kennedy's opinion is not narrower and therefore does not

Intra-circuit splits between whether to apply the plurality approach or Justice Kennedy's approach have also plagued question-first jurisprudence.[112] The Sixth Circuit, for example, held in *United States v. Pacheco-Lopez* that application of the plurality's test was sufficient, stating that "[r]esolution of whether the police purposefully sought to evade *Miranda* is unnecessary, as Lopez's statements are inadmissible even if the police *didn't* purposefully implement a question first-warn later strategy."[113] In *United States v. McConer*, however, a question-first decision filed only one day later, the Sixth Circuit held that "neither the plurality nor the concurrence in *Seibert*" demonstrated that police deliberately administered a question-first procedure to McConer.[114] In arriving at its decision, the Court emphasized that "Justice Kennedy's narrower concurrence . . . provided the fifth vote to find a *Miranda* violation in *Seibert*."[115]

Intra-state splits also exist.[116] In *United States v. Hairston*, the D.C. Court of Appeals discussed both the plurality approach and Justice Kennedy's approach, and attempted to determine whether the police had conducted a question-first procedure by applying the plurality's test.[117] In contrast, in *Edwards v. United States*, the D.C. Court of Appeals applied both approaches, reasoning that since "some disagreement concerning the precise analysis that *Seibert* mandates" and "the statements in this case should have been suppressed under

represent the holding of the Court); *see also* Eric English, *You Have the Right to Remain Silent. Now Please Repeat Your Confession:* Missouri v. Seibert *and the Court's Attempt to Put an End to the Question-First Technique*, 33 PEPP. L. REV. 423, 462 (2006); *cf. Sanchez-Gallegos*, 412 F. App'x at 72 n.1 (collecting cases in support of the view that Justice Kennedy's concurrence constituted the narrowest common ground of the *Seibert* majority).

112. *See Heron*, 564 F.3d at 885 (arguing that the *Seibert* plurality's defendant-focused approach is the correct method); *cf.* United States v. Hernandez, No. 11 CR 360, 2012 WL 601869, at *2 (N.D. Ill. Feb. 23, 2012) ("[T]he Seventh Circuit has adopted an intent-based approach to addressing two-step interrogations." (citing United States v. Littledale, 652 F.3d 698, 702 (7th Cir. 2011); United States v. Swanson, 635 F.3d 985, 1004 (7th Cir. 2011); United States v. Ambrose, 668 F.3d 943 (7th Cir. 2012); United States v. Richardson, 657 F.3d 521, 524-25 (7th Cir. 2011)).

113. *See Pacheco-Lopez*, 531 F.3d at 432 n.10.

114. United States v. McConer, 530 F.3d 484, 498 (6th Cir. 2008).

115. *Id.* at 498; *see* Missouri v. Seibert, 542 U.S. 600, 622 (Kennedy, J., concurring).

116. *See* Hairston v. United States, 905 A.2d 765, 781 (D.C. 2006) (focusing exclusively on the five factor test applied by the *Seibert* plurality to determine whether the *Miranda* warnings were effective); *cf. Edwards* 923 A.2d at 848 (asking whether police deliberately used a question-first procedure).

117. *Hairston*, 905 A.2d at 781.

either standard, we need not determine the precise analysis that follows from the opinions in *Seibert*."[118]

Significantly, circuit cases have demonstrated that the choice between the plurality and Justice Kennedy's approach can yield opposite results.[119] Indeed, in *United States v. Sanchez-Gallego*, the Court contrasted the analysis present in the plurality approach with Justice Kennedy's approach, and decided that "that the conclusion might be different under the plurality's test in *Seibert*."[120] Further, in *United States v. Zubiate*, the Court found that the conduct of United States Immigration and Customs Enforcement agents, who interrogated a suspect for fifteen minutes before providing the warnings, would not satisfy the plurality test but that the statement would satisfy Justice Kennedy's because the conduct was not "calculated."[121] The cumulative effect of such divergent outcomes sows confusion both among police officer and the lower courts.

2. Circuits that Solely Apply Justice Kennedy's Deliberateness Test to the Question-First Procedure Inquiry

Six circuits solely follow Justice Kennedy's view and ask whether the question-first procedure was a deliberate violation of *Miranda*. Specifically, the Second Circuit,[122] Third Circuit,[123] Fourth Circuit,[124] Fifth Circuit,[125] Eighth Circuit,[126] and Eleventh Circuit[127] conduct this

118. *Edwards*, 923 A.2d at 848.

119. United States v. Sanchez-Gallegos, 412 F. App'x 58, 73 (10th Cir. 2011) (Ebels, J., concurring); *see also Pacheco-Lopez*, 531 F.3d at 426–30; United States v. Carrizales-Toledo, 454 F.3d 1142, 1151–53 (10th Cir. 2006); *accord.* People v. Lucas, 232 P.3d 195 (Colo. App. 2009); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 48 (2010) (arguing that cases in which the police were not acting in bad faith—as the applying court understands the concept—yet the suspect was confused nonetheless about the freedom to stay mum after the *Miranda* warnings finally were delivered, the suspect will win under Justice Souter's test and lose under Justice Kennedy's test).

120. *Sanchez-Gallegos*, 412 F. App'x at 73 n.2.

121. No. 08-CR-507 (JG), 2009 WL 483199, at *9 (E.D.N.Y. Feb. 25, 2009).

122. United States v. Capers, 627 F.3d 470, 488 (2d Cir. 2010).

123. United States v. Green, 541 F.3d 176, 190 (3d Cir. 2008).

124. United States v. Mashburn, 406 F.3d 303, 308–09 (4th Cir. 2005).

125. United States v. Nunez-Sanchez, 478 F.3d 663, 668 n.1 (5th Cir. 2007) ("Justice Kennedy provided the fifth vote in a 5–4 decision, and decided the case on narrower grounds than the majority.").

126. United States v. Thomas, 664 F.3d 217, 223 (8th Cir. 2011) (citing United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007)) (finding Justice Kennedy's concurrence to be controlling because it provided the fifth vote necessary for a majority and because it was decided on narrower grounds than the plurality opinion).

inquiry. Each of these circuits hold that Justice Kennedy's concurrence is controlling because it represents the narrowest grounds of the *Seibert* majority. These circuits argue that the test stated in Justice Kennedy's concurring opinion is the narrowest grounds because it applies the Supreme Court's "effectiveness" inquiry only to deliberate execution of the question-first procedure.[128]

3. Criticism and Justification of the Plurality Approach Versus Justice Kennedy's Approach

Policy considerations and adherence to stare decisis play a critical role in the criticism and justification of circuit courts' decisions to use solely Justice Kennedy's concurrence. A critic writes that Justice Kennedy's approach cannot deter deliberate execution of the question-first procedure because judges forced to apply a subjective bad faith *Miranda* test will make disparate and arbitrary admissibility decisions.[129] An alternate view counters that the plurality's factors are no less vague.[130] Moreover, one commentator argues that the intent of the officer is reliably ascertainable because it is a standard

Immediately after the Supreme Court**'**s decision in *Seibert*, however, the Eighth Circuit applied only the plurality approach. *See* United States v. Aguilar, 384 F.3d 520 (8th Cir. 2004).

127. United 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." (citing United States v. Gonzalez-Lauzan*,* 437 F.3d 1128, 1136 n.6 (11th Cir. 2006)).

128. United States v. Capers, 627 F.3d 470, 488 (2d Cir. 2010) (Trager, J. dissenting); *see also* United States v. Williams, 435 F.3d 1148, 1157–58 (9th Cir. 2006) ("Although the plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed the *Seibert* exception to those cases involving deliberate use of the two-step procedure to weaken *Miranda's* protections."); United States v. Kiam*,* 432 F.3d 524, 532–33 (3d Cir. 2006) (applying Justice Kennedy's test in finding that law enforcement officials had not performed a deliberate two-step interrogation); *Mashburn,* 406 F.3d at 308–09 ("In *Seibert*, Justice Kennedy concurred in the judgment of the Court on the narrowest grounds."); United States v. Briones*,* 390 F.3d 610, 613 (8th Cir. 2004) (arguing that Justice Kennedy's opinion was "of special significance" because he relied on grounds narrower than those of the plurality).

129. Joelle Anne Moreno, *Faith-Based* Miranda*?: Why the New* Missouri v. Seibert *Police "Bad Faith" Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 398–99 (2005).

130. English, *supra* note 111, at 464–65; *see also infra* Part III (arguing that the multifactor test is supported by the plurality and Justice Kennedy and that the chief difference between the two lies in whether the inquiry focuses on the intent of the police or the suspect's understanding of his right against self-incrimination).

inference in evidence that intent may be inferred from actions.[131] Additionally, in *United States v. Capers*, the Second Circuit justified the requirement that police prove that a question-first procedure was not deliberate by reasoning that *Miranda* is an exclusionary rule "aimed at deterring lawless conduct by police and prosecution."[132] Another view argues that only an intent-based approach is suited to evaluate an inherently coercive question-first tactic.[133]

Addressing trustworthiness, a commentator observed that the post-*Miranda* statements would be in danger of being compromised if subject to the potentially coercive pressures of a deliberate question-first procedure.[134] Another commentator argued that Justice Kennedy's reasoning would apply to any confession, since deliberate execution of the question-first procedure can still yield trustworthy statements, and that is distinctly not what *Miranda* held.[135] Justice O'Connor, in her dissenting opinion, similarly reasoned that a suspect who experienced the exact same interrogation as Seibert, but where the question-first procedure was not deliberate, would not have any corresponding change in the trustworthiness of his statements.[136] Justice O'Connor also argued that intent was impossible to discern.[137] Additionally, at least one critic has suggested that an intent-based approach will perversely incentivize covert execution of question-first procedures, which will be difficult to reveal.[138] Another commentator, however, argued that it is a standard inference in evidence that courts may infer intent from actions.[139]

Interpretation of the *Seibert* opinions is also crucial to determining which opinion is controlling. Many courts justify choosing Justice Kennedy's concurring opinion as the narrowest ground of *Seibert*'s fragmented majority, because Justice Kennedy's concurring opinion holds that cases where a question-first procedure took place should be reviewed for the effectiveness of the *Miranda* warning only where

131. Elwood Earl Sanders, Jr., *Breaching the Citadel: Willful Violations of* Miranda *After* Missouri v. Seibert, 10 APPALACHIAN J.L. 91, 96–97 (2011).

132. *Capers*, 627 F.3d at 480.

133. *See generally* English, *supra* note 111, at 454–55.

134. Paul G. Alvarez, *Taking Back* Miranda*: How* Seibert *and* Patane *Can Keep "Question-First" and "Outside* Miranda*" Interrogation Tactics in Check*, 54 CATH. U. L. REV. 1195, 1233 n.95 (2005).

135. Friedman, *supra* note 119, at 23.

136. Missouri v. Seibert, 542 U.S. 600, 623 (2004) (O'Connor, J., dissenting).

137. *See id.* at 626.

138. Fan, *supra* note 1, at 1437–38.

139. Sanders, *supra* note 131.

the interrogator deliberately used a two-step technique to circumvent *Miranda*.[140] In contrast, other courts criticize this approach. In *United States v. Carrizales-Toledo*, the Tenth Circuit argued that Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the *Seibert* Court.[141] In *United States v. Rodriguez-Preciado*, a dissenting Ninth Circuit judge explained, "three of the four Justices in the plurality *and* the four dissenters decisively rejected any subjective [test] . . . based on deliberateness on the part of the police."[142] Moreover, the D.C. Court of Appeals argued in *Edwards* that although Justice Kennedy's test appears narrower because it only applies to the deliberate use of a two-step procedure, within that subset of cases, it is broader because Justice Kennedy's approach would suppress even if a court determined that the *Miranda* warnings could function effectively.[143] As a result, the D.C. Court of Appeals argues, more statements might be admitted that result from question-first procedures because the plurality's approach only excludes confessions resulting from effective warnings, regardless of the intent of the interrogating officers, whereas Justice Kennedy's approach reaches all intentional applications of the question-first procedure.[144]

The following sections of Part II illustrate both the factors and considerations that the circuit courts use to determine whether instances of question-first interrogation by police were deliberate.

B. Three Circuit Court Approaches to Applying Justice Kennedy's Concurrence

Circuit courts take three general approaches to evaluating whether police deliberately executed a question-first procedure. In the first approach, circuits argue that Justice Kennedy's deliberateness standard lacks explicit factors to consider because the record was clear in *Seibert* that the interrogating officers deliberately executed a

140. United States v. Capers, 627 F.3d 470, 488 (2d Cir. 2010) (Trager, J., dissenting).

141. *See* United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006).

142. United States v. Rodriguez-Preciado, 399 F.3d 1118, 1138–41 (9th Cir. 2005) (Berzon, J., dissenting in part); *see also* United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009) (arguing that Justice Kennedy's concurrence did not constitute the narrowest approach because seven of nine justices rejected an intent-based approach).

143. Edwards v. United States, 923 A.2d 840, 848 n.10 (D.C. 2007).

144. *Id.*

question-first procedure.[145] Circuits using this ad-hoc approach often cherry-pick factors from the plurality or underscore various facts or considerations to justify their evaluations of deliberateness.[146]

In the second approach, courts use the factors stated by the plurality, regardless of whether the failure to administer *Miranda* warnings during the initial interrogation was deliberate or not, reasoning that "Justice Kennedy uses the same factors as the plurality's approach, but he uses them . . . to determine whether police officers *deliberately* [withhold] *Miranda* warnings."[147] The application of these factors is still defendant-focused, however, in contrast to Justice Kennedy's inquiry solely into the intent of the interrogating officers.[148]

In the third approach, circuit courts adhere solely to the factors in Justice Kennedy's analysis, as opposed to strict adherence to the plurality's factors or an ad hoc inquiry into the totality of the evidence.[149] The third approach also focuses exclusively on the deliberateness of the police execution of the question-first procedure, as opposed to the second approach's defendant-focused perspective.[150] As an example, in *Gonzalez-Lauzan*, the Eleventh Circuit examined whether pre-*Miranda* questioning by police elicited any incriminating statements, whether the officers did not have pre-warned incriminating statements with which to cross-examine Gonzalez-Lauzan to pressure him to repeat them, and whether Gonzalez-Lauzan's post-warning statements related to the substance of his single, brief pre-warning statement.[151]

The circuit courts justify the three approaches to the *Seibert* factors with respect to the plurality and Justice Kennedy's opinion in different ways. For example, in *Gonzalez-Lauzan,* the Tenth Circuit prefaced their approach of strict adherence to the factors applied by Justice Kennedy, simply by stating "the two-step technique employed

145. *Capers*, 627 F.3d at 477–78 (citing United States v. Williams, 435 F.3d 1148, 1158 n.11 (9th Cir. 2006)) (finding that Justice Kennedy did not articulate how a court should determine whether an interrogator used a deliberate two-step strategy).

146. *See infra* Part III for criticism of this approach given its facilitation of biases for or against law enforcement.

147. United States v. Flack, No. 3:08-CR-108, 2009 WL 5031320, at *19–20 (E.D. Tenn. Dec. 11, 2009) (emphasis added).

148. *See* Missouri v. Seibert, 542 U.S. 600, 620 (2004) (Kennedy, J., concurring).

149. *Id.* at 618.

150. *Id.* at 620.

151. United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1138–39 (11th Cir. 2006); *see also* United States v. Hernandez, 200 F. App'x 283, 286–87 (5th Cir. 2006).

here is of the type that was the narrow focus of Justice Kennedy's opinion."[152] At least one commentator supported this approach, suggesting that courts could hold that absence of one or more of the criteria cited by Justice Kennedy is indicative of willfulness.[153]

In *Capers*, the Second Circuit examined the totality of the objective and subjective evidence by applying the five plurality factors and examining any other evidence available[154] before inquiring into curative measures. The court stated that all available evidence should be considered when examining whether the officers' actions indicate a deliberate question-first procedure. The court reasoned that both the Fifth and Eleventh Circuits used this approach, and noted Justice Souter's observation that "'the intent of the officer will rarely be as candidly admitted as it was' in *Seibert*, where the interrogating officer testified . . . that he was trained to conduct a question-first procedure."[155] Finally, courts justify the ad hoc approach by stealth omission of any discussion of the use of the suspect's pre-*Miranda* statements in the suspect's subsequent post-*Miranda* interrogation.[156]

C. Criteria Used by Circuit Courts to Evaluate Justice Kennedy's Factors and Other Considerations Associated with the Question-First Inquiry

The variance of the preceding circuit approaches results from the inherent difficulty of proving that police deliberately executed a question-first procedure. Moreover, question-first cases usually fall into a grey area between a good-faith failure to administer an earlier *Miranda* warning and a deliberate execution of the question-first procedure. Unlike *Seibert*, circuit courts rarely encounter question-first cases in which police admit to deliberate execution of the question-first procedure.

At least one circuit, however, has evaluated a failure to administer *Miranda* warnings that police admitted were deliberate.[157] Such an

152. Gonzales-Lauzan, 437 F.3d at 1139.

153. Sanders, *supra* note 131, at 97.

154. United States v. Capers, 627 F.3d 470, 478 (2d Cir. 2010).

155. *Seibert*, 542 U.S. at 615. This quote from *Seibert* appears intended to imply that any possible evidence available to divine the intent of a police officer using a question-first procedure should be factored into a question-first analysis, given the rarity of the interrogating officer's admission of deliberate use of question-first procedure.

156. *See Capers*, 627 F.3d at 470.

157. United States v. Street, 472 F.3d 1298, 1303–04 (11th Cir. 2006) (officer testifying that "we had already discussed the robberies prior to me writing this, and I

admission is significant because the Supreme Court stated that it had to look at facts that demonstrated the question-first procedure, even though the interrogating officer in *Seibert* admitted intent to use the question-first procedure, "[b]ecause 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)."[158] Although both the Third and Eleventh Circuits have considered the admitted intent of police to forgo giving *Miranda* warnings in question-first cases,[159] in addition to the requisite consideration of other factors, their treatment of police admissions of deliberateness contrasted starkly.

In *United States v. Green*, the Third Circuit relied on police admissions of intent to withhold *Miranda* warnings as a sufficient basis for rendering a suspected drug dealer's postwarning statements inadmissible.[160] Given the testimony provided by the interrogation officer "that he intentionally refrained from advising Green of his *Miranda* rights prior to showing the video,"[161] the Third Circuit held that "*Seibert* dictates that Green's post-*Miranda* statements[162] which relate to his pre-*Miranda* admissions are presumptively inadmissible."[163] In examining the police officer's intent to evade *Miranda*, the court highlighted the police officer's statement that he executed a "strategy" to "not Mirandize [the suspect] until he saw the video,"[164] due in part to the officer's prior knowledge of the suspect's familiarity with *Miranda*.[165] Additionally, in *United States v. McBride*, the District Court decided that the suspect's post-*Miranda* statements were inadmissible because the police admitted to deliberate use of the question-first procedure.[166] In *Gonzalez-Lauzan*,

went back and while I was writing, I was also talking with him to get the further details").

158. *Seibert*, 542 U.S. at 614–17 n.6.

159. This case presents the uncommonly straightforward circumstance of an officer openly admitting that the violation was intentional. But the inquiry will be complicated in other situations probably more likely to occur. *Id.* at 626 (O'Connor, J., dissenting).

160. United States v. Green, 541 F.3d 176, 191 (3d Cir. 2008) (citing *Seibert,* 542 U.S. at 622 (Kennedy, J., concurring)).

161. *Id.*

162. The post-*Miranda* statements were a product of express questioning that immediately followed the pre-*Miranda* interrogation. *Id.* at 191.

163. *Id.* at 191.

164. *Id.* (citation omitted).

165. *Id.* at 185 n.8.

166. United States v. McBride, Crim. No. SA-06-CR-374, 2007 WL 102153, at *1 (W.D. Tex. Jan. 8, 2007) (finding that the interrogating officer admitted to "strategically decid[ing] before the interview not to provide any *Miranda* warnings so

however, the Eleventh Circuit found that the admitted intent of three officers to forgo providing *Miranda* warnings to a suspect did not require the exclusion of the suspect's subsequent post-warning statements,[167] despite a series of interrogations similar to those conducted by the Third Circuit in *Green*.[168]

The circuit courts offer various justifications and criticisms in question-first cases involving police admission of a deliberate execution of the question-first procedure. In *Green*, the interrogating officer openly stated at the suppression hearing that he intentionally refrained from advising the suspect of his *Miranda* rights prior to showing the video, and the court held that the suspect's post-*Miranda* statements which relate to his pre-*Miranda* admissions were inadmissible unless the court determined that the second interrogation session was carried out under sufficiently different circumstances so as to have cured the initial taint.[169] However, in a question-first case where, "[p]rior to the interrogation, the detectives had decided not to provide [the suspect] with *Miranda* warnings for fear that [the suspect] would again refuse to speak with them,"[170] the United States Supreme Court issued a per curiam opinion holding that "no two-step interrogation technique of the type that concerned the Court in *Seibert* undermined the *Miranda* warnings [the suspect] received."[171] Generally, however, courts begin their question-first inquiry with the pre-*Miranda* statement elicited by police use of the question-first procedure.[172] This section therefore focuses on tests that circuit courts have developed to evaluate whether the factors they use are fulfilled.

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that he could gather background information to 'determine [Defendant's] level of truthfulness and degree of cooperation'"); *see also* United States v. Renken, 474 F.3d 984, 988 (7th Cir. 2007); Wilkerson v. State, 424 A.3d 703, 719 (Md. 2011) (finding that courts should look to "the totality of the objective and subjective evidence" only if a police admission of deliberate use of the question-first procedure is absent (quoting United States v. Capers, 627 F.3d 470, 479 (2d Cir. 2010))); State v. Knapp, 700 N.W.2d 899, 903–04 (Wis. 2005).

167. United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1130 (11th Cir. 2006) (noting that the "three officers made a decision not to administer *Miranda* warnings to the suspect at the beginning of this meeting").

168. 541 F.3d at 176.

169. *Id.* at 191 (citing Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring)).

170. Bobby v. Dixon, 132 S. Ct. 26, 28 (2011).

171. *Id.* at 31.

172. The large quantity of decisions that focus on the necessity of *Miranda* in the pre-*Miranda* stage warrants their discussion, even though these situations may not technically fall under the ambit of *Seibert*.

*1. Pre-*Miranda *Questioning and Statements*

Typically, courts first inquire into the length and completeness of the pre-*Miranda* questioning[173] and statements.[174] To undermine the *Miranda* warning, the initial interaction between a suspect and the police must constitute a custodial interrogation,[175] which typically requires *Miranda* warnings to be administered before the interrogation may begin.[176] Some courts, however, have found that police did not execute a question-first procedure because initial *Miranda* warnings were not required due to an exception to the *Miranda* requirement with respect to the circumstances surrounding the questioning.[177] Other courts find initial *Miranda* warnings unnecessary due to the type of questioning during the pre-*Miranda* stage.[178]

With respect to length of pre-*Miranda* questioning, some courts found it relevant to the pre-*Miranda* stage of the question-first inquiry whether pre-*Miranda* questioning was "short and cursory,"[179] or consisted of "one"[180] or a similarly "limited number of

173. *See* United States v. Phillips, No. 08-96-GFVT, 2008 U.S. Dist. LEXIS 111823, at *33–34 (E.D. Ky. Dec. 31, 2008); *see also* United States v. Verdugo, 617 F.3d 565, 575 (1st Cir. 2010); United States v. Materas, 483 F.3d 27, 33 (1st Cir. 2007).

174. *See* United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1138 (11th Cir. 2006); United States v. Woodruff, 830 F. Supp. 2d 390, 407 (W.D. Tenn. 2011) (quoting *Seibert,* 542 U.S. at 616 (Kennedy, J., concurring)). See *infra* Part III for an evaluation of the term "extended interview."

175. In *Miranda*, the Court held that statements made by a defendant while under custodial interrogation may not be used against him at trial, unless the prosecution proved that certain procedural safeguards were implemented to insure that the constitutional privilege against self-incrimination was protected. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

176. United States v. Sanchez-Gallegos, 412 F. App'x 58 (10th Cir. 2011) (finding that the suspect was not in custody when he was interrogated, thereby invalidating any subsequent *Miranda* violation).

177. *See* United States v. Thomas, 664 F.3d 217, 223 (8th Cir. 2011); United States v. Thomas, 381 F. App'x. 495, 502 (6th Cir. 2010); United States v. Pacheco-Lopez, 531 F.3d 420, 424 (6th Cir. 2008); United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007); Hairston v. United States, 905 A.2d 765, 786–87 (D.C. 2006) (Schwelb, J., concurring).

178. *See* United States v. Hernandez, No. 05-20158, 2012 WL 601869, at *3 (N.D. Ill. Feb. 23, 2012); United States v. Woodruff, 830 F. Supp. 2d 390, 403 (W.D. Tenn. 2011) (quoting Rhode Island v. Innis, 446 U.S. 291, 302 (1980)).

179. United States v. Phillips, No. 08-96-GFVT, 2008 U.S. Dist. LEXIS 111823, at *33–34 (E.D. Ky. Dec. 31, 2008).

180. United States v. Materas, 483 F.3d 27, 33 (1st Cir. 2007).

questions."[181] With respect to the length of pre-*Miranda* statements, courts also found it relevant to the question-first inquiry whether a brief statement could overlap significantly with a detailed post-*Miranda* statement[182] or needed to be systematic and exhaustive to constitute a deliberate question-first procedure.[183]

Many courts have justified the failure to provide *Miranda* warnings during the initial stage of questioning as exceptions to the *Miranda* requirement.[184] Other courts have voiced criticism of the use of exceptions. In *United States v. Woodruff*, the court found that the interrogating officer should have known his question was reasonably likely to elicit an incriminating response.[185] In contrast, in *United States v. Hernandez*, the court asked whether it was "a foregone conclusion" that such a question would elicit information indicating criminal activity.[186]

*2. Relationship Between Pre-*Miranda *and Post-*Miranda *Statements*

Circuit courts take slightly different approaches to the relationship between pre- and post-*Miranda* statements. Some courts focus exclusively on how related pre- and post-*Miranda* statements are to each other.[187] Other courts require that pre-*Miranda* and post-*Miranda* statements overlap.[188] This factor is significant because

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

182. United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1138 (11th Cir. 2006).

183. *Woodruff*, 830 F. Supp. 2d at 407 (quoting Missouri v. Seibert, 542 U.S. 600, 616 (2004)). See *infra* Part III for an evaluation of the meaning of the term "extended interview."

184. *See* New York v. Quarles, 467 U.S. 649, 655–56 (1984) (finding that questioning required for police safety does not violate *Miranda*); United States v. Pacheco-Lopez, 531 F.3d 420, 424 (6th Cir. 2008) (finding that asking questions about when and how Lopez arrived at a household ostensibly linked to a drug sale, as well as his origin, are relevant to an investigation and cannot be described as related only to securing the house or identifying the defendant, and that administrative concerns, such as a defendant's name, address, height, or weight, might permit questioning without a *Miranda* waiver).

185. *Woodruff*, 830 F. Supp. 2d at 403 (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

186. United States v. Hernandez, No. 05-20158, 2012 WL 601869, at *3 (N.D. Ill. Feb. 23, 2012).

187. United States v. Ollie, 442 F.3d 1135, 1141 (8th Cir. 2006); United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005); United States v. Aguilar, 384 F.3d 520, 525 (8th Cir. 2004).

188. Edwards v. United States, 923 A.2d 840, 849 (D.C. 2007); *Woodruff*, 830 F. Supp. 2d at 407.

"[r]eference to the prewarning statement [is] an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating."[189]

Courts have justified their treatment of the relationship between pre-*Miranda* questioning and statements in two main ways: either the statements must overlap or the statements must be related. For example, in *United States v. Torres-Lona*, the Eighth Circuit found no overlap where the post-*Miranda* statement was not identical to the pre-*Miranda* statement.[190] Analogously, in *Woodruff*, the court found little overlap due to the different content of the two stages of questioning.[191]

In contrast, in *Edwards* the D.C. Court of Appeals criticized the focus on overlap by courts. Specifically, the court argued that different pre- and post-*Miranda* statements that addressed the same crime were indicative of a deliberate question-first procedure because "limiting *Seibert* to full confessions would encourage police to withhold *Miranda* warnings at the beginning of interrogations and bring the suspect to the brink of confessing."[192] The relationship between pre-*Miranda* and post-*Miranda* statements influences how police may reference a pre-*Miranda* statement during a subsequent post-*Miranda* interrogation.[193] For example, a police officer may learn new information that allows her to ask informed, open-ended questions.

189. Missouri v. Seibert, 542 U.S. 600, 621 (2004).

190. United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007).

191. *Woodruff*, 830 F. Supp. 2d at 407.

192. *Edwards*, 923 A.2d at 850; *see also Ollie,* 442 F.3d at 1141 (finding that the appellant's post-*Miranda* confession that he had received a gun in exchange for driving two people to a liquor store was related to his pre-*Miranda* admission that he had handled the gun); *Mashburn,* 406 F.3d at 309 (holding that when a "question-first" strategy is deliberately employed, "postwarning *statements* related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statements are made"); United States v. Aguilar, 384 F.3d 520, 525 (8th Cir. 2004); *cf.* United States v. Richardson, 657 F.3d 521, 523 (7th Cir. 2011) (finding that asking where a suspect had gotten the cocaine base found in his pocket was related to suspect's subsequent post-*Miranda* statements because it addressed the same crime).

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

*3. Referencing Pre-*Miranda *statements in Post-*Miranda *Interrogation*

Most courts evaluate whether post-*Miranda* questioning referenced pre-*Miranda* statements[194] and ask whether the police confronted the suspect with her prior statements.[195] The Eleventh Circuit, however, did not include this factor in its question-first analysis.[196] The Eleventh Circuit's omission is significant given the extent of treatment that Justice Kennedy's concurrence devoted to it.[197] Courts justify the reference to a pre-*Miranda* statement during a subsequent post-*Miranda* interrogation factor as part of their application of either the plurality approach or Justice Kennedy's concurrence. Courts justify omitting this factor by taking into account other factors, such as the experience of the officer.[198]

4. Curative Measures

Circuit courts treat curative measures similarly, though there are several slight variations. Some circuit courts factor curative measures including continuity in interrogating officers and temporal and spatial proximity between interrogations into evaluating deliberateness.[199] For example, courts that apply the totality approach to evaluate

194. The Supreme Court refers to this factor as "[treatment of] the second round as continuous with the first." *Seibert*, 542 U.S. at 615; *see* Hairston v. United States, 905 A.2d 765, 781 (D.C. 2006) (finding that the second phase was not "continuous with the first" in that in the first session the interrogating officer posed no questions to the suspect about the details of the murder, as he did in the second phase).

195. United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007) (finding that there is nothing to suggest that Immigration and Customs Enforcement agents improperly confronted the suspect with his prior false statement in an effort to have it repeated); United States v. Hernandez, 200 F. App'x 283, 287 (5th Cir. 2006) (finding that the suspect was not directly confronted with her prior statements, and that she was asked open-ended rather than leading questions); United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1139 (11th Cir. 2006) ("[T]he officers did not have prewarned incriminating statements with which to cross-examine [the suspect] in order to pressure him to repeat them and thereby undermine the *Miranda* warnings.").

196. United States v. Street, 472 F.3d 1298, 1315 (11th Cir. 2006) (failing to ask whether the police relied upon the unwarned statements of the suspect in their second round of questioning despite the officer's testimony that "we had already discussed the robberies prior to me writing this, and I went back and while I was writing, I was also talking with him to get the further details" (internal quotation marks omitted)).

197. Missouri v. Seibert, 542 U.S. 600, 609 (2004) (finding that post-*Miranda* questioning that referenced pre-*Miranda* statements resembled a cross-examination).

198. United States v. Capers, 627 F.3d 470, 488 (2d Cir. 2010).

199. *Id.*

whether a question-first procedure was deliberate incorporate those three considerations into their initial analysis.[200] The Second Circuit justifies applying the curative factors to a deliberateness analysis and curing a finding of deliberateness because the curative factors illustrate evidence of a deliberate question-first procedure.[201] Other courts ask whether these factors dissipated the impact of a prior deliberate question-first procedure.[202] Some courts follow additional factors that Justice Kennedy suggests in his concurrence, including asking whether police advised the suspect that his prior pre-*Miranda* statements are inadmissible.[203]

5. Burden of Proof

Although Justice Kennedy's four factors are the key to the substantive question of law, the procedural issue of burden of proof on this issue was not addressed by Justice Kennedy's concurrence and lower courts have properly treated that as an issue of first impression.[204] Specifically, the issue of whether the suspect or law enforcement bears the burden of proof of deliberateness, and the level of that burden, has been debated by both commentators and circuit courts since *Seibert* was decided in 2004.[205] Multiple circuit

200. United States v. Williams, 435 F.3d 1148, 1158–59 (9th Cir. 2006).

201. *Capers*, 627 F.3d at 484.

202. Fleming v. Metrish, 556 F.3d 520, 557 (6th Cir. 2009) (finding no change in time, interrogating officer identity, or location).

203. The factors stated by Justice Kennedy, which also include the temporal, spatial, and personal continuity factors, are defendant-focused rather than intent-focused. Missouri v. Seibert, 542 U.S. 600, 620 (2004) (Kennedy, J., concurring); cf. *Capers*, 627 F.3d at 485 n.6 ("When analyzing deliberateness, however, courts may consider an experienced officer's failure to warn a suspect that an earlier admission, known to the interrogating officer, is inadmissible. Indeed, such an omission on the part of the interrogating officer is probative of a 'calculated' plan to subvert *Miranda*."); *see also* Coomer v. Yukins, 533 F.3d 477, 491 (6th Cir. 2008) (upholding as reasonable the admission of subsequent statements elicited after several hours had passed since her first oral confession because police informed the defendant that "circumstances had changed [and] that she was now in custody"); Hairston v. United States, 905 A.2d 765, 781 (D.C. 2006) (finding close temporal proximity between phase one and phase two of police interrogations of the suspect, and that the sessions were conducted in the same interview room with the same interrogating officer in both stages).

204. *Capers*, 627 F.3d at 478 (citing *Williams*, 435 F.3d at 1158 n.11) (finding that Justice Kennedy's opinion is silent as to which party bears the burden of proving or disproving deliberateness).

205. *See* Daniel S. Nooter, *Is* Missouri v. Seibert *Practicable?: Supreme Court Dances the "Two-Step" Around* Miranda, 42 AM. CRIM. L. REV. 1093, 1113 (2005) (discussing burden of proof in question-first analysis generally).

courts merely "eyeball" the evidence with respect to a potential question-first tactic,[206] while other circuits place the burden of proof on the defendant.[207] Most circuits and commentators, however, believe that the prosecution should bear the burden of proof.[208] Additionally, among those courts in favor of requiring a burden of proof, at least three different standards of proof have been applied.[209]

Courts and commentators have various justifications regarding their treatment of the burden of proof with respect to the deliberate question-first procedure. In the Eighth Circuit and the D.C. Court of Appeals, the courts argued that "placing that burden on the prosecution is consistent with prior Supreme Court decisions that require the government to prove the admissibility of a confession before it may come into evidence."[210] The Eighth Circuit has raised the criticism that "the law generally frowns on requiring a party to prove a negative."[211] One commentator, Daniel Nooter, disagrees with this view, however, arguing that "[j]ust as a criminal defendant does not affirmatively have the burden of disproving that an officer reasonably acted to uphold public safety, the defendant should not have the burden of disproving the exception *Seibert* recognizes for non-deliberate two-step interrogation."[212]

206. United States v. Ollie, 442 F.3d 1135, 1142 (8th Cir. 2006).

207. United States v. Tolutau, No. 2:12-CR-22 CW, 2012 WL 1898879 (D. Utah May 23, 2012) (holding that the defendant has not met his burden of showing that law enforcement deliberately engaged in the interrogate-first technique proscribed in *Seibert* and is, therefore, not entitled to have his post-*Miranda* confession excluded from evidence at trial).

208. United States v. Stewart, 536 F.3d 714, 719 (7th Cir. 2008) (finding that it is the government's burden to establish by a preponderance of the evidence that "the police did *not* deliberately withhold the warnings until after they had an initial inculpatory statement in hand"); United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007) ("[W]here a defendant alleges that his post Miranda statement was obtained in the course of a two part interrogation, the prosecution bears the burden of establishing by a preponderance of the evidence that the failure to provide warnings at the outset of interrogation was not deliberate."); United States v. Hernandez, 200 F. App'x 283, 288 (5th Cir. 2006) ("When a defendant challenges the voluntariness of a confession, the burden is on the government to show that a waiver of *Miranda* rights was the result of a defendant's own free and rational choice in the totality of the circumstances."); Edwards v. United States, 923 A.2d 840, 848 (D.C. 2007) (citing United States v. Ollie, 442 F.3d 1135, 1142–43 (8th Cir. 2006)).

209. Nooter, *supra* note 205, at 1113–15 (discussing burden of proof standards including proof by a preponderance of the evidence and clear and convincing evidence).

210. *Edwards*, 923 A.2d at 848 (citing *Ollie*, 442 F.3d at 1142–43).

211. *Ollie*, 442 F.3d at 1143.

212. Nooter, *supra* note 205, at 1114. This commentator also argues that to the extent a non-deliberate use of two-step interrogation forms an exception to the

Moreover, Nooter criticizes courts that merely "eyeball" question-first procedures, reasoning that a "clear delineation of evidentiary burdens is required to ensure the consistent application of *Seibert* across jurisdictions."[213] Additionally, Justice O'Connor's dissent in *Seibert* criticizes courts that choose to eyeball the evidence, rather than assigning a burden of proof.[214] In particular, Justice O'Connor argues, "there is no reason to believe that *courts* can with any degree of success determine in which instances the police had an ulterior motive."[215] Regarding the applicable standard of proof, a commentator argues that "[a] clear-and-convincing standard would not only prevent *Seibert* from being a dead-letter protection for defendants, but would provide the incentive for officers to read *Miranda* as soon as a suspect's custodial status is clear."[216]

III. RESOLUTION: A QUESTION-FIRST ANALYSIS THAT ACCURATELY APPLIES *MISSOURI V. SEIBERT* AND THE POLICIES AND PRECEDENT OF *MIRANDA*

Part III proposes a three-part resolution to the problem of the circuit courts' conflicting applications of the *Seibert* opinions. First, this Part proposes the adoption of the test used by the Second Circuit,[217] Third Circuit,[218] Fourth Circuit,[219] Fifth Circuit,[220] Eighth Circuit,[221] and Eleventh Circuit,[222] rather than the other circuits' use of

plurality's rule in *Seibert*, such an exception should resemble the "public safety" exception recognized in *Quarles* and analogized to by Justice Kennedy. *Id.* (citing Missouri v. Seibert, 542 U.S. 600, 619 (2004) (Kennedy, J., concurring)).

213. *Id.* at 1113.

214. *Seibert*, 542 U.S. at 627 (O'Connor, J., dissenting).

215. *Id.* at 626 (quoting W. LAFAVE, SEARCH AND SEIZURE § 1.4(e) (3d ed. 1996)) (emphasis added).

216. Nooter, *supra* note 205, at 1115.

217. United States v. Capers, 627 F.3d 470 (2d Cir. 2010).

218. United States v. Green, 541 F.3d 176 (3d Cir. 2008).

219. United States v. Mashburn, 406 F.3d 303 (4th Cir. 2005).

220. United States v. Nunez-Sanchez, 478 F.3d 663, 668 n.1 (5th Cir. 2007) ("Justice Kennedy provided the fifth vote in a 5-4 decision, and decided the case on narrower grounds than the majority.").

221. United States v. Thomas, 664 F.3d 217, 223 (8th Cir. 2011) (finding Justice Kennedy's concurrence to be controlling because it provided the fifth vote necessary for a majority and because it was decided on narrower grounds than the plurality opinion).

222. United 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." (citing United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1136 n.6 (11th Cir. 2006))).

the plurality test or the wasteful dual application of both tests.[223] Next, this Part proposes the adoption of the Fifth and Eleventh Circuits' strict adherence approach,[224] which requires that courts adhere solely to the factors applied in Justice Kennedy's analysis,[225] as opposed to strict adherence to the plurality's factors or an ad hoc inquiry into the totality of the evidence.[226] Third, this Part proposes several clarifications to the factors used by the subset of circuit courts that use Justice Kennedy's test.

A. In Support of an Intent-Based Approach

Justice Kennedy's intent-based approach, followed by the Second Circuit,[227] Third Circuit,[228] Fourth Circuit,[229] Fifth Circuit,[230] Eighth Circuit,[231] and Eleventh Circuit,[232] should be followed for several reasons. First, Justice Kennedy's approach is justified by question-first precedent established by the Supreme Court in *Elstad*. In *Elstad*, the Court stated that

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.[233]

223. *See supra* Part II.A.

224. United States v. Hernandez, 200 F. App'x 283, 287 (5th Cir. 2006); *Street*, 472 F.3d at 1313-14.

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

226. *See* United States v. Capers, 627 F.3d 470, 470 (2d Cir. 2010).

227. United States v. Capers, 627 F.3d 470 (2d Cir. 2010).

228. United States v. Green, 541 F.3d 176 (3d Cir. 2008).

229. United States v. Mashburn, 406 F.3d 303 (4th Cir. 2005).

230. United States v. Nunez-Sanchez, 478 F.3d 663, 668 n.1 (5th Cir. 2007) ("Justice Kennedy provided the fifth vote in a 5-4 decision, and decided the case on narrower grounds than the majority.").

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232. United 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." (citing United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1136. n.6 (11th Cir. 2006))).

233. Oregon v. Elstad, 470 U.S. 298, 309 (1985).

The term "calculated" modifies both "any actual coercion" and "other circumstances." The Supreme Court's statement logically implies that a question-first procedure that, unlike *Elstad,* includes "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will"[234] will render a subsequent post-*Miranda* procedure ineffective. Furthermore, in *Elstad*, the Supreme Court focused on the accidental nature of the police officer's failure to provide initial *Miranda* warnings, reasoning that such question-first procedures were merely "technical" and unintentional violations of *Miranda* that did not require exclusion of post-*Miranda* statements. Significantly, the *Seibert* plurality states that "it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally."[235]

Justice Kennedy's opinion therefore is justified in its focus on deliberateness of the suspect's post-*Miranda* statements because *Elstad* focuses on deliberateness to deny suppression of the post-*Miranda* statements. Indeed, Justice Kennedy expressly discusses the facts of *Elstad* and distinguishes them from the facts of *Seibert*, reasoning that the police officers in the latter case deliberately withheld *Miranda* warnings at the outset of the interrogation, only giving them after they had extracted a confession from the suspect, and then, during this second stage of the interrogation, referred back to statements made during the pre-*Miranda* interrogation.

Courts should also follow Justice Kennedy's concurrence because it represents the narrowest grounds for the *Seibert* decision. In *Marks*, the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[236] Courts have defined one opinion as narrower when it "is a logical subset of other, broader opinions"[237] and represents a "common denominator" of the judgment.[238] The

234. *Id.*

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

236. Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation marks and citations omitted).

237. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

238. Schindler v. Clerk of the Circuit Court, 715 F.2d 341, 345 n.5 (7th Cir. 1983).

narrowest grounds analysis does not always apply, however.[239] In particular, where the plurality and concurring opinions take distinct approaches and are mutually exclusive, no common denominator can represent the majority of a court decision.[240] Accordingly, various courts have held that the *Seibert* plurality and Justice Kennedy's concurrence are mutually exclusive. For example, in *Heron*, the Seventh Circuit argued that intent could not constitute the narrowest grounds of the *Seibert* majority, based on the circuit court's conclusion that seven of the Justices in *Seibert* had argued against focusing on intent.[241]

The two opinions, however, are not mutually exclusive. Justice Kennedy's intent-based approach is used by both the plurality opinion and Justice Breyer's concurrence. Indeed, the plurality opinion supports the consideration of intent in multiple instances to evaluate whether post-*Miranda* statements should be suppressed in question-first cases. First, the plurality describes *Seibert*'s facts as "by any objective measure reveal[ing] a police strategy adapted to undermine the *Miranda* warnings,"[242] while describing the question-first procedure in *Elstad* as "arguably innocent."[243] By focusing on the strategy of the police and the innocence of the interrogating officers, the plurality clearly considers intent in determining whether the post-*Miranda* warning was ineffective in the question-first procedure. Moreover, the plurality interpreted *Elstad* as rejecting the "cat out of the bag" theory that unintentional, pre-*Miranda* warnings produced a psychological impact on the suspect that rendered *Mirandized* statements involuntary.[244]

Justice Breyer's concurrence, which comprises one of the *Seibert* majority's five votes, provides evidence of the plurality's support of an intent-based approach, while stating its own requirement for an intent-based approach. Justice Breyer states, "I consequently join the plurality's opinion in full. I also agree with Justice Kennedy's opinion insofar as it is consistent with this approach and makes clear that a

239. *See generally* Heather Bailey New, *Determining the Precedential Value of Supreme Court Plurality Decisions in the Fifth Circuit*, 20 APP. ADVOC. 112, 115 (2007).

240. Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254 (D.C. Cir. 1998).

241. United States v. Heron, 564 F.3d 879, 884–85 (7th Cir. 2009).

242. Missouri v. Seibert, 542 U.S. 600, 616 (2004).

243. *Id.* at 615.

244. *Id.* (citing Oregon v. Elstad, 470 U.S. 298, 311 (1985)).

good-faith exception applies."[245] Justice Breyer's agreement with the plurality's opinion in full, while still endorsing Justice Kennedy's requirement that "good-faith" executions of the question-first procedure by police did not render the subsequent *Miranda* warning effective, shows that, on some level, the plurality examined intent. Thus, in addition to affirming the correctness of Justice Kennedy's focus on intent, the *Seibert* plurality clearly considered police intent to be a focal point of the question-first inquiry.

Justice Kennedy advocates a multifactor test like the plurality, but narrows its scope to deliberate, as opposed to unintentional, executions of the question-first procedure. At least one critic[246] of Justice Kennedy's approach, however, argues that the plurality rejects any consideration of intent, and locates this rejection in a footnote that states the following: "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 that show the question-first tactic at work."[247] The final clause of this sentence refers to the admitted intent of police officers as a fact. Because the plurality lists admitted intent as a fact, among other facts that are used by the plurality to evaluate a potentially improper question-first procedure, this approach verifies looking to police intent as one ground for determining that a question-first procedure is improper. In addition, the phrase "facts apart from intent" indicates that facts in addition to admitted intent must be sought, not that facts rather than intent must be focused upon. Justice Kennedy's narrower intent-based ground for suppression of post-*Miranda* statements is not distinct from the

245. *Id.* at 618 (Breyer, J., concurring). Justice Kennedy evidently agreed with this characterization of his intent-based approach, describing his approach as "a narrower test." Id. at 622 (Kennedy, J., concurring). Critics have argued, however, that this characterization applies to the applicable factors rather than the focus of the test itself. See *infra* Part III.B for an argument refuting this contention.

246. *See, e.g.,* Sandra Guerra Thompson, *Evading* Miranda*: How* Seibert *and* Patane *Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 678 n.196 (2006); James J. Tomkovicz, *Saving* Massiah *from* Elstad*: The Admissibility of Successive Confessions Following a Deprivation of Counsel*, 15 WM. & MARY BILL RTS. J. 711, 736 n.172 (2007); Stewart J. Weiss, Missouri v. Seibert*: Two-Stepping Towards the Apocalypse*, 95 J. CRIM. L. & CRIMINOLOGY 945, 975 (2005).

247. *Seibert*, 542 U.S. at 616 n.6 (arguing that the Seibert plurality did not adopt the bad faith test because Justice Souter acknowledged in a footnote that police officers rarely admit to bad faith and therefore *Miranda* should focus "on facts apart from [police officer] intent").

plurality's grounds, and, therefore, represents the single controlling opinion of *Seibert*.[248]

Justice Kennedy's concurrence supports the key policy underlying *Miranda* in its approach to the question-first procedure. The primary purpose of the *Miranda* warning is to protect the Fifth Amendment rights of the criminal suspect from the inherently coercive atmosphere of custodial interrogations. Relying on *Elstad*, both the three-Justice plurality and two concurring opinions in *Seibert* held that the interrogating officer's question-first procedure violated the "general goal of deterring improper police conduct [and] the Fifth Amendment goal of assuring trustworthy evidence."[249] Both *Seibert* and *Elstad* also emphasized that the concerns underlying the *Miranda* rule must be accommodated to law enforcement interests,[250] including the admissibility of reliable evidence, and other objectives of the criminal justice system.[251]

Justice Kennedy's deliberateness approach should be the sole precedent set by *Seibert*, because he correctly balances the concerns underlying custodial interrogations.[252] Justice Kennedy begins his justification for his intent-based approach by stating, "An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time."[253] Deterring unintentional actions is

248. Even if the plurality rejected using the multifactor test as an inquiry into the intent of police, which it does not, it nonetheless includes police intent as a rationale for holding that a suspect's *Miranda* warning was not understood, thereby establishing a common denominator with Justice Kennedy's concurrence.

249. *Seibert*, 542 U.S. at 619–20 (Kennedy, J. concurring); *Elstad,* 614 U.S. at 308 (citing Michigan v. Tucker*,* 417 U.S. 433, 445 (1974)). According to Justice Kennedy, "[e]vidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Seibert*, 542 U.S. at 618–19 (Kennedy, J., concurring). Note that Justice Kennedy, similarly to the plurality, employs curative measures to evaluate the ability of the suspect to understand his or her right against self-incrimination that *Miranda* is intended to protect. *Id.* at 619. This conception of curative measures further establishes overlap between the two opinions.

250. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (finding that courts evaluating constitutional issues must undertake a balancing operation with the correct decision seen as the one yielding the greatest net benefit).

251. United States v. Patane, 542 U.S. 630, 644–45 (2004).

252. *Seibert*, 542 U.S. at 619 (Kennedy, J., concurring) ("[T]he scope of the *Miranda* suppression remedy depends on a consideration of those legitimate interests and on whether admission of the evidence under the circumstances would frustrate *Miranda's* central concerns and objectives.").

253. *Id.* at 620.

unnecessary, unlike deterring intentional actions, which can prevent further reccurrences. The argument regarding trustworthiness is slightly more complicated. Given Justice Kennedy's specific exclusion of unintentional two-step interrogations, the goal of assuring trustworthy evidence no longer seems to be the main focus. Indeed, confessions given by suspects who did not fully understand their *Miranda* warnings, due to unintentional failures to administer pre-*Miranda* warnings, may be prone to subsequent deception, such as post-*Miranda* questioning predicated upon pre-*Miranda* statements, and would therefore be less trustworthy. Justice Kennedy's approach, however, prevents this outcome and safeguards trustworthiness by focusing on post-*Miranda* cross-examining of a suspect predicated on their pre-*Miranda* statements as a key factor in evaluating deliberateness.

Under the plurality's approach, however, an unintentional question-first interrogation could render a post-*Miranda* statement inadmissible, even though improper police conduct was totally absent and the post-*Miranda* statements were unrelated to the prior pre-*Miranda* statements and were unaddressed by police. The focus of the plurality on the defendant has been incorrectly repeated by circuit courts that apply the plurality's approach and Justice Kennedy's approach alike.[254] This mistake encourages courts to determine that the defendant was negatively affected and, as a result, suppress the defendant's post-*Miranda* statement without considering the relevant factors and the policy underlying *Elstad* and *Seibert*.

B. Courts Should Strictly Adhere to the Factors Set Forth by Justice Kennedy

Courts should focus on four factors to adhere properly to Justice Kennedy's concurrence.[255] First, courts should focus upon whether a two-step interrogation was deliberate, as opposed to examining whether such an interrogation exerted a coercive impact on the

254. United States v. Pacheco-Lopez, 531 F.3d 420, 433 (6th Cir. 2008) (Griffin, J., dissenting) ("We attempt to approximate what the defendant *could* understand only because we typically do not know what the defendant *did* understand."); *see also* English, *supra* note 111, at 455 (arguing that a suspect-centric perspective fails to adequately condemn or limit the question-first tactic).

255. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). While Justice Kennedy, unlike the plurality, does not explicitly lay out a test to demonstrate how courts should arrive at the conclusion that a two-step interrogation was deliberate, his analysis still creates the functional equivalent of a test due to the specific factors he employs. *See id.* at 618–22.

suspect.[256] Second, courts should examine whether the interrogating officers referenced the suspect's unwarned confession in their subsequent warned interrogation.[257] Third, the court should examine whether the suspect's subsequent warned statements relied upon his or her prior unwarned statements.[258] If these three considerations do indicate deliberateness, the courts should look to a fourth consideration: whether there were curative measures and whether the police cured the suspect of the coercive impact caused by the police's deliberate interrogation strategy.[259] Justice Kennedy applied this preceding consideration for a variety of reasons.

First, the focus of Justice Kennedy's inquiry is on facts relevant to the use by police of a deliberate question-first tactic by the police, as opposed to the impact on the suspect's ability to understand his rights under *Miranda*.[260] This factor is important because courts can justify admission of a coerced statement by incorrectly examining the effect of a failure to provide a suspect's initial *Miranda* warnings on the subsequent *Miranda* warning and ignoring evidence indicating intentional use of a question-first procedure.

Second, Justice Kennedy discusses the coercive effect of post-*Miranda* questioning that is predicated on pre-*Miranda* statements elicited by police. Specifically, Justice Kennedy discusses—for a full paragraph—the fact that the interrogating officer in *Seibert* confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them.[261] In *Seibert*, according to Kennedy's concurrence, the interrogating officer cross-examined the suspect based on his prior related or overlapping unwarned statements.[262] Justice Kennedy's focus on this issue

256. *Id.* at 622.

257. *Id.*

258. *Id.* at 621.

259. *Id.*

260. Oregon v. Elstad, 470 U.S. 298, 309 (1985) ("It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.").

261. *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring). Note that a law enforcement officer may still deliberately predicate a line of questions upon a prior unwarned admission, which itself was not deliberately elicited, and, in doing so, employ a deliberate question-first procedure. Justice Kennedy's emphasis on the issue of "cross-examin[ing]" a suspect with the contents of his unwarned confession supports this interpretation. *Id.*

262. *Id.*

illustrates that an interrogating officer's reliance on the defendant's prewarning statement to obtain the postwarning statement must be highly relevant to a finding that a deliberate two-step interrogation occurred.[263]

Third, Justice Kennedy repeatedly states that postwarning statements that are *related* to the substance of prewarning statements must be excluded if resulting from a deliberate two-step interrogation.[264] The plurality, rather than Justice Kennedy, identifies the higher standard of overlap between the pre-*Miranda* and post-*Miranda* statements as relevant to a question-first inquiry.[265] Justice Kennedy's lower threshold of relatedness is further demonstrated by the requirement in his final holding that suppressed post-*Miranda* statements be related to prior pre-*Miranda* statements.[266]

Fourth, Justice Kennedy discusses curative measures. According to Justice Kennedy, "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."[267] Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient.[268] The curative measures exception repeats the time and setting inquiry of the plurality multi-factor test, which, although utilizing a suspect-centric perspective,[269] nevertheless comprises a mandatory consideration.[270] No curative steps were taken in *Seibert*, however, so the postwarning statements are inadmissible and the

263. One may argue that a problem with this reasoning is that such reliance, and, thus, distortion of *Miranda*, can be equally accomplished through an unintentional question-first procedure (once an accidental unwarned statement occurs, it seems unfair and against the interests of *Miranda* for an interrogating officer to be able to refer back to this statement in order to get the suspect to repeat their earlier statement). Suppressing statements originating from unintentional question-first procedures, however, cannot deter improper police conduct that is accidental. *See id.* at 620 (noting that an "officer may not realize that a suspect is in custody and warnings are required").

264. *Id.* at 622.

265. *Id.* at 621.

266. *Id.* at 622 (finding that "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made," where police have deliberately executed a question-first procedure).

267. *Id.*

268. *Id.* at 622; *see* United States v. Capers, 627 F.3d 470, 484 n.5 (2d Cir. 2010).

269. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

270. *Id.*

conviction was vacated. Justice Kennedy determined that there were no curative measures taken by police, and that the initial questioning was intentional, unlike in *Elstad*, where the unwarned statement elicited by the officer was held to be inadvertent and police applied adequate curative measures.[271] Lower courts that apply a *Seibert* analysis of question-first interrogation cases should adopt the four aforementioned factors.

Adherence to Justice Kennedy's factors, as opposed to strict adherence to the plurality's factors or an ad hoc inquiry into the totality of the evidence, is correct for several reasons. First, Justice Kennedy states that his multifactor test is limited to analyzing the intent of police in question-first cases, and excludes use of the multifactor test to illustrate unintentional question-first procedures.[272] Specifically, he favors a "narrower test" that would be inapplicable to unintentional question-first procedures and "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."[273]

Further, Justice Kennedy separates curative measures from his deliberateness inquiry, while distinguishing those factors as defendant-focused, and not intent-focused.[274] This distinction of curative factors is affirmed in *Elstad*, which held that "[w]hen a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession."[275] Because these curative factors—temporal and geographic continuity, change in police personnel, and advisement that any pre-*Miranda* statements are inadmissible—are defendant-focused, they cannot use these factors in an inquiry limited to deliberateness. Thus, the majority of circuit courts that incorrectly apply these factors to Justice Kennedy's inquiry into deliberateness violate precedent. Additionally, the process of applying the curative factors to both the deliberateness and curative inquiries is inefficient because it asks the same three questions twice.[276]

271. Oregon v. Elstad, 470 U.S. 298, 308 (1985).
272. *Seibert*, 542 U.S. at 621–22 (Kennedy, J., concurring).
273. *Id.* at 622.
274. *Id.*
275. *Elstad*, 470 U.S. at 310.
276. United States v. Capers, 627 F.3d 470, 484 (2d Cir. 2010).

Circuits that cherry-pick curative factors from the plurality test or elsewhere and insert them into the deliberateness inquiry do not follow Justice Kennedy's concurrence. For example, in *Capers*, the Second Circuit uses the totality of the evidence approach, which considers types of evidence, such as the officer's experience, which neither the plurality nor Justice Kennedy view as factors.[277] The Second Circuit's decision is questionable because it emphasizes factors that are not considered in *Seibert*, yet dismisses as a non-issue the most heavily emphasized factor in Justice Kennedy's analysis—reference to pre-Mirandized statements—by simply noting that the interrogating officer "made no reference . . . to the statements Capers had already made during the initial interrogation."[278]

Similarly, in *Street*, the Eleventh Circuit, using a cherry-picking approach, focuses on irrelevant considerations, and does not examine the clear relatedness of the pre- and post-*Miranda* statements or the interrogating officer's referencing of the suspect's prior statement.[279] Although there may be a slight lack of guidance regarding the relative weight of various factors,[280] circuit courts violate stare decisis when they ignore the presence of factors expressly applied in Justice Kennedy's concurrence.[281] Furthermore, courts that use all of the plurality factors,[282] or add additional factors not considered by the *Seibert* opinions,[283] violate *Marks* because such considerations are not a logical subset of Justice Kennedy's concurrence.

The following analysis addresses the proper application of the factors articulated by Justice Kennedy in his concurrence.

277. *Id.* at 480.

278. *Id.* at 473.

279. United States v. Street, 472 F.3d 1298, 1315 (11th Cir. 2006).

280. Seth Goldberg, Missouri v. Seibert*: The Multifactor Test Should Be Replaced with A Bright-Line Warning Rule to Strengthen* Miranda*'s Clarity*, 79 ST. JOHN'S L. REV. 1287, 1309 (2005) (discussing the possibility that the factors from *Seibert* may carry different weight (citing Medley v. Commonwealth, 602 S.E.2d 411, 420, 426 (Va. Ct. App. 2004) (Benton, J., dissenting))).

281. *Seibert*, 542 U.S. at 618–22 (2004) (Kennedy, J., concurring).

282. *Id.* at 604–17 (plurality opinion).

283. United States v. Capers, 627 F.3d 470, 470 (2d Cir. 2010); United States v. Nunez-Sanchez, 478 F.3d 663, 668-69 (5th Cir. 2007); United States v. Williams, 435 F.3d 1148, 1158 n.11 (9th Cir. 2006); United States v. Street, 472 F.3d 1298, 1314 (11th Cir. 2006).

C. Proper Application of Justice Kennedy's Concurrence and Related Question—First Considerations

The factors that comprise Justice Kennedy's test also require clarification on an individual basis, given their inconsistent application by lower courts. As an initial matter, a police admission that the police intended to execute a question-first procedure should be sufficient to suppress any post-*Miranda* statements, subject to curative measures. Such an admission is significant because the Supreme Court stated that it had to look at facts that demonstrated the question-first procedure, even though the interrogating officer in *Seibert* admitted intent to use the question-first procedure,[284] only "[b]ecause 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)."[285] Indeed, it is inefficient to conduct a question-first inquiry into the intent of interrogating officers when police have given credible testimony that they deliberately executed a question-first procedure.[286]

1. Pre-Miranda *Violation*

Many courts determine that a question-first procedure was deliberate by evaluating whether the first unwarned statement elicited by police violated *Miranda*, as opposed to falling within a booking, noncustodial, listening, safety, or other exception.[287]

284. *Seibert*, 542 U.S. at 614–17.

285. *Id.* at 616 n.6.

286. *But see Capers*, 627 F.3d at 482 ("Justice Kennedy's concurrence in *Seibert* does not advocate a test whereby a deliberate two-step interrogation will be found only when a law enforcement officer admits to executing such a strategy.").

287. *See* New York v. Quarles, 467 U.S. 649, 655–56 (1984) (finding that questioning required for police safety does not violate *Miranda*); United States v. Thomas, 664 F.3d 217, 223 (8th Cir. 2011) (finding that the interrogating officer asked questions to establish probable cause, not to circumvent *Miranda* warnings); United States v. Thomas, 381 F. App'x 495, 502 (6th Cir. 2010) (finding that "casual conversation" does not rise to the level of interrogation); United States v. Pacheco-Lopez, 531 F.3d 420, 423–24 (6th Cir. 2008) (finding that "asking questions about when and how Lopez arrived at a household ostensibly linked to a drug sale, as well as his origin, are relevant to an investigation and cannot be described as related only to securing the house or identifying the defendant" and that administrative concerns, such as a defendant's name, address, height, or weight, might permit questioning without a *Miranda* waiver); United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007) (finding that illegal aliens are not entitled to *Miranda* warnings); Hairston v. United States, 905 A.2d 765, 786–87 (D.C. 2006) (Schweilb, J., concurring) (finding that presenting a suspect with incriminating evidence and instructing the suspect to listen does not violate *Miranda*).

Because application of *Seibert*'s inquiry hinges on an initial *Miranda* violation, courts must correctly determine when a pre-*Miranda* statement has been elicited by police in violation of *Miranda*. When a failure to Mirandize an in-custody suspect does not fall under an exception to *Miranda*, any interrogation that is reasonably likely to elicit an incriminating response violates *Miranda*.[288]

*2. Completeness of Initial Pre-*Miranda *Warning and Statements*

The completeness of the initial pre-*Miranda* warning and pre-*Miranda* statements should be treated by courts as a relevant, though non-dispositive, factor. While the plurality lists completeness as one of the first factors,[289] Justice Kennedy appears to, at most, indirectly refer to the completeness of the pre-*Miranda* interrogation in his conclusion: "When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, post-*Miranda* statements that are related to the substance of pre-*Miranda* statements must be excluded absent specific, curative steps."[290] Justice Kennedy's conclusion appears to include the term "extended interview," possibly appearing to indicate that an extended interview was necessary for a court to find police use of a deliberate question-first procedure. The term, however, is used in reference to the entire question-first procedure, because the extended interview includes the continuing violations of the suspect's Fifth Amendment privileges during the second part of the interrogation, which takes place after the administration of the *Miranda* warning. Unlike the plurality factors such as overlapping statements and continuing interrogations, Justice Kennedy does not use the plurality factor addressing completeness of pre-*Miranda* questioning and statements or move it to his curative measures analysis. Thus, courts that rule out a deliberate question-first procedure, where a short round of questioning or a short statement by the suspect occurred, violate Justice Kennedy's controlling opinion.

Unfortunately, several circuits still incorrectly apply this factor. In *Street*, the Eleventh Circuit evaluated a potential question-first procedure, where a suspect was asked about his involvement in a robbery and gave several "incriminating statements," although the

288. Rhode Island v. Innis, 446 U.S. 291, 302 (1980) (finding that words or actions that are reasonably likely to elicit an incriminating response can constitute the functional equivalent of an interrogation).

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

290. *Id.* at 621 (Kennedy, J., concurring).

"more damaging statements" were elicited following a *Miranda* warning.[291] Due to the statements' and interrogation's brevity,[292] the court held that police did not execute a deliberate question-first procedure.[293] But in fact, an entire confession can be uttered in three words. For example, in *Gonzalez-Lauzan*, the Eleventh Circuit argued that the suspect's statement "made during the unwarned interrogation . . . , 'okay, you got me,'" was too short and lacking detail to fulfill the plurality's completeness factor (which the court should not have applied in the first place).[294] In addition, the court supported its decision by improperly using dicta from the plurality opinion, stating, "there was little, if anything, of incriminating potential left unsaid," which described the facts in *Seibert*, rather than a controlling standard.[295]

The type of short but highly relevant information provided in pre-*Miranda* statements in *Street* and *Gonzalez-Lauzan* can provide a foundation for police to ask informed related Mirandized questions, and circumvent the *Miranda* warning. A complete initial round of questions and answers is less likely to be part of a deliberate question-first procedure. Police can use short questions and statements, however, as part of a question-first procedure. As such, completeness of pre-*Miranda* questioning and statements should function as a relevant factor, but, in contrast to *Street* and *Gonzalez-Lauzan*, should not unilaterally determine whether police executed a question-first procedure.

*3. Relationship Between Pre-*Miranda *and Post-*Miranda *Statements*

The relationship between pre-*Miranda* and post-*Miranda* statements also requires clarification. The D.C. Court of Appeals and the Eighth Circuit use the correct approach regarding the relatedness of a suspect's pre-*Miranda* statements to her post-*Miranda* statements. Both courts reason that, at a minimum, a suspect's pre-*Miranda* and post-*Miranda* statements must relate "to the same

291. United States v. Street, 472 F.3d 1298, 1212 (11th Cir. 2006).

292. *Id.* at 1314.

293. *Id.*

294. United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1138 (11th Cir. 2006) (quoting *Seibert*, 542 U.S. at 616).

295. *Id.* (quoting Seibert, 542 U.S. at 616).

crime."[296] Instead of overlap, which, at best, follows the plurality and Justice Kennedy's dicta, relatedness is rooted in Justice Kennedy's principal holding. Further, as the D.C. Court of Appeals stated in *Edwards*, focusing on relatedness, as opposed to overlap, prevents police from eliciting incriminating information until the confession is about to occur, and then administering *Miranda* warnings at the last moment. Additionally, pre-*Miranda* and post-*Miranda* statements need not be inculpatory. Quoting the decision of the Supreme Court in *Miranda*, the D.C. Court of Appeals stated that

> [t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense . . . . Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used in the prosecution.[297]

Exculpatory statements do not necessarily indicate the absence of a deliberate question-first procedure because police can deceptively bring the suspect to the brink of confessing, and then use the purportedly exculpatory pre-*Miranda* statements to minimize the step to the subsequent post-*Miranda* confession from the defendant's perspective.[298]

In contrast, the Second Department of the Appellate Division of the Supreme Court of the State of New York held in *People v. McMillon* that police had not executed a deliberate question-first procedure because the suspect's pre-*Miranda* statements were not incriminating.[299] Indeed, the suspect had not provided inculpatory statements while subject to custodial interrogation for three hours before police provided him with *Miranda* warnings.[300] The D.C.

296. United States v. Ollie, 442 F.3d 1135, 1141 (8th Cir. 2006) (finding that the appellant's post-*Miranda* confession appellant's post-*Miranda* confession that he had received a gun in exchange for driving two people to a liquor store was related to his pre-*Miranda* admission that he had handled the gun); Edwards v. United States, 923 A.2d 840, 849 (D.C. 2007).

297. *Edwards*, 923 A.2d at 850 (quoting Miranda v. Arizona, 384 U.S. 436, 476–77 (1966)).

298. *See id.*

299. People v. McMillon, 816 N.Y.S.2d 167 (N.Y. App. Div. 2006).

300. *Id.* at 170.

Court of Appeals's acceptance of both exculpatory and inculpatory statements is superior, however, because it focuses on the pre-*Miranda* statement's effect on the *Miranda* warning, rather than whether the pre-*Miranda* statement is purportedly exculpatory, since it may still relate to the post-*Miranda* statements.[301]

Police who learn from elicited pre-*Miranda* statements which questions they should ask during the post-*Miranda* stage can also game the overlap.[302] Relatedness deters such conduct by including any post-*Miranda* statements that are related to the same crime referenced in the pre-*Miranda* stage. Further, relatedness protects suspects from the inherently coercive custodial environment that diminishes the trustworthiness in the absence of the *Miranda* safeguard.

*4. Referencing Pre-*Miranda *Statements in Post-*Miranda *Interrogation*

Justice Kennedy's concurrence devotes a large portion to the police officers' confrontation of the defendant with her inadmissible pre-*Miranda* statements.[303] This emphasis demonstrates the high level of importance of this factor in his question-first analysis. Note that Justice Kennedy's concurrence is unclear as to whether a law enforcement officer has employed a deliberate two-step interrogation strategy where the officer deliberately predicated a line of questions upon a prior unwarned statement, which itself was not deliberately elicited.[304] Justice Kennedy's repeated emphasis on the fact that the police "cross-examined" the suspect in *Seibert* with the contents of her unwarned confession, and on the deterrence of improper police circumvention of *Miranda*, seems to support an interpretation that such a question-first procedure would still be deliberate.

In addition, Justice Kennedy's emphasis on referencing pre-*Miranda* statements during post-*Miranda* interrogation is further justified by the Supreme Court's analysis in *Elstad.* Specifically, the Court observed in *Elstad* that the police officers did not "exploit the unwarned admission,"[305] which contributed to their finding that the police officer did not execute a deliberate question-first procedure.[306]

301. *Edwards*, 923 A.2d, at 851–52.
302. Missouri v. Seibert, 542 U.S. 600, 621 (Kennedy, J., concurring).
303. *Id.*
304. *Id.*
305. Oregon v. Elstad, 470 U.S. 298, 316 (1985).
306. *Id.* at 318.

The importance Justice Kennedy attributed to the police practice of predicating post-*Miranda* questioning on pre-*Miranda* statements calls into question circuit decisions such as *Capers* and *Street*, where courts found that police did not use a deliberate question-first procedure.[307] Thus, the type of question-first procedure that falls within Justice Kennedy's narrow concurrence addresses the police practice, where officers deliberately first obtained unwarned incriminating statements from a suspect, and then used those incriminating statements in the warned interrogation in order to undermine the midstream Miranda warnings.

5. Curative Measures

Courts' application of the measures Justice Kennedy uses to cure a deliberate question-first procedure should adhere strictly to the factors advanced in Justice Kennedy's concurrence, and focus exclusively on the suspect's impression of the mid-interrogation *Miranda* warning. Courts' inclusion of curative measures in Justice Kennedy's deliberateness inquiry are incorrect because Justice Kennedy's concurrence follows *Elstad*'s use of the curative measures as intervening factors, the sole purpose of which is to dissipate the impact of a deliberate question-first procedure.[308] Curative measures should include continuity in personnel, physical location, and breaks in time.[309] Additionally, police advisement of the inadmissibility of a suspect's prior pre-*Miranda* statements is a factor under Justice Kennedy's curative measures exception.[310] The Second Circuit, however, takes the unwarranted added step of including it in the deliberateness inquiry:

> Consideration of whether or not curative measures were taken is an inquiry separate and apart from determining deliberateness. When analyzing deliberateness, however, courts may consider an experienced officer's failure to warn a suspect that an earlier admission, known to the interrogating officer, is inadmissible.

307. *See supra* notes 277–83 and accompanying text.

308. *Elstad*, 470 U.S. at 341–42 (Brennan, J. dissenting) (stating that a suspect's post-*Miranda* statements could not fairly be attributed to the statements taken in violation of *Miranda* if "a meaningful intervening event actually occurred"); Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring).

309. *Elstad*, 470 U.S. at 336 (Brennan, J., dissenting).

310. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). Kennedy's advisement is grounded in *Elstad*, though the *Elstad* majority does not mention it. *See Elstad*, 470 U.S. at 298 (majority opinion).

> Indeed such an omission on the part of the interrogating officer is probative of a "calculated" plan to subvert *Miranda.*[311]

The Second Circuit's application of Justice Kennedy's police advisement factor concerning the admissibility of the suspect's prior pre-*Miranda* statement to the deliberateness inquiry is incorrect because Justice Kennedy emphasizes that the advisement factor is solely defendant-focused.[312]

6. Burden of Proof

After addressing Justice Kennedy's factors directly, it is helpful to discuss the issue of burden of proof with respect to police use of the question-first procedure. Traditionally, courts place the burden of proof on the prosecution in criminal cases.[313] Moreover, "when a defendant challenges the voluntariness of a confession, the burden is on the government to show that a waiver of *Miranda* rights was the result of a defendant's own free and rational choice."[314] Courts should place a burden of proof on the prosecution to disprove deliberateness for a variety of reasons.[315]

First, courts that merely "eyeball" whether post-*Miranda* statements resulting from a question-first procedure should be suppressed are prone to arbitrary decision making in the absence of a burden of proof. In particular, Justice O'Connor, in her *Seibert* dissent, criticizes courts that choose to "eyeball" the evidence, rather than assign a burden of proof, arguing that "there is no reason to believe that *courts* can with any degree of success determine in which instances the police had an ulterior motive."[316] At least one circuit

311. United States v. Capers, 627 F.3d 470, 485 n.1 (2d Cir. 2010).

312. *Seibert*, 542 U.S. at 621–22 (Kennedy, J., concurring).

313. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (finding that the requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

314. United States v. Hernandez, 200 F. App'x 283, 288 (5th Cir. 2006) (citing Colorado v. Connelly, 479 U.S. 157, 163–65 (1986); United States v. Bell, 367 F.3d 452, 461 (5th Cir. 2004)).

315. United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007); United States v. Hernandez, 200 F. App'x 283, 288 (5th Cir. 2006); United States v. Ollie, 442 F.3d 1135, 1142–43 (8th Cir. 2006).

316. *Seibert*, 542 U.S. at 625 (O'Connor, J., dissenting) (quoting W. LAFAVE, SEARCH AND SEIZURE § 1.4(e) (3d ed. 1996)) (emphasis added).

argues that the burden should be placed on the defendant.[317] Second, the plurality states that the burden rests on the prosecution,[318] and Justice Kennedy's holding is the narrower ground and does not reject the plurality's placement of the burden of proof on the prosecution.

Additionally, at least one court has criticized any requirement that forces the prosecution to prove a negative.[319] The Eighth Circuit, however, which also requires the prosecution to disprove deliberateness, cautioned that while "the law generally frowns on requiring a party to prove a negative," the Supreme Court has consistently required the government to prove the admissibility of a criminal defendant's confession.[320] Thus, at the very least, when a defendant alleges that his post-*Miranda* statement was elicited by a deliberate question-first procedure, the prosecution bears the burden of establishing (at least) by a preponderance of the evidence[321] that the failure to provide warnings at the outset of interrogation was not deliberate.[322]

This burden of proof requirement will shape police conduct by disincentivizing question-first interrogations. Specifically, the prosecution will be unable to prove beyond even a preponderance of the evidence that police did not deliberately execute a question-first procedure. For example, in *Capers*, the Second Circuit held that

> [o]nce a law enforcement officer has detained a suspect and subjects him to interrogation . . . there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed.

317. Moreno, *supra* note 129, at 397–98 (finding that Justice Kennedy's intent-based approach places an impossible and inappropriate burden on the defendant, who must now prove that a particular police officer acted in bad faith).

318. *Seibert*, 542 U.S. at 608 n.1 (citing *Connelly*, 479 U.S. at 169); Brown v. Illinois, 422 U.S. 590, 604 (1975)) (finding that the prosecution bears the burden of proving, at least by a preponderance of the evidence, that the *Miranda* warning was effective).

319. *Ollie*, 442 F.3d at 1143.

320. *Id.*

321. United States v. Capers, 627 F.3d 470, 480 (2d Cir. 2010) ("[W]henever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence." (quoting *Connelly*, 479 U.S. at 168) (internal quotation marks omitted)).

322. United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007); *Ollie*, 442 F.3d at 1143; *see also* United States v. Ambrose, 668 F.3d 943, 955 (7th Cir. 2012); United States v. Stewart, 536 F.3d 714, 719 (2008) (finding that it is the prosecution's burden to establish by a preponderance of the evidence that "the police did *not* deliberately withhold the warnings until after they had an initial inculpatory statement in hand").

> Instead, the most plausible reason . . . is an illegitimate one, which is the interrogator's desire to weaken the warning's effectiveness.[323]

Thus, the burden of proof can constrain police execution of the question-first by forcing the prosecution to show evidence that justifies the omission of *Miranda* warnings.

7. Application of Holistic Question-First Approach

Russell Hart's case[324] underscores how the circuit courts' confusion can impact a suspect's Fifth Amendment protection.[325] When Hart's case came before the District of Nebraska, the Eighth Circuit had correctly decided to treat Justice Kennedy's concurrence as controlling.[326] Three years earlier, however, the Eighth Circuit applied the factors from the *Seibert* plurality to determine the impact of an apparent question-first procedure on the post-*Miranda* confession.[327]

In *Hart*, the trial court correctly followed Eighth Circuit precedent and Justice Kennedy's intent-based approach. The court, however, incorrectly treated the three factors regarding the temporal, spatial, and geographic proximity between pre- and post-*Miranda* interrogations as part of the inquiry into the initial effectiveness of the *Miranda* warning.[328]

The court's adherence to the factors applied by Justice Kennedy in *Seibert* also had serious shortcomings. With respect to Hart's pre-*Miranda* statements, the court found that the interrogating officer's inquiry into the length of time Hart had been in Nebraska and whether Hart had registered in Nebraska as a sex offender was reasonably likely to elicit information related to a violation of the "Adam Walsh" laws.[329] This finding belies the court's later reasoning

323. *Capers*, 627 F.3d at 480–81 (quoting United States v. Williams, 435 F.3d 1148, 1159 (9th Cir. 2006)).

324. United States v. Hart, No. 4:10CR3088, 2010 WL 5422900 (D. Neb. Nov. 30, 2010).

325. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

326. United States v. Torres-Lona, 491 F.3d 750, 758–59 (8th Cir. 2007).

327. United States v. Aguilar, 384 F.3d 520, 523–25 (8th Cir. 2004).

328. Defendant Hart was questioned both times in the same booking room, at least one officer was present during both stages of questioning, and only thirty minutes passed between the two sessions of questioning. *Hart*, 2010 WL 5422900, at *1.

329. *Id.* at *4 ("The law enforcement officers should have known that follow-up questions regarding Hart's residency and registration status were directly related to a

that the question-first procedure was not deliberate because "[t]he initial questioning was the spontaneous result of the booking process," rather than a "plan."[330] The court also raised the circular argument that the question-first procedure was legal because the police lacked any official question-first policy. Given that *Seibert* provided a multifactor test because police "rarely" admit to executing question-first procedures,[331] the presence of such a policy is unnecessary and unlikely.[332]

The District Court's most significant error arose in its determination of the relatedness of Hart's pre-*Miranda* and post-*Miranda* statements, and whether the interrogating officer relied on the defendant's pre-*Miranda* statement to obtain the post-*Miranda* statement used against Hart.[333] The relatedness of Hart's pre- and post-*Miranda* statements, which is notably absent from the District Court's analysis, is self-evident since both sets of Hart's statements are identical. Further, the District Court incorrectly concluded that the police did not refer to Hart's pre-*Miranda* admissions while administering his *Mirandized* interrogation.[334] Indeed, after initially eliciting the fact that Hart had yet to register as a sex offender beyond the acceptable time period, the police believed Hart had committed an Adam Walsh violation in Nebraska. As a result, the police "contacted the Marshal's office in Lincoln to gather information on the elements of the crime and an outline of questions to ask"[335] before providing Hart with *Miranda* warnings and resuming the interrogation. Thus, the police clearly relied upon the first statements in the subsequent stage, given that they arranged multiple questions based solely upon Hart's previous pre-*Miranda* admissions.[336] The District Court's incorrect application of *Seibert* permitted the use of a

potential violation of the Adam Walsh laws and could cause Hart to incriminate himself.").

330. *Id.* at *6.

331. Missouri v. Seibert, 542 U.S. 600, 616 n.6 (2004).

332. United States v. Stewart, 191 F. App'x 495, 499 n. 4 (7th Cir. 2006) (finding it "unlikely that in the wake of *Seibert* and the cases interpreting it, that a law enforcement agency would maintain an official policy that invites suppression motions under *Seibert*").

333. *Hart*, 2010 WL 5422900, at *6.

334. *Id.*

335. *Id.*

336. *Id.* at *1.

question-first procedure that enables police to undermine the meaning and effect of *Miranda*.[337]

CONCLUSION

The resolution of the conflict between the circuit courts regarding the proper approach to evaluating question-first procedures is a desirable goal that would help achieve consistency in the lower courts and predictability for police officers conducting custodial interrogations. The Supreme Court and dissenting circuit courts should adopt the intent-based approach of the Second, Third, Fourth, Fifth, Eighth, and Eleventh Circuits because the approach adheres to the precedent set by *Elstad*, represents the narrowest grounds of *Seibert*, and furthers the policy underlying *Miranda*. Furthermore, courts that conduct an inquiry into the deliberateness of a question-first procedure should follow both the strict adherence approach of the Fifth and Eleventh Circuits,[338] and the foregoing clarifications of the various dimensions of question-first analysis. Failure to do so risks violating stare decisis, the jurisprudence and policy underlying *Miranda*, and any hope of consistency in the examination of potentially deliberate question-first procedures.

Criminal parole violator Russell Hart was deprived of his *Miranda* rights because the Nebraska police deliberately executed a question-first procedure. As a result, Hart was compelled to confess and his constitutional rights against self-incrimination were violated. The lack of uniformity and clarity in the circuits with respect to question-first cases and the multidimensional analysis involved in such cases likely contributed to this outcome. A holistic resolution to the circuit court conflicts will, ideally, help reinforce *Seibert* and bring clarity to question-first law.

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

338. United States v. Hernandez, 200 F. App'x 283, 288 (5th Cir. 2006); United States v. Street, 472 F.3d 1298, 1314 (11th Cir. 2006).